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Neutral Citation Number: [2022] EWHC 505 (QB)

Case No: QB-2022-000754

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 March 2022

Before :

MR JUSTICE BENNATHAN

Between :

CALOR GAS LIMITED

**Applicant/
Claimant**

- and -

- (1) **JAMES STEPHEN WILSON**
- (2) **TIMOTHY BARRY MASSEY**
- (3) **SID'S DIY LIMITED T/A KINGS HEATH DIY**
- (4) **SULEMAN HUSSAIN**
- (5) **THE GAS STATION STIRCHLEY LIMITED**
- (6) **JONATHAN TAPPER**

**Respondents/
Defendants**

Anthony Peto QC and Celia Rooney (instructed by Knights PLC) for the Applicant/ Claimant

Hearing date: 8 March 2022

JUDGMENT

Mr Justice Bennathan :

Introduction

1. The Claimant is a large and well known company that sells liquid petroleum gas [“LPG”]. In this application the Claimant applies for search orders and related orders against three entities and the people associated with them, under section 7 of the Civil Procedure Act 1997.
2. The Claimant’s business, in the simplest terms, consists of it making cylinders available to its distributors and ultimate customers and selling the liquid gas within; the two necessary essentials of that part of the business is that the Claimant retains ownership of the cylinders and only it can refill them. The fact the Claimant alone refills the cylinders both allows it to make a profit and to ensure high standards of safety in that process.
3. According to the Claimant’s application, the Defendants are:
 - (1) James Wilson and Timothy Massey who together run a business trading as Bloxwich Hardware and DIY at 7, Elmore Row, Bloxwich, Walsall [“Bloxwich”]. The premises at 7, Elmore Row appear from a Land Registry Plan to be the same premises as 119 High Street, and Bloxwich also has use of a yard at the rear of 192 to 198, High Street, Bloxwich.
 - (2) Suleman Hussain who owns Sid’s DIY Limited, trading as Kings Heath DIY at 276, Alcester Road South in Birmingham [“KHDIY”].
 - (3) Jonathan Tapper who owns a business called The Gas Station Stirchley Limited at 1249, Pershore Road, Birmingham [“TGS”].
 - (4) The 2 limited companies, KHDIY and TGS.

Law

4. In dealing with this application, I have had the great advantage of reading the judgment of Mr Justice Fordham in *Calor Gas Ltd v Chorley Bottle Gas Ltd and Others* [2020] 4 WLR 129 [“Chorley”]. Given that decision granted a similar application to the same Claimant in similar circumstances, I adopt that judgment’s description of the law and procedure with both gratitude and minimal repetition.
5. The hearing was not on notice and was held in private. I was satisfied that to require the Claimant to give notice or to hold the hearing in public would defeat the purpose of the hearing. My aim is for this decision to be made available to the Claimant in writing shortly after today’s hearing so it can be served on the Defendants and/or their legal representatives and be published on or before the return date. I am satisfied that this temporary derogation from open justice and inter partes litigation is proportionate and proper in this case.
6. The Claimant has undertaken to issue a claim against the Defendants [on that basis I use the term “Claimant” and “Defendants” for consistency though technically at this preliminary stage they are “Applicant” and “Respondents”]. The material put before the Court includes a draft order, draft claim form, Skeleton Argument, written application, and affidavits sworn by Rowan Marshall-Rowan [General Counsel and Company Secretary of Calor Gas Limited, the Claimant] and Henry Betts [the Claimant’s National Engineering and Process Safety Manager] with attached exhibits,

and I have heard submissions advanced by Mr Peto QC and Ms Rooney, Counsel for the Claimant.

7. The conditions that must be fulfilled before the Court grants the sort of highly intrusive search order sought in this case are [to set them out in the order addressed by Fordham J in *Chorley*]:
 - (1) A strong *prima facie* case on the claim.
 - (2) Clear evidence of incriminating items in the possession of the Defendants.
 - (3) Risk of removal if the order is not granted.
 - (4) Serious harm to the Claimant if the order is not granted.
 - (5) That the order is proportionate.

Facts

8. Before considering those conditions in turn, I should summarise the evidence placed before me. The three businesses are all within perhaps 10 miles of each other. Bloxwich and KHDIY have signed contracts as retailers with the Claimant that include terms that specify:
 - (1) The cylinders remain the property of the Claimant.
 - (2) Only the Claimant may refill the cylinders.
 - (3) The retailers must not buy LPG from any other supplier.
 - (4) The retailers must not “*sell, transfer, charge, pledge, loan or otherwise dispose of or give up possession or control of any cylinders unless agreed by the [Claimant] in writing*”
9. TGS is not one of the Claimant’s retailers: It is, according to its website, a long established business supplying gas to a variety of customers. Mr Tapper, again according to the website, has a long history in the business and has built relationships with many gas users.
10. The starting point for the Claimant’s concerns was a steep decline in the gas bought by Bloxwich coupled with reports of an unmarked tanker attending those premises. That led to the Claimant deploying private investigators: In November 2019 they witnessed the Claimant’s cylinders being taken from, then returned to, the Bloxwich premises. They followed the van that had performed those 2 actions and that led them to the TGS premises. Later the same month an unmarked tanker belonging to TGS attended at the Bloxwich yard and appeared to be filling up the Claimant’s cylinders. There were plans to repeat the surveillance, but Covid intervened.
11. In August 2020 a van used by Bloxwich was seen entering the TGS yard, then the same van later returned to Bloxwich seemingly more heavily weighed down. In the same period KHDIY was seen to load a van with empty cylinders including those of the Claimant, on a day when the Claimant had delivered to that business: this was seen as significant as the obvious course would have been for KHDIY to send back any empty cylinders by way of the Claimant’s vehicle.
12. In December 2021 observations saw cylinders from Bloxwich, bearing the Claimant’s markings, being filled up in premises at TGS: film was obtained that seemed to show Mr Tapper [of TGS] and a man similar to one of the proprietors of Bloxwich filling those cylinders. On this occasion those observing noticed, to their surprise, that Mr

Tapper was smoking while carrying out that task, an obviously dangerous thing to do. In the same investigation a van was seen to leave TGS and drive to KHDIY, whereupon cylinders were unloaded.

13. Further investigations were carried out in late February 2022 at TGS. On that occasion there were, once more, the sounds of cylinders being filled, and vans seen which were from both Bloxwich and KHDIY. The February investigations report, however, recorded that the investigators saw a number of signs that precautions were being taken to obstruct any view of what was being done at TGS premises, with vehicles parked so as to block the line of view, gaps in the fabric of the shed being filled in, and men stationed in vehicles on the street who appeared to be keeping a look out.
14. The reports of all these investigations are exhibited by the Claimant's witnesses, accompanied by captured images of some of the events described. The submission made on the Claimant's behalf, which I accept, is that there is clear and persistent evidence that both Bloxwich and KHDIY are using TGS to refill the Claimant's cylinders and, significantly, this year has brought a realisation to those engaged in this activity that they are in danger of being discovered.
15. Mr Betts comments on a number of aspects of the operation seen at TGS which, above and beyond the "smoking" incident, leads him to suggest there are real concerns about the unsafe manner of how LPG is being handled.
16. Against that summary of the evidential material relied on by the Claimant, I turn to consider the 5 matters of which I must be satisfied before granting the order sought. I repeat and stress: the order being sought is unusual and highly intrusive and, as such, the Court must exercise great care and scrutiny in considering whether to grant it.

A strong prima facie case

17. There are 2 aspects to an assessment of whether there is a strong prima facie case: Is the activity alleged shown to have occurred? Would it proffer a basis for a legal claim against the Defendants? After considering the evidence of the activities I have summarised above, I am in no doubt that there is compelling evidence that Bloxwich and KHDIY have been using the services of TGS to refill the Claimant's cylinders.
18. The various causes of action that arise from the facts in this case vary between the Defendants who have a contract with the Claimant, Bloxwich and KHDIY and associated individuals, and those who do not, TGS and Mr Tapper.
19. The retailers could be liable for breach of contract, breach of a fiduciary duty, trespass to goods, passing off and an unlawful means conspiracy. TSG could be liable for trespass to goods, passing off, and an unlawful means conspiracy. The elements of these various actions are set out very fully in the documents served for this hearing by the Claimant. Some would require knowledge of the wrong being committed but on the facts before me that does not seem lacking given 2 of the Defendant entities have contracts with the Claimant and the third has self-proclaimed long experience in the gas supply industry and the terms on which the Claimant trades must be well known to those with such experience. In addition, the way in which there have been attempts

to conceal the activity support the argument that those engaging in it are well aware they should not be doing so.

20. For these reasons I am satisfied that there is a strong prima facie case for the claim that the Claimant has undertaken to lodge and which I have seen in draft form. I would stress that at this stage of the proceedings I am not making findings of fact and it would not be proper to do so given I have not heard the other side of the argument from any Defendant. Nonetheless, the tests that have to be met before granting this type of order require me to assess evidential matters at this stage. I should add that the Claimant has gone to some lengths to alert me to the possible arguments against the grant of this order, most fully in the affidavit of Mrs Marshall-Rowan.

Clear evidence of incriminating items in the possession of the Defendants

21. On the facts of this case, this requirement is addressed by the same material as I have summarised and discussed above, namely the evidence of the various investigations. For the same reasons I am satisfied there is powerful evidence that the various Defendants will be in possession of incriminating items.

Risk of removal if the order is not granted

22. For the reasons I have identified above, it is an obvious inference that all those participating in the conduct complained of will know it is in breach of the Claimant's contract terms. Further, the various efforts at concealment seen during the February investigations supports the contention that the participants realise they would be in serious difficulties if their activities are brought to light. In addition, and in respect of TGS, anyone with long experience of this highly regulated industry will inevitably realise the manner in which cylinders are being refilled fails to meet basic safety standards. Taken together these factors leave me in no doubt that there is a real risk that, if warned, the various Defendants may well take immediate steps to remove or conceal evidence of these activities.

Serious harm to the Claimant if the order is not granted

23. The Claimant's business model generates income by selling LPG. If retailers are using the cylinders made available to them by the Claimant to buy LPG from other suppliers, there is an obvious economic loss. The harm that would be caused were I to refuse to grant the order is that the Claimant could struggle to prove that loss without the various elements of the order, namely the searches and the information that the Defendants are obliged to supply. That, it seems to me, is a solid basis to find this requirement is met.

24. The Claimant, however, does not confine the harm caused to simple economic loss but lays great emphasis on the dangers of the operation being carried out at TGS. The extent to which such concerns can meet the "serious harm" requirement are considered at length in *Chorley* [22 – 27] and I adopt that analysis with gratitude and summarise it in terse terms; the Claimant is not to be equated with a public law enforcement body carrying out searches purely for the sake of public safety but there could be severe reputational damage if illicit cylinder filling were allowed to carry on uninterrupted and, in addition, on occasion the Court can also have some regard to the wider interests of the public in deciding to make an order. The concerns about the

TGS operation expressed by the Claimant include under-filling, which could cause an end user to believe the Claimant was selling them short, over filling which could cause dangers of leakage of this highly flammable gas, and broader dangers of fire or even explosion caused by operatives smoking, poor storage, and the proximity of TGS's filling operation to nearby buildings.

25. In my view these various considerations meet this requirement.

That the order is proportionate

26. As I have already remarked, this is a highly intrusive order. One of the Defendant entities, TGS, does not have a contractual relationship with the Claimant and purportedly has a wide ranging business dealing with other LPG users. This led me to discuss and require clarification of one clause that might otherwise have been understood to permit the Claimant to seize property beyond its own.
27. There are a number of features of the order which are designed to limit the impact of the proposed searches. The full terms of the order should be seen from the order itself, and what follows is simply my selection to illustrate the type of measures put in place to protect the interests of the Defendants, including:
- (1) The items that can be seized and removed are confined to the Claimant's own cylinders which, as explained above, remain their property in any event.
 - (2) The information obtained and matters seen through the order can only be used in the course of the proposed proceedings [with one exception should the Gas Engineers think it appropriate to share information with the Health and Safety Executive].
 - (3) The Defendants will be supplied with all the material put before the Court to obtain this order, and a copy of this judgment.
 - (4) The order specifies that the Defendants can obtain legal advice.
 - (5) A return date has been set at which, unless vacated by agreement, the Defendants will have every opportunity to raise complaints and make submissions.
 - (6) The order does not permit the search of any residential premises.
 - (7) The order does not authorise the seizure of computers or correspondence.
 - (8) The order includes an undertaking that the Claimant will pay any damages ordered by the Court if such are later found appropriate after the Defendants have had the opportunity to advance submissions.
28. While the order clearly infringes upon the rights of the Defendants, I am satisfied that the need for the order, as I have considered above, together with the careful delineation and limitation of the terms of the order, mean it is a proportionate interference and thus the last of the 5 necessary preconditions is met.

Conclusion

29. For all these reasons I am satisfied that the interests of justice come down firmly in favour of my making this order, and I do so.