



[2020] EWHC 1333 (Ch)

Case No: BL-2020-000635

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2020

Before :

MR JUSTICE MILES

Between :

- (1) FORTESCUE METALS GROUP LTD
(2) CHICHESTER METALS PTY LTD

Claimants

- and -

- (1) ARGUS MEDIA LIMITED
(2) S&P GLOBAL INC.

Defendants

**James Drake QC, David Hirst and Nicholas Gibson (instructed by Marcus Parker
Limited) for the Claimants**
Antony White QC and Kirsten Sjøvoll (instructed by Wiggin LLP) for the First Defendant
**Andrew Caldecott QC and Greg Callus (instructed by Mischo de Reya LLP) for the
Second Defendant**

Written submissions: 22 May 2020

Approved Judgment

Mr Justice Miles :

1. I have given judgment today dismissing the Claimants' application for an injunction. The parties have helpfully agreed an order subject to (i) costs and (ii) the Claimants' application for permission to appeal.

Costs

2. The Defendants are the successful parties and they seek their costs in the usual way under CPR r.44.2(2). The Claimants say that at least some of the costs have been incurred on matters which will be relevant at the trial and that these should be ordered to be in the case. I do not accept this. The Claimants chose to apply for an interim restraint order. This engaged s.12 of the HRA. The Court's task under s.12 was to reach a provisional assessment and not to make any final or binding decisions on any points. A court at trial, on the basis of fuller evidence, might come to different decisions on the various issues. This was not a dress rehearsal for the trial; it raises its own issues and engages a different test. The application is properly to be seen as a discrete, separate, one. The Defendants are entitled to all their costs of the application, to be assessed on the standard basis if not agreed.
3. The costs order should cover the costs reserved by HHJ Hacon in respect of the earlier hearings and disclosure application referred to in my main judgment.
4. Under the CPR the firm presumption is that the Court will make an interim payment and I shall do so. As to the amount, I need to estimate the likely level of recovery, subject to an appropriate margin for error in the estimate. In doing so I need to consider questions of reasonableness and proportionality. I take into account that the hearing involved a substantial amount of evidence (running to some 1,600 pages), many authorities and prolonged argument. The hearing took two full days. I also take into account the importance to the parties of the issues. I also bear in mind that the Defendants are seeking substantial amounts on account and that the Court does not have the same information it would have on a detailed assessment. The total amounts claimed by the First Defendant are £158,948.50 and by the Second Defendant are £367,092.87, including £16,844 for the costs of the disclosure application. The Second Defendant also served expert evidence.
5. This is inevitably an inexact process and I must use a broad brush. Taking all relevant matters into account, I consider the appropriate amounts are (a) £80,000 for the First Defendant and (b) £140,000 for the Second Defendant.
6. The Claimants ask for 28 days to pay. I see no reason to extend the time for payment beyond the usual 14 days. The Claimants referred generally to the Covid-19 pandemic but did not explain why this would hinder them from paying within 14 days.

Permission to appeal

7. The Claimants seek permission to appeal and, if permission is granted, a stay pending appeal.
8. The Claimants say that the judgment contained a number of errors. First, that in assessing the public interest defence, it reversed the onus and, relatedly, that in

carrying out the balancing exercise it required the Claimants to establish that their interest outweighed that of the Defendants. Second, they say that the judgment failed to take account of the evidence about the impact of the disclosure of a firm's "pricing information" on competition, and that this point favoured the Claimants. The Claimants also say, third, that the case involves important points of principle about the interplay between breach of confidence and Art 10 of the ECHR and these would benefit from clarification from the Court of Appeal.

9. I do not consider that there is a realistic prospect of an appeal succeeding. The Court applying s.12 of the HRA has to reach a provisional view of what will happen at trial, on the materials currently available. I specifically recognised, when carrying out that assessment, that the onus at trial would be on the Defendants on the public issue defence. I gave due weight to the general interest in upholding confidences and, separately, considered the consequences of the breach of the duty of confidence on the particular facts, in accordance with the principles in Brevan Howard. There is a general burden of persuasion on an applicant under s.12 but I did not place any additional or undue onus onto the Claimants. As to the second point, about competition and prices, the information was not, for the reasons given in the judgment ordinary "pricing information". The position was a lot more nuanced, as explained in several parts of the judgment. I took also account of the argument about competition and gave it appropriate weight. That was part of an overall evaluative, multi-factorial exercise, balancing and weighing the various strands of public interest. Absent an error of law an appellate court is unlikely to interfere, and (for the reasons given above) I do not consider there was any such error. On the third ground, there is no need for the Court of Appeal to revisit the principles it has recently set out authoritatively in the Prince of Wales case and Brevan Howard. For these reasons I refuse permission to appeal.
10. The parties are invited to finalise an order giving effect to this judgment.