Companies.

[2022]JRC172

ROYAL COURT
(Samedi)

18 August 2022

Before : J. A. Clyde-Smith OBE., Commissioner, sitting alone.

Between	**Hard Rock Limited**	**First Plaintiff/First Respondent**
And	**Hard Rock Café International (STP) Inc**	**Second Plaintiff/Second Respondent**
And	**HRCKY Limited (a company incorporated in the British Virgin Islands)**	**Defendant/Appellant**

Advocate R. D. J. Holden for the Plaintiffs/Respondents

Advocate H. Sharp QC for the Defendant/Appellant

JUDGMENT

THE COMMISSIONER:

1. This is an appeal by the Defendant against a decision of the Master to refuse its strike-out application.

2. This litigation has been on foot since 2013. The brief background is that on 11th June 1999, the Defendant (a BVI incorporated company) entered into a franchise agreement with the First Plaintiff (a Jersey incorporated company) to operate a Hard Rock Café branded restaurant in the Cayman Islands. The Defendant also entered into a memorabilia lease with the Second Plaintiff on 14th April 2000. Both agreements were terminated by the Plaintiffs on 17th June 2013 and proceedings were then brought by the Plaintiffs against the Defendant by way of Order of Justice on 13th August 2013 seeking payment of sums claimed to be due under the agreements. Summary judgment was granted to the Plaintiffs by the Master on 19th December 2013 and the

only part of the litigation that is therefore live is the counterclaim filed by the Defendant, and an answer to that counterclaim filed by the Plaintiffs, that was due to be heard in June of this year (but subsequently adjourned).

3. In its counterclaim, the Defendant asserts that:

   (i) The Plaintiffs fraudulently represented the anticipated profits of the restaurant business.

   (ii) The Plaintiffs unreasonably responded to requests made by the Defendant for changes in the standard operating business model which caused or contributed to the losses sustained by the Defendant in operating the business.

   (iii) The termination of the agreements by the Plaintiffs was unlawful.

   The Plaintiffs deny these claims.

4. The relevant procedural history is fully set out in the Master's judgment of 1st March 2022, reported at Hard Rock Café International (STP) Inc and Anor v HRCKY Limited [2022] JRC 055, which is the subject of the appeal. I will refer to this as "the March 2022 Judgment". The history is complex but I will give this brief summary for the purposes of the appeal:

   (i) Following a number of discovery orders and decisions on appeal made by Sir Michael Birt, Commissioner and Sir Timothy Le Cocq, then Deputy Bailiff, the Master reached the conclusion that documents existed or were likely to exist in relation to the profitability of the restaurant side of the business, which were required to be disclosed, and which had not been disclosed. He concluded that such documents were clearly relevant issues in the case, and this for the reasons set out in his judgment of 16th December 2019, reported at Hard Rock Limited and Anor v HRCKY [2019] JRC 243 (paragraphs 55 and 56). The Master made an unless order, requiring the Plaintiffs to file an affidavit in compliance with the order of the Deputy Bailiff, failing which judgment in the Defendant's counterclaim would be automatically entered without further order (paragraph 62).

   (ii) As explained in his judgment of 5th May 2020, reported at Hard Rock Limited and Anor v HRCKY Limited [2020] JRC 079, the Master found that the Plaintiffs had not complied with the order of 16th December 2019 but he refused the Defendant's strike out application. He ordered that:

(a) the Plaintiffs shall carry out further searches for any documents containing or referring to the profitability of the corporate cafés of the Hard Rock Group for all or any part of the period 1997 to 2004 inclusive (paragraph 2 of the Act).

(b) The Plaintiffs shall carry out a number of specified searches (paragraphs 3 and 4 of the Act).

(c) The searches be managed and supervised by Carey Olsen who shall appoint an expert eDiscovery provider who shall use artificial intelligence to enable these searches to be carried out (paragraphs 5 and 6 of the Act).

(d) If the terms of the Act of Court were not complied with ***"then judgment in default will be entered on the Defendant's counterclaim and the Plaintiffs' answer to the counterclaim will be struck out without further order"*** (paragraph 9 of the Act) and if there is any dispute about compliance ***"and if the Court finds there has been material non-compliance then the Plaintiffs' answer [to] the counterclaim will be struck out"*** (paragraph 10 of the Act).

The Defendant's strike out application which is the subject of this appeal was based on paragraphs 9 and 10 of this Act which I will refer to as the "Unless Orders".

(iii) In considering the appropriate sanction, the Master said this at paragraph 38:

> ***"38 There is serious force to these criticisms. However, Advocate Garrood reminded me, correctly in my view, that this is a case where significant damages are sought based on allegations of fraudulent misrepresentation and a lack of good faith. Unless it is absolutely plain that a party will not comply with its obligations of discovery or comply with other procedural orders, I agree with Advocate Garrood a trial is the best place for allegations of fraudulent misrepresentation and a lack of good faith to be resolved, rather than a judgment in default being entered. I have therefore been persuaded, albeit only just, that the plaintiffs should be granted one final opportunity to ensure that relevant documents are produced. I cannot emphasize strongly enough however that this is the final opportunity for the plaintiffs."***

(iv) On 1st September 2020, the Master granted an application for an extension of time by the Plaintiffs to comply with parts of the discovery orders that had been made on 5th May 2020, for the reasons set out in his judgment, reported at Hard Rock Limited and Anor v HRCKY Limited [2020] JRC 173. At paragraph 56, the Master stated that the aim of the order of 5th May 2020 was to get the Plaintiffs to focus and looking for documents relating to the profitability of corporate cafés as a whole and in his judgment, the order of 5th May 2020 had produced a change in approach on the part of the Plaintiffs since previous applications. The affidavit of Advocate Garood filed in support of the extension of time set out the searches that had been undertaken and other work done and made the point that tapes were most likely to contain relevant material and they had to be restored. The approach taken so far had led to the Plaintiffs identifying that there were potentially between 1.8 and 2.5 million documents on these tapes to which the process of artificial intelligence would be applied. At paragraph 59, the Master stated that the Plaintiffs were now looking for significant quantities of data which was a ***"sea change in approach"*** which meant that entering judgment was not justified (paragraph 59). His overall conclusion was at paragraph 62:

> ***"62. The plaintiffs are carrying out significant tasks, they have obtained tapes, analysed the most relevant of those tapes and have started the process of using artificial intelligence to identify relevant documents coupled with search terms. A manual review is also proposed. The work to-date and the proposed steps to be taken justify an extension of time being granted. The plaintiffs have not breached the order in respect of searching back-up tapes. The criticisms I have made in respect of not carrying out physical searches are not a justification to refuse an extension of time to continue to search what they should have done many years ago. I therefore have concluded that the plaintiffs should be permitted to continue their current approach and it is important that they do so."***

(v) In his judgment the Master accepted (paragraph 34) that the order made in paragraph 2 of the Act of Court of 5th May 2020 was wider than the orders previously made by Sir Michael Birt, Commissioner and Sir Timothy Le Cocq, then Deputy Bailiff and but he said that was as a result of the narrow approach to construction of those orders taken by the Plaintiffs which he found was in error and because he was invited to set out what the Plaintiffs should look for. The focus of the order was to capture any analysis by the directing minds of the Plaintiffs of the profitability of the corporate cafés being run by the Hard Rock Group and therefore to ascertain what information was known to the First Plaintiff when entering into the franchise agreement (paragraph 35). The Master acknowledged at paragraph 55 that he was requiring the Plaintiffs to go much further than previously ordered, searching for data created between fifteen and twenty-five years ago. The task of analysing who were

the relevant employees likely to hold such material would not, therefore, be straightforward and documents may no longer exist with the passage of time (paragraph 55).

(vi) Subsequent to that judgment, Advocate Pallot, on behalf of the Plaintiffs, filed an affidavit sworn on 30th September 2020, running to 56 paragraphs, containing a detailed explanation of the approach taken by the Plaintiffs to discovery following on from the order of 5th May 2020. The affidavit also exhibited appendices running to some 14 pages, containing information about the tapes searched. The Master quotes from that affidavit at paragraph 24 of the March 2022 Judgment. Following this exercise, some 13,000 documents were discovered by the Plaintiffs.

(vii) In September 2021, the Defendant, not then legally represented, wrote to Carey Olsen acting for the Plaintiffs, asking for a copy of the document known as "the 2006 Strategic Report" (sometimes referred to as the 2006 Strategic Plan or the PowerPoint Presentation) which had been referred to in discovery. Carey Olsen responded, saying that they did not consider this document to be relevant to any issues in dispute between the parties. It was created seven years after the conclusion of the franchise agreement and was not a contemporaneous document. They did not see how it could be relevant to the state of mind of the negotiating parties at the material time. They stated that the document was highly confidential but proposed a method by which the Plaintiffs were prepared to give discovery. On 1st November 2021, the Defendant, now represented by Advocate Jones, issued a summons for specific discovery of the 2006 Strategic Report. Advocate Jones explained why the document was relevant and observed that if the Plaintiffs conceded that this document was relevant, that would place them in breach of the existing discovery obligations. Carey Olsen responded on 15th December 2021 by maintaining that the document was not relevant, but as a matter of pragmatism enclosing a copy on the basis of the implied undertaking and reserving the right to make submissions at trial as to the relevance of the document.

5. On 7th January 2022, Advocate Jones filed a summons on behalf of the Defendant seeking the strike-out of the Plaintiffs' answer to the counterclaim on the basis that in failing to disclose the 2006 Strategic Report they had failed to comply with the Unless Orders and it is that application that was the subject of the March 2022 judgment.

March 2022 judgment

6. The Master made the following findings:

(i) The 2006 Strategic Report was a clearly relevant document because it refers to the profitability of the corporate cafés between 1997 and 2004 in numerous places. It was disclosable in any event because it was referred to in a witness statement exchanged by the Plaintiffs in 2017.

(ii) Applying the test in Newman v De Lima [2018] JRC 155, the order of 5th May 2020 had been breached.

(iii) The breaches were serious. No evidence had been adduced by the Plaintiffs in relation to this part of the test, explaining why this document was only disclosed at the end of December 2021. The judgments of 16th December 2019 and 5th May 2020 were clear, and the Plaintiffs must therefore have known by reading those judgments, that this document was discoverable. He therefore concluded that their failure to produce the document was not accidental or an oversight; it was a conscious or deliberate decision which constituted a serious breach.

(iv) As to the sanction to be applied, not to produce this document was an abuse of process and a flouting or ignoring of the orders of the Court.

7. Applying Leeds United Football Club v Admatch [2011] JRC 016A, the question posed by the Master was whether this abuse of process and the flouting of court orders rendered further proceedings unsatisfactory or prevented the Court from doing justice or whether the Plaintiffs had conducted themselves in such a way that evidenced an unwillingness to engage in the litigation process on an equal footing with other parties. Putting this in context, the focus of the orders of 5th May 2020 was to set out how the Plaintiffs should discharge their discovery obligations having failed to do so previously. A very significant exercise was carried out in respect of the searches he had required. He found it did show a willingness to engage in the litigation process on an equal footing. Except for this one document, the 2006 Strategic Report, the Defendant had not otherwise challenged the approach taken by the Plaintiffs.

8. The Master noted that the 2006 Strategic Report is a development and expansion on an earlier document that was already in the Defendant's possession and what had now been produced did not advance matters significantly compared to the earlier draft and did not fundamentally alter the question of what inferences can be drawn about knowledge of key executives between 1997 and 2004 based on an analysis carried out in 2006.

9. Ultimately, the Plaintiffs did produce the 2006 Strategic Report, did not resist the discovery summons and disclosed the document voluntarily without a Court hearing. The Master observed that this was not a case like Huda v Minister for Health & Social Services [2021] JRC 196 and Sheyko v Consolidated Minerals Limited [2021] JRC 267 where significant numbers of documents, for different reasons, had not been disclosed. The Plaintiffs had complied with what the Master had expected other than in respect of this one document.

10. The Court retained a discretion as to whether or not to give effect to an unless order, and in his judgment, there were both relevant and sufficient circumstances as required by Huda when set against a failure to produce one document, even though deliberate, not to strike out the Plaintiffs' answer to the counterclaim.

11. Ultimately the Master concluded that this abuse of process and the flouting of court orders did not render further proceedings unsatisfactory or prevent the Court from doing justice and that the Plaintiffs had conducted themselves in such a way that evidenced a willingness to engage in the litigation process on an equal footing with the Defendant.

12. The Master's decision was subject to a number of conditions, including that the Plaintiffs should further disclose any source material relied upon in relation to producing the 2006 Strategic Report, or any such reports which referred to the profitability of the corporate cafés for 1997 – 2004, whenever any document forming part of that source material was created. That did not require the Plaintiffs to disclose any raw data held by them, but only any source material relied upon to produce the 2006 Strategic Report. Some 1600 pages of additional pages have now been disclosed by the Plaintiffs pursuant to this order.

13. In order to express the Court's displeasure about the Plaintiffs' conduct in deliberately breaching a Court order without any explanation or justification, the Plaintiffs were ordered to pay the costs of the Defendant on the indemnity basis.

Test on appeal

14. The principal authority for the approach of the Court on appeal from a decision of the Master (exercising the jurisdiction of the Judicial Greffier, which is itself delegated by the Royal Court), is set out in Murphy v Collins [2000] JLR 276 at page 283:

"This is not a de novo hearing. Nonetheless, this court, in my view – and the Royal Court has always taken this view in a long line of cases – will not

have its discretion fettered unless there is clear reason for doing so. I therefore rule that this court has an unfettered discretion to conduct an appeal from the Judicial Greffier [or the Registrar of the Family Division] [and so including the Master as Greffier substitute] as it thinks the circumstances and justice of the case require."

15. This approach has been confirmed and affirmed more recently in Holmes v Lingard [2016] JRC 167 in which the then Bailiff held that:

"22 The classic statement of the test, for an appeal from a decision of the Master, a Greffier Substitute, is that set out in Murphy v Collins [2000] JLR 276, namely that the Court should exercise its own discretion and give such weight as it thought fit to the Greffier's exercise of discretion."

"26… here, the Master is exercising a delegated jurisdiction. We apply the test in Murphy. The Master has a very substantial procedural expertise and experience and that a huge measure of regard should be paid to his judgment and exercise of discretion in procedural matters."

Defendant's contentions

16. Advocate Sharp focused on the history of non-disclosure in this case, as explained more fully in the March 2022 Judgment. He submitted that this judgment did not really tackle head on the obvious realities of the conduct of the Plaintiffs in this case. They were extremely well-resourced corporate entities and experienced litigators, represented by a very large Jersey law firm. The Plaintiffs had deliberately adopted a litigation strategy of total non-compliance and of contesting every issue on discovery in order to make it as expensive as possible for the Defendant to obtain discovery, no doubt having regard to its far more limited resources, which had seen its beneficial owner, Mr Doyle, litigate the case in person at times.

17. The Defendant had repeatedly to go back to Court simply to achieve a basic level of discovery, which should not have required any hearings at all. Rather than litigating on an equal footing with the Defendant, the Plaintiffs had attempted to evade discovery altogether and drag the process out, presumably hoping that the Defendant would either run out of funds or energy.

18. Advocate Holden, for the Plaintiffs had only conceded part way through the hearing before the Master that the 2006 Strategy Report was relevant and therefore disclosable. If this report was deemed not relevant, and legal fees had been incurred in defending that position until the last

moment, what else had not been disclosed by the Plaintiffs on a similar irrational and unfair basis? No one could have confidence with the Plaintiffs on the issue of discovery and the Master had not explained in the March 2022 Judgment why the innocent party should be required to engage in a trial process on that basis. The possibility of adverse costs sanctions must have been factored in by the Plaintiffs as part of their strategy, with adverse costs orders being akin to parking tickets and considered well worth it in the context of the potential benefits of dealing with an issue in which they faced profound evidential difficulties.

19. The Master's principal reason for not striking out the answer to the counterclaim was the sea change he had described in respect of the Plaintiffs' conduct since the 1st September 2020 judgment, but that was not an exceptional circumstance. The fact that the Plaintiffs moved from denying the existence of entire classes of documents in 2019 in the face of unless orders to admitting their existence in 2020 may constitute a sea change on the facts of the case, but in real terms, it was, at best, nothing more than a move upwards to normal standards required of all parties before the Royal Court. Complying with the basic discovery obligations following years of withholding documents and even denying their existence cannot constitute the sort of exceptional circumstances envisaged by the Bailiff in Huda, where he said this at paragraph 53:

> ***"… orders of the Court are to be followed and in my judgment a breach of an unless order (which is already an extremely serious order and should have placed the Defendant on the highest possible alert to comply with it) which may have prejudiced the party who, in terms of the breach of the order, is the innocent party must it seems to me other than in the most exceptional circumstances be met with the natural consequences of that breach – namely that the pleading is struck out."***

20. Advocate Sharp also referred to other conduct of the Plaintiffs in procuring Mr Steve Godwin, a former CEO of the Plaintiffs, to provide a shortened version of a letter he had sent to Carey Olsen. It was the shortened version that was disclosed. Mr Doyle wrote directly to Mr Goodwin and obtained a copy of the original letter. Advocate Sharp also referred to the disclosure in January 2021 by the Plaintiffs of a single document entitled "Information for Prospective Franchisees Required by the Federal Trade Commission", which was then used to instruct their own expert evidence on the issue as to whether or not the Plaintiff had complied with US franchise regulations and related obligations. Advocate Sharp said that on any view, this document should have been disclosed four years previously and was only disclosed in 2021 because the Plaintiffs had determined that they now wanted to make use of it.

21. In essence, Advocate Sharp challenged the exercise of the Master's discretion not to strike out the Plaintiffs' answer to the counterclaim which he said should have been a natural consequence of the Plaintiffs' breaches.

Plaintiffs' contentions

22. The trial in which the Defendant alleges *inter alia* fraudulent misrepresentation was set to commence on 6th June 2022 some four weeks after the hearing of this appeal. The Court was therefore faced with a re-hearing of the strike-out application, and whether to strike out now and decide the counterclaim on procedural grounds rather than on its merits at trial in one month's time.

23. The Plaintiffs had expended considerable resources to ensure compliance with the orders of the 5th May 2020, which resulted in three affidavits of discovery being sworn by advocates and partners in Carey Olsen between July and September 2020. Save for the Defendant's strike-out application no criticism has been made of the discovery so provided. The strike-out application was brought following an application for specific discovery of the 2006 Strategic Report. The Defendant had an earlier draft of this document, and it had been discovered in proceedings in the United States involving a different company, one in which Mr Doyle, the beneficial owner of the Defendant, was also a principal. In short, on the 1st November 2021 the Defendant sought specific discovery of the 2006 Strategic Report which was provided on 15th December 2021. Despite now having that document, the Defendant then chose to apply to strike out the Plaintiffs' answer, asserting not having disclosed the report previously to be a breach of the Unless Orders. The Master made a conditional order by which the Plaintiffs would not be struck out if they provided further discovery, which they have now provided.

24. The Plaintiffs contend that they were not in breach of the Unless Orders and invited me to revisit that finding. Following the orders made by the Master pursuant to the March 2022 Judgment, Advocate Pallot filed an affidavit dated 21st March 2022 stating that the fourth affidavit of Ms Candice Pinares-Baez, director of Legal and Business Affairs of the Second Plaintiff, satisfied the Plaintiffs' discovery obligations. The fourth affidavit of Ms Pinares-Baez gives an explanation for the late disclosure of the 2006 Strategic Report that was not before the Master. Quoting from paragraphs 17-19 of her fourth affidavit:

> *"17. While recognising the Court's decision (and in making this affidavit to comply with the orders made in consequence of it) in the circumstances I should respectfully confirm that there was no conscious decision not to disclose the 2006 Strategic Plan or any other documents for that matter.*

18. Instead, after having been focused on providing the discovery as described in the affidavits of the Plaintiffs' Advocates, Jeremy Garrod [sic] (two affidavits both dated 03 July 2020) and Marcus Pallot (dated 30 September 2020), when the Defendant sought specific discovery of the 2006 Strategic Plan, this prompted the Plaintiffs to search for it.

19 The only known and complete and final version of the 2006 Strategic Plan relating to café operations) was retrieved from the Plaintiffs' discovery in the US Proceedings by the Plaintiffs' US attorney, Christian Burden. It was then delivered up in correspondence and without the need for a court order."

25. After explaining that, by reason of his participation in separate US proceedings, Mr Doyle, was aware of the 2006 Strategic Report, Ms Pinares-Baez explained further that:

"21 The Plaintiffs did not previously, for purposes of these proceedings, consider a detailed review of that which was discovered in the US proceedings ….. because the Plaintiffs were focused on conducting the necessary targeted and specific searches required under the unless order of 05 May 2020. The focus of the Plaintiffs' discovery activities thus shifted to the data bases, custodians and data ranges specified in the unless order. Regrettably, in hindsight, the Plaintiffs were not focused on other repositories (such as the US proceedings)."

26. The Master had interpreted the absence of an explanation from the Plaintiffs as a decision by them deliberately not to disclose the 2006 Strategic Report, which Advocate Holden submitted, rested on two propositions, the first that the 2006 Strategic Report should have been discovered pursuant to the Unless Orders, and for the reasons given by Ms Pinares-Baez could not have been, and the second, that it is the Plaintiffs that bear the onus of explaining why it was not discovered. However, it was not for the Plaintiffs to prove they were not in breach, but for the Defendant alleging the breach to prove it. That was made clear by the English High Court in Sahota v Sohi [2004] EWHC 1649 (Ch):

"21 [the Claimant] accepted that the initial onus of establishing that the Defendants had failed to comply with the Unless Order was on the Claimant, but submitted that the onus in practice shifted to the Defendants and that in the absence of any explanation as to what vouching documents they had had and why they were no longer available, or even a clear statement that this was the position, the Court could and should conclude that they were indeed at fault.

22 I have considered this submission with care but I am unable to accept it. It is true that the First Defendant's witness statement makes no attempt to explain why more documents have not been produced, and I can well understand how frustrating this is for the Claimant, particularly against the Defendants to comply with the various orders which have been made. There are real grounds for suspicion that the Defendants have not exhibited everything that they should and I remain sceptical whether the Defendants have duly complied with the Order.

23 But the fact remains that (unlike the previous cases of default by the Defendants) there has in this case been purported compliance by them with the order and in such circumstances it is the Claimant who must satisfy the Court that the Defendants are nevertheless in breach. …A debarring order is a strong order which impedes the Defendants' access to the court, and without going so far as the [the Defendants' counsel] suggested (who submitted that the Court should approach the application for a debarring order on the same strict basis as an application to commit for contempt of court), I accept that the Court should not conclude that the Defendants are in breach of the Unless Order, and hence at risk of being shut out altogether from adducing evidence, unless the default is strictly made out. But on the evidence before me, it may indeed be the case for whatever reason that the Defendants now have no other vouching documents, and I do not think the fact that they have not said so in terms is a sufficient basis for me to infer that there must be other material that they have …"

27. Sahota concerned an alleged failure, in breach of an unless order, to supply vouching documents in support of an account. The documents were said not to exist, and so simply not supplied with the account provided. That situation, said Advocate Holden, is more extreme than the present case in which the Plaintiffs have explained the extensive steps taken to comply with the 5th May 2020 orders. In the light of the extensive steps taken, there was no evidence to justify a finding that the Plaintiffs deliberately suppressed a discoverable document. Not explaining there was no suppression is not evidence of suppression. Such serious conduct should require cogent, positive evidence of wrongdoing to be found, citing Jafari-Fini v Skillglass & Ors [2007] EWCA Civ 261 at paragraphs 40 and 73.

28. The orders of the 5th May 2020 did not require general discovery of relevant documents. It was in specific terms to carry out specific searches, which as the Master found had been carried out. Advocate Holden further submitted that because of the draconian consequences of a party losing its right to a trial on the merits, an unless order must be strictly construed. Thus, in the English Court of Appeal decision in Realkredit Danmark A/S v York Montague 1998 WL 1042171 (1998) Tuckey LJ said:

"Usually a failure to comply with such an [unless] order will result in the proceedings being struck out. It follows, I think, that before this drastic consequence is visited upon the offending party, the court must be sure that there has been a failure to comply with the order in question. The onus is ordinarily on the party who alleges that there has been a failure to comply. Usually the discharge of this onus presents no problem because in almost all cases the court is concerned with a total failure to comply. But this is not such a case. I think the right approach in a case such as this is to be found in the two cases cited by Mr Elliot. First Abalian v Innous [1936] 2 All ER 834, at page 838 Green LJ said:

'The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies … to be in no doubt whatsoever as to the steps which he is to take if he is to avoid the action being dismissed. Looking at it another way: where the defendant, in reliance on such an order, goes to the court and asks it to say that, as a result of the order, the action stands dismissed and is no longer existent, he must be able to show, first of all, that the language of the order is sufficiently precise, and, secondly, that which the order contemplates have occurred.'"

29. In RealKredit, the Court at first instance had made an unless order in respect of the Plaintiffs' obligation to provide a list of documents which are or had been in their possession, custody or power relating to the matters in question in the action. A list was served in proper form some 186 pages long and listing 2,500 documents. It was alleged by the Defendants that the list was obviously deficient. In such a situation, has there been compliance or not? The Court of Appeal held that there had been. It accepted that a token effort could not satisfy unless order, but equally the mere fact of incompleteness did not render a more substantial list non-compliant with the order. It held the test was whether the list served was illusory, and in that case held that notwithstanding deficiencies in the list that would, by the serving parties' admission, have justified an application for specific discovery, there was no breach of the unless order. The Court of Appeal's reasoning was that:

"Interestingly there is no reported case of an action being struck out as a result of a list being incomplete. But there is in the much litigated field of Further and Better Particulars, where, in Reiss v Woolf [1932] 2 QB 557 at

pages 559-560, the Court of Appeal approved a passage from the judgment of Devlin J who said:-

> ***'so construed, default' refers to a default in the delivery of a document within the specified time. I do not, of course, mean that any document with writing on it will do. It must be a document made in good faith and which can fairly be entitled 'particulars'. It must not be illusory: … That is the test, in my judgment, and not as the plaintiff contends, whether each demand for particulars has been substantially met'."***
>
> *…..*
>
> ***"In the present case the court was only concerned with whether the unless order had been complied with. The lenders had conceded that the valuers' affidavits would have justified the making of an order for specific discovery. … Instead, the court was invited by the valuers to embark upon a wide-ranging critique of the list which had been served, and asked to conclude in the face of the affidavit evidence to the contrary that it did not amount to compliance with an unless order. Of course, none of the other procedural routes open to the valuers would have served their purpose which was to have the action against them dismissed.***
>
> ***I do not think the judge should have accepted the valuers' invitation."***

30. In this case, Advocate Holden argued that the affidavits provided by the Plaintiffs and the extensive steps taken to comply with the 5th May 2020 orders cannot be described as illusory. The 2006 Strategic Report was not included but there were two reasons for this:

    (i) As Ms Pinaris-Baez has clarified, the document was not retrieved at all from researches carried out in response to the 5th May 2020 orders; its only known whereabouts being the separate files created for discovering it previously in the US proceedings.

    (ii) Further the 2006 Strategic Report, as its description suggests, was created in 2006, and as the Plaintiffs made clear in the affidavits, and affirmations served, the searches carried out to comply with the unless order looked for documents created only within the period 1997 – 2004.

31. Advocate Holden repeated the submission made to and rejected by the Master that paragraph 2 of 5th May 2020 order was ambiguous and submitted that the Plaintiffs had made it clear throughout the process that they were searching for documents between 1997 and 2004. They were granted an extension in September 2020 to continue the process that was in train, for which they cannot be fairly criticised. Furthermore the 2006 Strategic Report was created outside the period specified in paragraph 2 of the 5th May 2020 orders and could not have been captured by the searches and approach which the Master in his judgment of 1st September 2020 said should continue. That issue is chose jugee by issue estoppel as described in the Court of appeal decision in Minories Finance Limited v Arya Holdings Limited [1994] JLR 149 at 162.

32. In any event, for the reasons put forward by the Master, the Unless Orders provided that strike out would only apply in respect of a breach which is "material". Even if the non-disclosure of the 2006 Strategic Report did amount to a breach of the 5th May 2020 orders, it did not engage the sanction of striking out because any such breach was not material and a fair trial could still be held.

Decision

33. As the Bailiff made clear in Leeds v Admatch, at paragraph 36, that was not a case where the Defendant was in breach of an unless order. Where there is a breach of an unless order, different considerations are, he said, likely to apply and he referred to the observations of Ward LJ in Hytec Information Systems Limited v Coventry City Council [1997] 1 WLR 1666 at 1674-1675, quoted with approval by the Court of Appeal in Alhamrani v Alhamrani [2008] JRC 187A at paragraphs 84 and 85. Quoting from the Court of Appeal decision in Alhamrani at paragraphs 84 and 85:

> ***"84 In that case, Ward LJ sought to resolve the issue as to what is the proper test for striking out proceedings for failure to comply with an 'unless order'. His Lordship encapsulated his views at pages 1674 – 1675 as follows:-***
>
> > ***'(1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order.***
> >
> > ***(2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed.***

(3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure.

(4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is preferred) flouts the order then he can expect no mercy.

(5) A sufficient exoneration will almost inevitably require that he satisfies the Court that something beyond his control has caused his failure to comply with the order.

(6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstance of that case; at the core is service to justice.

(7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain these two blights upon it also weighs very heavily. Any injustice to the defaulting party, though inevitably ignored, comes a long way behind the other two.'

(85) I see no reason to disagree with those views. A due weight must of course, be given to the point that the ultimate decision is made in the exercise of the judicial discretion, exercised on the facts and circumstances of each case on its own merits; and at the core is service to justice. In my view, where the defaulting party is a defendant, in actions such as a continued failure to provide further and better particulars, or the provision of an entirely unsound defence, could well entitle a court, in appropriate circumstances, to allow the result that the plaintiff is of necessity succeeded in his action because of the defences being struck out…..".

34. The facts and circumstances that the Master took into account were:

(i) The steps taken by the Plaintiffs to comply with the 5th May 2020 orders marked a sea-change in their approach. They had carried out the searches he had directed and the work they had done was significant. There had been no criticism by the Defendant of the work they had done pursuant to the 5th May 2020 orders bar the provision of this one document.

(ii) The fact that the 2006 Strategic Report did not advance matters significantly. It was a development and expansion of an earlier document that was in the Defendant's possession, and it did not fundamentally alter the question of inferences that can be drawn about the knowledge of the executives at the relevant time.

(iii) The 2006 Strategic Plan was produced when requested voluntarily without resisting the discovery summons.

(iv) The late production of this document did not render further proceedings unsatisfactory at the trial listed for June of this year or prevent the Court from doing justice at that trial.

(v) The Plaintiffs were evidencing a willingness to engage in the litigation process on an equal footing.

35. The Defendant placed emphasis on the decision in Huda, but that was a case where the Minister had failed to provide general discovery and specifically to search various email accounts that had been scheduled. These accounts were not searched because they had not been preserved in breach of the Minister's own policies and procedures. The breach was accepted, and no excuse proffered. The loss was irretrievable. Similar considerations applied in the case of Sheyko v Consolidated Minerals Limited where the decision of the Master to strike out was upheld on appeal. In that case it was too late to access the devices of the relevant data custodians. A fair trial was no longer possible. The damage has been done and it could not be repaired, nor could it be mitigated or managed by any lesser sanction than a strike out.

36. In my view the decision of the Master not to strike out was made after careful consideration of the facts and circumstances of this case and in the interests of justice. It is true that the approach of the Plaintiffs to their discovery obligations has in the past been seriously lacking, necessitating the Master making unless orders on both the 16th December 2019 and 5th May 2020, but the central point in this case is that this approach is not continuing. There has been a sea change in their approach following the 5th May 2020 orders, recognised by the Master in his judgment of the 1st September 2020 and the March 2022 Judgment. This change in their approach had enabled the Master to properly conclude that this one breach does not render further proceedings

unsatisfactory or prevent the Court from doing justice at the trial and that the Plaintiffs are now evidencing a willingness to engage in the litigation process on an equal footing. It would be disproportionate for the Court to shut the Plaintiffs out of a trial due to be heard in four weeks, in which allegations of fraudulent misrepresentation and bad faith are being made against them, because of their failure to produce this one document.

37. The Master did not have the explanation now provided in the fourth affidavit of Ms Pinaris-Baez and I have not been given any reason why that explanation could not have been given to him at the time of the hearing before him. Even so, the explanation was not challenged by Advocate Sharp nor are there grounds upon which to reject the explanation, save that it does not address the point made by the Master that the 2006 Strategic Report was referred to in one of the Plaintiffs' witness statements. In any event, the evidence now given on oath on behalf of the Plaintiffs is that this was not a case of a conscious or deliberate decision to withhold a relevant document and that only goes to support the decision not to strike out.

38. The 5th May 2020 orders required further searches to be undertaken for documents referring to the profitability of the corporate cafés between 1997 and 2004. I accept the proposition per Realkredit, that if an order is to be made in the form that, unless one party or another does something the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language so there is no doubt whatsoever as to the steps which are to be taken to avoid the action being dismissed.

39. Paragraphs 2 and 3 of the 5th May 2020 orders required further searches to be undertaken and that has been done in the manner explained to the Court in detail after the 1st September 2020 hearing. Paragraph 4 required a search of email accounts which has been done. Paragraphs 5 and 6 required that searches will be managed and supervised by Carey Olsen, who shall appoint an eDiscovery provider to use artificial intelligence and this has been done. Paragraph 7 provided that an affidavit of discovery be filed setting out the nature of all searches carried out, what data has been made available to the eDiscovery provider to search and the methodology used by the eDiscovery provider in carrying out its searches and this has been done. By analogy to the case of Realkredit, which was concerned with lists for discovery, the searches and work undertaken by the Plaintiffs pursuant to the 5th May 2020 orders cannot be described as illusory.

40. There is some force in the submission, therefore, that the Plaintiffs were not in material breach of the Unless Orders and this militates further in favour of the decision not to strike out, rendering it unnecessary for me to address the further arguments put forward by Advocate Holden.

41. For all these reasons I dismiss the appeal.

Authorities

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