

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (CHD)**

**ON APPEAL FROM THE ORDER OF DEPUTY MASTER TEVERSON DATED 13
OCTOBER 2022**

**IN THE ESTATE OF VLADIMIR ALEKSEYEVICH SCHERBAKOV, DECEASED
BETWEEN:**

CLAIM NO. PT-2018-000247

- (1) Brigita Morina**
- (2) AB (by litigation friend, Brigita Morina)**
- (3) BC (by litigation friend, Brigita Morina)**

-and-

Appellants

- (1) Elena Nikolayevna Scherbakova**
- (2) Olga Vladimirovna Scherbakova**
- (3) Alexander Scherbakov**
- (4) CD (by litigation friend, Elena Buchen)**
- (5) Chan Shee Khaw**
- (6) William Jeremy Alexander Gordon and Catherine
Mairead McAleavey (acting as Joint Administrators
Pending Suit of the Estate of Vladimir Alekseyevich
Scherbakov, Deceased)**

Respondents

AND BETWEEN:

CLAIM NO. PT-2019-000932

Brigita Morina

-and-

Appellant

- (1) Catherine Mairead McAleavey and William Jeremy
Alexander Gordon (acting as Joint Administrators
Pending Suit of the Estate of Vladimir Alekseyevich)**
- (2) Elena Nikolayevna Scherbakova**
- (3) Olga Vladimirovna Scherbakova**
- (4) Alexander Scherbakov**

Respondents

Tim Akkouch KC and Sparsh Garg of counsel (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the claimants
Emma Hargreaves of counsel (instructed by Fieldfisher LLP) for Olga Vladimirovna Scherbakova and Alexander Scherbakov
Oliver Jones (instructed by Farrer & Co LLP) for the Joint Administrators Pending Suit of the Estate of Vladimir Alekseyevich Scherbakov, Deceased

Hearing date: 2 February 2023

JUDGMENT

(handed down remotely on 2 March 2023 by circulation to the parties, and uploaded to the National Archives ‘Find Case Law’ website)

Mark Anderson KC :

1. This is an appeal against paragraph 8 of the order of Deputy Master Teverson made on 13 October 2022. The Master gave permission to appeal. At the conclusion of the hearing on 2 February 2023 I dismissed the appeal. These are my reasons.
2. Paragraph 8 of the Master’s order, so far as material, read:

...the Interim Administrators should carry out a reasonable and proportionate search of the attendance notes of Farrer & Co LLP and the internal emails of themselves and their solicitors Farrer & Co LLP for documents arising from the investigations of the Interim Administrators into the assets of the estate which may be relevant to any of the Disclosure Issues in the Probate Claim or the KPHL Claim.

The two claims

3. The Master’s order mentions two claims, the Probate claim and the KPHL claim. Both relate to the non-Russian estate of Vladimir Alekseyevich Scherbakov (“**Vladimir**”), who died in Belgium on 10 June 2017. The Probate claim is about who inherits his estate, and the KPHL dispute is whether the shares in a BVI company fall into the estate.
4. Vladimir married Elena Nikolayevna Scherbakova (“**Elena**”) in 1989. They had two children, Olga and Alexander (“**the Adult Children**”). One of the issues is when they separated and the nature of their relationship thereafter. It is common ground that

there were divorce proceedings in 2015-2016.

5. Brigita Morina (“**Brigita**”) met Vladimir in 2009. They became a couple and had two children born in 2014 (AB) and 2016 (CD). Brigita already had a child (BC) by a previous relationship.
6. In the **Probate Claim**, Brigita for herself and as the litigation friend of AB and BC asks the court to grant probate of a copy of a will dated 28 October 2015. The original will was not located. It leaves Brigita and two of her children a number of specific legacies and 90% of Vladimir’s residuary estate. The will made no provisions for another child, having been made before that child’s birth. She is the fourth defendant and has a separate litigation friend. She played no part in the appeal.
7. The active defendants to the Probate Claim are the Adult Children, who oppose the 2015 will, relying on a presumption from the absence of the original that Vladimir revoked it. There is also an issue as to where Vladimir was domiciled at the date of his death and as to which law of succession applies to his estate.
8. In the **KPHL claim**, Brigita is the sole claimant. She seeks a declaration that she is the sole beneficial owner of the shares in Key Platinum Holdings Limited, a company registered in the BVI. The active defendants to this claim are the Adult Children.
9. Elena is a defendant to both claims but she has not recently played an active part in the litigation.
10. Brigita, AB and BC (“**the claimants**”) were represented at the hearing before me by Tim Akkough KC and Sparsh Garg on instructions from Quinn Emanuel Urquhart & Sullivan LLP. The Adult Children were represented by Emma Hargreaves, instructed by Fieldfisher LLP.
11. Catherine Mairead McAleavey and William Jeremy Gordon, solicitors and partners in Farrer & Co LLP, are the **Interim Administrators** pending suit of Vladimir’s estate and are defendants to both claims. They take a neutral stance on both claims, since the Adult Children are defending them. They were represented at the hearing by Oliver Jones.

Issues for Disclosure

12. The parties, including the Interim Administrators, have been ordered to give Model D Extended Disclosure in accordance with a DRD which has been approved by the court. The Interim Administrators are required to give disclosure only of “documents that came into their control other than from one of the other parties”. The issues for disclosure include the following:

2. What was the nature of Elena and Vladimir’s relationship between 2010 and his death, and when after 2010 did Vladimir and Elena separate?

13 How did Vladimir historically hold his business interests prior to the 2015 Divorce Agreement and the commencement of the Russian Investigation? Disclosure on this issue shall be limited to ...12 [named] companies...

14. What changes were made to the shareholdings of companies, and what documents were executed relating to the ownership of companies, within the corporate structure of Vladimir’s business interests between June 2014 and Vladimir’s death and why? In particular, were these motivated by the alleged 2015 Divorce Agreement and/or by the Russian Investigation, or by some other reason? Disclosure on this issue shall be limited to the 12 companies stated at Issue 13 above.

15. What information did Vladimir continue to receive, and instructions did he continue to give, in relation to companies he had apparently divested himself of, between June 2014 and Vladimir’s death? Disclosure on this issue shall be limited to the 12 companies stated at Issue 13 above.

13. Vladimir’s estate is large and multi-jurisdictional involving a number of companies. Reference to the “Russian investigation” in Disclosure Issue 14 is to an investigation by the Russian authorities. It is possible that Vladimir sheltered his shares in companies from that investigation by giving them to his close associates whilst intending to retain beneficial ownership. That is particularly relevant to the KPHL claim, but it will be noted that Disclosure Issues 13 to 15 are not confined to KPHL. They are framed to elicit evidence of how Vladimir held his interests in other companies as well. The reason for this was explained in an earlier judgement by the

Master, on 18 March 2022, in which he rejected the claimants' submission that the other companies were irrelevant. He said:

There is a striking similarity in the timing and type of documentation executed in respect of KPHL and in respect of a number of other companies. For example, on 14 May 2015, the same day as in respect of KPHL, Vladimir executed a power of attorney and a call option in respect of First Digital Pte Ltd, a Singapore company. On the same day, Maryia Kazlouskaya, Vladimir's personal assistant, executed a power of attorney and call option agreement in favour of Vladimir in respect of the shares in Central Alliance Group Limited, a BVI company. It cannot in my view in those circumstances be right for the court to look at the KPHL documentation in isolation from all activity relating to the shares in other companies at or around the same time.

14. He ordered that Model D disclosure be given in respect of 12 companies identified in the DRD.

The Internal Notes

15. The Interim Administrators have been carrying out investigative work in order to identify and get in assets of the estate. In the course of these investigations they have spoken with a number of persons involved in Vladimir's business affairs, including persons who have held assets with which Vladimir appears to have been connected. Farrer & Co described this work in their letter of 31 January 2022:

The Interim Administrators have carried out extensive enquiries into assets which they believe may have been owned by the Deceased in order to establish whether or not they form part of the Estate. As you may appreciate, this has not been a straightforward process given the complexity of the Deceased's Estate, including as a result of the variety of corporate structures, company and nominee arrangements which the Deceased used during his lifetime to hold his assets; the widespread nature of his assets and business interests across a number of jurisdictions; and what the Interim Administrators understand was the Deceased's modus operandi of obscuring his ownership of assets, particularly in the face of

criminal investigations by the Russian state. It has also been difficult to obtain valuable information about companies in the BVI and their ultimate beneficial owners, not least because in the BVI the client of record can be a third party with no formal legal relationship with the company. As the parties will be aware, company reporting requirements in the BVI are also very limited.

16. By their letter of 27 May 2022 (further explained in paragraph 5.1 of their letter of 20 June 2022) Farrer & Co informed the parties that they intended to search and review, for disclosure purposes, attendance notes and internal emails recording their conversations with those to whom they had spoken in the course of their investigations (the “**Internal Notes**”). They estimated it would cost between £68,500 and £91,500 to search 18,500 internal emails. The letter accepted that privilege may apply to many of these documents, and invited suggestions from the other parties as to how the search could be refined in order to reduce costs.

17. By a further letter on 15 June 2022 Farrer & Co explained why they thought the search necessary:

However, as noted in our letter of 27 May 2022, the purpose of reviewing the documents in this category is to identify notes of meetings or telephone calls with the parties and third parties which touched on any of the Issues for Disclosure. As we have previously explained, this firm’s practice is often not to produce formal attendance notes but to record a summary of the conversation typically in internal emails. Given that the Administrators’ investigations span issues which are relevant to the issues for disclosure such as whether or not certain companies were owned by the Deceased during the relevant time period (e.g. as with their enquiries of Ms Kazlouskaya and others concerning the ownership of CAG), we consider that it is likely that documents recording meetings and calls in the course of such investigations will be relevant to the issues for disclosure.

18. By letter dated 21 June 2022 Farrer & Co identified (in Schedule 1) the individuals with whom they recalled having spoken. The letter went on to set out two options by which the exercise could be refined. Option 1 reduced the task to

reviewing some 4,500 documents which would cost about £16,500 to £22,000. Option 2 returned just 138 documents, which would cost about £500 to £650 to review. The letter concluded by suggesting that, as a starting point, Farrer & Co review the documents returned by Option 2. The letter concluded,

We can then consider, depending on how many documents are relevant, whether to widen the search further. We would welcome the parties' views on this proposal.

19. By letter dated 27 June 2022 Farrer & Co reiterated that suggestion. The letter also mentioned a possible modification of both options, which would reduce the number of documents to 2,712 returned by Option 1 and 79 by Option 2. That letter made clear that Farrer & Co did not intend to review all 18,500 documents at a cost exceeding £65,000. It said

... based on our recollection of the calls that the Administrators/Farrer & Co have had with third parties in the course of investigating the Deceased's personal and business affairs (including such as whether or not certain companies were owned beneficially by the Deceased) we believe that such documents may be relevant to issues 2 and 13-15.

20. So although Farrer & Co's first estimate of the cost of the proposed exercise was relatively high (up to £91,500), in later letters the proposal was refined with the aim of reducing its cost. That remained the proposal at the time of the hearing before the Master.

21. Nevertheless the claimants objected. They did not consider it reasonable or proportionate for the Interim Administrators to spend estate funds on reviewing attendance notes of conversations with third parties which took place after the proceedings were commenced. They questioned whether the Internal Notes will have any evidential value proportionate to the cost of the exercise.

The application

22. The Interim Administrators sought guidance from the court pursuant to PD51U paragraph 11 (PD51U has since been replaced by PD57AD but was still in force at the time of the hearing before the Master). The Master directed pursuant to paragraph

11.2 that the application required a longer hearing than the usual 30 minutes, and the matter (together with other issues) was listed for a full day on 22 July 2022. Following a reserved judgment, the Master exercised his power under paragraph 11.4 to make the order quoted in paragraph 2. above, rather than merely giving guidance. He also gave permission to appeal.

The Master's judgment

23. I am able to set out in full the essential paragraphs of the Master's succinct judgment on the issue under appeal.

55. In my judgment the Interim Administrators should carry out a search of their internal documents in order to provide disclosure to the parties of potential witness material. The Interim Administrators are the party with the most knowledge of the material. They consider that they should disclose what they believe may be potential probative witness material.

56. The fact that the documents have come into existence as a result of the investigations of the Interim Administrators does not mean they are outside the scope of their disclosure obligation. The reference in paragraph 7.3 of PD 51U to contemporaneous documents is in the context of identifying the issues for disclosure.

57. It would not be right in my judgment for disclosure of potential witness material to be excluded from disclosure. The material may turn out to be highly relevant. I accept that proper attempts will have to be made by any party seeking to rely on the material as evidence at trial to compel the attendance of the maker of the statements at trial and to serve a witness statement or, if that is not possible, a witness summary. The proceedings are still at a relatively early stage. The value of the KPHL shares in dispute is considerable. I was referred on behalf of Brigita to Tesco Stores Limited & others v Office of Fair Trading [2012] CAT 6. In that case, the disclosure sought by the OFT was at a very late stage and went to the credit of known witnesses.

...

63 In my judgment, the Interim Administrators should carry out a search which they consider is (i) most likely to result in the disclosure by them of the probative witness

material and (ii) will be at reasonable and proportionate cost. It would not be right to conduct an over-restricted search if that is going to lead to the need for a wider search. The Interim Administrators and their solicitors are the best judges of how to proceed.

The grounds of appeal

24. I will also set out in full the grounds of appeal from that judgment.

Ground 1

4 The Master erred in law by permitting the IAs to search and review Farrer's Internal Notes for the purposes of disclosure in the Claims in circumstances where Farrer's Internal Notes are not "contemporaneous" documents disclosable within the scope of Practice Direction 57AD ("PD 57AD"). In particular:

4.1 At [56] the Master erred in his interpretation of PD57AD 7.6 [PD51U 7.3] in holding that the reference to "contemporaneous" documents therein was merely "in the context of identifying the issues for disclosure" such that non-contemporaneous documents are disclosable under PD 57AD. To the contrary, if the issues for disclosure are to be identified by reference to "contemporaneous" documents, it follows that only "contemporaneous" documents, i.e. documents contemporaneous with the issues in dispute at trial, are disclosable.

4.2 The limitation in the scope of disclosure stated in PD 57AD 7.6 to "contemporaneous" documents reflects a sound policy reason, namely that "contemporaneous" documents are a far more reliable source for the trial judge in resolving disputed issues, rather than bare recollections of events that occurred many years earlier

Ground 2

5. The Master erred in law and in fact by holding at [55] and [57] that the IAs consider that Farrer's Internal Notes "may be potential probative witness material" and therefore are disclosable as being potentially relevant to the issues in dispute in the Claims. That was wrong:

5.1 It was wrong for the Master to conclude that Farrer's Internal Notes "may turn out to be highly relevant" based on the Interim

Administrators considering “that they should disclose what they believe may be potential probative witness material.”

5.2 To the extent that the Internal Notes record a Farrer employee’s summary of statements by witnesses, the appropriate method by which such “witness material” should be adduced is by way of serving a witness statement, which must comply with CPR Part 32 and PD 57AC.

5.3 To the extent that the Internal Notes summarise statements by one or other of the parties’ lawyers, they are not “witness material” at all, and cannot be said to have any probative value. It does not assist the trial judge in determining the substantive issues to have regard to what a lawyer has said to a Farrer employee about their client’s case.

5.4 To the extent that the Internal Notes summarise statements by persons who do not ultimately give witness statements or evidence at trial, they are not “probative witness material”. If such statements merely confirm the evidence of live witnesses, the Internal Notes will add nothing of probative value. If such statements purport to contradict the evidence of live witnesses, their admission would necessarily not be probative given that they are not there to stand behind the statements they are said to have made and be cross-examined on their evidence.

Ground 3

6. The Master erred in law and in fact by failing to find that the disclosure of Farrer’s Internal Notes would not lead to a just and proportionate resolution of the real issues in dispute. In particular, if the accuracy of the Internal Note is not accepted, there will be expensive and lengthy satellite disputes which would not assist in the determination of the substantive issues in the Claims.

Decision

25. I am grateful to all counsel for their written and oral submissions. I will deal with the most important points in explaining my decision.

Ground 1

26. Documents made contemporaneously with events usually provide more reliable evidence of those events than human memory. Contemporaneous documents will therefore generally be preferred as a source of evidence, to documents created after the event from memory. Mr Akkouch cited the well known observations of Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2020] 1 CLC 428 at [22]

... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

27. Leggatt J was speaking of the fallibility of human memory. He did not say that non-contemporaneous documents are never of evidential value, nor that documents made after litigation has started must always be irrelevant. He was not dealing with types of evidence where the fallibility of memory is not an issue. The most obvious example is an admission against the interest of the person making it. If a person admits that he forged a signature, no one is going to suggest that the admission is evidentially worthless because it was not contemporaneous with the forgery. Similarly, a person's behaviour after an event may be important in discerning their state of mind at the time of the event. Ms Hargreaves cited the example of a sham trust deed, where the parties' dealings after the date of the deed may be of significant evidential value (e.g. JSC Mezhprom Bank v Pugachev [2017] EWHC 2426 (Ch) at [151]). In these cases, the fallibility of memory is not a problem.

28. PD51U 7.3 [PD57AD 7.6] says that

“Issues for Disclosure” means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings.

29. As explained by the Chancellor in McParland & Partners Ltd v Whitehead [2020] Bus LR 699 at [46], “issues for disclosure are issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim”.

30. Mr Akkouh submitted that “contemporaneous documents” means only documents contemporaneous with the cause of action, and excludes documents created later. As the examples provided in paragraph 27. above demonstrate, that would in some cases result in excluding from disclosure documents which are important for the fair resolution of the claim. That cannot be right. Within the limits of proportionality, PD51U/PD57AD must be intended to achieve disclosure of *all* documentation which is likely to be relevant and important for the fair resolution of the claim, whether or not made contemporaneously with the cause of action.

31. Mr Akkouh submitted that disclosure of later documents could be achieved by applying for an order for disclosure of specific documents or classes of documents under paragraph 18.1 of the Practice Direction. That does not solve the problem created by his construction of paragraph 7.3/7.6, since the other parties may not know of the existence of the documents in question. Anyway there is no good reason why the Practice Direction would require a second application to achieve disclosure of a class of documents which may be important for the fair resolution of the claim.

32. However, even if I am wrong about the meaning of “contemporaneous documents” in paragraph 7.3/7.6, that was not the issue which the Master had to decide. By the time of the hearing before him, the Issues for Disclosure had already been approved, and the Master was therefore not concerned with paragraph 7.3/7.6 at all. The Master’s task was to give disclosure guidance, or (as it turned out) to make an order in response to a request for guidance. That is the point which I understand the Master to be making, correctly in my view, in paragraph 56 of his reserved judgment. Whatever

paragraph 7.3/7.6 means in the context of settling the Issues for Disclosure, it does not mean that the parties need not search for documents created after the date of the disputed events. On the contrary, they should search for all important documents, subject to any time limits laid down by the court under paragraph 9.6(1)(a) of the Practice Direction.

33. Mr Akkouh's submission would place far too much weight on the single word "contemporaneous", and would ignore the rest of the Practice Direction. For example none of the following provisions mentions the word "contemporaneous":

2.1: Disclosure ... involves identifying and making available documents that are relevant to the issues in the proceedings.

2.2: For the purpose of disclosure, the term "document" includes any record of any description containing information.

2.4 The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure (as defined in paragraph 7.3 [7.6]).

2.5 A "document" may take any form including but not limited to paper or electronic; it may be held by computer or on portable devices such as memory sticks or mobile phones or within databases; it includes e-mail and other electronic communications such as text messages, webmail, social media and voicemail, audio or visual recordings.

2.7 Disclosure extends to "adverse" documents. A document is "adverse" if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute.

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors— (1) the nature and complexity of the issues in the proceedings; (2) the importance of the case, including any non-monetary relief sought; (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved; (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates); (6) the financial position of each party; and (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

8.3 (1) Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.

(2) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.

9.6 Where the Disclosure Model requires searches to be undertaken, the parties must discuss and seek to agree, and the court may give directions, on the following matters with a view to reducing the burden and cost of the disclosure exercise— (1) that the scope of the searches which the disclosing parties are required to undertake be limited to— (a) particular date ranges ...

34. Paragraphs 8.3 and 9.6 seem to me to be especially inconsistent with Mr Akkouh's submissions. If the Practice Direction intended that an order for Model D disclosure would only cover documents contemporaneous with the cause of action, then both paragraphs 8.3 and 9.6(1)(a) would have said so. One would also expect the term contemporaneous to be defined.

35. The falsity of the appellants' arguments is demonstrated by an example provided by Ms Hargreaves in paragraph 38 of her skeleton:

To take an example from the present case, Issue 4 of the DRD provides: "Did the relationship between BM and Vladimir end permanently before Vladimir's death in June 2017"? On Brigita's approach, only documents which pre-date Vladimir's death would ever be disclosable because documents after his death would not be contemporaneous with the event i.e. the alleged termination of their relationship

before his death. Yet, as pleaded by the Adult Children, Brigita told the Belgian police after his death that at Easter 2017, she and Vladimir had had a huge argument and that she told him that she could not take it anymore. Brigita's statements to the police in the wake of his death are plainly relevant and capable of shedding light on the status of her relationship with Vladimir prior to his death. On Brigita's approach to PD57AD, however, the police report is not a contemporaneous document and would not be disclosable. That cannot be right.

36. I agree, and I reject Ground 1.

Ground 2

37. Grounds 2 and 3 challenge the exercise of the Master's discretion in relation to a matter of case management. These grounds cannot succeed unless the Master's decision was plainly wrong, that is, outside the generous ambit within which reasonable decision-makers might disagree.

38. The Master's reasons for ordering that the Interim Administrators should carry out a search of the Internal Notes were given in paragraphs 55 and 57 of his reserved judgment, which I have quoted in paragraph 23. above. Far from thinking those reasons to be plainly wrong, I respectfully agree with them.

39. It is true that the Internal Notes did not exist prior to the Interim Administrators' appointment in December 2018, and that the Master has therefore ordered a review of documents created during the course of the litigation, long after the events in question. I also accept that searching internal emails and notes of attendance upon potential witnesses is unusual, not least because such documents are likely to be privileged. But in this case the Interim Administrators are a neutral party and are officers of the court. As the Master said, they know the material better than anyone, and have formed the view that a search may reveal disclosable documents.

40. I reject Mr Akkouh's argument that the Internal Notes are incapable, by their nature, of containing disclosable material. The Internal Notes may contain relevant and important statements of fact by the persons with whom Farrer & Co communicated. If those persons are called as witnesses at the trial, what they said to Farrer & Co about an important issue may assist the court to evaluate their evidence at trial about the

same important issue. Although disclosure is not permissible in respect of material going only to the credibility of a witness, that does not exclude from disclosure material which is important to an issue in the case as well.

41. Insofar as the persons with whom Farrer & Co communicated are not called as witnesses at the trial, their statements to Farrer & Co may be received as hearsay evidence. If that hearsay evidence is contradicted by other witnesses who give sworn evidence at trial, it may not have significant probative value. But it is of course quite possible that the proposed search will yield evidence which is not contradicted by sworn evidence at the trial. It is certainly impossible to conclude that the search will not yield any material of any probative value.
42. Mr Akkouch relied on Tesco Stores Ltd v OFT [2012] CAT 6, in which Lord Carlile of Berriew QC, sitting as a judge of the CAT, refused an application by the OFT for disclosure of Tesco's notes of its discussions with potential witnesses. The only use to which the OFT said it would put the material, if disclosed, was to challenge the sworn testimony of Tesco's witnesses. Yet the OFT's pleaded case was that "The documentary evidence in this case is contemporaneous and it is clear and strong. No amplification of this evidence is required, by further documentary evidence or oral testimony, when considering the nature of the infringements found by the OFT" (see Lord Carlile at [22]). It was in that context that Lord Carlile said this:

28. The OFT is seeking disclosure of notes of discussions between Tesco and/or its external solicitors and potential witnesses so that those notes might be deployed to cross examine the witnesses called by Tesco (hereafter "the Potential Witness Material"). My judgement is that disclosure of the Potential Witness Material would not be consistent with the overriding objective in rule 19 of the Rules to deal with this appeal justly. Further, the documents sought are neither necessary nor proportionate to the issues before the Tribunal in this appeal.

29. First, I consider that using the Potential Witness Material for the purpose of cross examination is likely to be unfair and unhelpful. The OFT intend to use the material to test the evidence of a witness called by Tesco, presumably in an attempt to identify inconsistencies or ambiguities in the account given by that witness. If the live witness maintains his or her version of events in the witness

box, then it would be impossible for the Tribunal to draw any conclusion about his or her truthfulness from the fact that their version appears to contradict the recollection of another individual who has not been called as a witness. This would be unfair to the live witness. It would also be unhelpful to the Tribunal as it would not be in a position to assess the credibility of the witness, giving evidence on oath, by reference to unsworn statements made by another individual.

43. My understanding of that case is that the OFT had renounced reliance on the recollection of witnesses, basing its case squarely on contemporary documents. Yet it sought disclosure of documents recording the recollection of witnesses for the sole purpose of contradicting the recollection of other witnesses. The present case is entirely different. No one yet knows the purpose for which the Internal Notes may be useful or for which they may be used, and this case lacks the feature, which I understand to have been present in the Tesco case, that the applicant's limited basis for seeking disclosure was inconsistent with the stand it had already taken in its pleadings. In any event, Lord Carlile was obviously not purporting to lay down any general principle.
44. Contrary to Mr Akkouh's submissions, the duty to disclose a document containing evidence from a potential witness is not affected by the possibility that the person may be called to give oral evidence at trial. In this case there is no suggestion that the Interim Administrators intend to call all, or indeed any, of those whom they interviewed, some of whom may have important evidence to give. Absent disclosure, there may be no way in which the other parties will find out about the availability of that evidence.
45. I think the Master was right not to specify how the search should proceed, or to decide between the various options which had been proposed in correspondence. In paragraph 63, the Master correctly concluded that the Interim Administrators and their solicitors are the best judges of how to proceed. It is apparent that Farrer & Co intend to start with a limited search and to take matters further according to what they find. That is not a process that lends itself to close supervision by the court. The Master was right to confine himself to the issue of principle, and in my judgment was entirely correct in the way in which he decided it.

Ground 3

46. Ground 3 criticises the Master for not speculating about the possibility of satellite litigation arising from challenges to the accuracy of the Internal Notes. This argument was developed in the appellants' skeleton where it was said that "the admission of the Internal Notes will lead to satellite litigation regarding relevance, redactions and the context of the statement/accuracy of what has been recorded". In my judgment there is no basis for such speculation and the Master was right not to engage in it. The fact that the parties have already fought out one dispute which centred on an attendance note does not justify the conclusion that there will be other such disputes. I note also that that other dispute was not mentioned in the claimants' submissions to the Master.
47. I accept that in deciding whether to order that the Internal Notes be searched, it is relevant to consider the difficulties which may arise from their intrinsic nature. One potential source of difficulty is that they will not contain a transcript of what the third party said, only a summary, and the accuracy of the summary cannot be guaranteed. I also accept that if some of the Internal Notes are redacted for privilege, the redactions may be challenged and in any event may give rise to difficulty in understanding the context of what remains unredacted. Similar concerns were considered to be relevant by Edwards-Stuart J in BMG (Mansfield) Ltd v Galliford Try Construction Ltd [2013] EWHC 3183 (TCC) (see in particular [29-31]). The issue before the court in that case was whether the claimant, seeking permission to instruct a new expert, should be required to disclose privileged notes of its solicitors' discussions with the first expert. Evans-Stuart J concluded that the claimant had genuine reasons for not calling the first expert (who had become reluctant to serve), and was not guilty of expert shopping. He gave permission for the claimant to instruct the new expert without having to disclose the privileged attendance notes. That case therefore gave rise to very different considerations from the present case. Edwards-Stuart J's observations about accuracy and redactions are relevant here, but it must be appreciated that he mentioned those issues in the context of exercising a fact-sensitive discretion. He did not purport to lay down definitive guidance about the evidential value of attendance notes or the proportionality of searching them.
48. The Master chose not to mention this point in his reserved judgment, and neither was he obliged to do so. It did not feature prominently in the claimants' skeleton argument

before him and is not a strong point. Conjecture that the Internal Notes may be inaccurate, or that they may be disclosed with contentious redactions, cannot outweigh the belief of those who created them that the Notes may contain important evidence.

49. I therefore reject Ground 3 and the appeal is dismissed.