



Neutral Citation Number: [2024] EWHC 335 (Ch)

Case No: PT-2020-000449

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 16/02/2024

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

Between :

(1) SALIM MOOSA
(2) SHAUKAT ALI MOOSA
(3) GOOLAM HOSEN MOOSA

Claimants

- and -

KARIM ISSA MAWJI

Defendant

Mr Edward Brown KC and Mr Alex Riddiford (instructed by Rahman Ravelli Solicitors)
for the Claimants
Mr Simon Atkinson and Mr Theo Dixon (instructed by Teacher Stern LLP) for the
Defendant

Hearing date: 8 February 2024

JUDGMENT

Mrs Justice Joanna Smith:

1. At a Pre-Trial Review in this action held on 8 February 2024, the Claimants made an application for disclosure pursuant to CPR Practice Direction 57AD, paragraph 17. It was accepted at the hearing that the inevitable consequence of the court granting the application was that the trial date would be lost. I heard detailed argument on the point and rejected the application, giving directions for the conduct of the case to trial. In doing so, I gave brief reasons but confirmed that I would provide the parties with more detailed reasons as soon as possible. These are my detailed reasons, which are to be taken as replacing in full the brief reasons I gave at the hearing.

The Background to the Claim

2. By their claim, issued on 15 June 2020, the Claimants, who reside in South Africa and own and operate a number of family businesses including a portfolio of investment and development properties (“**the Property Portfolio**”), allege that in 2000, they orally agreed with the Defendant that he would manage that portfolio as their sole agent and advisor. They allege that whilst providing these services, the Defendant acted in breach of fiduciary and other duties he owed to the Claimants and/or in breach of trust and/or contract. They also allege that in 2004 the Defendant procured the restructuring of the Property Portfolio by changing the corporate service provider of the holding companies of the Property Portfolio to companies under his own control and by causing to be established a number of Liechtenstein entities which it is said were accustomed to act in accordance with his instructions. In a schedule to the Particulars of Claim, the Claimants identify a number of specific investment projects which were pursued in respect of five properties in England and one property in Germany (“**the Investment Projects**”). All of the Investment Projects concern transactions which occurred, or commenced, many years ago.
3. The Claimants assert that the Defendant has failed to deliver a true and full account to the Claimants upon request and they seek by way of relief, in summary: (i) an account of all dealings with the Property Portfolio including sales of property and income from the portfolio during the period 2000 to 2019, together with the manner in which the Defendant applied any sale proceeds, or income or other money from the Property Portfolio; (ii) an inquiry as to what balance of the money remains in the Defendant’s hands or under his control, subject to giving credit for legitimate expenses in managing the Property Portfolio; (iii) an account of what is due to the Claimants from the Defendant in respect of money received by him and/or by companies in which he had a direct or indirect beneficial interest; (iv) a declaration that the Defendant is personally liable to make good all sums received by him as trustee or agent of the Claimants, not duly accounted for; and (v) an order that the Defendant shall pay such sums as are due to the Claimants upon the taking of the accounts.
4. In addition, the Claimants allege that the Defendant threatened to misappropriate assets relating to an investment opportunity in land in South Africa in respect of which the Claimants say they have an indirect beneficial interest. The Claimants seek equitable relief preventing such misappropriation by the Defendant through his dealings with companies with interests in the land.
5. The Defendant denies that he owes the duties alleged and that he procured the restructuring of the Property Portfolio. He says that he did not provide the property

management services in respect of the Property Portfolio personally, but that those services were provided by corporate entities within the Montague Goldsmith group of companies (“**the MG Group**”) to corporate entities which held the titles to the properties in question and in which the Claimants were ultimately beneficially interested. He denies the allegations of control in respect of entities involved in the restructuring and, further, he denies any entitlement on the part of the Claimants to the equitable relief sought. In any event, the Defendant says that accounts have been rendered as necessary. Accordingly the Defendant denies that the Claimants have any entitlement to an account, to an inquiry or to any of the other relief sought.

6. At a costs and case management conference on 21 March 2021 (“**the CCMC**”), Master Shuman stayed the claim until 1 June 2021 for ADR. Nevertheless, she fixed a trial window between 26 April and 29 July 2022 and gave directions for the conduct of the case to trial. Amongst other things, she ordered that disclosure be given (“**the Disclosure Order**”) in accordance with the (agreed) Disclosure Review Document annexed to the order (“**the DRD**”), she gave directions for the service of witness statements, she gave the parties permission to adduce expert evidence in the fields of Liechtenstein law and Swiss law and she made directions for the preparation of trial bundles in accordance with the provisions of the Chancery Guide.
7. Thereafter, the parties sought, and obtained by consent, several orders extending time for compliance with the directions and a listing appointment was eventually fixed to take place by 31 May 2022 by an order of Deputy Master Rhys dated 29 May 2022. It appears that the trial was then fixed to commence in a five day window starting on 5 March 2024. However, the parties continued to seek, and obtain by consent, orders extending time for compliance with the directions, said to be necessary to “allow the review of documents pursuant to their compliance with the directions for standard disclosure”. By an order dated 16 March 2023, Master Shuman (now Chief Master) extended time for disclosure by list to 31 May 2023, together with extending time for service of witness statements and expert reports.
8. The key issues for disclosure relevant for the purposes of this application as identified in the agreed List of Issues for Disclosure concerned (i) the nature of the relationship between the Claimants and the Defendant and the involvement of corporate entities in managing the Property Portfolio; (ii) whether accounts have been rendered by the Defendant or corporate entities; and (iii) how each of the six specified investment projects proceeded and how they were funded. The parties agreed Model D disclosure without any express provision for narrative documents.
9. The parties completed their section 2 Questionnaires setting out their proposed searches. The Defendant’s Questionnaire identified the Defendant himself as the only custodian whose files it was proposed should be searched for documents relevant to the Issues for Disclosure and identified that limited hard copy and electronic documents were held in an archive in Switzerland on behalf of Montague Goldsmiths AG (“**MGAG**”). Although the parties’ statements of case name various corporate entities, including entities in respect of which the Defendant is alleged by the Claimants to have exercised control, no other party or entity was named as a custodian by the Defendant and no objection appears to have been taken to this by the Claimants. In response to the standard question about data sources held by “Third Parties who may have relevant documents which are under your control”, the Defendant’s Questionnaire identified electronic documents within the control of the

Defendant held by two cloud storage providers and said this: “Third Party data Source which may host relevant documents include the fiduciary corporate service providers in Lichtenstein which are not within the control of the defendant”.

10. By their evidence in support of the application for disclosure, the Claimants confirm that they do not take issue with the contents of the Section 2 Questionnaire filed by the Defendant, or with the agreed List of Issues for Disclosure. At no stage have the Claimants suggested a need to revise the List of Issues for Disclosure, made a formal application to vary the Disclosure Order or requested a disclosure guidance hearing.
11. On 30 May 2023, the Defendant’s solicitor signed a Disclosure Certificate on his behalf certifying compliance with the Disclosure Order. This confirmed that he had conducted a search for “the documents in his control from the sources as set out in the Disclosure Review Document” and that an agreed list of key-word searches had been applied. In total approximately 75,500 documents were manually reviewed and 8,450 documents were disclosed by the Defendant. These documents were provided for inspection on 31 May 2023 in a .zip format.
12. Due to technical issues, the Claimants’ technology assisted review (“**TAR**”) provider was unable initially to import the Defendant’s disclosure to its platform and discussions ensued between the parties as to how to resolve this difficulty. In the meantime, as the Claimants’ solicitors confirmed in a letter of 9 August 2023 (which is not mentioned by the Claimants in their evidence for this hearing, but was acknowledged in submissions) they had been obliged “to undertake a manual review of [the Defendant’s] disclosure”, which they complained was neither reasonable nor proportionate. The technical issues were resolved by 4 September 2023 when the Defendant’s disclosure was uploaded by the Claimants’ TAR provider to the Claimants’ eDiscovery platform.
13. At around the same time, and in circumstances where the Defendant’s solicitors, Teacher Stern LLP (“**Teacher Stern**”), were raising numerous queries in correspondence over the adequacy of the Claimants’ disclosure, they suggested a further extension of time for exchange of witness statements and expert reports; an extension that was granted by consent by Master Teverson on 13 September 2023. The parties were now obliged to exchange witness statements by 6 December 2023 and expert reports by 17 January 2024.
14. In a letter dated 17 October 2023, the Claimants’ solicitors, Rahman Ravelli Solicitors (“**Rahman Ravelli**”), noted that since the receipt of the Defendant’s disclosure on their eDiscovery platform, they had now been able to review that disclosure “more substantively”. They observed that the Claimants had “grave concerns” regarding the Defendant’s disclosure and its “evidence deficiencies” and they sought information as to (i) the enquiries that had been made of numerous identified corporate entities; and (ii) the processes that had been undertaken to identify documents within the Defendant’s possession or control. On a “strictly preliminary basis” they also sought inspection of numerous categories of document. The letter concluded by reserving the Claimants’ right to make a formal application to the court in respect of disclosure.
15. Teacher Stern responded at length on 3 November 2023, rejecting the suggestion that the Defendant’s disclosure was deficient or inadequate. Under the heading “Corporate Entities”, Teacher Stern said this:

“No enquiries were made of the various corporate entities that you have listed under your subparagraph 1 because documents which they hold are not documents that are classed as being within the possession or control of our client for the purposes of PD57AD”.

Teacher Stern noted that while a director of a corporate entity will have control over its documents, the same does not apply for an individual with only a beneficial interest. They confirmed that the Defendant was not a director of any of the entities that had been identified and so had no right to documents and no obligation to make enquiries. They expressly indicated that if the Claimants wished to make an application for further disclosure they should provide any evidence on which they intended to rely to assert the required levels of control on the part of the Defendant in advance of such application.

16. In the 3 November 2023 letter, Teacher Stern also dealt with various individual requests for information, explained in detail the approach that had been taken to disclosure on behalf of the Defendant and responded in turn to each of the categories of document that had been identified by the Claimants. They pointed out, amongst other things, the lack of clarity in various of the requests, that (in any event) documents falling within the issues in the DRD had been disclosed and they explained that many categories sought by the Claimants did not fall within any of the issues for disclosure in the DRD. Towards the end of the letter, Teacher Stern observed that, although the Defendant was willing to cooperate, he was not prepared to engage in:

“a tit-for-tat exchange of queries in relation to disclosure, in circumstances where many of the entities you are asking about were not controlled by him and in a number of cases were beneficially owned by [the Claimants]”.

17. Pausing here, in my judgment, this letter made the Defendant’s position in relation to documents held by third party entities crystal clear. He did not consider that their documents were within his control for the purposes of disclosure. Even assuming that the Claimants could not have identified this category of documents considerably earlier (a point to which I shall return), if the Claimants had wished to take issue with the Defendant’s position (and always bearing in mind that the trial date was fast approaching) now was the time to issue an urgent application.

18. However, the Claimants took a different course. On 21 November 2023, some 18 days later, Rahman Ravelli provided a detailed response to the Teacher Stern letter, confirming that it was not appropriate for them to litigate the point on control over third party documents in correspondence, but referring Teacher Stern to various authorities on the point and requesting that the Defendant at least make enquiries of the identified corporate entities. Rahman Ravelli then went on to note, comment on or reject the points that had been made by Teacher Stern as to the various categories of document sought, together with posing a very large number of yet further requests. These were justified at the end of the letter with the words:

“in order for our clients to plead their claim accurately, it is of paramount importance that [the Defendant] has complied with his obligation under PD57AD”.

I have seen nothing to indicate that the Claimants had ever previously sought additional documents to enable them properly to plead their case and no suggestion has been made during the course of this hearing that any documents sought are necessary to enable the Claimants adequately to plead their case for trial.

19. On 21 November 2023, at the behest of both parties, Chief Master Shuman ordered by consent that the time for the service of witness statements and expert reports be extended to 18 January 2024 and 25 January 2024 respectively.
20. On 24 November 2023, Rahman Ravelli sent another letter seeking copies of two additional documents/categories of document, again reserving the Claimants' rights "in line with our ongoing review of [the Defendant's] disclosure".
21. On 14 December 2023, Teacher Stern again responded on the subject of disclosure, observing that the disclosure sought in the letters of 21 and 24 November 2023 was "outside the scope of what has been ordered by the Court and is entirely disproportionate to the issues in the claim". They observed that if such disclosure had been sought prior to the CCMC it would have been resisted and they rejected the suggestion that they should make further enquiries of any third parties. They said that if the Claimants wanted further disclosure "they should make an application", noting also that if this gave rise to a question-mark over whether the Claimants could be ready for trial it was "incumbent" on them to seek an adjournment "as early as possible". Teacher Stern went on to deal again in substantial detail with each of the individual categories requested, disclosing a small number of additional documents.
22. The following day, on 15 December 2023, Rahman Ravelli wrote a further letter on the subject of disclosure which observed that the Claimants were now "preparing for trial" and that in anticipation of "various forthcoming pre-trial steps" a number of gaps in the Defendant's disclosure and/or aspects of the Defendant's case had been identified which remained unclear or unexplained. They made a limited number of requests for copy documents, asking for a reply by 29 December 2023. I am puzzled by this letter which does not appear to fit with the earlier run of correspondence to which I have referred and makes no reference to the Teacher Stern letter of the previous day. Although Mr Brown KC, for the Claimants, assured me on instructions that this letter was simply intended as yet another request for further disclosure, it does not read in that way on its face. When I first read it, I understood it to be identifying only a small number of discrete documents that were now being pursued in advance of the trial.
23. Teacher Stern appear also to have been confused by the letter because they responded on 20 December 2023 noting with surprise that Rahman Ravelli had not mentioned their letter of 14 December 2023 and referring Rahman Ravelli to that letter to determine "whether there are outstanding issues arising as a consequence". There is no evidence of any response from Rahman Ravelli.
24. At the beginning of January 2024, Teacher Stern continued to pursue outstanding requests for disclosure and Further Information from the Claimants, suggesting an extension to the 26 January 2024 for witness statements to accommodate the provision of these. This suggestion was reflected in another order by consent made by Chief Master Shuman on 12 January 2024, also extending time for expert reports to 2 February 2024. Rahman Ravelli engaged with Teacher Stern's letters at this time

without making any reference to the Claimants' own requests for disclosure and without addressing the extent to which any such requests remained extant in light of Teacher Stern's detailed letter of 14 December 2023.

25. On 10 January 2024 Rahman Ravelli served on the Defendant the Claimants' Pre-Trial Checklist, noting that a draft trial timetable would "follow shortly". The Pre-Trial Checklist identified that the Claimants intended to rely upon three witnesses of fact and, for the first time, intimated that the Claimants did not intend to rely upon any expert evidence (the box requesting information about the identity of the Claimants' experts remained blank). Importantly, in response to the statement "I believe that additional directions are necessary before the trial takes place", Rahman Ravelli ticked the box next to the word "No". From the Defendant's perspective, this can only have been viewed as a clear and unequivocal confirmation that the Claimants did not intend to pursue further the requests for disclosure that they had made in correspondence between October and December 2023. Indeed, at this stage, the Claimants appeared to be gearing up for trial.
26. On 19 January 2024 Rahman Ravelli sent a detailed letter responding to the Defendant's requests for disclosure from the Claimants and enclosing a Reply to the Defendant's Request for Further Information. They concluded by saying that the matter was listed for trial in approximately two months and that further correspondence around the Claimants' disclosure was a poor use of time and costs for all concerned.
27. On 22 January 2024 Teacher Stern wrote to Rahman Ravelli observing that the trial bundles should have been agreed by that date and asking, again, for proposals as to the content of those bundles. In a reply of 23 January 2024, Rahman Ravelli said that, pending exchange of evidence, the trial bundle could not be finalised and suggested that it be agreed after the PTR. They further observed that there may in any event be no need for a trial bundle given without prejudice discussions that had been taking place between the parties. Teacher Stern immediately pushed back on this proposition in a letter of the same date, noting that the trial date had not been postponed and that the Claimants were obliged to comply with existing orders of the Court.
28. On 24 January 2024, Rahman Ravelli served on the Defendant an application notice of the same date seeking a "variation" of the CCMC Order and the subsequent Consent Order dated 12 January 2024. No witness statement was served in support of this application, but the text included in the application notice stated that the application was necessary because the Claimants had been unable to agree yet further extensions of time with the Defendant (a statement which is not anywhere borne out in the evidence and was subsequently queried by Teacher Stern). Although the application was within time in respect of service of witness statements and expert reports, it was out of time in respect of the provision of the trial bundle. Mr Brown accepted that he had no explanation for the Claimants' failure to prepare and provide a trial bundle.
29. The 24 January 2024 application further stated that the Defendant had failed to respond to requests for disclosure and that in the absence of the further disclosure sought, "the Claimants are not able to sufficiently assess their position, finalise their evidence or formulate their case for trial". It stated that it was not "feasible" to

finalise the Claimants' witness statements in the absence of the disclosure sought. It said that "in light of the foregoing" the Claimants wished to inform the court that they were in the process of preparing an application for specific disclosure which they intended to file by no later than 31 January 2024. The draft Order attached to the application notice proposed an extension of time for service of witness statements to 16 February 2024, an extension of time for experts reports to 19 February 2024 and the provision of the trial bundle by 26 February 2024, one week prior to the commencement of the trial window.

30. This was on any view, in my judgment, an entirely unrealistic proposition. Parties cannot reasonably or sensibly be expected to prepare for a 10 day trial in such a short timescale and without access to the very documents they require in order to undertake that preparation. There was no proper evidence served in support of the "variation" application and no acknowledgement that, realistically, the obvious consequence of the court granting the application must be an adjournment of the trial. Notwithstanding the impending trial date, this was the first time that the Claimants had raised the subject of the Defendant's disclosure since before Christmas and, even now, they provided no evidence to explain why the Defendant's disclosure was deficient, why they needed it to finalise their witness statements and why they could not prepare for trial (including by preparing the trial bundle) in the absence of such disclosure.
31. No doubt it was for these reasons that Teacher Stern responded the same day stating that, in their view, the application was a "thinly disguised application to the Court to postpone the trial date". Teacher Stern pointed out that it was the Claimants who had failed in their disclosure obligations.
32. On 26 January 2024, pursuant to the Order of 12 January 2024, the Defendant served two witness statements for trial in password protected form, together with a supplemental List of Documents.
33. Finally, on 31 January 2024, the Claimants served the heralded application, seeking an order for disclosure pursuant to paragraph 17 of PD 57AD. The proposed draft Order sought an order for production of the documents and categories of documents identified in an attached annex, alternatively the service of a witness statement explaining why those documents or categories of documents could not be produced. The date proposed for compliance was 14 February 2024.
34. The Annex to the draft Order (which is appended to this judgment for ease of reference) identified twenty-seven documents or categories of document that were sought by the Claimants in respect of the Investment Projects. Many of these categories closely track those first identified and responded to in detail by Teacher Stern in the correspondence dating back to October 2023. A substantial number concern requests for documents held by third party entities.
35. In support of the application for disclosure, the Claimants relied upon the first witness statement of Mr Syedur Rahman ("**Rahman 1**"). Rahman 1 asserted that the Defendant had failed to comply with his duties of Extended Disclosure and had failed to comply with requests for further documents "of relevance in respect of the Issues for Disclosure" in the DRD which were within his possession or control. Rahman 1 confirmed that the Defendant's recent supplemental disclosure did not address any of

the categories of documents sought and explained that the documents sought were required by the Claimants “so as to allow them to sufficiently assess their position, finalise their evidence and formulate their case for trial”, and “to ensure that the evidential picture for trial is as complete as reasonably possible”. It suggested that the scope of the disclosure sought was “modest” and “capable of being produced by the Defendant in very short order” such that it would have “no necessary impact on the existing practical arrangements for trial or the parties’ trial preparation”.

36. Rahman 1 went on to address each of the twenty-seven individual items sought in turn, asserting that, in cases where the documents are held by third parties, they are within the Defendant’s control by reason of his role as direct or indirect shareholder or director. Although Rahman 1 referred in general terms to the correspondence between the parties, it did not seek to engage with the detailed explanations given by Teacher Stern in relation to the majority of the items sought as to why the Claimants were not entitled to disclosure. Rahman 1 concluded by observing that:

“The provision of these documents is essential for the fair determination of this claim and to allow for the formulation of further claims going forward...The Claimants consider that witness statements cannot properly be exchanged without full compliance by the Defendant with his disclosure obligations. Disclosure is at the heart of this claim and it would be highly prejudicial for the Claimants to be required to provide witness statements evidence without the benefit of proper disclosure”.

37. The Defendant responded to this application in the third witness statement of Mr Jacob Rabinowicz dated 5 February 2024 (“**Rabinowicz 3**”). He pointed out that the application did not show that there had been, or may have been, a failure by the Defendant adequately to comply with the Disclosure Order and he stated that disclosure at this stage would be disproportionate and unreasonable. Rabinowicz 3 took issue with various factual assertions made in Rahman 1, set out the history of disclosure to date and confirmed compliance by the Defendant with his disclosure obligations, explaining in detail the process that had been undertaken. Rabinowicz 3 also dealt in detail with the Defendant’s response to each item sought, pointing out in many cases that a detailed response had already been provided and that, where documents were held by third parties, they were not in the control of the Defendant. In the case of item 27 only, Rabinowicz 3 confirmed that files had been requested and documents would be disclosed.
38. In conclusion, Rabinowicz 3 expressed concern at the Claimants’ apparent belief that the documents they sought might enable them to “formulate” claims against the Defendant, saying (correctly, in my judgment) that this is not an appropriate justification for a disclosure application four weeks before trial and also observing that the disclosure application appeared to assume an entitlement to an account in circumstances where that was the question at the heart of the issue in the proceedings. Unsurprisingly, Rabinowicz 3 reported the Defendant’s view that an order for disclosure at this late stage “would necessitate the vacation of the trial”, that he would be seriously prejudiced by losing the trial date and that if he had to comply with such a far-reaching order for disclosure he would require at least 28 days, and this would be dependent, in any event, upon making enquiries of third parties.

39. The day before the PTR, the Claimants served a second witness statement from Mr Rahman (“**Rahman 2**”), signalling a very significant change in the Claimants’ position on the application. Specifically, Rahman 2 indicated (in summary) that, in relation to some categories of document sought, the Claimants would now be satisfied with a personal confirmation from the Defendant of the matters set out in Rabinowicz 3 in the form of a witness statement verified by a statement of truth pursuant to PD57AD paragraph 18.4; and that, in relation to categories of documents where the issue of control was disputed, the Claimants now invited the court to infer control, alternatively to order that the Defendant make a request for the documents from the relevant third party entities.
40. It appeared from Rahman 2 first, that the Claimants were now seeking to amend their application (at least in part) from an application under PD57AD paragraph 17 to an application under PD57AD paragraph 18, and, second, that they were, in many cases, inviting the court to infer control over documents on the part of the Defendant solely by reason of his role as shareholder or holder of an indirect beneficial interest in third party entities. Rahman 2 confirmed that item 20 was no longer pursued and noted the position in relation to item 27. At the PTR, there were accordingly 25 items in the Annex to the draft Order remaining in dispute.
41. In an approach that was, in my judgment, entirely divorced from the reality of the situation, Rahman 2 sought to suggest that the Claimants’ brief fees, already incurred, of £200,750, would be thrown away by an adjournment of the trial and that these must be paid by the Defendant, whose fault it would be if the trial was adjourned. Rahman 2 at last acknowledged that, in light of the content of Rabinowicz 3, the Claimants now had “no alternative” but to apply for an adjournment of the trial, noting that “this will allow the parties the opportunity to explore options in the UK and South Africa with the benefit of full disclosure”. The court has no information as to these “options” and this unexplained statement cannot possibly amount to a justification for an adjournment.
42. The Claimants’ skeleton argument for the PTR, dated 2 February 2024 (i) made no mention of PD57AD paragraph 18; (ii) continued to suggest that it was appropriate for the court to require production on 14 February 2024 of the documents sought in the disclosure application; (iii) suggested that the dates identified in the draft Order for an extension of time were “tight” but manageably so; and (iv) made no mention of the need for an adjournment. It bore little, if any, real relation to the submissions that were in fact made on behalf of the Claimants at the hearing.

The Law

43. Paragraphs 17 and 18 of PD57AD read as follows:

“17. Failure adequately to comply with an order for Extended Disclosure

17.1

Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may

make such further orders as may be appropriate, including an order requiring a party to—

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

17.2

The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3

An application for any order under paragraph 17.1 should normally be supported by a witness statement.”

18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents

18.1

The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2

The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3

An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4

The court's powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models A to E and requiring a party to make a witness statement explaining any matter relating to disclosure".

44. I pause here to note that while an application made under paragraph 17 "should normally be supported by a witness statement", an application under paragraph 18 "**must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied**" (emphasis added).
45. Paragraph 6.4 of the Practice Direction provides that, 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;
 - (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."
46. The law surrounding the approach to be taken by the court to these provisions is largely uncontroversial. Summarising it as shortly as possible, I derive the following propositions from the authorities to which I was taken:
- i) Paragraph 17 of the Practice Direction requires a two stage approach: first it is necessary to identify whether there has been a failure to comply (17.1) and, if there has been such a failure then, second, the party applying for the order must satisfy the court that making "some curative order" of the type referred to in paragraphs 17.1(1)-(5) is both reasonable and proportionate (see *Sheeran v Chokri* [2021] EWHC 3553 (Ch) per Meade J at [4]);
 - ii) In order to satisfy the court as to the first stage, there must be "more than just a general suspicion that there may have been a shortcoming in relation to disclosure". Speculation is not enough. Instead there must be some basis for

going behind the process in the disclosure certificate which has been signed by the disclosing party; “[s]omething is needed to show that there is a likelihood (as opposed to a possibility) of further documents existing” (see *Sheeran v Chokri* at [5]-[6] and *Berkeley Square v Lancer Property Asset Management Ltd* [2021] EWHC 849, per Mr Robin Vos, sitting as a judge of the Chancery Division, at [65]);

- iii) the test under paragraph 18 of the Practice Direction (which is concerned specifically with an application to vary an existing order for Extended Disclosure) is usually more difficult to satisfy than the test under paragraph 17 (White Book, Vol 2 at 2AA-72.1), because although it requires the court to consider whether a variation of the original order for Extended Disclosure is reasonable and proportionate, it also requires the court to consider whether such variation is “necessary for the just disposal of the proceedings”; but
- iv) where the practical reality of an application under paragraph 17 necessitates having regard to the date fixed for trial and the potential for that date to be lost, it is most unlikely to be reasonable and proportionate to make an order for disclosure unless that order is one that is necessary for the just disposal of the proceedings (see *Ventra Investments Limited v Bank of Scotland PLC* [2019] EWHC 2058 (Comm) by Mr Richard Salter QC, sitting as a Deputy High Court Judge at [35]);
- v) the principles applicable to “late applications to amend” apply equally to “late” applications for disclosure (see *Ventra* at [42]-[45]). In practice this means that, by analogy with the principles articulated in cases such as *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) and *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 per Sir Geoffrey Vos C (as he then was) at [41], there will be a “heavy burden” on the party seeking “late” disclosure (whether under paragraph 17 or 18 of the Practice Direction) to justify the lateness of the disclosure application, to show non-compliance with the Order for Extended Disclosure (paragraph 17 only), to show that the order sought is reasonable and proportionate and to satisfy the court that the just disposal of the proceedings requires a late order for disclosure to be made.
- vi) The parties and the court “have a legitimate expectation that trial fixtures will be kept” (*Quah Su-Ling* at [38]). An application for late disclosure which will place an excessive burden on the preparations of a party to the trial or will necessitate the vacation and relisting of the trial itself requires particular scrutiny. The wider interests of other court users and the court’s limited resources must inevitably be brought into the balance.
- vii) Although the court must strike a practical balance having regard to all of the relevant factors to which I have referred, and although the court must always bear in mind that “the process of disclosure is one of the most powerful tools available for achieving justice” (*Ventra* at [37]), the lateness of the application for further disclosure may in itself cause the scales to be weighted heavily against the making of an order (see *Quah Su-Ling* at [38] and *Maher v Maher* [2019] EWHC 3613 (Ch) per at [18]-[19]).

47. In this case, a key question arising on the Claimants' application for disclosure is whether documents held by various third party entities are under the control of the Defendant. "Control" in the context of the Practice Direction (echoing CPR 31.8) is defined in PD57AD at paragraph 1.1 of Annex 1 as including:

"documents (a) which are or were in a party's physical possession; (b) in respect of which a party has or has had a right to possession; or (c) in respect of which a party has or has had a right to inspect or take copies".

48. Where search-based disclosure is ordered, in the form of Extended Disclosure, "the concept of 'control', as defined, fixes the universe of documents from which, by one or other or a combination of means, a party's extended disclosure is to be generated" (per Andrew Baker J in *Pipia v BGEO Group Ltd* [2020] 1 WLR 2582 (Comm) at [8]-[13]).

49. It is common ground that the applicable principles when considering whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents were summarised in *Berkeley Square* at [46]:

"i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

ii) **There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;**

iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature" **(emphasis added)**.

The Claimants' submissions as they were developed at the hearing

50. As advanced at the hearing, the Claimants' arguments bore little relation to the content of Rahman 1 or the skeleton argument. Doing my best to summarise, those arguments, Mr Brown's fundamental point was that the disclosure sought was of "paramount importance to the determination of a fair trial" and that the inevitable consequence of a refusal to order disclosure would be that the Claimants would be fighting the trial "with one hand tied behind their back". He submitted that there is an asymmetry in this case between the Claimants and the Defendant in terms of access to documents and that the disclosure sought is necessary to enable the Claimants to make good their claims. He took me to the Particulars of Claim and the List of Issues for trial, submitting that the requested disclosure falls squarely within the issues for trial and that it was almost certain to be in the possession of the Defendant "and entities in whom he has an interest". On the subject of the DRD, Mr Brown confirmed that the Claimants make no criticism of the DRD, but submitted (without, as far as I can see, any support in the evidence) that when the DRD was agreed it was considered proportionate having regard to the position at that time, but that now, specifically in light of the Claimants' review of the Defendant's disclosure, the position was "different".
51. Mr Brown confirmed that the Claimants now pursue the application for disclosure under both paragraphs 17 and 18 of the Practice Direction, without providing any explanation for the failure to make that clear in the application notice itself or in Rahman 1, and without identifying which items in the Annex to the draft Order were sought under paragraph 17, and which under paragraph 18. He fairly acknowledged that "procedural rigour is important", but suggested that the procedural requirements of the Practice Direction are merely "designed to deliver justice" but are not to be regarded as justice in themselves. In connection with paragraph 17, Mr Brown submitted that it was not necessary formally to satisfy the court of a specific breach of the Defendant's disclosure obligations. Mr Brown confirmed that, if it was necessary to seek an amendment to the Claimants' application notice, then that is what he would seek, albeit without explaining why there was no hint of any of this in his skeleton argument, without identifying any specific amendment that the Claimants wished to make and without explaining how any such amendment might adequately be supported by the evidence that had been served in support of an application under paragraph 17 of the Practice Direction only.
52. Picking up on the points made in Rahman 1, I asked Mr Brown why the disclosure was required for the purposes of preparation of witness statements given the provisions of PD57AC (which require a witness statement to give evidence only of matters within the personal knowledge of the witness) and why it was appropriate to seek disclosure "for the formulation of further claims going forward". By way of response, Mr Brown acknowledged that the bulk of the documents sought were "financial documents", but suggested that "some" of the documents sought "might" allow his clients to "refresh their memory", although he did not identify which ones. He effectively disavowed the statement in Rahman 1 that the documents were required for the formulation of further claims, acknowledging that this was not a good reason to seek disclosure. However he submitted that a "better description" of the need for disclosure was that the Claimants wished to be in a better position to "formulate their remedies", although he did not explain how or why there was real

reason to suppose that the documents sought would facilitate this ambition. Certainly the Claimants have no evidence to support this contention. Mr Brown did not suggest that the documents were required to enable the Claimants accurately to plead their substantive claim.

53. In light of the content of Rabinowicz 3, Mr Brown explained that the Claimants were now making an (informal) application to adjourn the trial, but suggested that the trial could be re-listed as soon as possible after the disclosure had been provided, subject (perhaps) to the potential for an application (if necessary) by the Claimants against the third party entities for non-party disclosure under CPR rule 31.17 (as far as I can see, the first time such an application has been suggested on behalf of the Claimants).
54. Mr Brown drew my attention to the principles applicable to applications to adjourn a trial as set out in *Crypto Open Patent Alliance v Craig Steven Wright* [2023] EWHC 3287 (Ch) per Mellor J at [53]-[63]. I need not set these out for present purposes, but observe only that Mr Brown emphasised that, although an adjournment is a discretionary matter which must be considered having regard to the overriding objective, it must be granted if a failure to do so would result in irremediable prejudice to one or more of the parties such that there would be a denial of justice. As Mellor J said at [62], “the Court must be satisfied that it will be possible to have a fair trial”. For present purposes I note also that at [63] the Judge emphasised the duty of the parties to assist the court in active case management, a duty which he observed had “some added force” where, as in that case, there had been a default on one side which necessitated the application to adjourn.
55. Finally, in response to a request that the court be shown why the disclosure sought was necessary if a fair trial was to take place, Mr Brown took me through the various categories of document sought, explaining that (setting aside items 20 and 27 for reasons I have given):
 - i) In relation to items 1, 2, 3, 4, 5, 7, 8, 9-13, 15, 17 and 25 (and subject to (i) a few discrete points made in respect of individual items, and (ii) the overlap with items raising the issue of control), the Claimants would now be content for the Defendant to confirm the matters set out in Rabinowicz 3 in a witness statement, pursuant to PD57AD paragraph 18.4. I note that the items identified by Mr Brown on his feet in court differed slightly from those identified in Rahman 2 at paragraph 8. I also note that item 26 appears to have been omitted from Mr Brown’s list because Rahman 2 suggests that “[t]he Defendant’s position in relation to item 26 tracks his response to Items 3 and 6”;
 - ii) In relation to items 3, 4, 6, 9, 14, 17, 18, 19, 21, 22, 23 and 25, and insofar as the Defendant’s case is that there was no control over these categories in the “*Berkeley Square* sense”, the court should infer control and make the order sought, alternatively (as an “ancillary solution”) the court should order the Defendant to make a request for the documents/categories of documents from the relevant third party entity (see *Phones 4U (in administration) v EE Ltd* [2021] 1 WLR 3270, per Sir Geoffrey Vos MR at [30]). Again, it would appear that item 26 may have been omitted from this list.

iii) In relation to items 16 and 24, where Rabinowicz 3 had confirmed that the Defendant had undertaken a reasonable and proportionate search for documents and that, if discovered, they would have been disclosed, the court should order the Defendant to undertake “a targeted request/search in relation to these documents”, whether under paragraph 17 or 18 of the Practice Direction.

56. I pause to observe that this exercise did little to persuade me of the “essential nature” of the documents sought by the Claimants, or of the “irremediable prejudice” that the Claimants suggest they will suffer if the order they seek is not granted. Far from robustly pursuing their disclosure application, the Claimants now acknowledge that in respect of the items identified at paragraph 55(i) above, it is perfectly possible for there to be cross-examination of the Defendant at trial together with an invitation to the court to draw any appropriate inferences. As for the items identified at paragraph 55(ii) above, the Claimants have now identified a “fall back” position which only serves, to my mind, to heighten concerns (to which I shall return) over why this issue was not raised and pursued earlier.

The Application under Paragraph 17 of the Practice Direction – stage 1

57. Taking the formal application under paragraph 17 of the Practice Direction first, which has not been abandoned, I refuse the application for the following main reasons, which in many respects reflect the submissions made to me by Mr Atkinson on behalf of the Defendant.

58. The Claimants’ evidence has not begun to satisfy me that there has been, or may have been, a failure adequately to comply with the Disclosure Order. There is no focus in either Rahman 1 or Rahman 2 on how it is said that there has been non-compliance and no attempt to identify which of the Issues for Disclosure agreed by the parties properly encompasses the disclosure that is now sought, such that a failure to provide that disclosure amounts to a breach of the order made at the CMC. It was noticeable that Mr Brown’s submissions at the hearing barely touched upon the question of non-compliance with the Disclosure Order and that, when they did, he suggested that there was no need to establish any breach (or likelihood of a breach), a submission I reject in light of the clear words of paragraph 17.1, which expressly provide for this threshold requirement.

59. Importantly, in my judgment, the majority of the documents and categories of documents sought by the Claimants in their application are documents that, it is accepted by the Claimants, will (if they exist) be in the possession of third party entities. Yet the DRD identified the only custodian for the purposes of the Defendant’s disclosure exercise as the Defendant himself and did not identify any of the third parties now referred to by the Claimants (other than MGAG) either as custodians or as holding data sources that could be searched. Further, it did not suggest that any third party entities were in fact controlled by the Defendant (for the purposes of the approach identified in *Berkeley Square*) such that the disclosure exercise would need to encompass a review of their documents, or, at the very least, a request that they make documents available. I agree with the Defendant that there is no reason to suppose that he was obliged to make any enquiries of third party entities for documents, much less that in failing to do so he has acted in breach of the Disclosure Order. In *Phones 4U* the court made an order at the first case management

conference which addressed the need to seek documents from employees who may have documents which were not within the claimant's control. By contrast, in this case, the Claimants effectively agreed that there was no need to consider custodians other than the Defendant, or sources other than those identified.

60. What the Claimants are really saying is that a failure to disclose documents held by third parties which are in fact within the Defendant's control in the *Berkeley Square* sense amounts to a breach of the Disclosure Order. Yet the Defendant denies such control. My reading of *Rahman 3* is that the court is invited to draw an inference of control simply by reason of the fact that *Rabinowicz 3* does not expressly state that the Defendant "has no practical arrangement or understanding" with the various third parties of the kind referred to in *Berkeley Square*. However, whilst I accept that there are circumstances in which it may be appropriate to draw an inference of control, I do not consider that such an inference is appropriate here in the face of the evidence in *Rabinowicz 3*.
61. A fair reading of *Rabinowicz 3* establishes that (in dealing with the issue of control) Mr Rabinowicz has (i) confirmed that he is instructed that the Defendant is not in possession or control of various documents belonging to third parties; (ii) confirmed that some documents belonging to third party entities do exist and where they are within the possession or control of the Defendant they have been disclosed (for example, documents within items 1, 3, 4, 5, 8, 11 and 24); (iii) denied that the Defendant was a shareholder or beneficially interested in various of the third party entities (WESA, WHL, Flemingo, Radcliff, MMDL, Forest Hill Investments Limited, Taurin); (iv) denied that the Defendant was a director of various of the third party entities (Radcliff, WHL, Flemingo, Taurin, Parry, Seabreeze, Roebuck Holdings Limited); (v) denied that, even where the Defendant had an indirect interest in a third party entity (Radcliff, Taurin, Pranmo Foundation), he was entitled to demand documents from that entity or from entities controlled by it; (vi) denied the existence of an agency relationship with any of the third party entities (vii) pointed out that the Defendant believes that some of the third party entities are now in liquidation (MGAG, WESA, WHL, Beachcroft Property Investment Limited) and made the point that (at least in one case) there is no requirement for the liquidator to provide copy documents to the Defendant and no established course of conduct whereby he would do so; (viii) pointed out that in the case of MGAG relevant documents have already been disclosed from the limited sources identified in the Section 2 Questionnaire (for example, items 7 and 10); (ix) pointed out that some identified third party entities were not involved with the transaction in respect of which disclosure was sought (MG Capital); and (x) pointed out that some third party entities are not even specifically or properly identified (items 9, 14, 20, 21 and 25).
62. In my judgment, *Rabinowicz 3* provides a clear and detailed account of the exercise that was undertaken by, and on behalf of, the Defendant in order to ensure compliance with his obligations. A Disclosure Certificate was signed on 30 May 2023 and Mr Rabinowicz confirms in his statement that, to the best of his knowledge and belief, the Defendant has complied with his disclosure obligations under (i) the Disclosure Order; (ii) PD51U as it applied at the time the Disclosure Order was made; and (iii) PD57AD as it has applied since it came into force. The Claimants have provided no basis whatever on which the court would be justified in going behind that evidence. Even assuming that third party entities hold relevant documents, I cannot infer that

they are within the control of the Defendant by reason of a *Berkeley Square* style arrangement or understanding such that he has failed in his disclosure obligations in not disclosing them.

63. As for other categories of document (not caught by the “control” issue), explanations have been provided by Teacher Stern, whether in correspondence or in Rabinowicz 3, which make it unlikely that further documents exist or should have been disclosed (hence the Claimants’ confirmation in relation to the items identified above at paragraph 55(i) that they seek only a witness statement from the Defendant himself).
64. In respect of the two items identified in paragraph 55(iii) above, I am not satisfied that documents exist, or are likely to exist, which answer to these requests. Rahman 1 goes no further than to say (in respect of item 16 - written instructions) that the Claimants “believe that the Defendant relies on authorisation by the Claimants” and that the Claimants accordingly “require disclosure of any such written instructions evidencing such authorisation (if given)”; and (in respect of item 24 - evidence of an agreement) that the Claimants “require evidence of the alleged agreement”. In response, Rabinowicz 3 refers (in relation to item 16) to the fact that a reasonable and proportionate search has been undertaken and observes that the Claimants have not suggested any other document repository which ought to be searched; and (in relation to item 24) expressly says that the Defendant does not recall that any document exists, but “believes that the instructions were probably provided by telephone”. In the circumstances, the application for these documents is no more than speculative.
65. Furthermore, I agree with the Defendant that a number of the categories of document sought are plainly lacking in the clarity and particularisation that is required if the court is to be satisfied that there is a likelihood, as opposed to mere speculation, that the documents sought exist (by way of example, items 7 (“documentation pertaining to...”); 11 (“documentation relating to...”); and items 19 and 24 (“Evidence of...”). I agree with Mr Atkinson that this need for precision is all the more important where an application for disclosure is made so close to trial.
66. In all the circumstances, the Claimants have not satisfied me as to stage 1 of the test required in connection with an application under paragraph 17 of the Practice Direction and, in the circumstances, that application does not begin to get off the ground. It would plainly not be reasonable or proportionate for me to order the production of further documents by way of Extended Disclosure or the service of a revised Disclosure Certificate in such circumstances.
67. However, even if I am wrong on the threshold question (which for present purposes would mean that I should have inferred that documents held by third parties are within the control of the Defendant and that I should have found that all other documents which are still pursued exist, or are likely to exist), I reject the suggestion that it would be reasonable or proportionate to make the order sought and, further, that the order sought is necessary for the just disposal of the proceedings. Given the significant overlap between these questions and the questions that arise in respect of an application under paragraph 18, I shall deal with these together, in a moment, in that context.

The Informal Application under paragraph 18 of the Practice Direction

68. As I have said, the informal application under paragraph 18 was not intimated prior to Rahman 2 and it was not foreshadowed in counsel's skeleton. Unsurprisingly, given the history of the application, neither Rahman 1 nor Rahman 2 addresses the question, required by paragraph 18.3 of the Practice Direction, of why it is considered that the original Disclosure Order should be varied. Even as I write this judgment, I have no indication from the Claimants as to which categories of document sought are said to fall within the paragraph 17 application and which are said to fall under the paragraph 18 application. I can only assume that, in tacit acknowledgement of the limited nature of the Defendant's disclosure obligations as set out in the DRD, the paragraph 18 application is intended to give scope for additional disclosure that would not have been caught by the Disclosure Order – in other words it is intended to capture (by way of alternative) documents that I am invited to infer are held by third parties but are in the control of the Defendant, together with any other documents that fall outside the scope of the Disclosure Order.
69. Where, however, I have already determined that I can draw no inference as to the items identified in paragraph 55(ii) above, there could be no basis whatever for varying the Disclosure Order to include documents held by third parties. Similarly, where I have determined that I am not satisfied on the evidence that items identified in paragraph 55(iii) above exist or are likely to exist, there is also no basis for varying the Disclosure Order under paragraph 18 of the Practice Direction.
70. Furthermore, I reject the late suggestion that the Defendant be ordered to provide a witness statement under paragraph 18.4, in respect of the items identified at paragraph 55(i) above. Those items have been dealt with in correspondence and now confirmed on instructions in Rabinowicz 3. I cannot see that it is either reasonable or proportionate, or consistent with the requirements of the overriding objective, to require a yet further witness statement at this very late stage when the Defendant is entitled to be directing his full attention to the preparations for trial. As the Claimants accept, those matters can be fully explored in cross-examination at trial and, accordingly, I do not consider they will suffer any real prejudice.
71. The Claimants' final roll of the dice is to invite the court to order the Defendant to write to the third parties referred to in the Annex to the draft Order and/or the supporting evidence requesting disclosure of the categories of document requested. It is not clear that this is an application made under either paragraph of the Practice Direction, although there is no dispute that the court has jurisdiction to make such an order and I can only assume that the Claimants intend to invite the court to do so by way of variation to the existing Disclosure Order under paragraph 18. However, I do not consider that it is reasonable and proportionate to require the Defendant to take such a step at this very late stage in the proceedings, nor do I consider such a step to be necessary for the just disposal of proceedings.
72. No explanation has been given by the Claimants as to why this application has not been made before now and no evidence has been filed to identify specifically why the individual documents that the third parties would be requested to produce (described in Rahman 1 as "modest" in number) are so essential to the fair conduct of the trial. Many of the documents sought in fact cover large (or indeterminate) date ranges and I agree with Mr Atkinson that there must be real doubt over whether those documents

(if they ever existed) have been retained. Some categories of document sought are unclear and not all third party entities have been adequately identified by the Claimants. I cannot see that it would be appropriate to order the Defendant to make a request which itself lacks precision.

73. Furthermore, there appears to me to be no guarantee that third parties who still have documents will be persuaded to hand them over, particularly where they are now in liquidation. If the Claimants had established to my satisfaction that the documents held by third parties are essential to the fair disposal of the case, then I would have to take a different view, but they have not come close to doing so.
74. I cannot see that the justice of the trial is dependent upon obtaining responses from third party entities and there is nothing concrete in the Claimants' evidence to support such a suggestion. If an application of this kind is to be made, it must be made with precision and clarity and it must be properly supported by evidence. The respondent to the application must be given a proper opportunity to address it in advance of the hearing and to deal with it in submissions in full knowledge of what is being sought. Regrettably that did not occur here.
75. The reasons given by the Claimants for needing the documents (to "assess the position" before trial, to "formulate their claim", or (now) potentially to formulate the relief sought, to finalise their witness statements or to "complete" the evidential picture – some of which I deal with in more detail in a moment) are not reasons which weigh heavily in the balance when seen in the context of the inevitability of the loss of the trial date if the court were to accede to this application. To my mind, that is particularly so where the Claimants are the authors of their own misfortune. The court must have regard to the overriding objective and the need to ensure that cases are dealt with expeditiously and fairly, including allotting to them an appropriate share of court resources, while taking into account the need to allot resources to other cases. The loss of the trial date would inevitably prejudice the Defendant and would adversely impact other court users whose own trials (and in particular their listing) may be affected by reason of an adjournment and the need to re-fix this trial. In my judgment, the heavy burden that applies to any late application for disclosure will also apply to this application and I do not consider that it has been satisfied by the Claimants.

Reasonable and Proportionate/just disposal of the proceedings?

76. Finally, I turn to the question of whether (even if I am wrong as to stage 1 of the paragraph 17 test, and even if I am wrong that there are no grounds to vary the Disclosure Order under paragraph 18 of the Practice Direction) disclosure under either paragraph would be reasonable and proportionate, necessary for the just disposal of the proceedings and consistent with the overriding objective¹. In my judgment it would not, for the following main reasons:
 - i) While the issues in the proceedings are reasonably complex, and the claim is no doubt of importance to the Claimants, they have provided no good reason for the court to conclude that the documents sought are essential to the fair disposal of the trial. To my mind, the fact that this application has been made

¹ I have already dealt with these questions in connection with the discrete application for an order that the Defendant request disclosure from third party entities.

so late in the day and the manner of its making substantially undermines that proposition in any event.

- ii) The Claimants' evidence makes no attempt to explain why each of the categories of disclosure sought is of the utmost importance to the issues that will be determined at trial and why it would be genuinely unfair (or the cause of irremediable prejudice) for the Claimants not to have sight of any documents which exist (beyond the extremely general assertions made in Rahman 1).
- iii) Mr Brown conceded that the Defendant has "to a large extent provided documents which allow us to track what has happened to the Claimants' money" and that the documents now sought were really designed to "complete the process". He also conceded that various of the items sought could be addressed by way of cross-examination at trial. To my mind these concessions tend to militate against the real probative (or determinative) value of any of the documents sought in supporting the Claimants' case or undermining the Defendant's case.
- iv) It is quite obviously not reasonable or proportionate, or consistent with the overriding objective,
 - a) to order disclosure of documents at this stage in order to enable the Claimants to "assess their position" or "formulate" further claims, as I understood Mr Brown to accept. The entirely new submission that they are required to enable the Claimants better to formulate claims for relief is unsupported by any evidence.
 - b) to make an order for disclosure in the circumstances of this case in order to assist in the preparation of witness statements. Neither the Claimants' evidence, nor their submissions, has provided me with any reason to suppose that the documents sought would deal with issues that are within the knowledge of the Claimants' witnesses such that they would want the opportunity to address them in their statements, or would be prejudiced if they do not have access to them. I can see no possible basis for there to be any real prejudice given the requirements of PD57AC. None of the points relied upon in the Claimants' evidence convinces me that a fair trial cannot take place on the witness evidence absent the documents sought.
- v) I agree with the Defendant that, notwithstanding the evidence in Rahman 1, the number of documents sought is potentially large and that, even if I had been prepared to infer that the Defendant had control over the various categories sought from third party entities, it is most unlikely to be a swift or easy task to search for and find the documents. A number of the third parties are in other jurisdictions and some have, as I have said, been liquidated. It is now accepted that the exercise would result in an adjournment of the trial. I cannot take seriously the speculative suggestion, raised only during submissions and nowhere mentioned in the evidence, that it might be necessary to make an application for non-party disclosure in due course. If

this was genuinely an issue of so much importance to the Claimants, it is to my mind inconceivable that it would not have been pursued at a much earlier date.

- vi) There was some debate between the parties at the hearing over whether the documents sought fall within the scope of the issues identified in the agreed List of Issues for trial or whether they are more properly to be regarded as answering to the issues that arise on any hearing dealing with an account or inquiry in due course (if ordered). On reflection, I am inclined to think that this point is probably a red herring because, having examined Rabinowicz 3 with care, there are in fact only, I think, two categories of document (documents falling within items 2 and 7) which are said to fall outside the scope of the List of Issues for Disclosure (a list which it was accepted would encompass the disclosure required for the trial on the basis of the agreed List of Issues).
- vii) However, on balance, I agree with Mr Atkinson, that it is of significance in considering the question of whether there can be a just trial without the disclosure, that if the Claimants succeed in obtaining an order for an account and/or an inquiry, there would be no reason why, at that stage, they could not apply for further financial documents potentially relevant to that account, whether by making an application for disclosure against a third party or otherwise. From this perspective, the trial is not necessarily the final bite of the cherry for the Claimants. Requiring the trial to go ahead in these circumstances appears to me to be an entirely reasonable and proportionate response to such a late application, always bearing in mind the importance of expedition.
- viii) On the subject of expedition, the Claimants have failed to provide any real excuse for the significant delay in making the application, or for the content of the PTR Checklist, which Mr Brown candidly acknowledged he could not explain. This is important where a heavy burden rests on the Claimants given the serious procedural consequences of the court making an order for the disclosure sought.
- ix) I reject the Claimants' submission that they have only relatively recently identified the existence of significant gaps in the Defendant's disclosure such that there has been a "change of position" since the agreement of the DRD. This is a case in which the potential involvement of third party entities is clear from the face of the statements of case. If the Claimants had wanted to ensure that they obtain disclosure in respect of documents held by third parties, where there might be an argument over control of those documents by the Defendant, they could and should have raised this issue in advance of agreeing the DRD. At the very least, upon sight of the Defendant's proposals for the DRD, it should have been clear to them that (with the exception of MGAG) none of the third party entities was named as a custodian and that the data sources to be searched were very limited. At that stage, they could have requested searches in respect of other custodians by reference to other sources, thereby bringing the issue to a head.
- x) In this regard I note the provisions of paragraph 6.7 of the Practice Direction:

“It is important that the parties consider what types of documents and sources of documents there are or may be, including what documents another party is likely to have, in order that throughout a realistic approach may be taken to disclosure”.

It is noteworthy that the reason for extending the deadlines prior to the CCMC was to ensure the parties had sufficient time to review the disclosure. Whilst at this point that could only have concerned the review of their own documents, I consider that the Claimants also had ample time to consider the documents they thought the Defendant would have (and the possibility that relevant documents might be in the control of third party entities), and should have done so.

- xi) Even on the Claimants’ own case that they could not have identified the issue until they had reviewed the disclosure, they appear to have reviewed the disclosure in August 2023 and, had they been acting diligently, should have identified the potential need for an application at that point. I reject the submission made on behalf of the Claimants that they had a window in which to make the application which did not open up until 14 December 2023, after they had pursued extensive requests in correspondence. With the trial date fast approaching, and having identified the potential need for an application in their letter of 17 October 2023, the Claimants should have acted with alacrity to bring the matter before the court. Instead, they have waited until the eleventh hour to make an application (some six weeks after they accept the window to do so “opened”) and, even then, the delay since 14 December 2023 remains unexplained and the substance of the application has turned out to be an entirely moveable feast.
- xii) Given my overall conclusions, I need not draw any inference as to whether there was any ulterior motive to the strategic approach that has been taken by the Claimants, including their decision to complete the Pre Trial Checklist in the way that they did and to issue an application for a “variation” of the CCMC Order intimating a further application but providing no proper evidence in respect of that application and failing to acknowledge its real implications. Suffice to say that I am not at all surprised that Teacher Stern questioned that motivation in correspondence.
- xiii) That the Claimants have changed their position at the last minute is a function of the fact that, in many instances, requests for documents raised in correspondence, which were answered in detail by Teacher Stern in the letters to which I have already referred, were repeated in the application, without any acknowledgement in Rahman 1 that answers had already been provided. When this was pointed out in Rabinowicz 3, the Claimants appear to have appreciated that they could not pursue the categories of document referred to in paragraph 55(i) above, and instead changed their position. Equally, in relation to the categories of document in paragraph 55(ii), the Claimants were left to invite the court to draw an inference which, in my judgment, was not available on the evidence, as should have been clear.

- xiv) Against that background, and particularly bearing in mind that the Claimants appear to me to have paid scant, if any, regard to their duty to assist the court with active case management, I consider that the need for this case to be dealt with expeditiously and fairly weighs heavily in the balance. The Defendant's legal team has already been distracted from its preparations for trial by the applications that are now before the court. Any order for disclosure at this stage would not only present a yet further distraction, but would have the inevitable consequence of causing an adjournment of the trial. The Claimants have provided me with no real basis on which I could conclude that a fair trial is impossible absent the disclosure they seek.

77. Turning to a few individual items:

- i) I reject the suggestion that (even if I am wrong as to stage 1 of the paragraph 17 test) in respect of the two documents or categories of documents falling within paragraph 55(iii) above, it would be reasonable or proportionate for there to be a "targeted search". Where Rabinowicz 3 has confirmed that a reasonable and proportionate search for documents has been undertaken (item 16) and that to the extent that documents falling within this category were within the Defendant's possession and control and located on the data sets contained in the Section 2 Questionnaire they will have been disclosed (item 24), I can see no basis whatever for ordering "a targeted search". In this regard, I note that many of the Claimants' suggested "targeted search terms" identified in respect of item 24 have in fact already been used by the Defendant as agreed search terms;
- ii) It could not possibly be reasonable or proportionate to require disclosure in respect of documents that are publicly available – as is the case in relation to one of the items sought, and I did not understand the Claimants to suggest otherwise.
- iii) It is not reasonable or proportionate to require disclosure in respect of categories of document that are identified only in vague terms, particularly so close to trial.

78. For all the reasons I have given, the Claimants have not begun to satisfy the heavy burden that rests with them to show why justice requires an adjournment of the trial. Their offer, made only in reply submissions, to pay the Defendant's costs of such adjournment does not appear to me to shift the dial. The Claimants are not entitled to the disclosure that they seek and, even if I am wrong about that, it would not be reasonable or proportionate, or necessary for the just disposal of the proceedings, to make an order for disclosure.

Conclusion

79. For the reasons I have given, I dismiss the application for disclosure together with the informal application made at the hearing to adjourn the trial.

80. The trial must proceed as planned, subject to a short extension of time for service of the Claimants' witness statements. The trial will be fixed to start on the last day of

the existing trial window. I gave directions at the hearing for the preparation of the trial bundle and the provision of a trial timetable.

ANNEX

A. Wurzburg

1. Rent account statements, for Deutsche Kreditbank AG bank account number 1009854256, for the period from 2012 to 2017;
2. Rental agreements for all tenants of the property owned by Wurzburg Estate SA (“**WESA**”) from 2012 to 2017;
3. Loan agreement(s) between Flemingo Holdings Anstalt (“**Flemingo**”) and Radcliff Capital Corp (“**Radcliff**”) and/or Wurzburg Holding Limited (“**WHL**”) and/or WESA;
4. Loan agreements between (i) Montague Goldsmith AG (“**MGAG**”) and/or MG Capital and (ii) WHL and/or WESA;
5. Lichtenstein Landesbank bank account statement for 2016 onwards for the bank account number 5466.1768.2005;
6. Bank account statements for Taurin for the period of 1 February 2017 to 31 December 2017;
7. Documentation pertaining to the income in MGAG of CHF 3.5 million described as “*litigation case management fee RSA*”;

8. Bank statements for WESA and WHL from the opening date until 31 December 2007;
9. Loan agreements or bank account statements regarding the €350,000 payment concerning the lease agreement with Arabella Sheraton;
10. Bank account statements for WESA Credit Suisse client account;
11. Documentation relating to the remittance of retention from purchase of €310,000;
12. Payment confirmations and bank account statements relating to payment of €586,465.21;
13. Completion Statements for the sale of the property held by WESA;

B. Clarence Mill & Roebuck House

14. Fee agreements and/or invoices for Montague Goldsmith SA;
15. Incorporation and Shareholding Documentation relating to the Clarence Mill project;

C. Forest Hill

16. Written instructions from the Claimants for the sale of the Forest Hill property in January 2005;
17. Travers Smith completion statement for the sale of the Forest Hill property on 11 January 2005;
18. Fee arrangements and invoices concerning payment of £350,000 referred to in the completion statement was prepared by Taurin following the sale of the Forest Hill property;
19. Evidence of the calculation of profit as accounted to Flemingo in December 2006 from the sale of the Forest Hill property;
20. Invoice for the licence fee of £178,304.65 referred to in the revised completion account (i.e. specifically, Relativity MWJ-06923);
21. Documentary evidence in relation to monies paid on account in the sum of £150,000 referred to in the revised completion statement referred to at paragraph 19 above;
22. Notice of meeting and agenda for the meeting of Taurin's board of directors held on 5 January 2004;
23. Documents referred to in the minutes of meeting of the board of directors for Taurin dated 5 January 2004;

D. Bruntcliff

24. Evidence of the Second Claimant's agreement to the revised valuation of £1,714,820 in respect of the the Bruntcliff project;

25. Fee agreements and invoices for all payments to the Defendant and Montague Goldsmith associated entities in respect of the the Bruntcliff project;

E. Mystic River

26. Loan agreement(s) between Flemingo and Parry Asset Group Inc. / Seabreeze Property Investments Limited in respect of the Mystic River project;
27. Loan agreement(s) relating to the shareholder's loan from Abertay Investments Limited to Mystic River Investments 45 (Pty).