Neutral Citation Number [2016] EWHC 1464 (Ch)

IN THE HIGH COURT OF JUSTICE **Case No: CR-2016-000997**
CHANCERY DIVISION
COMPANIES COURT

In The Matter Of TRADEOUTS LIMITED
And In The Matter Of THE INSOLVENCY ACT 1986

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Tuesday, 17 May 2016

BEFORE: MR REGISTRAR JONES

BETWEEN

DAVID BROWN

Petitioner

- and -

(1) BCA TRADING LIMITED
(2) ROBERT FELTHAM
(3) TRADEOUTS LIMITED

Respondents

TIM WRIGHT (Solicitor) (of Candey) appeared on behalf of the Petitioner

MR S HOSSAIN QC (instructed by Berwin Leighton Paisner LLP) appeared on behalf of the Respondents

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MR REGISTRAR JONES:

1. During the course of this case management hearing, a number of matters have been raised for which I have not had to give a reasoned judgment. However, this issue is contested. It is the question whether or not electronic disclosure by the Respondents should be provided, as they ask, using predictive coding or via a more traditional keyword approach instead. Currently it is agreed that disclosure should be on a standard basis and currently it is not possible to decide otherwise.

2. The majority of the documents that may be relevant for the purposes of trial will be in the hands of the First Respondent. Whilst that in itself does not determine the outcome, it is relevant to take into account when considering the Respondents' assertion, presented from their own view and on advice received professionally, that they think predictive coding will be the most reasonable and proportionate method of disclosure. It is also relevant to take into account when their lawyers identify the favourable difference in cost which they expect to incur if predictive coding is used instead of key word searching. There is no factual or expert evidence to contradict those assertions.

3. In those circumstances it has to be extremely significant that the costs envisaged for predictive coding are in the region of £132,000, as opposed to costs for a key word search approach of at least £250,000 (and indeed I believe that figure may even reach £338,000 on a worst case scenario).

4. That, of course, is relevant and persuasive only to the extent that predictive

coding will be effective and achieve the disclosure required. That is not merely a question of the effectiveness of the intellectual property being used. It starts with the need to identify what documents (electronic or otherwise) are required for the purposes of trial disclosure within the context of proportionality and the overriding objective. When the size of potential disclosure is significant both in terms of quantity of documents and the time required to be spent on the disclosure process, it is particularly important for the lawyers to identify by reference to the true issues, the anticipated categories of documents and to enter into discussions to seek to minimise the work required and therefore the costs. Obviously this must be achieved without impinging upon the importance of disclosure but such discussions are important not just to reduce costs at the disclosure stage but also to make the future trial manageable.

5. The statements of case from both sides within this ***section 994 Companies Act 2006*** petition present extremely broad issues of factual dispute. Realistically, however, experience shows that issues will narrow significantly by the time the trial is reached. This can mean that what may have appeared to be necessary disclosure based upon the statements of case at this stage, will turn out to have been unnecessary and indeed to a large degree irrelevant to the way the case will be heard at trial. It can mean that costs will have been incurred which need not have been incurred both during disclosure and when complying with subsequent directions concerning evidence. It may be difficult to foresee this outcome but experienced solicitors should be able to make a reasonable attempt at doing so.

6. I am not intending to criticise the parties in regard to their statements of case. These reflect the traditional approach towards ***section 994*** petitions and, of course, not only must the lawyers present their client's case as best they can but also cases change over time and views reached at trial as to the need for earlier work may be attributable to the benefit of hindsight. Nevertheless disclosure is a stage when great advantage in terms of time and cost may be achieved by seeking to narrow down issues. This requires, as the parties accept, an internal assessment followed by a discussion between the parties concerning the likely shape of the issues at trial within the context of disclosure. A successful outcome from the use of predictive coding must, at least to some extent, depend upon the success of the parties having been able first to narrow down the issues and therefore the categories/types of documents relevant to the disclosure process.

7. This must be the first stage and I have made proposals for that process in the form of directions for the identification of issues with the aim of narrowing down what needs to be the borders for the searches. Those directions cannot be precise at this stage because the information available is not yet sufficiently precise and the parties need first to carry out their investigations and enter into dialogue. The directions intend to aid that process by both sides identifying within a schedule the issues they consider relevant, the documents relating to them, their source and location. This is not issue based disclosure but it should narrow matters down and reduce the costs. It is hoped that an approach of co-operation will avoid the need to return to apply for more detailed relief but obviously the parties can return if required.

8. I have also handed down the protocol proposed by the Technology and Construction Court, which is of great assistance for the process of disclosure of electronic documentation. In addition it is important to comply with CPR PD 31B, paragraphs 8 and 9 (discussions before the case management conference in relation to the use of technology and disclosure).

9. Looking at the second stage, the identification of documents to be disclosed: Assuming those directions are successful (or even if they are not), I reach the conclusion based on cost that predictive coding must be the way forward. There is nothing, as yet, to suggest that predictive coding will not be able to identify the documents which would otherwise be identified through, for example, keyword search and, more importantly, with the full cost of employees/agents having to carry out extensive investigations as to whether documents should be disclosed or not. It appears from the information received from the Respondents that predictive coding will be considerably cheaper than key word disclosure.

10. I appreciate that cost is not the only element and I have been taken by Mr Hossain QC for the Respondents to relevant passages from the recent decision of Master Matthews, **Pyrrho Investments Ltd** [2016] EWHC 256 (Ch). At paragraph 31 the learned Master sets out ten factors, together with an underlying eleventh, which assisted him to agree with the proposition of all parties that predictive coding for that case was appropriate:

"(1) Experience in other jurisdictions, whilst so far limited, has been that predictive coding software can be useful in appropriate cases.

(2) There is no evidence to show that the use of predictive coding software leads to less accurate disclosure being given than, say, manual review alone or keyword searches and manual review combined, and indeed there is some evidence (referred to in the US and Irish cases to which I referred above) to the contrary.

(3) Moreover, there will be greater consistency in using the computer to apply the approach of a senior lawyer towards the initial sample (as refined) to the whole document set, than in using dozens, perhaps hundreds, of lower-grade fee-earners, each seeking independently to apply the relevant criteria in relation to individual documents.

(4) There is nothing in the CPR or Practice Directions to prohibit the use of such software.

(5) The number of electronic documents which must be considered for relevance and possible disclosure in the present case is huge, over 3 million.

(6) The cost of manually searching these documents would be enormous, amounting to several million pounds at least. In my judgment, therefore, a full manual review of each document would be "unreasonable" within paragraph 25 of Practice Direction B to Part 31, at least where a suitable automated alternative exists at lower cost.

(7) The costs of using predictive coding software would depend on various factors, including importantly whether the number of documents is reduced by keyword searches, but the estimates given in this case vary between £181,988 plus monthly hosting costs of £15,717, to £469,049 plus monthly hosting costs of £20,820. This is obviously far less expensive than the full manual alternative, though of course there may be additional costs if manual reviews still need to be carried out when the software has done its best.

(8) The 'value' of the claims made in this litigation is in the tens of millions of pounds. In my judgment the estimated costs of using the software are proportionate.

(9) The trial in the present case is not until June 2017, so there would be plenty of time to consider other disclosure methods if for any reason the predictive software route turned out to be unsatisfactory.

(10) The parties have agreed on the use of the software, and also how to use it, subject only to the approval of the Court.

There were no factors of any weight pointing in the opposite direction."

11. I accept that all of those factors effectively apply to this case, to some degree at least, except insofar as factor (4) is neutral and paragraph (10) does not apply. This finding must also encourage and sustain my decision, as proposed, that a direction for the Respondents' disclosure to use predictive coding should be made. The eleventh, that there are no factors of any weight pointing in the

opposite direction, applies.

12. As against all of that, I understand in particular in the context of ***section 994*** petitions that it is commonly the case for there to be suspicion or at least cautiousness between the parties. This has been raised by the Petitioner and it is almost inevitable in these sorts of "quasi-family/partnership" disputes when one party alleges exclusion and feels wrongly excluded by the other. Predictive coding is new and there will be concern that it may not be as effective as traditional but more expensive methods.

13. However, it has to be borne in mind that the parties must do their best to achieve reasonable and proportionate results in any event. That is in their own interests and meets the overriding objective. I am also encouraged in reaching my decision by the fact that directions will cause the parties to sit down before the predictive coding begins in order to discuss the criteria to adopt and the general process of disclosure. It seems to me that is the right approach. If there are any problems, they can be identified and, of course, the parties can come back to the court for further directions.

14. Furthermore, of course, I bear in mind in this case that those discussions will be between experienced solicitors who can be relied upon to hold the reins within the context of them owing their duties as officers of the court, as well as their duties to their clients. I have absolutely no reason to have any doubt that the solicitors on both sides will do other than undertake their task in accordance with their duties and proceed properly and appropriately.

15. This endorses my decision that it is right to make an order for predictive

coding disclosure at this stage, with the emphasis, both with regard to that and the nature of the disclosure, ie, standard as opposed to issue, that the parties can come back to court insofar as necessary. I note that I am being asked to send this matter to the judge, and of course traditionally ***section 994*** petitions have always gone to the judge. That has recently changed but because of the time this trial is estimated to take, more than 10 days, it is plainly right to go to the judge. It means the order should include provision permitting the parties to return to Registrar for further directions to save having to go to the judge if that is inappropriate.

Order accordingly

(**After further submissions**)

Judgment on Costs Budget

16. I now consider the costs budgets for the purposes of a costs management order. For the purposes of CPR 3.15 I am to record the extent to which the budgets are agreed between the parties and the respective budgets or parts of budgets which are not agreed record the court's approval after making appropriate revisions.

17. On the face of it, this would give me no jurisdiction to do anything else in respect of the parts that are agreed. However, at paragraph 3.15.1 of the notes in the White Book, there appears the following:

> *"Rule 3.15(2) provides that, if the costs management order ("CMO") is made, the court will then record the extent to which each party's budget is agreed or is approved by the court. Accordingly, the court*

> *should decline to make a CMO for the time being if it wishes to urge the parties to reconsider their budgets, whether or not those budgets are agreed."*

There is then reference to the decision of Coulson J in **Willis v NRJ Rundell & Associates Ltd** [2013] EWHC 2923 (TCC) in which he declined to approve the parties' costs budgets in a professional negligence claim where the figures were disproportionate and unreasonable. Then there is an observation that:

> *"Circumstances may arise in which the court approves a budget in part only and neither approves nor comments upon the rest of it. See for example Hegglin v Persons Unknown (1) and Google Inc (2) [2014] EWHC 3793 (QB)."*

18. In this case, the majority of costs are agreed but I have found this a difficult case for the purposes of CPR 3.15 in the context of the reasonable and proportionate test to be applied. From my experience of ***section 994*** petitions, this is not one of the most difficult cases either factually or in law. On the other hand, the sum involved, although these days perhaps not enormous, is significant. The Petitioner is seeking to recover a sum over £20 million. Whilst that is far in excess of the Respondents' view of the value of the shares, this is the claim they have to face. In addition and importantly in this context, the allegations made by the Petitioner attack the reputation of the Respondents raising matters which will be damaging to them if proved, in particular to the professional reputation of the First Respondent. I can therefore understand why the Respondents consider it appropriate to instruct leading counsel; as has the Petitioner. This obviously increases the costs.

19. In those circumstances whilst I am concerned about reasonableness and proportionality when looking at the overall figures, subject to one point, I have

decided to adopt the approach that the parties' agreement reflects the seriousness of the litigation and their acceptable analysis of the need for the expense anticipated.

20. However, my accommodation to the agreement between the parties does not extend to the difference in fees for counsel for the purposes of trial. For the purposes of a ten day trial, and of course the brief fee includes preparation, the Respondents' total costs for counsel in the budget are £287,000. That is high enough but the total costs for the Petitioner are £445,000. This is a substantial difference. I understand why both sides have decided to go to eminent leading counsel. I obviously recognise that the Petitioner has decided to instruct very experienced senior leading counsel. But I cannot at the moment understand how, on a reasonable and proportionate basis, there can be a difference of £150,000-odd between the two sets of fees. It seems to me that I cannot possibly approve fees totalling £445,000 for a trial of ten days applying the test which I am required to apply.

21. In those circumstances, taking into account the guidance in the notes, I will decline to approve those fees, at least at this stage. I will urge the Petitioner to reconsider their budget in that regard.

22. There are then two other items of fees that are not agreed. The first concerns the costs of £124,000 for disclosure on the part of the Petitioner, with particular reference being made by the Respondents to £54,000 attributed to paralegals. I have been taken by Mr Hossain QC on behalf of the Respondents to correspondence from the Petitioner, namely a letter from his solicitors dated

12 May 2016, which seeks to explain the amount of work required by reference to the amount of documentation that the Petitioner has to disclose, or at least to view in order to decide whether or not to disclose it. It includes some 30,000 emails which it is now accepted no longer have to be viewed because they will be part of the Respondents' disclosure.

23. In those circumstances, Mr Hossain submits that £124,000 can no longer be considered reasonable and proportionate. I have heard from Mr Wright in response but need not set out his detailed arguments because my conclusion is that the answer is obvious. That must be right.

24. It is, of course, the position that there will be other work for the purposes of disclosure and the Petitioner's solicitors will need to review what is disclosed. However this change must lead to the conclusion that the sum presented cannot be a reasonable and proportionate sum. I consider it right to direct the Petitioner to reconsider and reformulate this estimate.

25. The second area concerns the paralegal costs for pre-trial work. These are presented for the Petitioner as 250 hours, producing £37,500 for the purposes of the budget. Mr Hossain QC refers in contrast to the Respondents' budget in which 91 hours is proposed, producing a sum of some £16,000. There is a disproportionate difference in hours spent and therefore in the amounts to be incurred.

26. Mr Hossain QC suggests a reduction of 150 hours would be reasonable and proportionate. He has also asked me to consider a background concern with reference to the pre-action costs. It is said that these are excessive but I am not

going to consider that point further. This would take too long and is contrary to the background of the wide agreement otherwise reached. The position is that the solicitors acting for the Petitioner have identified these as costs which they have incurred and I am not going to go behind that here.

27. Returning then to the arguments I will be considering, Mr Wright has submitted that I should take into account the fact that the original estimate has been reduced from some 300 hours and this shows the solicitors have carefully considered the figures finally presented. He has also emphasised that the figures have been influenced by the experience those solicitors have had in a recent, similar trial of a similar length. Finally he emphasises that his solicitors rely heavily on paralegals and their quality is high.

28. It is always difficult to predict what is going to be required for the purposes of a trial. However, I think it is right for me to compare the two amounts. I consider it right for me to look at 250 hours and take the view that this is (putting it colloquially) a lot of hours. In reaching my decision I recognise that potentially the Petitioner has to spend more time in preparation for trial than the Respondents and, admirably in the context of hourly rates, asks paralegals to spend that time.

29. Weighing those factors, I have decided I should find a figure in-between 250 hours and 91 hours, and not simply say the hours spent should be the same. I can only do rough justice and in that regard, rather than 250 hours proposed, I will accept 180 hours as the budget. I note there is, of course, always the ability for permission to come back with further details to vary it if

appropriate.

Order Accordingly