Neutral Citation Number: [2021] EWHC 3022 (Comm)

Claim No: CL-2020-000762

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 10 November 2021

Before :

The Honourable Mrs Justice Moulder DBE

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Between :

Patisserie Holdings PLC (in liquidation) and Others	**Claimants**
- and -	
Grant Thornton UK LLP	**Defendant**

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- -

Mark Templeman QC, Josephone Higgs and Rebecca Akushie (instructed by **Mishcon de Reya LLP**) for the **Claimant**
Simon Salzedo QC, James Brocklebank QC, Edward Harrison and Frederick Wilmot-Smith (instructed by **Taylor Wessing LLP**) for the **Defendant**

Hearing date: **10th November 2021**

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JUDGMENT

The Honourable Mrs Justice Moulder DBE **Wednesday, 10 November 2021**
(2.05 pm)

THE HONOURABLE MRS JUSTICE MOULDER DBE

1. This is the claimants' application dated 2 November 2021 that the defendant, Grant Thornton UK LLP ("Grant Thornton"), should disclose and provide the claimants with copies of its audit files for the financial years ending 30 September 2010 to 30 September 2013, or alternatively copies of the working papers from the defendant's audit files as set out in schedule 1 to the witness statement of Mr Davis dated 1 November 2021.

2. The application is supported by two witness statements from Mr Davis, a partner at Mischon de Reya LLP, having conduct of this matter on behalf of the claimants, dated 1 November 2021 and 8 November 2021. The defendant has filed a witness statement dated 5 November 2021 of Mr Howell, a partner in the firm of Taylor Wessing LLP, having conduct of the action on behalf of the defendant.

Background

3. I take the summary of the background from the case memorandum.

4. This is an audit negligence claim. The claimants (the "PV Group") are holding and trading entities that prior to their liquidation carried on business as part of a cafe and casual dining group.

5. The first claimant engaged Grant Thornton to audit its financial statements and those of the second to seventh claimants for the years ending 30 September 2014 to 30 September 2017.

6. The claimants allege that from at least March 2015 the PV Group's financial statements had been falsely manipulated and misrepresented its financial position and performance, that cash reserves, gross profit and revenue had been materially overstated, that the PV Group had substantial borrowings in circumstances where it had been reporting that it had none, had been facing extreme pressure from creditors at times when it was reporting cash surpluses and that its financial records, reporting and accounting policies and controls were inadequate.

7. The claimants' primary claim as currently advanced is for damages to be assessed in respect of the sums lost and expended as a result of the PV Group having continued to trade in line with its alleged policy of expansion funded by internally generated cashflow in the period between 25 November 2014 and 22 January 2019.

8. The claimants quantify the loss which they say is caused by Grant Thornton's negligence as in the region of £209 million. This is calculated as the difference between the net assets of the PV Group as at 25 November 2014 and net deficiencies in their liquidations as at 28 July 2020.

Chronology

9. The claim was issued on 22 January 2021.

10. On 7 May 2021, Grant Thornton issued its defence and a request for further information.

11. On 16 July 2021, PV Group served its reply and response to the RFI.

12. A copy of the audit file for the financial year 2014 was provided to the claimants on 10 August 2021.

13. On 29 October 2021, the PV Group served in draft substantial amendments to the particulars of claim. These do not yet contemplate the extent of the alleged misstatements for the 2014 year. It is contemplated that quantum will be amended to plead the economic value of the business at the start of trading in 2014 as a multiple of EBITDA.

14. Grant Thornton's position on the proposed amendments is reserved. Permission is not sought at this hearing from the court for the amendments and the court does not therefore proceed to consider them further other than to note that a copy of the financial year 2014 audit file was provided to the claimants in August 2021. Whilst there is considerable correspondence before the court on the provision of the 2014 audit file, it seems to me that that correspondence and the issues raised have no bearing on the application now before this court.

Relevant provisions of the CPR

15. The relevant provisions pursuant to which the application is stated to be made are paragraphs 5.11 or paragraph 9.4 of Practice Direction 51U. The claimant has now submitted that in the alternative it relies on the court's general case management power in CPR 3.1(2)(m).

16. Paragraph 5.11 of Practice Direction 51U states:

> "In an appropriate case the court may, on application, and whether or not Initial Disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply."

17. Paragraph 9.4 states:

> "The court may make an order for Extended Disclosure in stages."

18. CPR 3.1(2)(m) provides:

> “Except where these Rules provide otherwise, the court may—
>
> …
>
> (m) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.”

Claimants’ submissions

19. It is submitted for the claimants that the court has jurisdiction to make the order sought, that under paragraph 5.11 of the Practice Direction this is not limited to “key documents”, which is the limitation imposed in relation to Initial Disclosure, and that the issues to which the claimants now seek to respond arise as a result of the defence which was filed by the defendant.

20. In relation to the claimants' reliance on paragraph 9.4, it was submitted for the claimants that although the Disclosure Review Document is not before the court for approval, the parties have agreed in relation to this particular set of documents that there is an “Issue for Disclosure” and that Model C will apply and therefore the court could make an order given the agreement of the parties. It was submitted that the disclosure sought will enable the claimant to particularise the misstatements which have been identified, that the documents will be disclosable in due course and

that it would be consistent with the overriding objective to save expense and avoid unnecessary delay for Grant Thornton to provide the audit files now.

21. I note from the evidence that it is said that the earlier audit files have been requested in order to identify the extent of the misstatements in the 2014 financial year that are attributable to earlier years and thus to ascertain the true financial position of the companies in 2014; the documents will enable the claimants to consider the effect of misstatements in earlier years on the closing balances for the 2013 financial year and the opening balances for 2014 and identify trends and ratios in the misstatements in the earlier years which the claimants say are likely to impact upon the misstatements in the 2014 financial year and following years.

22. It is said in the evidence that without disclosure of the audit file for the 2013 financial year, the parties' experts will be hampered in the necessary process of assessing the closing balances for 2013 and the opening balances of 2014, that the claimants' records are likely to suffer from significant limitations since the extent of the misstatements in 2014 to 2017 suggest that the previous years' records are likely to be inaccurate in many respects. It is said in the witness evidence that one of the best records and primary sources for the exercise that both parties experts will need to undertake is the audit files of the defendant.

23. It is noted in the evidence that Grant Thornton has confirmed that it agrees that the documents contained within the audit files for 2006 to 2013 are disclosable insofar as they are relevant to the true financial performance of the PV Group during the period September 2006 to May 2014. It is therefore submitted for the claimants that the application by the claimants is only a timing issue in substance and relates to disclosure of documents which would be easy for Grant Thornton to provide.

24. It is said that the claimants' expert has explained that there is a difference between the underlying accounting records that the claimants have been able to access from Sage and the information which was presented to Grant Thornton during its audits and therefore the claimants need access to these

records in order to understand what records Grant Thornton was actually considering and upon which the financial statements are based.

Defendant's submissions

25. It was submitted for the defendant that this application does not fall within the scope of either paragraph 9.4 or paragraph 5.11 of Practice Direction 51U. It was submitted for the defendant that paragraph 9.4 is not a freestanding power and is inapplicable. It was submitted that paragraph 5.11 only applies where it is necessary to understand the other party's case or to plead a defence or reply. It was submitted for the defendant that in this case, the purpose of the disclosure sought is to enable the claimants to formulate their own case. It was submitted that the documents sought are not "necessary" but on the evidence filed by the claimants is only sought on the basis that the claimants' work to quantify the misstatements will be "*materially assisted*" by access to Grant Thornton's earlier audit files.
26. It is submitted for the defendant that the application is misconceived, it seeks disclosure in order to enable the claimants to plead a case, and even if the court has a discretion, there is no proper reason to give early disclosure of the audit files in order to assist the PV Group in pleading their case. It is submitted that any information in the audit files can only have come from the claimants' own records and that the audit files do not contain full records of the companies' own source documents. Thus, the information which is retained on the audit files reflects the quality and integrity of the data presented to the auditors.
27. It was submitted for the defendant that the claimants in this case have the documents and could carry out a search and that the claimants have provided no details of what the claimants have said in their evidence would be a "*costly and time-consuming exercise*".
28. It was noted by counsel for the defendant that the defendant does not accept that all the documents now sought are disclosable and that the defendant has only agreed to disclose documents which go to the strategy of expansion which the claimants say was successful until 2014. It was submitted for

the defendant that the content of the audit files sought is not limited to documents which are relevant to the true financial performance of the business.

Discussion

29. The first question for the court is that of jurisdiction, whether the court has the power to make the order which is sought. The first ground relied upon is paragraph 5.11 of the Practice Direction. Paragraph 5 as a whole is concerned with initial disclosure. This is the obligation to disclose "*key documents*" in support of the case and documents necessary to enable the parties to understand the case. Initial disclosure is tightly focused, see the observation of Cockerill J in *The State of Qatar v Banque Havilland SA and another* [2020] EWHC 1248 (Comm). Initial disclosure can, however, be dispensed with. Paragraph 5.11 sits as part of this section and provides that even where there has been no initial disclosure, the court can require disclosure where it is necessary to understand the claim or to formulate a defence or reply.

30. Although paragraph 5.11 clearly contemplates disclosure which goes beyond the initial disclosure, paragraph 5.11 must, in my view, be interpreted narrowly having regard both to the context of paragraph 5 itself and the overall purpose of the Practice Direction, which is to introduce a more proportionate approach to disclosure. A broad interpretation of paragraph 5.11 would, in my view, cut across the structure of the Practice Direction where, having made limited focused initial disclosure, the court then determines whether Extended Disclosure is to be ordered having regard to whether such an order for Extended Disclosure is reasonable and proportionate. To that extent, I accept the submission of counsel for the defendant that there is not a "third way" which is contemplated by paragraph 5.11.

31. The claimants relied on the language of paragraph 5.11 and submitted that it is necessary in order to formulate its reply. They submit that this is necessary because in its defence the defendant said that there was a lack of particularisation in the particulars of claim. I accept the submission for the defendant that that is not a reply to a substantive issue raised by the defence. Wherever the

subsequent particularisation is placed in the pleadings, be it the amended particulars of claim or in a reply, it forms part of the original case which is brought by the claimants. In my view, therefore, this application does not and cannot fall within paragraph 5.11 in that it seeks to particularise the original case which is brought by the claimants and not to respond to a new issue raised by the defence.

32. Turning to paragraph 9.4, it was submitted for the claimants that since the disclosure sought, at least in part, is agreed by the parties as going to an "Issue for Disclosure" and the parties have agreed the extent of disclosure in respect of that Issue, the court should use paragraph 9.4 to make the order which is sought.

33. The claimant referred the court to the draft Disclosure Review Document where the issue and the model has been agreed. The claimants submitted that this should therefore be viewed as part of an order for Extended Disclosure and thus the court has power to make this order under 9.4 since it provides for Extended Disclosure in stages.

34. The Practice Direction provides a structure for disclosure. Normally the parties will have completed a Disclosure Review Document and the rules provide that at the first CMC the court will determine whether to order Extended Disclosure. Whilst the courts will have regard to what the parties have agreed, the rules expressly state that the court will be concerned to ensure that disclosure is directed to issues in the proceedings and the the scope of disclosure is not wider than is reasonable and proportionate: paragraph 2.4 of the Practice Direction.

35. The court has an important role under the Practice Direction to determine whether to order Extended Disclosure, and the factors to which the court will have regard are set out in paragraph 6.4. They include the number of documents involved, the ease and expense of searching and the need to deal with cases expeditiously. Paragraph 8.2 provides that there is no presumption that a party is entitled to Extended Disclosure and no model will apply without the approval of the court. The parties have

to discuss the searches that will be undertaken, and the court may give directions with a view to reducing the burden and cost of the disclosure exercise: paragraph 9.6.

36. Whilst the parties are required in the Practice Direction to act constructively and to seek to agree matters, in my view, this application, were it to be premised on 9.4, would be premature. The court would be failing in its obligations to manage the disclosure process in the way contemplated by the Practice Direction to make an order now, merely because the documents, or part of them, go to an issue which is agreed between the parties. It is for these reasons that in the course of the hearing I said that the application on this ground would not succeed and I remain of that view having reflected on counsel's submissions.

37. The third basis for the jurisdiction of the court is under CPR 3.1(2)(m). It was accepted for the defendant that the court has an inherent jurisdiction to make an order to disclose documents but submitted that such power should not be exercised in a way that cuts across the Practice Direction. I accept that submission which seems to me to be in accord with dicta in the authorities, both *Raja v Van Hoogstraten (No 9)* [2008] EWCA Civ 1444, at [78], which was dealing with the inherent jurisdiction of the court outside the CPR, and *Mehmet Arkin v Marshall* [2020] EWCA Civ 620 at [42].

38. I do not accept the submission that the principle expressed by the Court of Appeal in *Mehmet Arkin* has no relevance because the court was there dealing with Practice Direction 51Z. It seems to me that, as in *Mehmet Arkin*, while the court retains the power to make an order for disclosure, the proper exercise of that power should be informed by the Practice Direction and the purposes for which it was imposed, namely to provide a structure and a set of rules which limit disclosure to what is reasonable and proportionate.

39. Accordingly, it seems to me that the court would only the order sought under its residual power if it was satisfied that it was not thereby running contrary to the regime imposed by the Practice Direction having regard both to its literal terms and its overall purpose. In my view, no case has

been made out which would allow the court to make the order sought in this case under its residual powers.

Conclusion on Jurisdiction

40. I am therefore of the view that the disclosure sought by this application falls outside the disclosure which can be ordered in accordance with the Practice Direction and to make an order under the court's residual jurisdiction would be to cut across and undermine the purpose of the Practice Direction.

Merits of the Application

41. However, if I am wrong on the issue of jurisdiction, I will consider whether the court should be prepared to make an order in the circumstances of this case.

42. If an order were to be made under paragraph 5.11, the claimants would have to show that the documents were necessary to formulate its reply. It was submitted for the claimants that it is necessary to quantify the misstatement in the 2014 to 2017 accounts. It is said in the evidence that without disclosure of the financial year 2013 audit file, the parties' experts will be hampered in the necessary process of assessing the closing financial year 2013/opening year financial year 2014 balances and of ascertaining which of the misstatements in the financial year 2014 financial statements were attributable to financial year 2014 and which to earlier years.

43. It seems to be accepted for the defendant that the earlier years go to the issue of whether the group were pursuing a successful policy of expansion during those earlier years. However, I have difficulty accepting that the claimants need the audit files for the earlier years in order to quantify the misstatements which they have identified.

44. I accept that the claimants wish to examine whether the misstatements which they have identified in 2014 to 2017 were present in earlier years and thus how they came to be made, but I do not accept that the quantum of the misstatements, which are said to arise from the overstatement of cash

reserves, gross profit and revenue and the existence of liabilities which were not included in the financial statements, is reliant on the prior years (2010-2013).

45. Even if I am wrong on that, the evidence is that the records for the 2013 financial year have been searched for by the claimants and located. The reason advanced by Mr Davis in the evidence for seeking access to the audit files of Grant Thornton is said to be that the information presented to Grant Thornton may have been different, and that it will enable the claimants to ascertain to what extent data and information was tested by Grant Thornton and can be relied upon (paragraph 80 of Mr Davis' first witness statement).

46. I find it difficult to reconcile on the one hand the allegations by the claimants that Grant Thornton failed to carry out its responsibilities with due care and the proposition that by looking at what Grant Thornton has done the claimants will be able to obtain reliable information. Further, whilst the claimants say that they have found inconsistencies between information in their own records and those of the Grant Thornton files, the Grant Thornton files are themselves derived from information supplied by the companies and will not contain complete financial records as they are an audit trail and not therefore a copy of the companies' financial records.

47. For those reasons, if this application were able to be made pursuant to paragraph 5.11, in my view, the claimant has not shown that the documents are “necessary” in order to formulate its case.

48. In the alternative, if I am wrong to hold that the court should not exercise its residual discretion as a matter of jurisdiction, I will consider whether the court should exercise that general discretion to order disclosure on the basis that even though the documents are not necessary, they will assist the claimants, and in due course some of the documents would be disclosable.

49. In my view, I should not make such an order. This is not a case where the claimants do not have the information. It appears that it has a large volume of information. The evidence in its witness statement is that it would be easier for the defendant to provide the information than for the claimants to carry out the searches. I refer to paragraph 79 of Mr Davis' witness statement:

> "Given the huge volume of data in the joint liquidators' possession and their unfamiliarity with parts of it, it will no doubt be both a costly and time-consuming exercise for them to search for and find all relevant records relating to financial years 2006 to financial year 2013, whereas the information should be more readily available on GT's audit files."

50. I accept the submission for the defendant that no details of the costs and time which would be incurred by the claimants have been provided. But even if such details had been provided, I am not persuaded that the documents in Grant Thornton's audit file, which are themselves derived from the claimants' own records, will be more accurate and, as indicated, they are in any event an incomplete record of the financial position of the company.

Conclusion on the application

51. To conclude, in my view, this application falls to be dismissed. It falls outside the ambit of the Practice Direction properly construed and seeks to obtain disclosure of documents prematurely. As a matter of principle, therefore, this application should not, in my view, be granted.

52. Even if I were wrong on that, I find that on the facts and evidence before me, the claimants have not made out a case for disclosure of these particular documents either under the Practice Direction or in exercise of the court's residual discretion.