



Neutral Citation Number: [2023] EWHC 677 (Comm)

Case No: CL-2018-000664

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Date: 27/03/2023

Before :

MR JUSTICE FOXTON

Between :

(1) TERRE NEUVE SARL
(2) LARGELY INVESTMENT SA
(3) LAURENT ZAHUT

Claimants

- and -

(1) YEWDAL LIMITED and ors

Defendants

Alex Barden and Samuel Rabinowitz (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for the Claimants

Meyer El Maleh (the Fourth Defendant), Sara Sasson (the Sixth Defendant), Carole Sasson-El Maleh (the Seventh Defendant) and Robert Nagggar (the Tenth Defendant) in person.

Hearing date: 13 March 2023

Further submissions: 15, 16, 17 and 23 March 2023.

Judgment Approved

(handed down subject to editorial corrections)

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE FOXTON

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 27 March 2023 at 10:30am.

The Honourable Mr Justice Foxton:

Introduction

1. This is a complex claim: complex in the underlying facts, in the causes of action in issue and in the procedural difficulties to which the case has given rise.
2. In summary, the Claimants say that they paid over a significant sum for what they describe as “tax optimisation” purposes under a scheme in operation between October 2008 and October 2012.
3. The scheme is said to have been recommended to the Third Claimant (**Mr Zahut**) by the late Mr Ernest Sasson. It involved payments to the First Defendant (**Yewdale**), an English company, from where it is said that they were meant to be transferred to the Second Defendant (**REDS**), from where – presumably with some fiscally improved status – it is said that the monies were then intended to be applied for the ultimate benefit of Mr Zahut. The Claimants say that the monies paid were misappropriated, and they have brought a variety of claims against those said to have undertaken, organised and/or facilitated the misappropriation. Those claims are brought in contract, delict and unjust enrichment under Swiss and French law.
4. In October 2012, there were police raids on property linked with the Claimants in France, and Mr Zahut became aware of a French police investigation into Mr El Maleh.
5. There have been settlements between a number of parties. The particular issues which have come before the court at this hearing concern the following defendants (**the Yewdale Defendants**):
 - i) Yewdale, the recipient of the payments.
 - ii) The Fourth Defendant (**Mr El Maleh**) who was a director of Yewdale until April 2019, and also director of a company called GPF SA (**GPF**), a Swiss company involved in the tax optimisation scheme. Mr El Maleh was convicted in Geneva of money-laundering on 29 January 2013, and convicted of money laundering by a French court on 19 October 2018 (when he was sentenced to 6 years’ imprisonment). The Claimants allege that Mr El Maleh controlled Yewdale, REDS and GPF.
 - iii) The Sixth Defendant (**Ms Sasson**) is one of the heirs to Mr Sasson, it being alleged that Mr Sasson was involved in the alleged misappropriation of assets, and in control of GPF, REDS and Yewdale. Ms Sasson is sued solely in that capacity. At some point she held 25% of Yewdale.
 - iv) The Seventh Defendant (**Ms Sasson-El Maleh**) is Mr Sasson’s other heir. She is sued in that capacity, but also faces an unjust enrichment in respect of payments made to her totalling Euros 47,000 and a claim for breach of fiduciary duty in her capacity as a director and corporate secretary of GPF. Ms Sasson-El Maleh is currently a director of Yewdale and owns some or all of its shares.
 - v) The Tenth Defendant (**Mr Nagggar**) was also a director of Yewdale, and for a period its only director. The case against him is based on an inference that, as a director of

Yewdale, he was aware that funds remitted to Yewdale under the tax optimisation scheme were being misappropriated.

6. Mr Zahut has been convicted of charges of tax evasion, money laundering, forgery and the use of forged documents. The witness statement filed by the Claimants in support of this application dated 24 November 2022 refers to that conviction and says, “he is appealing that conviction”. However, I understand that the appeal was dismissed on 31 March 2022.
7. It will be apparent that the Yewdale Defendants are alleged to have had different levels of involvement in the events giving rise to these claims. Pursuant to an order made by Christopher Hancock QC, they served a single defence through a firm of solicitors, Campbell & Co. In broad summary the defence is follows:
 - i) The Claimants’ account of the contractual structure is challenged.
 - ii) It is alleged that the monies transferred to Yewdale were applied for the benefit of Mr Zahut by various means.
 - iii) It is accepted that Mr El Maleh and Mr Sasson controlled GPF, REDS and Yewdale.
 - iv) It said that Mr Naggar was not aware of anything of concern in relation to Yewdale and, in effect, that Ms Sasson El-Maleh had no real knowledge of or involvement in the affairs of GPF.
 - v) A limitation defence is advanced.
 - vi) It was alleged that the claim is barred by the doctrine of illegality or *ex turpi causa* because the scheme was founded on an attempt to move assets from Mr Zahut’s name to certain corporate names for fraudulent purposes.

Procedural history

8. There was a lengthy hiatus during the case while service and jurisdictional issue were resolved. There were also settlement discussions (which were largely successful) between the Claimants and other defendants. On 22 February 2021, RKM Law (**RKM**) came on the record for the Yewdale Defendants.
9. On 29 April 2021, Mr Justice Jacobs held a CMC which addressed disclosure issues. He ordered the Yewdale Defendants to serve witness statements confirming:
 - i) “the source and repositories of documents and/or communications” which that defendant had access to, use of or were otherwise within that defendant’s control from 1996 to date;
 - ii) all potential sources of documents such as “phones, laptops, servers etc” listed in Question 2 of Section 2 of the DRD and “what email accounts, mobile phone numbers and/or other sources of electronic communication” the defendant had, or had had, use of, including what devices had been taken by the French and/or Swiss authorities and whether they had been returned; and

- iii) what documents, devices or other data sources they retained following seizures by the French and/or Swiss authorities.

10. Mr El Maleh swore a witness statement in response in which he stated the following:

- i) All of Yewdale's bank accounts were subject to a restraint order. The relevant accounts appear to have been located with HSBC in Mayfair.
- ii) The documents for GPF and Yewdale had been held in Switzerland, and during the police operation a "huge volume of documents, desktop computers, laptops, iPad, memory sticks, USB, hard CD disks and mobile phones were seized by the Swiss police".
- iii) The files and folders of Yewdale and REDS were controlled and managed by a Ms Vasarino, and emails and copies were placed in folders "to be retained in the archives of Yewdale and REDS".
- iv) When his family home and office were searched by the police, documents from the archives of Yewdale and REDS were seized, the archives mainly consisting of hard copy documents or PDFs saved on USB sticks and a CD. Mr El Maleh appears to have retained the CD but says it has since been confirmed that it has been damaged and no information can be retrieved from it.
- v) His iPhone, Blackberry and iPad belonged to GPF. He is not certain whether or not they had been returned by the Swiss police to GPF (the implication being that they had not been returned to him).
- vi) "For the purposes of these proceedings all the remaining archives of Yewdale and some documents of REDS have now been assembled and brought to his office" for search and production, which are "mainly in hard copy, PDF format save in USB stick" (sic).
- vii) The email account Y1 was used exclusively by Ms Vasarino until October 2012 and then by him but he cannot go further back than 2013/2014 when searching it.
- viii) He created the account M1 in March 2013 but had no dealings with the Claimants by or from that date.
- ix) He no longer had access to another email account.
- x) He no longer had access to the phone or sim card he used when working with GPF.
- xi) He has had an iPhone and iMac computer used for private use since June 2013 which are not linked with the Claimants, Yewdale or REDS.
- xii) After his conviction, only personal documents seized at his family home were returned to him.
- xiii) He has in his possession a huge box of documents representing the archive of Yewdale and a hardcopy box of REDS documents.

xiv) Documents had been made available to him in the French proceedings.

11. Ms Sasson-El Maleh also provided a witness statement on her own behalf and on behalf of Yewdale in which she adopted Mr El Maleh's witness statement. She said GPF had not provided her with any electronic devices and that she had never had possession of GPF documents. She identified the M2 email as her address.
12. Mr Naggar, in his witness statement, also adopted the contents of Mr El Maleh's witness statement. He said he had been appointed as director of Yewdale because he was a British citizen, the role was unpaid, that he had no involvement in its activities and that he had never had possession or control of its documents or been provided with any electronic devices by Yewdale. He said documents he had exhibited to a jurisdiction statement made on behalf of all of the defendants had been provided to him by Mr El Maleh. He had a phone, computer and email account for personal and private use only.
13. Finally, Ms Sasson provided a witness statement adopting Mr El Maleh's witness statement. She said that she had never had possession or control of any documents relating to Yewdale, GPF or REDS. She has an iPhone, computer and email account for personal and private use only.
14. The Yewdale Defendants deployed a number of emails ("the Disputed Emails") as attachments to their defence which the Claimants contended had been doctored to support aspects of the defence. It is right to note that the emails do appear to have been doctored in order to provide a misleading impression which would support the case which the Yewdale Defendants are advancing, but I have not been asked to make any finding as to who was responsible. Mr El Maleh said he had found the emails in the form in which they were exhibited in the archive of papers of Yewdale and some documents of REDS which Ms Vasarino had created and managed. The Yewdale Defendants withdrew any reliance on the Disputed Email, but clearly the fact that they were produced and deployed is an obvious point of concern. Further, it later emerged that one document disclosed by the Yewdale Defendants apparently bearing Mr Zahut's signature appeared to have "lifted" that signature from another document.
15. The Yewdale Defendants' disclosure was produced on 4 August 2022 with inspection on 16 September 2022. The disclosure comprised about 1,800 pages in the form of one continuous PDF, with the result that there were no native documents or original metadata. Some of the material disclosed comprised extracts from documents (in particular bank statements). The Claimants wrote a lengthy letter on 9 September 2022 making extensive criticisms of the Yewdale Defendants' disclosure, to which RKM replied on 26 September 2022 stating:
 - i) Ms Sasson had searched all of the sources referred to in her witness statement.
 - ii) Mr Naggar had searched all of the email accounts and devices referred to in his witness statement.
 - iii) Mr El Maleh and Ms Sasson-El Maleh had carried out searches on their behalf and for Yewdale which RKM had reviewed for relevance. The letter stated, "the documents which our clients have produced are in support of their consolidated Defence and it tackles the various and fundamental roots of the claim", which I have been asked to interpret as reflecting a fundamental misunderstanding on the part of Mr Megah of RKM

as to the test for disclosure, and whether it extends to adverse documents. That would have involved a very serious deficiency in Mr Megah's understanding, and I not willing to infer that this was the case. Indeed, later in the letter Mr Megah stated that the Yewdale Defendants "have disclosed all the documents which they have searched and found. They confirm not having cherry picked documents for disclosure". However, I accept that the letter does suggest that the review for relevance of email and electronic documents was conducted by the Yewdale Defendants themselves. By contrast, the letter stated that RKM had "received a huge volume of documents which we have searched and reviewed" and that "the documents collected from searches were sent to our firm for review".

iv) At the inspection meeting, Mr Megah confirmed that RKM had access to the Yewdale archive and the REDS documents, and to some extent, the Y1 email account back to December 2014, which was said to be the limit of review which was technically possible. He confirmed that the USBs had been reviewed by the Yewdale Defendants themselves as had electronic devices and personal email accounts. He also confirmed that there had been no independent attempt to review the CD.

16. On 13 October 2022, RKM came off the record. The Yewdale Defendants have acted in person since that date. Mr Naggar said that there were financial reasons for his decision to cease instructing RKM, and the other Yewdale Defendants attributed the decision to the fact of "the costs becoming exorbitant to us", and that "our finances did not allow us to have a lawyer to defend us". The Yewdale Defendants have clearly experienced difficulties in dealing with this complex action without legal representation, and in what for everyone except Mr Naggar is a second language, and in understanding what the procedural rules require of them, or permit, at each stage. They have also experienced difficulty in dealing with the lengthy and frequent correspondence generated on the Claimants' behalf.

The Application

17. On 24 November 2022, the Claimants issued the present application. As presented at the hearing, it sought the following relief:

- i) The Yewdale Defendants were "to identify and supply all relevant devices or other data sources, and access to all relevant email and/or phone accounts and any other data sources (including all available devices/ accounts/ sources identified in their witness statements of May 2021) to an independent e-disclosure provider who shall be appointed by the Court (the "EDP")". The criterion of "relevance" was not specified.
- ii) The Yewdale Defendants are to "supply all hard copy documents from any relevant document repositories" (cf. (i) above) to the EDP.
- iii) The EDP is to image all of the contents of all electronic devices and associated with all email accounts, phone accounts or other data sources, and to upload all hard documents, and then apply the existing search terms to the material with certain modifications.

- iv) All responsive documents are to be provided to a court-appointed independent lawyer who would identify relevant documents and redact those which were privileged on one of the recognised grounds, so that those could be the subject of disclosure in the usual way.
 - v) That “unless the Defendants now comply with and take all steps necessary to facilitate the orders above, they will be debarred from defending these proceedings” – i.e., a collective “unless order”.
 - vi) The costs of the EDP and the Lawyer were to be paid by the Yewdale Defendants.
18. Following exchanges at the hearing, the Claimants produced a revised form of order, which amended the existing order by including a category of identified sources in Schedule A which were to be provided to the EDP by each Yewdale Defendant, without restricting the wider obligation, but did link the “unless order” to the particular Yewdale Defendant who had not complied with the specific obligations imposed on them.
19. The grounds of the application are as follows:
- i) there had been a wholesale failure to conduct disclosure;
 - ii) RKM had not reviewed all data sources;
 - iii) native files had not been provided;
 - iv) the Yewdale Defendants and RKM had not understood their obligation to disclose adverse documents;
 - v) there were some categories of documents which should have been present but were not disclosed (including accounting ledger documents, communications and documents relating to the criminal trial); and
 - vi) the failures were particularly significant in a case which involved allegations of fraud, where the Claimants had no visibility as to what had been happened when funds reached Yewdale and when (as I accept) serious and legitimate issues have arisen in relation to some disclosed documents.
20. The response of the Yewdale Defendants is as follows:
- i) the Claimants are asking for documents the Yewdale Defendants do not have and have never had;
 - ii) all of the so-called Vasarino archive, which was the only archive, has already been provided to the Claimants by RKM;
 - iii) the USBs could not be produced without the approval of the French judge (this complaint concerning USBs provided from the French proceedings);
 - iv) they did not have “other items such as CDs, USB keys or hard drives”, only USBs from the French proceedings which Mr Zahut has already disclosed.

The Jurisdiction

21. I accept that the court has jurisdiction to make an order following the broad structure sought.
22. An order of this kind was made by Mr Justice Teare in *The Nolan Family Partnership v Walsh* [2011] EWHC 535 (Comm) in respect of documents belonging to the defendant but which were physically held by a third-party company which was in administration. The defendant had not engaged with the proceedings, and it was the company in administration which resisted the order. The Judge held that “the court does have inherent jurisdiction to appoint a supervising solicitor to enable discharge of the first defendant’s disclosure obligation in order to ensure that that obligation is fulfilled” ([10]). There was no suggestion that the documents had been or otherwise would be reviewed for relevance.
23. I made an order of a similar kind, for the purposes of identifying assets against which a judgment debt could be enforced in *Lakatamia v Su* [2020] EWHC 865 (Comm), in circumstances in which an injunction requiring asset disclosure had not been complied with against a respondent who had already been found to be in contempt of the disclosure order. The order was directed to social media and email accounts.
24. In addition, such an order was made in a pre-trial context in *JD Classics Limited v Hood* [2021] EWHC 3193 (Comm) by Mr Justice Bryan. He ordered a defendant who was actively engaging with the litigation, but whose approach to disclosure had been found to be seriously defective in a number of respects, and whose account of that exercise had already been subject to judicial criticism, to identify his electronic devices, and then provide all of those devices for third party inspection under a similar inspection framework to that sought in this case.
25. An order of this kind, however, is necessarily intrusive. In *CBS Butler Ltd v Brown* [2013] EWHC 3944 (QB), [38], Tugendhat J noted:

“In my judgment, an order which would deprive the defendants of the opportunity of considering whether or not they shall make any disclosure is (in the words of Hoffmann J [in *Lock v Beswick*]) an intrusive order, even if it is made on notice to the defendant. It is contrary to normal principles of justice, and can only be done when there is a paramount need to prevent a denial of justice to the claimant. The need to avoid such a denial of justice may be shown after the defendant has failed to comply with his disclosure obligations, having been given the opportunity to do so.”
26. He referred at [46] to the claimant not coming “near to surmounting the threshold that it has to surmount if it is to persuade the court to make so intrusive an order as one for disclosure to be carried out without the intervention of the defendants.”
27. *Lock v Beswick* [1989] 1 WLR 1268, to which Tugendhat J referred, was a decision of Hoffmann J, in which he referred at p.1281 to the need to “employ a graduated response”, and ensure “proportionality between the perceived threat to the plaintiff’s rights and the remedy granted .”
28. In *A v B* [2019] 1 WLR 5832, [22], Mann J noted that:

“the general rule is that the disclosing party has to carry out the disclosure exercise itself, applying a relevance test as best it can. It is assumed in the first instance that it will do that bona fide. In most cases comfort can be taken (at least to a degree) by the fact that solicitors are involved, and they are better placed to assess relevance than the party (and not inclined to suppress a relevant but damaging document). If one party considers that the disclosing party has not carried out its obligations properly then the remedy is an order for specific disclosure which focuses the issue more sharply. That order is not generally an order which involves the receiving party itself conducting a search and assessment of a very large body of the disclosing party's documents in order to see what relevant documents might be found, though I accept that in theory such an order would be possible under the “any other order” head under CPR r31.5(7). What is more likely to be ordered than that (if there is a problem which justifies it) is disclosure of a specified class of documents as a whole without any test for relevance being carried out by the disclosing party, though even then the disclosing party is the party which looks for that class in the first place.

29. At [30(vi)], he emphasised that what “must not be lost sight of, that the whole exercise (including the order itself) is a highly intrusive one, and any digital image of the kind in issue in these cases is likely to contain irrelevant material which is private and confidential (if not privileged) and which should not, if it can be avoided, be seen by the claimant at all.”
30. Such an order will also necessarily introduce a significant additional cost into the litigation, and the potential for satellite litigation. It should not be seen as simply another tool in the box of a litigant with legitimate complaints about the other party's disclosure.
31. In considering whether an order of the kind sought will be a proportionate response to the claimant's interest in obtaining disclosure of relevant documents, relevant factors will include:
 - i) Whether the disclosure is being sought for the purposes of the court's adjudicative jurisdiction, where it is possible for adverse inferences from deficiencies in disclosure to make good some of the adverse effects of inadequate disclosure, or whether it is sought in a context where this will not be the case – e.g. because the claimant is seeking to trace assets or find assets against which to enforce a judgment (see by analogy *Olympic Council of Asia v Novans Jets LLP* [2023] EWHC 276 (Comm), [51]-[56]).
 - ii) How significant the documents are in the litigation, and whether there are alternative means of addressing the issues to which the documents relate.
 - iii) Whether the documents have been subject to no review at all (as in *Nolan*), or whether one party believes (as is frequently the case) that the job has not been done as well as it should have been. As Mann J noted, the usual remedy in the latter case will usually stop far short of the order sought here.
 - iv) The degree of intrusion the order represents.
 - v) How compelling the case is that the relevant party has failed properly to conduct the disclosure exercise, and how widespread or significant the apparent failure is. In this regard, parties will frequently disbelieve another party's protestations that relevant

searches have been done and no relevant documents located. However, at the pre-trial stage of the proceedings, it is not generally possible for the court to reach a concluded view on what has happened, nor proportionate to make the attempt, and it may well be unwise to express one given the potential impact of such a finding at trial. Courts very frequently state that they cannot “go behind” such assertions, leaving it to the complaining party to pursue the issue at trial, when the court can make the appropriate finding and give effect to its consequences (*West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm), [86]).

vi) The cost of the exercise, having regard to the amount of the claim.

32. In this case:

- i) The documents are sought to enable the Claimants to prove their case, and challenge the Yewdale Defendants’ case, but no proprietary claim is brought. Adverse inferences, therefore, are, in principle, capable of addressing the Yewdale Defendants’ contention that funds transferred to Yewdale were routed back for the benefit of Yewdale.
- ii) Documents showing what happened to the monies paid to Yewdale are significant in the litigation, albeit, as I explain below, there are alternative means of addressing aspects of that issue.
- iii) The effect of the evidence is that the hard copy documents have been subject to review by a solicitor, but the electronic documents have either not been reviewed at all, or reviewed only by the Yewdale Defendants themselves.
- iv) There are legitimate concerns in relation to the authenticity of certain disclosed materials.
- v) Requiring the individual Yewdale Defendants to hand over their electronic devices, or give access to email accounts, in cases where these are highly likely to have a personal use, to be imaged in another jurisdiction, is a particularly intrusive form of order.
- vi) The evidence as to the efficacy of the disclosure exercise varies between different types of document. However, there are clear statements by the individual Yewdale Defendants supported by statements of truth as to the existence or non-existence of documents, or the use made of mobile phones and devices, and it would require a strong case for the court to conclude at this stage that those statements cannot be accepted.
- vii) I have no sense of the cost of the exercise. The claim is for some €10.6m.

33. I now turn to consider the terms of the order sought by the Claimants.

An order requiring the Defendants to identify any other devices and other data sources (electronic or hard copy), and access to any other email and/or phone accounts, which contain documents relevant to the issues for disclosure in these proceedings and are in the possession or the control of that Defendant

34. Mr Justice Jacobs has already ordered the Yewdale Defendants to produce witness statements providing:

“confirmation as to the sources and repositories of documents and/or communications which that Defendant and/or the First Defendant has (or had) access to or use of, or which are (or have been) otherwise within the control of that Defendant and/or the First Defendant (within the meaning set out in PD51U, Appendix 1, paragraph 1.1), during the period 1996 to the present day, including both historic sources/ repositories and any sources/ repositories that have been available only subsequent to 2012. Such confirmation to address: i. all the potential sources of documents (such as phones, laptops, servers etc) listed in Question 2 of Section 2 of the DRD; and 12 ii. what email accounts, mobile phone numbers and/or other sources of electronic communication each Defendant has (or had) use of or access to, in the period since 1996 (including any such accounts or sources that are historic / no longer used). If such access is restricted or is not possible, an explanation to be provided as to why that is so.”

35. Witness statements have been provided which give those confirmations. Whatever the position might be at trial, with the benefit of cross-examination (on which I express no view one way or the other), no sufficiently compelling case has been presented at this hearing which would enable me to conclude that the confirmations given were not true to the best of the Yewdale Defendants’ information and belief, such that a further order to essentially the same effect is now required. No further order is justified.

Yewdale

The CD said to contain the Yewdale archive:

36. The existence of this document is not in dispute, merely its readability. It appears to have an exclusively business content. It has not been searched to date. I am satisfied that it would be proportionate to order Yewdale to provide it to an EDP if it is still in Yewdale’s possession. If the CD can be read or data recovered, then I am also satisfied that it would be proportionate for the document to be subject to the search and inspection procedures contemplated in the most recent version of the draft order. If, as suggested in the communication of 23 March 2023, it is now suggested that Yewdale no longer has access to the CD, then this must be stated in a document signed by Mr El Maleh in which Mr El Maleh states:

“I believe the facts stated to be true. I understand that proceedings for contempt of court may be brought against any person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth”.

USBs said to contain the Yewdale archive

37. The evidence of Mr El Maleh has been inconsistent as to whether these USBs exist, or whether the only USBs are those provided to Mr El Maleh by the French authorities and which record the evidence in the French proceedings. There needs to be a clear answer to that question.
38. I am satisfied that I should make the following orders:

- i) Yewdale must confirm whether it has in its possession or control USBs which contain the Yewdale archive, which are **not** the three USBs handed over by the French authorities in relation to the French proceedings. That response is to be supported by a statement of

truth. If, as suggested in the communication of 23 March 2023, it is suggested that Yewdale does not have such USBs, then this must be stated in a document signed by Mr El Maleh in which Mr El Maleh states:

“I believe the facts stated to be true. I understand that proceedings for contempt of court may be brought against any person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth”.

- ii) If the answer is no, then no further order is made in relation to this category. However, Yewdale must be aware that the clear effect of Mr El Maleh’s earlier statement is that there are such documents. In those circumstances, it seems inevitable that the Claimants will invite the court at trial to conclude that these documents have been withheld because they would undermine the case of one or more Yewdale Defendants.
- iii) If the answer is that Yewdale does have USBs in their possession or control containing the Yewdale archive, and which are **not** the three USBs provided by the French authorities in relation to the French proceedings, then there has been no review of those USBs by a lawyer. The documents would appear to be purely business documents rather than containing personal data. Handing over a USB is clearly much less intrusive than handing over an electronic device.
- iv) Accordingly, I am satisfied that it would be proportionate to order Yewdale to provide any such USBs to an EDP for the document to be subject to the search and inspection procedures contemplated in the most recent version of the draft order.

Hard copy documents said to comprise the Yewdale archive

- 39. The effect of the evidence is that these documents were provided to RKM for review and were reviewed by them.
- 40. However, the production of extracts from some of those documents suggest that parts of the documents have been held back, and that only some bank statements have been handed over.
- 41. I am satisfied that Yewdale should provide directly to the Claimants all bank statements relating to Yewdale bank accounts which are in its possession and control, and do so without redactions. There is nothing to suggest that there would be any sensitive or personal data, or privileged material, in these documents. **It is no answer to point to the Claimants’ disclosure. Yewdale and /or Mr El Maleh must provide copies of any Yewdale documents they have in their possession and control.**
- 42. I would also note that, in terms of obtaining bank statements from Yewdale’s Mayfair bank accounts, there are further options available including:
 - i) an application under the Bankers’ Books Evidence Act 1879; and/or
 - ii) an order requiring Yewdale to write to its bank, requesting provision of a full set of bank statements (*Lakatamia v Su* [2020] EWHC 865 (Comm)).

43. If there are any other documents only parts of which were provided to the Claimants then the entirety of those documents should be provided directly to the Claimants. RKM confirmed that no material had been held back for reasons of privilege (letter of 26 September 2022). **Yewdale and Mr El Maleh need to understand if it is clear that only parts of documents have been produced, and they have the full document in their possession or control, they will be in breach of this order with the consequences which will follow. It will be enough simply to assert all documents have been produced.**

Mr El Maleh

USBs said to contain the Yewdale and REDS archives

44. As I have stated, the evidence of the Yewdale Defendants is inconsistent as to whether these USBs exist (that is also true in relation to the REDS archives), or whether the only USBs are those provided to Mr El Maleh by the French authorities and which record the evidence in the French proceedings.

45. I am satisfied the following order is appropriate:

- i) I will order Mr El Maleh to confirm whether he has in his possession or control USBs which contain the Yewdale archive, which are not the three USBs provided by the French authorities in relation to the French proceedings. That response is to be supported by a statement of truth. If, as suggested in the communication of 23 March 2023, it is suggested that Yewdale does not have such USBs, then this must be stated in a document signed by Mr El Maleh in which Mr El Maleh states:

“I believe the facts stated to be true. I understand that proceedings for contempt of court may be brought against any person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth”.

If the answer is no, then no further order is made in relation to this category. However, in that event, Mr El Maleh must, in the same witness statement, explain what USBs he is referring to at paragraphs 15, 18 and 29 of his fifth witness statement and what became of the same, and he should note the comment at [38(ii)] above. **Mr El Maleh should be aware that the letter of 23 March does not answer these questions. It needs specifically to address the language in the fifth witness statement which is not consistent with the statement made in the 23 March letter.** Further, the explanation must be supported by the following statement by Mr El Maleh:

“I believe the facts stated to be true. I understand that proceedings for contempt of court may be brought against any person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth”.

- ii) If the answer is that Mr El Maleh does have such USBs in his possession or control containing the Yewdale and/or REDS archive, and which are not the three USBs provided by the French authorities in relation to the French proceedings, then there has been no review by a lawyer of those documents and the same order as that made in relation to the Yewdale at [38(iv)] above is appropriate.

USBs said to contain documents relating to French and Swiss proceedings

46. Mr El Maleh accepts that he has received three USBs containing documents from the French proceedings. It would appear that Mr Zahut has similarly received, and in his case disclosed, documents provided to him from the French proceedings. Mr El Maleh has expressed concern as to whether he is permitted to produce these documents as a matter of French law, and has asked the English court to approach the French court directly for that material.
47. There is no suggestion that there is any personal material on the USBs, and given the subject-matter of the French proceedings, the USBs would appear to be a potential source of relevant material. There was no material before me from either party as to the status of these USBs under French law.
48. I am satisfied that the approach which addresses this issue in a proportionate manner is as follows:
- i) Mr El Maleh should provide the USBs to the EDP.
 - ii) Mr Zahut should provide the documents he obtained from the French proceedings to the EDP.
 - iii) A de-duplication exercise should be undertaken to see if there are any additional documents on Mr El Maleh's USBs which Mr Zahut does not have.
 - iv) If there are such additional documents, they should be subject to the search terms in the draft order, and a review of responsive documents undertaken by independent counsel.
 - v) However, no documents should be provided to the Claimants pending a further order of the court.
 - vi) That will allow the court to consider, on this occasion with the benefit of evidence from the Claimants as to the French legal position, any concerns relating to French law when the scope and scale of the documentation is known.

CD said to contain the Yewdale and REDS archives

49. If this CD is in Mr El Maleh's possession or control, then the order at [36] is appropriate, for the same reasons. If, as suggested in the communication of 23 March 2023, it is now suggested that Yewdale and/or Mr El Maleh no longer have access to the CD, then this must be stated in a document signed by Mr El Maleh in which Mr El Maleh states:

"I believe the facts stated to be true. I understand that proceedings for contempt of court may be brought against any person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth".

Hard copy documents said to constitute the Yewdale archive and/or REDS archives

50. For the same reasons, it is appropriate to make the orders at [41] and [43] above in relation to Yewdale and REDS hard copy documents. The Claimants' solicitors confirmed in their letter of

10 October 2022 their understanding that Mr Megah of RKM had told them that he had reviewed the REDS hard copy documents as well. I am not persuaded that paragraphs 15, 18 or 27 of Mr El Maleh's witness statement are referring to different documents to those reviewed by RKM.

Archive(s) of documents relating to KPMG and/or FINMA, in relation to GPF and/or the matters with which the instant proceedings are involved; including the reports by KPMG in relation thereto and any other reports by FINMA and/or the liquidator that Ds have referred to (Ds' Response to the Disclosure Application dated 20.1.23, page 3; Ds' "Reponse au Temoignage de Zahut" dated 3.3.23, pp.10, 21, 32, "Response au Temoignage de Zahut" dated 3.3.23, p.14; Ds' skeleton argument of 8 March 2023, p.20; Submissions of D4 at hearing of 13 March 2023, transcript page 89, line 25).

51. The Yewdale Defendants have stated that neither they nor the Claimants have access to the FINMA report nor the KPMG report which FINMA commissioned. However, some of the various references given by the Claimants do involve assertions as to what KPMG (in particular) and FINMA have said, the source of which is not clear.

52. In these circumstances, I am going to order Mr El Maleh to confirm whether or not he has a copy of the KPMG and/or FINMA reports relating to GPF, or documents produced by KPMG and/or FINMA relating to the investigation into GPF. The answer must be supported by the following statement by Mr El Maleh:

"I believe the facts stated to be true. I understand that proceedings for contempt of court may be brought against any person who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth".

53. If the answer is no, no further order is made. If the answer is yes, those documents should be provided directly to the Claimants by way of disclosure.

The set of Documents said to have been seized by the authorities but returned in 2013

54. Mr El Maleh has referred to personal/family documents seized from his family home and returned to him after conviction. I am not persuaded any order relating to these documents would be proportionate, given the low probability that they will contain relevant information and the high probability that they will contain personal information.

Email account YI

55. This email account appears to relate to Yewdale, and, therefore, to have a solely business use. It is Mr El Maleh's evidence that it has only been used by Ms Vasarino and (from October 2012) himself. RMK made some attempt to access the email account, but experienced limits on how far they could go back, with the result that it has not been searched by a lawyer. The Yewdale Defendants have raised no objection in principle to attempts to search that account – for example they have not suggested that its contents will be irrelevant, or that it has personal information within it.

56. In these circumstances, I am persuaded that it would be proportionate to order that access to the account be given to the EDP to run the search terms on it, and for any responsive documents to

be the subject of the independent lawyer's review, with relevant non-privileged documents being disclosed to the Claimants.

Email account M1

57. This account was created by Mr El Maleh in March 2013. It has not been reviewed by RMK, and the only issue raised by Mr El Maleh in relation to it is that by March 2013, he was no longer communicating with the Claimants. However, that is not a sufficient reason not to search the account, which might well contain relevant documents relating to the earlier period. Further, it is clear that at least some relevant documents were forwarded to that email address.
58. In these circumstances, I am persuaded that it would be proportionate to order that access to this account be given to the EDP to run the search terms on it, and for any responsive documents to be the subject of the independent lawyer's review, with relevant non-privileged documents being disclosed to the Claimants.

Mobile phone, iPhone and iMac

59. On the evidence:
- i) Mr El Mayer no longer has access to the mobile phone referred, which belonged to and was returned to GPF.
 - ii) The iPhone and Mac are for personal use.
60. An order requiring Mr El Maleh to send these devices for third party review would be highly intrusive, there being a significant prospect that they contain irrelevant personal data. There is no material which suggests that there is a significant prospect of these devices containing relevant material. In these circumstances, I am not persuaded that it would be proportionate to make any order in relation to these devices.

Ms Sasson

61. There is no suggestion in this case that Ms Sasson played any role in contemporaneous events. She is sued as one of the heirs to Mr Sasson's estate, and my understanding is that under Article 602(1) of the Swiss Civil Code, it is said that the inheritors of an estate become jointly and severally liable for debts, unless they disclaim their inheritance within a time period. The only issue for disclosure concerning her is whether she is "the joint owner of property belonging to Mr Sasson's estate with joint power of disposal over the rights of the estate".
62. That is a very narrow issue, and I am sure a targeted request for production of any will, probate or similar document, or Swiss legal evidence as to intestate inheritance, will prove sufficient to answer the question. In particular, if no evidence is adduced that any inheritance was disclaimed within the relevant period, the court is likely to conclude that this did not happen.
63. The order seeks production of her iPhone, home computer and access to her email account. Ms Sasson's evidence is that these were at all times used for personal and private purposes, and there is nothing before the court at this hearing to gainsay this contention. In these

circumstances, I am not satisfied that the order sought in relation to Ms Sasson is necessary or proportionate.

Ms Sasson El Maleh

64. Ms Sasson El Maleh is sued as one of Mr Sasson's heirs (as to which I repeat the observation at [62]), but also in her capacity as a director of GPF and as a recipient of a payment. Her evidence, which I understand will be challenged at trial, is that she had no involvement in GPF's affairs, was never provided with mobile devices by GPF or a GPF email account and has never had possession of GPF documents.
65. The Claimants seek an order requiring her to send an iPhone and iMac for imaging, and that she should give the EDP access to her email account M2. However, the electronic devices are current devices (at least in May 2021), and there is no evidence to suggest that they contain anything other than personal information. That is also true of the email account. In the circumstances, I am not persuaded that it would be proportionate to make an order. On the evidence, Ms Sasson-EL Maleh does not own the iMac, which is her husband's. I have already refused to make an order in relation to that device.
66. Finally, paragraph 11 of Ms Sasson-El Maleh's witness statement refers to certain items – documents and electronic devices – seized by the police in 2012, and states that the family items seized from the family home were returned. I am not persuaded that an order for production of devices on which there is likely to be a significant quantity of personal information, and where there is no evidence before the court to suggest that they were used for business purposes or contain relevant information, would be proportionate.

Mr Naggar

67. As I have stated, the case pleaded against Mr Naggar is based on the inference that as a director of Yewdale "he knew of the movement of monies through its account and in particular the fact that suspiciously large sums of money were being transferred to and from that account with little or no apparent economic justification". No claim is made against him for any payment received. He has not been the subject of any criminal investigation nor been the subject of any seizure by the authorities. It is Mr Naggar's evidence, which I understand will be challenged at trial, that he was a non-executive director because Mr Sasson, an old friend, wanted a British citizen on Yewdale's board, and that he had no involvement in Yewdale's business and was not paid for his role.
68. Mr Naggar says that he was never provided with any electronic device by Yewdale, The order sought applies to a phone, computer and email account which were in use in 2021 and were stated to be "for my personal and private use only". There is no material to suggest any of the devices were used in relation to Yewdale's affairs and I am not persuaded that it would be proportionate to make any order in relation to them.

The costs of review

69. So far as those documents which I have ordered be provided directly to the Claimants are concerned, no issue arises.

70. However, as to the material which is to be subject to EDP process, the EDP and independent lawyer will inevitably look to the Claimants to be responsible for their costs in the first instance. The order should so provide, but reserve the issue of whether those costs should be paid by the Claimants or Yewdale and/or Mr El Maleh until the outcome of the exercise is known. It will also be open to the Claimants to withdraw the application if, on further reflection, they are unwilling to bear those costs in the first instance.

Should the order be an unless order?

71. I am satisfied that the orders against Yewdale and Mr El Maleh should be “unless” orders, such that non-compliance will debar the party in breach from advancing a positive defence, albeit it will remain for the Claimants to prove their case, and to deal with any matters which the Court is required to take of its own motion:

- i) The orders I have made impose clear and proportionate obligations on Yewdale and Mr El Maleh.
- ii) The court is entitled to have regard to the fact that the issues raised in relation to the adequacy of the disclosure of these defendants goes back to 2021.
- iii) The records of what became of the money received by Yewdale are of obvious importance to the issues in the case.
- iv) There is a particular need for prompt compliance, given the trial is listed for November 2023.