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N THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (QBD)
[2022] EWHC 480 (Comm)



No.LM-2021-000086

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 3 February 2022

Before:

HIS HONOUR JUDGE PELLING QC

(Sitting as a Judge of the High Court)

B E T W E E N :

(1) FLOWCRETE UK LIMITED
(2) FLOWCRETE GROUP LIMITED
(3) TREMCO CPG UK LIMITED

Claimants

- and -

(1) VEBRO POLYMERS UK LIMITED
(2) VEBRO POLYMERS HOLDINGS LIMITED
(3) JOHN WATSON
(4) ROBERT GRAY

Defendants

MR T. KILLEN (instructed by Kennedys Law LLP) appeared on behalf of the Claimants.

MR S. PATEL (instructed by JMW Solicitors LLP) appeared on behalf of the Defendants.

J U D G M E N T

(via Microsoft teams)

JUDGE PELLING :

- 1 This is the hearing of the parties' application for costs arising out of two hearings of applications by the claimant for interim orders which, it was contended, were necessary in order to protect its confidential information. The applications for costs were heard at the end of the first CMC in these proceedings. There was insufficient time for judgment because the time estimate for the CMC had been inaccurate, and that is an issue I intend to return to in relation to the costs of determining this costs application. It goes without saying that had there been sufficient time, I would have delivered an *ex tempore* judgment dealing with the costs issues that arise at that stage. The result is that this judgment is longer than it would otherwise have been and its delivery has been delayed because of listing congestion and the non availability of the parties' advisors.
- 2 This judgment is not the place to set out the nature of this dispute, beyond the minimum necessary in order to make this ruling understandable. The claimants are companies specialising in the supply of industrial and construction chemicals. The first defendant is a company operating in the same sector that were formed in October 2019 and commenced trading in February 2020. With one exception, the first defendant's directors are all former senior employees of the claimants. The claimants allege that the defendants misappropriated and used in the course of the first defendant's business confidential information belonging to the claimants. Whilst it is accepted that the third defendant removed some documentation, he and the other defendants deny using that or any other confidential information belonging to the claimants as alleged by the claimants or at all.
- 3 These proceedings were commenced in March 2021 when the claimant sought interim relief including: (a) delivery up and destruction of documents that the third defendant in particular had removed when leaving the claimants' employment; (b) an imaging order in respect of a box drive belonging to the third defendant and a hard drive belonging to the fourth defendant; (c) an order preventing the defendants from using or further using the claimants' confidential information, and (d) what the claimants characterised as "springboard" relief - that is an order that, if granted, would have precluded the first and second defendants from carrying on their business in material ways.
- 4 The application was listed originally on Monday 19 April 2021, the original hearing having been vacated at the request of the defendants. On 16 April 2021, the defendants served their evidence in answer, and their counsel's skeleton was served on Sunday 18 April 2021. Each side maintains that the other was at least in part responsible for the late service of this material. In the result, on 19 April 2021, the defendants undertook: (a) to comply with the terms of a confidentiality agreement dated 13 April 2021; (b) to delete one particular document, and (c) destroy copies of another. In addition, it was ordered that the defendants delete and deliver to the claimants all copies of certain other classes of documents. The third defendant undertook to provide the necessary access details to permit imaging of his cloud storage box, and a limited form of springboard relief was obtained in the form of an undertaking set out at para.11(d) of the order. That undertaking was over until a further return date, and given only reluctantly. It was submitted on behalf of the defendants that such relief was inappropriate and unnecessary and would unduly damage the first and second defendants' business. The undertakings to deliver up and for destruction had been conceded in the defendants' skeleton.
- 5 I gave directions for a further return date, which in the event took place on 21 June 2021. At that hearing there were two issues to be determined, being: (a) whether any springboard

relief should be granted or continued, and (b) whether there should be a preservation order made in respect of information stored on various devices of seven named individuals employed in various capacities by the first and second defendant. In the result, (a) no further springboard relief was ordered and (b) an undertaking to preserve relevant documents was offered and accepted. It was directed that the costs of the 19 April and 21 June hearings would be reserved over and determined at the CMC. As I have explained, at the CMC, the issue was argued but no time remained for the delivery of a judgment determining the costs issues that remained to be resolved.

- 6 The claimants submit that (a) they should have the costs of and occasioned by the April hearing and (b) that whilst the claimants were not the “successful” party at the June hearing, the defendants should nonetheless not recover all the costs of that hearing. The defendants submit that (a) they should recover all the costs of the June hearing and (b) they ought to recover at least some of the costs of the April hearing since the springboard undertaking was offered only on an interim and “holding the ring” basis, and was offered reluctantly, and the claimants were not entitled, upon proper analysis, to any springboard relief, as is apparent from the June judgment.
- 7 The general principles that apply to costs applications relating to interim applications are well established. In summary: (a) the court has a discretion as to whether and when costs should be paid - see CPR rule 44.2(1) - but, subject to that, (b) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party - see CPR rule 44.2(2)(a) - but the court may make a different order and, in deciding what order to make, (c) the court will have regard to all the circumstances, including the conduct of the parties before and during the proceedings - see CPR rule 44.2(4)(a) and (5). The court’s powers include a power to direct that costs be reserved or that some or all of the costs be in the case - see Practice Direction 44, para.4.2. In this context, the approach in relation to interim injunctions is in part different from that which applies to interlocutory applications generally. Where an injunction is granted on the basis of balance of convenience, in order to hold the ring until the dispute between the parties can properly be decided at a trial, there can be no successful or unsuccessful parties, and in consequence the costs on such an application should generally be reserved to the trial judge: see Desquenue et Girrel UK Ltd. v Richardson [2001] FSR 1, *per* Morritt LJ (as he then was) at para.15. However, that does not assist where an application for an interim injunction has failed. In that event, there will be a successful party and, in my judgment, the general principles that I have summarised earlier in this judgment, rather than the Desquenue principle will apply in those circumstances.
- 8 I turn to the costs of the first hearing. The claimants submit that they were successful and they ought to recover the costs of that hearing. The defendants maintain that such an order would be unfair since most, if not all, of the orders made on 9 April were not opposed. The exception was the application for springboard relief and that was granted only on a “holding the ring” basis over until the return date in June, at which the claim for relief ultimately failed.
- 9 As I made clear in para.28 of my judgment on 19 April 2021, what I was concerned to do on that occasion was “... *to put in place some limited springboard relief over until the full hearing of this application* ...”. In my judgment, the Desquenue principle applies to the 19 April hearing, and that is why the costs of that application were reserved over to the hearing that took place on 21 June 2021. In my judgment, the correct course is that the costs of the April hearing should follow, or largely follow, from what order is made in relation to the June hearing.

- 10 I now turn to that hearing. At para.1 of my judgment, following that hearing, I made clear that there were two substantive issues that were argued and had to be resolved at the hearing, being (a) whether any springboard relief ought to be granted, as to which see para.1(a) of the judgment, and (b) whether an imaging order ought to be made in respect of the devices of the seven individuals I referred to earlier – an issue not determined at the earlier hearing.
- 11 In relation to springboard relief, having set out the applicable principles, I concluded, at para.43 of the judgment, that the only material relevant to that application was the document referred to in these proceedings as the Ti Spreadsheet, which the third defendant admitted retaining following the termination of his employment. Having considered that document in more detail, the evidence deployed in respect of it by the claimants, I concluded at para.47:
- “This is a remarkably imprecise and speculative way for Mr Black to express this evidence. It suggests that even on the claimants’ own case much of the relief sought is in excess of what is reasonable and necessary, having regard to the posting dates referred to earlier. No assistance has been provided as to how to formulate a more focused form of relief. It is simply not good enough on an application of this sort, where the orders sought may profoundly adversely affect the legitimate business interests of parties in the position of the first and second defendants to refer to some sales recorded in the schedules as being ones that *‘might well represent’* sales where protection of longer than twelve months would be justified without at least identifying the transactions concerned and explaining why a greater period of protection is required.”
- It was not suggested that the material in the Ti Spreadsheet was current - see para.49 of the judgment - and in consequence there was no sufficient evidence that the defendants could use the material in any useful way - see para.53 of the judgment. I added at para.56 of the judgment that there was no evidence of the defendants having even attempted to use the material to win business at the expense of the claimant, nor any evidence of the material being used for any purpose by anyone in connection with the first and second defendants’ business. This led me to conclude that the application for springboard relief should fail - see para.58 of the judgment.
- 12 On this basis, the claimants were plainly not successful, and the defendants, equally plainly, were successful. I do not accept that some different order than the one that follows from these conclusions should be made in the circumstances of this case. Springboard relief is an extreme form of interim relief that is capable of working ante competitively and inflicting great hardship on new businesses. It should be resorted to only where the tests that apply are clearly made out. If such relief is granted, it is highly likely that the costs will be reserved to trial, applying the principles referred to earlier. Where the application fails, however, then the party applying can expect only to pay the costs of and occasioned by the application, even where, as here, the relevant documents were admittedly misappropriated but where it must have been clear to the claimants and their advisers that the application could not succeed, given the gaps in the evidence I identified in the judgment, applying the tests that apply to the grant of such relief.
- 13 Turning now to the imaging order application, I set out the applicable principles at para.59 and following. In particular I drew attention, at para.59(b), to the fact that such orders are by their nature intrusive and should be made only in cases where a paramount need for such

an order has been demonstrated. I thus concluded that the evidence does not satisfy the relevant test - as to which see paras.65, 67, 68, 69 and 70 of the judgment - and I concluded at paras.71 to 73 of the judgment:

“71. Overall, the evidence provided by the defendants, in my judgment, shows extensive *bona fide* attempts to carry out the searches required to comply with para.4 of the April order. It shows extensive searches made against the various devices used by the relevant individuals, including computers, hard drives and indeed mobile telephones. Taking a step back, I remind myself that the imaging orders are not the common currency of commercial litigation and should not be treated as being so. They are a substitute for one of the most intrusive orders available to the English courts, namely search orders. The requirements that have to be satisfied before an imaging order is made are stringent. I do not accept that, in this case, the claimants have satisfied the necessary test.

72. In reaching that conclusion, I make clear that I have not merely considered each of the individual circumstances relied upon by the claimant as justifying this conclusion, but have considered the effect of the material as a whole but, in this case, have concluded that the whole is no greater than the sum of the parts and that the material simply does not carry with it the implication that the claimants must establish if an order of this sort is to be made.

73. In the result, the application for springboard relief and the imaging order are refused. I will accept an undertaking in the terms of para.1 of the draft order, or make an order to that effect, however. I will make an order in the terms of para.12 of the draft order as well, and I will hear from the parties further as to what, if any, directions should be given at this stage for a speedy trial, or for the convening of a CCMC in order that that issue can be ventilated.”

- 14 Applying the costs principles identified earlier, it is plain that the defendants should have the costs of the application for springboard relief in both hearings, and further should recover the costs of the application for imaging relief. The question which remains is whether it is appropriate to make any different order having regard to the requirement to take into account conduct.
- 15 There was much criticism and counter-criticism of the way in which each of the parties dealt with the applications. That is to an extent a feature of the very hard-fought nature of this litigation, which has been fought throughout in entirely uncompromising and in my judgment over aggressive terms. The claimants criticise the defendants for the late filing of the evidence which led to the adjournment of the 19 April hearing. However, that has to be balanced against the fact that, in the end, the hearing had to be adjourned in order to facilitate the hearing of an application for springboard relief that failed and that the two most extreme forms of relief sought failed. In my judgment, the effect of the late filing of evidence is outweighed by the applications being ones that the claimants ought to have considered would fail, applying the correct tests.
- 16 That said, there would have had to be a hearing to enable the court to accept the undertakings that were offered other than in relation to springboard relief. However, the *Desquenne* principles apply in those circumstances. Assessing what part of the costs of the

19 April hearing would have been incurred in any event is difficult. It is clear that the vast majority of time was taken up with the application for an adjournment and in considering what springboard relief ought to be granted over to the effective hearing. I consider the fair balance is 70 percent of the costs should be attributed to the application for springboard relief, with the balance of the costs to the remainder of the business considered at that hearing. In those circumstances, I conclude that, subject to one point which I will refer to at the end of this judgment, the defendants are entitled to 70 per cent of the costs of the April hearing. Further, I consider that the balance of the costs should be either reserved or be costs in the case. That issue was not ventilated at the CMC, and I will hear further, briefly, from the parties as to whether the balance of the costs should be reserved or in the case, following completion of this judgment.

- 17 As I have said, in my judgment, the defendants were plainly successful in relation to the June hearing. However, I accept the claimants' submission that time was taken up and costs wasted unnecessarily in addressing the issues summarised in para.77 of the claimants' skeleton, and that unnecessary costs were incurred in relation to Mr Gray's failure to address straightforwardly to whom he had delivered his hard drive. I accept some account has to be taken of these factors when arriving at a final order. I consider that is best addressed by directing that the defendants should recover 80 percent of their costs of the June hearing.
- 18 In the result, therefore, in relation to the April hearing, I consider that the defendants should recover 70 per cent of the costs of that hearing, with the balance either being reserved or in the case, and that the defendant should recover 80 per cent of the costs of the June hearing. As I have said, I will hear the parties now or at the end of this hearing in relation to whether the balance of the April hearing costs should be reserved or in the case, and further as to whether or not the costs that I directed should be recovered should be the subject of summary assessment, and, if so, how that summary assessment should be carried out.
- 19 Finally, if and to the extent that any application is made for any costs in relation to the costs hearing itself, I will invite submissions in relation to that, which must take account of the inadequate time estimate, as I indicated as the outset of this judgment.

LATER (Issue 1, defendants' disclosure)

- 20 This is a disclosure guidance hearing, where unsurprisingly in this case there are a large number of disputes between the parties which extend across the whole range of issues that are likely to arise on a Practice Direction 51U disclosure exercise. The particular focus of the issue I am now concerned with is issue for disclosure 1, which is identified in section 1A of the disclosure review document in these terms:

“Was any of the Claimants' confidential information ... misappropriated by the Defendants, or any of them (including their employees, servants or agents, and any former employee of the Claimants?)”

- 21 The focus of attention in relation to this issue, as summarised in the latest version of the search term table at tab 18 in the bundle, throws up a philosophical difference between the parties both as to date ranges and as to the scope of the enquiry. I start this part of the discussion by accepting the principle identified by Mann J in *Gulati v MGN* [2013] EWHC 3392, as almost a truism in breach of confidence cases of this nature, namely:

“It is a familiar state of affairs that a claimant is ultimately reliant on disclosure from the other side in order to bring his case home, particularly in

cases where the nature of the wrong is such that the defendant's activities were covert so that, if the case is good, the defendant is likely to have a substantial amount of material in its hands with no equivalent in the hands of the claimant. Unless the prospects of getting disclosure are 'fanciful', the claimant is generally entitled to maintain its case in those circumstances."

- 22 The approach of the defendants in relation to these issues has been to identify date ranges by reference to specific custodians, and to identify what is to be searched by reference to information which the claimant has been able to discern from its own enquiries concerning the activities of the defendants. Thus, and by way of example, in relation to Mr Gray and in a range between 27 January and 26 July 2020, it is proposed by the defendants that there should be a search only of client names listed at numbers 1 to 15 of confidential annex 7, and search terms listed within the updated annex A to the DRD, as being a mechanism by which all that can legitimately be required could be revealed. The point which is made by Mr Killen on behalf of the claimants is that the date range is both too narrow having regard to the allegations which have been pleaded, but also the premise on which this enquiry proceeds is that it proceeds by reference to names which the claimants have been able to identify; it does not proceed on the basis of a search designed to disclose what is alleged by the claimants to be the true level of activity.
- 23 In consequence, this led the claimants to propose a very generalised level of searching, which runs from 1 June 2018, which is the first date when it can legitimately be alleged misappropriation might have occurred, and identifies search terms which are very general in their expression, including such phrases as "*Our friends at Flowcrete*", and "*For+Vebro*", to give another example. The custodians are listed compendiously as being all the relevant players, and the sources to be searched are identified as including all Vebro and personal email addresses as well as electronic communications sent by mobile phone and any hard drives used by the custodians.
- 24 In the course of his submissions, Mr Killen was prepared to propose a slightly compromised approach to all of this, which was to adopt the proposals made by the defendants but invite me to provide guidance to the effect that there should be, in addition, searches by the defendants of two particular categories of words, that is to say each of the Flowcrete corporate names and each of the Flowcrete corporate products from 1 June 2018.
- 25 The point which is made on behalf of the defendants is that certainly in relation to the Vebro email accounts and the like, it is highly likely that the names of Flowcrete and/or Flowcrete's products will occur a very large number of times because this is a relatively cut-throat market in which those who wish to use materials supplied respectively by the claimants or the first and second defendants are likely to want to negotiate the best possible price for the product which performs the task required. Thus it is that those who wish to purchase products are likely to approach rivals and identify to the rivals concerned the price at which the rivals competitors are prepared to sell the product for the purposes of negotiating more satisfactory arrangements. I accept that submission, and I accept that if all Vebro email accounts were to be searched in the very generalised way that is suggested, then the task is likely to become one that is massively in excess of what is reasonable and proportionate.
- 26 The disclosure pilot was brought into existence for the purposes of controlling disclosure, both in quantitative and qualitative terms, as well as having the incidental advantage of reducing the costs of litigation. Therefore wide-ranging searches of the sort that are proposed by the claimants, if they are extended into the email accounts operated corporately

by the first and second defendants, would go too far. However, different considerations apply in relation to the personal email addresses, electronic communications sent by mobile and hard drives used by the custodians, because the point made by Mr Killen is that any communication naming either Flowcrete companies or Flowcrete products in private emails are more likely to be linked to conduct the subject of this litigation, and therefore the risk of a high level of false positives is significantly reduced.

- 27 It is necessary to bear in mind that para.18 of the disclosure pilot, headed “*Varying an order for Extended Disclosure; making an additional order for disclosure for specific documents*”, facilitates relatively speedy applications by a party for further disclosure where initial extended disclosure suggests there may be documents that are not being captured. In those circumstances, it seems to me that the appropriate course in relation to issue 1 where the disclosure model is Model D, is to direct disclosure in the terms identified by the defendants but, in addition, direct searches as against all personal email accounts, mobile phone and hard drives held by the custodians personally of the Flowcrete corporate names and the Flowcrete corporate products. It would be inappropriate to go more widely than that because to do so would be neither reasonable or proportionate.

LATER (Issue 1, claimants’ disclosure)

- 28 The issue I now have to resolve concerns an issue between the parties in relation to issue 1 of the issues for disclosure concerning the claimants’ searches. I need not repeat what that issue is. I set it out in detail in the first of the mini judgments I gave earlier today in relation to the defendants’ searches in relation to this issue.
- 29 The issue is one which is concerned with the misappropriation of confidential information belonging to the claimants. The claimants’ approach in relation to this has been to set out all the possible email operators, and some generic names as well, for the purposes of capturing any emails which might contain material which was being misappropriated. The position adopted by the defendants is that this is too narrow, and they propose a series of search terms which fall into broadly three categories. They first of all consist of the names of individuals. The next consists of names of projects which are specifically alleged to be the subject of misappropriation. And the third broad category of search terms is again generic in the extreme, referring to “Price+increase”, or “Delivery+issues”.
- 30 There is a range of a number of custodians who, as I understand it, include every salesperson employed by the claimants who were involved in some or all of the projects that have been identified. It is plain to me that before one even gets into the essential issue which arises, search terms involving the names - that is to say the first five items within the search terms - and the generic items which appear at the end of the list starting with “Price+increase” to “Failure+to+supply” cannot on any view be justified on grounds of generality, and therefore it would be unreasonable and disproportionate for a search to be carried out using those terms.
- 31 The more pertinent point is whether or not it is appropriate to search against the name of projects which the claimants allege were or may have been the subject of misappropriation. The submission which was made on behalf of the defendants is that it is only if a search to that effect is carried out that it becomes apparent whether or not information has been used in a way to facilitate the development of the defendants’ business. In my judgment, that is a mistaken way of approaching the issue. I agree with the submission made by Mr Killen that the focus of this particular search is on issue 1 and is therefore concerned with misappropriation. I agree with Mr Killen that if a search is done against the various email

operators identified in the search terms set out by the claimants, that is likely to reveal any information relevant to the misappropriation issue. I do not accept that it is either reasonable or proportionate to search against the names of each individual salesperson. Nor do I accept that it is reasonable or proportionate to search against the name of each potential project or each potential customer, because the information which is relevant to the issue that arises will reasonably and proportionately be yielded by the search terms proposed by the claimants.

- 32 Accordingly, in relation to this issue, I prefer the case advanced by the claimants and my guidance is therefore that there should be disclosure in relation to issue 1 by the claimants as proposed by the claimants.

LATER (Issue 4- Claimants)

- 33 The issue that I have now got to resolve is an issue concerning the claimants' disclosure in relation to issue for disclosure 4. Issue for disclosure 4 is:

“Have the Third and Fourth Defendants breached their restrictive covenants to the Claimants?”

That begs two questions. One, was a particular customer of the claimants a protected customer within the meaning of the covenants here referred to? Secondly, whether either the third or fourth defendants breached the covenants by seeking to do business with any of those who are protected customers.

- 34 The proposal so far as the claimants were concerned in relation to this issue had in the column entitled “Search Terms” a blank, and the defendants proposed that there should be a search in respect of all clients, architects and applicators listed in the search term report. The custodians are Mr Watson and Mr Gray. The databases that were supposed to be searched included the email accounts, phone records, work laptops of each of the custodians and the claimants' CRM.
- 35 By the time the submissions had finished, it was recognised, I think, by all concerned that to carry out a search of the CRM would be both unreasonable and disproportionate, by reason of the large number of false positives that it would generate. However, it was submitted on behalf of the defendants that it was wrong simply to look at this as an exercise in identifying whether a particular client was a protected client, because the focus of the issue was both as to that and as to whether there was a breach. I accept that submission.
- 36 Therefore, the first question is whether or not a requirement to search all clients, architects and applicators is wider than is both reasonable and proportionate. So far as that is concerned, Mr Killen had submitted that if a search was to be carried out in respect of each and every one of them, then the exercise would be expensive, time consuming and therefore both unreasonable and disproportionate. He said that the defendants should be required to plead to the list concerned to identify those customers who they disputed as being protected customers. A point made by Mr Patel on behalf of the defendants - accurately, in my judgment - is that this issue was addressed by the defendants' solicitors, JMW, in their letter of 26 October, which attached a schedule under the heading “*John Watson's clients*”, which identified, as highlighted in red, those where there was a dispute, I think, as to whether they were protected clients or not. This led Mr Killen to accept that, at any rate in the first instance, a search against those alone would be an appropriate one. I agree with that approach.

- 37 The second question which then arises is whether or not the search should be conducted against the CRM and, as I have indicated, I consider that would be in excess of what was reasonable and proportionate, since the focus of attention is on whether or not they were protected, which involves demonstrating there were dealings between either Mr Watson or Mr Gray and the entity concerned in the 12 months prior to their departure. In those circumstances, the appropriate areas to be searched are the email accounts of each of the custodians, Mr Watson and Mr Gray, their phone records and work laptops, because that is likely to generate both (a) material which demonstrates, if it be the case, that the disputed clients were protected clients, and (b) either (i) material which demonstrates illegitimate attempts to seduce away, or (ii) possibly exculpatory material. Therefore a search in those terms is both reasonable and proportionate.
- 38 The final issue concerns date range. The date ranges proposed by the defendants in the document are plainly wrong. What needs to be searched is the 12-month period prior to the date when the employment of respectively Mr Watson and Mr Gray ended. That, as I understand it, is 29 January 2021 for Mr Watson, and 27 February 2020 for Mr Gray. Therefore the date range should be the 12-month period ending in those dates respectively for each of those individuals.
- 39 In summary, therefore, there will be a search. The search terms will be the names of the entities highlighted in red in the list to which I have referred. The databases to be searched will be email accounts, phone records and work laptops of each of two custodians, namely Mr Watson and Mr Gray. And the date range will be 12-month period ending with their respective termination of employment being 29 January 2021, and 27 February 2020, as I have said.

LATER (Issue 6)

- 40 The issue I have now got to determine concerns disclosure by the defendants in relation to issue 6. Issue 6 is:
“Did the First or Second Defendants request, cause or encourage the Third and/or Fourth Defendant, or any current or former employee, servants or agents of the First or Second Defendants, to send the Claimants’ Confidential Information to them?”
- 41 The search which the claimants maintain should be carried out by the defendants in relation to this issue involves the searching of a large number of words and names and phrases which include, but not limited to, the names of employees who are said to have remained, and with whom contact is alleged to have been made, but also various more general words and phrases such as “*Flowcrete*” and “*jump+ship*”. The date range that is proposed depends upon who the communication is alleged to have been from or to, but in relation to Messrs Verinder, Greaves and Brookes, it is between 1 June 2018 and 19 March 2021, whereas for Mr Gray it is between October 2018 and 27 February 2020, and Mr Watson a similar start date, ending on 2 February 2021.
- 42 I am satisfied that in principle there should be a disclosure exercise carried out in relation to this topic, and I am satisfied that the search exercise should be carried out by reference to the Vebro and personal email addresses. I am satisfied that the searches should be limited to searches involving the names Rebekah Jones, Gary Chapman, Linsey Perry and Mr Cunningham and Mr Jenkins.

43 The date range is the issue which has perhaps exercised the parties most. The submission made on behalf of the claimants is that the events which lead to this claim commenced on 1 June, and therefore that is the appropriate start date because it is possible that contact was being made prior to either communicant leaving the employment of the claimant. In my judgment, that is in excess of what is reasonable and proportionate in the circumstances of this case. The focus of the date range should be on a period three months prior to Mr Verinder, Mr Greaves, Mr Brookes, Mr Gray or Mr Watson leaving the employment of the claimants, and the date when, respectively, Ms Jones, Mr Chapman, Ms Perry, Mr Cunningham and Mr Jenkins left the employment of the claimant. That captures the possibility that there was contact made by those who left first prior to them leaving, and focuses attention on what is likely to be the most significant period, that is after those listed in the right-hand column of the document we are using had left, and before Ms Jones, Mr Chapman, Ms Perry, Mr Cunningham or Mr Jenkins had left.

LATER (Issue 8)

44 The issue I have now got to determine is how to approach issue 8. Issue 8 is:

“Documents relating to the alleged task given to the Third Defendant by David Black in or around October/December 2020.”

This is, perhaps in microcosm, a particular issue which illustrates the difficulty which has arisen in this case in terms of the failure of the parties to get to grips with the collaborative approach required in order to deal with disclosure pursuant to Practice Direction 51U. The rival contentions on the part of the claimants, are that there should be a search of the relevant email accounts and likewise by reference to search words which include the words “*Underperform*”, “*Favoured*”, “*Leads*”, and “*Task*”, whereas the defendants’ position is, I think, very simply that every email should be examined passing between respectively Mr Black, Mr Smith and Mr Watson in the date range between either 15 October 2020 and 15 December 2020, or perhaps a slightly shorter date range.

45 This is entirely unsatisfactory, and it is entirely unsatisfactory not least because it would involve examining 600 emails. This is not the way in which disclosure under the disclosure pilot is meant to take place. Appropriate search words ought to have been identified collaboratively and the failure to do so is a failure by the parties to engage with the disclosure process appropriately. In those circumstances, I direct that the defendants use best endeavours to supply a list of appropriate search terms relevant to this issue to the claimants by no later than 4.00 p.m. seven days hence. Unless those search terms are agreed, then there will be a further disclosure guidance conference to be listed at the first available date thereafter at 09.30, at which I will resolve the issues on the face of the information then available. In principle, however, I am satisfied that it should be dealt with by search terms. I am not satisfied that the search terms that have been identified are going to be appropriate or responsive, and this is an issue which therefore requires some additional work by the parties before the court becomes involved. Of course if the parties are able to agree search terms, then it will not be necessary to have another guidance hearing.

CERTIFICATE

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