

BETWEEN:

SHELL U.K. OIL PRODUCTS LIMITED

**Claimant/
Applicant**

- and -

CHIEF CONSTABLE OF SURREY POLICE

Respondent

**SKELETON ARGUMENT FOR THE
RESPONDENT**
for hearing on 14 October 2022

References to pages of the hearing bundle are in the form: TAB/page

Introduction

1. The Respondent consents to the Claimant's application for a third party disclosure order. In this short skeleton argument the Respondent addresses only (i) the jurisdiction the Court has to make the order in relation to documents that may come into existence in the future; and (ii) the Respondent's costs.
2. The skeleton argument does not address the background or other features of the application or proceedings; the Respondent notes how these are addressed in the Claimant's skeleton argument [A4/64] and the witness statement of Emma Pinkerton [A3/10] and raises no objection to them. The Respondent agrees with the suggested pre-reading in the Claimant's skeleton argument.

The Court has jurisdiction to grant conditional disclosure orders

3. Disclosure is defined in CPR 31.2 in terms that relate to whether a document exists or existed: "*A party discloses a document by stating that the document exists or has existed.*" A party cannot, therefore, 'disclose' a document before it exist. It can, however, come under an obligation to disclose a document once it exists.
4. The consent order before the Court [A3/16] does not require the Respondent to disclose something that does not exist (i.e. it imposes no present obligation on the Respondent to disclose documents that do not exist). Rather, it is conditional; it orders that a

disclosure obligation will arise in the future if certain conditions are met. Those conditions are (i) that individuals have to have been arrested in the circumstances described in para.1(b) of the consent order, and (ii) that the Claimant has made a request to the Respondent. If either condition is unfulfilled, no obligation to disclose arises under the consent order.

5. The order does not, therefore, require “*disclosure of documents which do not exist*”, but rather it specifies that if certain documents are created in the future in certain circumstances, a requirement of disclosure may then arise. In this way, it is no different to a conditional disclosure order that requires a party, if it discovers a particular type of document exists, to disclose it upon discovery.
6. That principle underlies the continuing duty of disclosure in litigation in CPR 31.11(1) (“*Any duty of disclosure continues until the proceedings are concluded*”, emphasis added). Given the use of the word “*any*”, it would be surprising if the third party disclosure order could not make provision for new documents that came into being while the proceedings were ongoing.

Judicial statements that disclosure is about the present and past, not future

7. The Respondent accepts that the Court has no power under CPR 31.17 to order disclosure of documents that do not exist, in the sense that it cannot order a party to do the impossible (i.e. presently disclose something it does not have) or to create or obtain a document in order to disclose it. The absence of that power has sometimes been described by the Courts before as meaning that disclosure “*looks to the present and the past, not to the future*”. The absence of this power (and the existence of this phrase) may underlie the concern identified in Tipples J’s order of 7 October 2022 directing the parties to attend this hearing [A2/8].
8. In *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 W.L.R. 627 (HL), at 635-636, Lord Diplock said:

“[the duty is] to give discovery of documents under R.S.C., Ord. 24; and this, as I have pointed out, depends upon the true construction of the word ‘power in the phrase ‘the documents which are or have been in his possession, custody or power.’

The phrase, as the Court of Appeal pointed out, looks to the present and the past, not to the future. As a first stage in discovery, which is the stage with which the subsidiaries appeal is concerned, it requires a party to provide a list, identifying documents relating to any matter in question in the cause of matter

in which discovery is ordered. Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase ‘possession, custody or power’ the expression ‘power’ must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future.” (emphasis added)

9. As the final sentence makes clear, the phrase about disclosure not looking to the future simply means that a party cannot be directed to obtain or generate a document that it does not hold in order to disclose it. It does not, however, rule out an order that could have different effects over time; i.e. a conditional order that imposes different disclosure obligations depending on what documents may exist at any given time.

The Respondent’s costs

10. The general rule about costs for third party disclosure orders is that the applicant should pay the respondent’s costs both of the application and of complying with the order. CPR 46.1 says:

- (1) This paragraph applies where a person applies—

...

- (b) for an order under—

- (i) section 34 of the Senior Courts Act 1981; ...

...

(which give the court power to make an order against a non-party for disclosure of documents, inspection of property etc.).

- (2) The general rule is that the court will award the person against whom the order is sought that person's costs—

- (a) of the application; and

- (b) of complying with any order made on the application.

11. An application for a third party disclosure order under CPR 31.17 is on the basis of the power in s.34 Senior Courts Act 1981. Accordingly, the general rule applies and the Respondent respectfully asks that the order be amended to award it both sets of costs, “*to be assessed if not agreed*”.

Conclusion

12. The Respondent respectfully submits that the consent order should be granted, subject to the award of costs to the Respondent.

Ben Mitchell
11KBW
13 October 2022