SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 81

EDI-B383-19

NOTE OF SHERIFF KENNETH J MCGOWAN

in the cause

JET LOGIC LIMITED

Pursuer

against

THE PRIVATE JET BOUTIQUE LIMITED AND OTHERS

Defenders

Pursuer: Matthew, Solicitor; Aberdein Considine
Defenders: Clair, Solicitor; Balfour & Manson

Edinburgh, 16 July 2019

NOTE

Introduction

[1] The issue before me in this case concerns where the liability for expenses should lie in respect of a summary application in terms of which an order was sought and obtained under section 1(1) of the Administration of Justice (Scotland) Act 1972 ("the 1972 Act") for recovery of certain documents and the consequent execution of the commission and diligence granted by the court by way of a "dawn raid".

Procedural history

[2] On 10 April 2019 the pursuer presented a summary application under section 1 of the 1972 Act and rule 3.1.2 of the Act of Sederunt (Summary Applications, Statutory

Applications and Appeals etc Rules 1999) ("the 1999 rules"). In addition to seeking commission and diligence for recovery of certain documents, the appointment of a commissioner and an order allowing a named person to accompany the commissioner, the summary application sought warrant and authority for the commissioner to enter premises, search for and take possession of the documents referred to in the schedule to the application; an order that the defenders and their agents provide the commissioner with access to information stored in electronic format; dispensation with intimation of the application to the defenders prior to the granting of craves 2 through to 6; and thereafter authorising the pursuer to inspect any property recovered. As usual, certain undertakings required to be given by the applicant in relation to the granting of the order and the averments in support of the making of the order sought were supported by an affidavit. The matter having called before the court on 11 April and the sheriff having been addressed thereon, an order as sought was granted on the same day.

[3] In due course, the commission was executed by way of a "dawn raid". Certain material was recovered. Much of it was in electronic format and was thereafter the subject of analysis.

[4] On 17 April, the defenders sought recall of the order for recovery of documents. That motion was refused. Thereafter, the case was further continued on 23 May to allow the first defender to consider the forensic report which had been produced and again on 6 June to allow the pursuer to consult with an IT expert in relation to the recoveries.

[5] On 20 June, the matter came before me on the pursuer's opposed motion for dismissal of the application and for expenses. That motion was opposed in relation to expenses.

Submissions for pursuer

[6] The pursuer carries on business as a luxury jet and helicopter charter specialist. The second defender was employed by the pursuer from about July 2009 until 22 March 2018, initially as the pursuer's international charter manager and latterly as its client services director.

[7] In carrying out her employment, the second defender had access to the pursuer's clients' personal details and documents relating to the pursuer's business practices.

[8] The second defender's contract of employment contained certain confidentiality obligations and a restrictive covenant. The names and contacts for the pursuer's clients had been built up over a period of some 12 years. That data had significant value to the pursuer and consisted predominantly of a number of "high net worth" individuals.

[9] Given the nature of that data, the pursuer controls access to it. Only certain people are given access to the material and a record is maintained of who exercises that access. The market for the pursuer's services is relatively small and the pursuer specialises in providing services of high quality.

[10] The second defender had handed in her notice of resignation from employment on 26 January 2018. She worked a 2 month notice period. Unbeknown to the pursuer, the second defender accessed and downloaded large amounts of the pursuer's documentation. Someone using the second defender's computer and login details created a spreadsheet entitled "Vicky Clark Contracts" with details of the pursuer's entire client database on 25 January 2018. On the same day, the same person accessed a document entitled "Archived Quotes and Flights" which held all of the pursuer's data from incorporation to December 2017 when a new computer system was created. There was no legitimate business reason why this data would have been accessed on that date. On 26 January, the

same person downloaded a PowerPoint presentation containing the pursuer's pricing structure for its VIP clients. On 30 January 2018 the same person downloaded 465 files from the pursuer's central database onto the second defender's one drive system which was a unique part of the pursuer's server used by the second defender. These documents were then accessed remotely at 01.16 the following day. They were then deleted from the second defender's one drive system. There was no legitimate business reason why the second defender would have required access to this volume and nature of documentation. The pursuer believed that the documents were accessed so that they could be copied and retained for future use by the second defender.

[11] After the second defender left the pursuer's employment, she started trading using the trading name "Adiuvo Elite". The second defender traded initially as a virtual personal assistant which the pursuer actively sought to support. The second defender then started to arrange flights for the pursuer's clients. An action of interim interdict was raised in respect of the second defender's breach of her restrictive covenant. That interim interdict was granted although it has since expired.

[12] The first defender was incorporated on 8 November 2018. The third defender is its sole director. The third defender is the second defender's mother. The first defender's shareholders are the third defender (90%) and two other close family members (5% each). The first defender's registered office is the second and third defenders' home. The first defender markets itself as being in the business of luxury jet and helicopter charter specialists directly in competition with the pursuer. The pursuer understands that the third defender has no experience of the pursuer's industry. The testimonial section of the first defender's website refers only to customers' experiences of working with "Vicky" and that they have done so for several years. Another testimonial refers to "Vicky's new venture".

[13] The pursuer's position was that the second defender had entered into direct competition with the pursuer. The pursuer accepted the competition, but the second defender was not entitled to arm herself with client information and confidential material. The use of that information was likely to cause damage to the pursuer.

[14] The pursuer sought and obtained an order under section 1 of the 1972 Act. A huge number of documents were recovered. These have been analysed and two reports have been produced. The contents of the reports supported the conclusion that the material recovered from the first defender's files had come from the pursuers' records. An action of damages and interdict has been raised. The contents of the reports concerning the material recovered will be used as evidence.

[15] In these circumstances, the pursuer's summary application had been justified and the pursuer was entitled to the expenses.

Submissions for defenders

[16] It was clear that much of the material included email addresses but that kind of material was in the public domain and therefore could not be regarded as being confidential.

[17] In *Faccenda Chicken Limited* v *Fowler* (1986) ICR 297 there was a distinction drawn between trade secrets and confidential information. Only email addresses had been found in this case but no other documents. In the affidavit of Keith Campbell there was an appendix which set out the documents which were suspected or found to have been removed from the pursuer's premises (production 5/2/8-9). No such documents had been recovered.

[18] The second defender's position was that the client list and information recovered was obtained from public sources, apart from perhaps six or eight which the second

defender had remembered. The pursuer could not say that the information taken was in breach of the second defender's contract with them. Even if there were a small number of matches, the number was so low that the pursuer could not prove that the second defender came by the information illegitimately. In these circumstances, the pursuer should be found liable to the first defender in the expenses. Alternatively, no award of expenses should be made due to or by either party.

Grounds of decision

[19] I was not referred to any specific authority about how expenses in this type of situation should be dealt with and I have been unable to find any directly in point from my own researches. Therefore, I proceed on the basis that the matter is one for my discretion.

The defenders' argument

[20] In essence, the defenders' argument before me focused on what might be described as the "evidential value" of what was recovered, in connection with the now live action for interdict and damages and under reference to the distinction between trade secrets and confidential information.

[21] While I recognise and accept that distinction, my view is that the defenders' argument is flawed. Given that the material recovered is yet to be used and tested in the context of another set of proceedings, how can this court at this time prospectively judge the evidential value of it? In my opinion, that would involve evaluating the material without hearing evidence about it or submissions about it, thereby risking taking it out of context and misconstruing its significance. That does not seem to me to be an attractive proposition.

Put shortly, the material may yet prove to be evidentially significant or valueless. I cannot properly decide that issue in these proceedings.

[22] In any event, I doubt whether "evidential value" is a relevant factor at all. Where a substantive action has been raised and commission and diligence has been granted in that process, the question as to which party bears the expenses of that step of procedure is not determined by how useful any material recovered turned out to be (or indeed whether any material had been recovered at all). Instead, the expenses of obtaining and executing a commission and diligence are treated as part of the normal expenses of process and are carried by whichever has succeeded in obtaining an award of the "expenses of the action" in its favour: *Sheriff Court Practice*, McPhail, 3rd edition, paragraph 15.82. In my view, that suggests that the correct focus is on the proceedings at hand: see below.

A digression - reserve expenses meantime?

[23] From my own limited experience of these types of proceedings, the tendency has been for the question of expenses to be left in abeyance until the outcome of the subsequent (principal) proceedings is concluded. Put generally, I think it would be accepted that the successful party in the subsequent proceedings would be in a relatively strong position as regards the expenses of the "dawn raid" proceedings, not least because by that stage, it would usually be apparent - or at least more easily determinable - what use has been made of the material recovered and how valuable it has been.

[24] Nevertheless, since the reservation of expenses was not urged on me by either party (and I doubt if the evidential value of what was recovered is a relevant factor at all) I am not inclined to defer dealing with expenses.

Who has the successful party been in the present proceedings?

[25] Although a precursor to other proceedings, the present action is a distinct set of process. The pursuer made detailed averments setting out the basis on which orders were sought. (I observe, in passing, that the test applied by the court where orders of the type granted are sought is a high one. The court was asked to grant orders before any intimation was given to the defenders. That is an unusual step and the court has to be satisfied that there is a strong *prima facie* case for making such an order without giving the other party an opportunity to be heard in opposition thereto. In this case the court was so satisfied, as vouched by the order having been granted.) The defenders made an unsuccessful attempt to have the order recalled. But it would have been open to the defenders, in the normal way, to lodge defences and put in issue the averments on which the present action proceeded. If necessary, evidence could have been heard. The defenders have not sought to resist the action in that way and are content that it should be dismissed. The only battleground is expenses.

[26] That leads me to the conclusion that the defenders are to be held as accepting that the action was justified.

[27] In these circumstances it appears to me that the appropriate disposal is that the defenders should be found liable to the pursuer in the expenses occasioned of the action. I shall so order.