



Neutral Citation Number: [2019] EWHC 3104 (Ch)

Case No: HC-2016-000513

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
COMPETITION LIST

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

22 November 2019

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

Between:

AGENTS' MUTUAL LIMITED

Claimant and
Applicant

- and -

(1) GASCOIGNE HALMAN LIMITED

T/A GASCOIGNE HALMAN

(2) CONNELLS LIMITED

Defendants
and
Respondents

Mr Alan Maclean, QC and Mr George Molyneaux (instructed by Eversheds Sutherlands International LLP) for the Claimant/Applicant
Mr Andrew Neish, QC and Mr Alexander MacDonald (instructed by Holman Fenwick Willan LLP) for the Defendants/Respondents

Hearing date: 30 October 2019

Approved Judgment

MR JUSTICE MARCUS SMITH:

1. These proceedings were commenced by the Claimant – Agents’ Mutual Limited (“Agents Mutual”) – by a claim form originally issued on 17 February 2016. Although the proceedings were commenced in the Chancery Division of the High Court, because they involved issues of competition law of some moment, these competition issues were transferred to the Competition Appeal Tribunal, the non-competition issues remaining in the Chancery Division for later determination.
2. In a judgment dated 5 July 2017 ([2017] CAT 15), the Competition Appeal Tribunal (Marcus Smith J, Peter Freeman, CBE, QC (Hon) and Brian Landers) determined the competition issues. On appeal, that judgment was affirmed by the Court of Appeal ([2019] EWCA Civ 24). That opened the way for the non-competition issues – the hearing of which awaited the final outcome of the competition issues – to be determined. A five-day trial, before me, is due to commence in early March 2020 at which these non-competition issues will be determined.
3. The present application (the “Application”) – filed on 2 October 2019 – is for extended disclosure and/or the disclosure of specific documents and/or classes of document more specifically set out in a draft order appended to the application notice. The Application came before me on 30 October 2019, an earlier hearing (scheduled for 7 October 2019) having proved abortive. At the conclusion of the hearing on 30 October 2019, I ruled that the Application be dismissed, with reasons to follow. This Ruling contains those reasons.
4. Before describing the Application and the additional disclosure sought by Agents Mutual, it is necessary to say more about the history of these proceedings and the way in which disclosure has been conducted:
 - i) Disclosure on the standard basis had already taken place during the course of determining the competition law issues. It is important to stress that this disclosure was general and was not confined to the competition issues.
 - ii) However, since the determination of the competition issues, the ambit of the proceedings has changed. A further defendant, Connells Limited (“Connells”), has been joined as the Second Defendant in addition to the First Defendant, Gascoigne Halman Limited (“Gascoigne Halman”). Necessarily, the scope of the issues has expanded, not only for this reason, but also because of further articulation of the case against Gascoigne Halman by Agents Mutual. The joinder of Connells, as well as the amendment more generally to the pleadings, was sanctioned by my order of 19 February 2019 (the “Order”).
 - iii) The Order also provided:

- “13. By 12 July 2019, the Claimant and the First Defendant shall give standard disclosure in relation to any new issues arising out of amendments to the pleadings and the Claimant and the Second Defendant shall give standard disclosure in relation to the Claimant’s claim against the Second Defendant.
14. Any requests for inspection or copies of disclosed documents shall be made within 7 days after service of the list and shall be responded to within 7 days of receipt of the request.”
- iv) Until the Application, the disclosure process conducted pursuant to the Order remained in the hands of the parties, without any further Court intervention. As both parties accepted before me, Vos C’s decision in *UTB llc v. Sheffield United Ltd*, [2019] EWHC 914 (Ch) makes clear that the disclosure pilot for the Business and Property Courts in Practice Direction 51U supplementing CPR Part 51 (the “Disclosure Pilot”) applies to all relevant existing proceedings (apart from those specifically excluded), including where a disclosure order had already been made under CPR Part 31 before the Disclosure Pilot came into force. Since the Disclosure Pilot commenced on 1 January 2019, the Order should have been framed differently. Both parties accepted that the Order was one for Extended Disclosure under CPR 51 PD U §6; that it should have been framed in terms of one of the Extended Disclosure Models in CPR 51 PD U §8; and that the effect of the Order was to order disclosure on the basis of Model D (CPR 51 PD U §8.3).
- v) Gascoigne Halman and Connells (collectively, the “Defendants”) maintain a common front in their defence of these proceedings. The disclosure process adopted by them pursuant to the Order involved transferring electronic documentation held by defined custodians of the Defendants (plus a number – but only a small number – of scanned hard-copy documents) onto an electronic disclosure document platform (RelativityOne, a platform also used by Agents Mutual) operated by an electronic disclosure provider acting for the Defendants.
- vi) The disclosure process conducted by the Defendants has been described in detail in the witness evidence served by the Defendants in opposition to the Application. That evidence comprises statements of Mr Christopher Foster, a partner in the firm Holman Fenwick Willan LLP, instructed by the Defendants. It is unnecessary for me to describe the process in detail. In essence, the disclosure process conducted by the Defendants involved:
- a) Identifying the “custodians” of electronic documents and transferring the documents held by those custodians onto the disclosure platform. Additionally, as I have noted, there were some hard copy documents that were scanned to render them into an electronic format, which were also placed onto the disclosure platform. In this case, however, the vast majority of the documents were – in their original form – electronic. It is important to note that – by the time of the hearing before me –

no complaint was made of the universe of documents transferred onto the document platform (the “Document Universe”). In particular, by the time of the hearing before me, it was not suggested that the range of custodians should have been wider.

- b) The Document Universe was then subjected to an electronic search, limited by two main, cumulative, parameters:
 - i) *Parameters as to the date of the documents.* Essentially, documents falling outside certain date ranges (with the addition of a manual search in the case of certain dates) were not the subject of the electronic search. Again, by the time of the hearing before me, it was not suggested that this parameter should have been different.

And:

- ii) *Keyword parameters.* Unsurprisingly, the keyword search could be conducted with a high degree of sophistication, including use of “wildcards” and “boolean operators”. Wildcards enable searches of words containing a variant of a keyword: thus “cat*” may bring up documents referring to “cats”, “category” and “catechism”. Boolean operators enable the use of conjunctions (“and”, “or”, “not”, etc) to combine or exclude keywords in a search. It will be necessary to return to the advantages and disadvantages of these tools in due course. For the present, it is simply necessary to note that Agents Mutual contended that the keyword parameters were sufficiently unsatisfactory to require this part of the electronic search to be conducted again.
- c) The Document Universe comprised, in this case, a population of in excess of 2 million documents. The size of that universe was reduced – by way of the electronic search parameters that I have described – to a universe of around 30,000 documents, which were then subjected to a manual search. Relevant documents resulting from that search were produced as the Defendants’ disclosure.

- 5. The Application sought various forms of extended and/or additional disclosure, which (as I have observed in paragraph 3 above) were set out in a draft order appended to the application notice issued by Agents Mutual. Paragraph 3 of the draft order sought specific disclosure of various documents or classes of document. Thus, paragraph 3.1 sought specific disclosure of “[a]ll documents related to the arrangements between Zoopla and the Defendants for the funding of any defence, including but not limited to the emails referred to in the [Competition Appeal Tribunal] proceedings”.
- 6. I am satisfied that these applications for specific disclosure, to the extent they were actually maintained by Agents Mutual, were misconceived in that they did

not go to relevant issues on the pleadings. More to the point, however, I do not consider that, in framing its application, Agents Mutual had given thought to how specific disclosure would be given by the Defendants. The assumption underlying this part of the Application was that – having identified the documents or classes of document in question – the Defendants could, without more, locate these documents.

7. Yet, as I have described, the Document Universe was vast, comprising over 2 million documents. Unless the Defendants could know precisely which documents were the subject of these specific disclosure applications and locate them without the assistance of electronic searches, it is difficult to see how the Defendants could comply with an order for specific disclosure, whether proportionately or at all.
8. I consider that – absent evidence demonstrating that these documents could be located with a proportionate amount of effort (assuming, contrary to my finding, that they were relevant at all) without the assistance of electronic searches – the only effective and proportionate way of finding such documents would be by way of an electronic search. Yet a re-run of the Defendants’ electronic searches was the principal part of the Application. Paragraph 1 of the draft order sought an order that:

“The [Defendants] conduct a search for documents by reference to the additional search terms and the date ranges contained in Schedule 1 to this Order.”

I am not satisfied that the Defendants could – without the assistance of electronic searches – have located the documents the subject of paragraph 3 of the draft order. It follows that they could only be located by way of an electronic search, which is the subject matter of paragraph 1 of the draft order. There is, therefore, an overlap between the disclosure sought pursuant to these paragraphs. The real issue before me – and the matter on which the bulk of argument by the parties was focussed – was the question of whether a fresh search should be conducted.

9. There was an issue between the parties as to the basis on which the Application was being made. The application notice itself stated that the basis of the Application was CPR 51 PD U §18, which materially provides as follows:

“Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents

- 18.1 The court may at any stage make an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular issue for Disclosure.
- 18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

- 18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.”
10. During the course of his submissions, Mr Maclean, QC, who appeared for Agents Mutual, suggested that the Application might equally be based upon CPR 51 PD U §17:
- “Failure adequately to comply with an order for Extended Disclosure**
- 17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure, the court may make such further orders as may be appropriate, including an order requiring a party to –
- (1) serve a further or revised Disclosure Certificate;
 - (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
 - (3) provide a further or improved Extended Disclosure List of Documents;
 - (4) produce documents; or
 - (5) make a witness statement explaining any matter relating to disclosure.
- 17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).
- 17.3 An application for an order under paragraph 17.1 should normally be supported by a witness statement.”
11. The difference between these two provisions is easy to see:
- i) CPR 51 PD U §17 deals with the case where an Extended Disclosure order has not, or may not have been, adequately complied with. Because of the question of non-compliance, the test that must be met for the granting of an order under CPR 51 PD U §17 is that the order be “appropriate”, which requires the applicant to satisfy the court that making an order is “reasonable and proportionate”.
 - ii) By contrast, CPR 51 PD U §18 deals with the case where – even though there has been compliance with an order for Extended Disclosure – the order previously made is sought to be varied. In such a case, the applicant must show not merely that making the order is “reasonable and proportionate”, but also that varying the original order “is necessary for the just disposal of the proceedings”. Unsurprisingly, it is harder to obtain an order under CPR 51 PD U §18 than under CPR 51 PD U §17.
12. The Application was supported by the evidence of Ms Lesley Farrell. Ms Farrell is a partner in the firm Eversheds Sutherland (International) LLP, the firm instructed by Agents Mutual. Ms Farrell gave two witness statements in support of the Application, her ninth dated (2 October 2019, “Farrell 9”) and her tenth (dated 25 October 2019, “Farrell 10”). Ms Farrell contended that there were “a

number of serious deficiencies in the Defendants’ approach to disclosure” (paragraph 3 of Farrell 9). Although these words might have suggested the Application was being made under CPR 51 PD U §17, paragraph 2 of Farrell 9 – which referred expressly to the terms of the draft order – makes clear that the focus was on CPR 51 PD U §18.

13. I turn to consider the deficiencies in the Defendants’ disclosure alleged by Ms Farrell. In essence, these were as follows:

i) *Too few documents produced on disclosure.* One of the points made by Ms Farrell was that the Defendants’ search, as I have described it, had produced very few documents. To quote from paragraph 18 of Farrell 9:

“Of the 95 documents disclosed by the Defendants, 25 are public-domain or third-party documents, comprising 8 press articles, 5 analysts’ reports and 12 documents that are either the Claimant’s promotional materials, [Gascoigne Halman’s On the Market membership documents], or documents relating to [Agents Mutual’s] IPO. Of the remaining 70 documents, 39 contain redactions for (what is said to be) confidentiality, despite the protection afforded to these documents by the Confidentiality Ring.”

The same point is also made in paragraph 32 of Farrell 9.

This is not, in itself, a deficiency of the Defendants’ disclosure. The fact is that there may, in any given case, be few relevant documents of which to give disclosure. It may be that there are some cases, where it is so obvious that documents of a certain type or kind must exist, that the failure to produce such documents gives rise to an inference that the disclosure process has failed or is deficient. However, I do not consider that this is such a case. Given the nature of the issues between the parties, I consider it as entirely possible that there are actually very few relevant documents in the Document Universe.

ii) *Inadequate search terms.* In paragraphs 25ff of Farrell 9, Ms Farrell describes the searches undertaken by the Defendants, and suggests that the keyword parameters that informed the searches were inadequate:

a) Referring to the keyword searches, Ms Farrell says this in paragraph 26 of Farrell 9 (emphasis supplied):

“A fundamental deficiency in this process is that the search terms which the Defendants identify in Annex 1 to the Disclosure Statement are plainly too narrow to ensure that all documents relevant to the issues in this case have been captured or manually reviewed. Although 12 search terms are listed in paragraph 1 of Annex 1, this is apt to mislead. The terms involve a very large degree of overlap. Indeed, almost 40% of the unique search term combinations used by the Defendants in their main electronic document search are entirely duplicative of other search terms...”

b) Two points are made by Ms Farrell. The first is that the searches were too narrow to ensure the capture of all relevant documents. This essentially misunderstands the purpose of keyword

parameters. The whole point of keywords is to reduce an unmanageable universe of documents to one susceptible of a manual search. In this case, the keyword and date parameters reduced an unmanageable 2 million documents to a manageable 30,000. Were relevant documents missed? Some may have been. But that is not the question. The question is whether a reasonable and proportionate search has been undertaken. Part of that process is reducing the unmanageable document universe to a universe that can be (in this case) manually reviewed through an electronic process. The issue is as Morgan J described it in *Digicel (St Lucia) Ltd v. Cable & Wireless plc*, [2008] EWHC 2522 (Ch) at [80]:

“If one were to adopt the ‘leave no stone unturned’ approach to disclosure then one would be more ready to add keywords to those originally used by the defendants. However, it will usually be wrong in principle to adopt that approach and, in my judgment, it would be wrong to adopt that approach in the circumstances of this case. One therefore has to consider the proportionality of adding an additional keyword. For that purpose one has to form some sort of view as to the possible benefit to the claimants of adding the keyword and the possible burden to the defendants of doing so. The burden to the defendants will principally consist of the burden of manually reviewing a large number of irrelevant documents.”

c) Ms Farrell’s second point is that the searches were badly crafted. The identification of appropriate keywords, combinations of keywords and the particular boolean operators used to define such combinations is an art, and one that will depend on a good deal of trial and error. Using search terms connected by an “or” will, obviously, generate more responsive documents than where the same search terms are connected by an “and”. But it may well be that the use of the “or” operator will result in too many documents being produced for manual search. Whilst I entirely accept that the keyword searches proposed by Agents Mutual might well result in a different outcome, in terms of “hits” produced, I am entirely unpersuaded that it would produce a better outcome. That, as I see it, is the minimum threshold that Agents Mutual must pass before the Application even becomes arguable, and it is a threshold that the Application does not meet in this case.

iii) *The hypothetical example.* In paragraph 30 of Farrell 9, Ms Farrell hypothesizes a document containing the following (admittedly, and designedly, key) sentence:

“We intend to and will induce a breach of contract with Agents Mutual by listing on Zoopla, with the intention of causing harm to Agents Mutual.”

It was asserted by Agents Mutual – and accepted by the Defendants – that the electronic searches conducted by the Defendants would not have captured this document. But that demonstrates nothing: as noted in

paragraph 13(ii)(a) above, keywords are intended as a first trawl, to produce a manageable corpus of potentially relevant documents: they are not intended to capture every relevant or potentially relevant document.

14. These are the reasons why I dismissed the Application on 30 October 2019. In my judgment, neither the requirements of CPR 51 PD U §17 nor those of CPR 51 PD U §18 are met in this case. If I had to decide, then I would have held that this was a CPR 51 PD U §18 case, not a CPR 51 PD U §17 case. Agents Mutual has not, in my judgment, demonstrated that this is a case where there has been or may have been a failure adequately to comply with an order for Extended Disclosure. It follows that the higher test in CPR 51 PD U §18 applies: but, even if the lower test in CPR 51 PD U §17 had applied, the application would have failed: I am simply not satisfied that the order sought by Agents Mutual was reasonable or proportionate given the factors listed in CPR 51 PD U §6.4.
15. There was one point that gave me pause. I should explain the point and state why, in this case at least, it did not alter my conclusion regarding the outcome of the Application:
 - i) One point not made by Ms Farrell in Farrell 9 and Farrell 10 was that neither side, in the period after the Order, had engaged with the other in terms of agreeing search methodology and search terms before that methodology was actually implemented. This was a failing on both sides, albeit one that was, in part, corrected in that the Defendants did – after the event – take into account suggestions made by Agents Mutual in regard to the searches that were being carried out by them (see, for instance, paragraph 19 and 20 of Farrell 9). It is also fair to say that the Order said nothing about the agreement – or even the discussion – of search methodology or search terms. It follows that, although I was troubled by this failure of co-operation, it is not one that caused me to conclude that the Application should succeed.
 - ii) For the future, however, matters may well be different. As Vos C noted in *UTB llc v. Sheffield United Ltd*, [2019] EWHC 914 (Ch) at [75], “[t]he Pilot is not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality (see paragraph 2 of CPR 51 PD U), with disclosure being directed specifically to defined issues arising in the proceedings.”
 - iii) To that end, Extended Disclosure follows Initial Disclosure. Extended Disclosure involves consideration of the various Models described in CPR 51 PD U §8. It seems to me that where documents are or are going to be placed onto a document platform with a view to conducting electronic searches, then that is a factor that must be built into the manner in which disclosure is to be conducted, whichever disclosure Model (other than Models A or B) is ordered. Because electronic searches have the effect of determining the scope of subsequent, more intense and probably manual reviews, it is imperative that such electronic searches not be conducted unilaterally, but with the parties engaging with each other with a view to agreeing precisely how the electronic search is to proceed. I have well in mind that framing electronic searches is a

difficult process likely to be informed by trial and error. For example, keywords may very well appear to be appropriate, and the expectation will be that an unmanageable universe of documents will be reduced to manageable proportions. But such a search, when actually conducted, may very well produce too many hits or too few. In which case, in an iterative and co-operative way, the process of re-framing the electronic search process must be done again. It is important that this process be completed before any manual review is undertaken: it is the manual review that costs time and money, not the multiple re-runs of electronic searches.

- iv) Of course, the manner in which parties co-operate when considering electronic searches will be informed by the nature of the process being adopted. In this case, the Defendants adopted the process I have described in paragraph 4(vi) above.