



Neutral Citation Number: [2022] EWHC 64 (Ch)

BL-2020-000219

Case No: BL-2020-000219

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

Remotely at:  
The Royal Courts of Justice  
7 Rolls Buildings  
Fetter Lane  
London, EC4A 1NL  
Date: 14 January 2022

**Before :**

**DEPUTY MASTER RAEBURN**

**Between :**

**PETER SHARP & SON (a firm)**

**Claimant**

**- and -**

**GEA FARM TECHNOLOGIES (UK) LIMITED**

**Defendant**

**Richard Stead (instructed by Roythornes Limited) for the Claimant**  
**Narinder Jhittay (instructed by Burges Salmon LLP) for the Defendant**

Hearing date: 21 September 2021  
Further written submissions: 17 November 2021

**APPROVED JUDGMENT**

I direct that this approved judgment, sent to the parties by email on 14 January 2022, 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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## **Deputy Master Raeburn:**

### **Introduction**

1. This is the Defendant's application in which it seeks orders and directions under the Court's case management powers: (i) to exclude from consideration certain matters pleaded by the Claimant in its Particulars of Claim, pursuant to CPR 3.1(2)(k)/(m); and/or (ii) to the effect that any disclosure and evidence in these proceedings shall not extend to such matters, pursuant to CPR PD 51U paragraphs 6.4 and 10.6 and CPR 32.1.
2. The Claimant carries on a farming business, primarily comprised of dairy farming and operated by various members of the Sharp family. The Defendant carries on business as a vendor and installer of milking machinery, including an automatic milking system (the "**Mlone**"), cow guidance systems and ancillary plant and equipment.
3. In this action, the Claimant claims that it has suffered loss as a result of the Defendant's breach of contract and/or misrepresentations relating to the failed installation and defective operation of the Mlone system on its farm.
4. The Claimant's primary case centres upon the reduced income it has suffered from its milk production operations for which it claims losses amounting to approximately £1.01 million for the period of January 2015 to July 2019.
5. The Claimant's secondary case principally relates to its wasted expenditure in purchasing the Mlone system and preparing its farm for the installation and operation of the Mlone system, together with the loss of profit it has sustained. Under its secondary case, the Claimant's Particulars of Claim claims losses of

some £592,238 in total. The Claimant also claims that it suffers continuing losses which extend from July 2019 through to the date of judgment or settlement of these proceedings.

6. The Claimant broadly alleges that the Mlone system is defective in that it: (i) failed to increase milk yield; (ii) did not obviate the need for cow "pushing" (i.e. the physical coercion of cows to enter the milking machine); (iii) had failed and/or malfunctioning exit and sorting gates; (iv) had inadequate milk rack operations; (v) failed to maintain or improve milk and system hygiene and/or the health of the cows; (vi) failed to detect calving intervals; (vii) increased feed costs; (viii) had inconsistent sampling record systems; and (ix) led to increased labour costs.
7. In support of its case with respect to the claimed defects in the Mlone system, the Claimant pleads the following at paragraph 26 of its Particulars of Claim, indicating that it will seek to rely on similar fact evidence at trial:

*"26. The Claimant will rely, in support of its allegations at paragraph 25 above upon the similar complaints made by other farmers to GEA in respect of the Mlone AMSs installed by GEA or its agents on other farms between 1 January 2014 and 31 December 2018, including but not limited to those named by Mr Alan Bennett, Mr Steve Bennett, Mr Michael Evis, Kingshay Dairy Consultants, Mr David Partridge, Mr Michael Robertson, Mr Chris Shield, Mr Richard Tucker, Mr Tom Yuill, Mr Eddie Grigg, Mr Alan Bennet, Mr Richard Isaac, Mr James Bruna, Mr Ben Kedwell, Mr Clive Pullen, Mr Paul Heath, Mr Graham Stockdale, Mr Mark Myers and Mr Antony Hague."*

8. The Defendant denies the claim in its entirety and broadly alleges that insofar as there were any defects in the Mlone system or its output that these were as a result of other factors for which the Defendant was not responsible, including: (i) the lack of necessary inputs to the Mlone system (for example, the proper type, quality and level of cleaning chemicals); (ii) damage to the Mlone system (for example corrosion, blockages and contamination caused by a failure to address the hardness of the water supply); (iii) proper maintenance and servicing of the Mlone system being prevented; (iv) operation of the Mlone system in an incorrect or sub-optimal manner (for example, failure to input accurate settings in respect of the herd); (v) inadequate management of the milking herd; (vi) inadequate management of the surroundings of the Mlone system; and (vii) the Claimant deciding to proceed with a compromise in the design of the milking shed (despite having been warned of the risks of doing so).

## **The Legal Principles**

### *General Case Management Powers*

9. The Court's general powers of case management are well known. In particular, Civil Procedure Rules 3.1(2)(k) and 3.1(2)(m) provide (so far as material):

*"3.1—(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*

*(2) Except where these Rules provide otherwise, the court may—*

*....*

*(k) exclude an issue from consideration;*

*...*

*(m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case."*

10. Clearly, CPR rule 3.1(2)(k) provides the Court with the express power to exclude certain issues from consideration in the proceedings, which may be exercised as a matter of discretion.
11. I remind myself that CPR rule 3.1(2)(k) (which is clearly distinct to the Court's power to strike out a statement of case or dispose of a case or issue by summary judgment), does not empower the Court to exclude the consideration of issues which would have the effect of being dispositive of the claim or which are otherwise central to a pleaded defence, thereby preventing a party from putting forward an allegation central to its case.
12. Rather, the rule allows the Court to control the manner in which allegations are put and thus limit the costs involved; see McPhilemy v Times Newspapers Ltd (Re-Amendment: Justification) [1999] EWCA Civ 1464, per Lord Woolf MR.
13. The Court's case management powers under CPR rule 3.1(2)(m) are broad and clearly enable the Court to make necessary orders to manage a case effectively and in accordance with the overriding objective.

#### *Extended Disclosure*

14. CPR PD 51U paragraphs 6.4 and 10.6 provide that:

*"6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—*

*(1) the nature and complexity of the issues in the proceedings;*

*(2) the importance of the case, including any non-monetary relief sought;*

*(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;*

*(4) the number of documents involved;*

*(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);*

*(6) the financial position of each party; and*

*(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."*

...

*"10.6 The parties must seek to resolve any disputes over the scope of any Extended Disclosure sought in advance of the first case management conference. Any disputes which have not been resolved will normally be decided by the court at the first case management conference."*

*Power to Control Evidence*

15. In relation to evidence, CPR rule 32.1 states:

*"Power of court to control evidence*

*(1) The court may control the evidence by giving directions as to –*

*(a) the issues on which it requires evidence;*

*(b) the nature of the evidence which it requires to decide those issues; and*

*(c) the way in which the evidence is to be placed before the court.*

*(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.*

*(3) The court may limit cross-examination."*

#### *Similar Fact Evidence*

16. Counsel for the Defendant relies upon the well-known two-stage test governing the admissibility of similar fact evidence elucidated by the House of Lords in O'Brien v Chief Constable of South Wales [2005] UKHL 26, as summarised in JP Morgan Chase Bank & others v Springwell Navigation Corporation [2005] EWCA Civ 1602 per Brooke LJ at [67]:

*"There is a two-stage test: (i) Is the proposed evidence potentially probative of one or more issues in the current litigation? If it is, it will be legally admissible. (ii) If it is legally admissible, are there good grounds why a court should decline to admit it in the exercise of its case management powers?"*

17. There are a number of matters which may affect the way in which a Court exercises its discretion in this regard, which include:

- i) consideration of whether the new evidence will distort the trial and distract the attention of the decision-maker by focussing attention on issues that are collateral to the issues to be decided;
- ii) the potential probative value of the evidence weighed against its potential for causing unfair prejudice;
- iii) consideration of the burden which admission of the evidence would lay on the resisting party,

(per Lord Bingham in O'Brien at [6]).

18. In relation to the third of these matters, the Court should have regard to:

*"the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections."*

(per Lord Bingham in O'Brien at [6]).

19. Overall, in deciding whether evidence should be admitted, the Court should:

- i) be guided by the overriding purpose to promote the ends of justice (which requires not only the right answer be given but also procedural justice, in that it be achieved by a trial process which is fair to all parties);
- ii) have regard to proportionality and expedition;



- iii) in respect of evidence on collateral matters consider whether the evidence in question is likely to be relatively uncontroversial or whether its admission is likely to create side issues which will unbalance the trial,

(per Lord Bingham at [6] and Lord Philips at [56] in O'Brien).

20. As to the admission of evidence of collateral facts, (whilst not an inflexible rule of admissibility) a party must generally satisfy the Court that:

- i) first, the collateral fact which the party proposed to prove will, when established, be capable of affording a reasonable presumption or inference as to the matter in dispute; and
- ii) that the evidence will be reasonably conclusive,

(per Lord Phillips in O'Brien at [45] and [46]).

### **The Parties' Submissions and Evidence**

21. The Defendant's overall submission is that on a straightforward application of the principles governing similar fact evidence, the material referred to in paragraph 26 of the Claimant's Particulars of Claim ought not to be admitted.

22. In support of the application, the Defendant relies upon the witness statement of Ms. Abigail Jones of the Defendant's solicitors dated 7 September 2021, which, on the issue of proportionality states in summary, that: (i) the nature of the enquiry into the proposed evidence would be highly likely to result in thousands of additional documents for review as the Defendant is likely to hold a substantial number of documents relating to its customers, including

email correspondence with those customers and with dealers; and (ii) any additional material will increase the cost of production, processing, hosting and e-disclosure costs, which she estimates could be as much as £30,000 or more, depending on the number of documents involved.

23. In summary, the Defendant's position is that the material:

- i) would distract the attention of the trial judge by focusing attention on collateral issues in what is already a very substantial claim;
- ii) has potential for causing unfair prejudice which far outweighs its potential probative value (since it does not account for the particular circumstances on the Claimant's and other farms). It is said that the Defendant would be prejudiced in that it would not be feasible for it to illustrate to the Court why each complaint was unfounded within a 10 day trial;
- iii) would lay a significant burden on the Defendant (including giving disclosure, lengthening the trial in order to contextualise and explain the matters raised, and increasing costs);
- iv) would not help ensure that the right answer is reached (given the lack of probative value), and would at the same time prevent that being achieved by a trial process which is fair to all parties (given the burden and potential prejudice occasioned to the Defendant); and
- v) would be controversial, and therefore not be conducive to resolving the proceedings with proportionality and expedition.

24. In response to the application, the Claimant's overall submission is that the evidence is highly relevant to its claim, relates to a core issue raised in the Defendant's defence and is reasonable and proportionate.
25. Counsel for the Claimant submits that what is relevant in relation to the proposed evidence is the fact that complaints have been made and that the Defendant has responded to them in a similar way, (i.e. by making allegations of poor husbandry and poor management).
26. Counsel for the Claimant says that it is not necessary to have a trial to decide whether the similar complaints were well founded and the fact that there are similar complaints is of itself, probative.
27. Counsel for the Claimant further submits that such complaints would not have been pursued to litigation or letters of claim and in some cases settled, if they were not considered to be legitimate and that an assessment of this material is a documentary exercise which would not unduly prolong the trial in this action.
28. The Claimant relies on the witness statement of Mr. Carter of the Claimant's solicitors, dated 14 September 2021, in which the following points are made:
  - i) the Defence itself alleges that the failings of the Mlone system are the result of the Claimant's own action (or inaction) as opposed to any inherent failure of the Mlone system and it is therefore reasonable to consider whether other farmers experienced similar problems to determine whether it is the Mlone system or the relevant farmer is the cause of the issues in question;

- ii) as to any purported representations made to the Claimant by the Defendant and the terms of the contract between them, it is said that if the same or similar representations or type of contract has been entered into between the Defendant and other farmers, this is potentially relevant in deciding whether such representations or terms were agreed with the Claimant;
- iii) any prejudice that may arise to the Defendant by having to deal with this similar fact evidence in the course of a 10 day trial is resolved by the restrictions the Claimant is willing to agree in relation to the evidence adduced. These restrictions would take the form of limiting documentation to the disclosure of letters of claim and reply relating in these complaints together with documents relating to subsequent proceedings, if issued; and
- iv) it is said that the weight the Court will put on any such material cannot yet be determined until the material has been disclosed.

29. At the hearing before me, which was the first Costs and Case Management Conference, I gave oral rulings on other matters of case management (which are not dealt with in this judgment), however insufficient time remained to give judgment on the Defendant's application and it was necessary to therefore reserve this decision.

30. Subsequently, Counsel for the Defendant wrote to this Court stating that on 27 September 2021 the Defendant issued an equivalent application in a different claim brought against it in the Bristol District Registry, namely Claim No. BL-

2020-BRS-000005 (1) RJ Shield (2) Mrs PJ Shield (3) Mr CJ Shield v GEA Farm Technologies (UK) Limited ("**Shield**"). A case and cost management conference in that case took place on 4 October 2021 and the Defendant's application was granted (the "**Shield Judgment**").

31. The Defendant invited this Court to consider the Shield Judgment prior to hand down of this reserved judgment. I therefore gave directions for the parties to file an approved transcript of the Shield Judgment together with brief written submissions as to its relevance.
32. By its written submissions, Counsel for the Defendant says that while the Shield Judgment is not binding on this Court as a matter of precedent (being another first instance decision in the exercise of a discretion), this Court is invited to consider it as a persuasive illustration of the application of the relevant legal principles.
33. It is said that the court in the Shield Judgment came to a firm conclusion that the application to exclude the similar fact evidence was justified on the basis that: (i) it would not be potentially probative and would require that the other complaints were similar in some, if not necessarily all, of the sub-complaints in the relevant claimant's particulars of claim and were well-founded; and the latter would require the Court to become involved in an enquiry; and that (ii) in any event there were good reasons for excluding the material on case management grounds.
34. In response, Counsel for the Claimant makes the broad point that the Shield Judgment is not binding on this Court and is not persuasive either, on the basis that it deals with a different factual basis for a different claim compared to the

instant case before this Court. Counsel for the Claimant refers to the different evidence available to the parties in Shield, which included evidence of approximately two years of milking through a replacement automatic milking system manufactured by an alternative supplier by the time that case gets to trial.

35. I have considered the Shield Judgment and the parties' respective submissions as to its relevance and whilst I have reached a similar conclusion in this application (set out below), it has provided relatively limited assistance in determining the outcome of this particular application, which has involved the fresh exercise of an evaluative discretion by the Court in the pursuit of proper case management in circumstances where the parties, facts and evidence, amongst others, can be said to be quite different.

## **Discussion**

*Is the proposed evidence potentially probative of one or more issues in the current litigation?*

36. Whilst on its face, the Claimant's proposed evidence could be said to have some logical relevance to the issues in this case (in the general sense that complaints from other farmers against the Defendant could make the complaint the Claimant now seeks to prove more probable); I question whether the nature of the evidence is in fact relevant, in the sense of being potentially probative of the particular issues in this case.
37. Looking at the parties' respective pleaded cases, as a very broad summary, the issues in dispute include: (i) the proper parties to the claim; (ii) the nature and

extent of any alleged oral and written representations made by the Defendant to the Claimant, including their relevance, falsity, reliance and loss; (ii) the formation of the contract between the parties, including the incorporation of standard terms and whether any oral agreements were made; (iii) whether issues were experienced with the Mlone system and the cause of such issues; and (iv) the nature of any loss or damage sustained by the Claimant.

38. The fact that complaints have been made by other farmers to the Defendant in relation to an Mlone system on their farms is not in and of itself potentially probative of whether the pleaded defects in the Mlone system and losses sustained by the Defendant were attributable to the Defendant, the Claimant's own action or inaction, or some other factor. In addition, those complaints are unlikely to be potentially probative of the specific representations alleged to have been made by the Defendant to the Claimant, or the terms of the parties' contract and the Claimant has not advanced any compelling reasons as to why the terms which may have been agreed between the Defendant and a different farmer are potentially probative in this context.
39. I accept Counsel for the Defendant's submissions that the proposed evidence does not account for the particular circumstances on the Claimant's and other farms.
40. The facts giving rise to each such complaint could be quite different to those which are relevant to the current dispute and there are at present, no particular findings in relation to the facts underlying each such complaint which are capable of assisting the Court in determining their potential relevance to this case. The issues in those cases could also conceivably be quite different,

including in relation to the manner of and reliance upon any alleged representations made by the Defendant to those farmers or the nature and meaning of their negotiated agreements.

41. I do not regard the material as being potentially probative of one or more issues in this current litigation. In my judgment, it is not therefore legally admissible.
42. Even if I were to conclude that the complaints were indeed potentially probative of one or more issues in this case, I would have in any event declined to admit the evidence as a matter of case management for the reasons set out below.

*Are there good grounds why this Court should decline to admit it in the exercise of its case management powers?*

43. If the proposed evidence were legally admissible under the first stage of the test, it seems to me an appropriate exercise of my case management powers to decline to admit the proposed evidence on the basis that there are a number of good grounds supporting such a conclusion:
  - i) The interests of justice: I am satisfied that this is not a case in which justice requires the evidence to be admitted. This is not a case in which if the proposed evidence is excluded, a wrong result may be reached. I do not take the Claimant to have made such a submission and I am equally satisfied that the exclusion of the proposed evidence does not have the impermissible effect of being dispositive of the claim or



otherwise preventing the Claimant from putting forward an allegation central to its case.

- ii) Proportionality and expedition:
  - a) Considering the context of this case, the parties have permission to adduce a substantial amount of expert evidence including in relation to farm and herd management, milk quality and the dietary management of cattle in order to assist the Court in the determination of the issues. There is therefore little to no practical utility in adding yet further evidence for consideration at trial in the form of complaints from other farmers which are likely to obstruct and distract from the fact-finding process rather than expedite it;
  - b) I am satisfied that to adduce the proposed evidence would inevitably result in an unsatisfactory extension to the trial time allocated to the claim, together with additional costs. I reject Counsel for the Claimant's submissions that the mere fact of numerous "similar" complaints is of itself potentially probative and that the assessment of this material is merely a documentary exercise and will not unduly prolong the trial. Clearly, the evidence is not uncontroversial and will create side issues which will unbalance the trial. The Defendant will inevitably seek to contextualise and explain the matters raised which will lead to an enquiry into various unrelated issues, including the circumstances on those other farms,

representations made between different parties and the nature of other contracts, none of which will greatly assist this Court in determining what has occurred as between the Claimant and Defendant in this particular case.

- c) If I had concluded that the material was legally admissible, I would have regarded it as having, at best, limited probative force. Given the additional costs of adducing the evidence to which Counsel for the Defendant has referred, I am satisfied that the extremely limited benefits of adducing the evidence do not justify the costs of its admission (CPR 1.4(2)(h));
  - d) The Claimant's proposed restriction to narrow the scope of the proposed evidence to the letters of claim and reply is insufficient to persuade me that it would be proportionate to admit such evidence or include it within the ambit of extended disclosure; it would not obviate the need for the Defendant to answer those allegations in the context of its dispute with the Claimant and the proposed approach does not therefore remove the risk of satellite litigation on the nature of those complaints derailing the current trial;
- iii) Probative value and unfair prejudice: As indicated above, given the limited probative value to be attributed to the proposed evidence, when weighing that against its potential to cause unfair prejudice to the Defendant (particularly given the fact that the proposed evidence does not account for the particular circumstances on the Claimant's and

other farms), it is quite clear, in my judgment, that its examination would be disproportionately burdensome.

### **Conclusion**

44. In conclusion, for the reasons given, I am satisfied that it is an appropriate exercise of my case management powers to exclude the matters pleaded at paragraph 26 of the Claimant's Particulars of Claim from consideration in this action and I shall direct that any disclosure and evidence in these proceedings shall not extend to such matters.
  
45. I will hear counsel on the form of order and submissions on costs.