Neutral Citation Number: [2021] EWHC 964 (Comm)

Case No: CL-2020-000620

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane, London
WC2A 2LL

Date: 23/04/2021

Before :

MRS JUSTICE MOULDER

- -

Between :

(1) JOHN THOMAS KELLY	**Claimants**
(2) LANSDOWNE GROUP LIMITED	
- and -	
(1) MR BRIAN EDWARD BAKER	**Defendants**
(2) MR ROBERT JOHN BRAID	

- -
- -

Lance Ashworth QC and Ali Tabari (instructed by **Weightmans LLP**) for the **Claimants**
William Buck (instructed by **RPC**) for the **Defendants**

Hearing date: 16 April 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the court's judgment on the outstanding issues which were raised at the Case Management Conference on 16 April 2021 which was adjourned part heard on 19 March 2021.

2. The issues to be dealt with in this judgment are:

   i) the scope of Issue 1 in the list of issues in the Disclosure Review Document (the "DRD");

   ii) the appropriate model of extended disclosure applicable to the Defendants;

   iii) the Claimants' application dated 1 April 2021 (the "Application") concerning control of data on a server.

3. The CMC was heard remotely due to the current pandemic but the court had the benefit of written and oral submissions. The court has had regard to the submissions in writing this judgment but it is not necessary in my view to deal expressly in this judgment with every submission made in order to resolve the issues.

Evidence

4. The court had the benefit of the witness evidence served prior to the original hearing from Mr John Mark Surguy of Weightmans LLP, which represents the Claimants, dated 16 March 2021 and from Mr Simon Hart, a partner in the firm of RPC, solicitors acting for the Defendants, dated 17 March 2021.

5. The Application was supported by a second witness statement of Mr Surguy dated 1 April 2021.

6. In response to the Application, the Defendants have served a second witness statement from Mr Simon Hart, a partner in the firm of RPC, solicitors acting for the Defendants, dated 14 April 2021.

Background

7. It is not necessary to set out in detail the issues in the proceedings. It is relevant to note the following taken from the evidence of Mr Surguy: the Transaction at the heart of this case was completed on 31 March 2017. It took the form of a Management Buy-Out (an "MBO"). The sellers were DSM Group Holdings Ltd ("DSMGH") and St Francis Group Ltd ("SFG"). The buyers were DSM SFG Group Holdings Limited ("DSM SFG"), St Francis Group 1 Limited ("SFG 1") and St Francis Group 2 Limited ("SFG 2") (the "Buyers"). The Servers on which the Server Data is held, the subject of the present Application, transferred across to the Buyers in the Transaction.

Disclosure Review Document

8. Since the matter was last before the court the parties have made progress in settling the Issues for Disclosure. However Issue 1 remained in dispute as to the time period to be covered by disclosure.

9. It is proposed by the Defendants that Issue 1 should be limited (in part) by reference to a date range as follows:

> "the nature and scope of the Defendants' roles in any capacity within the Kelly family business and personal affairs (in the period January 2014 – March 2017) and in the Restructuring and the Transaction."

10. It was submitted for the Claimants that:

    i) Issue 1 should not be limited by date and that any limitation by reference to a date range should be dealt with in Part 2 of the DRD;

    ii) the appropriate date range would be 2003 – 2017 on the basis that the pleadings identify that the relationship between Mr Kelly and the Defendants, Mr Baker and Mr Braid, grew over a long period and that previously in an earlier draft of the DRD, the Defendants had accepted (albeit on the basis of model C disclosure) that disclosure should be given from 2003 in the case of Mr Baker and 2007 in relation to Mr Braid;

    iii) the Defendants have failed to say how much data would be caught by the longer time period and thus indicated the scale of the broader disclosure;

    iv) the period proposed by the Defendants would not cover the abortive sale in 2007 or the first meeting with Metric (which funded the MBO) in 2013;

    v) given that the court has not been provided with details of the volume of data, an alternative would be a staged approach to disclosure which would be in accordance with PD51U.

11. It was submitted for the Defendants:

    i) that the issue is what is reasonable and proportionate to order by way of disclosure;

    ii) the inclusion of a time period in Issue 1 is necessary and appropriate because the dispute relates to the relationship at the time of the sale;

    iii) however additionally the Defendants would agree to search in relation to the aborted sale in 2007 and propose a time period of 1 July 2006 – December 2008;

    iv) the Defendants have been unable to specify the quantity of material as they do not have "control" of the relevant servers on which the documents are held.

12. Paragraph 7.3 of PD 51U defines the "Issues for Disclosure" as:

> "…only those key issues in dispute which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings…"

13. As referred to above, the claim in this case relates to an MBO that took place in March 2017 and Mr Kelly's case (in essence) is that he placed reliance on Messrs Baker and Braid to get the best price on the market for the assets of DSMGH and SFG and that they assumed a fiduciary duty to him in advising him and dealing with third parties. To the extent therefore, that it is necessary to include as an Issue in Dispute the role of the Defendants in the Kelly family business and personal affairs, over and above reference to their role in the Restructuring and the Transaction, it seems to me that the Issue in Dispute is their role at the material time. Accordingly in my view the issue of their role should be limited by reference to the period from 2013 (the first meeting with Metric) to 2017. In relation to Part 2 of the DRD it seems to me that the time period for the search should extend to the period of the aborted sale (as having relevance to the Issue in Dispute as defined) and as proposed the period 1 July 2006 – December 2008 should be searched in addition to the period 2013 – 2017. However in my view it would be disproportionate to order extended disclosure for a period of 14 years on the basis of either Model D or Model E. Although the Court does not have information as to the extent of the data, it seems disproportionate to order Extended Disclosure over such a lengthy period given that the key issue is the role played by the Defendants and the duty owed at the time of the sale.

14. As to the appropriate model for Extended Disclosure, it was submitted for the Claimants that Model E was appropriate on the basis that:

    i) the case involves allegations of fraud, in particular egregious conduct such as a 30% discount applied on the valuation of properties by Jones Lang La Salle and a payment of £4.4 million to the Defendants' wives; such allegations have been met with a bare denial;

    ii) although the Claimants concede that this court cannot reach a preliminary conclusion on the merits, disclosure should be ordered of documents likely to be relevant and important for the fair resolution of the claim: *McParland and Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) at [46];

    iii) the documents, in particular the emails of the Defendants and others who were employees of the companies purchased will be key to establishing what the Defendants were telling Mr Kelly and his family members leading up to the Transaction, what the Defendants were telling the outside world about their roles and what the Defendants were telling the professional advisers involved in the Transaction;

    iv) the factors in paragraph 6.4 of PD 51U are met: in particular there are serious allegations of dishonesty, the value of the case is high, the financial position of the parties is not a barrier to Model E disclosure, there is one dataset.

15. It was submitted for the Defendants that Model D (without Narrative Documents) should be ordered:

    i) Model E is only to be ordered in an exceptional case: paragraph 8.3 (2) of PD 51U;

ii) the Claimants have not addressed the requirements identified in *Berezovsky*, as confirmed in the *State of Qatar v Banque Havilland SA* [2020] EWHC 1248 at [22]-[24]:

> "[22]…one of the major issues which we have to grapple with is the question of Model E versus Model D… Model E is exceptional… so it is plainly not enough to say that this is a serious case involving conspiracy and therefore Model E must follow…
>
> [23]… we would expect to get Model E being ordered in fewer cases and in more demanding circumstances than in Berezovsky.
>
> [24]… Berezovsky indicated that the approach that one should be taking is to look for effectively Model E disclosure where there has been an application which has focused attention on an identifiable category or class of document and linked to the specific issues and that then some explanation should be provided as to the nature of the inquiry envisaged (that is sub-paragraph (4) of paragraph 12)… an appropriately clear idea as to what documents are likely to fall within the scope of the order, to what specific issues the relevant documents to be searched on an enhanced basis relate and what the relevant trains of inquiry might be."

16. In my view the starting point, as is clearly set out in the Practice Direction is that Model E is only to be ordered in an exceptional case. Thus it is not enough to say that this is a relatively high value case, that it is important to the Claimants or that it involves allegations of fraud. In relation to the latter factor (fraud) this Court cannot take a view on the merits of the allegations or the alleged egregious nature of the conduct.

17. The Claimants' submission in reliance on *McParland* at [46] that there should be disclosure of documents "likely to be relevant and important for the fair resolution of the claim" does not assist the court in determining whether this is an appropriate case for Model E disclosure. In any event I note that the Chancellor was there addressing how to identify Issues for Disclosure and not the appropriate Model.

18. Following Cockerill J in the *State of Qatar,* Model E disclosure needs to be linked to the specific issues and with some explanation provided as to the nature of the enquiry envisaged.

19. In my view it is not sufficient for the Claimants to refer to, in effect, all communications by the Defendants with any and all parties involved. This does not justify a "train of enquiry" order. Further in my view, the submission that by way of example, if a meeting or telephone call was referred to, a search could then be made for a minute or note does not amount to an explanation as to the nature of the enquiry envisaged or if it does amount to an explanation, it suggests an enquiry which is far-reaching and not with any real justification other than in effect a "fishing expedition" to see whether anything turns up.

20. Just because it may be the position that the parties can afford to carry out such an exercise does not mean that such an order is proportionate having regard to the Overriding Objective to deal with matters justly and at proportionate cost.

21. For these reasons I find that the Claimants have not justified Model E disclosure in this case and the appropriate order is Model D.

22. As to whether Narrative Documents should be ordered, I was referred to *McParland* at [41]:

> "…they are normally not required or ordered particularly in a case where it is the actions of the parties that matter rather than their specific motives"

23. In the course of submissions in relation to Model E, Leading Counsel for the Claimants submitted that the documents sought by way of disclosure would go to what the various parties were being told. In my view therefore the need for Narrative Documents has not been established.

24. I therefore order Model D extended disclosure by the Defendants without Narrative Documents.

The Application

25. By their Application the Claimants seek a declaration that the Server Data is in the "control" of the Defendants for the purposes of paragraph 1 of Appendix 1 of Practice Direction 51U. That paragraph reads:

> "1.1 "Control" in the context of disclosure includes documents: (a) which are or were in a party's physical 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."

26. In the alternative the Claimants seek an order that the Defendants be required to request from DSM SFG, SFG 1 and SFG 2, a full and unedited copy of the Server Data up to and including 31 March 2017.

27. It appeared to be common ground that the company which now holds the data is DSM SFG (although the evidence of the Defendants is that the data acquired on the two file servers that were used prior to the MBO are now stored across a number of servers). Mr Braid remains a director of this company.

28. The material correspondence (referred to in the evidence) is as follows:

    i) on 15 March 2021 RPC wrote to Pinsent Masons LLP ("Pinsent Masons"), the solicitors for DSM SFG, to request that DSM SFG make available to the Defendants for the purpose of their disclosure in these proceedings data and documents held by DSM SFG.

    ii) Pinsent Masons' response of 16 March 2021 confirmed that DSM SFG was willing to make documents available to the Defendants:

> "provided that an appropriate protocol is agreed which enables our Clients to protect their privilege and personal data and, with respect to Mr Kelly, protects against misuse of material disclosed".

Pinsent Masons' letter of 16 March 2021 also reserved their clients' rights to make their co-operation conditional on being indemnified in respect of costs by Mr Kelly.

iii) On 8 April 2021, RPC wrote to Pinsent Masons enclosing a copy of the Application.

iv) By a letter dated 14 April 2021 Pinsent Masons set out their position on the Application. The material sections of that letter are as follows:

> "…We do not address in this letter any legal argument on control as that is a matter for submission by your clients' counsel. Instead, we have discussed and considered with our clients what rights, if any, your clients have to access or copy or inspect the Server Data pursuant to any contractual arrangements that exist between our respective clients
>
> We have considered with our clients those contractual documents, starting with your clients' current/former service agreements. The service agreements contain no express rights to access, inspect or copy the Server Data. However, when Mr Baker left our clients it was agreed that our clients would use reasonable endeavours to permit access to documents necessary to address certain matters, including litigation such as the Claim. That right of access is not however unlimited and is subject to exceptions. It does not permit (and our clients would not allow) the unencumbered and wide-reaching access to the Server Data as envisaged by the Server Data Application. It would be entirely reasonable for our client to refuse such access.
>
> …
>
> As we said in Our Letter [of 16 March 2021], our firm's involvement as part of that safeguarding process will solely be limited to ensuring that as far as possible any legal professional privilege in our clients' documents and our clients' employees' personal data is protected before the provision of our clients' documents to your clients….
>
> At no point was it suggested in Our Letter, or now, that our firm will be involved in conducting the relevance review. It was, and is, envisaged that RPC will undertake that assessment…" [Emphasis added]

29. In his second witness statement Mr Surguy stated:

> "15. In the immediate run up to the original CMC on 19 March 2021, the Defendants' solicitors, RPC, began to seek to create artificial obstacles to the ability of the Defendants to access the Server Data for the purposes of disclosure…"
>
> "20. RPC's letter of 15 March 2021 and Pinsents' response of 16 March …should be seen for what they are, namely an attempt to put up an artificial obstacle to restrict access to documents which fall within the control of the Defendants… In their letter of 16 March 2021 Pinsents refer to the other sets of proceedings, before seeking to impose conditions on Mr Kelly in return for DSM SFG agreeing "in principle" to make "certain documents" available to RPC. They claim that Mr Kelly is liable to indemnify DSM SFG "in respect of any costs that they incur in taking advice on your request and the disclosure of documents", stating that their cooperation will be conditional on their assistance being without cost to DSM SFG2. Pinsents then seek to set up other so-called concerns to merit conditions which they say will apply before DSM SFG will cooperate. They say that there must be a protocol which in effect allows for a firm of solicitors, which owes no relevant duties as regards disclosure in this litigation, to control the disclosure process. Pinsents would be effectively limiting access to the relevant documents which should be placed before the Court at trial to enable it to make just and fair decisions on the issues between the parties to the litigation.
>
> 21. This is an artificial construct designed to deflect from the fact that the Server Data is under the control of the Defendants and it is they, not DSM SFG acting through Pinsents, who are obliged to undertake the disclosure exercise in respect of the Server Data." [emphasis added]

30. Mr Hart's evidence in response was as follows:

> "…Without any waiver of privilege being intended or caused, my firm did have privileged discussions with Pinsent Masons in relation to the provision of DSM SFG documents to the Defendants for the purpose of these proceedings, prior to my firm's letter of 15 March. The outcome of those discussions was that my firm wrote an open letter to Pinsent Masons particularising the Defendants' request for documents, to which Pinsent Masons responded. In my view, this is an entirely conventional and unsurprising way for this issue to dealt with, and there is nothing artificial about it…"

31. In relation to Mr Braid's position the evidence of Mr Hart was that:

> "…I understand from Mr Braid that he is able to access DSM SFG documents, including the Server Data, in his capacity as and for the purpose of discharging his duties as a director.

> However, that does not mean that he has an unrestricted right to use them for purpose of these proceedings, to which he is a party in his personal capacity"

32. It was submitted for the Claimants that:

    i) the Claimants seek a declaration that the Defendants currently are in "control" of the relevant Server Data. Leading Counsel clarified that although the definition of "control" in Appendix 1 to PD 51U extends to both present and past possession, the Claimants' focus and thus the order that it seeks, is in relation to the present position as to which the Claimants submit that the "true nature of the relationship" is that Mr Braid is in control of the Server Data and it is to be inferred that Mr Baker has contractual rights to access the data;

    ii) the Claimants do not have to show that the Defendants have unrestricted access to all the data; it can be access to a single document (*Pipia v BGEO Group Ltd* [2020] EWHC 402 (Comm) at [48]) and it does not have to be a right which is legally enforceable (*Pipia* at [50] and [51]);

    iii) the court should consider the "true nature of the relationship" between the third party and the litigant; the Claimants referred to *North Shore Ventures Ltd. v Anstead Holdings Inc* [2012] EWCA Civ 11 at [35] and the position of a one-man company:

    > "35. If one asks the question what "different considerations" may apply in the case of the one-man company, the answer lies in the fact that a person with such domination over a company has or is likely to have the real say whether to produce the document. To obtain the "consent" of the company requires obtaining the consent of himself and no one else."

    Leading Counsel for the Claimants drew an analogy with the current position submitting that it would be unreal to conclude that, for example, a one-man company could avoid the conclusion that he had control merely by appointing two other directors;

    iv) disclosure is a pragmatic process: *Phones 4U Ltd (In Administration) v EE Ltd and others* [2021] EWCA Civ 116 at [25];

    v) it is nonsense to suggest that Mr Braid does not have control of the Server Data where in his capacity as a director of DSM SFG he has control of the Server Data.

33. In relation to the evidence filed by the Defendants it was submitted for the Claimants that:

    i) the evidence of Mr Hart that Mr Braid was no longer giving instructions to Pinsent Masons was merely an attempt to distance himself;

ii) there could be no possible privilege in the documents prior to 31 March 2017 as such documents could not be confidential;

iii) the Defendants have failed to provide to the court the documents which set out the limits on the access given to Mr Baker (as referred to in the correspondence from Pinsent Masons).

34. It was submitted for the Defendants that:

i) the Application extends to all documents on the server and is not specific;

ii) the Defendants asked the company for the documents and the response of the company was set out by their solicitors, Pinsent Masons, in correspondence;

iii) the suggestion that there has been any obstruction or "artificial construct" by the solicitors, RPC and Pinsent Masons is a serious and unwarranted allegation;

iv) the cases show that the issue of consent is a question of fact which takes into account the quality of the consent as well as the scope: *Pipia* at [50];

v) this is not a one-man company of the kind referred to in *North Shore*; Mr Braid is one of six directors;

vi) the request has been made and refused: that refusal is evidence that there is no standing arrangement: *Pipia* at [36] and [37].

35. Although the court in the course of the hearing was taken to the various authorities referred to above, it is clear and was common ground that the issue of "control" for these purposes is a question of fact. Andrew Baker J in *Pipia* was dealing with a parent/subsidiary relationship and *North Shore Ventures* related to beneficiaries under a trust. The authorities therefore are of limited assistance to this particular question of fact.

36. In my view the Claimants have not established that Mr Braid has "control" of the Server Data:

i) Mr Braid is one of six directors. He is seeking to access the documents in his personal capacity.

ii) This is not a one-man company. This is a company which is now part of a group of companies of which the parent is Metric. Although I accept that the company will be managed and run by its directors, there is no evidence which enables me to conclude that Mr Braid is able to access these data servers for the purposes of the litigation against him personally. The company is separately represented as a distinct legal entity and its lawyers have refused to provide access except on certain terms.

iii) It seems to me wholly unwarranted to suggest that two established firms of solicitors have in effect conspired to obstruct the disclosure of documents. To the contrary the correspondence from Pinsent Masons indicates that the

company will make the documents available but unsurprisingly in my view, seeks an indemnity for costs which the company's lawyers incur in this regard.

37. I am not therefore satisfied that there is, on the facts of this case, "an air of artificiality" nor that the position conveyed by the company through its lawyers is an "artificial construct".

38. For these reasons I am not persuaded that Mr Braid has "control" currently of the Server Data for the purposes of disclosure in these proceedings.

39. As to the position of Mr Baker it would appear from the evidence of Mr Hart's second witness statement that following his resignation as a director, Mr Baker retains "certain rights of access" to DSM SFG documents. Mr Hart's evidence is that:

> "26…following his resignation as a director of DSM SFG, Mr Baker retains certain rights of access to DSM SFG documents for the purpose of these proceedings.
>
> 27. DSM SFG is only obliged to use reasonable endeavours to make emails and group records available to Mr Baker and there is an express carve out for privileged documents. Mr Baker does not have the right to obtain a copy of the entire DSM SFG servers…"

40. Whilst Mr Baker has not provided copies of the relevant contractual arrangements referred to, on the evidence before the court, I am not satisfied that the contractual rights amount to control of the Server Data within the meaning of PD51U. Andrew Baker J in *Pipia* referred at [50] to the "quality of the consent – whether it involves free and unfettered access to the documents covered". In my view the evidence does not support a finding of free and unfettered access and thus a finding of "control" as a matter of contract. (It was not suggested that absent the contractual arrangements Mr Baker has in practice free access to the servers.)

41. In the alternative the Claimants sought an order from the court that the Defendants request unfettered access to the Server Data. It is clear in my view from the correspondence with Pinsent Masons both prior to and post the application on 1 April 2021, that in effect that request has already been made and Pinsent Masons have made it clear (in their letters of 16 March and 14 April 2021) that the documents would be made available to the Defendants subject to the safeguards referred to in that letter. In the circumstances I see no purpose in the court making such an alternative order.

42. Accordingly the Claimants' Application is refused.