IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2019-000010

[2019] EWHC 187 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 28 January 2019

Before:

MR JUSTICE FRASER

B E T W E E N :

ENTSERV UK LIMITED — Claimant

- and -

(1) THE MILES CONSULTANCY LIMITED
(2) THE MILES CONSULTANCY EUROPE LIMITED — Defendants

MR A. CHARLTON QC (instructed by Eversheds Sutherland (International) LLP) appeared on behalf of the Claimant.

MR P. JACKSON appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE FRASER:

1 This is a return date for an injunction granted by Mr Justice Martin Spencer on Christmas Eve by telephone in an urgent out-of-hours application made by leading counsel for the claimant, EntServe UK Limited, in relation to the storage of computer data on their behalf at that point being stored, it was considered, by the first defendant, The Miles Consultancy Limited. I will just identify immediately that the first order I made this morning was to grant an application to amend. The Miles Consultancy Limited is now the first defendant and The Miles Consultancy Europe Limited is now the second defendant. The first defendant has possession of the data and the second defendant is the contracting party.

2 I am just going to give the background. EntServe, the claimant, is a company connected with the Hewlett Packard Group. It entered into an agreement which is called the Master Services Agreement or more accurately the United Kingdom Master Services Agreement whereby certain employee data was stored and processed by the contracting party. That data is substantially employee data connected with expenses. It is unnecessary to go into an enormous amount of detail about what it is, but some of it is defined within the agreement as personal data and some of it is defined in the agreement as work data. There are different contractual provisions for each type of data but Hewlett Packard, in clause 11.5(a), is entitled to delivery up upon request of the HP personal data and under clause 13.1 Hewlett Packard is entitled to delivery up of data contained in what is defined as "Work Product". I am just going to read what the definition of Work Product is in clause 13.1:

> "Work Product means models, devices, reports, computer programs, tooling, schematics and other diagrams, instructional materials and anything else Supplier, its agents, employees and subcontractors produce in connection with this agreement. The data contained in all Work Product will belong to HP. Where not already provided, Supplier, its agents, employees and subcontractors will deliver all data contained in any Work Product to HP upon the earlier of the expiration/termination of this agreement or HP's request and subject to HP paying the Supplier's reasonable costs in collating and formatting such data."

3 What happened was the services being provided by the contracting party some time in the middle of 2018 effectively came to an end. The parties were unable to agree commercial terms for the defendant to continue to maintain that data. In correspondence, the detail of which it is not necessary to go into, it was suggested by the defendant that they would delete that data. The claimant went out of hours to Mr Justice Martin Spencer and obtained an order by way of an injunction together with the relevant undertakings preventing deletion or destruction of that data.

4 Today is the return date and before me Mr Charlton seeks not only continuation of the injunction in respect of failure to delete or, rather, preservation of the data but he also seeks an order for delivery up of the data. There are two operative paragraphs. The first is that (I am putting them in reverse order as they appear in the order) meetings take place in order that the claimant can specify the format in and means by which the data is to be delivered up and the second is to require the defendant to deliver up the data to the claimant in a format and means specified together with the dates by which that has to be done.

5 Mr Jackson, who is director of both the defendants, has appeared before me today in person. I gave him permission to speak for the companies. This is notwithstanding the fact that the

ex parte injunction had the usual provision of recommending the recipient of that order to seek legal advice. He has explained that for financial reasons it has only been possible to do that on a limited basis.

6 The defendants have served very little evidence. Such evidence as they have served maintains that the claimant already has this data in other documents, or other provisions or reports called "line manager reports". That point is in issue. It is not a point I can resolve today. It is sufficient for my purposes to conclude that there is a serious triable issue in that respect.

7 He has also made the point, and this is alluded to in his evidence and there is not an enormous amount of evidence in this respect, that there is a cost that is going to be borne by the defendants in providing this data to the claimants. With some enthusiasm, he explained to me the different bases of different cost figures ranging between about £160,000 and £212,000 which he says is going to be incurred by this company in transferring and delivering up this data. There undoubtedly will be a cost. I have already identified in clause 13.1 the provision for cost. There is a similar cost in clause 11.5. The cost regime is rather different under 11.5 and the relevant provision says:

> "HP and Supplier to agree appropriate and reasonable ways of sharing the cost in connection with putting this clause into effect."

8 Mr Charlton has made it clear to me that there is effectively an open offer from the claimant to pay £35,000 for this delivery up. There is not very much evidence before the court about cost, as I have said, but I am fairly clear in my mind that £35,000 is too little. However, subject to the cost provisions of the order, and taking into account the relevant provisions for injunctive relief which are very well-known and are set out by Lord Diplock in *American Cyanamid Co. v Ethicon Ltd.* [1975] AC 396 ("*American Cyanamid*"), and in particular the question of whether damages would be an adequate remedy in *Evans Marshall & Co. Ltd. v Bertola SA* [1973] 1 WLR 349, I am satisfied that the claimant is entitled not only to preservation of the data but also to an order for delivery up pending trial of the different issues between the parties in this case.

9 I have come to that conclusion, notwithstanding that the law in relation to the grant of mandatory injunctions is seen as being somewhat different to that as set out in *American Cyanamid*, I am not convinced it is entirely different, but there are different questions that one must ask oneself if making an order that is, in effect, a mandatory injunction. Effectively, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong.

10 In my judgment, the course that has the least risk of injustice, subject to agreeing a necessary form of words in the order in respect of cost and the undoubted necessity of these parties to come back again under a provision I am going to build into the order if they cannot reach agreement on cost, is for an order to be made in the claimant's favour for preservation and delivery up, though not in the form currently drafted by Mr Charlton in his draft order which he kindly provided to the court on 28 January.

11 So far as the principle of today is concerned, therefore, I am going to maintain the injunction broadly in the form suggested but I am now going to have debate with the parties about the relevant and necessary way in which the cost burden of doing that is dealt with in the order.

CERTIFICATE

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