NEUTRAL CITATION NUMBER:[2024] EWHC 3051 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPETITION LIST (ChD)

Claim No: CP-2022-000024 and CP-2022-000053
7 ROLLS BUILDING
FETTER LANE
EC4A 1NL
12 November 2024

Before
MR JUSTICE MARCUS SMITH

BETWEEN:

---

(1) STONEGATE FARMERS LIMITED
(2) CLARENCE COURT EGGS LIMITED
(3) THAMES VALLEY EGGS (PRODUCTION) LIMITED

Claimants

-v-

(1) MICHAEL RICHARD JOHN KENT
(2) PETER DONALD DEAN
(3) NOBLE FOODS GROUP LIMITED
(4) PAMELA JANE CORBETT
(5) RICHARD GERARD HEATON CORBETT
(6) JAMES DAVID SHEPPARD

Defendants

RAHUL VARMA (Instructed by **Forsters LLP**) appeared on behalf of the C**laimants**
JOYCE ARNOLD (Instructed by **Enyo LLP)** appeared on behalf of the **First Defendant**
STUART CRIBB (Instructed by DLA Piper UK LLP) appeared on behalf of the **Second Defendant**
JOANNE BOX (Instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the **Third Defendant**
FRANCIS BACON (Instructed by Loney Stewart Holland LLP) appeared on behalf of the **Fourth and Fifth Defendants**
TOM SHEPHERD (Instructed by DAC Beachcroft LLP) appeared on behalf of Lyons Davidson LLP

APPROVED RULING

Digital Transcription by Epiq Europe Ltd,
Lower Ground 46 Chancery Lane WC2A 1JE
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

MR JUSTICE MARCUS SMITH:

1. I have before me a question as to whether additional protections going beyond those contained in CPR 31.22 should be imposed in regard to documents that will be disclosed pursuant to a particular issue for disclosure in the list of issues for disclosure in these proceedings. The issue for disclosure is Disclosure Issue Number 31, according to the schedule that has been governing the disclosure process in these proceedings. That Disclosure Issue is described as follows in the schedule:

> "The Claimants' financial performance, including in relation to profitability and market share since divestment."

2. Disclosure Issue Number 31 arises from a plea in the Claimants' Amended Particulars of Claim at [79.8]. That reads:

> "The cumulative impact of the above breaches has been to strip the claimants of their most profitable arrangements and assets whilst depriving the company of revenue and opportunities and funds for growth during the period of growth for its market sector. But for such wrongdoing, the claimants would have grown their market share, in particular at the expense of Noble, and traded more profitably. Instead, the defendants dishonestly hobbled their business and effectiveness as a competitor and profited thereby. The claimants seek compensation for the sums that they would have made, net of the sums already recovered under paragraphs 79.1 to 79.7, if they had been allowed to compete effectively."

3. It is quite clear that wide-ranging disclosure as to the Claimants' financial performance will have to be made in the course of these proceedings, both to enable the Claimants to make their case and for it to be tested by the Defendants at trial. No-one disputes that.

4. The reason this category of disclosure needs, according to the Claimants, to be subject to special treatment is because it is particularly confidential, and the normal undertaking in the CPR is not, according to the Claimants, sufficient to protect it. That concern is articulated in various witness statements of Mr Walton, specifically "Walton 7", "Walton 8" and "Walton 9", being the seventh, eighth and ninth statements of Mr Walton. The concern is helpfully summarised in the Claimants' written argument:

> [3] The documents contain inter alia details of the Stonegate Group's customers whom it supplied with eggs, the prices made by those customers to the Stonegate Group, and the prices paid by the Stonegate Group to its producers who supply it with eggs.
>
> [4] The concerns are particularly acute in relation to Noble, which is the Stonegate Group's key competitor in the egg supply market, and which would therefore be in an obvious position to exploit any sensitive commercial information to Stonegate's disadvantage. Leaving aside the unlawful conduct which is the subject matter of these proceedings (see below) which is highly material, even if Noble could be relied upon to comply with the collateral undertaking, it would be unable to disregard the relevant information when conducting Noble's business affairs beyond the proceedings.

5. There have been protracted negotiations and discussions between the parties to deal with the conflicting issues of confidentiality and disclosure. I will not rehearse those negotiations and discussions now, though I anticipate that I will be taken to them when we come to the question of costs, with which this ruling is not concerned.

6. The upshot of these negotiations and discussions has been a draft order that has been agreed between some, but not all, of the parties. The parties that have signed up to a greater or lesser extent to the draft order on the individual side are D2, D4 and D5. I am using the abbreviations rather than the names of the parties, and I mean no disrespect in doing so. D2, D4 and D5 are all individual defendants. They have lawyers on the record, but they are individuals, and I want to stress that, because it is a significant point that informs my approach in this case.

7. I am going to focus for that reason on the agreement that has been reached between C, the claimants, and D3, a corporate defendant. D3 has acknowledged that there is an issue of confidence. It is certainly in dispute as to how wide-ranging the confidentiality protection needs to be, but a mechanism has been built into the draft agreed order to deal with that,. Potentially confidential documents will be identified by C by I think 19 November 2024, such that the parties all know what documents are subject to the special regime and what documents are subject to the ordinary CPR regime.

8. So far, so good. I, as the docketed judge, obviously need to be satisfied that a derogation from the ordinary regime is justifiable. A great deal of authority has been cited to me to that effect. With great respect to the judges who have enunciated it, I am not going to go through the law in any detail, because in this case at least what matters is less the law and more the specific circumstances of this case. It seems to me quite clear that a departure from the CPR default regime needs to be justified. But to be clear, I am satisfied, simply looking at the position as between C and D3, that an appropriate regime has been put in place, that protects both the rights of the defence of D3 and the concerns, which I accept are legitimate, on the part of C.

9. The problem arises in relation to the individual defendants. The burden of opposing the order has been taken by D1 and D6. D2, D4 and D5 has, as I have indicated, signed up to the order to a greater or less extent. But there are broad similarities between the positions of all the individual defendants, and its seems to me that the points made by D1 and D6 are appropriately taken also for the other individual defendants. Furthermore, I am not comfortable in having two distinct confidentiality regimes applying across individual defendants whose positions are, as I have said, not materially different – although, of course, there are some differences, which have been drawn to my attention.

10. D1 and D6 oppose the creation of a confidentiality regime that keeps their individual clients outside the confidentiality ring and not within it. It is therefore necessary to understand the concerns that C have in relation to the individual defendants, as I shall refer to all of the defendants save D3.

11. Cs' concern is not that the individual defendants will themselves use the information disclosed to their benefit because they gain a competitive advantage thereby, the concern is that they will take the confidential information and give it to D3, giving D3 the competition advantage that the parties are seeking to avoid, D3 in particular, by signing up to the confidentiality ring that appears in the draft order.

12. The question, therefore, for me is the extent to which there is a risk that needs to be reflected in an order that requires protection going beyond the norm. This is, as Mr Hollander for the Cs has said, a quite extraordinary case. I am not going to go into the details, partly because they do not matter for the purposes of this ruling, and partly because it would require me to trespass into matters which are much more for trial, because they relate to the merits. I want to say as little as possible about the allegations that have been quite properly pleaded by Mr Hollander, but I take fully into account that very serious allegations have been pleaded, they have not been struck out, and they are going to have to be tried by me in the course of a trial in the coming year. In a nutshell, the allegations concern a concerted effort at circumventing an order by the OFT, as it then was, to demerge. The history as I say does not matter, but what is alleged is the wholesale transfer of confidential information and business between entities that should have been separate but which were not. That was done, according to C, dishonestly. There is an arguable case that in the past there was a transition of information across lines that should never have been crossed.

13. The defendants all deny these allegations, and I hear those denials, but I am going to dismiss them as substantially irrelevant for the purposes of this application. I am not concerned with the merits, I am concerned with arguability, and how arguable issues should frame and inform the disclosure process.

14. Of far greater significance to the question of confidentiality is the fact that time has passed, and the passage of time makes a difference to the approach with regard to the protection of confidentiality in two respects. First of all, most significantly, the regime governing the control and use of confidential material is not the regime that existed in the past, but is a court-controlled regime of disclosure. It can of course be augmented, but the fact is that disclosure is being done by solicitors on the record, whose probity I obviously am going to accept. Communications between the parties, including as regards confidential information, will be between persons who are controlled by those who are running their cases.

15. So it seems to me that the difference between now and then is that there is a heavily lawyered-up process, and one must be very confident that that court-supervised, lawyer-conducted regime is actually going to be illegitimately circumvented before making an order that adds to the CPR default regime.

16. The other point made by Mr Cavender on behalf of D1 is that the situation has moved on in another respect. Not only are we in a litigation environment, but also the interests of most of the individual defendants (except perhaps D2) is such that they have no personal interest in passing information across the line unlawfully to benefit D3, because they have no interest in D3. The exception, possibly, is D2. I say possibly because I have no evidence in this regard, but it may be that D2 has an involvement in D3 that might benefit D2 indirectly. I do not consider that this is sufficient to cause me

to treat D2 any differently from the other individual defendants. I consider that the protections on the ordinary disclosure process are going to be sufficient.

17. If the interests that pertained in the past persisted, and if there was not the protection of legal control over disclosure, there might be a need for protection. That is not the case here, and it seems to me that it is important that we not exclude the individual defendants from seeing the confidential documents, as they are labelled, for the future.

18. Whilst I am satisfied that D3 can appropriately sign up to this order, and have an in-house lawyer, or someone who is not related to the commercial interests of D3, involved in seeing these documents, that is an option which simply does not exist in the case of the individual defendants. If I exclude them from the confidentiality ring, then they will not see these documents unless there is permission to show them, articulated by their legal team. The problem is self-evident. It may very well be that the individual defendant has a better idea as to what matters and what does not matter than the lawyers and experts instructed by them.

19. I have no idea about the intricacies of the egg industry. I am quite sure that at trial I will be educated in all of these intricacies, but the point is that it takes factual and expert evidence to do the educating of the judge, and critical are the people whose feet are on the ground. It seems to me that one should not, without extraordinarily clear requirements, exclude persons from a confidentiality ring, relying on purely external advisers to protect confidential documents. It seems to me that the risk needs to be far greater of illegitimate use than this.

20. On the other hand, it does seem to me that the material that Mr Hollander has articulated is of sufficient need of protection that a confidentiality ring, albeit not the one advocated for by Mr Hollander for C, or indeed Mr Singla for D3, is appropriate. What I mean by that is this: the confidentiality ring should operate as drafted, but the individual defendants should be "in" the ring and not "out" of it. That may be a purely formal change; Mr Cavender took me to undertakings that were offered by D1, and undertakings were similarly offered by other individual defendants to the extent they did not agree to sign up to the confidentiality ring itself. What I am doing is translating the effect of those undertakings into an articulation of a desire to join the confidentiality ring. Of course it is up to the individual defendant whether they do or whether they do not join in the ring. They may want to, they may not. But they should have that option so that when they come in, they can see the documents without any difficulty.

21. It seems to me that in addition, one should have articulated in the draft order an undertaking which every member of the ring must sign, which articulates in terms that are clear to the layperson the importance of preserving the confidential information that is protected by the ring.

22. One of the problems with the default regime under the CPR is that its gravamen and its importance is understood by lawyers, but less often articulated with granular clarity to the clients, who simply want to see more rather than less documentation but who do not realise fully the obligations of seeing that information. It seems to me that this is a case where those obligations ought to be made explicit, so that the parties within the ring, not all of whom will be lawyers, know exactly the implications of entering into the confidentiality ring and seeing that which, in the ordinary course, they would not normally see.

23. I am satisfied that this outcome meets the interests of justice, balancing the importance of confidentiality against the integrity of the disclosure process, and ultimately the question of open justice, for two further reasons.

24. First of all, as was articulated by myself and various of the lawyers before me today, we want a regime that is going to be sufficiently robust temporally, so as not to require frequent adjustment as one comes to review its operation in the context of witness statements and expert reports. Mr Bacon made this point for D4 and D5 with particular force, that if one has an exclusion regime, it will have to be revisited pretty quickly and pretty often as the case develops. The regime that I am directing is not exclusionary in that sense. It enables the individual defendants to be in rather than out, and it seems to me that that is a significant advantage to that which I am directing.

25. Secondly, I am very conscious that it takes two to tango. If one assumes, which I am not, a wholesale desire to breach confidentiality on the part of the individual defendants, they have to give the documents to someone, and D3 is simply not going to accept them; indeed I anticipate that D3, with the legal team that they have, will be the first to raise the alarm bell if the confidentiality regime is in some way infringed. In this regard I note not only is D3 fully represented, and is a substantial corporation, but also there has been a moving on of personnel from the ancient history of the demerger that was allegedly thwarted, such that there may not even be a conduit between the individual defendants and D3 by way of which confidential material can successfully be transferred.

26. In these circumstances, it seems to me that the order that I have directed be made in outline is the order that should be made. I am not drafting, I will leave it to the parties to come up with a form of order that meets what I have directed, which I will review in due course.

Costs

27. Following on from my ruling on disclosure, , I now have the question of costs.

28. I will begin by just setting out, not to the last decimal point but in broad brush terms, the costs that are claimed by the various parties: C, £79,000. D1, £120,000. D2, £62,000. D3, £215,000. D4 and 5, £41,000. D6, £17,000. The total value at risk, if I can call it that, is £534,000 or thereabouts.

29. These are depressing figures. I appreciate that this is hard fought and hugely important litigation for all concerned. But the fact that I have six parties before me on not a particularly difficult application arising out of a disclosure process that has been closely supervised by the court is disappointing. All of the parties have conceded that this application should not have been before the court, but of course they all differ as to who is to blame and who should bear the costs.

30. It is clear that, to a greater or lesser extent, all of the parties have contributed to this outcome. As a reflection of that fact, no-one quite has the order that they wanted. C has obtained a degree and measure of protection of documents. That protection could and should have been obtained by agreement, but to that extent there has been a measure of success. Of course, D3 has conceded a form of order, and the other individual defendants have, rowing in behind D3, sought, albeit at a late stage, to cooperate. That is not to say that C themselves are not at fault. The application was made late. It could be said that the wrong approach was taken, but for good reasons; there were good reasons for seeking protection.

31. The question I therefore have is what is the appropriate global costs order to reflect these unfortunate causes of increased costs? I am going to make a series of orders which are nested and interlinked, and it seems to me that some connection between these orders is readily apparent. I make that clear for the record.

32. The first order is that C does not recover their costs. I say that, although I have already said that I see why the claimants made the application that they did, but I do not want the claimants recovering their costs of this matter.

33. Before I proceed to the defendants' costs orders, I should make a point about timing which Mr Hollander identified, and rightly so. It is going to be quite difficult to separate out the costs of this application from the ordinary costs of disclosure that would have been incurred in any event. That clearly is a matter for detailed assessment, and it may very well be that the borderline of what the claimant cannot recover out of this application, and what it can recover, should it be successful in the action, are ordinary costs in the case. That is something which a costs judge is going to have to take a careful look at.

34. Moving on then to D3. I start with D3 because it seems to me that D3 was the key to unlocking this application. Mr Hollander in submissions made the point that Mr Robinson, the solicitor of D3, unlocked this in conceding that confidentiality was to be acceded to in relation to at least some of the documents in issue. It seems to me that that right. Without that concession, limited as it was and in response to an over-broad request for confidentiality, it was only when that concession was made that things began to move.

35. The other individual defendants, quite understandably, are in this case the tail following the main litigation and disclosure dog in the shape of D3. That is why I begin at D3. It seems to me that D3 should have their costs in the case, but that those costs should be capped at £100,000. That I do not by way of anticipation of detailed assessment. I would encourage whichever costs judge looks at this in due course to be singularly aggressive in looking at everyone's costs here. But the reason I am capping matters at £100,000 is not because I think that the costs will be cut down from £215,000 to rather less than that -- though I suspect they will be -- I am doing so because of the fact that I consider that there is a degree of fault and intransigence on the part of D3 as well as on the part of C, which means that this is the nuanced order that I am making. So it is D3's costs in the case, capped at £100,000.

36. Turning then to the individual defendants. I am much more troubled by their position, because it seems to me that they needed to take their lead from what D3 and C could agree amongst themselves, and it was only when there was a broad understanding of what confidentiality regime would be acceptable to those parties that they could reach any position as to what their stance would be, because the source of the need for protection is the provision of competitive material produced in disclosure by C to D3, its competitor.

37. The risk that one is seeking to avoid is the transmission from C to D3 of confidential material via one of the other defendants. I indicated in my earlier ruling why I consider that to be less probable and why I am happy to have the individual defendants in, rather than out, of the confidentiality ring, but the fact is that could only be considered right at the end, when the outline of the agreement between the parties D3 and C had been identified.

38. So it seems to me that the individual defendants ought to have their costs, but I consider that there should be a detailed assessment of all costs save D6, whose costs are at £17,000. Those costs can be summarily assessed in that amount, and I do so. So D6 receives an award of 100 per cent of their costs. The other individual defendants have their costs to be assessed on a detailed assessment, but with a payment on account that is limited to £25,000 in each case.

39. Again, I make a strong indication that the costs of all of these defendants should be scrutinised quite closely, but I do not consider that I am in a position, given the history, the amount of correspondence, and the sheer detail that is in the files before me, that I can make any form of summary assessment going beyond £25,000.