Neutral Citation Number: [2021] EWHC 689 (Ch)

Case No: **BL-2018-002028**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (CH D)**

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **8 March 2021**

**Before** :

**Tom Leech QC (sitting as a judge of the High Court)**

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**Between :**

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|---|---|
| **Barrowfen Properties Limited** | **Claimant** |
| **- and –** | |
| **(1) Girish Patel**<br>**(2) Stevens & Bolton LLP**<br>**(3) Barrowfen Properties II Limited** | **Defendants** |

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**Lexa Hilliard and Tim Matthewson** (instructed by **Withers LLP**) for the **Claimant**
**Roger Stewart QC, Angharad Start and Joshua Folkard** (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: **8th March 2021**

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# APPROVED JUDGMENT

**Tom Leech QC** **Monday, 8 March 2021**
(**11:53** am)

Judgment by **Tom Leech QC** (sitting as a judge of the High Court, Chancery Division)

## The Application

1. This is the sixth day of the trial of this action. There is before me an application by the Second Defendant, Stevens & Bolton LLP ("**S&B**"), for an order against the Claimant, Barrowfen Ltd ("**Barrowfen**"): (1) that Mr Prashant Patel, one of its principal witness, provide all of his email boxes and all of his email accounts to its solicitors, Withers LLP ("**Withers**"); (2) that both he and Mr Stephen Ross, the relevant partner at Withers, provide affidavits explaining the failures in Barrowfen's disclosure process and answer five questions set out in a letter dated 25 February 2021 from S&B's solicitors, RPC LLP ("**RPC**"); and (3) that Barrowfen pay the costs of the application on an indemnity basis.

## Background

2. The procedural history is set out in some detail in section 2 of S&B's Skeleton Argument but it is only necessary for me to set out the most recent events as background to this application. It is sufficient for me to say that on Sunday 28 February 2021 S&B served the application in draft supported by the evidence of Mr Nicholas Bird, the partner of RPC with conduct of this action. It is the third disclosure application which I have heard by S&B. Mr Girish Patel, the First Defendant, also made an application which I dismissed. What prompted this third application was the disclosure of an email dated 7 October 2013 sent by Mr Prashant Patel to his brother Ilesh. This email was disclosed to Mr Girish Patel's criminal lawyers, Shearman Bowen, by Edmonds Marshall McMahon ("**EMM**"), the solicitors acting for the prosecutor in the private prosecution which has been brought against Mr Girish Patel. The disclosure of that email raised further concerns about the quality of the searches and disclosure by Mr Prashant Patel from his laptop which S&B did not consider that Barrowfen had dealt with adequately in correspondence.

3. On Day 1 of the trial Mr Prashant Patel gave evidence that he had uploaded his emails personally on Withers' instructions. On Day 2 it was put to him that he had been prepared to deliberately suppress documents. He denied this and explained that he had made an honest mistake in failing to disclose emails in a number of archived folders. He was also asked whether he had actually provided

an image of his hard drive to his solicitors and he said that he had not. He also confirmed that he had not provided the laptop to them and that he had not been asked to do so. In the afternoon of Day 2 and on Day 3 he was asked about the disclosure of emails from an email account: prash@me.com. He was asked whether the emails from this account had been uploaded to the disclosure platform DISCO and had been searched and he answered both questions "yes". However, he accepted that he might have deleted a notification from Companies House in relation to his search. He then gave the following evidence:

> "Q. Is there no search undertaken for deleted items? A. Once it deletes, it deletes. I mean, after 30 days everything is. Q. So the court should be aware that so far as your emails are concerned, there has been no search for deleted items; correct? A. Well, there can't be. If it's deleted, it's deleted. Q. Did Withers enquire with you as to the ability to search for deleted items? A. No, they didn't. Well, I would have to see what was sent to me at the time. Q. Are you aware that usually it is possible to search for deleted items? A. I was not aware that an inbox once it disappears, it disappears. I mean, once it goes into your deleted mail and you delete -- when you empty the trash."

4. Although the subject matter of the Application Notice dated 28 February 2021 was an individual email and the failure to disclose other emails from the same period and the order which S&B sought was for Barrowfen to answer five questions which Mr Bird had asked in his letter dated 25 February 2021, those questions have now been answered by Withers in a letter dated 7 March 2021. They answered all five questions in some detail and they have confirmed the evidence which Mr Prashant Patel gave to me that his failure to disclose email items during the search period 1 January 2013 to 31 December 2014 was an honest mistake. They have also confirmed that the questions which he was asked by EMM about the 7 October 2013 email did not prompt him to realise at the time that he had failed to give disclosure in the present proceedings.

5. Those answers are not accepted by S&B and Mr Stewart told me that they would be the subject of submissions at the end of the trial. But he accepted that for the purposes of the present application the answers given by Withers can stand. He will, of course, make submissions that I should reject the explanation given by Mr Prashant Patel but he did not ask me to make an order for further disclosure now. Instead, he asked for an order that Barrowfen provide Mr Prashant Patel's laptop (upon which his emails were stored) to Withers for inspection in order to see whether it was possible to retrieve deleted emails and, if so, that any emails which fall within the search parameters in these proceedings should be disclosed. By this I mean emails falling within the keyword searches set out in the Disclosure Review Document.

6. Mr Stewart argued that Mr Prashant Patel had volunteered the fact that the notification for the search from Companies Registry had been deleted. He also submitted that it was more concerning that Mr Prashant Patel appeared to be unaware that it was possible to recover deleted material and that, in the context of this particular trial, where the issues involve serious allegations on both sides both of tampering with documents and dishonesty, it was only proper to order that he should be required to turn in his laptop for examination to establish whether any of the deleted emails could be recovered and, if so, whether they were relevant to the issues in the action.

7. In answer, Ms Hilliard argued that this was not the order sought in the application. RPC was asking for the relief set out in a letter dated 7 March 2021 which crossed with the explanation given by Withers in their own letter of the same date and that this was another example of the rolling requests for disclosure by S&B. She also made the point that a vast amount of time had been spent already on disclosure and that if S&B had been concerned about deleted documents not being disclosed, the obvious time to take this was during the disclosure process and in correspondence. She took me to two examples of the correspondence between the parties dealing with the prash@me.com email account in which S&B appeared to accept that it was not necessary or proportionate to search that email account even though Mr Prashant Patel gave evidence later that it had been uploaded and searched for the purposes of these proceedings. Ms Hilliard also relied on a number of authorities, including *UTB LLC v Sheffield United Ltd* [2018] 1 WLR 5195, in which Sir Geoffrey Vos C explained the approach which parties should take to disclosure, namely, that it should be a matter for co-operation and that the parties should not use it as a stick to beat each other or to obtain litigation advantage.

**Decision and Reasons**

8. I have had concerns about the disclosure given by Mr Prashant Patel and Barrowfen over the course of the trial. It is unfortunate that Mr Prashant Patel was unable to provide disclosure of emails during an important section of the agreed date range until 23 February 2021. He apologised for his mistake (as did Withers). The question on the present application is whether I should go further and make a draconian order that he should now surrender his laptop for further investigation and interrogation because of the earlier lapses in the disclosure process. Although I have expressed concern about the quality of Barrowfen's disclosure given by the claimant, I am not satisfied that it would be proportionate to make such an order now for three reasons.

9. First, I am not satisfied that it is practical for Mr Prashant Patel to provide his laptop for a disclosure consultant to examine in Singapore, for the deleted entries to be identified and for disclosure to take place to enable him to be recalled in relation to that disclosure over the course of this week. Mr Stewart accepted that in practical terms this is what the order which he was seeking would require and asking Barrowfen to do this during the second week of the trial would impose a very significant burden when the parties are engaged in a heavy trial which is hotly contested.

10. Secondly, and more importantly, I am not satisfied that a search of Mr Prashant Patel's deleted emails would contain relevant material which would justify him being recalled or would make a material difference to the outcome of these proceedings. Mr Stewart did not ask me to decide whether I should accept or reject Mr Prashant Patel's evidence on this application and I am not prepared to make findings about his evidence at this stage and before I have heard the other witness and all of the evidence. It seems to me that the primary purpose of the application was to obtain further material to persuade me that Mr Prashant Patel's explanation that he made an honest mistake in relation to disclosure was untrue and that he has deliberately suppressed documents and not to elicit disclosure of further documents which might be relevant to the issues. But I have ample evidence on which to reach that conclusion now and a further search of deleted items is highly unlikely to affect the outcome on that issue. Likewise, if I am satisfied that Mr Prashant Patel made an honest mistake and that the evidence given by Withers shows equally that it was just an unfortunate error and that he failed to upload his email boxes, I have all the evidence necessary to reach that conclusion. Since I have not decided – and I am not prepared to decide yet – whether to accept Mr Prashant Patel's evidence about his disclosure, it would be wholly disproportionate to require him now to produce his laptop for inspection to establish whether he has deleted emails.

11. Thirdly, I bear in mind that the order which S&B now asks the Court to make falls outside the scope of the Application Notice and that Withers have fully answered the questions which formed the subject matter of the formal application. I would not have regarded that as a sufficient reason to refuse disclosure given that the issue arose out of the cross-examination of Mr Prashant Patel. But I am satisfied that he and Withers have made every effort to answer the criticisms made by RPC which prompted the original application.

12. Subject to one discrete issue, I will decline to make any order on the application. If the parties wish to argue at a later date that one or other of them has been successful and is entitled to an order for

costs, it seems to me that that is better dealt with after I have made the necessary findings of fact. I will, therefore, reserve the question of costs on this application until after final judgment.

13. That leaves one issue which was identified by RPC in their letter dated 7 March 2021. They also asked for an explanation why Withers had disclosed two documents which were blank. Ms Hilliard informed me that they were html files which were attached to emails (and which might contain a logo or an attachment which had no content) and that Barrowfen had disclosed them because they fell within the keyword searches and were technically required to be disclosed under the disclosure order. That seemed to me to be an entirely satisfactory explanation and, in my judgment, it is unnecessary for Withers to confirm it in writing now that it has been dealt with in open court by leading counsel.