Neutral Citation Number: [2020] EWHC 2426 (QB)

Case No:

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COURT 37 REMOTE HEARING
HEARING IN PRIVATE

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 22 July 2020

Before:
MR JUSTICE FORDHAM

- -

Between :

CALOR GAS LTD	**Applicant**
- and -	
(1) CHORLEY BOTTLE GAS LTD	
(2) MRS NATALIE HAMBLETON BALL	
(3) MR STEVEN BALL	**Respondents**

- -
- -

Anthony Peto QC and Celia Rooney (instructed by Knights Professional Services Ltd) for the **Applicant**

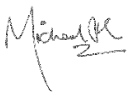
The **Respondents** did not appear and were not represented

Hearing dates: 21-22 July 2020
Judgment as delivered at the hearing

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced for the parties, approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM:

Introduction

1. This is an application without notice for a search order and related orders. It was made pursuant to the Civil Procedure Act 1997 section 7. It was supported by two affidavits: the first by the solicitor and head of legal and company secretary of the claimant, Rowan Marshall-Rowan; and the second by the head of health safety security and environment at the claimant, Henry Betts. The application was also supported by a skeleton argument and various other appropriate materials filed with the court. I heard the application yesterday, adjourning part-heard for continuation this morning. I decided, and informed the claimant that I had decided, to grant the application substantially in the terms of a revised draft order provided today by the claimant's representatives, but with some modifications which were the subject of discussion between me and counsel. I have made the order and it has now been provided to the claimant's representatives. I announced that outcome, but with reasons to follow, and this ex tempore judgment now explains the reasons why I granted the application. If an approved version of this written judgment can be made available sufficiently speedily it will itself be served, with the order, on the respondents when the steps covered by the order come to be taken. The applicant is the proposed claimant in proposed proceedings and I have seen a draft claim for and particulars of claim. The three respondents will be the three defendants to those proceedings. I will use the language "applicant" and "claimant" interchangeably, and likewise with the language "respondents" and "defendants".

Summary of the order

2. In essence, the order which I have made allows a search team to arrive at two premises, one of which constitutes business premises and the other a private residence, both in Adlington. The search will allow the identification and retrieval of pressurised gas cylinders belonging to the claimant, including any which are considered to belong to the claimant but disputed. The cylinders will be able to be photographed and will need to be listed before removal. The search will also allow the examination and photographing or videoing of certain equipment. I will return later to describe the nature of the 'equipment'. The order restrains action which would involve the disposal of cylinders belonging to the claimant, including cylinders which may come into the possession or control of the defendants after the date of this order or after the search. The order requires, within 21 days, an affidavit to be sworn detailing various dealings which the defendants have had relating to supply to them or by them of liquid petroleum gas. This summary is not in substitution for the terms of the actual order. The parties will have the order with all of its detail. The purpose of my description is to explain in outline for the purpose of these reasons the nature of what I have ordered. There are various protections built into the order. There are undertakings to pay damages if the court subsequently considers that to be appropriate, whether to the defendants or to an affected interested party. There is a return date, for a further hearing before this court at which all parties can be heard as to what should happen next. There is a liberty to apply provision to entitle the respondents if they wish to apply to vary or discharge the order that I have made. Detailed provisions are made in the order relating to the search and other steps, and in relation to identifying the property and equipment to which the order relates. Various personnel are identified as able to participate, for various reasons, in the search and

other steps. They include qualified employees of the claimant with appropriate skills and expertise relating to the transport of pressurised gas cylinders, and safety engineers who are able to ensure the safety of the search and appropriate identification and examination for photographing and videoing of relevant items. Detailed passages in the affidavits were designed to give full and frank disclosure by the claimant of the points that they could identify as capable of being made against the claimant and against the application.

Hearing in private

3. The hearing was in private. I was satisfied that publicity would defeat the object of the hearing. In due course, once the return date has passed, this judgment will be able to be published in the usual way. I was and remain satisfied that the open justice principle has been secured to the extent that it can be and that the nature and extent of derogation from it was fully justified as necessary and proportionate.

Mode of hearing

4. The mode of hearing was a remote hearing by BT conference call, recorded so that the recording would be secured and available for subsequent access should it be needed. A shorthand writer participated in the hearing including its resumption. The decision to conduct the hearing by remote hearing was mine. The claimant's legal representatives had made clear, to their credit, that they were willing to come to court 37 at the Royal Courts of Justice to appear in open court physically before me. Grateful though I was, and am, I decided that it was necessary and appropriate that the hearing should be a remote hearing. Although we can be said to be in the post-lockdown phase (as things currently stand) in relation to Covid-19, the arrangements remain extant in the courts for remote hearings to be directed where justified as necessary and appropriate. I was anxious that arrangements would be needed to be taken at very short notice to set up a conventional hearing, with modified social distancing arrangements, and including not only the claimant's representatives but the court staff. As it seemed to me, there was no disadvantage, and several advantages, from proceeding in this case by means of remote hearing. At the start of the hearing I was able to discuss with Mr Peto QC the claimant's leading counsel whether the mode of hearing was in any way detrimental to his client. He was satisfied, and I was satisfied, that it was not. I also had in mind that this was likely to be, and I reviewed the position when the hearing commenced and I needed to direct on that matter, a private hearing. In open justice terms, there was therefore nothing to be gained from the hearing taking place physically within the court building. The hearing as I explained has been tape-recorded, and it was my intention to give a reasoned ruling which in due course would be published. I was and remain satisfied that it was necessary and appropriate to take steps to minimise risk, and secure practical effectiveness and speed. In all those circumstances, and for those reasons, I am satisfied that the mode of hearing was one which was not only appropriate but necessary.

The parties

5. I turn to describe the parties. The claimant supplies branded liquid gas cylinders to retailers. The cylinders are labelled on the evidence property of and to be filled only by the claimant. The cylinders are supplied by the claimant full and returned to the

claimant empty by retailers. In turn, retailers supply customers with full cylinders and collect empties. The evidence before the court explains the nature of the process of filling or refilling one of the claimant's cylinders. The court has a description, in what is clearly a heavily regulated field with regulations and applicable codes of practice, the compliance standards and safety standards which the claimant identifies as applicable, and the controlled manner in which filling and refilling takes place. The evidence also describes how each reused cylinder is inspected from the perspective of safety at the time of any refilling. The first defendant is a retailer who has been supplied with gas cylinders by the claimant over a period of years, pursuant most recently to a retailer agreement dated 14 January 2019. The claimant's position is that under the contractual documentation, which I have seen, the first defendant was entitled only to sell the claimant's gas in the claimant's gas cylinders, those cylinders being owned by the claimant, insofar as the first defendant was concerned with supply a directly comparable liquefied gas. One of the documents before the court is a cylinder refill agreement, described as being part of the retailer operations manual with which the first defendant has a contractual obligation to comply. The second defendant is sole director and sole shareholder of the first defendant. The third defendant is former director and shareholder of the first defendant and is husband of the second defendant. The evidence describes the third defendant as being directly involved in the day-to-day business of the first defendant, and describes him as the sole proprietor of the private residence occupied by him and the second defendant. It is that private residence which is one of the two premises that is the subject of the order.

The proposed claim

6. The proposed claim in essence, as I see it, really comes to this. The claimant submits that the defendants have been undertaking a DIY refilling operation, in which the claimant's cylinders have been refilled using bulk tanks, filled from liquid gas delivered by third parties, and using filling hoses and weighing apparatus and other equipment in order to undertake that refilling from those bulk tanks. I said earlier that I would return to the 'equipment' to which the order relates. It is the bulk tanks, filling hoses weighing apparatus and other equipment capable of being used in the refilling of the claimant's cylinders that constitutes that 'equipment'. The claim is that the DIY refilling operation breaches various duties owed to the claimant. A helpful summary in one of the affidavits that the court has before it, describes the proposed claim for breach of contract against the first defendant; the further claim against the first defendant for breach of fiduciary duties owed to the claimant in respect of its cylinders; alternatively breach of a duty of care owed as bailee; and claims against all three defendants for conversion alternatively trespass to goods in respect of the claimant's cylinders, together with passing off and unlawful means conspiracy, in respect of a fraudulent scheme operated in respect of the DIY refilling. That summary is quite sufficient for the purposes of this reasoned ruling. In the claim – and alongside the action which the claimant confirms to the court it intends in any event to take of terminating its contractual arrangements with the first defendant and ceasing any further supply dealings – the claimant seeks various orders and seeks to achieve various objectives. The claim is designed to safely and successfully recover the claimant's property and to injunct unlawful action in relation to the claimant's property or contractual rights. The remedies in the claim include an injunction and

order for delivery up. There is also a claim for damages or alternatively an account of profits.

The health and safety perspective

7. The wider perspective is important for the purposes of the application before me. The claimant, directly and avowedly, in key passages in the evidence – confirmed in the written and oral submissions – is concerned with the safety implications that arise in the present case. The claimant is concerned about health and safety implications of DIY filling, in principle, and by the defendants in particular. It is concerned about public safety in relation to cylinders which have been refilled, or which may now be refilled, wherever those cylinders are to be found. A broader objective of the claimant is ultimately to be able to 'track and trace' its cylinders insofar as they have been impermissibly refilled by the defendants. The implications of that wider health and safety perspective have also been characterised in the materials before the court as being directly linked to economic implications, and in particular reputational implications themselves having an economic dimension.

The five components required by the law

8. The application being for a search order, without notice, and linked orders, attracts the familiar five-component approach identified in the relevant authorities. The five components, in relation to each of which a court needs to be satisfied as preconditions to any order, are set out in the White Book at paragraph 15-91. It is sufficient for the purposes of this judgment if I cite one of the many authorities in this field, an authority to which I will return later in this judgment. In the BMW case [2018] EWHC 1713 (Ch) Mr Justice Henry Carr gave his reasons for granting a search order, interim injunction and related relief in a case which concerned claim about fake BMW wheels. He summarised the criteria at paragraph 14 of his judgment. He said this:

> A search and seizure order is an exceptional form of relief. The conditions that need to be satisfied are as follows. First, there must be a strong *prima facie* case of a civil cause of action. Suspicion is not enough; nor is it enough that there is a serious question to be tried. Second, the danger to the applicant to be avoided by the grant of the order must be serious, and if the order is to forestall the destruction of evidence, the evidence must be of major importance. Third, there must be clear evidence that the respondent has incriminating documents or articles in its possession. Fourth, there must be a real possibility of the destruction or removal of evidence. Fifth, the harm likely to be caused by the execution of the order on the respondent and his business affairs must not be out of proportion to the legitimate object of the order.

I am fully satisfied by the materials and submissions that have been made in this case on behalf of the claimant and placed before the court that all five of the components which I have just quoted are satisfied in the present case so as to justify the making of an order and the making of the order of the nature that I have described. I will turn to examine each of the five components, though I will address them in a slightly different sequence.

Strong prima facie case

9. The starting point is whether there is a strong prime facie case of a civil cause of action. As to that, the position on the materials that are before me, in essence and as I see it, is as follows. Documents dating from December 2014 between the claimant and the first defendant spelled out that there was to be no illegal filling of cylinders by or on behalf the first defendant. That was made clear by the claimant, as the basis for the contractual arrangements that was to take place at thereafter. Indeed, a specific requirement was imposed for the dismantling of an old bulk tank located at previous business premises. There was also express warning that: "Should any evidence be found of such activities than we will take immediate legal action to protect our position including the termination of your account". The contractual documents that I have seen reflect the ownership of the cylinders as being that the claimant and the fact that the first defendant and those acting on its behalf were not entitled themselves to fill those cylinders. It is enough that I refer to one provision in one document. Part of the retailer operations manual is the refill agreement, used by the retailer in its dealings with its customers. The provisions of that refill agreement state expressly: "cylinders remain the property of the company at all times and may only be filled by the company". The company is defined as the claimant.

10. An investigation and surveillance which took place in February 2020 and resumed in May 2020 secured evidence, placed before the court, including several photographs. What can be seen on the face of that evidence are four bulk tanks in what is effectively the back garden to the private residence occupied by the second and the defendants. What can also be seen are gas cylinders, many of which have been identified in the evidence as belonging or likely to belong to the claimant. They include dark blue butane cylinders and a red propane cylinder. The evidence describes how also observed, in what I have described as the back garden, are weighing scales which would be used in a refilling operation. The photographs also show tarpaulins used to cover the bulk tanks. In some of the photographs the tarpaulins are over the tanks; in others the tanks are visible, or semi-visible. Those surveillance investigations were undertaken after an eagle-eyed delivery driver in February 2020 spotted the claimant's cylinders over the fence when delivering to a nearby property. Subsequently surveillance took place and evidence was gathered. It is significant that the identified premises for the purposes of the contractual arrangements between the claimant and the first defendant are the business premises and only the business premises. It is also significant that a bulk tank had had to be dismantled from business premises. The documentary and photographic evidence strongly supports a case that what has been commenced and undertaken, deliberately located not at the business premises where the claimant's spot-checks and visits would take place, but at the residential premises where they would not, is the setting up and use of a DIY refilling operation. The photographs and documentary evidence also identify vehicles being seen such as would transport gas cylinders to and from the land adjoining the private residence. On the face of it, the tarpaulins strongly support the claim that there has been an attempt to conceal the visibility of the bulk tanks.

11. It is appropriate for me to emphasise at this stage that I am not making any findings of fact. This is a without notice hearing at which I have heard from one party, and received evidence from what is effectively one side of the story. But it is essential in considering this first component of the five-component approach that I examine the

evidence before the court and the strength, as the evidence stands, of the claim. I am satisfied on the basis of this material that there is a strong prima facie case.

12. But the material goes much further. The evidence before the court describes a test purchase which was undertaken on 24 February 2020. What happened, in essence, was this. The first defendant was approached to sell a full gas cylinder to a customer, and was unable to do so, explaining that it did not have any stock. Later on the same day the purchaser was contacted and told that there was now a full gas cylinder available to be sold, and the purchase proceeded. In between those two events there was observed the arrival of a liquefied gas supply tank tanker belonging to a third party. No transaction was ever recorded in the materials required by the contractual arrangements between the claimant and the first defendant. There was no supply by the claimant during that period. When the test purchase was eventually effected, it was of a marked cylinder belonging to the claimant. In my judgment, that is very strong prima facie evidence in support of the claims proposed to be made, in the claim form to be issued pursuant to an undertaking given embodied in the order I am today making.

13. The photographic evidence also depicts a large number of light blue gas cylinders. The claimant does not identify those as being its property. Moreover it is accepted, on the application before me, that those light blue gas cylinders may not only be the property of a direct competitor but may furthermore relate to 'non-comparable' liquid gas such as is – as I understand it – used in small camping gas cylinders. It is an open question as to whether conduct of filling cylinders of that kind could be relevant to the contractual position between the first defendant and the claimant. For the purposes of the application before me, I have put that aspect of the matter to one side. It is not relied on before me. Indeed, I have proceeded on the assumption that the filling of cylinders of that kind by the defendants may be benign, so far as the claimant's position is concerned. Whether or not there are any health and safety implications arising from that is really a matter which, if appropriate, would fall to be considered by relevant public authorities under relevant regulatory schemes.

14. There is other evidence before the court. The claimant has explained how it undertook various other steps alongside the surveillance exercises. A stock reconciliation exercise identified a deficit of some 400 or so cylinders belonging to the claimant which were unaccounted for. In other words, the claimant had supplied to the first defendant a large number of cylinders which, in the event, had never been returned empty. A volume analysis conducted by the claimant identified a clear disparity in the ongoing supply volume from the claimant to the first defendant: the evidence describes how for 2019/20 the supply was some 40% down on the previous year; the evidence also describes that the previous year 2018/19 was itself down some 57% on the previous year 2017/18. The precise figures do not matter for the purposes of my decision. But all of this evidence, in my judgment, strongly supports a suite of strong prima facie civil claims, based on an unauthorised DIY refilling exercise, with 'off the book' supplies to customers, using the claimant's gas cylinders.

Clear evidence of incriminating documents or items

15. The next component I take is the third. Is there clear evidence that in the possession of the defendants are incriminating documents or items? On the evidence before the court, for the reasons that I have already explained, there is clear evidence of an

undertaking involving DIY filling of the claimant's cylinders; there is clear evidence that the claimant's cylinders are themselves kept and stored, including in the private back garden , in conjunction with that activity; there is clear evidence of articles in the setup of such an activity, including the bulk tanks themselves and the weighing apparatus. The clear inference is that there are, on-site, filling hoses and other items needed to be used and in fact used in that operation. I am satisfied – on the face of it – that all of these are within the defendant's possession or control and would incriminate them so far as the civil claim is concerned. I am also satisfied that this is relevant evidence of major importance so far as the vindication of the claimant's rights is concerned. Given that the order that I have made relates to a search to examine and photograph the equipment and to locate and remove the cylinders, what I have described is amply sufficient to meet this element and justify the intrusive aspects of the order. I am also satisfied, though, that there is and will be in the possession of the defendants other material including documentary evidence of significance. So far as that is concerned, the provision of the order sought and which I have made compels that the defendants secure relevant documents and describe relevant dealings in an affidavit. No more immediate and intrusive order is sought in this case.

16. So far as the cylinders themselves are concerned, I would also add this. Section 7 of the 1997 Act describes the court making an order for the purpose of securing the preservation of evidence in the case of proposed proceedings (see section 7(1)(a)), but Parliament also made provision (in section 7(1)(b)) for a court order to be made for the purpose of securing "the preservation of property which is or may be the subject matter of the proceedings or as to which any question arises or may arise in the proceedings". The claimant relies on both limbs of section 7(1). Certainly so far as the cylinders are concerned I am satisfied that, on the face of it, they are property falling within the description in the statute. In my judgment, it would be sufficient for the purposes of this component of the five-component approach, for me to be satisfied – as I am – that "the property" in question is held in circumstances which are "incriminating" in the sense of there being a strong prime facie case of a civil cause of action involving dishonesty relating to the use of that property. But, even if that were not right, I would and remain satisfied I would be and remain satisfied that the cylinders – as with the other material that I have described – amply satisfies the test of being incriminating items of which there is clear evidence of possession on the part of the defendants.

Risk of removal

17. It is sensible next, in my judgment, to address the fourth of the five components. Is there a real risk, or real possibility, or real reason to believe, that the defendants will destroy or remove evidence absent the making of the order which is sought? An important part of this component involves the court examining whether there are less intrusive orders that the court could make – for example orders for preservation or delivery up – which would be sufficient; or whether, on the other hand, the court is satisfied that it is necessary for the more intrusive order to be made.

18. So far as this component is concerned I am, as I have explained, fully satisfied that it is met on the evidence before the court in this case. The conduct speaks for itself. The defendants knew and understood the significance of the prohibition on DIY refilling of the claimant's cylinders. The first defendant had specifically been required to

dismantle the bulk tank on the business premises. The evidence which I have described – and do not repeat – is as to what then appears, behind the private residence, including the use of the tarpaulins. It prompts the obvious questions as to why the defendants would take such steps. It is, in my judgment, intrinsic to the nature of the claim that has been identified and evidenced, and which I have held to be a strong prima facie claim, that there is real reason to believe that the defendants have the motive and the means to conceal their activities and to act dishonestly in relation to their activities. To this feature can be added the fact that it is not, on the evidence, difficult to take action to move or remove cylinders or relocate them, or to move or remove or relocate equipment, or to get rid of gas currently stored in the bulk tanks – including by filling any empty cylinders prior to moving them elsewhere. I would have been satisfied of this component, based on the evidence and the implications as so far described in this judgment. In my judgment the material, intrinsically and objectively, constitutes clear evidence of a very real possibility that the defendants – if faced with a court order but one less intrusive than the one sought – would take steps to remove items or destroy them.

19. But, again, the evidence goes further. I have been shown materials which on their face support the contention that the third defendant – whose name and whose address is that of the residential property to which I have referred and is given in the material – was sentenced in the Crown Court in September 2014 to a custodial sentence of 4 years and 5 months. That sentence arose out of 3 offences on the evidence before me. The first was that the third defendant had been concerned in the supply of cocaine; the second was a count of possession of a weapon; and the third was a conviction on a charge of assault with intent to resist arrest. The claimant submits, and I accept, that that material strongly supports the requisite conclusion in relation to this component. I am, as I have said, fully satisfied that it is met on the evidence.

Serious harm ‘to the applicant’

20. I turn next to what is component number two: is there serious danger or serious harm to the applicant which would be avoided by the grant of the order? That includes, in the case of the preservation of evidence (section 7(1)(a) of the 1997 Act) that the evidence whose destruction is forestalled is evidence of major importance. I have already described, and will not repeat, the conclusions I have reached as to the nature of the evidence which stands to be preserved by the order. I am satisfied that the claimant’s cylinders and their location and their safe retention themselves fall within evidence justified as necessary to be preserved. I am satisfied that the other equipment, in relation to which the search and photography or videoing would take place, also constitutes such evidence. I am satisfied that all of that evidence is evidence “of major importance”. On that basis alone I am satisfied that the description of forestalling the destruction of evidence of major importance it is met in this case. Furthermore, the vindication of the claimant’s rights through the claims which are to be brought in this court, is itself a matter of major and substantial importance. Events which would undermine the claimant’s ability to vindicate those rights, through these proceedings, would in my judgment constitute serious harm to the claimant. All of that is amply sufficient in this case, in my judgment, to meet this component of the legal test. Once again though, in my judgment, the picture goes further, as I will explain.

21. I make clear, in the context of serious harm if the order is not made, that I have had in mind that the claimant intends to terminate the contractual arrangement with the first defendant in any event; that it does not seek an order for the search or seizure of computers or documents. I have also had in mind that health and safety issues are matters in relation to which there is a regulatory regime and appropriate public authorities. Nevertheless, in my judgment, the wider perspective of the health and safety and public protection implications of the application are serious and significant. I will explain why and how.

Serious harm and public health and safety

22. In addressing the relevance of public health and safety to this component of the five-component legal test, Mr Peto QC on behalf of the applicant put forward two alternative submissions. His first submission was that, to the extent that it is necessary to do so , the public safety implications – viewed through the prism of commercial and reputational harm to the claimant – amply constitute serious harm to the claimant which is avoided and avoided only by the grant of the order sought. Mr Peto QC identifies an intimate link between public safety and risk to the public and the commercial interests of the claimant. He identifies a clear and cogent link to the all-important reputational position of the claimant, within the regulatory world in which it operates; the vital importance of public confidence; the need to take the available steps to secure that risk is eliminated; and the economic consequences that would arise were any danger to be transformed into the sort of harmful incident that could befall a member of the public. I said near the outset of this judgment that the public health and safety perspective is avowedly (and candidly) placed at the heart of the application before me. I am satisfied, on this first basis, that the claimant has made out the link between health and safety implications and its position, in terms of serious harm to its own position.

23. There was an alternative and broader formulation. It can perhaps be encapsulated in the following way:

> At least in a case concerned with the preservation of property pursuant to section 7(1)(b) of the 1997 Act, it can in an appropriate case be sufficient to meet the component of 'serious harm or danger' that the applicant is able convincingly to point to the need to eliminate the risk of serious harm to public safety, through a court order: where that order is linked to the claimant's own position and a proposed claim which it is to bring, where there is a legitimate and pressing interest because of the real risk of the destruction or removal of property, which stands to produce a serious and tangible public safety risk.

That formulation is, in essence, how I saw Mr Peto QC's alternative submission. If he is right about it, the court would be entitled in an appropriate case to step outside the narrow focus on danger or harm 'to the applicant' and look at the broader question of real danger to public health and safety, legitimately invoked by the applicant and linked to a cause of action of the applicant.

24. During the adjournment overnight part-heard, the claimant's junior counsel Ms Celia Rooney was able to identify one authority touching on this broader point. It is the judgment of Mr Justice Henry Carr in the BMW case to which I have previously

referred. In his consideration of the application of the five components (which, as I have shown, he had set out at paragraph 14), the judge in that case discussed as legally significant what he described as "the clear possibility of a danger to public safety" (paragraph 15). He considered that to be relevant to his evaluation. The point arose because one of BMW's concerns as to fake BMW wheels related to the implications of people driving around with wheels that they believed to be authentic. There is something of a parallel between that case and this one. What, moreover, on the face of it appears to be the case is that BMW was a case concerned directly with the preservation only of "evidence" (see paragraph 18 in particular), whereas the present case can be said to be a stronger candidate, so far as it is concerned with the preservation of "property". It can be said that there was sufficient in the judge's analysis in the BMW case to be satisfied that there was serious harm 'to the claimant': the judge described what he said was plainly "irreparable damage" to BMW by the sale of counterfeit wheels.

25. Also produced, from the archives of the claimant even if not from its leading counsel (who appeared for it in that case too), was a note of an unreported judgment of Mr Justice Holroyde in Calor Gas Ltd v Stanford on 13 November 2009. That was a judgment on the return date following a search order which had been successfully obtained without notice from Wyn Williams J. In that note of judgment there is a quotation from the transcript of the original hearing on the without notice application. I am confident given that that transcript would have been available to those writing up that note and that the quotation is fully reliable. Wyn Williams J said this:

> Not without some hesitation, as has been obvious by virtue of the interchange between leading counsel and myself, I propose to make a suitable Search and Seizure Order in a moment. The princip[al] reasons which have led me to that course are threefold. First of all, the cause of action appears unassailable, certainly on the information placed before me, but in all probability, the cause of action is unassailable. Secondly, the Respondent has previously given an undertaking to the court, admittedly 12 years ago, but the evidence put before me suggests that the Defendant is continuing a course of conduct which is in breach of that undertaking.

I interpose that I understand there to have been a strong parallel between the facts and circumstances of the Sandford case and 'DIY filling' operations of the claimant's cylinders and the present case. The judge continued as follows:

> Thirdly, there is a public interest in the granting of this injunction since there is a risk that the misuse of the Claimant's cylinders in the way described in the evidence could lead to real public safety concerns. On those grounds this draconian Order is justified.

26. That passage supports the contention that, in an appropriate case, addressing the component of serious danger to the claimant's interests if the order is not made, it can be appropriate for the court to consider and be satisfied on the basis that evidence is being preserved or property preserved (and in particular in a case of the latter), looking at danger whether in terms of damage to business volume of profits etc, or looking in terms of risk to public health or safety. In my judgment that is right as a matter of principle. In my judgment it is also supported as a matter of practical illustration by the two cases to which I have referred. I am aware of no authority – and

the claimant's representatives would have shown me any authority had they been aware of one - which precludes reliance on this wider perspective. It is important in this field as in all others not to treat the guidance of the courts as though observations and descriptions of criteria are to be read as a statute. It would, in my judgment, the regrettable and harmful to the public interest and the interests of justice if this broader perspective could not properly be invoked in an appropriate case. That is not to say that the applicant somehow takes on the mantle of a public authority regulator, nor that the court transforms into a public law court in imposing an order in the public interest. Rather, the position is far more modest. It is that the court can properly be asked to have regard to public health and safety risks, in considering the claimant's position: linked to the cause of action; linked to the implications of not making the order; and the risks as to evidence and as to property. It can properly have regard to the wider implications of making or not making the orders sought, where they are properly invoked by the applicant with a cause of action. On that second, and alternative, basis I would in any event have been satisfied that the component of serious danger or 'serious harm 'to the claimant' (or 'to the claimant's interests') if the order is not made is satisfied

27. I emphasise, again, that I am not making findings of fact. Nor am I saying I am satisfied that this is a case in which it can be said, on the evidence, that there is 'an imminent risk of immediate danger to the public'. So far as that is concerned I have in mind the background to the way in which the issue came to be investigated by the claimant itself. There was, on the evidence, an anonymous letter in June 2018 which indicated that DIY refilling was taking place. The evidence describes some steps that were taken at that stage but were not taken further. There was then the renewed concern raised in February 2020. The order is being sought and made in July 2020. I am satisfied that the evidence explains the proper and appropriate steps being taken by the claimant, after February 2020, and bearing in mind the Covid-19 lockdown that arose when it did earlier this year. The applicant does not put the position before me as high as involving an 'imminent risk of danger to the public'. The position is, rather, that there is a legitimate and genuine concern. In particular there, is in my judgment, a legitimate and genuine concern which would arise out of steps to move or dispose of cylinders, belonging to the claimant, particularly if they have been filled from the bulk tanks, including any filling of which now were to take place in order to empty those tanks. In my judgment, the relevant harm arising in those circumstances has to do with the claimant losing visibility on its cylinders which would then be elsewhere and unknown to it, compared with the securing of an order which will serve to protect the position by ensuring that the search can take place the cylinders be identified and safely removed. One of the provisions in the order that I have today made does however allow for the gas safety engineers involved in the search to be able to alert the supervising solicitors of any need, which they judge as having arisen, to immediately notify the Health and Safety Executive should they discover any circumstance which they judge calls for such a step. I have considered the implications of the timeline and the past delay in this case, and have had regard to what was said in the BMW case about delay. I am quite satisfied that there is in this case no delay which could constitute a reason to refuse the order if otherwise satisfied, as I am, that it is necessary. Moreover, there is on the face of it no prejudice to the defendant's arising from any delay.

Proportionality

28. I turn finally to the fifth element, that is to say proportionality: is the harm caused by the execution of the order excessive or out of proportion to the legitimate objective of the order? I am fully satisfied that the answer to that question is resoundingly "no". There is no legitimate business interest in the clandestinely DIY filling of the claimant's cylinders. The claimant has, as I have been shown, a contractual entitlement to the cylinders. Indeed, there are contractual provisions which entitle the claimant to enter premises to recover its cylinders. I emphasise that the order made by me today is not an order, on a without notice application, to back those contractual rights. The order made is independently justified, as a search order and related injunctive relief and ancillary orders, by reference to the principles that govern such orders and by reference to the five elements that I have described. However, it is in my judgment relevant to the proportionality and fair balance considerations (under this fifth element) that the entry and recovery aspect is one which, on the face of it, is a mirrored by the arrangements freely contractually entered into by the parties. That strongly supports the proportionality of the order and its execution. The order sought and made involves no entry into any residential premises: the residential premises in this case can be entered and searched only so far as the back garden and exterior sheds are concerned. The search pursuant to the order is for the claimant's own property , and a search to examine and photograph but not to remove the bulk tanks and other equipment. The only items being removed are the claimant's own property. The search party and the gas safety engineers will be able to examine the equipment and to satisfy themselves as to its utilisation, in accordance with the terms of the order, thus allowing the obtaining and preserving of relevant evidence. But none of those items will be removed. There is no searching, still less removal, of any documentation or of computers. Nor, on the revised order put before me by the applicant today, is there any 'doorstep' requirement that questions be answered as to commercial dealings undertaken by the defendants: the only requirement for information during the search relates to identification as to where relevant items covered by the order are to be found. The order sought has been restricted in these ways quite deliberately by the applicant and as a matter of design.

Proportionality and Covid-19

29. I am told, and I accept, that one of the key features which has led to that narrower formulation relates to the current Covid-19 pandemic and social distancing requirements. Mr Peto QC submits that the claimant ought not to be penalised by reference to the fact that it has not sought further and yet more intrusive orders, for example in relation to searching and seizing of documents but has relied instead on more conventional court orders that documents be preserved and that an affidavit be sworn describing relevant transactions. I accept that submission. It is, in my judgment, a virtue that the applicant sought in the design of the proposed order realistically to recognise proportionality considerations arising out of the current Covid-19 circumstances. Also to the claimant's and its lawyers credit is the design within the provisions of the draft order, and accordingly in the order which I have made, search and other steps to ensure appropriate action so far as safety and distancing and Covid-19 is concerned. Given that rather unusual feature of this case I will set out here what are called 'the Covid undertakings' put before the court in the present case and embodied in the order which I have made. They read as follows:

The Supervising Solicitor will: (i) Not permit any person in the search party to enter the Business Premises or those parts of the Domestic Premises identified in Schedule A without first undergoing a temperature test. (ii) Not permit any person who has a temperature above 38 degrees to enter the Business Premises or those parts of the Domestic Premises identified in Schedule A. (iii) Before allowing any member of the search party to enter the Business Premises or those parts of the Domestic Premises identified in Schedule A, make inquiries as to whether anyone currently on either premises is considered to be clinically vulnerable to COVID-19 or is otherwise shielding during the pandemic. If any such individual is identified at the Domestic Premises, they will be advised to remain in those parts of the Domestic Premises that are not identified in Schedule A during the search. If any such individual is identified at the Business Premises, the Supervising Solicitor must stop the search for at least 2 hours to allow for them to make alternative arrangements and to leave the property, if they wish to do so. (iv) Use best endeavours to comply with the requirements of social distancing, maintaining a distance of 2 metres between any persons on the premises, wherever practicable. (v) Use best endeavours to ensure that every member of the search party wears plastic gloves and facemasks at all times when on the Business Premises and the Domestic Premises. (vi) Ensure that every member of the search party has hand sanitising gel and carries it on his or her person at all times when on the Business Premises and the Domestic Premises, both before, during and after the search. (vii) Bring spare pairs of plastic gloves and facemasks to the Business Premises and the Domestic Premises, and offer said equipment to the Respondent and any other person identified on the Business Premises or Domestic Premises.

Conclusion

30. For all these reasons I am satisfied that the order I have made is necessary and proportionate and strikes a fair balance the defence will be able to contest the claim and defend themselves. The defendants are protected by the cross undertakings in damages, as are any relevant third parties. The defendants have the liberty to apply to vary or discharge the order, and they have the return date, which is deliberately prior to the deadline for the affidavit in relation to transactions. But the order secures that the claimant will effectively be able to identify and recover its own cylinders from these two properties. The order also secures that the claimant will be able effectively to identify and examine photographs and video any equipment set up at the premises. Those steps are secured, by a tailored order: in circumstances where it is of major importance to be able to secure those outcomes against the backcloth where there is a strong prima facie claim; in circumstances where there are very serious concerns that those outcomes would be thwarted and undermined absent this order, and were any alternative less intrusive order to be made. In all the circumstances and for those reasons, I was satisfied that the order is necessary in the interests of justice, and indeed that to refuse it would stand to effect an injustice to the claimant.

22 July 2020