Neutral Citation Number: [2022] EWHC 1309 (QB)

Case No: QB-2021-000899

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2022

Before:

RICHARD HERMER QC, SITTING AS A DEPUTY HIGH COURT JUDGE

Between:

(1) CAMBERLEY GROUP **(2) CAM LOCK LIMITED** **(3) BROADOAK MANUFACTURING LIMITED**	**Claimant**
and	
(1) MR PAUL FOSTER **(2) MR MARK PILLING** **(3) Ms SUCHADA CHURAT**	**Defendant**
and	
PETER FOSTER **CJ CARTER LIMITED**	**Non-Party Respondents**

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Mr Mark Stephens (instructed by **Laytons LLP**) for the **Claimants**
Mr James Wibberley (instructed by **Blake Morgan LLP**) for the **First Defendant**
Mr Mark Pilling (acting as Litigant in Person on his own behalf and that of his wife) the **Third Defendant**
Hearing dates: 13 May 2022

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Approved Judgment

Covid-19 Protocol: this judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time of hand-down is 10.30am on 27 May 2022

RICHARD HERMER QC

1. This is an application for disclosure, made pursuant to CPR 31.17, against two persons who are not parties to these proceedings.

2. An application for disclosure was also pursued against all three defendants to the proceedings. The Claimants sought orders for specific disclosure, pursuant to CPR 31.12, against each of them. At the conclusion of a full day of argument, however, the Claimants and Defendants were able to reach agreement apart from the question of the costs of the application. Accordingly, I divide this judgment into two parts. Firstly, I address the applications for non-party disclosure. Secondly, I address the discrete cost dispute arising out of the Claimants' application for specific disclosure against the Defendants.

3. Before turning to the substance of the applications it is necessary to say something about the subject matter of the dispute in order that the request for documents can be put in context. Needless to say, what follows is no more than a broad summary and nothing contained within it should be taken as expressing a view on the merits of any aspect of the claims or defences, which will be a matter exclusively for the trial judge.

4. The Claimants are a group of companies involved in manufacturing plastic and rubber products. At the time material to the claim, the First Defendant was employed as the Managing Director of the Second and Third Claimants, the Second Defendant was the General Manager of the Third Claimant and the Third Defendant (who is married to the Second Defendant) was employed by the Third Claimant.

5. The pleadings set out the following causes of action against each Defendant.

i. The First Defendant is alleged to have acted in breach of a warranty given to the First Claimant as part of a settlement agreement concluded at the termination of his employment. It is alleged that the First Defendant warranted that at the date of the agreement he was unaware of any material breach of the terms and conditions of his employment that might have justified summary dismissal. The First Claimant alleges that it subsequently discovered that the First Defendant had misappropriated funds, including for home improvements, and that this amounted to a breach of warranty. The First Defendant denies this aspect of the claim. He avers that the claim is brought improperly against him by his former father in-law, Mr Griffiths, said to be the ultimate owner of the Claimant companies, as a means of punishing the First Defendant for perceived poor treatment of his daughter. The First Defendant avers that he has never misappropriated funds and the monies received were authorised by Mr Griffiths.

ii. The First Defendant is also alleged to have unlawfully induced the Second Defendant to breach his contract of employment with the Third Claimant. It is alleged that in or around March 2019 the First and Second Defendant created a business plan to start a new venture to compete with the Third Claimant. The Claimants aver that in pursuit of this plan, the First and Second Defendant located business premises, improperly obtained confidential information about compound formulae for client products to be shared with third parties, and contacted long-standing clients of Third

Claimants (including CJ Carter Limited, one of the respondents to the non-party disclosure application) to lure away business. It is said that as a result of these actions, CJ Carter Ltd moved its business away from the Third Claimant. The First Defendant admits that he briefly considered setting up a technical rubber business, but he quickly concluded that it was not a financially viable option. He denies trying to set up a business with the Second Defendant.

iii. A claim for breach of contract is pursued against the Second Defendant by the Third Claimant in respect of what are alleged to be the steps taken to create a competitor business. The claim includes damages for the loss of the business of CJ Carter Ltd. The Second Defendant admits creating the draft business plan and to having discussions with the First Defendant. It is averred that these are no more than preparatory steps and were not prohibited by any material obligations owed to any of the Claimants.

iv. A claim for misappropriated funds is also brought against the Second Defendant which is denied.

v. A claim is brought against both the Second Defendant and Third Defendant. This arises out of the Third Defendant's employment with the Third Claimant. It is said in essence that the Second and Third Defendant conspired to claim wages for periods of time when the latter was either not working at all for the Third Claimant or was not working the amount of time claimed. The Defence avers that the Third Claimant was only paid for hours she actually worked.

Applications for disclosure against persons not a party to the proceedings

6. CPR 31.17(3) provides that a Court may make an order only where:

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

7. Orders under CPR 31.17 have been described as the '*exception not the rule*' Frankson v Secretary of State for the Home Department [2003] EWCA Civ 655 and that the Court "*has a clear obligation to ensure, if necessary of its own motion, that this instrusive jurisdiction is not used inappropriately even by consent*" Gary Flood v Times Newspapers [2009] EWHC 411.

8. The Claimants have brought their application against two non-parties and I consider each in turn.

Peter Foster

9. Mr Foster is the father of the First Defendant. He was not present at the hearing nor represented.

10. Prior to the issue of the application the Claimants, through their solicitors Laytons, made a single request of Mr Foster to provide documents. In a letter dated 9 March 2022 they requested that he provide specified documents within a week or face an application compelling him to hand them over. There was no response and the application was issued. The application was sent to Mr Foster at an address in

Kettering and by email. Mr Foster has not responded to the Claimants' application even to acknowledge receipt.

11. The Claimants allege that Mr Foster assisted in facilitating the plans of the First and Second Defendant to start their new business including taking on a business premises. The evidential basis for the application is contained in the witness statement of Mr William Slater, solicitor for the Claimants dated 25 March 2022. Although Mr Peter Foster's involvement with the case is set out in the pleadings and by way as part of a general description of the claim in Mr Slater's statement, only one paragraph of that statement is specifically addressed to the non-party application against him. Save for the lease of the business premises rented by Mr Foster, nothing is said in the witness statement about the specific documents sought in the of the draft order (pertaining to him) nor is any explanation proffered as to how the tests in CPR 31.17 have been met. The matter was not materially elaborated upon in either of the two skeleton arguments served by Mr Stephens, counsel for the Claimants.

12. On the morning of the hearing, an amended draft order was provided. This sought to attach a Penal Notice to the Order (without prior notice to the parties or the respondents) and sought additional documents from Mr Foster beyond those initially demanded in the application. It is unclear whether any attempts to draw this amended version of the draft Order to Mr Foster's attention were made. In my judgment it is plainly inappropriate to seek to attach a Penal Notice to a proposed order, for the first time and without notice, at the start of a hearing. This point applies to the applications for specific disclosure against actual parties (sought on the same composite draft order) but it is even more obvious in respect of an application against non-parties who have not been subject to, let alone breached, any extant orders of the court.

13. A more fundamental problem with the application is whether Mr Foster was properly served with the application in the first place, in particular whether due regard was had to the possibility that his usual residence was France and was not England & Wales.

14. On 2 March 2022, Blake Morgan, solicitors for the First Defendant informed Laytons that Peter Foster lived predominately in France. On 22nd March 2022, in response to a request from Laytons that they accept service on Mr Foster's behalf, they made plain that they did not act for him.

15. This correspondence should in my judgement have put Laytons on notice that Mr Foster was potentially usually resident outside of England & Wales and/or that the address they possessed for him was not his last known residence. The need to consider proof of service might be thought to be particularly important where an 'intrusive' order is sought against a non-party.

16. CPR 6.9(3) provides:

"*Where a claimant has reason to believe that the address of the defendant……..is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant's current residence or place of business ('current address').*

17. Although CPR 6.9 is addressed to service of a claim form, the same principles apply to service of other documents under CPR 6.20.

18. Mr Foster was served with this application by sending it to an address in Kettering and by email. This is a postal address that he appears to have used on some documentation shown to the court and it also seems clear that he has shared the email address with his son. Those facts do not, however, demonstrate that he is usually resident in England when seen in light of the information the Claimants have possessed since early March, namely an assertion that Mr Foster was living in France for the majority of the time. That should have put the Claimants on notice that his usual or last known address might not be in England and that reasonable steps should be taken to ascertain the position. The Claimants took no such steps. The need for some element of verification of service was underlined by receipt of the signed statement of the First Defendant who stated in terms that his father spent the majority of time in France.

19. It may be that Mr Foster spends sufficient time in England, or did at the time relevant to service, to deem that he has his usual residence here, but the position is far from clear and the Claimants have taken no steps to ascertain the position. I reject the submission advanced by Mr Stephens that the burden of proving service does not rest on the party serving the documents and simply because Mr Foster has not replied from the email address he is known to use he can be deemed to have been served – that is irreconcilable, amongst other things, with the clear terms of CPD 6.9(3). If Mr Foster is not usually resident in England or Wales but rather outside of the jurisdiction in France, then there is no dispute that he was not properly served. On the materials before me I am not satisfied that the Claimants have shown good service and for this reason the application is dismissed without the need to consider the substantive merits.

C J Carter Limited

20. As set out above, the Claimants allege that the First and Second Defendant conspired to set up a business in competition to them. The Claimants' case includes an allegation that this included an approach to CJ Carter Limited who it is said consequentially moved their existing business away, albeit not to the Defendants who (it is agreed), never actually set up any competing business.

21. Mr Carter did not attend the hearing, nor has he been legally represented. He made plain to the Claimants that he would not be attending.

22. Mr Carter was first contacted by Layton's on 30 July 2021 asking him to provide evidence and stating that if he did not, they might seek to summons him. Mr Carter replied on 18 August 2021. His response explained that the reason he moved his business was unconnected to the First and Second Defendants but rather was in response what he considered the distasteful attitude of the Claimants. He stated that he had no interest in meeting with Laytons and did not believe he held relevant evidence.

23. Laytons responded to this letter on 4 October 2021. They stated that they had evidence that conflicted with Mr Carter's account (although they did not specify what it was) and requested that he repeat his account on a sworn affidavit. Layton's

also requested that Mr Carter provide the 'metadata' embedded in his reply of 18 August 2021.

24. Layton's wrote to Mr Carter again on 9 March 2022 asking him to provide a witness statement and documents. The letter gave Mr Carter a week to respond and stated that, absent his agreement, they would apply for an order. The application was duly made on 25 March 2022.

25. On 11 April, Laytons wrote to Mr Carter informing him of the forthcoming hearing. Mr Carter responded the following day stating that 'CJ Carter Ltd' had never done any business with the Third Claimant and asking Laytons to "*please stop contacting me as I find your email very intimidating*"

26. On 3 May 2022 Layton's wrote again to Mr Carter. They made plain that they had not meant to intimidate Mr Carter but did seek his assistance. They asked him to clarify what he meant about 'CJ Carter' having no business with the Third Claimant and enclosed some documents suggesting that this was not the case drawing his attention to references in his earlier letter to 'my company' and a search showing that CJ Carter Limited was the only business in which he was a director.

27. Mr Carter responded on 9 May 2022. He apologised for the delay in responding, explaining that he was unwell and still recovering from admission to hospital. Mr Carter responded to the request to clarify his comments about business with the Third Claimant, he stated:

"*CJ Cater was set up for export only and has never done any business with any companies within the UK. All UK business is done via CJ Carter sole trader*."

28. Laytons did not respond to the substance of this point. On 10 May 2022 they wrote to Mr Carter informing him that this hearing had been listed for later in the week and stated to him that:

"*Skeleton arguments are due to be exchanged today. Would you please confirm when you propose to do so? Our barrister's clerk will be ready to do so from noon today.*"

29. I drew my concerns about this communication to Mr Stephens' attention. Contrary to the clear implication of the email, there was no direction at all that required Mr Carter to produce or exchange a skeleton nor any explanation to unrepresented non-party as to what a 'skeleton argument' actually is. The response by Mr Stephens that the email was only addressing the Claimants and Defendants obligations to exchange written arguments and was not suggesting to Mr Carter that he needed to, does not withstand scrutiny when applied to the plain words used. Similarly, my concern that the unexplained use of the term 'skeleton argument' might not be readily understood by an unrepresented individual was not adequately justified by Mr Stephens' proclaiming that Mr Carter could simply have 'googled it'. If in fact Mr Carter, an unrepresented non-party, had felt intimidated by the correspondence to date, then this email could reasonably have expected him to feel worse.

30. Mr Carter replied on the same day. He stated he was not attending the hearing as he was unwell. He also stated that he did not have any relevant messages about moving his business to any person, "*There are none as they did not exist*".

31. This application is, and has always been, against CJ Carter Limited not Mr Carter personally. They are distinct and separate legal personalities albeit it appears that Mr Cater is the sole director of the former. It is clear from the correspondence that from at least 11 April 2022 Mr Carter had raised the issue as to whether 'CJ Carter Ltd' had any business with the Claimants at all. He clarified the position, by request, on 9 May 2022 to make plain that whilst he had business with the Claimants that had been in his capacity as a sole trader. He explained that this was distinct from CJ Carter Ltd, of which he was a director, that had no business at all with the Claimants.

32. This plainly raises an issue as to whether the correct Defendant has been served. It is for the applicant Claimants to demonstrate to the satisfaction of the court that the respondent to a non-party application is the correct party, including that they are likely to possess relevant and necessary documentation. It would have been open to the Claimants to seek to demonstrate that Mr Carter's assertions were wrong, not least that they had traded with CJ Carter Ltd not (or as well as) Mr Carter as a sole trader. As it was, the Court was not presented with any evidence of this nature nor did Mr Stevens seek to demonstrate why it must be the case that relevant documents were held by the respondent company rather than the individual. Rather, Mr Stevens sought to contend the Court should proceed as effectively treating CJ Carter Ltd and CJ Carter as a single entity who could be subjected to an order from the court in either capacity.

33. I reject such an approach as wrong in principle. The application has always been predicated on the pleaded allegations that the First and Second Defendant sought to improperly obtain business from CJ Carter Limited and consequentially the Claimants lost work from CJ Carter Limited. It was accordingly CJ Carter Limited against whom the application was made. The point having been raised by Mr Carter that the Claimants had identified the wrong 'Carter' it behoved them to satisfy the Court that the application remained valid. They have failed to do so. This is not a mere technicality – as with the question of service, in an application to serve a non-party, it is essential that the fundamentals of an application, namely good service on the correct party, are addressed and the burden of satisfying them that they have been rests on the applicant. None of this is to determine as a matter of fact the role that Mr Carter played as alleged in the Particulars of Claim (whether as a sole trader or as the director of CJ Carter Limited), that will be a matter for trial. For the purposes of this application however, the Claimants have failed to satisfy me that they have issued an application against the correct legal personality.

34. Had Mr Foster and Mr Craig attended and/or been represented at the hearing they would have been entitled to recover costs against the Claimants. Although it still remains open for the Court to make an adverse costs order against the Claimants, in light of the minimal involvement of Mr Craig to date and the complete absence of any response at all from Mr Foster, it consider it appropriate and proportionate to make no order for costs.

Costs

35. I turn next to consider the outstanding applications for costs arising out of the Claimants' applications for specific disclosure against the Defendants. I deal first with the application against the First Defendant.

The First Defendant

36. Although at the conclusion of the hearing the parties agreed the terms of an order, I set out below a short history of the request for documents not least because it will assist in explaining the decision I have reached below in respect of costs.

37. The Claimants and First Defendant exchanged lists of documents, by way of standard disclosure, on 14 February 2022. The following week the Claimants' solicitor, Laytons, wrote to the solicitor for the First Defendant (Blake Morgan LLP) asserting that various categories of documents had been wrongly withheld from the list and setting out nine detailed questions relating to what were said to be missing documents. Laytons stated that in the absence of an adequate response they would issue an application for specific disclosure.

38. Blake Morgan responded by letter of 2 March 2022 providing their clients responses to each of the nine questions raised. This in turn was responded to by Laytons on 15 March 2022. They asserted that the responses from Blake Morgan were inadequate and would therefore be issuing an application for specific disclosure. No explanation was given as to why it was said that the First Defendant's responses had been inadequate.

39. On 22 March, Blake Morgan wrote back pointing out that they had not been told why the application was inadequate nor "*what information or documents you consider remain outstanding.*" Blake Morgan asserted that in such circumstances any application for specific disclosure would be premature. Laytons emailed back on the same day. They asserted that it was not for them to point out how the First Defendant was to comply with its disclosure obligations but that "*he had obviously failed to do so*". Laytons provided the terms of the specific disclosure order they were seeking against the First Defendant and demanded a response by 4pm the following day (their email was timed at 17.49). Blake Morgan responded by noting, amongst other things, that they would not be able to respond within such a short period of time but would seek to do so as soon as possible, which they did not expect to be within 14 days. Layton's response to this email, sent later that evening, refused to change their unilaterally imposed deadline. A further attempt the following morning by Blake Morgan to persuade Layton's to extend time for answering their requests was similarly rebuffed.

40. On 25 March 2022 the Claimants issued this disclosure application. It contains, at Schedule 3 to the draft order, a list of documents sought from the First Defendant. Blake Morgan wrote to Layton's on the same day. They once again asked for further details as to how it is said that the answers provided to date were inadequate, maintaining that the most proportionate way to deal with the Claimants concerns would be to have those concerns explained to them.

41. On 5 May 2022 the First Defendant served a witness statement which, over 44 paragraphs, addresses the points raised in the Schedule, many of which mirror responses in Blake Morgan's letter of 2 March 2022.

42. On the morning of the hearing the Claimants produced a further version of the draft order. This sought to introduce, without notice to any of the parties or respondents, a Penal Notice to the draft Order. In respect of Schedule 3 it also sought to

introduce a number of additional documents to the request for specific disclosure, which had never previously been sought even in correspondence.

43. During the course of submissions, I sought to ascertain from Mr Mark Stephens, counsel for the Claimants, the reasons why these newly requested documents had not been previously sought. I also sought to ascertain the extent to which it was said that the remaining requests had not been addressed in the First Defendant's witness statement and the earlier letter from his solicitor. Irrespective of the truth of the contents of that statement and/or letter, it was my preliminary impression that they had provided definitive answers to the requests made and that the requests now sought were duplicative. With respect to Mr Stephens, he was unable to give me a clear answer to either question.

44. In the course of his helpful submissions Mr Wibberley, counsel for the First Defendant, made plain that notwithstanding his client's provision of answers in his earlier statement, he would be prepared to answer the additional points raised on the morning of the hearing. He submitted that his client's stance was consistent with the approach taken thus far of seeking to cooperate and was designed in part to demonstrate that his client had 'nothing to hide'.

45. At the conclusion of Mr Wibberley's submissions, Mr Stephens indicated that he might be prepared to agree a way forward. Having permitted the parties some time for discussion an agreed form of Schedule 3 was provided that narrowed down the scope of the documents sought, resolving all issues between them on the application apart from costs.

46. On 17 May 2022 the parties exchanged written submissions on costs.

47. In my judgment the appropriate order is that the Claimants pay the costs of and occasioned by the application on the indemnity basis.

48. I have reached this conclusion for two connected reasons. Firstly, because I consider that the Claimants are the unsuccessful party (within the meaning of CPR 44.2(2)) and because of what I consider to be the unreasonable conduct of the Claimants in pursuing the application in the manner that they did against the First Defendant (per CPR 44.2(4)(a))

49. The Claimants application sought wide ranging disclosure (and explanations for searches undertaken) in respect of documents which had been significantly addressed in Blake Morgan's letter of 2 March 2022 and then almost entirely answered in his witness statement of 5 May 2022. It may be that at trial the assertions set out in those documents will be shown to be untrue or misleading but that is not for the Court to determine at this interlocutory stage (despite repeated entreaties by Mr Stephens). At this juncture, the relevant point is that the documents have already been requested and the other party has provided a signed witness statement providing them or explaining why they do not exist. It is very difficult to divine what purpose was sought to be served by the application – had the Claimants not effectively abandoned most of it at the hearing then the application would have been dismissed. The position was even more stark in respect of the 'new' requests inserted into the draft order produced on the morning of the hearing,

together with the previously unheralded Penal Notice. No good explanation was provided for the timing.

50. The conduct of the Claimants in the weeks leading up to this application was unreasonable. At each juncture the First Defendant's solicitors were asking, entirely reasonably in my judgment, for explanation as to why their responses were deemed 'inadequate'. They received no reasonable response, wholly contrary to the spirit of the overriding objective. In my judgment the combination of outcome and conduct justifies an order that the Claimants pay the costs and that they be assessed on the indemnity basis.

The Second and Third Defendant

51. The Second and Third Defendants no longer have legal representation. At the hearing, Mr Pilling, the Second Defendant represented himself and his wife, the Third Defendant (who was not present).

52. Until very shortly before the hearing, they had wholly failed to comply with the terms of the disclosure order first made by Master Sullivan on 11 October 2021. The Second Defendant attended that hearing before the Master and represented himself and the Third Defendant. The terms of that order were varied by consent and ultimately required disclosure by exchange of lists on 14 February 2022.

53. In the absence of a list from the Second and Third Defendants, Laytons wrote to them noting that they were in breach of their disclosure obligations and requiring an update from them. Some correspondence followed in which the Second Defendant promised that disclosure would be forthcoming. As it was, he did not provide a list until 10 May, a few days before the hearing and 3 months later than ordered.

54. At the hearing before me, Mr Pilling was unable to offer any good reason for non-compliance with the order. He stated that he had not really turned his mind to it. He accepted that he should have done and that he would now comply with the order.

55. At the prompting of the Court, Mr Stephens narrowed down the terms of his draft order and redrafted it in terms that would be readily understood by a litigant in person. Mr Pilling consented to an order in these terms.

56. The parties were invited to make any submissions on costs in writing. The Claimants produced written submissions, but Mr Pilling did not.

57. In my judgment taking into account the flagrant breach of Master Sullivan's order and the admission that there was no good reason for it, the only appropriate order in these circumstances is that the Second and Third Defendant pay the Claimants costs of the application in so far as it relates them.