IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1427/5/7/21

BETWEEN:

BELLE LINGERIE LIMITED

Claimant

- v -

(1) WACOAL EMEA LTD
(2) WACOAL EUROPE LTD

Defendants

ORDER

UPON reading the application, filed by the Claimant on 16 May 2022, for a conditional or unless order pursuant to Rules 53(1) and 57 of the Competition Appeal Tribunal Rules 2015 and for an order for wasted costs on the indemnity basis (the "Application")

AND UPON reading the third witness statement of Susannah Sheppard dated 15 May 2022 on behalf of the Claimant and the submissions filed by the Claimant on 16 May 2022

AND UPON reading the first witness statement of Robert Lye dated 18 May 2022 on behalf of the Defendants ("Lye 1") and the submissions filed by the Defendants on 16 and 18 May 2022

AND UPON reading the inter partes correspondence submitted as part of the Application

AND UPON the Defendants having failed to comply with the directions relating to disclosure and inspection made by the Tribunal at the first case management conference on 14 March 2022 (the "First CMC"), as set out in paragraphs 11 and 12 of its Order dated 14 March 2022 (the "Directions Order")

IT IS ORDERED THAT:

1. Subject to paragraph 2 below, the Defendants shall provide inspection of their Phase 1 Disclosure (as defined in the Directions Order) in full by no later than 4pm on 31 May 2022, in an electronic format and on an electronic medium to be agreed by the parties.

2. The Defendants shall provide inspection of tranches of disclosed documents as described in paragraphs 28 to 39 of Lye 1 on a rolling basis and on such earlier date as each tranche is available.

3. The Defendants shall pay the Claimant's costs attributable to the Defendants' failure to comply with the directions in paragraphs 11 and 12 of the Directions Order in any event to be assessed on the standard basis.

4. There be liberty to apply.

REASONS

1. Although the Tribunal dismissed the Claimant's application for its claim to be subject to the fast-track procedure it was of the view that these proceedings were urgent, and gave directions at the First CMC leading to a five day trial commencing on 15 September 2022. The Directions Order provided that the parties would file and serve disclosure reports and electronic disclosure questionnaires ("EDQs") by 4pm on 19 April 2022 (paragraph 10); agree a list of further categories of documents and data to be disclosed for Phase 1 Disclosure by 4pm on 3 May 2022 (paragraph 11); and provide inspection of the Phase 1 Disclosure by 4pm on 10 May 2022 (paragraph 12).

2. The parties filed and served their EDQs on 19 April 2022 (nothing turns on the Defendants' being one hour late). On 21 April 2022, the Claimant's solicitors wrote a detailed letter raising a number of matters arising out of the Defendants' EDQ and seeking to agree keyword searches for the disclosure exercise. The Claimant's solicitors sought a reply by 4pm on 25 April 2022. The Defendants' solicitors responded on 25 April 2022 at 3:58pm indicating that Mr Lye had that day returned from holiday, but they would endeavour to reply by 27 April 2022.

3. No substantive response was received until 28 April 2022, and then the Defendants' solicitors sought only to clarify the keyword searches proposed, and to advise the Claimant that the Defendants would need to engage a third party e-disclosure platform provider. At 3:56pm on 3 May 2022, the Defendants' solicitors wrote to the Claimant stating that they intended to ask the Claimant to disclose further documents, but that it had not been practicable to decide which documents in the absence of the junior Counsel who had been on holiday and had only returned that day. They pointed out what was by then obvious: the deadline provided for in paragraph 11 of the Directions Order would not be met.

4. A substantive response to the remainder of the issues raised by the Claimant in its solicitor's letter of 21 April 2022 was not received until 6:37pm on 3 May 2022. Mr Lye said that they needed to wait for factual information to be provided by their clients, and for junior Counsel's return. However, the sort of questions being asked by the Claimant ought to have been capable of being answered by the Defendants in significantly less than the 12 days it took. Neither Mr Lye's nor junior Counsel's holiday is a satisfactory answer, in circumstances where the firm instructed by the Defendants is a substantial one; more than one solicitor is engaged in representing the Defendants; arrangements for holiday cover must (or ought to) have been made; and Leading Counsel is also retained.

5. On 5 May 2022, for the first time, the Defendants' solicitors sent to the Claimant's solicitor a list of the additional categories of documents that they requested that the Claimant disclose, and later the same day sought further clarification about the Claimant's keyword searches. On Friday, 6 May 2022, just two business days prior to the deadline for providing inspection, the Defendants' solicitors sent to the Claimant's solicitor a letter complaining about the Claimant's proposed keyword search terms and explaining the approach that the Defendants were now proposing to take to the disclosure exercise, following discussions with their e-disclosure platform provider. They raised the prospect that the Defendants' disclosure would now need to take place in stages.

6. The Claimant's solicitor responded on Monday, 9 May 2022, indicating that it would endeavour to provide the documentation belatedly requested by the

Defendants; pointing out that the Defendants had had plenty of time to liaise as regards the Claimant's proposed keyword searches, and reminded the Defendants that they had had nine months from the date of the letter before claim to consider the information they held that was relevant to the claim and that they had also not provided any of the documentation the Claimant had requested prior to commencing its claim. The Claimant's solicitor requested the Defendants' proposals for disclosure and inspection as soon as possible.

7. The Claimant, in compliance with paragraph 12 of the Directions Order, made its documents available for inspection on 10 May 2022. The Defendants' solicitors sent a letter at 4:20pm on 10 May 2022 informing the Claimant that various sets of data had only just been collected and were being uploaded to the e-disclosure platform, that they would be unable to meet the deadline in paragraph 12 of the Directions Order, and that there would be a "short delay". By 12 May 2022, the Defendants had still not provided their disclosure. The Claimant's solicitor wrote to the Defendants expressing concern as to the way in which disclosure had been conducted and indicating that unless the Defendants confirmed that disclosure would be provided the following day the Claimant would seek an unless order.

8. On 13 May 2022, the Defendants' solicitors replied advising the Claimant that a sub-set of disclosure would be provided by 4pm, but much of the remaining data was still awaiting review, or in some cases still being collected prior even to being uploaded to the e-disclosure provider's platform. The Defendants' solicitors apologised for the delay but said that they were pressing on with the disclosure exercise as quickly as possible in the circumstances, and that they had now decided what the next steps should be having received their e-disclosure platform provider's report. At 4pm the Defendants provided a small number of emails later that day, but then wrote to advise the Claimant that these were incomplete. An additional 42 emails were sent at 7:58pm.

9. It is against that background that the Claimant then issued this Application by which it seeks an order that unless the Defendants provide inspection by 4pm on 18 May 2022, the Defence be struck out, or the Defendants be debarred from

taking any further part in the proceedings without the permission of the Tribunal.

10. The Tribunal noted at the CMC that the Defendants had not engaged with the Claimant's pre-action requests for documents, and that Counsel was unable to explain the scope of what would be required by way of disclosure. Although Mr Lye suggests that "considerable thought" was given to the scope of the disclosure exercise before the EDQ and disclosure report were prepared, he does not explain what preliminary conclusion was reached. It is in any event apparent from Lye 1 that the Defendants "did not commence their disclosure exercise in earnest until after EDQs and disclosure reports had been exchanged". This is said to be because it seemed to be "disproportionate" for the exercise to be undertaken without agreement as to keyword terms to be applied and the scope of disclosure. This is no answer in circumstances where the Defendants had not begun to interrogate their electronic data prior to filing the EDQ and disclosure report and did not provide any proposed keyword search terms for the Claimant to consider. The Defendants plainly ought to have actively engaged in the process envisaged by paragraph 11: not allowed it to slip.

11. Mr Lye explains that the e-disclosure platform provider was only contacted on 28 April 2022, and introduced to the Defendants "within the next few days". The Defendants only provided instructions to proceed on 5 May 2022. It was only on the recommendation of the e-disclosure platform provider that Counsel was asked to provide high level search terms which (in his view) ought to cover the majority of the issues involved. This apparently enabled the amount of potential data to be collected from the file server "to be reduced somewhat". It was only after the appointment of the e-disclosure platform provider that the Defendants were asked to consider which of the files were unlikely to contain any relevant documents. These steps could and should have been taken by the Defendants weeks before: preferably prior to, and in any event shortly after the First CMC, given the tight timetable ordered in this case.

12. The Defendants suggest that there was uncertainty as to whether the Claimant would in fact be in a position to proceed with its claim if the fast-track procedure was not ordered, or a costs capping order not granted, and that somehow justifies

their inaction in relation to disclosure. Such an approach is entirely misconceived. The Tribunal made its Directions Order, and the Defendants were required to comply with it: not "wait and see" whether the claim went away.

13. The Defendants say that the data collected by the third party e-disclosure platform provider consists of:

    (a) Email data from the Microsoft Cloud server used by the Defendants. This is apparently the documentation made available on 13 May 2022;

    (b) OneDrive data from the Microsoft Cloud server used by the Defendants. This has now been reviewed and was disclosed on 17 May 2022;

    (c) Teams messages from the Microsoft Cloud server used by the Defendants. This should be available either on 18 or 19 May 2022; and

    (d) Data from Wacoal's file server. This should be available for the Defendants' solicitors to review on 24 and 27 May 2022, and available for inspection on or before 31 May 2022.

14. In addition, certain documentation has been provided directly from the Defendants. That, it is said can be provided on 19 May 2022. Further, the Defendants can provide their solicitors with the documentation requested by the Claimant's expert economist by 23 May 2022, and it should be provided to the Claimant by 26 May 2022.

15. The Tribunal has the power to make an unless or conditional order pursuant to Rules 53 and 57. The Defendants failed to comply with the Directions Order without seeking an extension of time. The Claimant suggests that it has been prejudiced (i) in having less time to consider the Defendants' disclosure than the Defendants have had to consider the Claimant's; and (ii) because there is limited opportunity to consider the disclosure as part of the preparation for factual, industry and economic expert witness evidence (due variously on 10; 17; 24 June, and 1; 15; 29 July 2022). This is said to be exacerbated by (i) an existing information asymmetry in relation to the Defendants' strategies and

policies; (ii) the inequality in arms between the parties (the Claimant being a small enterprise); and (iii) Claimant's Counsel having other commitments such that altering the timelines set aside for various tasks is not straightforward. The Claimant is also concerned should there be any risk to the trial date.

16. An unless order is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified (*Marcan Shipping (London) Limited v Kefalas* [2007] EWCA Civ 463, per Moore-Bick LJ at [36]). In the context of a failure to comply with disclosure obligations, it may be appropriate where a party is "substantially in default of his disclosure obligations", such that the breach is "so serious that it gives rise to a risk of injustice in the adjudication of the trial of the issues in the action" (Matthews and Malek, Disclosure (5th Edn, 2017 at paragraph 17.06; 17.07). It is a "nuclear option" (*Al-Subaihi v Al-Sanea* [2020] EWHC 3206 (Comm) per Cockerill J at [47]).

17. This is the Defendants' first failure to comply with an Order of this Tribunal, albeit a very serious one, particularly in light of the tight timetable in this case. The Defendants have apologised for their failure to complete their Phase 1 Disclosure in accordance with the Directions Order. They are now taking steps to provide the remaining disclosure as quickly as possible, and anticipate that inspection of all relevant documents will have been given by no later than 4pm on 31 May 2022.

18. The deadline for exchange of witness statements is only 10 days later. That said, witness statements for trial are intended only to contain matters of fact of which a witness has personal knowledge (Practice Direction 2/2021 paragraph 3.2). As such, the Defendants' disclosure is likely only to be of limited assistance. If on the contrary it is, then the Tribunal would be willing to accommodate any need on the part of the Claimant to address it in the Claimant's Reply evidence. The Defendants maintain they have no disclosure to provide as regards the industry expert. Disclosure is therefore likely to be most pertinent to preparation of the economic expert evidence. The Defendants suggest that disclosure of the documents relevant to the economic expert evidence will be provided on 26 May 2022 (or at the latest, 31 May 2022) and that will give sufficient time before

the economic expert evidence must be filed and served by 15 July 2022. In the circumstances I do not think that the trial date is in jeopardy, and whilst I note the availability issues of Counsel, I do not think that the Claimant will be unduly prejudiced.

19. The Application for an unless order is therefore dismissed. I consider that the Defendants should have until 4pm on 31 May 2022 to provide inspection. However, the Defendants must not wait until that date to provide any remaining documentation: their solicitors must endeavour to review the responsive documents at pace and the Defendants must provide their documents in tranches as soon as they are available, and (whilst I make no order as to specific dates for each tranche) in line with what has been proposed in Lye 1.

20. In the circumstances set out above, I consider that this is an appropriate case to order that the Defendants pay the Claimant's costs attributable to the Defendants' failure to comply with paragraphs 11 and 12 of the Directions Order in any event to be assessed on the standard basis. The Defendants suggest this Application was unnecessary. However, the timetable in this case is tight, the Defendants are in breach and, at the time the Application was issued the Defendants had not given any date by which disclosure would be provided. The Application was entirely justified.

21. The Claimant seeks its costs on the indemnity basis. The circumstances leading to this Application and Order are entirely unsatisfactory, but it is a first breach by the Defendants and inspection is to be provided, albeit three weeks late. I do not consider that the Defendants' conduct is such as to take the case out of the normal so as to justify an order for indemnity costs (*Socrates Training Limited v The Law Society of England and Wales* [2017] CAT 12 at [8]).

Bridget Lucas QC Made: 19 May 2022
Chairwoman of the Competition Appeal Tribunal Drawn: 20 May 2022