Neutral Citation Number: [2021] EWHC 2930 (QB)

Case No: **QB-2017-007393**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: **1 November 2021**

Before :

Mr Justice Martin Spencer

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Between :

Mrs Oluyomi Ayannuga & 4 others	**Claimant**
- and -	
One Shot Products Ltd	**Defendant**

- -
- -

Simeon Maskrey QC (instructed by **Leigh Day**) for the **Claimant**
Jack Harris (instructed by **Kennedys Law**) for the **Defendant**

Hearing dates: **1st November 2021**

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APPROVED JUDGMENT

Mr Justice Martin Spencer **Monday, 1 November 2021**
(**2:50** pm)

Judgment by **MR JUSTICE MARTIN SPENCER**

1. This is an application on behalf of the claimants for orders in relation principally to disclosure against the defendants.
2. The claim arises out of an incident on 1 January 2015 when one Tito Gbadegeshin tried to unblock the kitchen sink of Mr and Mrs Ayannuga using a product called One Shot Instant Drain Cleaner, manufactured by the defendants. It is alleged that the release of hydrogen sulphide gas and fumes were responsible for Mr Gbadegeshin's death and injuries to the Ayannuga family. In particular, Mr Ayannuga suffered serious brain injury and is now in a persistent vegetative state and is a patient at the Royal Hospital for Neuro-Disability. I have seen an inquest into the death of Mr Gbadegeshin and also I have seen medical reports in relation to members of the Ayannuga family.
3. On 23 November 2015 Leigh Day wrote to the defendant putting them on notice of these claims and there was a conversation between Mr Jervis of Leigh Day, the partner who has had conduct of this matter throughout, and Mr David Sutton, who is the manager of the defendant company, and Mr Sutton indicated that the letter of 23 November had been passed on to insurers. After a little delay, on 21 December 2015 the claimants' solicitors received a letter from the defendants' insurers, ACE.
4. A claim form was issued on 20 December 2017. That was of course necessary because the three-year limitation date was approaching. Thereafter, there were various orders granting extensions of time for the service of the particulars of claim by Master McCloud, Master Eastman, Master Cook and eventually Deputy Master Bard. Particulars of claim were served on 29 June 2020 and a defence was served on 18 August 2020.
5. Then, in March 2021, Master Eastman made his main order for directions, which included a direction that the defendants file and serve its electronic document questionnaire by 29 April 2021. There was a further hearing before Master Eastman on 14 April 2021, which was principally a costs

budgeting hearing, but in the course of that, Mr Jack Harris, who has represented the defendants throughout as counsel, made some significant reference to disclosure.

6. Eight days later, on 22 April, the court sent notice of trial date to the parties with an eight-day trial in a five-day window commencing on 1 March 2022.

7. On 29 April 2021 Melissa Lewis, a solicitor instructed by Kennedys Law, the solicitors for the defendants, sent an email to Leigh Day seeking an extension of time to serve the electronic document questionnaire. That email stated:

> "As you are aware, the EDQ is due to be served today. However, we are currently awaiting an endorsed version of the document from our client. We would be grateful if you would permit a brief extension of time until 4.00 pm tomorrow."

It was not possible for Leigh Day to respond that day, but they wrote the following week, on 6 May, only to receive an out-of-office bounce-back indicating that Ms Lewis was out of office until 10 May. In any event, although seeking an extension of time to 30 April, no EDQ was served on 30 April.

8. Having received that out-of-office response, Leigh Day wrote to Mr Shrimpton, the partner at Kennedys Law with conduct of this matter, on 6 May, that being the document at page 120 of the electronic bundle for this hearing, and received no reply. The EDQ was eventually served on 10 May 2021. Although the circumstances must have been a matter of some irritation to those representing the claimant, I consider that in the end nothing turns on the late service of the EDQ and I grant relief from sanctions, so that the defendant is to be regarded as having complied with that part of the Master's order.

9. The next relevant date is 17 May, when Kennedys wrote to Leigh Day indicating that the defendant had no hard documentation dating back more than six years. They indicated that a large amount of hard copy documentation post 2009 had been transferred into electronic format by scanning documents in and converting to pdf format, and that was featured on the single hard drive. They

indicated that all disclosure would be provided in electronic format. That led to a letter from Mr Jervis on 25 May, setting out certain ongoing matters of concern. It is unnecessary for me to refer to that document in detail, but Mr Jervis set out the concerns which he had from the letter of 17 May. In particular he asked:

> "Please can you explain what hard copy documents post 2009 were destroyed and why? When were these hard copy documents post 2009 scanned on to the defendants' hard drive and for what purpose?"

He also pointed out the defendants' explanation did not account for all the hard copy documents from the date the product first entered the market until 2009, that being a period of almost 30 years. Mr Jervis also raised issues surrounding the insurance broker, Towergate, used by the defendant since 2009, asking whether they would have been notified of all claims previously made since the product had been supplied to the market or whether that information lay with the insurance companies and asked about who the brokers were pre 2009 and who insured them.

10. I can comment that it is clear that the purpose of these questions and the purpose of these investigations was that the claimants' solicitors reasonably and understandably wanted to know whether there had been previous claims against the defendant in relation to this product, in particular for injury or death arising from fumes.

11. Then, on 7 June 2021, Kennedys wrote in response to Leigh Day's letter of 25 May and dropped what can perhaps be described as a bombshell, namely that:

> "All hard copy documentation in the factory was shredded in 2016."

They asserted that there is no legal requirement for the defendant to retain hard copy documentation spanning a 30-year period. This of course caused Leigh Day enormous concern, not least the fact that apparently relevant documents had been shredded on a date in 2016 when the letter putting the defendant on notice of the claims had been sent on 23 November 2015 and there had been the conversation between Mr Jervis and Mr Sutton on 26 November 2015.

12. The question arises what the defendant was doing shredding documentation in 2016 when they had been put on notice of a claim in 2015. That question remains to be answered, but I note that although it has been asserted that Mr Mounce and Mr Sutton, who jointly are the moving forces behind the defendant company, are not sophisticated when it comes to information technology and computers, they were experienced when it comes to facing claims of various sorts, including claims to infrastructure, such as kitchens and bathrooms, and claims relating to burns arising from the caustic nature of their product, and therefore can be expected to have been advised many times previously of the important obligation of retaining documentation relevant to litigation.

13. Not unnaturally, the letter of 7 June led to a further letter from Leigh Day on 30 June, asking the following questions:

    "Exactly when did the Defendant destroy its hard copy documentation in 2016?

    "Has the Defendant received legal advice on this point. Who was advising the Defendant at that point in time? Was it Kennedys or BLM [who have represented the defendant at another stage] and/or someone else?

    And why it chose:

    "... to just scan documentation that only went back to 2009 and what were those documents?"

14. It must be said that there was no substantial response to any of those questions and the defendants and their solicitors have engaged in what was termed by Mr Maskrey QC in today's hearing as a "radio silence".

15. On 30 June there was an email exchange between Kennedys and Leigh Day relating to an extension of time by four weeks to 28 July 2021 for the exchange of documents, exchange of disclosure lists and statements. Leigh Day were prepared to agree such an extension, as long as there was a correlative extension for the deadlines for the other paragraphs in Master Eastman's order, namely paragraphs 4(e), 5, 6 and 8.

16. On 8 July 2021 Kennedys sent an email to Leigh Day stating that they were taking instructions arising out of the letter of 30 June and that they were awaiting further information from Towergate, the defendants' insurance brokers.
17. On 27 July Kennedys wrote to Leigh Day again indicating that, whilst there was an exchange of signed lists due the following day, 28 July, pursuant to the agreement that had been reached on 30 June, the defendants' management had received some devastating family news. I understand that Mr Sutton was married to Mr Mounce's daughter and she had a relapse in her cancer, which she had suffered from, and I understand that since July she has in fact succumbed to her illness. Obviously, given that this was effectively a two-person run firm, for that to have happened to somebody who was the daughter of one and the wife of the other must have predominated their thoughts and their actions at that time, and clearly the court understands that their attention to matters thereafter in relation to this litigation would not have been their priority. However, it must be pointed out that 27 July, when that information was apparently forthcoming, was at the very end of the period which had been agreed and that does not account for the apparent lack of activity and compliance with the requests from Leigh Day prior to that date.
18. On 28 July 2021 Kennedys sent to Leigh Day a blank and unsigned list of documents, together with a completed Excel spreadsheet appended to it, setting out what documents the defendant held. That was apparently an error, sending that document, the error relating to the fact that it was a blank list, rather than being an unsigned list, and on the same day Kennedys served an application to extend the time for service of a signed list of documents. The serving of a blank document was an error by Ms Lewis.
19. Having received that application, Leigh Day understandably wrote direct to Master Eastman requesting that he did not deal with that application in the absence of a hearing.
20. There was a further conversation between Mr Jervis and Mr Shrimpton on the same date, 28 July. Mr Jervis had emailed Mr Shrimpton from holiday, asking if they could speak on the telephone and

giving his mobile telephone number on the basis that it was an important issue and could not wait. I have, at paragraph 40 of Mr Jervis' witness statement, his contemporaneous note of that call. Mr Jervis said that in the absence of a proper explanation as to why the defendant destroyed documents back in 2016, after he had put them on notice of the claim and when they were involved in the inquest, the defendant and its representatives were, to use the expression used by Mr Jervis, "in hot water". There was no meaningful response to that suggestion. Mr Jervis, whilst obviously sorry to hear about the family problems experienced by Mr Mounce and Mr Sutton, pointed out that he had a client who was in a persistent vegetative state and Mrs Ayannuga was having to work through the whole process with them and therefore there were problems on both sides, and he expressed a lack of understanding as to why it had not been possible to make more progress.

21. As Mr Maskrey put it in his position statement and again to me in submissions, the case had very much stalled at this disclosure point. Mr Shrimpton told Mr Jervis that the sending of the blank form N265 had indeed been a mistake, that the form had been completed but just had not been signed. Then there was further discussion of all these matters, which I need not repeat.

22. The signed disclosure document was then served on 29 July, but, as Mr Jervis has indicated in his witness statement, he did not regard that as an acceptable document and that led to the application notice being issued on 6 August, which is the notice which has come before me today, supported by Mr Jervis' witness statement of the same date.

23. I come then to the evidence for the defendants and that consists of a statement from Mr Shrimpton, dated 28 October. Today is Monday, 1 November and so I note that that statement was made on Thursday of last week. There is also a witness statement from Ms Melissa Lewis, dated 24 September 2021, but for reasons which are obscure that statement was not served until last week either. It is therefore the position that the claimants and their solicitors have only had any kind of substantive response to this application within the last few days.

24. Even then, the response was not as full as it should have been and there were further developments, in that Kennedys have indicated that in respect of one of the aspects of this claim or application, namely that Towergate interrogate or investigate the archived documents in relation to their documentation pre-dating 2013, it is now going to be possible for them to do that digitally if they are given sufficient time. That new information only came to light in the course of Mr Harris' submissions.

25. Dealing with the application, then. Paragraph 1 seeks an order that the defendant serve signed witness statements from both Mr Mounce and Mr Sutton explaining six matters. The first four of those matters are agreed, subject to the word "exactly" in the first of them being replaced by the words "as best they are able", and therefore an order will be made in those terms in relation to those four matters.

26. An issue has arisen whether there should be witness statements from both Mr Mounce and Mr Sutton or just Mr Mounce. Mr Maskrey told me that he understood, and this has been confirmed by Mr Harris, that Mr Mounce now lives most of the time in Florida and has done since 2015, if I recall correctly. In any event, that does mean that the day-to-day handling of the business must be by Mr Sutton, his son-in-law, who is not in fact a director. Mr Harris has submitted that, given that the application is against the company and given that Mr Mounce is a director, but Mr Sutton is not, it is only appropriate that the court should order that a witness statement be served and filed by Mr Mounce. However, given that much of the management and handling of the company and these matters appears to have been left to Mr Sutton by Mr Mounce, if the court were only to order that Mr Mounce sign a witness statement, it seems inevitable that much of what Mr Mounce tells the court will be on the basis of what he himself has been told by Mr Sutton. In my judgment, it is, in the circumstances of this case and in the light of the history which I have related, much more appropriate and desirable that relevant information which Mr Sutton has should be attested to by

him directly with a statement of truth. Therefore, there will be witness statements ordered from both Mr Mounce and Mr Sutton, not just from Mr Mounce.

27. Paragraph 1.5 of the order proposes that the witness statements should explain which of the documents that are listed on the defendants' disclosure list served on 28 July were provided by the company or its insurance broker, Towergate, or any other source. Mr Harris objects on the basis that disclosure relates to the documents, rather than to their progeny, and he relies on what is stated by Mr Shrimpton in his witness statement at paragraph 27. Mr Shrimpton suggests that this is an inappropriate order because as a general rule all documents disclosed have originated from the defendant itself, save for documents related to previous claims against the defendant which have originated from Towergate, the reason being that the defendant, whenever it received a claim, forwarded such correspondence to Towergate. He suggests that further details of the source of the disclosed documents is not reasonably required, that not being the purpose of disclosure. Mr Maskrey QC submits that the progeny of the documents is important in the context of a case where documents have been destroyed and where the defendant is reliant on third parties to comply with its disclosure obligation. He states that the progeny of the documents is relevant because it puts the claimant on a possible route of enquiry as to the existence of further relevant documentation.

28. I agree with Mr Maskrey that, in circumstances where there has been destruction of documents and where there has been a lack of co-operation on the part of the defendants in relation to the disclosure process, it is reasonable for the claimants to be able to follow up on disclosure by having the knowledge of not just what documents have been disclosed, but where they have come from, and I will therefore make an order in the terms of 1.5.

29. 1.6 asks Mr Mounce and/or Mr Sutton to explain how the hard copy documents from 2009 onwards were scanned into the defendants' computer system and by whom, and asks questions as to the resolution or quality of the scans and whether they are OCR-searchable and also to explain how the search for electronic documents was carried out.

30. In my judgment, it is not necessary for them to explain how the search for electronic documents was carried out because this has been explained by Ms Lewis in her witness statement of 24 September. However, it is relevant for Mr Mounce and/or Mr Sutton to explain how the hard copy documents were scanned on to the system and by whom. I do not think it is necessary for them to explain about the resolution or quality of the scans and whether they are OCR-searchable, particularly given that we are talking about a relatively small database of documents in this case, and given that Ms Lewis has explained that she has carried out a manual search of all the documents. I therefore restrict the order in paragraph 1.6 to the first sentence.

31. Paragraph 2 of the draft order seeks an order that the defendant carries out a further search of the documents that still exist without using specific search terms and that the additional search should include a search of an additional email address that once belonged to Mr Mounce's son, who I understand is now also deceased. And, thirdly, that the defendant should carry out a search of any relevant documents held by its insurers who have dealt with claims involving this product since its supply to the market.

32. This needs to be unravelled a little bit. Firstly, because I am going to order, in accordance with paragraph 3, that the defendant allow the claimants' appointed forensic IT expert access to the computer and hard drive to carry out his own search, I am not going to order that the defendant carries out further search of the documents without using specific search terms because it seems to me that Mr Bottomley can do that for himself, as long as there is the appropriate co-operation from the defendants and their solicitors in relation to his access to the computer.

33. The search of the additional email address is not resisted.

34. So far as relevant documents held by insurers are concerned, firstly, it is necessary to identify those insurers. I understand that Towergate have been the defendants' insurance brokers since 2009. Before that, the brokers were called Hare, who no longer exist and appear no longer to be traceable, and therefore it is a futile exercise to try and identify through them insurers prior to 2009.

35. What ought to be eminently possible is for Towergate from their records to identify with whom the defendants' insurance has been placed since they have been brokers and that is not by any means a colossal exercise but, rather, a relatively straightforward exercise. It seems unlikely that insurance companies will have been changed more often than each year, depending upon the premium charged, and therefore the maximum number of such insurance companies seems to me to be 12 or will probably be rather less.
36. Of course, if Towergate inherited from Hare any information about the previous insurance position and they are likely to have inherited something at least in relation to the previous year, if not years before that, then they should be able to provide that information and, as Mr Maskrey rightly submitted, Towergate are the defendants' agents for these purposes and therefore orders can be made in relation to Towergate, who must do as the defendants instruct them to do in this regard.
37. The position is that the defendant needs to identify through Towergate who the insurers were, certainly during the time that Towergate have been the brokers, and previous to that if that is within Towergate's information and knowledge, and then those insurers can be asked whether they have any, and I emphasise "relevant", documents involving previous claims in relation to this product. Once that has been done, it will then be possible to see whether there are indeed such relevant documents which need to be disclosed and if there is any difficulty in getting hold of them, a further application can be made to the court, if necessary, for third party disclosure, although I would expect such insurance companies to co-operate with any request for such identified documentation. Therefore, I would ask that paragraph 2 be amended accordingly.
38. As I have indicated, I am going to make an order in the terms of paragraph 3. It seem to me that there have been sufficient questions raised in relation to the way in which the disclosure, and in particular the interrogation of the hard drive, has been dealt with for the claimants reasonably to want their own expert to interrogate this hard drive using the more sophisticated software available to their expert, Mr Bottomley, which will potentially reveal not only documents which have been

deleted, but which remain retrievable from the hard disk, but will also reveal whether external drives have been connected to the hard disk and documents have been uploaded to the external drive and then subsequently deleted from the hard drive. In the light of the history of this matter and in all the circumstances, and in particular given the shredding of documents in 2016, it seems to me that this is a precaution, which the claimants reasonably now request should be carried out through their IT expert.

39. So far as paragraph 4 is concerned, Mr Harris has indicated that Mr Ben Jones, at Towergate, sent an email on Friday informing Kennedys Law that documents held in the archive referred to in the evidence are now online and accessible, but he needs time to be trained on how to use the digital archive, how to access the information on it, how to search it, and then to look for what is needed. It has been suggested that he be given six weeks to do so. In my judgment, six weeks is much too long in the context of a case where there has been a lamentable failure to make proper disclosure in this case by the defendant and to answer the reasonable questions asked of them in correspondence and in telephone calls from Mr Jervis, and I am going to allow three weeks for this process, not six weeks. If it emerges that Mr Jones or anyone else who is tasked with this process at Towergate is unable to comply within three weeks, then the defendants are to make an application to the court before the expiry of three weeks explaining exactly what has been done, what still requires to be done, the basis upon which further time is needed, how long will be needed and applying for that amount of time. I emphasise that such an application is to be made before the expiry of the three weeks, not after. Given my involvement with this application and my knowledge of the case as a result, I shall reserve any such application and indeed any further interlocutory applications in relation to the directions that have been made in this case and in particular any application to vacate the trial to myself.

40. Paragraphs 5 and 6 fall by the wayside effectively because the third parties have indicated that they will comply with the request for documentation, those third parties being Hull Trading Standards

and the Health & Safety Executive. I understand that Hull Trading Standards are prepared to comply without an order of the court, but insofar as the Health & Safety Executive prefer to have an order of the court, that will be provided.

41. Finally, so far as extensions of time are concerned, that is now effectively agreed. Reasonably the defendants, and in particular Mr Shrimpton, wanted to see what the court was going to order before agreeing to the extensions of time and the dates suggested, but I am told by Mr Harris that there is no objection in principle and I think that nothing that I have said in this judgment affects the position. So those extensions will be ordered as sought.