



Neutral Citation Number: [2021] EWHC 2675 (Comm)

Case No: CL-2019-000676

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 08/10/2021

**Before:**

**THE HONOURABLE MR JUSTICE CALVER**

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**Between:**

<b>(1) QUARTZ ASSETS LLC</b>	<b><u>Claimants</u></b>
<b>(2) QUARTZ ASSETS PTE LTD</b>	
<b>- and -</b>	
<b>KESTREL COAL MIDCO PTY LTD</b>	<b><u>Defendant</u></b>

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**Charles Graham QC and Oscar Schonfeld (instructed by Slaughter and May) for the Claimants**  
**Nigel Tozzi QC and Kate Livesey (instructed by Stewarts Law LLP) for the Defendant**

Hearing dates: 21 and 22 September 2021  
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**JUDGMENT**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 8 October 2021 at 11:00 am.**

**Mr Justice Calver :**

1. There are two separate disclosure applications before the court:
  - i) the Defendant’s specific disclosure application dated 4 June 2021 (“the Defendant’s Application”); and
  - ii) The Claimants’ application dated 19 July 2021 for additional disclosure (“the Claimants’ Application”) – comprising an application for expansion of the Disclosure Issues directed at the first Case Management Conference (CMC) (to which the Defendant has consented) and a direction that the Defendant’s disclosure should extend to documents held by a third party (which is disputed).

**(A) Relevant factual background**

2. The First Claimant (“Quartz Delaware”) is a US limited liability company incorporated in Delaware, USA. The Second Claimant (“Quartz Singapore”) is a limited company incorporated in Singapore. The Claimants are both special purpose vehicles (SPVs) within the Värde group.
3. The Defendant (also referred to herein as “Kestrel”), previously known as Mining Holdco A Pty Ltd, is a limited company incorporated in Australia and one of a series of Australian SPVs that were ultimately owned by a consortium of investors, led by EMR Capital Advisors Pty Ltd (“EMR”) and PT Adaro Energy Tbk (“Adaro”) (together, the “Sponsors”), and which were intended to be used (and were used) by that consortium to acquire Rio Tinto’s 80% interest in the Kestrel coal mine in Australia (“the Acquisition”).
4. On 26 March 2018, Quartz Delaware, Nomura Singapore Limited (“Nomura”) and the Defendant entered into a Mezzanine Commitment Letter (the “Commitment Letter”) pursuant to which Quartz Delaware (or its affiliate), Nomura and Indies Capital Partners Pte Ltd (collectively defined in the Commitment Letter as the “Mezzanine Lenders”) would make available a facility of up to US\$400m for the purposes of the Acquisition.
5. On 27 March 2018, Rio Tinto publicly announced that it had signed a binding agreement for the sale of its interest in the Kestrel coal mine to the consortium led by EMR and Adaro.
6. On 23 July 2018, Quartz Singapore entered into a Mezzanine Subscription Agreement (the “MSA”) with the Defendant pursuant to which a facility of US\$325m of mezzanine financing would be made available (the “Mezzanine Facility”). At the time of entering into the MSA, Quartz Singapore did not hold the funds to be provided under the Mezzanine Facility, but was instead to receive the funds from 7 Värde funds (the “7 Värde Funds”) who would then become shareholders in Quartz Singapore in proportion to the funding each provided. On 25 July 2018, the Defendant delivered a cancellation notice terminating the facility provided for under the MSA. As a result, the planned transfer of funds from the 7 Värde Funds was cancelled and Quartz Singapore never received the funds that had been earmarked for the Mezzanine Facility.
7. On 1 August 2018, it was announced that the Acquisition had completed, in part, with funds received by the Defendant from another finance-provider, Meritz, a Korean

investment house, in the form of a US\$325m mezzanine financing facility (the “Meritz Mezzanine Facility”). The Claimants later learned that the Defendant had entered into the Meritz Mezzanine Facility on 24 July 2018, the day after it had entered into the MSA and the day before it cancelled the facility provided for under the MSA.

8. In summary, the Claimants’ case is that:
  - i) Pursuant to the Commitment Letter, the Defendant appointed the Mezzanine Lenders as exclusive providers of mezzanine financing for the purposes of the Acquisition. The Claimants say that the Defendant’s appointment of Meritz as mezzanine provider was in breach of those exclusivity obligations as set out in the Commitment Letter;
  - ii) In the Commitment Letter, the Defendant warranted and represented to the Mezzanine Lenders on a daily basis from 26 March 2018 to 23 July 2018 (inclusive) that it intended to utilise the Mezzanine Facility in connection with the Acquisition. At the very latest, when the Defendant started serious negotiations with Meritz for the provision of mezzanine financing outside of the Commitment Letter and did not inform the Mezzanine Lenders of the same, those warranties and representations became untrue and misleading or false; and
  - iii) By negotiating the Meritz Mezzanine Facility, secretly and simultaneously with its negotiations for the MSA, the Defendant acted in breach of its obligations under the Commitment Letter to negotiate the MSA in good faith.
9. The Defendant denies any breach of the Commitment Letter and denies that it gave any untrue, misleading or false warranties or representations. Those denials are based in part on the Defendant’s alternative construction of key terms in the Commitment Letter.
10. The Claimants claim the loss of profits one or other of them would have made had the Defendant complied with its obligations under the Commitment Letter and, as a result, used the MSA facility (or an equivalent facility under a replacement funding agreement) instead of the finance provided by Meritz.
11. It is common ground that, in principle, the relevant Claimant should give credit for:
  - i) Any funding costs that would have been incurred by the relevant Claimant had it provided finance under the MSA (or an equivalent facility); and
  - ii) Any loss in fact avoided and/or which should reasonably have been avoided by alternative profitable investment of the unused funding commitment.
12. However, the Claimants say that:
  - i) Because, as a matter of fact, the funding that would have been made available to the Defendant under the MSA (or equivalent agreement) by the relevant Claimant would have been that Claimant’s own equity capital no funding costs would have been incurred; and
  - ii) Because neither Claimant *in fact* ever received equity capital for use as mezzanine financing for the Defendant and neither Claimant had the power to

compel the transfer to them of such funds, neither Claimant made any alternative investments or could reasonably have been expected to have made any.

**(B) The disclosure ordered**

13. Directions for disclosure were given at a CMC before Mr. Richard Salter QC on 31 July 2020. Prior to the CMC, the parties had managed to agree all but one of the Issues for Disclosure (“IFDs”) and all of the models for disclosure in respect of all of the IFDs. Accordingly, disclosure was ordered in respect of 12 IFDs.
14. The Defendant relies on IFD 9 and IFD 10 in relation to the remaining parts of its Disclosure Application. Model D extended disclosure (narrow search-based disclosure without narrative documents) was ordered in respect of both IFD 9 (quantum) and IFD 10 (mitigation).

- i) IFD 9 provides as follows:

*“Which, if either, Claimant has suffered a loss of profit as a result of Kestrel’s decision to use the Meritz finance in the Acquisition instead of the finance contemplated in the Commitment Letter and MSA and in what amount. Specifically:*

*(1) Whether, had Kestrel not used the Meritz finance in the Acquisition, following the cancellation of the MSA, Quartz Delaware would have been the party that entered into a replacement MSA or its equivalent and lent the funds committed, and has thereby sustained the loss claimed.*

*(2) What the net profit of the Claimants (or either of them) would have been had the finance contemplated in the MSA been used in the Acquisition either pursuant to the original MSA (if not cancelled) or pursuant to a replacement MSA or its equivalent.”*

- ii) IFD 10 provides as follows:

*“(1) Whether the Claimants have avoided (alternatively in breach of their duty to mitigate loss have failed to avoid) the claimed loss of profits (or any of it) by investing the funding committed in the Commitment Letter and MSA in other profitable ventures.*

*(2) Did either Claimant in fact receive by 25 July 2018 (or have the right to compel production of) the funds which it would have used to perform its obligations under the MSA, but for the cancellation of the MSA facility by Kestrel pursuant to clause 9.2 of the MSA?*

*(3) If so, has either Claimant made any alternative investments with the funds not used for the Kestrel MSA and could either have reasonably been expected to do so?”*

**(C) The Defendant’s Application**

15. The Claimants gave disclosure against those (and the other) IFDs on 11 December 2020 and 10 February 2021. The issues which remain between the parties concern the following categories of document listed in the Schedule to the draft Order:
- i) Categories 3A, 3E, 3F and 3J; and
  - ii) Categories 4A, 4B and 4C.
16. In summary, Categories 3A, 3E, 3F, 3J and the Category 4 documents are documents (or categories of documents) that appear to exist and which the Defendant maintains are relevant to its quantum and mitigation defences.
17. The pleaded issues in respect of which these categories of disclosure are said to be relevant are as follows:
- i) At paragraphs 24 to 27 of the Amended Particulars of Claim, the Claimants (one or other of them) claim to have suffered a loss of profits as a consequence of the Defendant's alleged breach of contract in not borrowing US\$143.5m from either Claimant for use in the transaction, namely (1) up to US\$112,169,167 comprising lost daily interest of US\$55,805.56 per day over a five year period; and (2) loss of the value of warrant shares (in a sum to be assessed by an expert in due course).
  - ii) By paragraph 44 of the Re-Amended Defence, the Defendant pleads as follows to the Amended Particulars of Claim:

*“As to paragraphs 21 to 25:*

*(a) The normal measure of damages applicable to claims for breach of contract entitles a wronged claimant to be put into the position it would have been in had the breach of contract not occurred subject always to the claimant's duty to mitigate its loss”.*
  - iii) And paragraph 50 of the Re-Amended Defence responds as follows:

*“50. Further or alternatively, the relevant Claimant should give credit by deduction from the sums claimed for alleged interest and warrant loss for (1) the funding costs which it would have been necessary to incur in order for the funding committed under the MSA to have continued to be made available after 25 July 2018 had it not been cancelled and (2) loss in fact avoided and/or which should have been avoided by successfully investing the cancelled funding commitment in other profitable ventures. Kestrel will say that in mitigation of their alleged loss of income in respect of the cancelled commitment, the Claimants should have sought other investment opportunities and that, had reasonable attempts been made, alternative investment income in respect of the cancelled commitment should have been secured timeously and well within the six month period for which Quartz Delaware has been recompensed for unearned interest by payment of the Additional Fee.”* (emphasis added)
  - iv) Paragraph 17 of the Amended Reply then pleads as follows:

“17. As to paragraph 50:

- (1) *The Claimants admit that they should in principle give credit, by deduction from the sums alleged, for the matters listed at paragraph 50(1) and 50(2).*
- (2) *As a matter of fact, however, the funding that would have been made available to Kestrel by either of Claimants under the MSA (or equivalent agreement) would have been that Claimant’s own equity capital. As a result, no funding costs would have been incurred by that Claimant and, therefore, no such costs fall to be deducted from the sums claimed herein.*
- (3) *Further, by the time of Kestrel’s voluntary cancellation under clause 9.2 of the MSA-and its utilisation of the Meritz Mezzanine Facilities, neither Claimant had received from its shareholders the equity capital that had been intended to be used as mezzanine financing for Kestrel under the MSA, and to this date neither Claimant has received such funds or has had the power to compel their transfer. Neither of the Claimants, therefore, has made any alternative investments with the funds that were foregone by Kestrel, nor could it reasonably be expected to have made any.”*

- v) The principle pleaded in the Re-Amended Defence and accepted in terms at paragraph 17(1) of the Amended Reply reflects what is said to be the normal measure of loss applicable in the case of a breach of lending agreement (there being an available market to lend and invest money). See, e.g., *McGregor on Damages* (21<sup>st</sup> edn) at paragraph 30-031 setting out the principle that “*Conversely,*” (referring to the preceding paragraphs 30-029 to 30-030 where cases supporting the equivalent principles applicable in the case of breaches of a lending contract by a lender are set out) “*the normal measure of damages for the borrower’s failure to accept the money contracted to be lent is the profit the lender would have made on the loan less the profit the lender can make on a substitute loan they made in the market. There appear to be no cases dealing with the question.*”

18. The key issues in the case have been agreed by the parties to include, by Issues 13, 13(1) and 13(3) in the List of Issues settled prior to the first CMC the following:

“Mitigation

*13. Have the Claimants avoided, alternatively acting reasonably should they have avoided, the lost profit claimed (or any part of it) by investing the funds committed under the MSA but cancelled by Kestrel’s notice on 25 July 2018 in other profitable ventures? In that regard:*

*(1) What was done after 25 July 2018 with the funds committed to Kestrel until that date?*

...

*(3) Did either Claimant make any alternative investments with the funds not committed to Kestrel after 25 July 2018 and could either have reasonably been expected to do so?”*

19. Nigel Tozzi QC (appearing with Ms. Kate Livesey) for the Defendant contends that the Claimants must know but have not said – and their disclosure and witness statements do not address – the question of what was done after 25 July 2018 with the funds committed to the Defendant (i.e. agreed issue 13(1)). The Claimants’ disclosure and witness statements, he submits, provide only part explanations of the position, namely, that the intended transfer of funds from within the Värde group to Quartz Singapore’s bank account for on-lending to the Defendant had yet to be made on 25 July 2018 when the Defendant served notice cancelling the funding available under the MSA, and was thereafter countermanded.
20. The Claimants’ case contained in paragraph 17(3) of the Amended Reply is that “*Neither of the Claimants ... has made any alternative investments with the funds that were foregone by Kestrel, nor could it reasonably be expected to have made any.*” Mr. Tozzi QC submits that the Claimants’ position set out at paragraph 17 of the Amended Reply, if correct, would result in a startling outcome. The Claimants do not say that the funds which would have been advanced to the Defendant were not, in fact, used elsewhere. In short, he submits, the Claimants want to claim for a theoretical loss whilst at the same time giving no credit for what can be assumed to have been an actual profit made from deploying the funds elsewhere. He submits that this is impermissible. He maintains that the Claimants’ refusal to give disclosure would prevent the Defendant (and the Court) from having a full and proper understanding of what actually happened.
21. Mr. Tozzi QC further submits that at trial the Defendant will contend, amongst other things, that there is a fundamental fallacy in the Claimants’ case: they want to be treated as if they had funds available to lend to the Defendant for the purpose of calculating their loss, yet at the same time they want to say that they had no funds available to invest elsewhere so as to extinguish or mitigate their loss. If the Defendant succeeds with its argument that the measure of the Claimants’ loss should take account of any profits that were or should have been obtained through alternative investment, the Court will need to put a figure on the credit which the Claimants have to give (or else award the Claimants nominal damages only) in the event that a breach of contract is established. The best evidence as to what the value of any credit should be is likely to be gleaned from the actual use to which the funds were put. In particular, the Defendant does not accept that the Claimants can avoid giving credit by arguing that ‘the relevant Claimant’ never had the funds. If the Claimants want to claim damages on the basis that they had funds available to lend to the Defendant, then the Defendant will wish to argue that on any assessment of their loss they must be treated as having those same funds available for use elsewhere.
22. Accordingly, Mr. Tozzi QC concludes that in order for the Court to evaluate the factual and legal validity of the Claimants’ case and the Defendant’s arguments in response to it, the Court will need a full and proper understanding of (1) the relationship between the Claimants and the relevant Värde funds, and (2) what actually happened to the funds which would otherwise have been used to make the relevant advance to the Defendant. The Defendant suggests that a full understanding of the facts is particularly important where the Court may be considering the correct approach in an area where there are no reported cases.
23. The Defendant also relies upon the fact that its expert witnesses have made plain that they require these documents in order to be able to opine on their areas of expertise. In

particular, Mr. Steadman states in his letter dated 31 March 2021 to the Defendant's solicitors that:

*“We have reviewed the disclosure provided by Quartz responsive to issues of alleged loss and alternative investment. We understand that Quartz asserts that (a) there was no alternative use for the funds that would have been invested in Kestrel because those funds were not invested in Quartz; and (b) Quartz's loss falls to be measured as the profit Quartz would have made from that investment without deduction for cost of capital. In our view, Quartz' present disclosure does not allow an Expert to calculate Quartz's loss (if any) or properly consider any alternative investment and/or appropriate cost of capital.”*

24. Whilst the Claimants take issue with Mr. Steadman's analysis both as a matter of law and fact, the correctness or otherwise of his analysis is not something that I can determine on this application.
25. Furthermore, the Court directed the corporate finance experts to consider the question of whether and, if so, at what return either Claimant could have made alternative investments with the funds not committed to the Defendant after 25 July 2018 (Directions Order, para 5(2)i.2). For want of adequate disclosure on the topic, reports have been exchanged which do not adequately address the issue. The Claimants' expert does not address the issue at all (having been instructed by the Claimants' solicitors not to do so). The Defendant's expert has only been able to address the question in theoretical and abstract terms using limited information available in the public domain: Sections 8.1 and 8.5 of his report briefly explain the difficulty.
26. The Court also directed sequential exchange of forensic accountancy expert reports which were (among other things) to quantify the *“relevant Claimant's net loss... after quantification and deduction of any loss in fact avoided, or in fact avoidable, by investment of the cancelled commitment...”*, using as a starting point the opinions of the corporate finance experts on this issue (Directions Order, para 5(2)iii.2). Owing to the lack of disclosure on the topic and the limitations of the corporate finance experts' reporting on the alternative investment issue, the forensic accountancy experts' reports are similarly incomplete. In Section 6 of his report the Claimants' expert explains that he cannot calculate losses that may have been mitigated without further factual evidence identifying investments that the Claimants have made or could reasonably have made.
27. In his oral submissions upon this application, Mr. Tozzi QC expanded upon the Defendant's pleaded case (set out above). He submitted that the documents sought are essentially relevant to three issues which are complex issues of law and fact which can only be determined after a trial, as follows:

*(1) Proper measure of loss*

28. The Claimants' case is that where finance is provided to a company by investors who get, in return, equity in the company, then no deduction is to be made for the cost of capital in the calculation of the profit of the company. But, the Defendant submits, that cannot be correct as it would result in a significant double recovery for the intended investors. The Claimants' loss of profit would then be calculated by the Claimants in this case *as if* Quartz Singapore had received and utilised the funds (US\$143.5m), and



yet those earmarked funds would have been retained by Värde and used elsewhere. The correct measure of loss must take account of alternative returns made on the funds which *would have been* advanced to Quartz Singapore. If the Claimants wish to claim damages on the basis that they had these funds available to advance to the Defendant then they must be treated as having those same funds available for use elsewhere even if they were not in fact advanced to them. Mr. Tozzi QC submits that this is an issue for trial, and that disclosure must be given in respect of it, whether or not the Claimants dispute the principle. I agree. Whilst Mr. Charles Graham QC, who appears for the Claimants together with Oscar Schonfeld on this application, forcefully submitted that Mr. Tozzi QC's argument cannot run, because the loss which the Claimants suffered is not the loss of their shareholders, that is not something which I can resolve on this application. It is at least arguable that Mr. Tozzi QC's approach to this issue – that the Claimants must be treated as having the funds available (in determining the proper measure of loss) if they wish to claim for loss and damage on that basis – will be shown to be correct at trial.

### (2) Causation

29. The Claimants accept, of course, that they must prove that the loss which they claim was caused by the Defendant's breach of contract, rather than by the fact that they had not been put in funds by Värde. Mr. Tozzi QC submits that it was only in paragraph 17(3) of the Amended Reply that the Claimants themselves raised for the first time that they had not received any funds from their shareholders, nor did they have the power to compel any transfer. He submits that whether they could compel the transfer of funds or not, it needs to be investigated whether they would have sought and obtained funds from Värde for other investment opportunities (it is pleaded that "*Neither of the Claimants ... has made any alternative investments with the funds that were foregone by Kestrel, nor could it reasonably be expected to have made any*"). That, he says, requires a full understanding of the relationship between Värde and the Claimants. Mr. Graham QC submitted that the possibility that the loss was caused by Värde pulling the plug on the financing or by the Claimants themselves deciding to pull the plug was "*highly unlikely*". But once again, I consider that this is an argument which is open to the Defendant and which will need to be determined at trial. It follows that disclosure on this causation issue should in principle be given.

### (3) Mitigation

30. Mr. Tozzi QC points out that Quartz Singapore has been capitalised by its shareholders to some extent, at least, having received funds from 25 July 2018 to date, and so he says that non-compulsion is only part of the story. Who cancelled the equity funding, when and why will need to be explored at trial. He accordingly contends that the Claimants will have to prove that no funding was available to mitigate their loss, regardless of compulsion. It is not suggested that the Claimants do not have possession or control of documents which concern this issue.
31. Alternatively, Mr. Tozzi QC submits that any loss should reflect the theoretical use of the money elsewhere. The documents are relevant to what could have been done.
32. Mr. Graham QC submitted that if the Claimants did not have power to compel the funding, it was not enough that they could merely ask for funding in order for the Defendant to get a mitigation case off the ground. Whilst that might be true on a strict

reading of IFD 10(2), documents showing how the earmarked funding was in fact invested engages IFD 10(1). These documents are undoubtedly relevant to the mitigation case which the Defendant wishes to and is entitled to run at trial.

33. Mr. Graham QC complained that Mr. Tozzi QC was advancing each of these arguments (proper measure of loss; causation; mitigation) for the first time and this was not the Defendant's pleaded case. I do not accept that submission. As explained above and below, I consider that the categories of documents sought are relevant to the pleaded issues and to IFDss 9 and 10. But even if they had not been, I would have agreed to vary the IFDs under CPR PD 51U, paragraph 18, because in the light of paragraph 17 of the Amended Reply, it is just to allow the Defendant disclosure of these categories of documents in order for it fairly to advance its arguments on measure of loss, causation and mitigation. Moreover, whether the Defendant will be able to make good its case on proper measure of loss, causation and mitigation are not questions which this court can answer now. Those are matters for trial.
34. I do, however, bear firmly in mind Mr. Graham QC's submission that the disclosure sought must be reasonable and proportionate. In particular PD51U, paragraph 6.4 provides as follows:

*“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.”*

35. I return to this issue of reasonableness and proportionality below.

36. So far as the individual categories are concerned, Mr. Tozzi QC submitted as follows:

*(1) Category 3A*

*“Category (3) Documents required to allow the parties' forensic accounting experts to assess the relevant Claimant's Cost of Capital for the purpose of verifying any net loss of the relevant Claimant.*

- A. *Un-redacted copies, insofar as they address any investments or prospective investments by any of the 7 Värde Funds, of the meeting materials/packs for, and the minutes of, the meetings of Värde's Investment Committee, between 1 April 2017 and 31 July 2019 (i.e. the period 12 months before and 12 months after the commitment to the proposed Kestrel investment), including (but not limited to):*
- i. *disclosure in unredacted form of the relevant documents in this category already disclosed by the Claimants in redacted form; and*
  - ii. *investment memos similar to the investment memos prepared re the Kestrel investment...*

37. It is clear that these documents exist. Mr. Tozzi QC submits that these documents are relevant for the reasons already given, and that the Claimants must know what happened to the earmarked funds and what investment opportunities existed for the Claimants as SPVs of Värde. So far as redactions are concerned, Mr. Tozzi QC showed me how the Claimants have entirely redacted certain Värde Investment Committee minutes, and that entries concerning this project, "Project Super", have been redacted. He points out that paragraph 44 of the Claimants' own skeleton argument refers to the documents containing "*highly sensitive confidential material pertaining to ongoing investments and investment opportunities that remain live.*" That suggests that they are relevant to these issues and yet, he submits, commercial sensitivity can be managed by the parties agreeing appropriate safeguards.
38. Mr. Tozzi QC submits that category 3A is a proportionate request in that it is limited to 7 Värde Funds and covers only a two year period. Mr. Graham QC on the other hand, submits that this is a potentially huge number of documents, many of which will be highly confidential. He submits that the breadth of the disclosure sought should be considered in the light of the weakness of the case which the Defendant now belatedly wishes to run on proper measure of loss, causation and mitigation.
39. I do consider that these documents are likely to be relevant to the dispute between the parties – that is, in relation to the arguments which the Defendant wishes to run concerning proper measure of loss, causation, mitigation as set out above.
40. However, I consider that to meet Mr. Graham QC's concerns about disproportionality, the period pre- and post- the commitment to the proposed Kestrel investment should be limited to 6 months, and accordingly the time period for disclosure should be between 1 October 2017 and 31 January 2019. I accordingly grant this request save for that time restriction and save that, so far as category 3Ai is concerned, I do not order disclosure in unredacted form of the relevant documents in this category already disclosed by the Claimants in redacted form. Rather, I order the Claimants' solicitors to re-review those documents in the light of this judgment and un-redact those documents where necessary. Commercial sensitivity can be catered for by putting in place adequate safeguards. It is to be expected that the parties will be able to agree upon the necessary safeguards.

(2) *Category 3E*

*"Documents recording which 'Shareholder' and/or which Värde Fund(s) have made payments to Quartz Singapore since 31 July 2018 (as recorded in the Quartz*

*Singapore General Ledger) to meet its ongoing expenses and the basis on which such payments have been made.”*

41. In support of this category of disclosure, Ms. Gillett says in her second witness statement as follows (paragraph 16E):

*“No further disclosure has been provided by the Claimants in relation to Request 3E, and the Claimants resist disclosure on the grounds of relevance (Michael 1, para 50(A)). The request is of obvious relevance to the issue raised in para 17 of the Reply of Quartz Singapore’s ability to access funding from its shareholders and/or “deemed participants” (to use the Claimants’ terminology). The Quartz Singapore General Ledger ... records receipts from “Funds” and from “Shareholder” but the terms on which those payments were received is not known. Those terms are relevant to the pleaded issues of loss and mitigation.”*

42. The ledger for September 2019 shows credits in Quartz Singapore’s books for “*amount received from Funds for VPA payment*” and “*amount received from shareholder*”. These documents, submits Mr. Tozzi QC, are relevant to show why the Värde Funds are financing Quartz Singapore, and to show the nature and basis of their relationship. They appear to show that the Claimants can call upon the Värde Funds for injections of capital, yet their case is that they did not receive the earmarked funds in this case and they had no power to compel the transfer of capital from the Värde Funds.

43. In response to this request, Mr. Michael states in his first witness statement served on behalf of the Claimants as follows (paragraph 50F):

*“Category 3E: The Defendant is here seeking disclosure of documents relating to payments from the Värde Fund(s) to Quartz Singapore since 31 July 2018 to meet its ongoing expenses. I note that the Defendant has sought to interrogate this issue in connection with its security for costs correspondence. The matter was not relevant in that context and it is not relevant in this context and I consider it to be inappropriate for the Defendant to now seek disclosure of those documents nominally in connection with its quantum case. Indeed, the documents sought are not relevant to any pleaded matter in dispute between the parties. The only relevant expenses are those which would have been incurred in the counterfactual scenario where the Defendant had not acted in breach of its obligations and they are addressed in Category 2. There is therefore no basis for the Defendant’s application for specific disclosure of documents falling within this sub-category.”*

44. Mr. Graham QC accordingly submits that the payments recorded in the ledger do not relate to any investment that Quartz Singapore could have made in the counter-factual scenario. However, it does not appear to me that this objection meets the Defendant’s point. As Ms. Gillett states, the request is of relevance to the issue, raised in para 17 of the Amended Reply, of Quartz Singapore’s ability to access funding from its shareholders and/or “*deemed participants*.” As mentioned above, it is pleaded in paragraph 17(3) of the Amended Reply that “*Neither of the Claimants ... has made any alternative investments with the funds that were foregone by Kestrel, nor could it reasonably be expected to have made any*”. Quartz Singapore’s ability to access funding for its operating costs in the years since its cancellation of the MSA is relevant to its ability to have accessed funding in order to have made those alternative investments. I therefore consider that this category of documents should be disclosed

but again, in order for disclosure to be proportionate, I consider that it should only be granted for the period 31 July 2018 to 31 December 2019. That will also pick up the September 2019 entries in the ledger to which Mr. Tozzi QC referred in his oral submissions.

(3) *Categories 3F and 3J*

*“3F For each of the 7 Värde Funds that would have provided equity capital to Quartz Singapore, and/or that have received a distribution of the Break Fees from Quartz Singapore:*

- i. Fund prospectus or private placement memorandum;*
- ii. Limited Partnership Agreement and/or other governing documents;*
- iii. Quarterly reports for quarters ending after 31 December 2017;*
- iv. Documents evidencing investments by the Funds between 1 April 2017 and 31 July 2019 (including size and expected rate of return);*
- v. Documents identifying market indices or comparative funds against which Värde benchmarked the performance of the 7 Värde Funds;*
- vi. Documents evidencing investment criteria and minimum hurdle rates applied by Värde for similar or contemporary investments by the 7 Värde Funds.*

...

*3J Any calculations and/or reports by or on behalf of Värde (e.g., carried out by third party advisers or independent valuers) which refer to the Cost of Equity or Weighted Average Cost of Capital of the 7 Värde Funds and the Quartz Delaware Funds and/or their individual investments, carried out between 1 April 2017 and 31 July 2019. For the avoidance of doubt this should include any independent valuation reports prepared on behalf of the 7 Värde Funds and the Quartz Delaware Funds for the purposes of reporting their performance to their Limited Partners (i.e. investors).”*

45. As for these categories, Mr. Tozzi QC submits that the relevance of these categories is the same as for Categories 3A and 3E. It is not said by the Claimants that they do not have possession or control of these categories of documents. In particular, these documents it is said, will show the sorts of returns on the Värde funds which were expected; and the fund prospectuses will shed light on the funding relationship between the SPVs and the Värde Funds. Once again, any commercially sensitive material can be subject to appropriate safeguards.
46. In response, Mr. Graham QC relies upon what Mr. Michael says in his first witness statement as follows (paragraph 50G):

*“Category 3F: This again amounts to a request for disclosure of Värde Fund-level documents, rather than documents that relate to quantification of the losses incurred by the Claimants themselves. For the reasons set out at paragraphs 45 and 47 above, any documents relating to actual or prospective investments in or by the 7 Värde Funds are not relevant to the matters in dispute between the parties. There is therefore no basis for disclosure of any documents falling within this sub-category.”*

And (paragraph 50K):

*“Category 3J: Again, the Defendant is here seeking disclosure of Värde Fund-level documents, without explaining how these might be relevant to quantification of the losses incurred by the Claimants themselves. For the reasons set out at paragraphs 46 and 47 above, any documents relating to actual or prospective investments in or by the 7 Värde Funds are not relevant to the matters in dispute between the parties. There is therefore no basis for disclosure of any documents falling within this sub-category.”*

47. This is the same argument as described above, namely that it is the Claimants who have suffered the loss rather than the Värde Funds. For the reasons set out above I do not consider that this is the correct way of analysing the relevance of these documents. Whatever the issue may have been prior to service of the Amended Reply (and in particular paragraph 17 thereof), an important issue between the parties now is whether the Claimants in fact had access to funds from the 7 Värde Funds, regardless of issues of compulsion.
48. Mr. Graham QC also complains about the breadth of disclosure sought, pointing in particular to request 3F(iv) and 3J. I consider that this complaint is a fair one. I accept that the period in 3F(iv) is too broad and I accordingly restrict it to documents evidencing investments by the 7 Värde Funds between 1 October 2017 and 31 January 2019. Furthermore, I consider that the request in category 3J is too broad, including as it does *“any calculations”* carried out *“by or on behalf of Värde”*. I accordingly limit category 3J disclosure to:

*“Reports prepared by or on behalf of Värde between 1 October 2017 and 31 January 2019 which refer to the Cost of Equity or Weighted Average Cost of Capital of the 7 Värde Funds, to include independent valuation reports prepared on behalf of the 7 Värde Funds for the purposes of reporting their performance to their Limited Partners (i.e. investors).”*

49. Once again, sensitive material can be protected with adequate safeguards.

*(4) Category 4*

50. Category 4 documents are said to be *“Documents evidencing the basis of the cancellation by Värde’s Treasury Team on 25 July 2018 of the transfer from Värde’s US account to Quartz Singapore of the funds allocated to Quartz Singapore for investment in Kestrel.”*
51. This category of documents is said to be relevant to causation – what caused (what was the basis of) the cancellation of the earmarked funds (for example, whether Värde or Quartz Singapore cancelled the funds) – as well as to mitigation of loss. Mr. Tozzi QC submits that these documents go to the heart of the Claimants’ case at paragraph 17 of the Amended Reply.
52. Category 4 then contains a series of sub-categories of general category 4 as follows.

*(5) Category 4A*

*“Documents evidencing the relationship as at 25 July 2018 when Kestrel served notice cancelling the committed funds between (a) Värde, (b) the Claimants’*

*shareholders or prospective shareholders allocated in July 2018 to provide the committed capital to Quartz Singapore (the 7 Varde Funds), and (c) the Claimants.”*

53. So far as this sub-category is concerned, Ms. Gillett states in paragraph 86 of her first witness statement on behalf of the Defendant:

*“In light of the Claimants’ position (which the Defendant does not accept) that there was no relevant duty to mitigate the claimed loss of profits by investing the unused funds committed to Kestrel in other available investments on the basis that the Claimants were entities with no funding or ability to call for or compel transfer of funding for investment, it is necessary for the Defendant to understand (1) the relationship between the Värde entities, the Claimants’ shareholders or prospective shareholders, and the Claimants as at 25 July 2018 when Kestrel served notice cancelling the committed funds; (2) what the rights and obligations of the Claimants and its shareholders or prospective shareholders were as regards the funds allocated to Quartz Singapore but not transferred; and (3) on behalf of and/or at the request of whom Värde’s treasury team cancelled the transfer of the funding that had hitherto been allocated and “locked” for provision to Quartz Singapore from the 7 Värde Funds.”*

54. She further states in paragraph 19A of her second witness statement:

*“As regards Request 4A (for ‘relationship’ documents), some partial explanations but no disclosure has been provided in response to the Request (as set out in Michael 1 at para 61A). It is not clear, and no explanation or supporting documents have been provided shedding light on what the Claimants mean by the concepts of ‘deemed participants’ and ‘economic participants from an operational perspective’ (para 9(b) to the schedule to Slaughter and May’s letter of 23 June 2021 [EM1/453]). It has not been said that documents responsive to the request do not exist; rather it is said, on instructions, that “there will be no documents to the contrary which are responsive to category 4A.” (Michael 1, para 61(A), quoting the schedule to Slaughter and May’s letter of 23 June 2021 ...”*

55. In response as regards this general category, in their letter of 23 June 2021 Slaughter & May, solicitors for the Claimants, stated as follows (to which Mr. Michael, a partner of that firm, referred in paragraph 61A of his first witness statement):

*“... the 7 Värde Funds were “deemed participants” in the Super transaction albeit that pending the transfer of funds they had not subscribed for shares in Quartz Singapore; and [...] the Värde Funds had not entered into any commitment to provide the funds to Quartz Singapore (or Quartz Delaware for that matter). This is entirely consistent with the Claimants’ case and we are instructed that there will be no documents to the contrary which are responsive to Category 4A.*

*As for the relationship between the Claimants and Värde, it is clear from the disclosure that has been provided to date and the statements made in Malik 1 that (i) VPA provides certain services to Quartz Singapore, pursuant to the March 2018 services agreement, and that (ii) VPI, the ultimate general partner of each of the Värde Funds, is the managing member of Quartz Delaware.”*

56. In summary, the Defendant's case therefore, is that it is entitled to disclosure of documents showing the relationship between the Värde entities, the Claimants' shareholders or prospective shareholders, and the Claimants as at 25 July 2018 when the Defendant served notice cancelling the committed funds. The Claimants, by contrast, submit that the only relevant aspect of the relationship between the Claimants and other entities in the Värde group, and the only aspect included in the IFDs, is whether the Claimants had the *power to compel* the 7 Värde Funds to transfer to them the funds earmarked for Project Super. Insofar as any of the documents falling within sub-category 4A are relevant to that issue the Claimants say that they have already been searched for and disclosed in response to IFD 10(2) and all that remains in sub-category 4A are documents that do not relate to that issue and which are therefore outside of the scope of the IFDs.

57. I do not accept the Claimants' submission. I consider that the Defendant's pleaded case is wide enough to cover their request under category 4A, in particular because the documents are relevant to causation, namely why the Claimants were not provided with the earmarked funds, and whether their loss was caused by the non-provision of the funds or by the Defendant's breach of contract. That is covered by IFD 9:

*"Which, if either, Claimant has suffered a loss of profit as a result of Kestrel's decision to use the Meritz finance in the Acquisition instead of the finance contemplated in the Commitment Letter and MSA and in what amount?"*

58. I consider that this category of documents is also relevant to mitigation of loss and accordingly covered by IFD 10(1):

*"Whether the Claimants have avoided (alternatively in breach of their duty to mitigate loss have failed to avoid) the claimed loss of profits (or any of it) by investing the funding committed in the Commitment Letter and MSA in other profitable ventures."*

59. In the circumstances I order disclosure of this category of documents.

(6) *Category 4B*

*"Documents evidencing what the rights and obligations of the Claimants were as regards the funding allocated to Quartz Singapore in July 2018 to include:*

*i. documents evidencing the terms on and/or the arrangements by which and by whom (a) the funding was allocated to the Claimants and (b) the transfer of the funding to Quartz Singapore from Varde's US account was entitled or required to be and was in fact cancelled;*

*ii. any documents evidencing the "operational approvals", "infrastructure" and "instructions" referenced in the witness statement of Mr Malik, para 33;*

*iii. documents evidencing the underlying arrangements and basis on which the service of a Utilisation Request by Kestrel would have triggered the capitalisation of Quartz Singapore and/or the transfer of funds (as described in the witness statement of Mr Mangun, para. 28)."*

60. I consider, by parity of reasoning (causation and mitigation), that the documents sought in category 4B(i) above are disclosable in so far as they have not yet been disclosed. It



is not sufficient for the Claimants to maintain that they have explained how these decisions were reached without disclosing all of the relevant documents.

61. So far as the documents referred to in category 4B(ii) are concerned, in paragraph 33 of the witness statement of Mr. Malik<sup>1</sup>, he says this:

*“It was intended that the relevant Quartz entity would fund the Mezzanine Facility from its equity capital following a capitalisation. Prior to the cancellation of the Mezzanine Facility, I am advised by our operations team and understand that all the operational approvals and infrastructure required to move the funds from the US bank account, which holds the funds on behalf of the Värde Funds, to Quartz Singapore’s bank account had been obtained and put in place. The last step was for the US treasury team to process the instructions to move the funds from Värde’s US account to Quartz Singapore. However, in the light of Kestrel’s cancellation of the Mezzanine Facility, our US treasury team called off the funding and ultimately Quartz Singapore was not capitalised.”*

62. The Claimants were originally agreeable to disclosing the applicable operational processes in place in respect of any transfer of funds from Värde Funds into a SPV within the Värde group, but they then subsequently refused to do so and instead sought to rely upon Mr. Michael’s summary of the processes (but without disclosing the relevant documents) contained in paragraph 61G of his first witness statement. I consider that these documents should be disclosed in so far as they have not yet been disclosed – they are relevant again to both causation and mitigation of loss. It is not sufficient for the Claimants to maintain that they have explained how these decisions were reached without disclosing all of the relevant documents.

63. So far as the documents referred to in category 4B(iii) are concerned, in the witness statement of Mr. Mangun<sup>2</sup>, paragraph 28, he says this:

*“We were ready to transfer funds imminently and were awaiting receipt of a utilisation request from Kestrel, which would have triggered the transfer of funds.”*

64. I agree with Mr. Tozzi QC that this category of documents is also relevant to issues of causation and these documents are disclosable, in so far as they have not yet been disclosed. Again, it is not sufficient for the Claimants to maintain that they have explained how these decisions were reached without disclosing all of the relevant documents.

(7) Category 4C

*Documents evidencing (1) the entity on behalf of which Värde’s treasury team acts or of which it is part; (2) on behalf of and/or at the request of whom Värde’s treasury team cancelled the transfer of the funding hitherto allocated and “locked” for provision to Quartz Singapore; and (3) any request by any person or entity that the transfer of the funds to Quartz Singapore should be cancelled.*

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<sup>1</sup> Mr. Malik is employed by Värde Partners Asia

<sup>2</sup> Mr. Mangun is also employed by Värde Partners Asia

65. The request for this category of documents can also be seen to derive from paragraph 33 of Mr. Malik's statement. They concern a relatively narrow time-frame. I consider that these documents are again relevant to causation and mitigation of loss and should be disclosed, in so far as they have not already been disclosed. Once again, it is not sufficient for the Claimants to maintain that they have explained how these decisions were reached without disclosing all of the relevant documents.

**(D) The Claimants' Application**

66. The Claimants' application for additional disclosure comprises an application for expansion of the IFDs directed at the first CMC (to which the Defendant has consented) and a direction that the Defendant's disclosure should extend to documents held by a third party (which is disputed).
67. More specifically, the Claimants seek an order, pursuant to CPR PD51U paragraph 17.1(2), that the documents of Mr. Shiv Dave and Ms. Jessica Yeo of Emindobiz Advisory Pte Ltd ("Emindobiz") responsive to IFDs 3, 3A, 4 and 5 (the "Emindobiz Kestrel Documents") be treated as being (or having been) in the Defendant's control and that those individuals be treated as data custodians for the purposes of the Defendant's disclosure: see paragraph 3 of their draft order.
68. The Claimants suggested that there was a related question as to whether Mr. Shiv Dave was retained personally to act as a consultant to one of the Sponsors, EMR, but Mr. Graham QC sensibly did not press this point which is not something that I could determine on this application.
69. It is common ground between the parties that the Emindobiz Kestrel Documents are likely to be relevant to the IFDs and the issues in the proceedings: see Mr. Michael's third witness statement at [20] and Mr. Jones' third witness statement at paragraphs [12]-[13]. In particular, Mr. Michael explains that it is clear from the Defendant's existing disclosure that Emindobiz were not only centrally involved in identifying the Mezzanine Lenders, they also took ongoing steps after the Commitment Letter was agreed to identify whether other mezzanine financing was available at a lower cost to the Defendant, leading to the replacement of the Mezzanine Lenders with Meritz.
70. The relevant factual background to this application is as follows. Emindobiz was instructed by EMR and Adaro to identify potential senior and mezzanine lenders and, potentially, equity investors for the Acquisition.
71. Emindobiz did so pursuant to a retainer. That retainer ("the Emindobiz Retainer") was a contract made between Emindobiz and EMR Capital Management Limited ("EMR Capital"), under which Emindobiz agreed to act on behalf of EMR Capital and "*a consortium of co-investors and potential joint venture partners [which], via an SPV owned and controlled by them ("Borrower") [was] planning to acquire Rio Tinto's interest in the Hail Creek and Kestrel mines*".
72. The SPV owned and controlled by the consortium of co-investors (i.e. the Sponsors), and which was to act as the Borrower, was the Defendant.
73. Pursuant to clause 1 of the Emindobiz Retainer, Emindobiz's Scope of Work was to:

- “a) Identify lenders and form a group/consortium of lenders ... who agree to provide Senior Debt with a tenor of at least 5 years on terms acceptable to the Borrower;*
- b) Prepare a term sheet for the proposed Senior Debt;*
- c) Interact with lenders and the Borrower to agree amicable terms for this loan;*
- d) Negotiate the best possible commercial terms for the Borrower during documentation of the Senior Debt;*
- e) Introduce parties who may potentially consider providing equity funding for the acquisition of the Assets;*
- f) Introduce lenders who may potentially provide mezzanine financing for the acquisition of the Assets, and if requested by EMR Capital negotiate the best possible commercial terms for the Borrower under the mezzanine financing arrangements; and*
- g) Provide advice in respect of the above and such other assistance to EMR Capital as agreed in writing from time to time.”*

74. In his oral submissions, Mr. Graham QC relied particularly upon clauses 1(d) and 1(f) of the retainer, in submitting that Emindobiz was retained to act as the agent of the Borrower (i.e. the Defendant) as well as the agent of the consortium of investors which owned and controlled the Defendant, i.e. the Sponsors, being EMR and Adaro. He submitted that clause 1(f) meant that Emindobiz would inevitably be put into a position of acting as agent for the Borrower as it could not negotiate the best possible terms on the Borrower’s behalf without assuming that role.

75. Moreover, Mr. Graham QC submits that clause 5 of the retainer also shows that Emindobiz was acting on behalf of the Borrower:

*“EMINDOBIZ (on behalf of itself and its affiliates and its and their respective personnel) acknowledges and agrees that it has not and will not take any actions that would cause EMR Capital, the Borrower or their affiliates to be in violation of any applicable laws or regulations, including but not limited to applicable anti-corruption laws and anti-money-laundering laws.”*

76. Mr. Graham QC referred to the fact that clause 11 of the retainer contains a “No agency” clause (upon which the Defendant relies) as follows:

*“Nothing herein shall be deemed to have authorized EMINDOBIZ to take any action or sign any document on behalf of EMR Capital or the Borrower or otherwise bind EMR Capital or the Borrower in any respect whatsoever. Under no circumstances shall the EMINDOBIZ be deemed to be an employee or agent of EMR Capital or the Borrower.”*

77. However, he submitted that whilst that clause provides that Emindobiz does not have power to bind EMR Capital or the Defendant by entering into a contract on their behalf, the clause does not prevent Emindobiz from negotiating on their behalf, in accordance

with clause 1(f) of the retainer. I consider that to be clearly correct. Moreover, as Mr. Graham QC submitted, this clause does not prevent Emindobiz from potentially altering the legal relations between the Defendant and a third party.

78. As is stated in *Bowstead and Reynolds on Agency* (22<sup>nd</sup> Edn), paragraph 1-007:

*“Notwithstanding its voluntary nature, where there is evidence of a conferral of authority to alter a principal’s legal relations, the normal incidents of agency are, prima facie, likely to apply even if the parties’ contract expressly disavows one being the agent of the other.”*

79. Furthermore, in *Pengelly v Finance 4* [2020] EWHC 2002 (Ch), Marcus Smith J stated as follows at [31]-[33]:

*“[31] Bowstead and Reynolds defines "agency" in the following terms:*

***‘Article 1***

***Agency and Authority***

*(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his legal relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party.*

*(2) In respect of the acts to which the principal so assents, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties...’*

*[32] It was suggested by Finance 4 that (at least in the case of a mortgage broker) the reference to "a power to affect the principal's legal relations with third parties" meant that "true" agency was limited to those relationships where the agent was empowered to affect the principal's legal relations by causing a contractual relationship to arise between the principal and the third party. Whilst, clearly, this is an instance of agency, I do not accept that the relationship of agency is limited to this case. An agent can affect his legal relations with third parties in many cases where the agent has no power to conclude a contract on behalf of his principal. Thus, and purely by way of example, a solicitor acting for a vendor in a house purchase, has authority to receive and give good discharge for the purchase monies received, but does not have authority to conclude the sale itself; equally, an insurance broker may have no power to conclude the contract of insurance, but may well be the "agent to know" for the purposes of disclosure and – if guilty of a non-disclosure or misrepresentation – may very well render the contract of insurance voidable even though the contract itself was concluded by the principal. This is because it is perfectly possible for an agent to affect the principal's legal relations with third parties in ways other than the conclusion of a contract.*

*[33] Clearly the label cannot drive the legal consequence, and the term "agent" is used frequently and in a variety of contexts. The fact that a person adopts or is given the label "agent" – or, conversely, seeks to avoid it – cannot be determinative. That is why it [sic] necessary to focus on the functions that the agent is performing. But it is important not to be too prescriptive about what functions qualify a person as being an agent with fiduciary duties and what functions do not (even though the term "agent" may be used).” (emphasis added)*

80. I agree with that analysis. As Mr. Graham QC pointed out, an agent in Emindobiz’s position is able to affect the Borrower’s legal relations by making representations during negotiations which bind the Borrower, despite the fact that Emindobiz has no power to bind its principal to a contract.
81. The fact that EMR Capital may be the party paying the agent for its work does not alter this analysis. As *Bowstead* states at 1-004: “*Nor does the fact that a third party, X, pays the remuneration of Y make Y the agent of X if Y is properly the agent of Z. It is quite common ... for an agent’s remuneration to be paid by the third party or some other person.*” Nor does the fact that the Defendant was not a party to the retainer affect this analysis if Emindobiz was in fact acting as the Defendant’s agent.
82. The issue in the present case is accordingly whether the agent has authority to negotiate on behalf of the Defendant. As the Claimants put it in paragraph 25 of their skeleton argument:
- “Accordingly, it is irrelevant that Emindobiz did not have power to bind the Defendant or the Sponsors to contractual terms negotiated with lenders; its function under the Emindobiz Retainer was undoubtedly to communicate and negotiate with third party lenders on the Defendant’s behalf (and so on the Sponsors’ behalf). Given the function it was performing it must be that the Defendant is entitled (and the Sponsors are entitled) to see what communications have been made, what negotiations carried out, on its (or their) behalf. It is inconceivable that Emindobiz could say in response to the Defendant or the Sponsors: “I have, as required, interacted and negotiated with lenders on your behalf but I refuse to tell you what I said to them, or how they responded”.*
83. I agree with the Claimants’ analysis. The Defendant has a legal right to access the documents held by Emindobiz which were created during the course of the agency relationship, in particular whilst Emindobiz was negotiating with third party lenders on its behalf. Contrary to Mr. Tozzi QC’s submission in paragraph 29.b of his skeleton argument, since Emindobiz acted as agent for the Defendant, the Defendant has relevant documents held by that agent in its control, within the meaning of CPR 31.8. “Control” covers the situation where a party’s documents are in the hands of a servant or agent (save that the principal does not have a right to possession of the agent’s own working papers which belong to the agent): see *White Book 2021*, Vol. 1, Note 31.8.2.
84. Mr. Tozzi QC submits that the documents or classes of document sought by the Claimants are not identified with a sufficient degree of specificity and that disclosure is not necessary to dispose fairly of the claim or to save costs. As to the former point, the application is framed by reference to IFDs 3, 3A, 4 and 5, and in the circumstances, I do not consider the criticism to be a valid one.

85. As to the latter point, Mr. Tozzi QC relied upon paragraph 41 of the Re-Amended Defence and in particular paragraph 41(c) which reads as follows:

*“On 19 May 2018, the Sponsors were informed by Emindobiz Advisory Pte. Ltd (“Emindobiz”), debt advisors who had been engaged by EMR Capital Management Ltd to identify senior, mezzanine and equity finance for the Acquisition, of an approach from Standard Chartered Bank who said that they had investors keen to provide mezzanine finance without warrants. Standard Chartered Bank had been approached to provide mezzanine financing in relation to the Acquisition at an earlier stage before the Commitment Letter had been entered into with Nomura and Quartz Delaware.”*

86. Mr. Tozzi QC submitted that this was the date of the first approach from Meritz offering mezzanine finance, and that it is enough for the purposes of the Claimants’ case that this has been admitted by the Defendant. Accordingly, he submitted, disclosure of these documents is not central to the issues in dispute or required to fill any notable gap in the documentary material. Further disclosure is unlikely to advance or affect either party’s case.

87. Mr. Graham QC took issue with this. He justifiably complained that this was a submission which Mr. Tozzi QC had advanced for the first time orally. Despite the late notice of this point, Mr. Graham QC was able to refer the court to an email dated 23 March 2018 which suggested that as early as that date Emindobiz was negotiating the terms of the mezzanine finance with the lenders. It may be inferred that the request to do so came from EMR Capital prior to 23 March 2018. That date pre-dated the Commitment Letter. Whilst there is an issue about this - as the Defendant’s position was that this email related to Emindobiz’s involvement in the negotiation of the terms of the mezzanine finance referred to in the Commitment Letter itself and did not evidence any request by EMR to Emindobiz to negotiate with any potential provider of alternative mezzanine finance – the point appears at least arguable and I cannot determine this factual dispute at this stage.

88. Mr. Graham QC also referred to a further email from Emindobiz to EMR Capital dated 1 May 2018 in which Mr. Dave of Emindobiz stated:

*“Our suggestions to the sponsors*

*1. This could be a good opportunity to explore to replace our existing mezzanine - without call protection and warrants (there is a cost to replace existing mezzanine, but we believe costs of call protection and warrants outweigh the cost of replacing mezzanine)…”*

89. Mr. Graham QC persuasively submitted that EMR Capital must accordingly have given instructions to Emindobiz to act in the negotiation of the terms prior to 19 May 2018. The date may very well be important as it is likely to dictate the date upon which the relevant representation (which is said to be a rolling representation on the terms of the Commitment Letter which the Defendant is deemed to repeat every day) became false. That is because in paragraph 20 of their Amended Particulars of Claim the Claimants plead as follows:

*“(1) Pursuant to paragraph 10.1(a) of that Letter, Kestrel represented and warranted to Quartz Delaware, inter alia, in the terms of paragraph 1.1 of the Commitment Letter and in the circumstances represented and warranted that its advice there referred to was and remained correct, i.e. that its intention was that the financing of the Acquisition would include the Mezzanine Facilities (as defined).*

*(2) Pursuant to paragraph 10.1 (b) of the Commitment Letter, Kestrel represented and warranted to Quartz Delaware that nothing had occurred and no information had been withheld that had resulted in the advice referred to under paragraph 20(1) above being untrue or misleading in any material respect.*

*(3) Pursuant to paragraph 10.2 of the Commitment Letter, the representations and warranties referred to above were deemed to be repeated by Kestrel daily from 26 March 2018 until such time as all the Key Documents, including the Warrant Instrument and a Utilisation Request, inter alia, were signed.*

*(4) Quartz Delaware and Quartz Singapore relied upon those representations in deciding to negotiate and conclude the terms of the MSA with Kestrel.*

*(5) The moment Kestrel started serious negotiations with Meritz for provision of mezzanine finance outside the arrangements contemplated by the Commitment Letter and did not inform the Mezzanine Lenders of the same, the representations and warranties referred to under paragraphs 20(1) and 20(2) above became untrue or misleading in a material respect and the daily representations and warranties referred to under paragraph 20(3) above were false.*

*(6) Further, from the moment referred to under paragraph 20(5) above, Kestrel’s failure to inform the Mezzanine Lenders of its negotiations with Meritz amounted to a breach of paragraph 10.3 of the Commitment Letter.”*

90. Mr. Graham QC accordingly submitted that documents created by Emindobiz in the course of its agency are likely to be central to the Claimants’ claims based on the Defendant’s breach of warranty, misrepresentation and breach of obligation to negotiate in good faith. These submissions appear to me to be well founded.
91. Whilst I agree with Mr. Graham QC’s submissions in this respect, I also consider that there is merit in Mr. Tozzi QC’s submission that it is not reasonable and proportionate for the Defendant to have to give disclosure of documents created in the course of the Emindobiz agency which fall within *all* of IFDs 3, 3A, 4 and 5. I accordingly consider that, in the interests of proportionality as well as clarity, paragraph 3 of the Claimants’ draft order should be restricted to IFD 5 (in the amended form set out in the Re-Amended Disclosure Review Document and including IFD 5(1)-(3)).
92. I add that I do not consider it to be an answer to this application that, according to Mr. Jones (see paragraph 7 of his fourth witness statement on behalf of the Defendant), Emindobiz indicated (i) in mid/late 2020 that it would not assist with the Defendant’s disclosure process and (ii) in October 2020 that it would not assist the Defendant in relation to the litigation. As Mr. Graham QC pointed out, Emindobiz has not yet been asked for these documents pursuant to an order of this court. If in fact the Defendant

fails to disclose these documents, there may be other legal remedies open to the Claimants or they may invite the court to draw particular inferences in support of their case, depending upon the circumstances of the refusal. That is all for another day.

93. In the circumstances it is not necessary to go on to consider the interesting and more difficult question of whether there is an arrangement or understanding between the Sponsors and the Defendant pursuant to which the Sponsors have already given the Defendant access to their documents in these proceedings.
94. Finally, I consider that the Defendant should serve a rejoinder to the Claimants' Amended Reply, setting out clearly its case in response, in particular, to paragraph 17 of the Amended Reply so that there is no uncertainty as to the Defendant's case on causation and loss which the Claimants must meet at trial.
95. I leave it to counsel to draw up an order which reflects the terms of this judgment, including a direction that the Defendant shall serve a rejoinder within 21 days of the date of that order.