

Neutral Citation Number: 2014 EWHC 722 (Ch)

Case No: HC12C00705

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2014

Before :

RICHARD SPEARMAN Q.C.
(sitting as a Deputy High Court Judge)

Between :

(1) ANDREW IAN MCTEAR

Claimants

**(2) CHRISTOPHER KENNETH
WILLIAMS**

- and -

(1) MICHAEL CONRAD ENGLEHARD

(2) MARIA ELIZABETH RISBY

(3) ANNA MARIE ENGLEHARD

(4) SYLVIA PATRICIA ENGLEHARD

(5) NATASHA RISBY

**(6) ANNA MARIE ENGLEHARD AS THE
PERSONAL REPRESENTATIVE OF PAUL
SIEGFRIED ENGLEHARD (DECEASED)**

Defendants

(7) ENGLEHARD HOLDINGS LIMITED

Simon Davenport QC and Richard Samuel (instructed by Isadore Goldman, Lawrence
House, 5 St Andrew's Hill, Norwich for the Claimants

Jonathan Lopian (instructed by Hansells Solicitors) for the Defendants

Hearing dates: 5, 6, 7 March 2014

JUDGMENT

RICHARD SPEARMAN Q.C.:

Introduction

1. On 27 November 2013, the Court of Appeal handed down the judgment in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537, [2013] 6 Costs LR 1008, on the effect of the new CPR 3.9. At [46], the Court said:

“The new more robust approach that we have outlined above will mean that from now on relief from sanctions should be granted more sparingly than previously ... the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long”.
2. The present case is another in which the implications of Mitchell fall to be considered.
3. I was referred to the subsequent decisions of the Court of Appeal in Durrant v Chief Constable of Avon and Somerset Constabulary [2013] EWCA Civ 1624 (dated 17 December 2013) and Thevarajah v Riordan [2014] EWCA Civ 14 (dated 16 January 2014). I was also referred to the recent decisions at first instance of Hamblen J in Lakatamia Shipping Co Ltd v Nobu Su [2014] EWHC 275 (Comm) (dated 13 February 2014), Globe J in Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWHC 438 (QB) (dated 18 February 2014), Leggatt J in Summit Navigation Ltd v General Romania Asigurare Reasigurare [2014] EWHC 398 (Comm) (dated 21 February 2014) and Andrew Smith J in Associated Electrical Industries Ltd v Alstom UK (a private limited company) [2014] EWHC 430 (Comm) (dated 24 February 2014).
4. It was drawn to my attention that in Durrant and Thevarajah the Court of Appeal had reversed decisions of judges at first instance to grant relief from sanctions. Further, that at [47] in the Associated Electrical case Andrew Smith J had concluded that, although he considered that as between the parties this was a disproportionate response and unjust, the emphasis that the Court of Appeal has given in Mitchell to enforcement of the CPR in order to encourage procedural discipline had driven him to conclude that he should grant the defendant’s application to strike out the claim form and refuse the claimant’s application for an extension of time. I was informed that permission to appeal to the Court of Appeal has been granted in Chartwell and that permission to appeal to the Supreme Court is being sought in Thevarajah.

Summary of the case

5. Although the relevant legal principles need to be properly identified and correctly applied, each case falls to be decided on its own particular facts. In some cases, a party

has been in breach of an order, direction or rule; has then been made the subject of a further order in which an express sanction is spelled out; and has then failed to comply with that further order. In other cases, applications for relief from sanctions or for extensions of time have been made long after the time when the relevant steps ought to have been taken. What has happened in the present case is different, not least because it involved a number of defaults the effect of which came all together either shortly before or even during the trial, as appears from the procedural history below.

6. The Claimants are represented by Simon Davenport QC and Richard Samuel. The Defendants are represented by Jonathan Lopian.
7. Mr Lopian submitted that, like the party which was criticised by Leggatt J in Summit Navigation, the Claimants in the present case have sought to rely on Mitchell to turn to their tactical advantage a short delay by the Defendants in complying with the timetable contained in an order of the Court which in itself had no material impact on the efficient conduct of the litigation, nor on the two needs that are highlighted in the new CPR 3.9: “for litigation to be conducted efficiently and at proportionate cost”, and “to enforce compliance with rules, practice directions and orders”. These submissions are entirely in line with the way in which this litigation has been conducted on behalf of the Defendants in the run up to the trial. In my judgment, however, they are quite unreal. I also consider that they reflect a lack of understanding of the appropriate way in which litigation should be conducted.
8. In my judgment, the suggestion that what has happened in the present case can properly be characterised in that way is misguided. I have reached the conclusion that the stance of the Claimants in the present case, and the orders they invite me to make, accord not only with Mitchell but also with the overriding objective, with unambiguous provisions of the CPR (concerning, for example, expert evidence), and with pre-Mitchell case law (concerning, for example, late applications for permission to amend). In Summit Navigation, Leggatt J said at [54] that the grounds for arguing that the defaults relied upon were material were without merit, and that the stance of the party opposing relief from sanctions “disregarded the duty of the parties and their representatives to cooperate with each other in the conduct of proceedings and the need for litigation to be conducted efficiently and at proportionate cost. It stood Mitchell on its head”. I consider that the correct analysis is that the reverse applies in this case.
9. The Defendants have not provided any satisfactory explanation as to why they did not find the new documents before standard disclosure ought to have been given on 22 April 2013, and still less for their conduct after those documents were found on 15 February 2014. They decided, quite deliberately, to wait until 21 February 2014 to spring those documents on the Claimants, without identifying them to the Claimants, and instead by including them in a bulky exhibit to a witness statement which made repeated reference to them. Their witness statements had to be delivered by hand due to the bulk of this exhibit, and were served late. At the same time, they served expert evidence that they had no permission to adduce, and waited until the trial to apply to re-amend the Amended Defence to plead new matters. The usual procedures, either within the times laid down by the CPR and court orders or (where that is needed) with the permission of the Court, involve: first, formulating and serving pleadings; second,

providing disclosure and inspection of documents; third, serving witness statements; and, last, preparing trial submissions. However, the Defendants decided to follow their own rules. They have:

- (i) produced (without identifying them to the Claimants) a significant number of documents that they have not previously disclosed;
 - (ii) done this at the same time as serving their trial witness statements and in such a way that those documents are inextricably entangled with that evidence;
 - (iii) served evidence and written submissions for trial relating to issues that they have not pleaded, or even formulated at the time in a draft Re-Amended Defence, including one factual issue that they accept cannot be tried as part of this trial;
 - (iv) served evidence from an accountant that they accept is expert evidence in part (and, as I consider, in whole) without seeking the permission of the court;
 - (v) done all of this not only out of time in accordance with rules and orders, including a recent order that was made on their own application, but also on the eve of trial and all together;
 - (vi) refused to accept the need to make applications to the court, and therefore have not made those applications either promptly or so that they might be heard before the trial;
 - (vii) accordingly, placed the Claimants in the position that they did not know what case they had to prepare to meet and would require an adjournment if relief was granted;
 - (viii) in any event, seriously disrupted the trial timetable, with the attendant risk (that was, in the result, averted by refusing them relief from sanctions) of jeopardising the interests of other court users.
10. By proceeding in this way, it seems that the Defendants hoped to impose on the Claimants new documents, new evidence, and a new pleaded case, and to obtain the court's endorsement for their conduct, whether on the grounds that it was immaterial, or that there were good reasons for it, or that the prejudice to the Defendants of refusing to endorse it so outweighed the prejudice to the Claimants of endorsing it that it should be endorsed in the interests of doing justice. I consider that this approach is unacceptable, and that it would be wrong for the court to endorse it.

The proceedings

11. The Claimants are the former joint administrators of Broadland Wineries Limited ("BWL") and the former supervisors of a Company Voluntary Arrangement ("CVA") which BWL entered into. BWL went into administration on 10 March 2006 and came out of administration on 1 February 2007. BWL entered into the CVA on 18 October

2006 and the CVA came to an end on 20 November 2011. By a Deed of Assignment dated 20 September 2011, BWL's claims in these proceedings were assigned to the Claimants, and they hold them on trust for BWL's creditors.

12. Although BWL was sold to a third party on 20 November 2011, at all times material to this claim BWL was one of a number of companies that were owned or controlled by members of the same family. In this regard:
 - (i) The Seventh Defendant ("EHL") was the holding company in the group. EHL held 90% of the shares in BWL. EHL held the remaining 10% of those shares jointly with Paul Engelhard, a businessman who died on 2 December 2006.
 - (ii) Paul Engelhard was married to Anna Engelhard, who has been joined as the Third Defendant in her own right and as the Sixth Defendant in her capacity as his personal representative.
 - (iii) The First Defendant, Michael Engelhard, and the Second Defendant, Maria Risby, are the son and daughter of Paul and Anna Engelhard. Michael Engelhard took over the running of the business on his father's illness and death. Maria Risby was BWL's company secretary, and she was also a director of EHL, but she is not relevant to the claims that are presently before me.
 - (iv) The Fourth Defendant, Sylvia Engelhard, is the former wife of Michael Engelhard.
 - (v) The Fifth Defendant, Natasha Risby, is the daughter of the Maria Risby, but she is not relevant to claims that are presently before me.
 - (vi) EHL's directors and shareholders were Paul and Anna Engelhard, their son Michael Engelhard, and Michael Engelhard's former wife Sylvia Englehard. With the exception of Sylvia Engelhard, who was only a director of EHL, the same individuals ("the director Defendants") were also directors of BWL.
13. It is common ground that EHL did not generate any trading income. Whether and to what extent EHL provided management and head office services ("the services") to BWL, and, if it did so, the value of the services are issues in the proceedings.
14. There is also an issue as to the extent to which the decision to make payments to EHL or to incur charges in respect of the services placed the director Defendants in breach of duties that it is accepted that they owed to BWL, further or alternatively that they owed to the creditors of BWL, in light of BWL's financial predicament in the period before BWL went into administration.
15. Some of the claims have been settled. The remaining claims revolve around payments in the total sum of £412,739.17 that were made by BWL to EHL between the start of BWL's financial year on 1 April 2005 and the date when BWL went into administration on 10 March 2006.

16. The Claimants contend that those payments comprised loans from BWL to EHL, and that those loans fell due upon demand, that was made at latest by service of the claim in the present proceedings. Accordingly, they claim £412,739.17 from EHL as a debt due from EHL to BWL. Among other things, in support of this claim they rely upon:
- (i) the way in which these payments, and that total sum, were recorded in BWL's inter-company account with EHL;
 - (ii) the fact that they are not aware of any documents evidencing any agreement to treat these payments in any other way, and no such documents have been disclosed by the Defendants;
 - (iii) the facts that not only are these payments in irregular amounts but also that EHL raised no contemporary invoices in respect of any of these payments; and
 - (iv) the fact that, prior to BWL's insolvency, what happened is that EHL raised a charge at the end of the financial year end on 31 March for the sum of £450,000 plus VAT for the supply of the services, and that the director Defendants could not validly have met to approve such a charge after 31 March 2006 because by then BWL was in administration.
17. The Claimants further contend that, if BWL truly owed EHL monies, EHL should and would have proved in BWL's administration for the sums due from BWL to EHL.
18. Instead, on 27 April 2006, the then Financial Controller of both BWL and EHL, Richard Coleridge, sent an email to Mr McKay of the Claimants. According to the Claimants, this gave notice of an intention to make adjustments to BWL's statement of affairs. The Claimants contend that, on the one hand, the statement of affairs was the responsibility of the directors of BWL, but that, on the other hand, the directors had no right to change the financial position shown in the books and records of BWL as at the date of the Claimants' appointment as administrators. One of those adjustments was "Accrue Management Fee £424,109.58 to 10/3/2006". Richard Coleridge later made that adjustment to the SAGE inter-company account D-D176, and attributed to it the date of 28 February 2006. The effect of this was to enable EHL to recoup £412,739.17, and, as the Claimants contend, to prefer EHL over BWL's other creditors, instead of treating EHL *pari passu* with them. The Claimants contend that this was done on the instructions of Michael Engelhard.
19. As against the director Defendants, the Claimants contend that the adjustment of £424,109.58 on 27 April 2006 was (1) a sham transaction or accounting entry, (2) a breach of the fiduciary duties that they owed to BWL, (3) a breach of the duties of care that they owed to BWL, further or alternatively to the creditors of BWL, and (4) an improper exercise of a management function after administration without the consent of BWL's administrators contrary to paragraph 64(1) of Schedule B1 to the Insolvency Act 1986. The Claimants further contend that (5) by continuing to incur the charges and make the payments referred to above in the financial year in question, the director Defendants were in breach of the same duties, for failing to consider whether that was in the best interests of BWL and its creditors, and when no service of an equivalent

value was provided, and when that preferred EHL (in which the director Defendants had an interest) over other creditors.

20. These claims are pleaded in paragraphs 21 to 29 of the Particulars of Claim, and are the subject of paragraphs 8 to 13 of the prayer for relief in that statement of case.
21. Initially, these claims were answered by the pleas contained in paragraphs 33 to 39 of the Defence. On 7 November 2013, the Defendants served “Voluntary Particulars” of that Defence. Following protests from the Claimants’ solicitors, the contents of those “Voluntary Particulars” were inserted into an Amended Defence as a new paragraph 36A. By an Order of Master Bowles made on 24 January 2014, the Defendants were granted permission to serve an Amended Defence in that form, service of which was thereby deemed to have taken place.
22. By the same Order, Master Bowles granted permission to the Claimants to serve an amended Reply, and ordered (among other things) that: “each party shall give further disclosure arising from the foregoing amended pleadings by list by 4pm on 7 February 2014... 5. Paragraph 7 of the Order of the Court dated 6 February 2013 shall be amended so that each party shall serve on every other party the Witness Statements of the oral evidence which the party serving intends to rely on at trial such statements and any notices of intention to rely on hearsay evidence to be exchanged by 4pm on 21 February 2014”. That Order was made on the Defendants’ application.
23. The Order of the Court dated 6 February 2013 was also made by Master Bowles, and contained directions down to trial. Those directions provided that the trial of this claim should take place in the window between 1 December 2013 and 28 February 2014. They included orders that (1) each party should give standard disclosure by list by 4pm on 22 April 2013, (2) requests for inspection or copies of disclosed documents should be made within 14 days after service of the list, and (3) witness statements and notices of intention to rely on hearsay evidence should be exchanged by 4pm on 28 June 2013. Neither side asked for permission to serve expert evidence.
24. The substance of the defences with which I am concerned, as originally pleaded, is as follows:
 - (i) the inter-company account did not record and never had recorded a debt owed by EHL to BWL, but instead it recorded monies that had been paid by BWL to EHL on account of the accruing management charge for the services rendered by EHL (including payments that EHL made for and on behalf of BWL);
 - (ii) that accruing charge was payable monthly at the rate of £37,500 per month, and this was reflected in BWL’s management accounts, which every month recorded, as part of BWL’s running costs, the sum of £37,500 (that is to say, one twelfth of the charge for the full year in the agreed amount of £450,000 (excluding VAT));
 - (iii) as at 10 March 2006, the accrued pro-rated management charge from 1 April 2005 down to that day was £424,109.58, which sum should have been posted to

BWL's profit and loss account, thereby extinguishing any notional cash balance of £412,739.17;

- (iv) the adjustment that was the subject of the email from Mr Coleridge dated 27 April 2006 was simply an exercise in tidying up the accounts by posting the sum of £424,109.58 to BWL's profit and loss account, where it should have been in the first place;
 - (v) the director Defendants did not breach their duties to BWL (or at all) and no sums are recoverable from them for breach of fiduciary duty or negligent mismanagement; and
 - (vi) it was in the best interests of BWL to commit itself to incurring the material charges for the services, and BWL received good value for those charges.
25. The text that was inserted into the Amended Defence as a new paragraph 36A pursuant to the Order of Master Bowles made on 24 January 2014 gave particulars of the matters summarised at (i)-(iv) above. That text also made reference to two Schedules, that were attached marked "A" and "B", and that contained breakdowns of the sums of £412,739.17 and £424,109.58.
26. There is also a plea of estoppel, contained in paragraphs 5 and 6 of the Amended Defence. In paragraph 5 of the Amended Defence it is said that the remainder of that pleading is pleaded "without prejudice" to these assertions. In sum, it is pleaded that, at all material times, the Claimants on the one hand and the Engelhard family, EHL and another Engelhard family company called Engelhard Farms Limited ("EFL") on the other hand acted on the assumption that the account balances complained of in the Particulars of Claim were correct. Accordingly, it is said that "the Claimants are estopped from asserting that the balances on the SAGE account are other than a correct statement of the true account as between BWL and/or the Claimants on the one hand, and the Defendants on the other, since it would be unjust and/or unconscionable to allow the Claimants to go back on the above assumption".
27. Those are the issues that were due to be tried at the trial of this claim, in a window starting on 3 March 2014. In fact, the trial of those issues did not begin until after 2 days had been taken up with legal argument on the applications discussed below.

Procedural history

28. In accordance with directions made on 6 February 2013, the parties were ordered to give standard disclosure by list by 4pm on 22 April 2013, and witness statements and notices of intention to rely on hearsay evidence were to be exchanged by 4pm on 28 June 2013.
29. By order dated 24 January 2014, made on their application, the Defendants were granted permission to serve an Amended Defence, and the parties were ordered (a) to

give standard disclosure arising from that amended pleading and any Reply served in response to it by list by 4pm on 7 February 2014 and (b) to serve witness statements by 4pm on 21 February 2014.

30. The latter directions were made in the context that this case was due to be tried in a window beginning on 3 March 2014, with an estimated length of hearing of 4 days.
31. On 31 January 2014, the Defendants instructed new Counsel, Mr Lopian, and he first met them on 10 February 2014. By then, the date for giving additional standard disclosure had already passed.
32. Thereafter (quoting from the Defendants' application before me concerning a further list of documents) "4. Counsel set about preparing the final versions of their witness statements, which task was only completed, after exhaustive and detailed discussions, on 21st February 2014. 5. During the course of that final preparation the Defendants clarified the documents needed to support their witness statements, and in particular the statement of the First Defendant, Michael Conrad Englehard. In consequence, they carried out further investigations and searches with a view to locating any such documentation that might still exist".
33. On 15 February 2014 (a Saturday), Michael Engelhard carried out a further search at his new home and found documents that the Defendants had not previously disclosed.
34. In the following week, between 17 February (a Monday) and 21 February (a Friday) no attempt was made to inform the Claimants' solicitors that the Defendants had, or even might have, additional documents to disclose, still less to provide a further list (albeit out of time) or to provide copies of new documents to the Claimants' solicitors.
35. Instead, the Defendants and their legal advisers set about creating a witness statement for trial of Michael Engelhard that (a) exhibited over 700 pages of documents, including all or almost all of the documents that had been found on 15 February 2014 and that had not been disclosed to the Claimants, and (b) placed reliance on both the contents of the new documents and on information provided to Michael Engelhard by an accountant, Mr Needham. Both Michael Engelhard's witness statement and Mr Needham's own evidence included reference to a new issue that had not been pleaded. This was, in short, whether a transaction dated 1 April 2005 in the sum of £145,428 that was posted to the SAGE inter-company account on 12 April 2007 ought to be taken into account to reduce the £412,739.12 claimed by the Claimants to £267,311.17. This new point had been raised by the Defendants in correspondence from 12 February 2014, and I was told that it was first identified by the Defendants on 11 or 12 February 2014.
36. On the afternoon of 21 February, having been informed by the Defendants' solicitors that the Defendants' witness statements were too bulky to exchange by email, the Claimants' solicitors were inspired to send an email at 15.18 stating "Our clients are concerned that your clients are trying to circumvent the Court's rules on disclosure by appending documents that have not previously been disclosed to their witness statements. Can you confirm whether or not this is the case?"

37. The Defendants' solicitors replied at 15.28 stating: "Even if that were the case, it would be a matter for argument in court, not this afternoon. However, I am satisfied that everything that is coming as exhibits to the witness statements will have been seen before. You will have to make up your own mind about that. That being said, we intend to disclose further documents. You will doubtless attempt to make much of the fact that such disclosure is late ... but so be it".
38. By email sent at 15.56, the Claimants' solicitors noted that "you appear to be very careful not to confirm that the documents appended to your clients' witness statements either are or are not documents which appear as part of your clients' disclosure", referred to CPR 31.21, stated that "Your clients need relief from sanction in order to legitimately disclose further documents. We will oppose any such application coming as it does so close to trial", and suggested the following way forward:
- "1. Your clients should prepare new witness statements removing any reference to any previously undisclosed documents and re-serve the statements in order that the trial can proceed on proper grounds. Your clients will of course need relief from sanction in order to do so but this is an application that in the interests of getting the trial on properly our clients would not oppose.
2. There is no other basis upon which your clients can properly comply with the exchange of statements. It appears that your clients appear to be hoping to convince the court on the first day of trial to overlook your clients' failure to proceed in accordance with either existing directions or the requirements of the CPR".
39. The Defendants' solicitors replied at 16.13 saying that the Claimants' email was "based upon a supposition which you have no basis for" and continuing: "I suggest you wait to see what is contained within the witness statements and their exhibits before you start down the path of saying what you will or will not agree to. As for accepting service or not, that is not your choice. You will be served with what our clients consider appropriate to serve you with, and you will then have to decide what if anything is right to do about it ... All of this is delaying our final preparation of our clients' exhibits, which were virtually finished. Any delay will be your responsibility, unless you cease this line of communication and allow us to conclude our work in that regard".
40. The Defendants' witness statements were delivered by hand to the Claimants' solicitors at 4.50pm on 21 February. That was 50 minutes later than the time ordered on 24 January 2014, and, under the CPR, as service was after 4.30pm, was deemed to occur on 24 February.
41. On 24 February, the Claimants' solicitors wrote saying, in summary, that (a) in light of CPR 32.10, the Defendants needed the permission of the court to call their witnesses of fact, (b) the Defendants' witness statements included a statement of Mr Needham, that he was an expert, and that they had not obtained or even sought permission to adduce expert evidence, (c) in light of CPR 31.21, the Defendants could not rely upon the documents appended to their witness statements that they had not previously disclosed without the permission of the court, (d) the Defendants had clearly been in breach of their obligations to conduct a reasonable search for documents, (e) the Claimants

expected any applications to correct the position to be made promptly; and (f) the Claimants were in a position to apply to strike out the Amended Defence.

42. The Defendants' solicitors replied on 25 February, saying, in summary, that (a) the late service of the Defendants' witness statements was not a deliberate flouting of the CPR; (b) Mr Needham is not an expert witness and his statement is one of fact; (c) they were willing to provide a further list of documents "though in reality this is simply confirming the position with regard to those parts of the witness statement exhibits which have not previously been disclosed"; and (d) they had not sought to "prepare the ground" for further documents being disclosed and "We have instead sought to prepare our clients' witness statements and during the course of doing so it has become apparent that a number of items needed to be incorporated within those witness statements. In so far as this has produced further disclosure, then our position with regard to the production of a further list had previously been explained".
43. Later on 25 February, the Defendants' solicitors sent an email attaching what they referred to as a supplementary list of documents, and stating that this was served late "primarily because we did not receive the court's order until after the deadline for the service of the list had expired". A letter to like effect was sent on 27 February.
44. The Claimants' solicitors also wrote a letter dated 25 February, saying (a) that they believed that the applications that the Defendants would now have to make would fail the Mitchell test, (b) that the Claimants were being considerably prejudiced by the Defendants' refusal to make timely applications to correct their procedural defaults; (c) that the Claimants should not have to spend time and money preparing for the possibility of dealing with late evidence, expert evidence for which the Defendants had not sought leave, late disclosure, and unpleaded issues; and (d) that should the Defendants succeed on their applications the Claimants would apply for an adjournment on the basis that they would not know until trial the case that they had to meet.
45. On 26 February, the Claimants' solicitors sent an email asking what the Defendants intended to do about making applications and stating "Given it will clearly be relevant to any application made in relation to disclosure, please detail the searches made by your clients for documents prior to April 2013, or confirm that your clients have instructed you not to respond; your answer will clearly be relevant to our own arguments".
46. The Defendants replied later on 26 February, stating "Whatever applications we see fit to make will be made at the time and in the manner we believe to be appropriate. It is not for you to demand any more information than we will be able to provide at the point that the application is made, and at that point you will doubtless deal with it as you see fit. We have no intention of responding to your request for details of the searches made by our clients ..."
47. On 28 February, the Claimants' solicitors wrote rehearsing the breaches of court orders and the CPR that they were complaining about and saying that they were not trivial but "serious, substantial and highly prejudicial to our clients' ability to properly prepare for trial".

48. By notice dated 28 February, but issued and served on 3 March, the Claimants made an application, with a time estimate of 1 hour, seeking (a) a declaration that the Defendants are in breach of the Orders dated 14 February 2013 and 24 January 2014, (b) an order striking out the Amended Defence pursuant to CPR 3.4(2)(c) for non-compliance with those Orders and for seeking to adduce expert evidence without the leave of the court pursuant to CPR 35.4(1), and (c) leave to abridge service of the application so that it could be heard on the first morning of the trial.
49. On 28 February, the Defendants issued the first of their applications which came before me at the start of the trial, with a time estimate of 10 minutes, seeking an order pursuant to CPR 3.1(2)(a) extending time for the service of their witness statements by 1 hour, further or alternatively relief from sanction under CPR 3.10 pursuant to CPR 3.9.
50. By notice dated 3 March, issued on 4 March, the Defendants made a second application, with a time estimate of 30 minutes, seeking an order extending the time for service by them of further disclosure by list to 27 February, further or alternatively relief from sanction related thereto.
51. On 3 March, Counsel exchanged Skeleton Arguments for the trial. The Defendants had filed their Skeleton Argument on 28 February, and were ready to exchange on that date.
52. On 4 March, the Claimants' Counsel served a Supplemental Skeleton Argument, submitting (a) that the Defendants' Skeleton Argument relied on arguments which were not available to the Defendants on their pleaded case and in respect of which they needed permission to re-amend the Amended Defence, and (b) that, if sought, such permission should be refused.
53. On the same day, Mr Lopian served a Supplemental Skeleton Argument, (a) in support of the Defendants' above two applications, and (b) stating that the Defendants did not believe that it was necessary for them to re-amend the Defence, but that now that the point had been taken by the Claimants "a draft Re-Amended Defence is attached to this skeleton ... and in the event that the Court considers re-amendment to be necessary, the Defendants will so apply".
54. On 6 March, the Defendants produced a draft application notice, with a time estimate of 30 minutes, seeking permission to re-amend the Amended Defence in the form of the draft appended thereto (which contained minor differences of wording from the earlier draft). The Defendants undertook that they would issue that application later.
55. The trial started at 2pm on 5 March. Mr Lopian's submissions on the Defendants' applications occupied the whole of the afternoon on 5 March and did not finish until 12.45pm on 6 March. Mr Davenport's submissions occupied the remainder of 6 March (they were speeded up because he asked me to pre-read or re-read a number of documents and various authorities overnight). Mr Lopian's submissions in reply took from 10.30am until about 12.20pm on 7 March. I gave *ex tempore* reasons for disposing of the applications as I did. Together with dealing with Mr Lopian's suggestion that he might appeal to the Court of Appeal immediately, that took until 1pm.

56. In the result, the first 2 days of what was listed as a 4 day trial were entirely taken up with the above applications, and the evidence did not begin until 2pm on 7 March. Among other things, this meant that the court had to sit late on 7 March to enable Mr Lopian's cross-examination of the First Claimant, Mr McTear, to be completed on that day. This was necessary because Mr McTear was travelling to Dubai the following day, and would not be returning for 10 days.

The CPR

57. CPR 3.1(2)(a) provides that the court's general powers of case management include a power to "extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)".

58. CPR 3.4(2) provides:

"(2) The court may strike out a statement of case if it appears to the court

- (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
- (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
- (c) that there has been a failure to comply with a rule, practice direction or court order".

59. CPR 3.8 and 3.9 provide:

"3.8

(1) Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction ...

(3) Where a rule, practice direction or court order –

(a) requires a party to do something within a specified time, and

(b) specifies the consequence of failure to comply,

the time for doing the act in question may not be extended by agreement between the parties.

3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence".

60. In accordance with CPR 31.6, standard disclosure requires a party to disclose (a) the documents on which he relies; and (b) the documents which (i) adversely affect his own case, (ii) adversely affect another party's case, or (iii) support another party's case.

Under CPR 31.7(1), when giving standard disclosure, a party is required to make a reasonable search for documents falling within CPR 31.6(b) or (c). The factors that are relevant in deciding the reasonableness of a search include those set out in CPR 31.7(2).

61. CPR 31.21 provides:
“A party may not rely on any document which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission”.
62. CPR 32.10 provides:
“If a witness statement or a witness summary for use at trial is not served in respect of an intended witness within the time specified by the court, then the witness may not be called to give oral evidence unless the court gives permission”.
63. CPR 35.4(1) provides:
“No party may call an expert or put in evidence an expert’s report without the court’s permission”.
64. There was discussion before me as to whether the Defendants’ applications are applications for relief from sanctions, or are properly to be characterised, either wholly or in part, in some other way. I consider that retrospective applications for extensions of time either are or are to be treated as applications for relief from sanctions: see the judgment of Andrew Smith J in Associated Electrical, in particular at [18], and the authorities there cited. Even if that is wrong, I do not consider that it makes any difference on the facts of this particular case. The conclusions I have reached are justified by the overriding objective, a proper exercise of discretion under each material provision of the CPR, striking the balance of prejudice and justice as between the parties, and not endorsing conduct such as has occurred in this case, whether it is properly regarded as showing disregard for rules and orders or the tactics of ambush.

The applicable principles

65. I gratefully adopt the following summary of the principles established by the Court of Appeal in Mitchell, taken from the judgment of Leggatt J at [39] in Summit Navigation:
 - (i) On an application for relief from a sanction under CPR 3.9, it is usually appropriate to start by considering the nature of the non-compliance. If the non-compliance can be regarded as trivial or insignificant, the court will usually grant relief provided that an application is made promptly [40].
 - (ii) If the non-compliance cannot be so regarded, the court should consider why it occurred and will still be likely to grant relief if there is a good reason for it [41].
 - (iii) Good reasons are likely to arise from circumstances outside the control of the party in default [43]; by contrast, inefficiency or incompetence of a party's solicitors – for example, where a deadline is simply overlooked – is unlikely to amount to a good reason [41].

- (iv) Where the non-compliance is not trivial and there is no good reason for it, the court is still required by CPR 3.9 to consider "all the circumstances of the case, so as to enable it to deal justly with the application" [37] + [49]. However, relief should not usually be granted in such cases because the circumstances which should generally be given greatest weight are the two factors specifically mentioned in the rules [49] + [58].
66. The following further points emerge from, or are emphasised in, Durrant:
- (i) Applications for relief from sanction which are so late that they have to be heard on the first day of the trial, such that it is likely that the trial will have to be adjourned if the applications are granted, will seldom be justified on a proper application of CPR 3.9 [42];
 - (ii) The effect on the parties, and the effect on the public interest of having the issues tried, have only a limited role to play in the context of relief from sanctions [44];
 - (iii) Even where non-compliance, taken by itself, might be characterised as trivial, as an instance where "the party has narrowly missed the deadline imposed by the order", it may become more significant when seen against the background of other matters [48];
 - (iv) One reason why it is right to have regard to whether an application is made promptly, especially where the trial is imminent, is that unless and until relief from sanction is obtained, the party not in default cannot be expected to prepare to deal with witness statements (and I would add documents) that have been served out of time [49];
 - (v) It may also be significant that the party not in default has protested strongly, such that it is immediately obvious that an application for relief against sanctions will have to be made, because this makes any delay all the more inexcusable [49].
67. So far as concerns permission to amend, I was referred to the following passages in the judgment of Lloyd LJ (with whom Elias and Patten LJ agreed) in Swain-Mason v Mills & Reeve [2011] 1 WLR 2735 (the emphasis below has been added by me):

"68. Mr Simpson showed us a decision of the Court of Appeal, powerfully constituted by Lord Bingham LCJ, Peter Gibson LJ and Waller LJ, in *Worldwide Corporation Ltd v GPT Ltd*, [1998] EWCA Civ 1894, decided on 2 December 1998. It seems to me unfortunate and surprising that this case features neither in any report nor in the notes to the White Book. Searches on electronic databases reveal that it was referred to and followed in at least six cases in the Court of Appeal between 1999 and 2004, as well as in a number of first instance decisions. Particularly worthy of note is the endorsement in paragraph 79 of the judgment of Rix LJ in *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630:

"As a postscript I would add that, although decided prior to the introduction of the CPR and concerned with an egregious application to change direction in the course of trial itself, the judgment of this court in *Worldwide Corporation Ltd v GPT*

Limited contains a full compendium of citation of authorities as at that date which emphasises that, even before the CPR, the older view that amendments should be allowed as of right if they could be compensated in costs without injustice had made way for a view which paid greater regard to all the circumstances which are now summed up in the overriding objective."

69. The appeal in *Worldwide Corporation v GPT Ltd* was by the Claimants against the refusal of Moore-Bick J in the Commercial Court to permit amendments to the claim in the first week or so of the trial, amendments prompted not by discovery of some unsuspected evidence or fact but by a re-appraisal by newly instructed Counsel of the merits of the case. It was said that he felt that the case previously pleaded would fail and that only by way of the amendment could the case be put on an arguable basis. Waller LJ gave the judgment of the court, setting out the reasons why the appeal had been dismissed. Mr Stanley Brodie Q.C. for the Claimants relied on observations as to the generous approach of the court to amendments required to enable the true issues between the parties to be resolved, so long as any injustice can be avoided, mainly by terms as to costs: Bowen LJ in *Cropper v Smith* (1884) 26 Ch. D. 700 at 710-711 is one of the classic statements of this attitude. Another is that of Brett MR in *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262 at 263. More recent statements include that of Millett LJ in *Gale v Superdrug Stores plc* [1996] 1 WLR 1089 at 1098 and following. The court in *Worldwide Corporation v GPT* said this about this attitude:

"We are doubtful whether even applying the principle stated by Bowen LJ, the matter is so straightforward as Mr Brodie would seek to persuade us. But, in addition, in previous eras it was more readily assumed that if the amending party paid his opponent the costs of an adjournment that was sufficient compensation to that opponent. In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) "mucked about" at the last moment. Furthermore the courts are now much more conscious that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales."

70. Later in the judgment the court said this under the heading "Approach to last minute amendments":

"Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.

We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why

justice both to him, his opponent and other litigants requires him to be able to pursue it."

71. The court also recognised, as I do, the reluctance with which an appellate court will interfere with discretionary case management decisions, perhaps especially those of a trial judge.
72. As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court".

The applications

68. It is convenient to deal with the Defendants' applications before that of the Claimants.

The Defendants' first application

69. The Defendants' first application relates to their witness statements. The evidence in support of it is contained in the application notice. What is sought is an extension of time or relief from sanctions under CPR 32.10 to cover the "short delay" from 4pm to 4.50pm on 21 February. The grounds are that the failure to comply with the order made on 24 January 2014 is trivial, alternatively that there is good reason for it, namely that "There was a very large amount of documentation to be collated and exhibited to one of the witness statements which could only be completed on 21 February 2014. The witness statements themselves were being worked on until 21 February and preparation of the exhibits could only be completed after they had been finalised. Additional delay to completing the task was caused by the fact that the supervising partner with conduct of this case on behalf of the Defendants was unable to deal with it on the previous day (20.2.14) due to his absence from the office owing to his father's funeral".
70. Mr Lopian's submissions on this application focused on the first of the above grounds. He submitted that all that I could take into account when deciding whether or not to give permission for the Defendants to call witnesses to give oral evidence in circumstances where the statements of those witnesses had been served 50 minutes late was that delay of 50 minutes. He referred me to the Chartwell, Lakatamia and Summit Navigation cases as instances where judges had given short shrift to attempts by opposing parties to invoke delays of comparable brevity, and where longer delays had been excused, among other things having regard to the balance of prejudice produced by granting relief on the one hand and refusing it on the other.

71. If all that had happened was that the Defendants had been 50 minutes late in serving witness statements to which no other objection could be taken I would have little hesitation in accepting Mr Lopian's submission that the failure to serve by 4pm on 21 February was trivial. Indeed, by their email sent at 15.56 on 21 February the Claimants made clear that, if appropriate witness statements were to be served late, they would not oppose an application for permission to call the witnesses to give oral evidence at trial. The Defendants chose to spurn that offer.
72. However, that is not all that has happened. Further, I reject the submission that the court is constrained to considering the period of delay alone and nothing else when deciding whether to grant permission pursuant to CPR 32.10. There is nothing in the wording of CPR 32.10, the notes to CPR 32.10, or any authority to which I was referred by Mr Lopian to suggest that such a constrained interpretation should be adopted, and the tenor of both Mitchell and Durrant are strongly against it. I also consider that such an approach would be contrary to both the letter and the spirit of the overriding objective, and fly in the face of reason and common sense, as the facts of the present case conveniently illustrate. I consider that, contrary to Mr Lopian's submissions, the merits of this application cannot be considered separately from, and indeed are inextricably bound up with, the Defendants' second application, to which I now turn.

The Defendants' second application

73. The Defendant's second application relates to a further list of documents. Again, the only evidence in support is contained in the application notice. I have quoted paragraph 4 and part of paragraph 5 of that evidence above. Paragraphs 7 to 10 read as follows:

"7. The Defendants had hitherto laboured under the apprehension that most of their relevant documents had been destroyed by them in April/May of 2012, after the period of six years had passed from the events which gave rise to the creation of the said documents, but before the Defendants had been made aware of the Claimants' intention to bring the claims the subject of these proceedings.

8. Further to the discussions in relation to preparation of the Defendants' witness statements they carried out a further search, in particular at the new home of the First Defendant, and uncovered the existence of the documents which are listed as items 1 to 3 and 8 in the supplementary list. These were only discovered by Michael Engelhard on Saturday 15th February 2014.

9. The said documents were exhibited to the witness statement of Michael Conrad Engelhard, which was served on 21st February 2014.

10. The task of preparing and completing the witness statements, following permission being granted to amend the defence (notified to the Defendants on 7th February), was an extensive and extremely time consuming task which was only completed two weeks after receipt of the said order. At the earliest possible time following completion of that step, the Defendants prepared and served a supplementary list of documents".

74. Another point made in that evidence is that the Claimants are in breach of their disclosure obligations. That point has been ventilated, and denied by the Claimants, in the correspondence referred to above. It is also answered by a witness statement of Mr Gibbs of the Claimants' solicitors dated 5 March 2014. In my judgment, if the Defendants have grounds for complaint against the Claimants, they should have raised them in an application to court. In some cases, paying regard to "all the circumstances" might enable a party in default to pray in aid the default of the other party. In this case, I consider the Defendants cannot argue that "two wrongs make a right".
75. The following points can be made about this evidence:
- (i) There is no direct evidence as to what occurred prior to the original date of 22 April 2013 by which lists of documents were ordered to be exchanged, and certainly no clear evidence as to what searches were then undertaken.
 - (ii) Such evidence as exists is not only provided by a solicitor (Mr Eagle, who is a partner in Defendants' solicitors) instead of one of the Defendants, but by a solicitor who was not acting for them from 12 July 2012 to 22 August 2013.
 - (iii) There is no suggestion that the searches that were carried out in February 2014 could not have been carried out before 22 April 2013, and no reason to doubt that if they had been carried out then the new documents should and would have been listed in compliance with the order dated 6 February 2013.
 - (iv) Indeed, it seems clear that Mr Lopian was the driving force behind the recent searches. It was the Defendants' prerogative to instruct new Counsel in advance of the trial. However, it is a commonplace feature of litigation that this leads to a different approach to the case. To instruct Mr Lopian on 31 January 2014, and to then not see him for the first time until 10 February was taking a risk that steps would have to be taken out of time and at the eleventh hour, as happened. I suspect that Mr Lopian has had to do his best in less than ideal circumstances.
 - (v) The evidence makes plain that the Defendants adopted the approach that the proper way of proceeding was to spend considerable time and effort preparing a witness statement which deployed the new documents (to the extent that, in the result, the witness statements were served late), to ensure that the Claimants could not object to receiving the new documents because they were entangled with the witness evidence in that way, not to tip the Claimants off in advance of service, and not to attend to disclosure until it suited them.
 - (vi) The evidence places reliance on the fact that the order of 24 January 2014 was not sealed until 5 February and returned to the Defendants' solicitors until 7 February. However, the order was made on the Defendants' application. There is no suggestion that they did not know the timetable that they themselves had sought and obtained, regardless of when the order was sealed and returned to them. I am surprised this point has been made, and I attach no weight to it.

76. Although this evidence makes no reference to the fact that Mr Eagle had to attend his father's funeral on 20 February, I consider it fair to take that into account because it is relied upon in the Defendants' first application, and, as I have held, the two applications ought to be considered together. The loss of a parent naturally engages sympathy, and attending the funeral of a father is likely to be very upsetting for anyone. Whether such events are regarded as a good reason for the occurrence of a default depends on whether they are equivalent to having a debilitating illness or being involved in an accident, or whether they are subject to the principle that a solicitor who is unable to meet a deadline is expected to delegate work to others in the interests of ensuring the efficient conduct of litigation (see Mitchell at [41]). In the present case, the evidence is exiguous, and the only mention of the impact of his father's funeral does not come from Mr Eagle, but from another solicitor, and in the Defendants' application concerning the witness statements. In any event, the matters in issue cannot be attributed to the events of a single day. I was told by Mr Lopian that the Defendants did not apply for an extension of time before 21 February because they considered they would meet the 4pm deadline on that date, and I infer that these events were taken into account in making that decision. I am unable to conclude that these events amount to a good reason.
77. The claim form was issued on 24 February 2012 and it and the Particulars of Claim were served on 18 June 2012, with limited prior notification to the Defendants. The material financial year ended on 31 March 2006, and the 6th anniversary of that date occurred before the Defendants learned of these claims. It is possible that better evidence exists as to precisely what documents of the Defendants were destroyed or lost or were thought by them to have been destroyed or lost at that time, the searches that were carried out before standard disclosure was given, when and by whom those searches were done, and why those searches did not unearth the new documents. However, that is speculation, and I can only proceed on the evidence before me.
78. The list attached to the application is dated 25 February, and comprises 27 documents or classes of documents. I was taken through these items by Mr Lopian, with a view to making good the submission that item 10 (the documents that were replicated as "Voluntary Particulars") should not have been listed at all, and that many other items had been disclosed by the Claimants, or were already in the trial bundles prepared by the Claimants, or had been deployed at earlier stages of these proceedings as exhibits to witness statements. This exercise alone took longer than the 30 minutes' estimate that was given for dealing with the entire application. It is regrettable that it was not reduced to writing in advance, as that would have saved valuable court time, and should have enabled a number of these points to be agreed before trial.
79. The upshot, according to what I was told, was that the only new items in the list were: (a) items 1, 2 and 3, comprising together 140 pages and located in the exhibit to Michael Engelhard's witness statement at bundle D2, pages 582-721, (b) BWL's management accounts for 2004 and 2005, comprising part of item 7, and located at pages 130-386 of bundle D2, (c) 30 pages of bank statements of EHL, located at D2, pages 551 to 581, that contain entries that are mirrored in many more pages of bank statements of BWL that have already been disclosed, and (d) individual emails at items 11, 12 and 19-23, and 26, one of which is not included in D2. It was also said that items 11, 12 and 19-23, and (I believe) 26 ought to have been disclosed by the Claimants as

well. However, I am unable to form a view on that, as I was not asked to read any of these additional documents, and so cannot say whether or not they fall within CPR 31.6.

80. As I believe is almost self-evident, the subject matter of this application is not trivial, and nor has any good reason been made out for the Defendants' default in providing disclosure and as to why an extension of time should be granted, as sought, to 27 February (or even to 25 February). Moreover, all the considerations that I have sought to extract from Durrant apply in this case.
81. As alternative fall-back positions, Mr Lopian suggested that even if I was to decide that the Defendants could not rely on the new documents, either (a) Michael Engelhard is entitled to give the evidence contained in his witness statement, including referring to the excluded documents, although the documents themselves would have to be taken out of the exhibit to his statement, or (b) if that is wrong, Michael Engelhard is entitled to give the evidence contained in his witness statement, subject to the paragraphs that refer to the excluded documents being ignored or removed. No version of his witness statement complying with the latter suggestion was available.
82. I am not prepared to countenance either of these suggestions. The first seems to me to lack any principled foundation. The second is not unreasonable at first sight. However, this was effectively the way forward proposed by the Claimants' solicitors in their email sent at 15.56 on 21 February, and summarily rejected by the Defendants' solicitors saying "You will be served with what our clients consider appropriate to serve you with, and you will then have to decide what if anything is right to do about it". Having tried to impose the documents on the Claimants as they did, having responded in this fashion, and having then made applications which occupied the first 2 days of what should have been the trial hearing, I consider it would be contrary to the overriding objective, let alone the new approach heralded by Mitchell, to permit the Defendants to subject the Claimants and the court to any such exercise during the trial.
83. Leaving aside these fall-back positions and the issue of whether Mr Needham is an expert witness, no submissions were addressed to me to the effect that different considerations apply to some of the Defendants' witness statements than apply to others. The subject of the Defendants' second application was otherwise treated on an "all or nothing" basis by both sides.

Mr Needham's evidence

84. Mr Needham is a chartered accountant, who has acted for Michael Engelhard, EHL and EFL since January 2007. Mr Needham had been asked by Mr Engelhard to "assist him in reviewing and explaining the financial and accounting information that had been disclosed to him in respect of [BWL] and the financial and accounting information in his possession in respect of [EHL] for the years up to and including the financial year ended 31 March 2006". Mr Needham had no involvement in the events which give rise to the present claim.
85. Mr Lopian accepted that Mr Needham is not a witness of fact. He also accepted that part of Mr Needham's evidence, relating to the new factual issue concerning the sum of

£145,428 which forms part of the subject of the Defendants' third application, is expert evidence.

86. From this rather unpromising start, Mr Lopian nevertheless contended that the remainder of Mr Needham's evidence was not that of an expert witness. I reject that submission. In addition to the points made above, Mr Needham explains that he prepared the two Schedules that are appended to the Amended Defence. Those Schedules bear all the hallmarks of expert evidence. Purely by way of example, the explanatory notes to the first of them include the following: "My actions have been to sort by account code [and] select the transactions relating to Account D176 "Inter-company holdings", delete a number of superfluous columns, and add a cumulative column or running total ... Analysis of these transactions show the first item to be"
87. I hold that the Defendants should not be permitted adduce Mr Needham's witness statement on the further ground that it contains expert evidence for which no permission has been sought. Mr Needham might have difficulty in discharging his overriding duty to the court in any event, given that he is not independent, but is instead the accountant for the persons identified above.
88. In reaching this conclusion, I have taken into account the contents of paragraphs 33-01 to 33-25 in Phipson on Evidence, to which I was helpfully referred by both sides.

The Defendants' third application

89. The Defendants' third application is for permission to re-amend the Amended Defence by adding to the pleas summarised above the following further paragraphs:

"36B. Alternatively if, which is denied, the sum of £412,739.17 was owed to BWL by EHL, it was automatically set-off against the accrued sum of £424,109.58 due [and] owed to EHL by BWL as at 10 March 2006 in respect of management charges, by the terms of the CVA entered into by BWL on 18 October 2006.

36C. In the further alternative, if which is denied the sum of £412,739.17 was and is owed to BWL by EHL, EHL was and is entitled to an equitable set-off in respect of its accrued management charges in the sum of £424,109.58 due and owed to it by BWL as at 10 March 2006.

36D. Further, and without prejudice to the foregoing, the true amount of the balance on the SAGE inter-company account as at 10 March 2006 was £267,311.17 and not £412,739.17 as alleged in the Particulars of Claim".

90. The evidence in support of this application is contained in the application notice, and reads as follows: "The proposed re-amendments are intended to cover the alternative formulation of the Defendants' case with regard to the inter-company nominal account as set out in the Defendants' skeleton argument dated 28th February 2014".
91. That statement is doubtless true. However, it is little more than a reflection of the fact that the Defendants included arguments in their Skeleton Argument for trial to which

the Claimants took objection on the grounds that those arguments were not open to the Defendants on the pleas contained in the Amended Defence, with the result that the Defendants appear to have accepted that they required to issue an application seeking permission to re-amend.

92. One of the factors that Hamblen J identified in Brown v Innovatorone plc [2011] EWHC 3221 (Comm) at [14] as being likely to be relevant when striking the balance to which Lloyd LJ referred in Swain-Mason at [72] and [104] is “the history as regards the amendment and the explanation as to why it is being made late”. In the present case, the history is as I have summarised, and no real explanation is given in the application notice. Accordingly, this factor militates against granting permission to the Defendants.
93. As indicated above, the issue raised by the proposed paragraph 36D is supported by, and indeed appears to be based on, the evidence contained in the witness statement of Mr Needham. It is a new issue, and, if my understanding is correct, Mr Lopian accepted that it could not be tried without affording the Claimants an opportunity to consider it and respond to it. He suggested that (a) it should be allowed into the proceedings by permitting the proposed re-amendment, and (b) it should then left over until the end of the trial to see whether it remains live in light of the outcome of other issues, and (c) if it does remain live, it should be tried at a future date.
94. This course would allow an issue in without considering whether there is evidence to support it, create the prospect that there will need to be two separate trials on liability (presumably before different judges, but with some or all of the same witnesses being called in both trials), and in the meantime create uncertainty for the Claimants as to the issues they need to succeed on to obtain the relief they seek. I consider that it would be wrong to sanction such a course, which seems inimical to the overriding objective, when the Claimants have come to trial to meet a different case, and when the lateness of the application is entirely of the Defendants’ making.
95. Initially, I was attracted to the view that the introduction of the proposed new paragraphs 36B and 36C raised points of law that involved consideration of no new facts, such that it could be permitted even at this late stage without causing any prejudice to the Claimants that could not be compensated in costs, and that it would have no significant impact on other court users.
96. However, in clarifying with Mr Lopian what these proposed new pleas added to the Defendants’ existing pleaded case, he made reference to the breadth of the concept of “mutual credits, mutual debts or other mutual dealings” in Rule 4.90 of the Insolvency Rules 1986, and, in particular, to the consideration that this concept extends to future and/or contingent dealings. I assume that Mr Lopian would say the same applies to equitable set-off, which he explained he would only need to rely upon if and to the extent that the hiatus which arose in the present case before the CVA became operational was material on the facts. The explanation for this is that the CVA engaged Rule 4.90, but the administration that started on 10 March 2006 did not.
97. Mr Davenport submitted that (a) a set-off is only available for mutual dealings, and what amounts to mutual dealings is not a straightforward topic, (b) the Defendants

would need to establish proper mutuality by evidence, (c) there are a number of authorities on the issue of mutuality, and the Claimants do not accept that it arises in the circumstances of the present case – for example, as appears from the judgment of Millett LJ in Manson v Smith (unreported, 13 February 1997) improper withdrawals of money from a company do not constitute dealings with the company, such that money which has been misappropriated cannot be set-off against any debts owing to the company, and (d) the new pleas would not affect the claims against the director Defendants in any event. It seems to me that this last point is double-edged, as it means that to that extent the Claimants would not be prejudiced by allowing in the new claims. However, Mr Lopian made clear that he did not accept that the proposed new pleas would not affect the claims against the director Defendants. Indeed, he said the contrary was the case.

98. I am persuaded by Mr Davenport’s submissions that my initial view was too simplistic. I accept that the proposed pleas would involve consideration and resolution of matters of law that are not entirely straightforward and of matters of fact that do not arise on the Amended Defence, and at the very least that justice requires that the Claimants should be afforded an opportunity to investigate and give consideration to those matters that they would not have in the event that the proposed new pleas were to be allowed in at this late stage and after the trial has begun and they are not granted an adjournment to deal with them. My views have been reinforced by glancing at the cases and other materials concerning set-off that were included in the Defendants’ bundle of authorities.
99. Mr Lopian submitted that to refuse the amendments would cause serious prejudice to the Defendants, in that they would be shut out from relying upon a defence that was good, and this might lead to the result that they would lose a case that they would otherwise win. Mr Davenport countered by pointing to the prejudice to the Claimants of permitting such a late amendment: either they would face an unfair trial now, or else there would have to be an adjournment of a trial that they had come to court prepared to fight on the existing pleadings.
100. Accordingly, essentially applying the reasoning that is set out in the passages in Swain-Mason underlined above, in the exercise of my discretion I refuse permission to re-amend. The Defendants have not discharged the onus that they have to discharge in order to obtain permission to re-amend now in the circumstances of this case.
101. I should mention that, having on one view adopted the stance that the Defendants did need permission to amend as sought by the application notice, Mr Lopian argued in his oral reply submissions that they did not need permission in light of the permissive nature of CPR PD 16, paragraph 13.3: “A party may ... refer in his statement of case to any point of law on which his claim or defence, as the case may be, is based”. I reject this submission. It does not follow from this wording that the new defences sought to be pleaded in this case do not need to be pleaded.

The Claimants’ application

102. As stated above, the Claimants seek (a) a declaration that the Defendants are in breach of the Orders dated 14 February 2013 and 24 January 2014, and (b) an order striking out the Amended Defence pursuant to CPR 3.4(2)(c) for non-compliance with those Orders and for seeking to adduce expert evidence without the leave of the court pursuant to CPR 35.4(1). The Claimants' application was supported by a witness statement of a partner in the Claimants' solicitors, Mr Looome, dated 28 February 2014, exhibiting the correspondence referred above. Mr Looome rehearses many of the points discussed above, as well as some additional points that I have not further lengthened this judgment by addressing, such as that the Defendants' lists were signed by a solicitor who was the best person best placed to verify that proper disclosure had been given. At paragraph 34 he states: "These persistent breaches and the refusal to take the appropriate steps to remedy them has inevitably and substantially prejudiced the Claimants' ability to prepare for trial, leading to the formal notification of the Claimants' intention to apply to adjourn the trial in the event that the Defendants' applications to introduce expert evidence, previously undisclosed documents, and late witness evidence are successful ... This was not a position that the Claimants ever wished to take, and would not wish to take now, but equally the actions of the Defendants have made preparing for trial almost impossible given the uncertainty as to the case the Claimants have to make at trial and the admissibility of the evidence to be given by the Defendants in response to it".
103. It follows from what I have said in dealing with the Defendants' applications, that the Defendants are in breach of the Orders dated 14 February 2013 and 24 January 2014, and that they have also sought to adduce expert evidence without the leave of the court.
104. However, I do not consider that it follows that the Amended Defence should be struck out. Although the Defendants' failure to carry out proper searches pre-dates 22 April 2013, their remaining defaults are much more recent, and it seems to me to be a disproportionate response to all their defaults to strike out a pleaded case that was placed on the record before any of the recent failures to comply with court orders and the CPR occurred. The Defendants may be hindered in their ability to make good their case by the orders that I have made on their applications, which, on my rulings, are the product of their conduct of this litigation. However, I am not persuaded that it is right to go further and deny them the opportunity to defend the claim altogether. I expressed these views in the course of the hearing, and Mr Davenport did not press this part of his application, perhaps in light of the other successes that he had achieved.
105. Mr Lopian submitted that I had no jurisdiction to strike out the Amended Defence, on the grounds that CPR 3.4(c), like CPR 3.4(a) and CPR 3.4(b), relates only to matters concerning a statement of case. I consider that this submission does not accord with the wording of CPR 3.4(c) or with numerous decided cases. Mr Lopian did not press the argument, although I am not sure that he formally abandoned it. I note that at [33] in Summit Navigation (one of Mr Lopian's authorities), Leggatt J said that the "normal approach in the Commercial Court" is illustrated by the recent case of SC GD Petrol SRL v Vitol Broking [2013] EWHC 3920 (Comm), in which Eder J (a) made an order for the provision of security for costs, (b) when security was not provided by the date originally set, extended the time for providing security until a later date, with a stay of

proceedings in the meantime, and (c) ordered at the same time that, unless the security was provided or a further extension of time was granted, the claim would be struck out.

Conclusion

106. These are my reasons for ruling on the applications as I did. I will hear Counsel on arguments as to costs and as to form of Order that should be made when I hand down judgment on the claim. I extend the Defendants' time for seeking permission to appeal until that date.