Case No: E00YE350 & F00YE085

NEUTRAL CITATION NUMBER: [2021] EWHC 2250 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY & COMPANIES LIST (ChD)

5 August 2021

Before
HHJ PAUL MATTHEWS
BETWEEN:

("Possession Proceedings")

AXNOLLER EVENTS LIMITED

Claimant

-v-

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Defendants

("Eviction Proceedings")

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

-v-

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

Andrew Sutcliffe QC, Edwin Johnson QC and William Day (Instructed by **Stewarts Law LLP**) appeared on behalf of the Claimant in the Possession Proceedings and Defendant in the Eviction Proceedings

Mrs Nihal Brake appeared on behalf of the Defendants in the Possession Proceedings and Claimants in the Eviction Proceedings

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RULING

(As Approved)

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(Official Shorthand Writers to the Court)

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1. **JUDGE PAUL MATTHEWS:** This is an application made by notice dated 27 June 2021 by the Brakes in both the 'Eviction' and the 'Possession' proceedings, in which they seek certain orders for specific disclosure from the Guy Parties on the other side of each action, in respect of some 14 categories of documents set out in the application notice. I have just held the pre-trial reviews, and the trials are listed for 11 October and 6 September respectively.

2. The first question which I have to deal with is, in effect, a kind of preliminary issue, which is what jurisdiction I am exercising in looking at this application at all. The problem is this: that when I made my original order for disclosure in these proceedings, I appear not to have considered that this was a case within Practice Direction 51U, and therefore simply ordered by consent standard disclosure as if it were proceeding under CPR Part 31, as previously. But, in fact, as has subsequently been realised, this is a case that falls squarely within the disclosure pilot, and is therefore governed by Practice Direction 51U, which sets out a different set of procedures and tests correcting failures to give disclosure and for giving further disclosure.

3. I have been referred to a number of decisions which deal with the question of what happens when you have a case which starts under one system and then finds itself under the other, although I do not think that any of the cases actually deals with the situation where mistakenly the order was made under the earlier system and then it was discovered it should have been under the other. But nevertheless the question arises what do you do when you have an order made under the old system, whether rightly or wrongly, and then you have a realisation of, or a transition into, the new, and then you have to deal with further questions such as defective disclosure or extending disclosure.

4. It is clear from the decisions to which I have been referred, in particular the decision of the then Chancellor in *UTB LLC v Sheffield United Limited* [2019] Bus LR 1500, that the disclosure pilot scheme applies to all relevant existing proceedings, whether started before or after 1 January 2019, including where a disclosure order has already been made under Part 31, before the pilot came into force. The last few words are not quite right for our case. But it seems to me that the principle is the same, and that although this case should have been dealt with under the pilot from the beginning, the sense of the policy behind that decision should apply to this case too.

5. We can see the same also from the decision of Mrs Justice Falk in the case of *Brearley v Higgs & Sons* [2020] EWHC 376 (Ch), where the judge referred to the coming into force of the disclosure pilot, and points out that the pilot was not to disturb an order made before the commencement date. In that case an order had been made before the commencement date for standard disclosure, as it then was. The question was, what happens when issues about the disclosure arise subsequently. In this particular case an application was made for specific disclosure by the defendant against the claimants. Mrs Justice Falk said that the pilot was intended to effect a culture change, and referred to the *Sheffield United* case. She then said that it was necessary to look at the terms of the Practice Direction to find the jurisdiction to make further orders.

6. She said, at paragraph 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."

So it is clear from her judgment that the learned judge there considered that we no longer looked at the old CPR Part 31 but instead looked at the provisions of the Practice Direction for cases that fall within its remit.

7. The outlier in this jurisprudence is a decision of Mr Edwin Johnson QC, given in a case called *White Winston Select Asset Funds LLC v Mahon* [2019] EWHC 1014 (Ch). Although it was decided before those two earlier decisions that I have referred to, it was not referred to in either of those two decisions in the context of the jurisdiction to be exercised (though it was referred to in passing in the *Sheffield United* case in a different context), and therefore I do not have the benefit of knowing how those judges would have reacted to what the deputy judge says about jurisdiction.

8. In that case Mr Edwin Johnson QC was dealing with a case where the direction given originally was for standard disclosure, but there was an allegation made by the

claimants that one of the defendants had failed to comply with his disclosure obligations. An application for specific disclosure was made. So the questions were what order might be made, and under what jurisdiction. The judge considered the question of whether there was jurisdiction under the disclosure pilot, that is to say under Practice Direction 51U, because he considered that the disclosure pilot did apply to those proceedings.

9. He said this:

> "9. It is not clear, in the absence of any specific transitional provisions, what the position is in relation to a situation where one has a standard disclosure order made prior to 1 January 2019 but an application is made for specific disclosure expressed to be made pursuant to CPR rule 31.12 after 1 January 2019.
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> 10. At least on one reading of the disclosure pilot it could be said that the court does not have any jurisdiction to make an order under CPR rule 31.12 because that particular provision of the CPR has been replaced by the disclosure pilot. Looking through the disclosure pilot, it is equally not obvious which particular part of the disclosure pilot would give the court jurisdiction to make the equivalent of an order for specific disclosure under what would previously have been the jurisdiction under CPR rule 31.12.
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> 11. There is paragraph 18 of the disclosure pilot but the difficulty with that paragraph is that it appears to apply in circumstances where there has been a direction for extended disclosure within the meaning of the disclosure pilot. That is not the position in the present case.
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> 12. Mr Tritton, who, as I have said, appears for the claimants, addressed me on this question of jurisdiction. His submissions were that the required jurisdiction could be found either in paragraph 18 of the disclosure pilot which I have just mentioned or in paragraph 20 of the disclosure pilot which makes it clear that the court's general case management powers are preserved. Essentially, Mr Tritton's submission to me was that, pursuant at least to Part 3

> of the CPR, and pursuant to my general case management powers under that part, it ought to be possible for me to make an order for specific disclosure. He also made the submission, as one would expect, that it would be a very strange result if I was to be satisfied that there had been a failure on the part of Mr Mahon to comply with his standard disclosure obligation but if I was then to come to the conclusion that there was nothing I could do about it because CPR rule 31.12 had been replaced by the disclosure pilot.
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> 13. It seems to me that the right answer is that, at least as a matter of the general case management powers of the court, I do have the ability to make at least the equivalent of an order which could previously have been made under CPR rule 31.12 in order to ensure that Mr Mahon does comply with his standard disclosure obligations, assuming of course that I am satisfied that there has been a failure to comply with those obligations.
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> 14. In those circumstances, I accept the general submission made by Mr Tritton on behalf of the claimants to the effect that I do have the jurisdiction to make an order, which I will describe as an order for specific disclosure, in order to ensure that Mr Mahon does comply with his standard disclosure obligations if I am satisfied that there has been a failure in that respect."

Then the learned deputy judge goes on to consider whether or not he should make such an order in that case.

10. Now I am bound to say that I follow the reasoning of the learned deputy judge all the way through, and, on the hypothesis that he puts forward I think I might well have come to the same conclusion. The problem is that he does not anywhere refer, and evidently was not referred by counsel, to paragraph 17 of the disclosure pilot. But paragraph 17 does supply the jurisdiction for the court under the Practice Direction to deal with a *failure* to comply with a disclosure order, even if that was a standard disclosure order made before the pilot came into force. On the other hand, paragraph 18 does not deal with failures, but simply with extended orders, that is to say where an additional order for disclosure is required for some good reason.

11. In my judgment, the problem with the decision in *White Weston Select Asset Funds* is that it proceeds on a false basis. The subsequent decisions to which I have referred, namely *UTB v Sheffield United* and *Brearley v Higgs*, correctly express the position in saying that, where there is a case which now falls within the disclosure pilot regime, it is that regime which governs how the court proceeds in relation to specific disclosure and not the provisions of rule 31.12 which, as Mr Johnson QC said, had gone, nor rule 3.4 under the case management powers preserved by paragraph 20 of the Practice Direction.

12. Accordingly, it seems to me that, with the greatest respect, I can put the *White Winston* case on one side and look instead at the provisions of the Practice Direction at paragraph 17 and paragraph 18. As I have said, they deal with quite different matters, which was pointed out quite clearly by Mr Justice Marcus Smith in *Agent's Mutual Limited v Gascoigne Halman Limited* [2019] EWHC 3104 (Ch), at [11].

13. The pre-conditions to an order under paragraph 17 are, first of all, that the applicant must show that there has been or may be a failure to comply with an existing disclosure order and, secondly, the applicant must show that the further order sought is reasonable and proportionate by reference to the considerations set out in paragraph 6.4 of the Practice Direction. That is concerned with where there may have been a failure, and Mrs Brake in the present case certainly says that there has been a failure to comply with the standard disclosure order.

14. Paragraph 18, on the other hand, has different pre-conditions, and indeed more difficult pre-conditions, to meet. The first is that there has to be a witness statement explaining the circumstances in which the original order was made and the reasons for varying it. However, there is no such witness statement here doing that.

15. Secondly, the variation must be necessary, not just desirable but *necessary*, for the just disposal of the proceedings. So, as was said in the *Brearley v Higgs* case, it would be, in effect, restricted to the key issues arising in the case.

16. Thirdly, the applicant must show that the further order sought, as with paragraph 17, is both reasonable and proportionate, again by reference to the same considerations. So far as that third or, in the other case, second pre-condition is concerned, there is the decision of His Honour Judge Hodge QC in *Maher v Maher* [2019] EWHC 3613 (Ch). That is a case which does refer to the decision of Mr Johnson QC in *White Winston Select Asset Funds* but, once again, not in the context in which I have had to deal with it.

17. In *Maher v Maher*, the judge pointed out that he was being asked to make an order for specific disclosure of bank statements, which might therefore lead to further enquiries and which might or might not support the particular allegations in the particular case, and that that was being sought some seven weeks before the beginning of the trial. The judge held that, given the shortness of time before the trial, it would not be reasonable and proportionate to make that order, even though it might well have been proportionate or desirable to make that order at an earlier stage of the proceedings. That was not the test. The test was, where are we now?

18. The present case is one in which the first of the two trials is, like in *Maher v Maher*, to begin in I think just under five weeks' time and the second trial in just under ten weeks' time or something like that. It seems to me that similar considerations apply here, that if I make an order for specific disclosure I am going to create a further burden for the parties at a time when, as Mrs Brake frankly told me, she was up to her ears in dealing with preparations anyway. However that may be, what weighs with me is that at this advanced stage of the preparations for trial it is not right to go embarking upon further disclosure exercises in 14 categories of documents, and, accordingly, for that reason alone I would not make an order under either paragraph 17 or 18, because it is not reasonable and proportionate in the circumstances where we are.

19. But in addition I will say that I am not at all satisfied that it would be *necessary*, for the purposes of paragraph 18, in order to make such an order as is sought here. This is because the issues in the case are already well defined, and there is a mass of documentation, so that the trial bundles will already be huge. The material that we have is going to be more than enough to deal with the case as it stands.

20. Thirdly, so far as it concerns paragraph 17, what Mrs Brake needs to show is that there may have been, at the lowest, a failure to comply with an existing disclosure order. The trouble is, as Mr Sutcliffe QC said in submissions, that there have been perfectly regular disclosure statements made on behalf of both the Guy Parties in this case showing what disclosure has been made and it is necessary to show an arguable case for a failure to go behind that in some way. But that is something which Mrs Brake has not been able to do. If she were able to show, for example, that there were documents which she knew about which should have been disclosed and they had not been disclosed, then that would be one way, perhaps, of going behind the disclosure statements.

21. Now during the course of her very able submissions, Mrs Brake referred to the fact that she had been given disclosure very recently in other proceedings, employment proceedings, pending in the Employment Tribunal which she said should have been disclosed, and this (she said) demonstrated that there had been a failure on the part of the Guy Parties. The problem is that at the present stage those documents are subject to the disclosure obligations in the employment proceedings which prevent their being used in collateral proceedings, such as these, without the permission of the tribunal. So she is not entitled as a matter of law to rely on them in this application in these two cases. But that would mean that potentially she could go to the tribunal, obtain an order and come back and seek another order. So, very sensibly, the Guy Parties have conceded that if Mrs Brake makes an application on Monday to the employment tribunal for the use of those documents in these proceedings they will not oppose that application. I have to say I think that is an entirely pragmatic thing to do and one which solves the problem for present purposes.

22. However, as things stand, for the reasons I have given I must dismiss the further application of Mrs Brake for specific disclosure.

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