Neutral Citation Number: [2018] EWHC 3483 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 December 2018

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

HYPERAMA PLC	**Claimant**
- and –	
(1) ARISTEIDIS POULIS **(2) ALI SONER GUVEMLI**	**Defendants**

- -
- -

Stuart Benzie and **William Clerk** (instructed by **Gateley plc**) for the Claimant
No appearance for the Defendants.

Hearing dates: 13-14 December 2018

- -

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.

....

MR JUSTICE PEPPERALL

MR JUSTICE PEPPERALL :

1. By this application, Hyperama plc seeks injunctive relief against one former employee, Aristeidis Poulis, and one departing employee, Ali Soner Guvemli. The application has been made without notice to either Defendant.

2. Hyperama is a substantial company with an annual turnover of around £140 million. It has two trading divisions:

   2.1 JK Foods is a specialised Asian food distributor. It imports products from South East Asia and China which it distributes across the United Kingdom to independent oriental supermarkets, restaurants, takeaway restaurants and national supermarket chains.

   2.2 Hyperama Wholesale runs a chain of four cash and carries across the Midlands. It services independent retailers, off licences and pubs and restaurants. While a relatively small player in the cash and carry sector, Hyperama's strength is in the fast food and Asian restaurant sector.

3. The First Defendant, Aristeidis Poulis, was first employed by the company in August 2015. He was initially employed in the Hyperama division, first as Head of Trading, subsequently as Commercial Director and from, February 2017, as Managing Director. In early 2018, Mr Poulis was moved to the JK Foods division as its Managing Director. Despite the titles Commercial and Managing Director, Mr Poulis was not in fact a statutory director of Hyperama plc. He was, nevertheless, a senior employee. He resigned on 22 August 2018 and his employment ended on 23 November 2018.

4. The Second Defendant, Ali Soner Guvemli, was appointed by the company as the Commercial Director of the Hyperama division in October 2017. Again, he was not a statutory director but was a senior employee. He resigned his employment on 4 October 2018. His notice does not expire until 4 January 2019 but Mr Guvemli has not reported for work since 5 November 2018 and appears now to be working for the leading food and drink wholesaler, Bestway.

5. There are three principal strands to Hyperama's claim:

   5.1 First, it alleges that both men have taken confidential information with the intention of unlawfully competing with their former employer.

   5.2 Secondly, it alleges that both men are acting in breach of restrictive covenants in their contracts of employment.

   5.3 Thirdly, and most seriously, it alleges that both men acted fraudulently in the course of their employments by dishonestly diverting secret profits.

6. Hyperama seeks injunctive relief to preserve its confidential information and to enforce the restrictive covenants. Further, it seeks damages, an account of profits and exemplary damages.

NOTICE TO THE DEFENDANTS

7. Such claims might be expected in the ordinary run of events to lead to an application made on notice for some interim relief pending trial of Hyperama's claims. Here, however, Hyperama seeks relief without notice to the Defendants.

8. Rule 25.3 of the Civil Procedure Rules 1998 provides that the court may grant an interim remedy on an application made without notice if it appears to the court that there are "good reasons" for not giving notice. In National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Practice Note) [2009] UKPC 16, [2009] 1 W.L.R. 1405, Lord Hoffmann said, at [13]:

> "Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of Mareva or Anton Piller order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act."

9. Here, Hyperama does not seek a search order, but rather an order requiring the Defendants to deliver up various property on their doorsteps. Such order is plainly intended to prevent the Defendants from taking steps to defeat the purpose of the injunction. Accordingly, if justified, such relief is of the kind that might properly be granted at a hearing without notice to the Defendants.

10. It is, however, important to recognise that court orders should not ordinarily be made in the absence of the Defendant. To proceed without notice is an exceptional course that should only be followed with good reason. Where justified, the decision to hear an application without notice is not licence to seek all manner of other relief that ought properly to be considered at an inter partes hearing. Accordingly, it is in my judgment, important that the court should only entertain those parts of this application where notice would defeat the purposes of the injunction.

11. Here, Hyperama seeks, in addition to the doorstep delivery-up order, further orders prohibiting the use or disclosure of confidential information and enforcing the restrictive covenants. The application for such orders should, in my judgment, be determined at a proper inter partes hearing. Accordingly, I decline to make any such orders at this hearing.

DOORSTEP DELIVERY UP ORDER

12. This application is for a variation of the search order. In the seminal case of Anton Piller KG v. Manufacturing Processes Ltd [1976] Ch 55, Lord Denning MR said, at page 61:

> "should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties: and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated: and when the inspection would do nor real harm to the defendant or his case… We are prepared, therefore, to sanction its continuance, but only in an extreme case where there is grave danger of property being smuggled away or of vital evidence being destroyed."

13. Ormrod LJ added, at page 62:

> "There are three essential preconditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the respondents have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made."

14. In Booker McConnell plc v. Plascow [1985] RPC 425, Dillon LJ referred to Ormrod LJ's reference in Anton Piller to a "real possibility" that the respondent might destroy incriminating material and observed, at page 441:

> "The phrase 'a real possibility' [used by Ormond L.J] is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off. Where the production and delivery up of documents is in question, the courts have always proceeded, justifiably, on the basis that the overwhelming majority of people in this country will comply with the court's order, and that defendants will therefore comply with orders to, for example, produce and deliver up documents without it being necessary to empower the plaintiff's solicitors to search the defendant's premises."

15. In Lock International plc v. Beswick [1989] 1 W.L.R. 1268, Hofmann J (as he then was) stressed the exceptional nature of the jurisdiction. He said at, p1281:

> "Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response. To borrow a useful concept from the jurisprudence of the European Community, there must be proportionality between the perceived threat to the plaintiff's right and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an *Anton Piller* order. People whose commercial morality allows them to take a list of the customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them. In many cases it will therefore be sufficient to make an order for delivery up of the plaintiff's documents to his solicitor or, in cases in which the documents belong to the defendant but may provide evidence against him, an order that he preserve the documents pending further order, or allow the plaintiff's solicitor to make copies. The more intrusive orders allowing searches of premises or vehicles require a careful balancing of, on the one hand, the plaintiff's right to recover his property or to preserve important evidence against, on the other hand, violation of the privacy of a defendant who has had no opportunity to put his side of the case. it is not merely that the defendant may be innocent. The making of an intrusive order ex parte even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff. The absolute extremity of the court's powers is to permit a search of a defendant's dwelling house, with the humiliation and family distress which that frequently involves."

16. In Films Rover International v. Cannon Film Cells Ltd [1987] 1 W.L.R. 670, Hoffmann J observed, at page 680E:

> "The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the "wrong" decision, in the sense of granting an injunction to a party who fails to establish his right at the trail (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense I have described. The guidelines for the grant of both kinds of interlocutcry injunctions are derived from this principle."

17. A doorstep delivery-up order was granted by Templeman J (as he then was) in Universal City Studios Inc v. Mukhtar & Sons [1976] 2 All E.R. 330. The judge observed, at page 333A-B:

> "The order which I was asked to make by the present plaintiffs is a strong order, albeit less stringent than that ordered in *Anton Piller* by the Court of Appeal. It does not involve entry on C's premises, but that C should hand over the infringing articles for save custody. It is a form of relief which the court will grant with great reluctance and which should seldom be sought and more seldom granted."

18. Paul Goulding QC considered the circumstances in which a doorstep delivery-up order might be made in the third edition of Covenants, Confidentiality and Garden Leave. He observed at paragraph 10.153 that such an order might be worth considering where the evidence does not satisfy the high threshold required for a search order. Goulding added:

> "In particular, as was made clear by Hoffmann J in Lock v Beswick, the balancing act that must be undertaken prior to the grant of an order may more easily fall in favour of an applicant where the Defendant's premises are not being searched and his privacy not being invaded."

19. In Nottingham Building Society v. Eurodynamics Systems plc [1993] 468, Chadwick J (as he then was) considered the court's jurisdiction to order delivery up of computer software following the purported termination of a contract. He summarised the principles at page 474:

"In my view the principles to be applied are these:

First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be "wrong" in the sense described by Hoffmann J.

Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo.

Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish his right

at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted."

20. Stuart Benzie, who appears with William Clerk for Hyperama, takes issue with the third proposition. He submits that it would be more accurate to say that the more onerous the obligations imposed by the order, the greater degree of assurance is required. There is, he submits, no separate rule for mandatory orders. Certainly, Mr Benzie has the support of Lord Hoffmann for that submission, both as a puisne judge in Films Rover (at page 680G-H) and as a law lord in the Privy Council case of National Commercial Bank Jamaica Case, (at [19]-[20]).

21. That said, Chadwick J's formulation was commended by Phillips LJ (as he then was) in Zockoll Group Ltd v Mercury Communications Ltd [1998] F.S.R 354 at page 366 as a concise summary of the law.

22. In my judgment, the point is academic on this application. Mr Benzie properly concedes that a doorstep delivery-up order is a strong order which therefore calls for a high degree of assurance in his client's case.

23. Accordingly, I approach this application on the following basis:

    23.1 First, I apply the elevated standard of whether I have a high degree of assurance that Hyperama will be able to establish its claims at trial in view of the strength of the order that is sought. Such standard is not significantly different from the "extremely strong prima facie case" required to justify a search order but, given that the order is less invasive, I accept that it may be that less is required to justify a doorstep order.

    23.2 Secondly, I consider whether Hyperama has established that the damage, potential or actual, to its business interests is very serious.

    23.3 Thirdly, I consider whether there is clear evidence that the Defendants have incriminating documents in their possession.

    23.4 Fourthly, I consider whether there is a real possibility that the Defendants might destroy such material before any inter partes hearing can take place.

    23.5 Fifthly, I consider whether the relief sought is proportionate to its legitimate aims.

(1) THE STRENGTH OF THIS CASE

24. Plainly I cannot and should not embark on a mini-trial upon the papers. Equally I cannot and do not make any findings of fact. Nevertheless, I am required to make some assessment of the strength of the case against these Defendants. In doing so, I am astute to consider the extent to which assertions made in the affidavit evidence before me are supported by documentary evidence. Further, I am mindful that I am only hearing one side of the case.

25. There is, in my judgment, clear evidence before the court to support four central planks of Hyperama's case.

26. First, there is clear evidence that the Defendants have wrongfully taken copies of Hyperama's confidential information:

    26.1 On 27 September 2017, Mr Poulis downloaded significant quantities of Hyperama documents to an external storage device.

    26.2 Between April & October 2018, he ran reports on Hyperama's IT system and then downloaded & e-mailed to his personal Hotmail account data concerning customer sales, customer prices, cost prices and supplier lists. For company's e-mails sent on 7 July 2018 are described by Peter Fairley, Hyperama's Financial Director, as containing the company's "crown jewels."

    26.3 In July 2018, Mr Poulis created a spreadsheet containing all of JK Foods' wholesale customers, the products that they buy and at what price.

    26.4 As to Mr Guvemli, between August & November 2018 he sent numerous e-mails to his Hyperama e-mail address containing highly confidential company data concerning details of products, suppliers, costings, sale prices and depot sales. The majority of this activity was in October 2018 just as he was planning to leave Hyperama to join Bestway.

    26.5 On 5 November 2018, Mr Guvemli's last working day at Hyperama, he e-mailed a colleague with confidential information concerning the entire product range, cost prices, sales, customer and supplier details. He did so despite it being his last working day, the employee concerned serving his own notice of resignation and the fact that the employee had no business need to receive such data.

27. Secondly, there is clear evidence that the Defendants are competing, or preparing to compete, with Hyperama's business:

    27.1 Mr Guvemli is known to have joined Bestway. Indeed, there are e-mails from him to Hyperama's customers clearly confirming his move to Bestway in early November 2018.

    27.2 While there is no direct evidence that Mr Poulis is also working for Bestway, a number of pieces of evidence combine, in my judgment, to create a strong inference that he is doing so.

        a) As well as creating the spreadsheet of wholesale customers in July 2018, Mr Poulis also created a rudimentary 3-year business plan. Closer analysis showed that Rizwan Pervez of Bestway was the original creator of that file.

        b) Mr Poulis booked half a day's holiday for 11 October 2018 at short notice. His work mobile phone was traced that afternoon to Bestway's head office in Cardiff.

        c) On 24 October 2018, Mr Poulis told Mr Singh that he had been interviewed at Bestway.

    27.3 In addition, a number of other key employees sent their CVs to Mr Guvemli days before resigning their own positions with Hyperama.

28. Thirdly, these matters are in turn clear evidence to support an inference that the Defendants have taken Hyperama's confidential information for the purpose of such competitive business.

29. Fourthly, there is clear evidence that the Defendants wrongfully caused Hyperama to trade with Foodtrade and Eurolink in order to earn a secret profit:

    29.1 Mr Singh says that he was first tipped off about suspicious trading activity by a supplier, Richard Storer of Agristo, at the end of October 2018.

    29.2 There is evidence that both Defendants caused Hyperama to order Farma's Chips from Foodtrade. E-mails show that Mr Poulis caused Hyperama's in-house design team to design a box for Farma's Chips. Mr Guvemli is also implicated in placing the orders for Farma's Chips.

    29.3 Equally, there is evidence that Mr Guvemli was involved in the supply of chicken through Foodtrade. In this instance, Foodtrade purchased the chicken from Hyperama's usual supplier, Kappers Foods BV, and then sold it directly on to Hyperama at an inflated price.

    29.4 Finally, there is evidence that Mr Poulis asked a colleague in the Hyperama division about his interest in 277 cases of Rekha prawns on 3 July 2018. On 30 July, Shihab of Eurolink offered 166 cases of Rekha prawns to Mr Guvemli, who subsequently agreed to buy them. Ultimately 271 cases of Rekha prawns were purchased, which is obviously very close to the 277 cases that Mr Poulis had sourced a few weeks earlier.

    29.5 Three months later, Mr Guvemli caused Foodtrade to supply £300,000 worth of frozen prawns to Hyperama. Such order far exceeded the business's requirements for prawns. The contact was again Shihab, but this time acting on behalf of Foodtrade.

30. For these reasons, I am satisfied with a high degree of assurance at this interim stage that Hyperama has good claims against the Defendants in respect of the misuse of confidential information and breaches of contractual obligations of fidelity. While I make no findings as to the strength of the case under the restrictive covenants, the claims that I have considered are sufficient of themselves, if made out at trial, to entitle Hyperama to damages and/or an account of profits and to seek injunctive relief.

(2) DAMAGE

31. Hyperama is a niche business, specialising in the oriental food sector. It is plainly at risk of being squeezed out of its market position in that sector by increased competition from the major players. It is particularly sensitive to the risk of competition from Bestway. Bestway is a significant operator in the cash and carry market. There is clear evidence before me of Bestway's intention to increase its market share with oriental restaurants, takeaways and specialist supermarkets.

    31.1 First, Mr Singh recounts that Bestway has a declared intention to move into the sector.

    31.2 Secondly, Bestway has made offers for the Hyperama business.

31.3 Thirdly, Mr Guvemli is known to have joined Bestway and, for the reasons set out above, there is evidence that clearly supports the inference that Mr Poulis is also working with, or preparing to work with, Bestway.

32. At paragraphs 133-134 of his affidavit, Mr Singh said:

> "133. The Confidential information which Aris, Ali, Ismail and Stephen have taken is wider ranging, highly sensitive and would cause very serious damage to our business if it was provided to a competitor. The JK Foods supplier and customer portfolio has taken my family 40 years to build up; the Hyperama customer and product list has been built and refined for over 25 years. If this confidential information is provided to a competitor it would cause very serious harm to those businesses.
>
> 134. Our Industry is very competitive and margins are relatively low. If a competitor had access to the information taken by Aris and Ali (and Stephen and Ismail) it would allow them to compete with us in a way that would make it very difficult for us to compete. As such the potential loss is significant and we bring this application in the hope of restraining the unlawful use of our confidential information."

33. In my judgment, there is therefore good evidence before me that the potential damage to Hyperama may be very serious.

(3) DOCUMENTS IN THE DEFENDANTS' POSSESSION

34. There is, as I have already found, clear evidence that the Defendants have electronic copies of a substantial amount of Hyperama's confidential data, that they were jointly involved with the apparent fraud committed against Hyperama through Foodtrade and/or Eurolink and that they have some business connection now with Bestway.

35. In my judgment, one can therefore infer that on the balance of probabilities they will still have electronic copies of Hyperama's confidential information and that they will hold further electronic documents evidencing their use and the extent of any disclosure of such information and their connections with Foodtrade, Eurolink and Bestway.

36. I am not, however, satisfied that there is clear evidence that they hold such documents in hard copy form. First, they appear to be modern businessmen who communicate through e-mail and What's App messages. Secondly, the evidence is of their improperly exporting data to external drives, to e-mail accounts and to a cloud-based storage solution. Thirdly, I note paragraph 14 of Mr Singh's affidavit which particularly stresses the importance of electronic evidence expected to be found in What's App messages and in the cloud.

(4) REAL POSSIBILITY OF DESTRUCTION

37. Mr Guvemli handed back his work laptop. Examination showed that everything sensitive on the laptop had been deleted, although Hyperama's IT consultants, Smith & Williamson

were able to recover a number of deleted files. He did not hand back his work mobile phone at first. When he did, it had been reset to factory settings and it was returned without the SIM card. He appears still to be using the SIM since on 7 December 2018 he sent a text to Hyperama's HR manager from his company phone number asking for his P45.

38. Mr Poulis handed back his work laptop and mobile phone without apparently deleting content.

39. With a little know-how, electronic data can be permanently deleted. Indeed, one of the Defendants' associates used proprietary software to wipe the contents of his laptop. The IT consultants, Smith & Williamson, advise that deleted What's App messages are likely to be irrecoverable.

40. I have given anxious consideration to whether Hyperama has established a real risk of destruction. Indeed, in the case of Mr Poulis it is the issue that has troubled me most on this application given that he did not delete files from his work computer. I firmly bear in mind the observations of Dillon LJ and Hoffmann J that the overwhelming majority of people can be expected to comply with court orders and produce and deliver up documents without the need for a search order.

41. The evidence of fraud in this case weighs heavily in the balance and, in my judgment, Hyperama has established sufficient possibility of destruction for a doorstep delivery-up order.

(5) PROPORTIONALITY

42. It is then necessary to stand back and consider whether the relief sought is proportionate to the harm that may be done if no order is made on a without-notice basis. Hyperama was wise not to seek search orders. I disagree with Mr Benzie's submission that this case justified such draconian relief. In my judgment, it fell short of the evidence required to justify such a significant invasion of privacy.

43. The case does, however, justify a doorstep delivery-up order strictly limited to electronic documents in which there is no entry upon the Defendants' premises, no need for any search for or through hard copy documents and no entitlement for the applicant or its lawyers to see anything until after an inter partes hearing.

44. Such order, in my judgment, involves the least risk of injustice between the parties and holds the ring pending a proper inter partes hearing. It protects Hyperama against the risk that key electronic evidence of the Defendants' wrongful use and disclosure of confidential information and as to their true dealings with Foodtrade, Eurolink and Bestway is lost. While a strong order, it protects the Defendants from having to allow access to their homes, from having to search for and hand over hard copy documents and from either Hyperama or its lawyers seeing the electronic data without further court order.

45. I shall therefore grant a doorstep delivery-up injunction. On handing down this judgment, I shall hear counsel briefly as to the terms of that order.

GAGGING ORDER

46. The detailed terms of the order for the doorstep delivery-up order already include a provision preventing one Defendant, should he be served before the other, tipping off his co-Defendant. That is obviously sensible and proportionate and I will make an order in such terms.

47. In addition, however, Hyperama seeks a so-called gagging order to prevent the Defendants from informing anyone else about these proceedings save for the purpose of obtaining legal advice until the return date. Mr Benzie explained that the particular concern was they might tip off others who might potentially be added to this claim as additional defendants.

48. Such order is plainly a restriction on the Defendants' freedom of speech and might potentially restrict them in their ability to defend these proceedings or prepare properly for the return date. It is not to be granted lightly and must, in my judgment, be properly founded on evidence that the Applicant is seriously considering the joinder of additional defendants, that absent such order there is a serious risk that important evidence might be lost and that such relief is proportionate. In this case, the evidence does not address any of these issues. There is accordingly no proper evidential basis for the gagging order sought and I make no such order.