



Neutral Citation Number: [2021] EWHC 1961 (Ch)

Case No: BL-2019-001377

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/7/2021

Before:

MASTER CLARK

Between:

**EURASIAN NATURAL RESOURCES CORPORATION
LIMITED**

Claimant

- and -

AKE-JEAN QAJYGELDIN

Defendant

David Glen (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimant**
Ben Silverstone (instructed by **Memery Crystal LLP**) for the **Defendant**

Approved Judgment

I direct that this approved judgment, sent to the parties by email on 20 July 2021, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic

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Master Clark:

1. This is my judgment on the costs of the claimant's application dated 4 January 2021 for various orders in respect of disclosure.
2. On 8 March 2021 I handed down judgment ("the Judgment") in which I dismissed the application, in the modified form in which it had been sought by the claimant at the hearing.
3. Although the parties filed skeleton arguments as to costs, there was insufficient time at the next hearing to deal with that issue. I therefore directed written reply submissions on the two main issues between the parties:
 - (1) whether the costs of the application should be decided now or at a future stage; and
 - (2) if now, the liability for such costs.

Whether the costs of the application should be decided now or at a future stage

4. The claimant seeks an order that costs should be reserved until after the disclosure process has concluded. Its position is that the outstanding issues in relation to disclosure, primarily the circumstances in which the operaksgb account went offline, and whether an Apple laptop was an existing depository when the defendant's DRD was completed, are relevant to the costs of the application.
5. I reject the claimant's submission that the decision as to costs should be postponed to a later stage, for the following reasons.
6. First, although the court's decision as to costs is a discretionary one, the general rule is that the unsuccessful party pays the successful party's costs: CPR 44.2(2)(a). The court retains a discretion to make a "different order" (CPR 44.2(2)(a)), and is entitled to have regard to all the circumstances, including the conduct of the parties. However, none of the factors listed in the rule involve matters arising after the relevant decision; and the general position is that events occurring after a decision are not relevant to costs.
7. Thus, the approach to be taken in determining liability for the costs of this application is, in my judgment, to take as a starting point who was the successful party in the application itself. Later events are not relevant to that exercise. This is particularly so when my judgment expressly refers to and considers the inconsistencies in the defendant's evidence as to the two matters relied upon by the claimant.
8. Secondly, postponing the decision as to costs would involve the further time and costs of revisiting the application and reviewing its outcome in the context of the disclosure provided. The application and matters consequential on it have now been the subject of two separate hearings (although there was insufficient time to deal with it at the second hearing) and two skeleton arguments as well as the written reply submissions (which were directed to reduce costs). The exercise envisaged by the claimant would in my judgment be disproportionate, and, for that reason, contrary to the overriding objective.
9. Thirdly, it would in my judgment be unfair to the defendant to delay a decision on the significant costs of responding to the application until some unspecified time in the future. If as he contends, he is entitled to an order for his costs, then that unfairness is increased by his being deprived of those costs.

Liability for costs

10. In its solicitors' letter of 4 March 2021 the claimant's position was that, if costs were not reserved, the appropriate order was no order as to costs in the application, or costs in the case. This was said to be on the basis that the costs incurred in the "two distinct parts" of the application were approximately equal.
11. The claimant's final position is that the costs of the application should be borne primarily by the defendant. The defendant's position is that he is entitled to the costs of the application.
12. The matters arising in the application can be divided into two parts:
 - (1) matters which were contested at the hearing of the application;
 - (2) matters which were no longer contested at the hearing.

Matters which were contested at the hearing of the application

13. As to these, the outcome, as decided in my judgment, is accurately summarised by the defendant's counsel as follows:
 - (1) The jurisdictional bases for the orders sought identified in the application notice were PD 51U, ¶¶10.3 and 17.1. However, neither of those paragraphs conferred jurisdiction to make the orders sought by the claimant : Judgment, ¶¶54-60.
 - (2) The claimant did not cite any authorities in which an order for disclosure in respect of a party's compliance with his disclosure obligations, as sought by the claimant, had been made: Judgment, ¶81
 - (3) I noted that "although the court has jurisdiction to order disclosure in relation to issues not arising on the statements of case, that jurisdiction is very sparingly exercised". Moreover, "[t]here are strong policy reasons for the court's reluctance to order disclosure as to this type of issue, which are vividly illustrated by this case. The parties' and the court's resources should be directed and focussed upon the matters which the court will need to decide in order for there to be a fair resolution of the claim at trial": Judgment, ¶82.
 - (4) The claimant had made numerous complaints about the defendant's conduct in connection with disclosure. Of those, most were rejected or held to be of no practical significance. As to the remainder, I expressed concern about information provided by the defendant as to whether he held a business card containing a crime reference number, the period in which he made inquiries of his German lawyer and an Apple MacBook referred to in his DRD. However these matters "fall far short of justifying the disclosure sought": Judgment, ¶¶62-78, 84.
 - (5) I held that the claimant had failed to show "any basis for criticising the accuracy of the defendant's solicitors' representations as to matters within their own knowledge" and that "[T]here is therefore no reason to conclude that they will not respond accurately in providing the results of their enquiries, so far as relevant to the defendant's fulfilment of his disclosure duties": Judgment, ¶85.
 - (6) It would be "wrong in principle and disproportionate" to require the defendant to disclose the correspondence sought by the claimant: Judgment, ¶86.
 - (7) The information at ¶1(b)(v) to (vii) of the claimant's draft order was "not relevant to whether the defendant has fulfilled his disclosure obligations, as those obligations are confined to documents within his control": ¶Judgment, ¶87.

14. It is clear from this summary that the defendant was the successful party on the point of principle which arose, not just on the application as drafted, but also on the alternative basis that the court had a residual inherent jurisdiction to order disclosure other than in respect of the issues arising on the statements of case.

Matters which were no longer contested at the hearing

15. As to the chronology leading up to the application, reference should be made to the Judgment.
16. As noted above, conduct is a factor which may displace the general rule that the successful party is entitled to its costs. In applications, reasonable conduct on the part of the applicant will normally be to request (in correspondence) the relief it seeks from the respondent, and to allow the respondent a reasonable time to consider and respond to the request. If an application is brought without making any such request, or allowing insufficient time to respond to it, then even if the respondent provides the relief sought following service of the application, the applicant may be deprived of costs because of its conduct.
17. In addition, the Disclosure Pilot imposes duties on the parties to co-operate. Thus, under the heading, “Principles”, ¶¶2.3 and 2.4 of PD 51U provide:
 - “2.3 The court expects the parties (and their representatives) to cooperate with each other and to assist the court so that the scope of disclosure, if any, that is required in proceedings can be agreed or determined by the court in the most efficient way possible.
 - 2.4 The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in Appendix 1).”
18. At ¶11, provision is made for “Disclosure Guidance Hearings” (“DGHs”):
 - “11.1 The parties may seek guidance from the court by way of a discussion with the court in advance of or after a case management conference, concerning the scope of Extended Disclosure or the implementation of an order for Extended Disclosure, where—
 - (1) the parties have made real efforts to resolve disputes between them;
and
 - (2) the absence of guidance from the court before a case management conference is likely to have a material effect on the court’s ability to hold an effective case management conference, or the absence of guidance from the court after a case management conference is likely to have a material effect on the parties’ ability to carry out the court’s case management directions effectively.”
(emphasis added)
19. Specific sanctions are provided for by ¶20.2, which provides (emphasis added):

“If a party has failed to comply with its obligations under this pilot including by—

- (1) failing to comply with any procedural step required to be taken;
- (2) failing to discharge its disclosure duties; or
- (3) failing to cooperate with the other parties, including in the process of seeking to complete, agree and update the Disclosure Review Document,

the court may adjourn any hearing, make an adverse order for costs or order that any further disclosure by a party be conditional on any matter the court shall specify. This provision does not limit the court’s power to deal with the failure as a contempt of court in an appropriate case.”

20. As the defendant’s counsel submitted, the case-law under PD 51U also stresses the need for the parties to take a co-operative and proportionate approach to the disclosure exercise.
21. In *UTB LLC v Sheffield United Ltd* [2019] Bus LR 1500 Sir Geoffrey Vos C stressed that “the requirements for the parties to co-operate and to act with proportionality are of the greatest importance under PD51U”: ¶78, continuing at ¶79 that: “Extended Disclosure is not... something that should be used as a tactic, let alone a weapon, in hard-fought litigation”.
22. The Chancellor returned to the theme at ¶110 by “reminding the parties once again about the need for proportionality in this litigation”, stating that the court would not be “likely to look favourably on further disclosure applications in this case” and that “[p]roportionality needs to be engaged at every stage of the process”. He urged the parties “to consider very carefully their continuing obligations under paragraph 3.2(3) of PD51U ‘to liaise and co-operate with the legal representatives of the other parties ... so as to promote the reliable, efficient and cost-effective conduct of disclosure’, and indeed the trial of the action more generally”: ¶112.
23. In *McParland & Partners Ltd v Whitehead* [2020] Bus LR 699 the Chancellor gave judgment in a DGH “in order to clarify some aspects of the way in which the Disclosure Pilot is intended to work” and “to provide guidance for other users of the Business and Property Courts”: ¶2. The Chancellor noted, at ¶3, that the “watchword” for how Extended Disclosure is to be given under PD 51U, ¶¶6-9 is “contained in paragraph 6.4 of PD51U, which provides that an order for extended disclosure in all cases ‘be reasonable and proportionate having regard to the overriding objective including’ the factors listed at ¶6.4(1)-(7).
24. He continued, at ¶4, as follows:

“It is critical, however, that in every case, the type of extended disclosure is fair, proportionate and reasonable. The Disclosure Pilot should not become a disproportionately costly exercise. This latter requirement means that the parties have to think co-operatively and constructively about their dispute and what documents will require to be produced for it to be fairly resolved.”
25. In his concluding remarks, the Chancellor stated:

“53. [...] I do wish to emphasise the need for a high level of co-operation between the parties and their representatives in agreeing the issues for disclosure and completing the DRD. The Disclosure Pilot is built on co-operation as its terms make clear (see paragraphs 2.3, 3.2(3), and 20.2(3) of PD51U). This is not intended to be mere exhortation.

54. It is clear that some parties to litigation in all areas of the Business and Property Courts have sought to use the Disclosure Pilot as a stick with which to beat their opponents. Such conduct is entirely unacceptable, and parties can expect to be met with immediately payable adverse costs orders if that is what has happened. No advantage can be gained by being difficult about the agreement of issues for disclosure or of a DRD, and I would expect judges at all levels to be astute to call out any parties that fail properly to co-operate as the Disclosure Pilot requires.

Conclusions

55. The Disclosure Pilot is intended to operate proportionately for all kinds of case in the Business and Property Courts from the smallest to the largest. Compliance with it need not be costly or time-consuming [...]

58. Co-operation between legal advisers is imperative. The Disclosure Pilot must not be used as an opportunity for litigation advantage. If that is attempted, the parties responsible will face serious adverse costs consequences.”

26. The claimant’s counsel submitted that the application was necessary to obtain full and proper answers to requests first made in the claimant’s solicitors’ letter dated 16 June 2020. It played, he said, a critical role in ensuring that the defendant’s disclosure search was reframed in adequate terms, and that inquiries to preserve document repositories were properly progressed ahead of the deadline for Extended Disclosure, which was 26 March 2021 (later extended by various consent orders to 2 July 2021).

27. He particularly relied upon the defendant’s witness statement dated 22 January 2021 having been produced in response to the application. First, he said, a key objective of seeking a witness statement was to provide formal confirmation and certainty as to the defendant’s actual position, in the light of the shifting and frequently contradictory positions which had previously been advanced about the status and existence of his document repositories in correspondence. Secondly, he said, the defendant’s witness statement in turn provoked new issues about the status of his key document repositories which he himself has accepted require further investigation and explanation.

28. The defendant’s counsel made the following criticisms of the application:

- (1) Several of the requests made in the December letter were not transposed into the draft order filed with the application (“the First Draft Order”): e.g. ¶¶1, 2(b), 4, 6(a) and 6(e) of the December letter.
- (2) Many of the orders sought in the First Draft Order did not correspond to requests made in the December letter: e.g. ¶1(a)(i) (which comprised numerous questions), (iii), (iv), (v), (vi) (so far as concerned the operabus account), (viii), (ix), (x), (xi),

- (xiv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), (b) (so far as concerned the operabus account) and (c) of the First Draft Order.
- (3) Many of the questions in the First Draft Order had already been answered by the defendant – he relied upon his analysis of the correspondence discussed in paragraph 29 below.
 - (4) Much of the First Draft Order was internally repetitive in that the same questions were asked in several paragraphs: see, e.g., the first defendant’s witness statement, ¶¶26, 27, 28 and 37.
 - (5) The claimant sought to have the application determined on an urgent basis and proposed a time estimate (including pre-reading) of 2 hours, with no provision for evidence in answer by the defendant.
 - (6) The date sought by the claimant for compliance with the numerous orders in the First Draft Order was 15 January 2021 (i.e. within 8 working days of the application).
29. The defendant’s analysis of the relevant correspondence between the parties sets out the questions asked in the First Draft Order, and identifies when the defendant’s solicitors answered each question. In addition, the questions and responses in relation to the email accounts and the Devices are set out and considered in the Judgment. A fair summary of this correspondence is as follows. First, the defendant’s solicitors did respond in detail, on 22 June 2020, to the claimant’s solicitors’ letter of 16 June 2020 letter, after which matters went to sleep for several months. The claimants’ solicitors reactivated the correspondence on 13 November 2020, and there was then a flurry of correspondence leading up to the CCMC on 3 December 2020. There was further correspondence after the CCMC, culminating in the claimant’s solicitors’ 5½ page letter of 24 December 2020 (“the December letter”), which sought to impose a deadline of 1 working day (30 December 2020) for a response. The application was issued 1 working day after, the defendant’s solicitors having stated on 30 December 2020 that they were taking instructions and would respond as soon as possible.
30. I do not accept the claimant’s counsel’s submission that the application was necessary. Much of the information provided in the defendant’s witness statement had already been provided in correspondence; and to the extent that further details or explanation were required, this could have been dealt with in correspondence.
31. The claimant was critical of both the defendant’s and his solicitors’ responses to its queries. However, as set out at para 13 above, in the Judgment I either rejected those criticisms, or to the extent that I accepted them, held that they did not justify the disclosure sought by the claimant.
32. Crucially, in my judgment, the claimant has not sought to explain or justify why, having written the December letter to the defendant, it did not allow the defendant a reasonable amount of time to respond to it. Similarly, to the extent that the First Draft Order contained questions which were not raised in the December letter, the reasonable course would have been for the claimant to raise those questions in correspondence before including them in the application. The application was therefore premature, and the fact that the defendant responded to it by providing answers to the claimant’s queries in the form of a witness statement is, for the reasons explained above, not sufficient to entitle the claimant to its costs. The appropriate order for costs should

reflect the fact that had the claimant raised the questions in correspondence, then the application (at the least in its wide-ranging terms) would have been unnecessary.

33. Furthermore, if, matters having been fully ventilated in correspondence, issues remained between the parties, the appropriate course would have been to seek a focussed Disclosure Guidance Hearing, at which the court could have given guidance (and at which the normal order would have been costs in the case).
34. In *Vannin Capital PCC v RBOS Shareholders Action Group Ltd* [2019] EWHC 1617 (Ch) Joanna Smith QC, sitting as a Deputy Judge of the High Court criticised the parties' decisions to bring applications rather than seek a Disclosure Guidance Hearing (emphasis added):

“Before addressing the detail of the applications, I note that there has been no attempt by either party in this case to seek guidance from the court in accordance with the procedure identified in CPR PD 51U, paragraph 11, in advance of making formal applications to the court. Whilst applications to vary an order for Extended Disclosure do not appear to be contemplated as suitable for Disclosure Guidance Hearings, applications concerning the scope of Extended Disclosure expressly fall within that provision. Lengthy skeleton arguments have been filed on both sides in respect of these applications and detailed submissions have been made which took more than half a day of court time. This approach seems to me to be both undesirable and contrary to the spirit of the Disclosure Pilot which requires the parties to cooperate so as to promote the reliable, efficient and cost-effective conduct of disclosure. Whilst the differing positions of the parties appear to have been amply explored in *inter partes* correspondence and, it seems, were not capable of resolution without further intervention from the court, this seems to me to be just the sort of situation in which guidance could have been sought from the court under paragraph 11 (at least) on the issue of whether the Claimant's application fell within the scope of the existing Disclosure Order. Had such guidance been sought and obtained, some of the issues arising on this hearing might well have fallen away, thereby saving time and costs.”
(emphasis added)

35. In this application, there have, similarly, been lengthy skeleton arguments on both the application itself and as to the costs of the application. The parties' costs in respect of the hearing of the application alone were about £110,000 as at the hearing on 17 February 2021, and no doubt substantially more following the hearing on 12 March and the reply submissions on costs. The Judge's observations in *Vannin Capital* (which also concerned the scope of Extended Disclosure) are directly pertinent.

Conclusion

36. For the reasons set out above, therefore, I shall order that the claimant pay the defendant's costs of the application.