NEUTRAL CITATION NUMBER: [2025] EWHC 1923 (Ch)

Case No: BL-2025-000456

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

7 Rolls Buildings
Fetter Lane
London
EC4 1NL

BEFORE:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

ACASTA EUROPEAN INSURANCE COMPANY LIMITED	**CLAIMANT**
- and -	
EMMIERA GROUP LIMITED	**DEFENDANT**

Mr Stuart Benzie and Matthew Tonnard of Counsel on behalf of the Claimant

Judgment

Judgment date: 2 April 2025

Reporting Restrictions Applied: No

The Honourable Mr Justice Marcus Smith:

1. I have before me an application by Acasta European Insurance Company Limited, which I shall refer to as the Claimant or C, against Emmiera Group Limited, which I shall refer to as the Defendant or D. The application is for what is now known as an Imaging Order.

2. The law in regard to Imaging Orders is in a state of some development. The position regarding Imaging Orders was comprehensively set out in a judgment of Arnold LJ in the Court of Appeal in *TBD (Owen Holland)*, and there have been a few first instance decisions applying the law as they are stated, of which this will become one.

3. The application for an Imaging Order is almost always made in private and ex parte without notice to the Defendant, as is the case here. The reasons for this are obvious when one understands the nature of the jurisdiction.

4. An Imaging Order is an order that is intended to ensure that documents that would normally be produced in the course of disclosure, that is to say after proceedings have commenced, are protected from destruction at a stage prior to the issue of proceedings, so that they may be preserved and reviewed pursuant to direction of the Court in a manner that the Court will decide in due course. In other words, all that is happening is that an accelerated approach is taken in aid of disclosure, because if the ordinary course of conduct of the Courts were followed, there would be a risk of destruction of data, documents, information, which would be to the prejudice of the due administration of justice.

5. Having articulated the basis on which Imaging Orders are made and sought, it is clear that these applications must normally be heard in private and without notice to the Defendant, because the giving of notice would inevitably run the risk of destroying the purpose of the application, because the destruction of the documents would be accelerated. So, I gave permission for this hearing to be heard in private and I entirely understand and endorse the approach of C to move this application without notice to D.

6. The evidence that has been adduced before me is set out in a schedule to the draft order that is before me. Essentially, I have seen and read the first affidavit of Michael Gallagher, the first affidavit of Rebecca Macfadyen, both of entities within the C group, the first witness statement of Leanne Schneider-Rose, the first witness statement of Dean Parnell, and the first witness statement of John Holden.

7. These latter three witness statements are statements of those who are intended to be the supervising solicitor, or solicitors, to supervise the execution of the order. From this, it becomes clear that C has, quite properly, regarded the order that it seeks as one that is in the more serious category of orders that this Court can make. It ranks, perhaps not quite alongside, but certainly very close to, the search order jurisdiction that this Court will exercise in an appropriate case, but only with caution.

8. Turning to the history of matters. The relationship between C and D began in 1999. Essentially, C is an insurance company and D is C's claims handler. The form of insurance offered and the sort of claims handled in the relationship between C and D are essentially forms of minor chattel and property insurance. The business, I am sure, is more wide ranging than that, but it is things like insurance of household goods, sofas,

that sort of thing, and there is, therefore, a high volume of claims to be handled by D on C's behalf.

9. The terms of business between C and D are set out in two documents, which I should briefly refer to.

10. First, there is a terms of business agreement, which contains in Section 27 provisions regarding records, statistical information, and audit and inspection. Because it is an important provision, I propose to read this provision into the record, and I will do so now:

> **"27.1. The agent, that is D, shall establish and maintain complete records relating to all insurances bound under the agreement. Such records shall be, and shall remain, the property of the company (C).**
>
> **27.2. The company, external auditors or other representatives appointed by the company shall have the right at any time during normal business hours, without any restriction or limitation, to inspect and audit any records, statistical information, systems and processes, including electronic systems and processes, of the agent relating to insurances bound and to the operation of the agreement, and shall have the right to make copies or take extracts of any such records.**
>
> **27.3. The agent undertakes to deal openly and cooperatively with the company and any other applicable regulator or supervisory body in relation to the operation of the agreement. The agent shall permit the company and/or any other regulatory body with jurisdiction over the company or the agent to have access to any of its business premises where the agent carries on business, which is the subject of the agreement, to inspect and audit the records, statistical information, accounts and business processes related to the operation of the agreement. The agent shall, unless prohibited by law, inform the company promptly, and in any event within five business days, in accordance with Section 46, in the event that any regulatory or supervisory body exercises or seeks to exercise any right to inspect or audit the records held by the agent in relation to the agreement.**
>
> **27.4. Subject to Section 38.5, the agent shall retain all records, including electronic, relating to all insurances bound for a minimum period of seven years following expiry of the policy, or for such a longer period as may be required by local law, and for this period the company shall retain full legal Title II and ownership of all such records.**
>
> **27.5. The agent shall provide to the company any information as the company may reasonably require, from time to time, relating to insurances bound and the operation of the agreement.**
>
> **27.6. The agent shall make available the persons responsible for the overall operation and control of this agreement, as detailed under 3.1 of the Schedule, for the purpose of answering any of queries in relation to such records."**

11. There is a second agreement, as I indicated earlier, which is a Claims Handling Agreement, which contains in Section 15 a provision which is broadly similar to that which I have just read into the record. I will take it into account, but I am not going to lengthen this ruling by referring to it with any greater specificity.

12. Plainly, there is an agency relationship between C and D, and it is asserted in the particulars of claim that I have seen, which are drafted, but as yet not served or issued. I have seen that there is an allegation, which I understand, of a fiduciary relationship between C and D. That, it seems to me, is plainly and well arguable.

13. In the course of the last few months, it has become apparent to C that there are potential irregularities in the conduct of business by D as regards both C and as regards C's ultimate customers, the insurers, under the policies that it issues.

14. As is true of many fraud cases, and this is certainly a case where fraud is being alleged, there is some difficulty in C asserting precisely what has been going on. Indeed, one might very well say that the point of seeking extensive disclosure and the protection of documents in anticipation of disclosure is to enable a proper fraud case to be articulated. But it is quite clear, even on matters as they stand, that C has been able to articulate and has articulated a case which passes and passes by some comfort the American Cyanamid Stage 1 test of a serious issue to be tried.

15. I will revert on due course as to whether this is the appropriate standard to apply in cases of Imaging Orders, but it is plain to me that that relatively low threshold has clearly been passed.

16. To put a little bit of flesh on the bones of the allegations that are pleaded by C, I will refer to an example of a complaint which was handled by the Financial Ombudsman Service in relation to a Mrs M Amjad. The complaint concerned the handling of her claim, or indeed claims, by D in regard to an insurance policy issued by C. This concerned a claim for the replacement, or possibly repair, of a sofa which was valued, according to Mrs Amjad, in the sum of £2,718.

17. One can see in this way the sort of claims that were being handled by D on behalf of C. They are low value, high volume claims, and that is why a specialist claims handler employing, as D does, a large number of people is called for in this type of business.

18. What the review by a Mrs Sanders-Muir of the Financial Ombudsman Service found was that there was a mis-categorisation in that Mrs Amjad had made a claim in regard to a sofa, and D recorded no less than 15 different claims in regard to that specific sofa, no doubt referenced by the individual items of damage that had been done to the sofa, rather than saying this was a single claim regarding a single damaged sofa.

19. The Financial Ombudsman found, or rather the investigator in the Financial Ombudsman found, that there had been a mishandling, and that the claims' categorisation had been incorrect. It is unnecessary to go into the details of this, but it is sufficient to say that there was a recommendation that C amend their systems to reflect the correct number of events which gave rise to claims, to settle Mrs Amjad's claim in line with the remaining terms and conditions, and to pay Mrs Amjad £100 compensation for the upset and inconvenience caused. So this is an example, and I stress only an example, of the sorts of issues that arise in this case.

20. The benefit to D is that they charge C a charge that is calculated by reference to number of claims. So clearly, depending on how claims are remunerated, D is getting about 15 times as much as it should in this particular case, because one claim has been notified to all parties as 15 distinct claims. There is obviously, therefore, harm to C, in that C is paying D more than they should.

21. But there is also broader prejudice to the consumer. Quite clearly, this is an unsatisfactory state of affairs for consumers, and even if there is no multiple deductible per claim, there is inconvenience to consumers who are C's insureds, as the Financial Ombudsman found in this particular complaint. This is obviously only one aspect, and it is fair to say that there has been a quite significant independent review conducted by an entity referred to before me as SX3 of D's claims handling procedures, which has identified a number of very serious concerns which C has endeavoured to investigate.

22. I do not consider that it is necessary for me to go into the details of the investigation and the documents provided by D to C in the course of that investigation. It is sufficient to say that the details are fully set out in the affidavits of Mr Gallagher and Ms Macfadyen of C, which I have read and which were before me on the making of this application. The concerns as to what has been going on are fully articulated in Ms Macfadyen's affidavit, and I will refer to these.

23. In paragraph 48 of her affidavit, Ms Macfadyen identifies a concern about the fraudulent activities that may be taking place at D insofar as they affect C. It is a list of seven items. It includes payroll fraud, ghost broking, artificial inflation of claims costs, payments made to personal associates of senior D personnel, fraudulent claims, concerns in relation to bribery and corruption within D, and the concern that individuals at D were manipulating systems logins to hide fraudulent transactions.

24. There is more detail in paragraph 48 of Ms Macfadyen's affidavit and, indeed, more detail in Mr Gallagher's affidavit, but I will not refer to that.

25. It is sufficient to say that there is a great deal that requires investigation by C in respect of D's behaviour, and the implications of this are very serious. Not only is there a real prospect that C has been overpaying D, but there is the wider consumer disbenefit of D's conduct, and, of course, there is the enormous reputational risk to C of D's conduct, which it must manage and seek to make good. So, these are extremely serious matters and, unsurprisingly, C sought to obtain further information from D.

26. One of the employees, now a former employee of D, is a Mr Whelan. The importance of Mr Whelan is twofold. Mr Whelan is, it would appear, involved in the frauds or misconduct that I have been describing, and as Ms Macfadyen has summarised in her affidavit. The extent of Mr Whelan's role in the frauds that have been alleged is unknown. Mr Whelan is no longer with D. He is employed elsewhere. He has been speaking to C about the goings on within D, and his point is that those misdoings were much broader than one might expect simply looking at what D was saying about irregularities. It is D's position that the irregularities which have been spotted are entirely to do with Mr Whelan and nothing to do with anyone else in D's organisation. This, of course, may well be an entirely self-serving assertion by D.

27. Now, that is an important point to address because it does go to the significance of this order. The fact is that C does not know, and cannot know, the full extent of D's alleged

misdoings. It is fairly clear that there is a serious issue to be tried as to the extent of the misdoings going beyond Mr Whelan's conduct within D. There are a number of points of evidence which have been articulated which show that the operations and the misconduct appears to be wider than that of Mr Whelan. For instance, Mr Whelan used a different login than the two nominated logins for him. There were Whelan 1 and Whelan 2 logins which appear to have been used, but not by him, in order to continue the misconducts that I have described.

28. But there are other aspects which indicate, not with certainty but with clear arguability, that the problems are not confined or limited to the conduct of Mr Whelan.

29. The demand for information recovery by C from D began December 2024. There were demands of documents, including by reference to the contractual provisions that I identified earlier. There have been some documents provided by D to C, but they have been, again, for reasons set out in the evidence, substantially unsatisfactory in that the data provided by D has been impossible to reconcile with other data, including in the claims bordereaux that have been submitted. There are obvious problems in trusting the material that has been provided, particularly when there is an obvious area of dispute as between C and D in terms of the extent of the misconduct that is being investigated by C and alleged by C against D.

30. On 27 January 2025, D wrote to C by email indicating as follows:

> **"Following exhaustive investigations, we are as satisfied as we can be at this point in time that all fraudulent activities perpetuated by Chris Whelan have been identified. The sum of £22,583.50 that was highlighted as being claimed on the bordereaux has been refunded and we await your feedback on claim 241436. Please refer to my email from 23 January. The matter is further being investigated by the FCA and the police and moving forward we will deal directly and exclusively with these parties. If any further fraudulent activity comes to light, we will advise you accordingly but can no longer respond direct to Acasta with any queries on this matter. In Rayne's earlier notes 225, anomalous claims were identified, however on review of a representative sample these were all identified as relating to historical claims that were reopened. We do not have concerns of fraudulent activity relating to these transactions. However there does appear to be several administrative errors pertaining to the sample we reviewed. We will share our findings on these claims during the forthcoming audit. We apologise for this regretful incident and look forward to drawing a line under the matter."**

31. If I may be colloquial, the substance of this email is: "*Nothing to see here. It is all down to Mr Whelan and we have sorted the problem out. Please C, will you go away?*" C quite obviously will not go away and C regard this letter, as indeed do I, as a clear arguable breach of D's obligations to C.

32. Those obligations are to cooperate and to provide documents as I have indicated in the terms that I read into this ruling earlier. D is not permitted to say we will deal exclusively with the FCA and the police and you, C, must remove yourselves and will not be reported to by D. Obviously the obligation to liaise and inform and assist the

FCA and the police is paramount but that does not exclude the obligation in the contract to assist and cooperate and preserve and provide documents by D to C.

33. So this is regarded and is pleaded as a breach of fiduciary duty and a breach of contract in the particulars of claim and it further goes to support the concerns that have actuated this application.

34. To summarise those concerns, if true, and I stress that everything that I have been saying in this ruling is at the level of allegation, I must assess the weight of those allegations, but I am making no findings of fact beyond that. The fact is that the allegations that have been pleaded and set out in the witness evidence are extremely serious. If they were to be established then the individuals involved within D would be facing rather serious personal consequences.

35. There is, therefore, every incentive on D to ensure that the documents to the extent they exist, which demonstrate the existence of the fraud and the truth of C's allegations are destroyed.

36. That is buttressed, not undermined, by the email of 27 January 2025 that I referred to earlier. It is quite clear that D's narrative is going to be that only Mr Whelan was the bad egg in the organisation and everything else was regular. That is a narrative which, as I have described, C resists and I have identified the evidence which suggests that that position is a supportable one for C to adopt.

37. Quite clearly there is an incentive on D to ensure that the documentary record reflects the narrative that they are propounding. That goes to augment the concerns that both C and I have that the preservation of documents in this case is extremely important.

38. With that I turn to the question of whether I should make the Imaging Order that is sought. I will of course review the terms of that order with counsel after this ruling, but it is important, I think, to set out what appears to be the approach that courts should take in cases such as this.

39. It is quite clear that an Imaging Order is at the serious end of the spectrum that civil courts can make. That emerges very clearly from the decision I referred to earlier, *TBD (Owen Holland) Ltd v Simons and Ors* [2021] 1 WLR 992.

40. The Imaging Order jurisdiction starts by treating the order as essentially an order that should be granted pursuant to the American Cyanamid principles, but there are some very important variants that need to be noted.

41. The requirements of American Cyanamid are extremely well known and the first of these is that there must be a serious question to be tried. I have already said, but I repeat, that I consider that there is a serious question to be tried in this case.

42. The next question is the question of balance of convenience. It is here that a court must tread particularly carefully when applying this second stage of American Cyanamid. What the court is considering, in the case of imaging orders, is not whether the conduct which is the subject matter of the ultimate proceedings, for instance the infringement of a patent, should be enjoined prior to trial. That is what most American Cyanamid interlocutory claims for relief are all about. There is conduct that is complained of, that is being litigated in the substantive proceedings but the applicant for the injunction,

the claimant in the proceedings, is seeking to ensure that the conduct complained of is stopped prior to trial. That is not the point of Imaging Orders.

43. It is true that in this case there is a claim for the delivery up of various documents under the Torts (Insurance of Goods) Act and that claim may very well succeed. It is obviously seriously arguable because of the clauses in the two agreements between C and D that I have identified. But that is not the reason this application is being moved now. The reason this application is being moved now is because of the concerns that unless the order is granted, documents that would be produced on disclosure will be destroyed and not preserved.

44. It is trite that the first thing, or practically the first thing, any solicitor tells their client on the commencement of litigation is that you must halt your processes for the destruction of documents and you must preserve documents that could potentially be relevant to the proceedings. In the vast majority of cases these obligations to preserve documents on disclosure are adhered to because we have a legal profession that is very conscious of the rule of law and the importance of disclosure in litigation in these courts.

45. This is a case where it is said that the ordinary process of disclosure will simply not function and therefore a peculiarly intrusive order, an Imaging Order, is sought. It seems to me that the balance of convenience needs to be considered in that light.

46. The inconvenience to D operates at two levels. First of all, there is the potential that there might be a good argument, an argument that succeeds at the end of the day, that in fact these documents are not Cs after all and that D is entitled to hang on to them. In the face of the clauses that I have read that seems a difficult argument but who knows, it may succeed. But the point is that the documents are not being sought for purposes of delivery up. They are being sought for purposes of pleading out the case, investigating wrongdoing, reporting to regulators in due course.

47. At the moment there will be no inspection by C. What will happen is the documents will be imaged by computer experts under the supervision of the supervising solicitors I have identified and preserved and held by them. At that stage there will be a further hearing before this court at which the question of inspection will be debated. It will be debated in the light of the documents that have been uplifted in the course of the process and there will be full argument about C's entitlement to inspect at all, relevance to proceedings, protection of privilege, protection of confidentiality and so on.

48. All of these matters are not for today. Today is simply concerned with preservation and that is a very significant factor in favour of protecting D and entitling C to preservation of the documents. But I am stressing the safeguards that Imaging Orders have built within them in that they are separating very clearly the two stages of: (i) preservation, which is this stage; and (ii) disclosure, which is to be dealt with later on through an inspection hearing.

49. The question, therefore, is whether the intrusion and the acceleration of the preservation stage of the disclosure process is justifiable in this case. First of all it is quite clear that C has thought very carefully about how this order might be as unintrusive as possible. As I understand it through the information provided to me by counsel, Mr Benzie, the imaging can be done by way of a portable, that is to say a vehicular, imaging centre, which will go to D's premises and the materials, that is to

say the iPads, the mobile phones, the computers that can be taken out of the offices of D will be imaged in the vehicle without entering the premises. Of course some entry will be required if there are servers or if there are immobile electronic devices, but it is clear that the intrusion will be as minimal as it can be. So it does seem to me that the prejudice in terms of an invasion of privacy of D is being minimised as far as it can be.

50. Furthermore, it could be said, and rightly said, that the prejudice of providing the documents is, in fact, minimal to D because all C is asking for is no more than compliance with its contractual obligations. Now, I fully accept that those contractual obligations are matters that will be the subject of litigation in due course, but it does seem to me that in weighing the balance of convenience in making the order or not making the order it is relevant to bear in mind that this is really little more than what D ought to be doing in any event. It is simply that they are not doing it, they are not cooperating and the documents are needed.

51. That brings me to the critical point, which is, is preservation necessary so as to justify the making of this order? Really that is the key driver of the application here. For the reasons I have given I am entirely satisfied that this is an order that needs to be made for the preservation of evidence that may or may not be needed in the course of these proceedings, that question to be determined at a later hearing. So I am going to make the Imaging Order.

52. I did say that there have been a number of cases at first instance dealing with the granting or otherwise of Imaging Orders. In his decision in *Hyperama*, Pepperall J identified a number of factors that he considered to be relevant. They are identified in paragraph 37 of Mr Benzie's written submissions and they concern the degree of assurance that a judge needs to have about establishing the claims at a trial.

53. The judge there considered that a high degree of assurance was required given the invasive nature of the order sought. I make clear that I do have that high degree of assurance, although it does seem to me that this is a matter that is enormously case dependent and the basic legal requirement is, and remains, that in American Cyanamid. Namely that in terms of the substantive merits one does not go into them but one simply looks to see whether there is a serious issue to be tried.

54. Secondly, the judge needs to consider the damage potential or actual to the applicants' business interests and to be satisfied that they are very serious. That is obviously a hugely relevant factor and for the reasons that I have given I consider that it is met in this case. Not only is there the question of immediate financial loss to C but there is the wider problem of harm to consumers and reputational loss to C as a result of that harm.

55. Thirdly, there is a question of whether the respondents to the application, here D, have incriminating documents in their possession. Well, that is, again, obviously right in this case for reasons that I have given. I would only qualify the point that what matters really is not so much incriminating documents, but documents that are relevant to the proceedings that are about to be issued. In other words, one would make an Imaging Order in regards to documents that were relevant even if they were not necessarily incriminating provided the risk of destruction of documents justifies the making of an Imaging Order. In other words the question of incrimination is relevant to the risk of destruction because one is more likely as a respondent to this sort of application to

destroy documents that are incriminating rather than documents that are innocent. But, it seems to me, that that is what incriminating goes to rather than simply categorising documents as having to be incriminating in order to justify the relief being sought.

56. Fourthly, there is the question of there being a real possibility that the respondent, here D, might destroy such material. This is the critical question as I have described and it seems to me it is well met in this case but is linked to Pepperall J's third factor regarding the presence of incriminating documents.

57. Fifthly, and finally, the judge needs to consider whether the relief sought is proportionate to its legitimate aims and that, it seems to me, is entirely right. It is the point that the judge must have regard to, throughout the course of these applications.

58. I will make one further remark by way of gloss on the question of proportionality. Proportionality is not to do with the extent of disclosure. It is absolutely clear that Imaging Orders are over-extensive in terms of what is being produced. The point is that if one is imaging the iPhones, iPads, computers of a large range of individuals one is bound to get a vast pool of data that is not only potentially confidential but also highly likely to be irrelevant. It goes without saying.

59. That might be said to be disproportionate: but that would be wrong. The point of the Imaging Order, is to preserve and what is produced for inspection occurs at a later stage. So the width of the preservation is justified by the need to preserve the ability in the court to maintain a proper disclosure process. Quite what C will receive by way of inspection is an altogether different matter but it could be a tiny subset of that which is preserved. That will depend upon later arguments and is a matter for a later judge to decide.

60. So the question of proportionality is whether it is justifiable to prematurely initiate the disclosure process by way of preservation of documents and, in doing so, invade the privacy of the respondent to the application. That is an important consideration, and it is one that I have had well in mind. It is clear in this case, to me, that the Imaging Order should be made.

61. I will turn to the details of the Order in a moment. I shall only say one more thing which indicates that both the Court and C have had proportionality well in mind. D is a not an insubstantial organisation and the applicant C has been careful to seek to limit the question of what, or whose, devices are imaged to not merely corporate servers and machines but also the devices of specific employees, not every employee. The employees in play have been described by Ms Macfadyen in paragraph 50 of her affidavit and amount to about ten individuals. So it is quite clear that a selective approach has been taken.

62. The other point that is worth making is that the computer experts that C intends to use are confident, they cannot give an absolute assurance, but they are confident that the imaging process can be undertaken with minimal disruption to D's business activities. Essentially what will happen is that the devices will be brought out to the van, if they can be, one-by-one, they will be imaged and then they will be returned and that is a process which will go on as long as it takes in order to do the job properly. Only if the relevant devices cannot be produced by hand delivery to the vehicle will entry to D's premises take place in order to secure the images that are needed pursuant to this order.

63. So, for all those reasons I will make an order along the lines suggested by counsel in the draft before me.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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