

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 09/03/2020

Before :

HHJ DAVID COOKE

In the Matter of MKG Convenience Ltd

Between :

Mustafa Hassanali Abdulali (1)	<u>Applicants</u>
Neil James Dingley (2)	
(as joint liquidators of MKG Convenience Ltd)	
MKG Convenience Ltd (3)	
- and -	
URL Local Express Ltd (1)	<u>Respondents</u>
KKS Investments Ltd (2)	
Kathiraavelu Komaleswaran (3)	

Ian Tucker (instructed by **Vicarage Court Solicitors Ltd**) for the **Applicants**
Marc Brown (instructed by **Wilkes**) for the **Respondents**

Hearing dates: 19 November 2019, 20 February 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
HHJ DAVID COOKE

HHJ David Cooke:

1. MKG Convenience Ltd ("MKG") is a company that used to run a number of small local convenience stores. It was wound up by order of the court on 7 May 2015 on the petition of creditors in respect of a costs award following litigation to enforce a covenant against sale of alcohol at one of the stores in Strathdene Rd, Selly Oak in Birmingham. The first and second applicants were subsequently appointed liquidators. On their appointment they were unable to find any assets belonging to MKG or even, initially, to identify all the stores from which it had traded. They have been told that no such assets remained, any trading operation and associated assets having been transferred away in February 2015 or before. The liquidators have recovered little or nothing by way of the company's records from its named directors or any other source.
2. The liquidators allege that the third respondent Mr Komaleswaran was a de facto or shadow director of MKG and has orchestrated the transfer away of the company's funds and other assets without justification, in connection with which substantial unjustified payments have been made to Mr Komaleswaran himself and to the first two respondents, which are companies owned and controlled by him. They allege that some at least of the trading operations were transferred to URL, which is a company owned and controlled by Mr Komaleswaran and that URL carried them on thereafter without payment for stock or goodwill. By their application dated 26 September 2018 they seek recovery of the payments challenged, which total over £660,000, and orders that the respondents are liable to account for (or pay compensation for the loss of) the value of stock goodwill fixtures and fittings at 8 shops.
3. The respondents were represented at the hearing in November 2019 by the fourth firm that has acted for them since the liquidators' enquiries began. Their position as to the allegations made has varied during that period, but is currently that:
 - i) Mr Komaleswaran was never a de facto or shadow director of MKG. He was registered at Companies House as a director for a short period in 2013, by mistake.
 - ii) URL has never traded at any of the stores. It was formed only to purchase stock and resell it to MKG, and any payments to it were properly made in respect of such sales of stock, or to reimburse costs of refurbishment at its stores or other liabilities of MKG that URL had paid on its behalf. URL is in fact a net creditor of MKG.
 - iii) The second respondent ("KKS") is the freehold owner of some of the shop premises. Payments to it were for rent at these premises or to reimburse sums KKS had paid on behalf of MKG to other landlords. KKS is also a net creditor of MKG.
 - iv) A third party unconnected with Mr Komaleswaran, Sandhu News Ltd ("Sandhu News"), took over the operation of MKG's shop at Egghill Lane, Northfield in February 2014. Sandhu News took over the running of all MKG's other shops in February 2015; consequently there were no stock or assets of MKG remaining at the date of liquidation.
4. The liquidators are sceptical of these explanations. They are doubtful of the genuineness of the transfers to Sandhu News and of that company's asserted

independence from Mr Komaleswaran. They suspect that MKG did in fact carry on trade at some or all of the shops after the dates claimed by the defendants, and that some or all of those businesses have been transferred to URL rather than Sandhu News. They doubt the genuineness of the justification for the payments made to the respondents, as well as their claims to be net creditors. Given the effective absence of any of MKG's own records, full disclosure of documents by the respondents is, they say, essential to gain a proper understanding of what has happened and whether the respondents' contentions are true.

5. However, the liquidators say, the respondents have over a long period failed to comply with their disclosure obligations, and have done so deliberately. The application now before me is dated 27 August 2019 (bundle p 247) by which the applicants seek declarations that the respondents have failed to comply with an unless order for disclosure made by consent on 10 June 2019 (p 245) and that accordingly the sanctions provided for by that order have taken effect, ie that the respondents' evidence is "struck out", that they are debarred from defending the proceedings and that the applicants are entitled to judgment in the terms of their original application.
6. The respondents filed their own application, dated 23 September 2019 (p 729). The application form states that it seeks relief from sanction for delay in filing a costs budget, making no mention of disclosure. It was accompanied however by a lengthy witness statement from Mr Komaleswaran setting out submissions as to why, if the court concluded there had been a breach of the disclosure obligations in the unless order, relief from sanction should be given. It has been treated as an application for that relief, and I have heard nothing about the respondents' cost budget.

Procedural history and disclosure given

7. I begin with the procedural history in relation to disclosure, and the steps taken by the respondents in or towards compliance in that respect.
8. The respondents were initially represented by a firm of solicitors referred to as BSG. After receipt of the letter before action however they changed to their second firm, CRS, who on 6 July 2018 (p 334) wrote providing some VAT summaries and stating that they were instructed that their clients held some 40 to 50 lever arch files of third-party supplier invoices, which they were willing to provide copies on payment of copying costs. About a month later, the respondents instructed their third solicitors, Aspect, who were acting at the time the substantive application was issued in October 2018. An order was made by consent adjourning the first hearing of the application and giving directions for filing of evidence by the respondents in response by 15 March 2019, without any specific provision for disclosure.
9. Mr Komaleswaran filed a witness statement in response to the application (p 71), some 10 days after that date setting out his explanation that URL had been formed to purchase stock for resale to MKG at its various shops, and attaching schedules from URL's VAT returns which he said set out what URL had purchased and subsequently resold to MKG.
10. The applicants considered that disclosure of further documents was necessary for them to respond to this evidence, and made an application for an order for extended disclosure pursuant to the recent disclosure pilot scheme. The respondents consented to an order, which was approved on 29 April 2019 (p 231) which provided:

- i) by para 2 that the respondents would by 13 May 2019 deliver to the applicants' solicitors "the purchase invoices of [URL] from 18 February 2011 to 7 May 2016". Those invoices were to be left with the applicants' solicitors for 14 days, presumably for inspection and copying as required.
 - ii) By para 3 that the respondents would provide Extended Disclosure in accordance with Model C of the pilot scheme, by reference to the classes of documents set out in an attached Disclosure Review Document (the DRD), by 21 May 2019. The DRD (p 233) set out a list of 10 issues for disclosure derived from Mr Komaleswaran's witness statement, and a list of the categories of documents of which disclosure was requested in respect of each of those issues.
11. 13 lever arch files of invoices and receipts were delivered pursuant to that order on 15 May 2019. The applicants did not accept this satisfied the order, pointing out (p 346) that CRS had previously indicated there were 40-50 files of such invoices, and that nothing had been provided under the Extended Disclosure provisions. By the due date for that disclosure (21 May) nothing further had been received. Aspect sent an email at 3:54 pm on that day saying that they had "yet to hear back from the clients in respect of the extended disclosure, we are seeking urgent instructions". Nothing further was heard from them, and the Applicants made their application for an unless order two weeks later on 3 June 2019.
12. No disclosure was made, but the respondents consented to the terms of the unless order sought, which was made on 10 June 2019. The material terms were as follows:

“Unless the Respondents do comply with paragraphs 2 and 3 of the Consent Order dated 26 April 2019... by 4 pm on 24 June 2019:

 - (a) their evidence be struck out;
 - (b) they be debarred from defending the proceedings; and
 - (c) judgment be entered in favour of the Applicants. ”
13. On the last date for compliance, 7 further lever arch files of documents were delivered in purported compliance with the disclosure order, accompanied by disclosure certificates in respect of each of the respondents, a list of the documents contained in the files and a schedule headed "Documents no longer in the Respondents Control" setting out reasons why other documents could not be provided. Among other matters, it was said that no accounting records of URL or KKS, other than the accounts that had been filed at Companies House, could be provided because the accountant for those companies (a Mr Nagarajah) had died in March 2018.
14. There followed a certain amount of correspondence in which the applicant's solicitors set out concerns about the documents disclosed. Amongst other things they sought confirmation that the respondents had no bank accounts other than those for which statements had been disclosed. That request was refused on the basis that it amounted to "interrogation". There was no justification for that; the requests for disclosure included "the respondents' bank statements" for relevant periods, necessarily requiring disclosure of what accounts were held by each of the respondents.

15. A detailed letter setting out the applicants' criticisms and concerns was sent dated 16 July 2019 (p 1312). Among the points made were:
- i) there were numerous pages missing from the bank statements disclosed.
 - ii) the death of the accountant was not a credible explanation for the absence of any accounting records. The accountant's files and records should still be available at his office, or would have been transferred to the accountant who had taken over, and in any event it was not credible that the companies themselves did not retain any copies of any such documents or of their own books and records.
 - iii) URL had not disclosed any purchase invoices for periods after 7 May 2015 (the date on which MKG went into liquidation) although the liquidators were aware, by reason of documents disclosed in other litigation by them against NISA (a supply organisation that had previously supplied goods to MKG at several stores) that at about that time NISA had transferred its account from the name of MKG to that of URL, and had issued a considerable number of invoices after that date addressed to URL. The liquidators had a schedule of these invoices, but URL ought to have the invoices themselves.
 - iv) Further, the bank statements disclosed showed that URL continued after that date to make payments to other suppliers to the stores, but no invoices or documents relating to those payments had been disclosed. The payees included Smith's News (a supplier of newspapers), and payment services called Global Payments and Paypoint, from whom it should be possible to obtain duplicates of invoices or statements of account.
 - v) No utility bills or records for payment of rates by URL for the 12 month period from 7 May 2015 were said to have been located, which was not credible in light of the fact that Mr Komaleswaran had been able to exhibit copies of certain invoices from just before the liquidation to a witness statement in other proceedings in 2017, and it had been accepted that URL had continued to occupy at least one of the relevant properties until December 2016.
 - vi) A significant part of the third party liabilities said to have been paid by KKS related to 3 invoices from a supplier called "Beni Cool Man" totalling over £170,000. According to Mr Komaleswaran, this amount was paid in cash. It was not considered credible that there were no receipts or accounting records in respect of such payments, or that the bank statements disclosed did not show any entries consistent with cash having been withdrawn in amounts sufficient to pay these invoices.

An explanation was sought for these and other discrepancies. The respondents were invited to agree that they were in breach of the unless order and that the sanctions set out in it had taken effect.

16. No explanation was received, beyond correspondence stating that the issues raised were being discussed with "leading counsel" (26 July) or "counsel" (5 August) and a response would be sent as soon as possible. The present application was filed on 27 August 2019. It was listed to be heard on 9 September 2019.

17. By that date however Aspect had applied to be removed from the record as acting for the respondents, and an order to that effect was made on 3 September 2019. The respondents then instructed their fourth solicitors, Wilkes, who appeared at the first hearing in order to seek an adjournment on the grounds of their recent instruction. They served (on Sunday 8 September) a second witness statement by Mr Komaleswaran maintaining that he had complied with the disclosure order or done his best to do so, but nevertheless attaching further documents including additional bank statements. HHJ Rawlings adjourned the application to the hearing before me and directed that any application for relief from sanctions should be made by 23 September 2019. That led to the application and third witness statement of Mr Komaleswaran that I have referred to.
18. The applicants served evidence in response, as permitted by the order of HHJ Rawlings, on 7 November 2019. There was no provision for further evidence from the respondents, but further witness statements, one of which was a lengthy fourth statement from Mr Komaleswaran with a substantial number of attached documents including some but not all of the missing pages from the bank statements, were served on 13 November 2019. At the opening of the hearing I refused permission to rely on these statements but directed that the documents exhibited were to be taken as additional disclosure.

Has the order been complied with?

19. The first question is whether the respondents have complied with paras 2 and 3 of the order of 29 April, by the extended date given by the Unless order (ie by 24 June 2019). It is for the Applicants to show that they have not, to the normal civil standard, so that the sanctions have taken effect.
20. Para 2 of that order required delivery of actual documents, ie URL's purchase invoices in the stated period, not just a list (which would have included documents no longer in the respondents' possession or control) with copies to follow if requested. It seems to me, therefore, that the obligation to comply presupposes that the documents to be delivered must be those that were at the time in the respondents' actual possession, or are at least obtainable by them, so that they can be so delivered. I do not doubt that it extends to copy documents, if the respondents have copies but not the originals.
21. Para 3 however provides for Extended Disclosure of categories of documents, which include, but are not limited to, URL's purchase invoices over the same period. Compliance with that para would therefore require service of an Extended Disclosure List of Documents, which in turn would have to list documents presently or formerly in the possession or control of the respondents. It extends to documents held in whatever form, so specifically including email and other electronic records.
22. Mr Tucker's first point is that the respondents have admitted breaches of the unless order, in that since the due date for compliance significant quantities of further documents have been disclosed with Mr Komaleswaran's second witness statement (dated 6 September 2019) his third witness statement (dated 23 September 2019) and the fourth witness statement served immediately before the hearing as referred to above. Of these documents, Mr Tucker focusses on the emergence of statements on various bank accounts. These he submits are of critical importance as they show whether URL has continued to pay costs and expenses associated with running the shops after the dates on which they were said to have been taken over by Sandhu News, and to the extent that such payments have been made (and it is clear they have

been) are essential to test the explanations put forward by Mr Komaleswaran, in particular that anything paid by URL has been by mistake and/or has been reimbursed by Sandhu News.

23. Mr Tucker points specifically to an account of URL at HSBC, number ending 452, which is said to be its main business client account. Only one page was disclosed initially, and although further pages were provided on 8 September 2019 and thereafter, these were in part redacted and at the date of the hearing before me it appeared from the page numbers on the statements that numerous pages must still be missing. The only explanation given was that Mr Komaleswaran had been "unable to locate and obtain" these sheets, but they had not been listed as documents no longer in URL's possession, and no steps appear to have been taken to obtain copies from the bank. Another page from the same account had in fact been previously provided by Mr Komaleswaran's first solicitors, but that page was not listed in the disclosure list served.
24. Many pages also appeared to be missing from those disclosed from accounts of KKS at HSBC (number ending 291), of Mr Komaleswaran himself at Halifax (number ending 871) and a further account of URL at HSBC (number ending 275). A further account of URL at Halifax, number ending 667, had not been disclosed at all by the time required by the unless order, and subsequently no statements had been provided on the basis Mr Komaleswaran considered that account to relate only to URL's transport business and so to be irrelevant.
25. Mr Brown submitted that although it appeared that there were gaps in the runs of statements, in most cases it was apparent from the closing balance on one sheet and the opening balance on the next that had been disclosed that there had been no transactions in between. This was not however so in all cases, was not an explanation that had been previously put forward by Mr Komaleswaran and in any event is not a good reason for not disclosing the intermediate sheets- the fact (if it is the case) that they show no transactions is as much relevant to the issues in the case as any transactions that had taken place would be. I accept of course that to the extent it appears there may not have been such transactions that is potentially supportive of the respondents' position, and so cannot support an inference that these sheets have been deliberately withheld as potentially damaging to the respondents' case.
26. No good reason has however been put forward for redactions to the statements, or for withholding entirely the statements on the account said to relate to a transport business. Given the terms of the disclosure order it was not for the respondents to make their own judgment whether the entries withheld were relevant; the whole purpose of the disclosure was to enable the applicants to have a full picture of the respondents' financial transactions and be able to test for themselves the explanations given to them.

Further disclosure after the November hearing

27. I was provided with correspondence between solicitors after the hearing, in which further additional disclosure was sought as a result of examining the additional documents produced just before the hearing, and some additional documents were provided by the respondents. Since I was invited by the applicants to take that in to account I invited further submissions and at the request of the parties listed a hearing on 20 February 2020. Shortly before that hearing Mr Komaleswaran applied for it to be adjourned on the basis he was now acting in person and would be travelling to Sri

Lanka for over a month to observe funeral rites for his father who had died on 11 January. I refused that application, by order of 19 February which also provided that the respondents might instead make written submissions. The hearing proceeded but there was no attendance on behalf of the respondents and no written submissions were received. In case it might be said that short notice of the refusal of an adjournment had not allowed sufficient time to prepare such submissions, I extended the time for them to 24 February but no such submissions were received.

28. Mr Tucker did attend, and provided a bundle of the correspondence between the parties since the November hearing and the additional documents disclosed. That material was extensive, and what follows is only a brief summary of the most important points Mr Tucker made arising from it.
29. At the time of the hearing in November 2019, the respondents had between them disclosed five bank accounts. A letter from Wilkes for the respondents of 27 November revealed one more, and provided some of the missing statement sheets from the 6 disclosed accounts. They also sent a letter dated 27 November signed by Mr Komaleswaran confirming he had no other personal accounts between 2011 and March 2016, and was not aware of the corporate respondents having any other accounts in that period.
30. Not satisfied with the caveats in this letter, the applicants solicitors pressed further, pointing out that transactions shown in the disclosed statement pages suggested other accounts that existed and were likely to be held by the respondents. A further letter from Wilkes of 29 November admitted that the respondents did have further accounts, and listed an additional 12. A schedule attached to that letter in fact showed those 12 and 5 more accounts, making 18 accounts that existed but had not been disclosed prior to the November hearing. Statements were provided, though not a complete run for all such accounts.
31. Mr Tucker took me to entries on six of the newly disclosed accounts, which showed:
 - i) Four of them were accounts in Mr Komaleswaran's personal name showing entries for receipts of weekly payments described as rent for properties that appear to be shops formerly operated by MKG, paid in periods at and after the date on liquidation of MKG. One such property was Strathdene Rd. Receipt of rent by Mr Komaleswaran would be on the face of it inconsistent with his evidence that the landlord of that property was an independent third party. Another was the Solihull shop. Continued receipt of rent there raises questions about his evidence that that shop had been closed and remained closed, not being traded by Sandhu News or any other party.
 - ii) Two of them were accounts of URL, showing many transactions consistent with it carrying on a mainly cash retail trading operation since 2011 both before and after the date of liquidation of MKG, the cash receipts of which increased from about £60,000 pm before liquidation to over £200,000 in July 2015. After May 2015 one account showed multiple large payments in and out of sums up to £50,000. Several such payments were to NISA. These transactions are on the face of it inconsistent with the respondents' case that URL existed only to buy stock for resale to MKG, and did not itself trade any of the shops. If that account is not correct, the basis for setting off sums URL paid to buy stock against monies transferred to URL from MKG is undermined.

32. Insofar as an explanation has been put forward for the failure to disclose these accounts earlier it is that the respondents' previous solicitors Aspect "dissuaded" them from disclosing these accounts or gave "instructions" not to do so. I do not regard this as in the least likely. For Aspect to have given any advice about these accounts they would have to have been told about them. If they had been so told, it would have been obvious to them (and to the "leading counsel" they said was advising on disclosure) that these accounts plainly fell within the extended disclosure order, and that the nature of the transactions they showed was in any event relevant to issues central to the case.
33. Further, such an explanation could not account for Mr Komaleswaran having said in the letter he signed on 27 November that he had no other personal accounts and was not aware of any other corporate accounts. As at 27 November when Wilkes forwarded that letter, it must be inferred they had not been told about the 17 accounts that were disclosed two days later.
34. I am satisfied that Mr Komaleswaran must have known that these accounts should have been disclosed. Not only did he not do so by the due date, he did not do so thereafter for a considerable time when he was maintaining that he was doing his best to make up for his breaches of the order. Further, even after the November hearing he positively denied the existence of further accounts, withholding knowledge of them from his own solicitors. It is a reasonable inference he would have continued to conceal them if the enquiries by the applicants' solicitors had not made that impossible. Far from doing his best to achieve late compliance, he was still seeking to avoid compliance with the unless order.
35. There may yet be an explanation of the transactions shown in these statements that is consistent with the respondents' case. But they clearly raise difficulties for that case, and it is a reasonable inference that the deliberate suppression of documents showing these accounts and the transactions through them would be motivated by a wish to avoid such difficulties.

Purchase invoices

36. Mr Tucker submits that the respondents remain in breach of the unless order because it is apparent that they have still failed to disclose all of URL's purchase invoices for relevant periods. Mr Komaleswaran's explanation for what has been disclosed and the shortcomings alleged, as set out in his third witness statement, is (see paras 61ff):
 - i) He had provided by 15 May 2019 all of URL's purchase invoices up to 15 February 2015. After that date all trading at the shops was by Sandhu News, so there were no invoices relating to trading by URL after that date.
 - ii) He had provided by 24 June 2019 7 further boxes of invoices containing "all of URL's invoices" in periods after 15 February 2015, but these did not relate to trading at the shops (the schedule of documents sent refers to invoices for the haulage business, which is all that Mr Komaleswaran says URL was carrying on after 15 February, see p 357). Insofar as the bank statements showed that URL had paid suppliers to the shops after 15 February, URL had been reimbursed by Sandhu News.
 - iii) Insofar as the liquidators had been informed by NISA that NISA had traded with URL after that date, that was wrong. NISA's accounts had always been

with URL (and not MKG as NISA had said in its evidence to the court). From 15 February 2015 sales from NISA were to Sandhu News, but because Sandhu News did not have an account with NISA invoices continued to be raised addressed to URL. Because Sandhu News did not have its own account with NISA, it made payment to NISA through the bank account of MKG.

- iv) NISA did not send physical invoices. Orders were sent electronically from EPOS tills in the shops (para 68), to which only Sandhu News had access after 15 February. At para 70 he asserts that "as referred to above" URL never received any electronic invoices because these were sent by NISA to the EPOS tills in the shops. In fact he does not say anything "above" about invoices being sent to EPOS terminals, but only that orders would be sent from those terminals to NISA.
 - v) Insofar as this account is inconsistent with the evidence given in the liquidators' proceedings against NISA, the respondents were not party to those proceedings, did not have the opportunity to give any evidence in them and are not bound by the findings.
37. If URL had in fact received any of these NISA invoices, I am in no doubt they would fall to be disclosed either as physical documents under para 2 if still held, or as electronic documents or documents formerly in URL's possession under para 3. This would be the case even if URL's case is correct that because of the transfer of the business liability to pay the invoices fell on Sandhu News. That is because the invoices are addressed to URL and they are documents relevant to the question whether URL is or is not the entity trading with NISA. URL is obliged to disclose them in order that the truth of its explanation for them can be tested.
38. I do not consider however that I can conclude from the mere fact that NISA continued to produce invoices addressed to URL after February 2015 that those invoices must have come in to the possession or control of URL such that they fall to be disclosed by URL (and therefore that URL must be in breach of the unless order by not disclosing them). I have no evidence from the liquidators as to how these invoices were delivered. The invoices themselves each state the "delivery address" to be one of the shops and the "invoice address" to be the same shop. They do not give any indication of having been sent, by post or other means, to any other address such as URL's registered office. Accordingly if URL's case is correct that after February Sandhu News was in occupation of all the shops it may be the case that Sandhu News rather than URL would have received any physical invoices sent there. The suggestion that invoices might have been sent by electronic means to EPOS tills is surprising, but I do not have any evidence that they were sent by other means, eg by email and if so to which address, which might demonstrate that they must have been received electronically by MKG or URL.
39. Mr Tucker devoted a considerable part of his submissions to an alternative line of argument, which I would summarise as being that URL's case that Sandhu News took over the operation of the shops can be seen at this stage, before the evidence has been considered at trial, to be wrong and/or incredible, and that in consequence it must be the case that URL carried on the trade at those shops and so must have, or must have had, in its possession or control documents such as supplier invoices relevant to that trading which it has not disclosed, including documents sent by whatever means to the shop addresses. It must therefore be in breach of the unless order.

40. This argument is based on *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 564. In that case defendants had been granted relief from sanction for failing to comply with an unless order, on the basis of statements made in an affidavit supporting the application for relief. Subsequently further material emerged which, the first instance judge found, showed that the content of that affidavit was untrue and the court had been misled. The Court of Appeal upheld his decision revoking the relief and re-imposing the sanction. It held that the court was entitled to decide whether it could safely reach the conclusion that it had been misled without waiting for a final hearing. In doing so it should consider whether in fairness it ought to direct trial of an issue or cross examination of witnesses, but was not bound to do so in every case.
41. On the same basis, Mr Tucker submits, the court faced with an application for relief from sanction may determine whether to accept the evidence put before it to justify that application, and may determine whether it is necessary to hear oral evidence before doing so, but it is not bound to hear such evidence in all cases and may if appropriate determine that an explanation it has been given is demonstrably false without hearing evidence.
42. I accept that as a matter of principle. It must be the case that the court can evaluate what is put before it to justify an application for relief, and in doing so may reject evidence as incredible or demonstrably false, and if appropriate do so without hearing oral evidence. But it seems to me to be taking this too far to say that, without an application for summary judgment, the court may determine that a party's entire case on the facts is incredible and untrue, and then work back from that to conclude that the party must have disclosable documents that would have existed if the case were untrue, and accordingly must be in breach of a disclosure order.
43. In any event, in the present case I am not persuaded that the matters the applicants point to in their criticisms of the respondents' defence are such that I can at this stage safely conclude that that defence would necessarily fail at trial. In those circumstances, and particularly since if there is a trial it may be before me, I do not propose to set out in any detail what submissions were made about that case, or to enter into any analysis of either party's position on the case as a whole. That must be left for the trial judge, if a trial proceeds.

Accounting records

44. The following documents have been disclosed that fall within the category of accounting records:
 - i) Statutory abbreviated accounts filed by URL at Companies House for periods from 2012 to 28 February 2016 (see p 1/11/367) and for KKS for periods from 2012 to 31 January 2018 (p 368). In respect of all other records the disclosure statement said "the Respondent has been unable to locate any further documents, as set [out above] the Respondents' accountant died in March 2018".
 - ii) Schedules to URL's VAT returns for periods from 2012 to 31 March 2015 (p 1/5/95-210) These were exhibited to Mr Komaleswaran's first witness statement (in March 2019) but not referred to in the disclosure statement filed some months later. No doubt they should have been, but I cannot regard that as a breach of the disclosure obligation.

45. Mr Tucker submits that this explanation is incredible. He points to the following:
- i) According to the evidence given by NISA in the proceedings against it, a set of complete (ie unabbreviated) accounts of URL for the period to 28 February 2014 and stated to have been approved by Mr Komaleswaran on 1 May 2015 was given to NISA in connection with the transfer of MKG's account at NISA to URL (p 1/11/310). This showed that the accountants must have prepared full accounts for the directors, as well as the abbreviated accounts filed at Companies House.
 - ii) URL must have had VAT records for the period after March 2015, but has only disclosed those up to that date. Such records would be likely to show whether it had carried on trade at any of the shops after that date.
 - iii) It was apparent from records at Companies House that KKS had refinanced borrowings on its properties by obtaining funding from Natwest Bank in February 2015. It was not credible that it could have done so without presenting to Natwest accounts or other financial information such as management accounts and financial projections.
46. Insofar as Mr Komaleswaran has expanded on his explanation relating to the death of his accountant, the information he has provided is in my view extremely weak. In his second witness statement (after the expiry of the unless order) he said (p 2/13/583):
- “I have supplied those records I have. It is important to bear in mind that some of those records would have been held by my accountant. He has unfortunately passed away. I have made efforts to retrieve the records such as visiting the offices et cetera; however the offices have been taken over and it has been impossible to retrieve those records in those circumstances. For the avoidance of doubt I have already supplied VAT returns, the invoices. I have not however been able to supply any accounts beyond the ones contained in Companies House as they were held by the accountant. The company did not do management accounts. I also do not have the employee records as these would have been maintained by the accountant. There were no employee contracts.”
47. In his third witness statement, Mr Komaleswaran said (p 2/16/751) that his accountant had allowed him to use a desk at the accountant's office for office work, and accordingly would hand to Mr Komaleswaran any accounts that needed to be signed, rather than sending them by email. All the VAT records had been held at the accountant's premises. After his death, Mr Komaleswaran had visited those premises to collect "his stuff" but was unable to find any of his records. Some of the accountant's files were stacked in a corridor, but he could find none related to URL. He was told that all other records had been disposed of in a skip. Apart from the 2014 accounts sent to NISA "as far as I am aware no further accounts were supplied to other suppliers and therefore I am unable to supply other accounts." He attached one further VAT return for URL covering the date of liquidation of MKG, as to which he said "I have obtained this from the company's accountants". Whether or not NatWest held any financial information provided in connection with the refinancing, he did not hold it himself and had not considered that the disclosure order obliged him to make any enquiries of NatWest.

48. I do not consider that this is a credible explanation for the absence of any other accounting records. It appears from Mr Komaleswaran's evidence that his former accountant's offices have been taken over by another firm of accountants. I do not find it in the least plausible that professional accountants taking over another firm's premises would destroy or dispose of accounting records belonging to the previous firm's clients without at least contacting those clients to see if they wished to have them returned.
49. Nor in my view is it remotely credible that, whatever Mr Komaleswaran's arrangements with his accountant, they can have been such that none of the documents that the company would have had to prepare and maintain for the purposes of its accounting records were ever held anywhere other than at the accountant's offices, or that none of the documents that the accountant would have had to prepare in the course of his work, such as draft accounts, would ever have been sent to him by any means or taken by him outside the accountant's offices.
50. Since the death of his former accountant, Mr Komaleswaran has evidently instructed new accountants to act on behalf of both of his companies. If it were the case that those accountants had been completely unable to obtain any accounting documents relating to any period prior to the death of the previous accountant, that would be a major difficulty in performing their functions, and one would expect to be able to see documents evidencing the steps they had taken to get round the problem, such as correspondence with the executors of the former accountant or the firm that had taken over the offices and correspondence with Mr Komaleswaran, HMRC and perhaps other persons about steps being taken to recreate records or deal with their absence. Mr Komaleswaran would inevitably have some at least of these documents, which he ought to be able to produce to support his account. He would be in a position to obtain evidence from his new accountants to back up his explanation. He has done neither, in circumstances where the applicants have made it obvious that they do not believe his account and therefore it would be to his advantage to produce such corroborating evidence if it existed. It is in my view appropriate to infer from the absence of such evidence that he has not produced it because it does not exist.
51. Further, it must be the case that URL has or did have VAT returns from periods after May 2015. Mr Komaleswaran has not produced any such returns or given an explanation why he cannot do so. He maintains that the latest return for the period including May 2015 does not show any entries relating to trade by URL continuing at that date, but that is not a reason for failing to disclose the later returns that fall within the period ordered. The applicants are entitled to see them in order to satisfy themselves whether or not they are consistent with Mr Komaleswaran's version of events. If it is Mr Komaleswaran's position that he does not have access to any such returns because they were destroyed with other records kept by the former accountant, he has not given any explanation, let alone credible explanation, why it is the case that despite his general position that no accounting records were held at any location other than the offices of the accountant, he has been able to disclose apparently a full set of VAT schedules for all periods up to May 2015, but none at all thereafter.

Utility invoices

52. The applicants contend that URL must have received utility invoices in respect of all the properties for periods after the liquidation of MKG, but it has failed to disclose any such invoices, either by production as documents in its possession or by listing them as formerly in its possession and explaining why they are no longer held. In

response Mr Komaleswaran says (see his third witness statement at p 2/16/753) that any such invoices would have been sent to the properties themselves and retained and paid by Sandhu News which was occupying them since at least February 2015.

53. That cannot be the case however in respect of the property at Strathdene Rd. The liquidators have obtained a copy of a witness statement filed by Mr Komaleswaran in proceedings in London in which he sought to rescind a winding up order against URL made on the petition of HMRC. In that he referred (p 1/11/501) to claims against URL by Birmingham City Council for business rates in respect of the properties at Egg Hill Lane and Strathdene Rd. He denied that URL had ever been in occupation of Egg Hill Lane, but accepted liability in respect of Strathdene Rd up to December 2016, when he said that a new tenant "SSK2 Convenience Ltd" had taken occupation. Although the invoice sent referred to the period from 27 November 2015, he claimed credit for an overpayment in respect of the periods from 25 June 2012 to 26 November 2015, necessarily implying that URL had been in occupation up to 26 November 2015 and thereafter for a further 13 months until December 2016.
54. In his third witness statement Mr Komaleswaran said that the only utility bills he had were those that had been provided by the Official Receiver in those proceedings, but that is not an adequate explanation because:
- i) He did not disclose even the invoices provided by the OR in his disclosure statement.
 - ii) If URL was in occupation of Strathdene Rd up until December 2016 it must have received those and other utility statements during that period, which should either have been produced or listed as documents no longer held.

Occupation of Strathdene Rd by URL during that period is of course inconsistent with the account Mr Komaleswaran has given in these proceedings. He did not give any explanation of that inconsistency in his third witness statement. His attempt to deal with non-disclosure by saying that he "does not have" any of these documents misses the point that even if that is so he should have disclosed them as documents formerly held.

Beni Cool Man invoices and payments

55. The disclosure order required disclosure of documents evidencing the alleged cash payments to this supplier, the source of the cash used and any receipts and relevant accounting and VAT records. Mr Tucker submits that no specific documents have been disclosed or referred to in this connection, but that if the respondents' account were true it would be inevitable that some relevant documents would have been created, which ought to have been disclosed. Mr Komaleswaran says in his witness statements that the cash used can be identified from the bank statements, though that is not accepted.
56. I do not think that even if I accepted the proposition that cash transactions such as this would have generated at least some documentation I could conclude from that that there must necessarily have been a breach of the disclosure order. If no such documents exist or ever have existed that may support an inference that the respondents' account is not true, but if so there would still have been no documents to disclose and no breach of the disclosure order.

Other documents that should exist if the Respondents' case is true

57. Mr Tucker set out various other categories of document that, he said, must exist or have existed if the Respondents' case is true. But it seems to me the position is the same in relation to these categories- their absence may be a hurdle to persuading the court that the respondents' case is true, but does not necessarily show a breach of the disclosure order.

Conclusions as to breach

58. I conclude therefore that breaches of the unless order have been established in the following respects:

- i) All the documents subsequently disclosed were necessarily not disclosed by the date they should have been. It has not been suggested that any of them fell outside the disclosure orders made.
- ii) Failure to produce or disclose and explain the absence of accounting records of URL and KKS by the due date or at all.
- iii) Failure to disclose the existence of all bank accounts of all three respondents by the due date.
- iv) Failure to produce or disclose and explain the absence of all pages of statements on all the bank accounts by the due date.
- v) Failure to disclose utility invoices in respect of the Stradhene Rd premises.

59. It was not submitted that the terms of the order required any further order or other step before the sanctions took effect, and accordingly those sanctions are in effect unless the respondents obtain relief from them.

Relief from sanction

60. Mr Brown accepted that the question of relief is to be approached in the three stages identified in *Denton v White* [2014] EWCA Civ 906, ie

- i) Identify and assess the seriousness and significance of the breach. Has it for instance imperilled hearing dates or disrupted the conduct of the litigation?
- ii) Consider why the breach occurred. If the breach is not serious or significant and/or there is a good reason for it, relief will usually be given.
- iii) If it is serious or significant and there is no good reason, evaluate all the circumstances including the proportionality of the sanction to the breach, bearing in mind the importance of conducting the litigation efficiently and complying with the rules and orders,

61. Mr Brown submitted that any breach was not serious or significant. It has not imperilled any hearing, as no trial or further hearing date has been set. There is an outstanding direction for witness statements, but time can be extended to take account of the disclosure now given without prejudice to either side. To the extent Mr Komaleswaran did not comply with the unless order, he has sought to do so and disclosed a considerable volume of documents; it is not as if he has sought to ignore

his obligations, but he failed to understand them fully. He has done his best to comply, albeit belatedly. Matters have been confused by the applicants making different requests for documents said to be missing at different times, and by their application which wrongly focusses on the merits of the case overall rather than the alleged breach and how it could be rectified.

62. That submission was of course made at the hearing in November and before the further accounts came to light. Shortly after they were revealed Wilkes came off the record for the respondents and Mr Brown was not instructed to attend the further submissions hearing in February 2020.
63. In relation to the third stage, Mr Brown submitted that the sanction is Draconian in relation to the breach, as it deprives the respondents of any opportunity to defend what are substantial claims. In relation to the claim against Mr Komaleswaran personally, that depends on whether he is shown to be a de facto or shadow director, but any breaches of the disclosure obligation do not go to that issue, so it would be unfair to deprive him of a defence to which any missing documents could not have been relevant.
64. In principle, compliance with a disclosure order is an important matter, the more so when it has been backed up by an unless order on account of prior failure to comply. Disclosure is one of the essential parts of the English judicial process, and any failure to undertake it properly potentially affects the court's ability to deal with the case before it fairly. That said, it is obviously the case that breaches of a disclosure order may vary from the trivial to the very serious- the content of the obligations to be complied with is set out in some detail in the relevant PD and one could envisage breaches ranging from those of pure form to the concealment of vitally important documents. Failure to produce documents, for instance, may be very serious if they are not produced at all, or relatively trivial if the deadline for production is missed by a small margin.
65. It is not the case therefore that any failure to comply with a disclosure order is automatically serious or significant; it is necessary to consider the nature and degree of the failure and what its impacts might be on the conduct of the litigation.
66. In this case however, in my judgment the failures to comply were serious and significant. The issues in this case revolve around the truth or otherwise of the explanation the respondents have given for the effective disappearance of the business and assets of a company that was apparently thriving until shortly before its liquidation. The liquidators come to the case with no prior knowledge of the facts and so are dependent on what they can ascertain from third parties. The explanation they have been given for the disappearance of the business is surprising, and there is a significant amount of material they have discovered that suggests that explanation is open to doubt. There is an obvious incentive for anyone who may be liable to claims by the company to suppress disclosure of documents that may be adverse to him. The liquidators rely greatly on proper performance of those with obligations to them or the company in order to undertake their own functions. In the context of litigation, it is if anything more important than usual to be satisfied that disclosure obligations are properly performed, because the liquidators may have less opportunity than other litigants to perform their own cross checks to pick up non-compliance.
67. The extended disclosure sought was intended to produce documents that would allow the explanations given to be tested, by showing whether URL in particular had acted

in relation to third parties as if it were the owner of the businesses and/or continued to incur and pay for liabilities associated with trading any of the shops, or whether as it said MKG had transferred operation of those shops to Sandhu News. All the information they might contain was potentially relevant to resolving that issue one way or the other. A full picture was vital, since anything less would increase the possibility that information was being selected to advantage the respondents.

68. Against that background, the breaches I have found are in my judgment serious. I have not upheld those complaints that might be unfounded if the respondents' case on the facts were true, or those that might not show a breach if that case is false, but only those that must be well founded whether that case is true or not. Failure to disclose all the bank accounts and all the statements relating to those accounts is particularly serious and something for which there is no good reason.
69. Mr Komaleswaran, who effectively represents the position of all the respondents for these purposes, failed to reveal the existence of numerous plainly relevant bank accounts, and, as I find, deliberately maintained the concealment of those accounts up to and after the hearing in November, showing a continuing intention to avoid disclosing potentially damaging material as long as he could possibly do so.
70. Similarly the almost complete failure to disclose any accounting records of either respondent company is very serious. I have rejected the explanation given as incredible. Such records may shed light on what has gone on, and the failure to produce them deprives the liquidators of an important source of information.
71. The conduct of the litigation has been adversely affected both by failure to disclose what has still not been disclosed and also by delays in disclosing and producing that which has been provided after the due date. The liquidators have been required to devote time and cost to identifying the gaps in disclosure and pressing the respondents to make them good. They have no doubt been hampered in their ability to pursue enquiries with third parties and in preparing their own case.
72. I reject Mr Komaleswaran's attempt to excuse his failures on the basis of lack of understanding of his obligations. He was advised at the time of the original disclosure order and when the unless order was made, both of which were by consent, albeit by a different firm than that now acting. He could have been in no doubt from the liquidators' correspondence what documents they were seeking, but instead of providing them he seems to have devoted his efforts to evading doing so.
73. I conclude then that the breaches were serious and significant, and there is no good reason for them.
74. As for the overall assessment of the circumstances and justice of the case, I accept that the sanction is severe. It is relevant, though not determinative, that it was imposed by consent, as was the disclosure order that the respondents failed to comply with. I do not accept the submission that the disclosure could not bear on the issue whether Mr Komaleswaran was a de facto or shadow director of MKG- it might well do so if for instance the contemporary documents showed intermingling of funds between Mr Komaleswaran and MKG, or that he took part in transactions between MKG and the other companies.
75. I can only assume that Mr Komaleswaran is likely to have taken the course he has with a view to defeating or frustrating the claims against him and his companies.

Those claims are made in circumstances which, on the material available to the liquidators, call for an explanation and in the absence of such an explanation plainly suggest that there may have been significant impropriety in dealing with MKG's affairs, with good reason to believe Mr Komaleswaran may have been principally responsible.

76. This is not a case in which the respondents have a defence that appears inherently strong on the material presently before the court. It faces obvious difficulties of credibility which have been exacerbated by the documents disclosed after the hearing (though I repeat I do not rule out the possible that it could be made good at trial). Depriving the respondents of the opportunity to maintain that defence to trial may represent some risk of an outcome they could have avoided, but the relative unlikelihood of the defence succeeding lessens the risk of injustice.
77. I bear in mind that even if the overall case as to the circumstances by which the business and assets disappeared did not succeed, there might be arguments as to individual aspects of the claim or as to quantum that might have been pursued at trial but, because of the way the sanctions take effect, could not now be pursued. But the only such argument that was raised before me was as to Mr Komaleswaran's position as a shadow director of MKG, on which his position seems to me to be particularly weak. I do not regard any loss of ability to pursue that as raising a substantial risk of injustice.
78. Insofar as relief is sought by the liquidators in relation to particular payments made, no case has been put that if the general case against the respondents is made out, particular payments are nevertheless not recoverable. No doubt it would have been open at trial for the respondents to present arguments as to the state of account between MKG and the respondents, and for instance to argue that sums were due to the respondents for other transactions that might be set off, but it seems to me that the disclosure sought would have been highly relevant to any such cross claims, and if the respondents have prejudiced their position by failing to provide that disclosure, that is not a cause of injustice.
79. Part of the relief sought by the liquidators is by way of account in any event, and the sanction does not prevent the respondents participating in the taking of any account required.
80. In those circumstances in my judgment, it is not unjust to maintain the sanction that the respondents agreed to, the effect of which is that Mr Komaleswaran and his companies will be found liable for the claims made as they are pleaded. Severe as it is, that sanction is not disproportionate.
81. Accordingly, I refuse relief from sanctions. The applicants are entitled to judgment in accordance with the terms of the unless order. I will hear submissions as to the form of order at the handing down of this judgment.