Neutral Citation Number: [2020] EWHC 376 (Ch)

Case No: BL-2018-000016

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS
CHANCERY DIVISION (BUSINESS LIST)

The Rolls Building
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Date of hearing: 12/02/2020

Start Time: 13:30 Finish Time: 14:15

Page Count: 11
Word Count: 5647
Number of Folios: 79

Before:

MRS JUSTICE FALK DBE

Between:

JAMES RICHARD SCOTT BREARLEY & OTHERS	**Claimant**
- and -	
HIGGS & SONS (a FIRM)	**Defendant**

- -

MR SULLIVAN (instructed by **Freeths LLP**) for the **Claimants**
MR. M. POOLES QC and **MS H. EVANS** (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

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Approved Judgment

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MRS JUSTICE FALK:

1. This is my decision on an application by the defendant for specific disclosure against the claimants. I have already dealt with my applications for third party disclosure against three respondents, Finance Birmingham, Barclays Bank and Jaguar Land Rover. An application against the fourth respondent, Steven Smith, remains to be dealt with at a hearing fixed for mid-March. My decision also briefly addresses two other applications in relation to expert evidence.

Background

2. By way of background, the claim is one in professional negligence against a firm of solicitors, Higgs. It relates to the claimants' attempts to develop a Jaguar Land Rover dealership in Wolverhampton ("the Wolverhampton opportunity"). Higgs were instructed in connection with that opportunity.

3. At the time, Mr Brearley, the first claimant, was employed by Pendragon, a substantial motor dealership. The claimants' case is that Higgs failed properly to advise them of the risk that they might be precluded from pursuing the Wolverhampton opportunity while Mr Brearley was an employee of Pendragon or for a period of twelve months following his departure. In the event, Pendragon took action against Mr Brearley, issuing proceedings in October 2015 for alleged breach of contractual and fiduciary duties, having failed to receive requested undertakings. A settlement was reached with Pendragon after Higgs ceased to act in February 2016, on terms that were more restrictive than the restrictive covenants contained in Mr Brearley's contract of employment, and which the claimants say prevented them from being able to pursue the Wolverhampton opportunity.

4. The claim against Higgs was made in January 2018. The claim is for the alleged value of a lost chance to pursue the Wolverhampton opportunity, wasted costs in relation to that opportunity and costs of the Pendragon claim.

5. Standard disclosure was ordered by Deputy Master Cousins under an order made at a CMC on 27 November 2018, with disclosure required to be given on 27 February 2019. Witness evidence and expert reports have been exchanged and the trial window starts on 15 June this year.

PD51U

6. On 1 January 2019, the Disclosure Pilot for the Business and Property Courts came into effect in the form of Practice Direction 51U. Under PD51U, there is no transitional provision, although paragraph 1.3 provides that:

> "The pilot shall not disturb an order made before the Commencement Date...".

It therefore did not affect the order for standard disclosure in this case.

7. However, the pilot is relevant to any further application for additional disclosure. In particular, CPR 31.12, which deals with applications for specific disclosure, is not retained by PD51U.

8. For confirmation of the application of PD51U to existing proceedings, including where a disclosure order was made before 1 January 2019 under CPR 31, see *UTB v Sheffield United* [2019] EWHC 914 (Ch) at 11-18.

9. There are clearly some potential issues in seeking to apply PD51U in a case as this, bearing in mind in particular that there is no list of issues for disclosure. However, any difficulties can and should be dealt with on a case by case basis. As the Chancellor explained in *Sheffield United* at 24, the court will interpret PD51U in a way that makes it work effectively. The key point is that PD51U lays down important principles about the approach to be taken to disclosure. Those principles apply to all cases covered by the pilot, and that includes this case.

10. The pilot was intended to effect a culture change, see *Sheffield United* at 75. In particular paragraph 2.4 of the Practice Direction states that:

> "The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate…in order fairly to resolve those issues..."

11. Under paragraph 3.2, legal representatives have a number of obligations, including a duty to liaise and cooperate with the other parties' representatives to promote reliable, efficient and cost-effective conduct of disclosure. Furthermore, although less relevant to this application, there is a specific requirement to disclose known adverse documents.

12. Issues for disclosure are determined pursuant to paragraph 7. Relevantly in the context of paragraph 18.2, to which I will revert, "Issues for Disclosure" are defined in paragraph 7.3 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."

It goes on to say that it does not extend to every issue which is disputed in the pleadings by denial or non-admission.

13. It is also worth noting that there is no presumption that a party is entitled to one of the models of extended disclosure, in particular, model D or E (see paragraph 8.2). Most of the orders sought in this case have been characterised as being within model D.

14. The nearest equivalent to the specific disclosure rule in CPR 31.12 is paragraph 18 of PD51U. That provides that the court can vary an order for extended disclosure, including making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular issue for disclosure. Paragraph 18.2 requires any party applying for such an order to:

> "…satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate…"

15. Since at least part of the defendant's complaint is an allegation that the claimants have failed to comply with the existing order for standard disclosure, paragraph 17 is also potentially relevant. That applies where there has been a failure adequately to comply with an order for extended disclosure, and permits the court to make such further orders as may be appropriate. Paragraph 17.2 requires the applicant for such an order to satisfy the court that making an order is reasonable and proportionate.

16. In this case there is no existing order for extended disclosure as the term is used in PD51U, so it is arguable that strictly paragraphs 17 and 18 do not apply and that this application should be treated as one for extended disclosure, to which paragraph 6 applies. Paragraph 6 relevantly provides that the court will only make an order for extended disclosure:

> "…where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure."

It also requires any order for extended disclosure to be "reasonable and proportionate".

17. The concept of reasonable and proportionate is dealt with in paragraph 6.4. That requires the court to determine what is reasonable and proportionate having regard to the overriding objective, including a number of specified factors. These include the nature and complexity of the issues, the importance of the case, the likelihood of documents existing that will have probative value in supporting or undermining a claim or defence, the number of documents involved, the ease and expense of searching for and retrieving any document, the financial position of each party and the "need to ensure that the case is dealt with expeditiously, fairly and at a proportionate cost".

18. Importantly, the principles in paragraph 6.4 are expressly applied for the purposes of paragraphs 17 and 18. So in a key respect, that is the requirement for reasonableness and proportionality, there is no difference between these paragraphs and the approach to be taken is the same.

19. To the extent that it might make any difference, I have concluded that the best approach to making the new rules work effectively in this case is to apply PD51U as if the existing standard disclosure order were an order for extended disclosure. At the least, paragraph 18 is a very strong signal of the approach to adopt where disclosure is sought to be expanded beyond that previously ordered, and paragraph 17 is at least relevant by analogy where there has been a failure to comply with an existing order.

20. On that basis, additional disclosure should only be ordered in this case to the extent that the court considers it to be necessary for the just disposal of the proceedings and reasonable and proportionate as referred to in paragraph 6.4. A further order where there has been a failure to comply will only be made if it is appropriate to do so and the proposed order is reasonable and proportionate. In the absence of a list of issues for disclosure, the court will need to have regard to the fact that the clear intention is to restrict disclosure to material that is relevant to key issues in dispute as defined in paragraph 7.3.

21. It is also worth noting that paragraph 18 has close parallels with earlier case law on specific disclosure. In particular, in *Portman Building Society v Royal Insurance* [1998] P.N.L.R 672, Simon Brown LJ summarised the principles applicable under the

then RSC rules at page 675, including that disclosure (then described as discovery) must relate to matters in question in the case, that it should not be ordered if it is not necessary for disposing fairly of the matter or saving costs, and should not be allowed if it is fishing or unduly oppressive. The application must also be accompanied by evidence deposing to the belief that the other side has relevant documents, and must be based on more than speculation. Any order made must identify with precision the class of documents required.

22. There seems to me to be a close relationship between the test applied in *Portman* and paragraph 18.2, to which must now be added the specific requirement for the order to be reasonable and proportionate, as explained in paragraph 6.4. In my view, this provides additional support for the approach I propose to adopt of applying PD51U as if the existing standard disclosure order were an order for extended disclosure. In my view, this is the best way of making the new rules work effectively in this case, and is also consistent with the approach to specific disclosure in previous case law.

Disclosure sought by the claimants

23. At the heart of the case is a claim by the claimants that if Higgs had not given negligent advice, Mr Brearley could have extricated himself from Pendragon on better terms and in a manner allowing the Wolverhampton opportunity to be pursued.

24. Higgs say that a key part of the dispute relates to when Mr Brearley started work on pursuing the Wolverhampton opportunity, and the extent to which he had breached his duties to Pendragon before resigning from his employment in April 2015 and actually leaving the group in August 2015. Higgs say, in essence, that there was no realistic change of pursuing the Wolverhampton opportunity due to Mr Brearley's own activities, which they say included wrongly dissuading Pendragon in September 2014 from pursuing the Wolverhampton opportunity itself. Other key aspects of the case go to the assessment of any loss of chance, including in particular the chances of the Wolverhampton opportunity being successfully pursued and the profits that the claimants might have made.

25. In relation to disclosure, in very brief summary, Higgs complains about a “drip feed” of disclosure from the claimants. They say that the initial disclosure was surprisingly light in their view, and that since then there has been much more substantial disclosure following significant correspondence, including material disclosure since the application I am concerned with today was made. They have complained about a lack of documents from the claimants’ advisers, documents which they say were in the claimants' control. They complain about the date range for searches being too narrow and a lack of evidence of expenses in relation to cost-related claims. The claimants disagree, and suggest that this is a belligerent attempt by an insured party to apply costs pressure.

26. I need to record that the areas of dispute in relation to disclosure have narrowed between the parties very significantly during the two-day hearing before me. I appreciate the cooperation shown by counsel on both sides and those instructing them in enabling the issues to be narrowed, such that substantial areas of dispute have been removed.

27. I also need to record that it is not my role to resolve areas of factual dispute in this case, and I have no intention of doing so. In particular, reliance has been placed on alleged

inaccuracies in statements made. I do not make any findings about those matters, which are properly questions for the trial judge.

Date range

28. The most substantial outstanding issue I need to decide relates to the date range for searches. The claimants' position is that prior to the CMC they offered a start date for searches of 30 September 2014. The defendant was not content with that and wanted to go back to a date in 2013. On 21 February 2019, after the CMC, the claimants agreed to go back as far as 1 February 2014, and they carried out standard disclosure on that basis. The defendant raised a challenge about that some time later, initially on 24 June 2019, suggesting at that time that there were documents pre-dating 1 February 2014 that should be included. The application now made requests documents from 1 February 2013 onwards, in other words pushing the start date back by twelve months.

29. I have concluded, based on the evidence I have seen, that it is not appropriate to extend the date range to start before 1 February 2014. The evidence relied on as justifying an earlier date was as follows –

(1) First, a document in what appears to be the form of a presentation produced for a shareholders' meeting of the second claimant, JRB Automotive Ltd, in June 2015. That included a statement, under the heading "Recap", that Mr Brearley and Mr Venables (who was another individual involved in the Wolverhampton opportunity) approached Mr Stevens and Mr Danks (the third claimant), "to fund/construct a new JLR building/s in February 2014".

(2) A response to a request for further information on 1 June 2018, where it is stated on behalf of the claimants that Mr Brearley had an initial discussion with Mr Danks and Mr Smith in or around March 2014, "where the general concept of investing in a JLR franchise was raised".

(3) A witness statement of Mr Brearley produced in the Pendragon proceedings and dated 14 March 2016. Paragraph 25 of that statement referred to Mr Brearley taking advice from a financial adviser "in around February 2014", when Mr Brearley was considering making an investment with his SIPP. The statement adds that at that time he was considering using the SIPP to purchase a gym in Bridgnorth for his son to run. The context of this is that Mr Brearley's SIPP acquired an interest in one of the two sites that were identified for the Wolverhampton opportunity.

30. In my view, this is insufficient evidence to justify ordering disclosure for periods prior to 1 February 2014, and I reach that conclusion under whichever of the tests in paragraph 6, 17 or 18 of PD51U that I apply. In my view, it is not reasonable and proportionate to require an extension of the date range in that manner, having regard to the overriding objective. In particular, the document produced for the shareholder meeting is not a document produced with proceedings in mind. There is no reason for it to be incorrect. There is nothing in that or the other evidence relied on before me that suggests the likelihood of documents existing prior to February 2014. The witness statement from the Pendragon proceedings refers to investment in a gym and not to the Wolverhampton opportunity.

31. Although the claimants rely on other parts of that witness statement as containing what they say are incorrect statements, and suggest that on that basis I should not rely on the accuracy of what is said in relation to the SIPP, as already indicated I am not prepared to make any finding in respect of the accuracy of such statements and I do not do so. That is a matter for trial. I also do not need to rely on that witness statement, except to note that it contains nothing to indicate that an earlier date is justified. The more significant evidence is that from the shareholders' meeting.

32. In the circumstances, searches for an earlier period would, in my view, be a form of fishing and not justified by the evidence. At the very least, the exercise would be speculative in nature. I accept that this is a complex and high-value claim, and that the extent to which Mr Brearley may have breached his duties while he was employed by Pendragon is potentially highly relevant to the question of whether he could have done a better deal with Pendragon if he had been differently advised. I also accept that the material sought is in the control of the claimants rather than the defendant, making it obviously more difficult to demonstrate that there is likely to be relevant material covering an earlier period.

33. However, the existing searches cover a period that commences well over a year before Mr Brearley actually resigned and over seven months before Pendragon took a decision not to pursue the Wolverhampton opportunity itself. The likelihood of any evidence emerging before February 2014 that could make a material difference in determining the existence or extent of any breaches of duty by Mr Brearley, and the impact of any such breaches on the claim against Higgs, appears to me to be relatively low.

34. The additional burden on the claimants is also relevant. It is not at all clear to me that the scale of the additional disclosure exercise would be limited in nature or straightforward. I also take into account that, although the defendant never expressed itself as content with the date range, it did not actually object to the date range being used for some months after the date on which standard disclosure took place (albeit I accept that it did complain about it prior to that date).

35. In summary, I do not think that extending the date range to a period before 1 February 2014 would be reasonable and proportionate.

Other matters

36. As already indicated, a number of the other issues the subject of the application for disclosure were resolved by agreement during the hearing. However, it is appropriate for me to deal with a number of them briefly, as well as matters still in dispute.

37. First, the defendant expressed a concern about whether requests for documents made to firms who had acted as advisers to the claimants in connection with the Wolverhampton opportunity had been put in a way that ensured that all documents under the claimants' control, to which the standard disclosure order applied, had been retrieved. I was taken to some correspondence with one of the advisers, Smith & Williamson, a firm involved from the genesis of the Wolverhampton opportunity proposals, as support for this.

38. The defendant also points to substantial recent disclosure derived from Gateleys, conveyancing solicitors in respect of the two sites acquired in connection with the Wolverhampton opportunity, and also from Wilkes, the solicitors who took over from

Higgs in the Pendragon litigation. The defendant is concerned that proper processes may not have been pursued, in particular in determining what documents are privileged, and that the claimants' solicitors (Freeths) only sought full files from Wilkes in November 2019. A specific concern is expressed in relation to Gateleys that nothing was provided before January 2015 and nothing in relation to dealings between Gateleys and the advisers to Lancaster Plc, who acquired the sites once the claimants had abandoned the Wolverhampton opportunity.

39. A further area of concern relates to what was done in relation to key word searches. Additional key word search terms were agreed beyond those agreed originally in September 2018. Based on those additional key words, the claimants performed searches which produced 2087 additional documents. The defendant has expressed concern that, of those documents, the claimants have only disclosed 85 documents as relevant.

40. Dealing with these points together, Mr Sullivan for the claimants says in summary that if a solicitor says that he or she has done his job properly, then that should ordinarily be accepted. He also points out that the application in this case was for specific disclosure, whereas part of what was being sought by the defendant was an order specifically requiring the claimants to provide details of the terms of the requests they made to third party advisers, and indeed to make further requests. More generally, the claimants' position is in summary that the application by the defendant was made prematurely, without really considering what had already been provided or engaging with Freeths' requests for clarification.

41. I agree with the principle that the court should be slow to reach conclusions that solicitors have not done their job properly. In addition, a key point to take into account is that apart from the issue of the date range and some specific points which I will refer to later on, which are or were still in dispute, Freeths say that they have provided or agreed to provide all the requested documents. I accept the submission that it is not appropriate to make an order for further disclosure just in case disclosure that Freeths have already provided or agreed to provide is or turns out to be insufficient.

42. Following discussion between myself and counsel and between the parties during the course of this hearing, a compromise has been agreed on this issue. A senior solicitor of Freeths will provide a witness statement setting out the terms of the requests made to a specified list of third parties, not limited to the advisers I have just mentioned, and what has been received from them. The same witness statement will also explain the disclosure of only 85 out of the 2087 documents I referred to.

43. I note that the approach of requiring an explanatory witness statement is specifically recognised as an option available to the court in paragraph 17 of PD51U. Although the provision of a witness statement was ultimately agreed, it is worth setting out very briefly the reasons why I think it is appropriate. In my view, it is not appropriate simply to assume that Freeths are not doing their job properly and make an order for disclosure on that basis, and it is much more appropriate to request confirmation of the position by witness evidence. That best reflects the fact that Freeths say they have provided, or have agreed to provide, the relevant disclosure, albeit that the defendant's solicitor RPC has not yet been able to review it properly.

44. This approach also takes into account that there has been at least some apparent justification for RPC's concerns, particularly in relation to dealings with advisers in respect of documents in the claimants' control. I refer particularly to correspondence I was shown with Smith & Williamson and the late, and in some ways apparently limited, disclosure from Wilkes' and Gateley's files. That evidence gives some basis to suggest that the approach may not initially have been as rigorous as may have been appropriate.

45. However, I should also record that Mr Sullivan did not make full submission on these points to me. My views are expressed based substantially on the defendant's submissions and the documentary evidence I was shown, rather than full submissions from the claimants, which may have provided answers to these points.

Bank statements

46. Turning to some other specific matters, the defendant had sought disclosure of bank statements from the first and third claimants, Mr Brearley and Mr Danks. Bank statements from the two corporate claimants have already largely been provided, or I understand will be provided. The provision of bank statements by Mr Brearley and Mr Danks was initially disputed. However, by the end of the hearing the position was agreed in terms that where the schedule of loss refers to costs claimed, then in respect of those items the claimants will provide relevant extracts from the individuals' bank statements.

47. Again, I should record briefly that, in my view, this is the appropriate way to proceed. The claimants had previously relied on the disclosure of invoices and said that no bank statements were needed. But particularly in the context of an aborted transaction, where it may be that full amounts invoiced were not paid, I do consider it reasonable and proportionate to require additional evidence that the sums in question, which are material, have actually been incurred. I do not agree that it is necessary to produce an evidential basis of lying to justify that requirement.

Social media and text messages

48. I turn next to social media and text messages. The claimants are said not to be frequent users of social media, but this issue is at least relevant for LinkedIn and in addition for text messages. These media were covered by keyword searches already performed, but the defendant says that key word searches are insufficient given the nature of social media and texts and, in particular, the informal nature of the language used.

49. The defendant sought disclosure by reference to messages passing between the first and third claimants and a list of individuals which, by the end of the hearing, was reduced to Mr Smith, Mr Venables and certain named individuals who were at Jaguar Land Rover or Pendragon. The defendant's position is that the key relevant issue to which this matter related was when Mr Brearley first became involved with the Wolverhampton opportunity, and specifically when he first got in touch with Jaguar Land Rover about it.

50. In my view, the response to this is similar to that in relation to the date range matter I have already dealt with, and similar points apply. I have decided that it is not appropriate to make the order sought by the defendant. I am concerned that it would not be proportionate and that there is no strong likelihood of material of probative value

emerging. In particular, I think it relatively unlikely that further searches of messages would, for example, identify the first approach to Jaguar Land Rover, in circumstances where that had not already been picked up by the key word searches.

51. As the claimants pointed out, the existing key word searches picked up all the surnames of the relevant individuals, and therefore seem likely to have picked up any relevant material contained in exchanges via the LinkedIn site in particular (where exchanges might be expected to show surnames).

52. The defendant points to the fact that Freeths themselves suggested to RPC that key word searches were insufficient in relation to Higgs' personnel. However, That is not in itself a good reason to make this order. I need to apply the test in PD51U.

53. Although hampered by not having a significant amount of information about the likely scale of the work, I was informed by Mr Sullivan on instruction that checks of Mr Brearley's phone returned some 86,000 messages, out of which only 1,438 messages were identified on keyword searches, and of those only 61 were disclosed.

54. I was also referred to witness evidence provided in relation to the disclosure relating to the additional key word searches to which I referred earlier, which also gives some possible indication of scale. That evidence stated that of the 2,087 documents, 1,438 were from mobile data, and that in relation to so-called "family" documents there were 5,745 mobile phone hits. That is all against the background of just 85 documents being disclosed as relevant.

55. In all the circumstances, including taking account of the proximity to the date of the trial, I do not think that it would be proportionate to require a further search.

56. Mr Pooles for the defendant suggested what he described as a fallback, which was that the evidence already agreed to be produced by a senior solicitor at Freeths should also explain the criteria used to determine relevance in relation to text and social media messages. I agree with Mr Sullivan that that does not really address the application made. The application was made on the basis of the informal nature of the messages, and the concern that the key word searches already agreed would not pick relevant material up.

57. I am therefore not proposing to make an order on the terms Mr Pooles suggests. However, I do note that the proposed witness statement is going to deal with the basis on which the 85 documents were selected as relevant. Indirectly that should give an indication of the methodology used.

Mr Brearley's employment contract

58. Mr Brearley is now employed in a senior role at Inchcape. His P60s and P11Ds have been provided, but his employment contract has not been. The defendant say that ascertaining his remuneration package is highly material to the determination of the quantum of any loss. By the end of the hearing, a proposal was agreed that in relation to this material, a partner at Freeths should review his employment contract and confirm whether there is provision for remuneration or benefits that is not reflected in the information already provided. It has also been agreed that that review will cover any

provision in the contract in relation to retirement date, which is also potentially relevant to determining loss.

Schedule of loss

59. The defendant was concerned that the claimants have produced various iterations of a schedule of loss covering costs that are the subject matter of the claim, and that they have not produced anything in the form of a schedule of loss in relation to the claim for loss of profit.

60. For clarification, and reflecting confirmations given at the hearing, I will order that the schedule of loss most recently served on 7 February stands as the schedule of loss in respect of the claim for costs wasted or incurred, and that the loss of profit figure is to be taken to be that provided in the claimants' expert witness evidence.

Motor industry expert evidence

61. There is also an outstanding issue in relation to the motor industry expert evidence. The claimants made an application on 28 January for disclosure of documents referred to by the defendant's motor industry expert, Mr Jones. Following correspondence between the parties, the issues raised by that application have generally been resolved and it was determined that most of the information requested is already held by the claimants. However, as of today, there is an outstanding issue in relation to what the claimants say are two reports available to the defendant's expert, but not the claimants' expert. The claimants say these relate to so-called composite data produced by Jaguar Land Rover in relation to the financial performance of dealerships. There is a suggestion that the defendant's expert may have relied on confidential information only available to him or to his firm.

62. I have made clear in open court and record now that there must be equality of arms as to the underlying financial data available to the experts. Both experts must have an equal and fair opportunity to work on and analyse that data. In view of the proximity to the trial, it is appropriate to address this. The defendant has helpfully offered an undertaking to grant sufficient access to the claimants' expert to enable him properly to identify and work on the data, under conditions of confidentiality if required.

Property valuation expert evidence

63. The final application before me was an application made on 20 December 2019 to introduce expert property valuation evidence. The terms on which that should be done and the scope have been agreed, and I am content with those terms.

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This judgment has been approved by the Judge.