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Case No: HT-2022-000043, HT-2022-000363

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

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

Date: 03 July 2024

Before :

Jason Coppel KC (sitting as a Deputy High Court Judge)

Between :

- (1) MORNINGTON 2000 LLP
(t/a STERILAB SERVICES)
(2) SANTE GLOBAL LLP

Claimants

- and -

**THE SECRETARY OF STATE FOR HEALTH
AND SOCIAL CARE**

Defendant

Sarah Hannaford KC and Rose Grogan (instructed by Lewis Silkin LLP) for the Claimants
Michael Bowsher KC and Lara Kuehl (instructed by Government Legal Department) for
the Defendant

Hearing date: 18 June 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 3rd July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

JASON COPPEL KC

Jason Coppel KC:

The application

1. This is an application by the Defendant to two related claims arising out of a contract for the supply of Covid-19 lateral flow test kits which was concluded between the Claimants and the Defendant on 6 September 2021 (“**the contract**”). In order to perform the contract, the Second Claimant (“**Santé**”) had a sub-contract with a supplier based in Germany called MP Biomedicals Germany GmbH (“**Bio**”) and Bio in turn had a sub-contract with the manufacturer of the test kits in China, Xiamen Boson Biotech Co Ltd (“**Boson**”).
2. The Defendant terminated the contract on account of alleged violations of labour law, health and safety and worker payment obligations in Boson’s factory in China, following an audit conducted on behalf (ultimately) of the Defendant by a firm known as “QIMA”. These violations were alleged to constitute breaches of contract, giving rise to a right to terminate the contract, on account of (a) the goods to be supplied not being in accordance with the terms of the contract, and (b) the Claimants and Boson having provided inaccurate and misleading information when applying to join the procurement pursuant to which the contract was awarded. The Claimants dispute that there was any breach of contract on their part and, as a result, claim damages and interest in excess of £100m for wrongful termination of the contract. There is also a procurement claim, alleging that the Defendant breached the Public Contracts Regulations 2015 by placing additional orders with other suppliers after having terminated the contract, and failing to offer the Claimants the opportunity to compete for further contracts, leading to further loss of profits, which – I apprehend - could run to further tens of millions of pounds.
3. The application principally concerns whether, as a result of the arrangements between Santé, Bio and Boson, documents in possession of Bio and Boson are to be regarded as within the control of Santé for the purposes of discharging its disclosure obligations. The position reached thus far on disclosure is that Waxman J has ordered extended disclosure primarily on the basis of Model D (narrow, search-based disclosure), with certain categories on the basis of Model C (disclosure of particular documents or narrow classes of documents). The date for standard disclosure is imminent and the Defendant wishes to ensure that relevant material is provided, in particular, from Boson, whose role is central to the key disputes regarding the justification for the Defendant’s termination of the contract. Categories of disclosure set out in the Disclosure Review Document (“**DRD**”) filed in the proceedings where Boson’s input seems of particular significance include:
 - “1. The extent to which the responses relevant to [Boson] in the Standard Selection Questionnaire were accurate including all documents supporting the statements made in those responses.
 4. The contractual (including informal contracts or any agreed orally or by conduct) relationship between the Claimants, MP Bio and Boson.
 12. The basis on which the QIMA Audit was carried out and compiled, including:

- The documents and information requested by QIMA before and during the course of the audit;
- The documents and information made available by Boson during the course of the audit; ...

13. Whether [Boson's Licence from the Jimei District Human Resources and Social Security Bureau, on which the Claimants rely to rebut many of the allegations of breach of contract] is authentic, how and when it was procured, whether Boson had the benefit of the Licence and the scope/extent of the Licence."

4. The application was originally in two parts but one part no longer falls for determination. That was an application for specific disclosure of contractual documents which the Defendant accepted at the hearing before me should not be granted, on account of the proximity of standard disclosure. What remains is an application for a declaration regarding the scope of the documentation which is within the control of the Claimants for the purposes of their disclosure obligations pursuant to PD57A. The application was reformulated at the hearing by Mr Bowsher KC on behalf of the Defendant, so as to seek:

"A declaration that documents within the possession of: (i) [Bio]; (ii) [Boson] which respond to the issues identified in the DRD are within the control of the Claimants for the purposes of their extended disclosure obligations under Practice Direction 57AD"

5. Originally, part of the declaration sought extended to auditors who had been instructed by the Claimants and/or Bio and/or Boson. Relevant disclosure regarding one such firm of auditors was provided on the eve of the hearing and Mr Bowsher KC submitted, and I accept, that the appropriate course would be to adjourn that part of the application so that the Defendant may consider further whether it needs to be pursued.

The legal principles

6. Pursuant to the definition in Appendix 1 of PD57AD, at §1.4, a party gives disclosure by stating "that a document that is or was in its control has been identified or forms part of an identified class of documents and either producing a copy, or stating why a copy will not be produced". For that reason, the concept of control has been said to fix the "universe" of documents from which a party's extended disclosure must be generated (see Pipia v BGEO Group Limited [2020] 1 WLR 2582 at §13). The definition of "control" for the purposes of disclosure in PD57AD (see Appendix 1, §1.1) includes (but is not limited to) documents: (a) in a party's possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies. The same definition applies under CPR 31.8(2) so the authorities dealing with the question of control in the context of CPR 31.8(2) are equally relevant to the question of control for the purposes of PD57AD.
7. It is well-established that an arrangement or understanding which gives a party practical or *de facto* control of a third party's documents is sufficient to constitute control for disclosure purposes. The parties were agreed that the relevant principles to be applied when deciding whether the categories of documents sought from Bio and

Boson were within the practical control of Santé were those stated by Mr Robin Vos in Berkeley Square Holdings Limited v Lancer Property Asset Management Limited [2021] EWHC 849 (Ch), §46 as modified in one respect by Jacobs J in Public Institution for Social Security v Al Wazzan [2024] EWHC 480 (Comm), §28. The Berkeley Square principles are as follows:

“46. Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:

i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;

iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

vi) The arrangement or understanding must not be limited to a specific request but should be more general in its nature.”

8. The qualification entered by Jacobs J was in relation to principle (i):

“.. it is not accurate to say in (i) that the relationship between the parties is "irrelevant". It would be correct to say (as illustrated by the example of parent and subsidiary) that the nature of the relationship is not determinative. However, the nature of the relationship (if any) between the parties (i.e. the party to the litigation, and the third party whose documents are alleged to be under the former's control) may well be relevant. For example, it is relevant that the nature of the relationship between PIFSS and KPMG (and indeed EY) is that of client and independent professional adviser.”

9. Sarah Hannaford KC urged me not to read the Berkeley Square principles “as if they were a statute”. She invited me to apply the dictum of Mr Peter MacDonald Eggers KC in Various Airfinance Leasing Companies v Saudi Arabian Airlines Corporation [2021] EWHC 2904 (Comm), §21:

"Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of a party to the action

not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access... However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement..."

10. Ms Hannaford also referred to the judgment of Cockerill J in Loreley Financing (Jersey) No. 30 Ltd v Credit Suisse Securities (Europe) Ltd and others [2023] EWHC 548 (Comm) where, having cited the dictum of Mr MacDonald Eggers, the Learned Judge stated that the authorities justified the conclusion that there was a "degree of stringency required", that caution was needed and the issue was not to be elided with practical control in the sense of there being an expectation of complying with a request. Cockerill J also pointed out (§32) that on an interim application such as that before me the question is whether the balance of the evidence favours the conclusion that there is practical control.

The submissions

11. Mr Bowsher KC relied upon a range of indications that Santé is to be treated, on the balance of the evidence, as having practical control over the documents held by Bio and Boson which are responsive to the categories of disclosure which have been ordered in this case. I summarise the more important of these as follows.
12. First, undertakings have been made whereby Bio and Boson have committed to providing Santé with assistance in terms which are applicable to the claim. Clause 6.14(a) of the contract between Santé and Bio states:

“The Supplier shall, at Santé’s request, promptly provide (and procure that the Manufacturer provides) Santé with all reasonable assistance requested by Santé in connection with:

(a) any dispute between [Santé] and the [SoS] in relation to a claim that Goods supplied to the [SoS] are defective or not in accordance with the Client Contract...”

In this clause, Bio is “the Supplier” and Boson is “the Manufacturer”.
13. There is a similar clause in a letter written by Boson to Bio which has been described by the Claimants as the contract between Bio and Boson. §13 of that document contains an undertaking, given expressly both for Bio’s benefit and for Santé’s benefit:

“To assist you and [Santé] on request in connection with either (i) any dispute which may arise between [Santé] and [the SoS] in relation to a claim that Goods supplied to [the SoS] are defective or not in accordance with the Client Contract...”

14. The Claimants do not deny that these clauses (“**contractual assistance clauses**”) are apt to cover the current dispute between them and the Defendant, which concerns whether the production of “the Goods” is or was in accordance with the contract between them and the Defendant. Whilst the clauses do not refer in terms to documents, Ms Hannaford did not dispute that the wording of the clauses is sufficiently broad as to cover the provision of documents which are necessary for the resolution of a dispute regarding whether or not “the Goods” are in accordance with the contract. Whilst Mr Bowsher does not rely upon these clauses as establishing an enforceable legal right of access to the documents in question, not least because the Defendant remains unsure as to whether it has received all of the relevant contractual documents, he does rely upon them as providing a firm foundation for the *de facto* control for which he argues.
15. Second, Mr Bowsher submits that, both prior to and for the purposes of these proceedings, there has in fact already been extensive provision of documentation to Santé from Bio and/or Boson, consistent with the effect of the contractual assistance clauses. In particular:
- (1) A number of the documents provided by the Claimants by way of initial disclosure in the proceedings can only have originated from Boson.
 - (2) The Claimants received documents from Boson, for provision to the Defendant, in late October 2021 and again in November 2021, in the immediate aftermath of the QIMA Audit report.
 - (3) In October 2023, the Claimants requested from Bio a copy of the purchase order which it had issued as part of its contract with Boson. This was not provided immediately but was provided in early June 2024 after a similar request had been made to Bio’s solicitors (along with a quality agreement between Bio and Boson).
- The Defendant complains, with some justification, that the Claimants have been deliberately vague about the nature and circumstances of the requests for documents that they have made to Boson and Bio, refusing to disclose them or even elucidate upon them until the very eve of the hearing. Certain of the requests, it turns out, were made orally or - in one case - may have been made orally (the relevant individual not being sure about whether he made the request - as recently as October 2023 - orally or in writing).
16. Third, Boson has provided and will continue to provide other forms of assistance to the Claimants in prosecuting their claim, including by making available employees to give evidence on behalf of the Claimants at trial. Indeed, Mr Bowsher asks me to infer that Boson has a strong interest and perhaps even a direct financial interest in the Claimants’ success. There is no direct evidence of the latter, although I can accept that it would likely be in Boson’s commercial interests to “clear its name” of the allegations made by the Defendant and of the fact of the Claimants’ contract with the Defendant having been terminated for breach of contract on account of Boson’s conduct (something which may have to be disclosed, and may prejudice Boson, in other tender processes). It is also undoubtedly correct that prior to and upon commencement of the claim, the Claimants and Boson were presenting a united front in opposition to the Defendant’s allegations, and that a number of averments made by

the Claimants in their Statements of Case must have been based upon information provided to them by Boson.

17. Fourth, although the Claimants claim that there was no contractual relationship between Santé and Boson, Mr Bowsher pointed to a number of indications that Santé has been in direct contact with Boson and enjoyed significant power in that relationship. For example, in July 2021, and before the Defendant awarded the contract to the Claimants, Santé commissioned an audit of Boson's premises by a firm called Intertek. A further audit was commissioned by Santé, by a firm called V-Trust, after the QIMA audit. The Claimants do not dispute that the Intertek and V-Trust auditors were given access to Boson's documents for the purposes of conducting their audits. As already noted, Boson gave undertakings for the benefit of Santé as well as Bio and these included a right for an employee of Santé (not Bio) to be located on Boson's premises to monitor production of the test kits and compliance by Boson with its various obligations.
18. Fifth, Mr Bowsher emphasised the unfairness of the position if the Claimants were able to produce and rely upon documentation originating from Boson which was helpful to them, whilst not being subject to any obligations in relation to other documentation held by Boson which might undermine their case. Or, put another way, it would be unfair if the Claimants were able to rely upon the contractual assistance clauses to their advantage but without risking any disadvantage in terms of the documents provided by Boson. I should say that the Claimants had in fact offered to make requests to Boson which were formulated by the Defendant but this offer was not accepted, in part because the Claimants would not accept that they had any disclosure obligations in relation to Boson's documents and in part also because of the difficulties which the Defendant perceived in making specific requests for documents without knowing enough about the universe of documents held by Boson.
19. For her part, Ms Hannaford for the Claimants emphasised the following points:
 - (1) There was nothing more than an ad hoc commercial relationship between Santé, Bio and Boson and the authorities show that it is necessary for there to be something more than even a close commercial relationship. None of the authorities concerned a relationship as distant as contractor-sub-contractor, most of the cases being concerned with parent company/subsidiary, employer/employee and trust/beneficiary relationships.
 - (2) The contractual assistance clauses do not mention provision of documents and do not suggest the "free and unfettered right of access" which, she said, would be necessary to found a conclusion of *de facto* control. She asserted that clauses such as the contractual assistance clauses are common in contractor/sub-contractor relationships and did no more than reflect a similar assistance clause in the contract between the Claimants and the Defendant. If clauses like these were sufficient to give a contractor control of the documents of a subcontractor (or a sub-contractor control of the documents of a sub-sub-contractor) then there would be what she described as "an astonishing floodgates problem".
 - (3) All that had happened in this case was that Boson had responded to a limited number of requests for documents from Santé in reaction to a specific event. This

was not suggestive of a standing arrangement of the type necessary to found de facto control.

(4) There was nothing in the contractual assistance clauses to suggest that Boson's documents would be available for searching by Santé, yet the effect of granting the declaration sought by the Defendant would be to require Santé to conduct a reasonable and proportionate search of Boson's documents for documents responding to the relevant categories of the DRD, which it would be unable to do. She pointed out that in Pipia the Court had found there to be a continuing right to make requests for documents which constituted control and held that the appropriate course of action was to order Model C, request-based disclosure in relation to the relevant categories of documents.

Decision

20. In my judgment, the balance of the evidence in this case demonstrates that Santé enjoys practical control over documents held by Bio and in particular Boson which may contain information which is required for the determination of the claims.
21. I apply the six Berkeley Square factors - with the requisite degree of stringency - as follows:

(1) As to the relationship between the parties, I accept that, as compared with previous authorities, this is an unusual case for there to be practical control. However, factor (i) is clear that the nature of the relationship is not determinative and that practical control does not depend upon there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship. There is no reason in principle why a contractor could not enjoy practical control over certain documents held by a sub-contractor or a sub-sub-contractor. Moreover, it seems to me that the relationship between Santé, Bio and Boson was a close one in the sense that they participated in what was in substance a joint venture, in seeking to be awarded contracts for the supply of lateral flow tests. And that it has been close during this litigation, which had at its commencement, and continues to have, a strong flavour of being a joint enterprise. The fact that one or more of Boson's employees will be giving evidence for the Claimants is indicative of that. In other words, the relationship between the parties on the Claimants' side has gone beyond a standard, arm's length contractor/sub-contractor/sub-sub-contractor relationship.

(2) In my judgment, the balance of the evidence shows that there is an arrangement or understanding that Boson will search for relevant documents or make documents available to be searched. Boson has an ongoing commitment to do this in the contractual assistance clause in its contract with Bio, and Bio has an ongoing commitment to secure that Boson does so, insofar as this constitutes assistance (Boson clause) or reasonable assistance (Bio clause) with the claim. These are commitments which have been honoured by Boson prior to and during the litigation, resulting in Boson making available documentation which is critical to the claims, and also by Bio. If Santé's need was for a search of Boson's documents so as to produce a document or documents which would be favourable to the claims, I have little doubt that Santé would consider that Boson was obliged to conduct that search and would expect it to do so on the basis of the arrangement or understanding between the parties thus far. I have also little doubt that that search would take place. The contractual

assistance clauses are, however, broader in their effect and would extend to searches for documents, favourable or unfavourable, which are necessary to the fair disposal of the claims. I would reject the proposition that assistance or reasonable assistance is confined to making available or searching for documents which are helpful to Santé's claims.

(3) The Defendant does not suggest that all documents held by Bio and Boson are within Santé's control but only the documents responsive to categories in the DRD, which have been decided to be necessary to the fair disposal of the claims such that a search for them must be carried out. These are documents which are concerned with a dispute between Santé and the Defendant regarding whether the goods to be supplied by Boson via Bio would have been supplied in accordance with the contract with the Defendant.

(4) The contractual assistance clauses are the starting point for inferring the arrangement or understanding which I find to be present in this case, but there are significant other factors which give rise to that inference, including in particular the evidence of past access to documents being provided by Boson. This may, as the Claimants submitted, have occurred only during a small number of discrete periods but the Claimants do not rely upon any instances where Boson has refused to provide access to documents and it seems to me very likely that if more requests had been made by Santé they would have been satisfied by Boson. This is a highly relevant factor, and there are others, including the initial and ongoing cooperation between the Claimants and Boson for the purposes of pursuing the claims. These matters taken together are "more specific and compelling" than there merely being a close commercial relationship between Santé, Bio and Boson which – see the dictum in Airfinance (§9 above) – would be insufficient to establish the necessary control. I do not accept that there are so many other cases in which similar factors would be present as to create a floodgates problem of the type I was warned about by Ms Hannaford.

(5) Contrary to Ms Hannaford's submissions, it is not necessary for the Defendant to establish that Santé, or Bio, has free and unfettered access to Boson's documents (see Pipia, §§48 and 50-51, where Andrew Baker J explained that free and unfettered access was not a necessary precondition for control and that "*how, under the consent given, the disclosing party will get hold of [the] documents*" did not go to the existence of control but to "*what the disclosing party can be expected and required to do so as to discharge any disclosure obligation to conduct a search for [the] documents*"). I am satisfied that there is an understanding that access will be permitted and that Boson will cooperate in providing the relevant documents or copies of them or direct access to them. That documents may have been provided previously on request, rather than by Boson permitting direct third-party access to its documents, does not, contrary to Ms Hannaford's submissions, establish that searching of Boson's documents would not be permitted. It is for that reason also that I would reject Ms Hannaford's submission that the declaration sought by the Defendant cannot be granted because it is unrealistic for the Claimants to carry out Model D disclosure in relation to Boson's documents (whereas a less onerous, request-based approach might be permitted). It would be wrong for me to accept, on the current evidence, that Boson will not make its documents available for searching when requested to do so by Santé or Bio (as opposed to providing specific documents or categories of documents

in response to a request). Making its documents available for searching would be providing assistance, and reasonable assistance, in relation to and in connection with Santé's claim that the goods were to be supplied in accordance with the contract. If Boson refuses, that will need to be explained to the Defendant and ultimately to the Court, with a degree of openness which has thus far been somewhat lacking in the explanations from the Claimants' side. Any refusal to cooperate by Boson will no doubt be a matter which can be taken into account by the Court at trial in assessing the credibility of the evidence given on behalf of the Claimants, in particular by Boson's employees.

(6) For the reasons already given, I find that the arrangement or understanding in this case has not been and will not in future be limited to a specific request and is more general in its nature.

22. Finally, I make clear that I consider it appropriate to make the declaration sought by the Defendant in relation to Bio as well as Boson, notwithstanding that most of the Defendant's submissions were directed at Boson rather than Bio. The evidence does also support there being a similar arrangement or understanding with Bio as with Boson, which has given rise to the provision of documentation via Bio's solicitors (albeit that Bio might be expected to have many fewer documents which are relevant to the proceedings than Boson). Norton Rose's letter of 5 June 2024, providing a purchase order and quality agreement between Bio and Boson, professed to find "unclear" the connection between that documentation and the dispute between the Claimants and the Defendant, and not to accept that it was "reasonable assistance" for Bio to provide the contractual documentation between itself and Boson. The connection between that documentation and the claims is perfectly obvious to me: the Court at trial will certainly wish to be fully informed of, and to understand, the contractual relationships between the Claimants', Bio and Boson which were put in place in order to discharge the Claimants' obligations under their contract with the Defendant. I find it surprising and a little concerning that such a manifestly weak point was taken. Nevertheless, the documentation was provided and I would expect that other requests for assistance to Bio which are necessary for the fair disposal of the claims will also be satisfied.
23. There is also a practical reason to include Bio within the scope of the declaration. Whilst I accept the Defendant's submission that there has in practice been a direct relationship between Santé and Boson, the precise terms and nature of the relationships between the parties on the Claimants' side remains opaque and it may be that the requests to Boson for the actions necessary to ensure compliance with the Claimants' disclosure obligations will need to go through Bio, which will provide reasonable assistance to Santé by making the requests of Boson and procuring that Boson complies with them. If documents are then provided by Boson to Bio, rather than to Santé, there must be no doubt that they remain within the scope of the Claimants' disclosure obligations.
24. For those reasons, I will grant the declaration in the modified form in which it was proposed at the hearing.