

IN THE HIGH COURT OF JUSTICE
Queen's Bench Division
Neutral Citation Number: 2017 EWHC 175 (QB)

Court 34

ROYAL COURTS OF JUSTICE
THE STRAND
LONDON
WC2A 2LL

Friday, 3 February 2017

Before:

MR JUSTICE LEGGATT

BETWEEN:

(1) PCP CAPITAL PARTNERS LLP

(2) PCP INTERNATIONAL FINANCE LIMITED

Claimants

-v-

BARCLAYS BANK PLC

Defendant

Mr J Wardell QC appeared on behalf of the Claimants
Mr D Toledano QC appeared on behalf of the Defendant

JUDGMENT
(As Approved by the court)

APPROVED JUDGMENT

1. **MR JUSTICE LEGGATT:** This is an application made by the claimants in this action for an order under CPR 31.17 that disclosure of certain documents be given by a third party, Mr Richard Boath, who is a former employee of Barclays.
2. The documents fall into two categories, which have been referred to as, first of all, the “offline documents”, being a description of certain emails sent from the personal email account of Mr Jenkins; and secondly, certain emails dated 30 October 2008. All of these documents are in the possession of Mr Boath because he has been provided with them by Barclays in relation to investigations carried out by the Serious Fraud Office into events which are also the subject of these proceedings.
3. Mr Boath says that he is willing to provide the documents to the claimants if ordered to do so. It is clear, however, that he is not at liberty to do so without an order from the court, because the party to whom the documents belong and to whom Mr Boath owes a duty to keep them confidential is Barclays, the defendant in these proceedings.
4. The position taken by Barclays today is to accept that they have all the documents in their possession, that the documents are relevant and that the documents will, accordingly, be disclosed as part of Barclays’ standard disclosure which is due to be given in a few weeks’ time. In those circumstances, they say, it is unnecessary for the court to make an order under CPR 31.17 for a third party to disclose the documents, because the test under that provision is that an order should be made only where it is necessary to dispose fairly of the claim or to save costs. Such an order is

not necessary, they argue, when the documents will, in any event, be provided very shortly.

5. Mr Toledano QC, who represents Barclays today, further submits that the appropriate application for the claimants to make, if they wish to argue that early disclosure should be given, is an application against Barclays, the defendant, and not an application against a former employee and witness who has copies only because Barclays has given them to him. Mr Toledano submits that, if such an application was to be made at all, it should have been made at a case management conference last November at which questions relating to disclosure were decided.
6. I deal first with the 30 October emails. Those documents are of particular significance because in the particulars of claim the claimants seek to rely, in support of an allegation that Barclays acted dishonestly in making representations which were known to be false, on certain emails said to have been sent on 30 October 2008 which were allegedly copied to Mr Jenkins. In their defence, Barclays have denied dishonesty and denied in particular that Mr Jenkins was aware of any matters by reason of which it could be said that he knowingly made false representations. They have also pleaded in response to the claimants' reliance on the emails said to have been sent on 30 October that, pending production by the claimants of those emails as requested in certain letters, Barclays makes no admission in relation to the allegations based upon them. The reference to letters there is to a chain of correspondence in which Barclays have repeatedly demanded that the claimants provide copies of the documents referred to in the relevant paragraph of the particulars of claim.
7. The claimants say that they do not have those documents in their possession. It

appears that they have only a description of documents which they believe to exist. A central reason why they seek disclosure of the documents from Mr Boath is to enable them to comply with that request for disclosure of the documents which they have referred to and sought to rely on. It appears from correspondence with Mr Boath's solicitors that the 30 October emails which he has in his possession correspond, in some cases closely and in other cases partially, with the documents described in the particulars of claim.

8. Plainly, Barclays know exactly what emails were sent on 30 October which may be relevant, as they have those documents in their possession and will shortly be disclosing them in any event. It seems to me wholly unreasonable and obstructive for Barclays on the one hand to be clamouring in correspondence for provision of documents referred to in the particulars of claim and on the other hand to be resisting attempts made by the claimants to obtain, at this stage, copies of documents which closely correspond to the documents which they believe exist – thereby enabling them to correct their pleading in any details, if correction is needed, and to provide Barclays, although Barclays have them already, with the documents on which they are seeking to rely.
9. I am entirely satisfied that those documents are necessary to dispose fairly of the claim and to prevent further costs from being incurred in pointless game-playing in correspondence over this particular issue.
10. The proper party, in my view, to disclose the documents should be Barclays, but if they object to an order for disclosure being made against them today on the ground that there is no such application before the court, I will make the order in relation to Mr Boath.

11. The “offline documents” fall into a different category because they are not documents referred to in the particulars of claim. In the ordinary way, the appropriate time for disclosure of those documents would be when standard disclosure is given. There has, though, it is clear, been a misunderstanding in the correspondence as to whether Barclays have these documents in their possession or not.
12. Certainly, letters sent by Barclays' solicitors were capable of giving the impression, and did give the impression to the claimants' solicitors, that Barclays were saying that emails sent from Mr Jenkins' personal account can no longer be recovered because that account has been deleted and that such emails will not necessarily fall within the documents which will be captured by Barclays' searches for the purpose of disclosure. The claimants' solicitors made it clear that that was their understanding of the position in a letter sent on 31 October 2016. Barclays' solicitors have never responded to that letter to say that the understanding of the claimants' solicitors is wrong and that in fact all the relevant communications are documents within their possession and indeed must be because they gave the documents to Mr Boath to consider.
13. Had that been made clear in correspondence I would have considered that it was appropriate for disclosure to await the time when standard disclosure is given. Indeed, it is unlikely that I would have ordered that part of the application to proceed to an oral hearing today, as I did when it came before me on paper in December.
14. However, Barclays' solicitors failed to provide any clarity about the position, and it is only today, in court, that Barclays' representatives have categorically stated that they have the documents in their possession and will disclose them in April. Having,

through what I consider to be their fault, allowed the matter to proceed this far, I consider that it would again be calculated to waste further costs to simply to postpone the matter until April.

15. These documents are accepted to be relevant. They are evidently documents of considerable importance. I consider that it is necessary to dispose fairly of the claim that they be provided as soon as possible.
16. Again, I consider that the appropriate party to provide them is not Mr Boath but Barclays. However, again, if Barclays stand on the point that there is no application against them before the court today, I will make the order against Mr Boath.