

Case No: HQ15X03159

[2016] EWHC 603 (QB)  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

The Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Thursday, 11 February 2016

BEFORE:

**MRS JUSTICE SLADE DBE**

BETWEEN:

**ARTHUR J GALLAGHER SERVICES (UK) LTD AND ORS**

Claimants

- and -

**ALEXANDRE SKRIPTCHENKO AND ORS**

Defendants

MR P NICHOLLS QC (instructed by **DAC Beachcroft LLP**) appeared on behalf of the  
Claimants

MR R WEEKES (instructed by **Mishcon de Reya LLP**) appeared on behalf of the  
Defendants

The Fifth Defendant did not appear and was not represented

**Judgment**  
(As Approved)

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(Official Shorthand Writers to the Court)

No of words: 5,131  
No of folios: 71

**Thursday, 11 February 2015**

**(2.00 pm)**

1. JUSTICE SLADE: The claimants apply for interim relief in proceedings brought against the defendants arising out of their alleged misuse of confidential information.
2. A claim form was originally issued by the first two claimants against the first two defendants. By consent, on 28 July 2015, an order was made by HHJ Walden-Smith. Amongst other matters, the first two defendants were required to deliver up to the claimants' solicitors by 5 August 2015 all documents belonging to either claimant, including but not limited to specified categories.
3. Electronic devices were to be delivered up by the first defendant to the claimants' forensic information technology expert. The expert was to inspect the devices, and the first defendant was to cooperate in the deletion from the devices of information belonging to the claimants. The second defendant was to permit the expert access to all computer systems it controlled in order to search for documents containing information belonging to the claimants, or derived from such information.
4. By clause 8 of the order, the first defendant was by 12 August 2015 to make an affidavit including the following in paragraph 8:
  - "(iii) identifying precisely all property and documents containing information belonging to either claimant which he took (or organised to have taken) away from either claimant in electronic and/or hard copy form.;
  - (iv) stating, in the case of property belonging to either claimant, the use to which he has put each such piece of property and any person to whom he has provided any such property; and
  - (v) stating, in the case of documents containing information belonging to the Claimants, the use to which he has put each such document; the identity of any person to whom he has disclosed any such document; the identity of any person he has contacted using any such document; and the purposes for which he has contacted such person."
5. Further, both defendants were required to provide to the claimants' solicitors certain other matters.
6. There is no complaint that the defendants failed to comply with the consent order. About 4,000 documents in all were disclosed by them on various dates between 5 August and 11 November 2015. From those documents, it appeared to the claimants that more individuals were involved in the wrongful use of their confidential information, and that this information related not only to the type of insurance broking business, that offered to the property professionals referred to when applying for both the Walden-Smith order, but also to a second area of their business, the broking of insurance to recruitment consultants.
7. It was realised that further claimants and further defendants should be parties to the proceedings and the information relating to the insurance for recruitment consultants should also be included. Accordingly, the claimants issued an application notice on 11 December 2015.

8. By consent, on 17 December 2015, the claimants were permitted to amend the claim form to add the other parties, and to amend their particulars of claim. All defendants gave undertakings not to use the claimants' confidential information and not to deal with the restricted clients or any insurance broker in relation to any restricted client until the hearing of the application of 11 December 2015, or further order.
9. The part of the application of 11 December 2015 which was not dealt with by consent and which is now before this court relates to the search and deletion from devices of the defendants confidential information of the claimants which they say was taken or used by the defendants.
10. The claimants sought in the application notice an order:  
" permitting the imaging and inspection of the defendants' computers and electronic devices and the deletion therefrom of confidential information belonging to the claimants;"
11. The principal differences between the parties on this application were over the principle of an order for inspection and destruction of material held by the defendants, in particular at an interlocutory stage, the necessity for such an order. . Further, there was a difference between the parties over its scope or the mechanism for carrying it out if such an order were appropriate.
12. The claimants were represented by Paul Nicholls QC. The defendants, save for the fifth defendant, Mark Addis, were represented by Robert Weeks of counsel, instructed by Mishcon de Reya. Mr Addis did not appear, nor was he represented at the hearing. Mr Addis had different solicitors acting for him who acted for him until 7 February 2016. Since then, he has had no legal representation.
13. A draft defence was prepared on behalf of all the defendants, including Mr Addis. I was told that whilst there were some differences in the claims against him as a former director, for the purposes of this application there is no material difference between his position and that of the Mishcon de Reya defendants.
14. Solicitors for the claimants emailed Mr Addis on 10 February at 8.15 am, informing him that the hearing which took place on 9 February, in which he was a respondent but did not attend, would recommence that day. The time and court number was given. Mr Addis replied that he did not have the means to continue instructing solicitors. He wrote that he did not have anything further materially to add to the defence that has already been submitted and that he resigned as a director from the second defendant. In these circumstances, I deemed it appropriate to hear the application against Mr Addis, as well as the other defendants.

***Outline of the facts:***

15. This outline is given on the written material available to the court on this interim application. It is not intended to be, or to include any findings of fact. Those will be a matter for the judge when the matter comes on for trial.
16. The claimants are all companies within the Arthur J Gallagher group of companies. They provide insurance brokerage services. The first claimant, AJG Services,

employs and supplies staff to companies within the Arthur Gallagher group. At all material times, the second claimant, AJG Brokers, offered insurance brokerage services. AJG Brokers was from 15 August 1995 until 6 May 2014 called Giles Insurance Brokers Ltd. It was part of a group purchased by the Gallagher group in November 2013.

17. The third claimant, INK Underwriting Agencies Ltd offered insurance brokerage underwriting and placement services. The fourth claimant, Quillco 226 Ltd has been part of the Gallagher group since its acquisition of the Giles group. The fifth claimant, Heath Lambert Ltd, offered insurance brokerage services.
18. The Gallagher group operates a number of different business units focused on the provision of insurance brokerage and underwriting services to different sectors of the market. Two business units are relevant to these proceedings; one, a business unit trading under brand name "Agent Assure", which provides professional indemnity insurance brokerage services to property professionals, such as the sales and lettings agencies and surveyors, and secondly, business units which used to trade under the name Dallas Kirkland Recruit Insure, providing insurance or insurance brokerage for those operating in the recruitment sector.
19. The defendants: the first defendant was employed by AJG Brokers, then Ink, and finally by AJG Services. His employment was terminated on 1 July 2014. A settlement agreement was entered into with him. He has been employed by the second defendant, Portsoken Ltd, from a date unknown, but which is believed to be 1 February 2015.
20. The second defendant, Portsoken Ltd, was incorporated on 28 March 2013, and has since about March 2015 been carrying on the business of insurance brokerage. I was told that its areas of operation are providing insurance brokerage for property professionals and recruitment consultants. It also provides insurance or insurance brokerage dealing with lost share certificates.
21. The third defendant, Mr Kirkland, worked in the Dallas Kirkland business unit. He was from 10 July 2006 employed by Quillco with a job title of managing director for recruitment. He was made redundant on 28 February 2013. Mr Kirkland has been a director of Portsoken since 26 March 2014 and latterly chairman..
22. The fourth defendant, Mr Prescott, was employed in the Dallas Kirkland business unit. His employment transferred to Ink, from which he resigned on 28 February 2014. He has been a director of Portsoken.
23. The fifth defendant, Mr Addis, was appointed managing director of both the Agent Assure business unit and the Dallas Kirkland business unit. From at least 21 April 2011, he was employed by Ink. He was a statutory director of INK from 20 September 2009 until 16 January 2013. He ceased to be employed by Ink on 31 December 2012. Mr Addis became a director of Portsoken on 3 March 2014. In his e-mail of 10 February 2016, Mr Addis states that he has resigned from Portsoken.
24. The sixth defendant, Miss Polak, was employed by Dallas Kirkland (Professional) Ltd from around 20 September 2005 and became employed by INK in about September

or October 2009. Miss Polak ceased to be employed by Ink in or around April 2013 and has worked for Portsoken as an AccountantExecutive.

25. The seventh defendant, Mr Carman, was engaged by INK as a consultant to manage the tenancy deposit scheme (TDS) and the client money protection scheme (CMP). Mr Carman is the founder of Portsoken and has been a director since 28 March 2014 when it was incorporated.
26. In the middle of 2015, it came to the claimants' attention that the first defendant had taken away their confidential information and that he was using it to contact and seek to do business with the claimants' clients on behalf of the second defendant.
27. The first two defendants agreed to the injunctions made by an order of HHJ Walden-Smith on 28 July 2015. The claimants' initial application for the injunctive relief was based on admissions (a) that the first defendant took away what the claimants say is confidential information belonging to it in the form of a client list, and (b) that the second defendant loaded that information onto an electronic platform and then made use of that to approach over 300 of the claimants' clients.
28. Following the order of HHJ Walden-Smith, the defendants disclosed about 4,000 documents over a period from 5 August to 11 November 2015. It became apparent from the documents that the use of confidential information not only covered Agent Assure, but also the recruitment part of the claimants' business, and that more individuals were involved other than the first defendant. The claimants therefore applied on 11 December 2015 to add defendants and to amend the particulars of claim. They also appreciated that additional claimants should be added.. By consent the amendments and the additions of parties were agreed.
29. The defendants have produced a draft defence. The draft defence runs to 66 pages. It includes the following at paragraph 31.1:

"It is admitted that the Portsoken defendants have misused confidential information to the limited extent that they have already disclosed in the two affidavits filed by Mr Skriptchenkov [the first defendant], and the affidavit filed by Mr Carman.

...

32.2. Save that the Mr Skriptchenkov [first defendant] did remove and retain two documents, being the AA bordereau and the LD schedule, it is denied that the Portsoken defendants removed any confidential information belonging to the claimants."
30. The pleadings contained detailed allegations and responses relating to the alleged use to which the defendants have put the claimants' information which was said to be confidential. Amongst these are the following from the draft defence, at paragraph 49.3 on page 29:

"It is admitted that Mr Addis sent some confidential information relating to the DK business unit. He sent Mr McParland or Ms Hallam a one page document which he or Mr Carman had originally prepared, being the recruitment claims document. Some confidential information was contained in that document. The draft presentation did not contain any confidential information belonging to the claimants."

31. At paragraph 51.1, the defendants refer to the substantial voluntary disclosure which they made. Mr Nicholls drew attention to a number of those documents, which he submitted showed that contrary to their assertions, the defendants had made use of the claimants' confidential information. Mr Nicholls referred to the third affidavit of Carlos Thompson, managing director of the Agent Assure brand, made on 20 July 2015. The affidavit included at paragraph 5:

"It now transpires that the document Alex Skriptchenkov [the first defendant] had printed off and taken to Portsoken was in fact the ACE PI scheme Bordereaux for 2011/12 (the "bordereaux"). The bordereau is sent to insurers automatically on a monthly basis to provide them with monthly changes to the risk pool so that they can manage the complete book of insurance. Unless something goes wrong and it has to be sent manually, there is never any need to print the bordereau, and there is certainly never any need to print the bordereau for a full year as Alex Skriptchenkov [the first defendant] did."

32. Counsel also referred to a number of documents which had been disclosed by the defendants, which indicated that they had been using the claimants' confidential information to pitch Portsoken's pricings. These include an e-mail from Mr Kirkland to Mr Addis, copied to Mr Prescott, on 12 May 2014, responding and thanking for some information statistics being sent to him:

"As I mentioned to Andrew I don't think you can formally put these in any presentation as we would obviously be breaching confidentiality but would suggest that we keep in our back pocket to show on a nudge nudge wink wink basis to interested parties."

33. Also included in the documentation which was disclosed by the defendants is a schedule showing that the Dallas Kirkland recruitment consultants account as at 30 June 2012. That schedule showed premium and percentage commission and expenses, along with other information.

34. Further, there is an e-mail from Mr Carman to Mr Prescott on 24 June 2014 headed "FW: Old (DK) and new (Portsoken) recruitment rates", in which he wrote he understood the Portsoken rates were "designed to take on/be cheaper than DK".

***The current application:***

35. Mr Nicholls for the claimants submitted that the issues which arise on this application raise the point of principle and a point of practicability. What is sought is a search of the defendants' electronic devices and databases and imaging of them and a destruction of the claimants' confidential material which is found on the devices.

36. As for practicability, the claimants' position was sensibly modified during the course of the hearing so that if the issue of principle were to be resolved in favour of the claimants,, the differences between the parties were over search terms and the mechanism for dispute resolution, whether material contained on the devices was the claimants' confidential information, or whether it was material derived from their confidential information.

37. In the course of the hearing before me, the claimants produced a new draft order in which they sought to address some of the concerns about the original draft. Mr Nicholls contended that the orders for delivery up, imaging and search of the defendants' electronic devices and computers is necessary to prevent them from having access to the claimants' confidential information.
38. Deletion of such material from their devices, it is said, is necessary before those devices and computers can be used again by the defendants. It is proposed that two copies of the imaging of those devices be kept so that the material which is deleted from the devices is preserved.
39. A procedure for who is to inspect and who is to keep those devices and what is to happen in the event of disagreement as to whether material is or is not confidential, or is or is not derived from confidential material has been proposed. Mr Nicholls submitted that the order for search of the defendants' devices and destruction of confidential information found is not controversial. We live in an age when information is held and communicated in electronic form.
40. Although neither counsel had found any authority supporting the granting of such relief, Mr Nicholls posited that it is likely that it is not uncommon. In Warm Zones v Thurley & Anor [2014] IRLR 791, Simler J had made an order for imaging and inspection of defendants' computers, albeit not for destruction of material.
41. Further, Mr Nichols drew attention to passages in the book "Employee Competition", edited by Paul Goulding QC. At paragraph 10.162, the author referred to interim orders requiring the respondent not merely to stop using confidential information, but to destroy all electronic copies of the confidential information remaining on his computer.
42. Mr Nicholls contended that the proposed order contained the necessary safeguards for the defendants. A copy of the material deleted from the defendants' devices would be preserved so that if it was subsequently found to have been wrongly removed, it could be restored to the defendants.
43. Further, in the course of the hearing, it was agreed by the claimants that the devices would be delivered to the defendants', not the claimants' expert, and that in the event of a dispute as to whether material did or did not contain the claimants' confidential information, a disputed item which the defendants may say contained their confidential information would not be shown to the claimants.
44. The mechanism for dealing with such disputed information, such as making a summary of what it contained, could be used. It was submitted that a mandatory injunction for search of devices and destruction of material on those devices being sought as an interim order was not objectionable. The proposed order contains safeguards for the return of that material if the court at trial were to find that it had been wrongly deleted.
45. It was said that the evidence before the court, including the defendants' own admissions, showed beyond doubt that the defendants had taken the claimants' confidential information and used it to further their own business. It was submitted

that damages are clearly an inadequate remedy, as it is very difficult, if not impossible, to ascertain the damage caused by wrongful use of that information. The claimants are a substantial organisation and are well able to satisfy their undertaking in damages. It was said that the balance of convenience clearly favours granting interim relief.

46. As for the mechanism for implementing the order, the claimants now propose that delivery to and search of devices and the images be carried out by the defendants' expert. Complaints about costs are met by the observation that the need for this mechanism has arisen because the defendants have taken and used the claimants' confidential information. The defendants have used it to identify clients, renewal dates and pricing. The material disclosed so far shows that pricing has been pitched to undercut the claimants' rates.
47. It was said that the claimants proposed list of search terms is designed to capture material which not only refers directly to the claimants and their business units, but also, as is necessary, that which is likely to have been derived from the claimants' confidential information. Material so identified, it was said, could be scrutinised and excluded by the expert and disputes resolved by the dispute resolution mechanism. Such a procedure could also be used to deal with the defendants' confidential information.
48. It was submitted that the dispute mechanism for referral to a judge is appropriate and would safeguard both parties' confidentiality.
49. Mr Weeks for the defendants, save for Mr Addis, accepted that search for and retention of the claimants' confidential material from the defendants' devices could be ordered at the end of the trial, but he submitted that there is no basis for this to be ordered on an interlocutory application.
50. By consent, the defendants had agreed to deliver up their devices for forensic examination. Further, they had been assiduous in disclosing documents on a voluntary basis to the claimants. As has been said, over 4,000 documents were given to the claimants' solicitors after July 2015.
51. Mr Weeks submitted that the interim mandatory order sought is not supported by evidence. There is no evidence that the defendants have not complied with the agreed Walden-Smith order or that they are in possession of or have used the claimants' confidential information after that date. It was submitted that there is no need for the exceptional mandatory relief sought, and no precedent for an interim destruction order.
52. Mr Weeks submitted that the order sought is likely to have a damaging effect on the defendants' business. The cost of the proposed expert's assessment and any dispute resolution will be considerable and lead to satellite litigation. It is said that despite requests, the claimants have not given figures for their alleged loss. The profits of Portsoken are small. The loss suffered by the claimants is likely to be insubstantial, and it is unquantified.. It is said the costs of the litigation, let alone the proposed dispute resolution procedure, are disproportionate.

***Discussion and conclusion***

53. The claimants are seeking mandatory interim relief. As was referred to by Simler J in Warm Zones, where an application for interim relief involves a mandatory interlocutory injunction the principles to be applied are those summarised by Chadwick J, as he then was, in Nottingham Building Society v Eurodynamics Systems [1993] FSR 468 at 474, approved by the Court of Appeal in Mercury Communications Ltd, 27 August 1997. Those principles are as follows:
- "First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong in the sense described by Hoffmann J. Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive steps at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate where a mandatory injunction is sought to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial. That is because the greater degree of assurance a plaintiff will arguably establish his right, the less will be the risk of injustice if an injunction is granted. But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweighs the risk of injustice if it is granted."
54. The American Cyanamid principles are also to be applied.
55. The claimants' claim that the defendants had taken confidential information belonging to them and had used it for their own business purposes is established to the extent that it needs to be at this stage and on the material before the court. Whilst it is not the role of this court on an interim injunction to decide whether the claim is made out, in my judgment, on the material before the court, I feel a high degree of assurance that the claimants will establish that the defendants have taken and used their confidential information. That being the case, an order for destruction of that information on the defendants' devices is likely also to be made.
56. The role of each claimant and each defendant may differ, but it has not been suggested that any such differences are material to this application. Mr Addis, although not present, has not sought to advance a different case from that of the other defendants. I have a high degree of assurance that the claimants will be able to establish a claim of breach of confidence at trial for the following reasons.
57. In their draft defence, the defendants had admitted to taking the claimants' confidential information and had misused it. The extent of their wrongdoing and the role of each will be determined at trial, but there is sufficient on their own admission to establish a case. Further, the material disclosed by the defendants reveals the use to which some of those defendants have put the claimants' confidential information and that they clearly knew that to do so was wrong.

58. Mr Weeks contended that the type of mandatory relief sought, search of devices and destruction of material, should not be granted. He submitted that it is invasive, unprecedented and unnecessary. I have considered whether the protection of their confidential information to which the claimants are entitled could be secured on an interim basis by lesser orders, such as requiring the defendants themselves to search for and destroy the claimants' confidential information.
59. They have already by the Walden-Smith order consented to an order for the delivery up and search by the claimants' computer expert of their electronic devices and computers. That was an appropriate order to make at that time. The fact that there has been no complaint of non-compliance with the Walden-Smith order does not in my judgment diminish the need for an interim order enabling the search of the defendants' devices now. Whilst the defendants have disclosed a large number of documents and complied with the orders, their behaviour as admitted and shown in the e-mails, to which attention has been drawn in the course of this hearing, shows a high degree of subterfuge in the use of the claimants' confidential material.
60. The claimants are entitled to protect their confidential information. The defendants are not entitled to have it or to use it. On the evidence before me, I am not satisfied that the defendants can be trusted to seek out and delete such material themselves, were they to retain it whether deliberately or inadvertently.
61. Since the Walden-Smith order, the defendants have disclosed a large amount of material which revealed their use of different confidential information for the purposes of the recruitment consultant business area. Balancing the scope and effect of the mandatory orders sought against the real risk of use by the defendants of the claimants' confidential information. In my judgment, a form of order requiring delivery up of, and imaging of, and search of the defendants' electronic devices is required to protect the claimants' confidential information on an interlocutory basis.
62. Such an order, in terms I will outline, would involve the least risk of injustice if it turns out to be wrong. In reaching this conclusion, I have also considered the factors in American Cyanamid. I am satisfied that the claimants have shown at this stage a strong case that their claim will succeed at trial and they will obtain the relief claimed, which includes the destruction of material, that damages would be an inadequate remedy were interim relief not to be granted, and that the claimants will be able to meet their cross-undertaking in damages.
63. In my judgment, the balance of convenience favours granting interim relief for the delivery up of the defendants' devices and computers, their imaging to the extent not already carried out, a search for confidential information and material using such information, and its destruction on the devices to be returned to the defendants, provided that all such material is preserved if it should hereafter be shown that the material was wrongly destroyed.
64. I accept and recognise the defendants' concern that an order such as this should not place their confidential information in the hands of the claimants. The order as originally proposed carried a risk of this effect. The order which will be granted is designed to eliminate the risk of the defendants' confidential information being accessed by the claimants. As already agreed, the devices and computers will be delivered to an external computer expert appointed by the defendants.

65. A copy of the images that the expert will take of those devices will be kept and preserved. The expert will search against search terms. Material he or she considers to be within the scope of the order is to be listed and shown to the defendants. If the defendants agree that the material said by the expert to be confidential to the claimants or to be shown to use their confidential information it will by agreement be deleted from the devices. That information or material will be preserved on the copy of the imaging, which is to be kept and preserved by the computer expert. However, that agreed confidential material is to be irretrievably deleted by the expert from the defendants' devices.
66. Material which the defendants do not agree falls within the scope of the confidential information agreed to be that of the claimants or to be derived from such information will be removed from their devices if the computer expert considers it should be so removed as falling within the scope of the order. It will be kept, as will the entirety of the information on the devices. However, until trial the disputed information t will not be available to the defendants.
67. At their request, the defendants may refer the question of whether the disputed material contains or uses the claimants' confidential information to the court or other agreed arbitrator for decision. An order is to be drawn up in accordance with the terms of this judgment.
68. There has been an issue between the parties as to the search terms to be given to an expert searching the devices. If those terms cannot be agreed between the parties -- and there is considerable debate about those search terms, and I would strongly urge the parties to agree them -- I would like brief submissions from counsel as to the resolution of any remaining dispute.

**(2.54 pm)**