

[2021] EWHC 2820 (QB)

IN THE HIGH COURT OF JUSTICE – QUEEN’S BENCH DIVISION

Case No: QB-2017-006111

The Rolls Building
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London
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Monday, 13th September 2021

Before:
THE HONOURABLE MR JUSTICE CALVER

B E T W E E N:

BES COMMERCIAL ELECTRICITY LTD & ORS

and

CESHIRE WEST & CHESTER COUNCIL

MR P MARSHALL QC & MR M MORRISON appeared on behalf of the Applicant
MS F BARTON QC appeared on behalf of the Respondent

JUDGMENT
(Approved)

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MR JUSTICE CALVER:

1. This is the claimant's application to adduce expert evidence shortly before trial, made by application notice dated 19 August 2021. The application is for permission to rely upon the expert evidence of an IT expert to provide evidence on what techniques could and should have been used by the defendant to search and take copies of material held on the computers, servers and other devices seized from the claimants and whether, had appropriate techniques been used, the equipment could have been returned earlier than it was.
2. These proceedings arise out of the actions taken by the defendant in connection with a without notice application for search warrants made on 22 July 2016 and their subsequent execution. These warrants were then executed on the 28th and 29 July 2016 at the premises of the claimants. The first and second claimants who are called 'BES' operate as a non-domestic energy supplier. The fourth claimant operates as an intermediary known as an 'aggregator' through which non-domestic energy suppliers, including BES pass details of their products to a network of brokers, who are called 'CPL'. Finally, the third claimant operates as a non-domestic water supplier which, it is alleged, was prevented from beginning to trade by the actions of the defendant in obtaining the search warrants.
3. The defendant is a Local Authority which has been conducting a Trading Standards investigation over a period approaching eight years into allegations of fraudulent mis-selling by energy brokers. At the relevant time, the defendant alleged that it suspected that such activity had been carried out by BES, CPL and their officers including Mr Andrew Pilley and Miss Michelle Davidson. The claimants strongly denied and continue to deny involvement in such activity.
4. It is the claimant's case that the defendant has breached their human rights and/or committed acts of trespass and conversion in that the defendant caused the search warrants to be obtained in breach of its duty, it is said, of full and frank disclosure; that it obtained warrants in excessively broad terms; that it seized material beyond the scope of the search warrants; that it failed properly to protect material subject to legal professional privilege and that it retained such material for an excessive period of time. It is this last allegation of the various allegations made with which the expert evidence upon this application is concerned.
5. On 28 July 2017, being one year after the execution of the warrants, an application was made to the Preston Crown Court, pursuant to Section 59 of the Criminal Justice and Police Act 2001, for the return of the seized property. The application was heard by the Recorder at Preston on the 7th and 8 September 2017. Judicial review proceedings were also issued by the claimants, challenging the orders made by the court, in particular, the refusal of the Recorder to make any order concerning the return of copied data held by the defendant. That is the background to the application.
6. On any view, this application is made late in the day with a substantial trial of this action of some 12 to 15 days due to take place on 15 November 2021; the parties are, no doubt, fully occupied now in preparing for that.
7. The terms of the application notice can be seen to be extremely broad in terms of the nature of the expert evidence sought to be adduced. The precise issues for the experts to adduce are not identified in the notice itself and, as Ms Barton QC has pointed out in her submissions on behalf of the defendant, the name of the expert who is to give the expert evidence is not provided, despite the fact that the expert has, Mr Marshall confirms, been identified.
8. For the purpose of the present application, the relevant parts of the claimant's pleaded case are paragraphs 58.3 and 66 to 69 of their particulars of claim which aver that the defendant retained a substantial quantity of IT equipment, essential for the claimants' ongoing operations for an excessive period of time, following the execution of the search warrants in

breach of section 53 of the 2001 Act. It is said certain of these items remained unreturned nearly a year later, although the three main servers were returned within some three weeks of the obtaining of the warrants.

9. Naturally, the burden rests firmly upon the claimants to prove that allegation and Ms Barton, for the defendants, points out that no criticism of the techniques used to search and take copies of the electronic data are made by the claimants in their particulars of claim. The defendants' pleaded response to the particulars of claim is as follows:
 1. The defendant contends that a "huge volume" of data was seized, including 53 terabytes of digital data and that that had been examined and returned as soon as reasonably practicable, given the scale and complexity of the investigation and the volume of material seized; that is paragraph 49(iv) of the defence.
 2. The defendant maintains that it had agreed to prioritise certain items and that it had no duty to examine the items seized in any particular order – see paragraph 57 of the amended defence.
 3. The defendant does not admit the claim that items were returned in piecemeal fashion and asserts that "items were imaged in priority order following discussions with the claimants' legal representatives. Items were returned as soon as reasonably practicable". That is paragraph 58 of the amended defence.
 4. The defendant pleads that "all items were reviewed as soon as reasonably practicable" and refers again to there being 53 terabytes of digital data and that that was held on a database which could be interrogated. That is paragraph 62 of the amended defence.
10. It follows that it has always been a pleaded issue in the case that the items were said to have been retained for longer than was reasonably necessary and the defendant pleaded back to that issue and its defence served as long ago as 26 July 2019. Mr Marshall QC, for the claimants, submits that the defence did not, as it ought to have done, flag up that there were technical difficulties in returning the equipment and, accordingly, the claimants could not have foreseen that those sorts of issues would arise in the context of the witness statement of Mr Childs which was served in these proceedings relatively recently, on 27 July 2021.
11. However, Ms Barton QC points out for the defendants that the claimants have had for some considerable time three witness statements of Mr Childs served upon them in related proceedings, the judicial review proceedings, on 23 August 2017, 6 September 2017 and 28 March 2018, and I note that Mr Childs refers and relies upon those statements in his statement served in this action on 27 July 2021. Those three previous statements were disclosed in these proceedings in August 2020.
12. Importantly, those three statements were served before the issue of these proceedings and, accordingly, in my judgment, and having read them, the claimants knew the techniques used by the defendants and they could have pleaded their criticisms of them in their particulars of claim in asserting that the defendants had taken too long to return the relevant materials. The claimants must have known, by reason of the pleaded case and Mr Childs' witness statements of the essential type of evidence which Mr Childs was inevitably going to give on this issue concerning the IT techniques utilised by the defendant and the time taken by them and, indeed, that is what has occurred.
13. The claimants maintain that the witness statement of Mr Childs of 27 July 2021 changes things in that, in certain respects, he gives unexpected expert evidence which means that the claimants should be allowed, very belatedly, to serve expert evidence of the very broad type to which I have referred and which is specified in the notice of application and paragraph one

- of its draft order served in support of it.
14. I do not accept that submission. Mr Carter sets out in paragraph 23 of his witness statement, served on behalf of the claimants on this application, the paragraphs in Mr Childs' witness statement for trial of which the claimants complain. It can be seen from those paragraphs – the sub-paragraphs to paragraph 23 of his statement, that the complaints relate to specific paragraphs of Mr Childs' statement and they are, in fact, narrow in their compass. They do not justify, on any view, the wide-ranging nature of the expert evidence which is sought in the notice of application.
 15. Indeed, to allow such an application would, in my view, as Ms Barton submitted, give rise to a real risk that the trial date would be lost. Mr Marshall indicated that the claimants could serve this new expert evidence by way of a report in some two weeks but it is notable that the claimant's draft order before me makes no provision for expert evidence in response from the defendant, nor indeed, for a meeting of experts and a joint memorandum.
 16. In my judgment, if permission were granted to serve an expert report of this breadth, it is likely to give rise to significant disputes if the defendant then wishes to call its own expert – independent expert evidence – in response and, indeed, one would anticipate that it would because, as Ms Barton pointed out, Mr Childs is not an independent expert. Accordingly he would be open to criticism that his evidence insofar as it is said to be expert evidence ought not to be relied upon and there would, therefore, be an imbalance of experts as, indeed, Mr Marshall himself pointed out.
 17. Moreover, the overly broad nature of the expert evidence sought in the application notice makes it difficult for the defendant to take immediate and precise steps in terms of instructing any expert itself as it will not know with any degree of precision the scope of the expert evidence to which it is required to respond until it receives the claimant's expert report.
 18. I note from paragraph 23 of Mr Carter's witness statement that in identifying the eight specific complaints about Mr Childs' witness statement in that paragraph, that he refers to the fact that witness statement includes those matters of opinion but his complaint is not limited to those particular complaints and so, I do not accept Mr Marshall's submission that it would be clear precisely what the experts would be opining upon and, again, that gives rise to significant issues in terms of (a) disputes between the parties and (b) delay in progressing any exchange of expert evidence.
 19. Even if the claimants were able to serve their expert report in two weeks' time, and despite Mr Marshall submitting in paragraph 10 of his skeleton argument that a compressed timetable could be laid down for the various steps required in dealing with this belated expert evidence, I do not consider it to be realistic; not least bearing in mind the heavy burden of trial preparation which will, no doubt, be in full swing at the same time that this expert evidence of uncertain scope and breadth is being adduced.
 20. As I have said, the expert evidence relates to just one issue out of several which fall for determination at trial. Furthermore, there will naturally be a significant escalation in costs.
 21. As such, applying the tests laid down in *Quah Su-Ling -v- Goldman Sachs International* (“GS”) [2015] EWHC 759 (Comm) and, indeed, the *NHS Trust* case, to which I have been referred, I do consider that the application is made very late. I consider it is not sufficiently precise in terms of the scope of the expert evidence that is sought to be adduced and, accordingly, I refuse to allow the expert evidence in the terms sought in the notice of application.
 22. I do consider the application could have been made long ago and the claimants have not shown why justice to them, their opponent and other court users requires them to be able to adduce this evidence. The risk to the trial date because of the lateness of the application causes the balance to come down against the grounds for permission and, accordingly, I refuse

- the application.
23. That brings me to the claimants' criticisms about the content of Mr Childs' witness statement. So far as that is concerned, as Ms Barton QC points out, by section 3.2 of the Civil Evidence Act 1972, where Mr Childs expresses an opinion, that is admissible insofar as it is a way of conveying relevant facts where were personally perceived by him. I agree, therefore, with paragraph 12 of her skeleton argument in that Mr Childs is in a position to tell the court exactly how the material was dealt with and for the purposes of the allegation of delay, he is entitled to say that, in his view, it was done as quickly as possible. What weight the court gives to that is another matter.
 24. That assertion can then be tested in cross-examination by some factual questions about the processes adopted and whilst Mr Childs is giving evidence of fact, it is inevitable, in view of the technical and scientific nature of that factual evidence, that it will occasionally blur the boundaries of factual and opinion evidence but that does not make it inadmissible and this is a long way, this case, from *JD Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch.) or *New Media v Kagalovsky* [2018] EWCH 2742 (Ch) which were relied upon by Mr Marshall QC.
 25. However, it may be that in certain specific respects, Mr Child's witness statement does require some redaction in order to go no further than he is permitted to by section 3(ii) of the Civil Evidence Act and I have in mind, in particular, the last sentence of paragraph 22 of his statement where he says, "these were all returned at the earliest practical time following the imaging and verification process"; paragraph 24 where he says, "We returned these as soon as practicable, given the sheer volume of exhibits"; and the last sentence of paragraph 34, where he says, "There was no unnecessary or unjustified delay". It does seem to me that those particular references are arguably objectionable because that this the question that the court will have to determine, not Mr Childs.
 26. However, the claimant has not made any application to exclude parts of Mr Childs' statement and I am concerned that Mr Marshall raised, for example, an issue about paragraph 22 of Mr Childs' witness statement which is not referred to in Mr Carter's witness statement in paragraph 23, as well as other new complaints about the statement. Accordingly, I do not consider it to be appropriate at this hearing to embark upon an exercise of review of Mr Childs' statement save, as I say, simply to indicate that there may be some limited objections in the form that I have mentioned which may require the defendant to revisit Mr Childs' witness statement in order to ensure that, so far as those aspects are concerned, that he is not putting forward evidence which is not for him to give.
 27. In short, whilst there may be a few minor points of criticism of Mr Childs' witness statement which require deletion or correction, that does not justify the admission of wide-ranging expert evidence at this late stage of the proceedings and for the reasons, therefore, that I have given, I refuse the application.

End of Judgment

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