[2019] EWHC 1381 (Ch)

IN THE HIGH COURT OF JUSTICE **BL-2017-000228**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

BEFORE

HIS HONOUR JUDGE SIMON BARKER QC SITTING AS A JUDGE OF THE HIGH COURT

BETWEEN

(1) WHITE WINSTON SELECT ASSET FUNDS LLC
(a limited liability corporation incorporated under the laws of Delaware, USA)

(2) ENGLISH CUT LONDON LIMITED
(formerly White Winston London Limited)

Claimants

-and-

(1) THOMAS MICHAEL MAHON

(2) S. REDMAYNE LIMITED

Defendants

Representation

Mr Jeremy Reed, instructed by Irwin Mitchell LLP, for the Claimants

Mr Thomas Michael Mahon, the First Defendant, in person

Mr Michael Wigglesworth a director of S. Redmayne Limited for the Second Defendant

Trial : 26, 27 and 28 February 2019, 1 March 2019, 16 April 2019, 4 June 2019

JUDGMENT (1)

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript.

JUDGE SIMON BARKER QC :

1 Thomas Mahon, the first defendant, ('D1') is a tailor. D1 began his career in 1983 as an apprentice with S. Redmayne Limited, the second defendant, ('D2'). In 1995, D1 established his own tailoring business and built up a steady and loyal customer base in the UK, Europe, and, as a result of sales trips, the USA. In 2005, he incorporated English Cut Limited ('ECL') which took over his business as a bespoke tailor. Given the need for considerable personal attention, D1's bespoke tailoring business maintained a fairly constant turnover level which reached a plateau at around £250K per annum. In about 2014, D1 had it in mind to expand the business by also offering less labour intensive made to measure garments in addition to bespoke tailoring. One of his American customers, Todd Enright ('TE'), became interested in funding this expansion commercially through an entity in which he is a partner, White Winston Select Asset Funds LLC, a Delaware incorporated company, which is the first claimant, ('C1'). This led to a series of revolving credit or loan agreements with ECL said to have escalated over a two year period from an initial advance totalling US$250K under an agreement dated 17.6.15 to indebtedness in excess of US$3.3million by 31.7.17. C1's security for its loans was or included a floating charge.

2 C1, as a floating charge holder, placed ECL in administration on 31.7.17. The validity and accuracy or otherwise of the ECL's indebtedness of US$3.3million to C1 was the subject of some comment during the trial but it is not in issue before me and nothing in this judgment reflects a finding one way or the other about that. Following a brief marketing exercise, on 1.9.17 English Cut London Limited, formerly White Winston London Limited, ('C2', and, collectively with C1, 'Cs'), of which TE is a director, bought ECL's business and various assets of ECL, including goodwill, from ECL's administrators in what was in substance a prepack. In the sale and purchase agreement, the business sold was defined as "the business of [ECL] as currently operated by [ECL] at the Business Premises"; and, "the Business Premises" were identified as leased premises at 14-16 Market

Street, Brampton and at 58 Chiltern Street, London. The consideration for this transaction was £60K, of which £18K was attributed to goodwill, plus a further £30K in the event that terms as to assignment of the business lease at Chiltern Street, London were met. According to ECL's administrators' proposals, issued on 22.9.17, ECL's trading between 31.7.17 and 1.9.17 was confined to selling stock and as from 1.9.17 ECL ceased trading. According to D1, on 31.7.17 the administrators told D1 that they did not want him to resign as a director but his services as a tailor were no longer required and he was free to pursue an independent career as a tailor. I accept that is an accurate reflection of what the administrators told D1. D1 did not have a service contract as a director or a written employment contract and he was not subject to any restraint of trade agreement or terms.

3 Cs issued the claim form in this action and an application for interim relief on 27.10.17, the day after they obtained an assignment of certain specified causes of action that ECL may then have had for breach of confidence, breach of fiduciary duty, breach of duty as a director, breach of contract for employment or services, and misuse of lists of actual and potential customers ('ECL's lists'). The principal focus of the intended claims was D1. The proceedings followed a solicitor's letter before action dated 10.10.17, which was sent to D1 before Cs had acquired such causes of action. The assignment was rectified on 1.11.17 to correct the misidentification of C1's state of incorporation from Utah to Delaware, nothing turns on this.

4 Cs' claims against D2 were discontinued, with the court's permission, during the trial. D2 was represented at trial by Michael Wigglesworth, its director, ('MW'). MW was a tailor at D2 while D1 served his apprenticeship. MW is a long standing friend of and a sympathiser with D1. However, it is clear that there was no wrongdoing on the part of D2. The terms of discontinuance included discharge of an interim injunction, first obtained on 2.11.17, and payment of D2's costs of the action in the agreed sum of £6K.

5 The claim against D1in breach of confidence is straightforward, as are the relevant facts on the evidence before me. On 1.8.17, the day after C1 placed ECL in administration, D1 arranged for ECL's lists, which were based on email addresses for contact through MailChimp, an electronic marketing platform, to be

copied electronically and provided to him and/or available for his use. The total number of names on ECL's lists was estimated by D1 at the time at 4,500, but apparently exceeds 5,000. As D1 readily admitted in cross-examination, he had it in mind that he might want to access and use the information on ECL's lists, or at least the email addresses of a number of persons on ECL's lists, in the course of carrying on a new business in his trade as a tailor. However, D1's view was and is that ECL's lists were not ECL's property because he had built up the content, that is email addresses linked to names or simply email addresses, over the course of 20 years mainly from contacts with his blog about himself and tailoring, which is also called English Cut, and which at all times he kept separate from ECL. That view would be correct had D1 sourced the email addresses for his email communications from the records or any database of his blog; but, that is not what happened. D1 had provided the contact details built up through his blog to ECL in about 2013 so that it could have its own lists of actual and potential customers for its sales and marketing purposes; thereafter ECL's lists appear to have been expanded by the addition of ECL's own customers' contact details and further details provided by D1.

6 D1 did make use of ECL's lists on two occasions. First, on 21.8.17 he emailed 19 customers who then had open orders with ECL. Secondly, on 4.10.17, he emailed 109 customers whom he regarded as established customers of himself personally.

7 The former email contact informed such customers that ECL had entered administration and that he had left ECL and would not cut or oversee progress of their pending orders for garments, recommended that the customer contact ECL to ascertain the status of the order, and concluded by informing the customer that he would continue in business as a tailor on his own account and be in business again in the near future. The selection of the names appears to have been from D1's recollection of the names of customers with whom he regarded himself as having a close personal relationship and recollection of pending orders and details such as cloth. A number of the customers receiving the 21.8.17 email had been, or may have been, D1's customers when he was a sole trader, but as from the incorporation of ECL in 2005 they became ECL's customers. These emails led to a dialogue and the transfer of a number of orders to D1. One example is Sir Jonathan Ive, who then had an open order for seven garments and who was a very long standing and significant customer. It was not suggested on behalf of Cs

that he would have been likely to remain with ECL once he knew that D1 had left. The same appears true of many, if not all, of the other 18 customers. It emerged in evidence that these were not the only customers with open orders at ECL, rather they were identified by D1 from his recollection of open orders and his personal relationship with the particular customers. However, the inescapable fact is that D1 took ECL's lists and used them for this contact because it was a convenient shortcut.

8 The latter email sent on 4.10.17, which was sent variously in one of three similar versions, was aimed at customers in the USA to promote a forthcoming sales visit by D1 to Atlanta, Boston, New York and San Francisco in November 2017 and to solicit appointments for bespoke and made to measure suits. D1's view was that, regardless of the fact that since the incorporation of ECL such sales trips had been made for that company, he personally had an established customer base in the USA based on such trips which he initiated before ECL was incorporated and which grew through national and international interest in his English Cut blog. Be that as it may, the lists used to identify the customers' contact details were ECL's lists.

9 The trial before me is confined to liability. The evidence deployed at trial did not extend to the extent or value of any business attributable to these email contacts. That said, there appears to be a very substantial volume of financial material concerning ECL in the trial bundles. What the email responses referred to in evidence do show is that D1 was very highly regarded by customers as a bespoke tailor and that many of those customers whose email communications were in evidence regarded D1 personally as their tailor and trusted him personally to oversee all aspects of the tailoring of their garments. In other words, their customer loyalty was to D1, not ECL.

10 Even though the likelihood is that many, probably the great majority, of the names and addresses on ECL's lists were provided to ECL by D1 from outside sources, in particular D1's English Cut blog, they were not all from such sources. Crucially, and as already noted, the lists obtained by D1 on 1.8.17 and subsequently used by him had been created for ECL in 2013 and developed thereafter by ECL.

11 There can be no serious argument against a finding that ECL's lists comprised confidential information. There can be no basis for doubting that ECL's lists were communicated to D1 as such (that is as ECL's lists of actual and potential customers and their contact details) in circumstances imposing an obligation of confidence on D1. There can be no realistic argument that the instructions which D1 gave to a third party holding or hosting ECL's lists, which instructions resulted in D1 receiving or securing access to copies of ECL's lists, were duly authorised by ECL or for ECL's benefit. Thus, and as Mr Reed, counsel for Cs, submitted, the obtaining, copying and retaining of ECL's lists sufficed to establish the elements of breach of confidence; see, if authority were needed, Robb v Green [1895] 2 QB 1 and Coco v A. N. Clark (Engineers) Limited [1968] FSR 415. The use made of ECL's lists for the purpose of obtaining email addresses of specific customers also constituted beaches of confidence.

12 It is no answer to liability for breach of confidence that ECL's lists were used merely a shortcut or that a number of the names were established customers of D1 before ECL was incorporated and that many, even the great majority, of the individuals regarded themselves as customers of D1 rather than ECL. It is also no answer to the issue of liability for breach of confidence that, had he applied himself, D1 could have compiled email lists for those 19 and 109 individuals whom he contacted.

13 This is a clear and classic case of a shortcut or springboard misuse of confidential information.

14 Cs' application for interim relief was first heard on 2.11.17. D1 was represented by Queen's Counsel under the CLIPS Scheme and gave an undertaking in a form equivalent to an appropriate interim injunction. That undertaking was given by D1 until trial or further order and the order itself was endorsed with a penal notice. The interim application had the effect of nipping in the bud any future misuse of ECL's customer lists. Mr Reed, for Cs, accepted in his submissions at trial that, following destruction of the lists in D1's possession or control, there is no need for a permanent undertaking or injunction and any remedy for Cs sounds only in damages or an account of profits. Consequently, D1 was released from his undertaking during the trial.

15 This is not all there is to the case or all that needs to feature in my judgment in this case. However, as I see it based on the evidence drawn to my attention, this short judgment encapsulates and addresses the breach of confidence claim made by Cs, the flaw in D1's defence, and the judgment on liability in relation to breach of confidence to which Cs are entitled. It is clear that this aspect of the claim is straightforward. There were at most three issues for exploration in evidence and argument in relation to breach of confidence: (1) the circumstances in which D1 came to have for his own use access to ECL's lists, (2) the source of the email addresses used by D1 on 21.8.17 and 4.10.17, and (3) what use, including any other use than on 21.8.17 and 4.10.17, was made by D1 of ECL's lists.

16 I now turn to the question of D1's alleged breach of fiduciary duty and director's duty. The hallmark of fiduciary duty is loyalty. Loyalty is the underlying principle of the specific duties of a director which are now enshrined in the Companies Act 2006 ('CA2006'). As a director of ECL, and while an employee of ECL, D1 will have owed a fiduciary duty to ECL.

17 As noted above, I accept D1's evidence as to what ECL's administrators told him about getting on with his career as a tailor. I also accept D1's submission that he had sought to resign as a director upon ECL entering administration. Cogent evidence was given in the witness statement of Frank Palmer, a solicitor and friend of D1, ('FP') as to efforts FP made to secure the administrators' agreement to D1 resigning as a director of ECL during August 2017. I also note that, as Mr Reed acknowledged, this aspect of Cs' claim, if successful, cannot lead to a different or greater remedy than that available for breach of confidence.

18 Cs recast the particulars of breach of fiduciary duty and director's duty alleged against D1 shortly before the pre-trial review ('PTR'). Six breaches of duty as a director of ECL were identified : (1) commencing trade as a tailor in conjunction with D2; (2) exporting and misusing ECL's lists; (3) actively soliciting the transfer of business from ECL to D1 and/or D2; (4) actively soliciting ECL's employees to work for D1 and/or D2; (5) failing to disclose his own wrongdoing; and, (6) failing to cause customer lists and prospective customer lists to be kept in an organised and/or secure manner.

19 It is clear from the evidence that, for their own convenience in dealing with the administration of ECL, ECL's administrators did not want D1 to resign as a director and that, on 11.8.17 and again on 25.8.17, they made their position clear to FP when he telephoned them on D1's behalf to express D1's desire to resign as a director of ECL. As a matter of law, D1 was entitled to resign as a director but, at least initially, he appears to have misunderstood the legal position. In the event, D1 did resign on 15.12.17. In my view, although D1 did not complete the formalities of resignation until 15.12.17, through FP, if not personally, he had made clear his desire to cease being a director on, if not before, 11.8.17 and again on 25.8.17. On the evidence before me it appears probable that ECL's administrators appreciated and acknowledged D1's position but also that they discouraged D1 from resigning and disregarded his wish to resign until he did formally resign on 15.12.17.

20 Having regard to the director's duty principally relied on by Cs and taking into account D1's contention that he had sought to resign in August 2017, Mr Reed drew attention to s.170(2)(a) CA2006 which provides :

> "A person who ceases to be a director continues to be subject –
>
> (a) to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information, or opportunity of which he became aware at a time when he was a director";

and, for the principal duty relied on by Cs, to s.175 CA 2006 which provides :

> "(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.
>
> (2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)".

21 Other particular duties relied on by Cs, which are not extended by CA2006 beyond the date on which a director ceases to be such, were : acting in a way the director considers in good faith to be likely to promote the success of the company (s.172 CA2006) and exercising reasonable skill care and diligence (s.174 CA2006).

22 Mr Reed submitted that by securing access to and the use of ECL's lists on 1.8.17, and, even if he had resigned on 11.8.17, by sending the 19 emails on 21.8 17 and the 109 further emails on 4.10.17 D1 put himself in a position of conflict of interest and duty.

23 The email of 21.8.17 to each of 19 customers having open orders was phrased in a way that fell short of touting for ECL's business but was likely to bring about adverse consequences for ECL. Further, at that time, ECL still had a business. The email contacts on 4.10.17 with 109 customers were intended to secure business for D1. However, at that time ECL no longer had a business or business assets. Moreover, the only business that D1 would be likely to have secured was that of customers who regarded D1 personally, and not ECL, as their tailor.

24 Mr Reed submitted that the court has no alternative but to find Cs' claim based on breach of director's duty and, in particular, s.175 CA2006 made out. Mr Reed also submitted that even though this aspect of the claim may add nothing to the remedies available to Cs, that is not a reason why the breach of director's duty claim should not have been advanced and Cs acted properly and reasonably in so doing.

25 D1, in his closing submissions, raised an argument under s.1157 CA2006 that he had acted honestly and reasonably and that, having regard to all the circumstances of the case, the court should exercise its power to excuse him from liability. I do not regard it as honest or reasonable for a director to appropriate to his own use the company's customer lists. On the issue of liability, this applies no less in principle where the director has himself been instrumental in building up and/or collating information outside the scope of performing his duties and has then provided that information to the company for inclusion in its own customer lists. The breach of duty is in appropriating to his own use and/or accessing the information through the company's property, namely its customer lists.

26 When analysing Cs' claim for breach of fiduciary duties and breach of duty as a director it is important not to lose sight of the following (1) D1 owed fiduciary duties and duties as a director to ECL, including in respect of its business; (2) D1 did not owe a free standing duty to the business itself or to avoid conflicts with the interests of third parties; (3) ECL ceased trading not later than, and had no

business or business assets as from, 1.9.17; (4) D1 was not subject to any form of contractual restraint of trade; and (5) on 31.7.17 the administrators had told D1 that he was free to go and continue his career as a tailor elsewhere.

27 Irrespective of whether or not D1 had ceased to be a director – or could or should be treated as having ceased to be a director – he remained subject to the duty to avoid conflicts of interest under s.175 CA2006. However, that duty depended for its subsistence upon the company, ECL, continuing to have interests with which D1's direct or indirect interests would, or possibly might, conflict. The fact that customers contacted through ECL's lists would in any event have chosen to place their orders for garments with D1 rather than ECL did not negate or diminish the conflict of interest up to the point at which ECL sold its business and business assets.

28 As to events as from 1.9.17, I find it difficult to follow, and it has not been explained by Cs, how conduct after ECL ceased trading and sold its business could give rise to a breach of the duty to avoid conflicts with the interests of the company. From that point, the duty to promote the success of the company under s.172 CA2006 was rendered nugatory and there was nothing left for the application of the duty to exercise reasonable care, skill and diligence. Further, in my view, it would be unjust to hold D1 liable or accountable for breaches of his duties as a director which are not continued by s.170(2)(a) CA2006 in circumstances where, after he had made efforts to notify the administrators of his desire to resign from office, rather than accept D1's stated wish they sought to deflect him from so doing for their own convenience.

29 As to the alleged particulars of breach of fiduciary and director's duty, the evidence justifies the following findings and conclusions.

30 As to (1), D1 did not commence trade as a tailor in conjunction with D2, rather he established his own business, which he was entitled to do.

31 As to (2), it was unquestionably a breach of fiduciary duty and director's duty under s.175 CA2006 to secure copies of and/or access to ECL's lists on 1.8.17 and to use them as a shortcut on 21.8.17. At that time ECL had not ceased trading. However, given that ECL's trading was limited to disposing of stock, the extent to which ECL suffered loss or D1 relevantly profited are, of course, different (as well as future) questions. By 4.10.17 ECL had no business or

business assets and there were no extant interests with which D1's duty would or might conflict.

32 As to (3), there is a large overlap with the position under particulars (2). The 21.8.17 email did not actively seek to solicit the transfer of business from ECL to D1 and/or D2, the email's text urged customers to contact ECL and made clear that D1 was not then in business on his own account, albeit that the text also made clear that he intended to be trading in the near future. There was no reference to D2 in this email. The email of 4.10.17 was a blatant attempt to solicit business for both bespoke and made to measure garments and it made an ambiguous reference to D2. However, as from 1.9.17 ECL had no business or business assets. Further, D1 had no connection with and owed no fiduciary or director's duties to either of Cs.

33 As to (4), D1 had no contractual restraint limiting his freedom to establish a rival tailoring business, whether bespoke and/or made to measure. The evidence is clear that those of ECL's employees who left ECL and went to work for D1 needed no soliciting. They were close and loyal to D1. Further, as from 1.9.17 ECL had no tailoring business in which they could be employed. There was no legal impediment to D1 offering employment in competition with Cs.

34 As to (5), D1 did fail to disclose his wrongdoing in relation to ECL's lists on 1.8.17. Such disclosure would have been likely to enable wrongdoing by exploitation of ECL's lists to have been prevented altogether. D1 also failed to disclose the use made of ECL's lists on 21.8.17. Against that, he had sought to resign not later than 11.8.17 and ECL had no business or business assets after 1.9.17. Cs have not alleged or, apart from the point noted in the second sentence of this paragraph, identified any particular consequence of D1's failure to disclose his own wrongdoing.

35 As to (6), D1 does appear to have kept ECL's lists in an organised and secure manner so far as third parties are concerned. Under particulars (6), D1's breach was to abuse his right of access to ECL's lists. In substance, this adds nothing to the particulars at (2) and (3).

36 Thus, there is a time-constrained and limited basis for finding that D1 was in breach of fiduciary duty and in breach of his duty to ECL as a director. This finding (as identified in paragraphs 31, 32, 34 and 35 above) is narrower in ambit

than, and is accepted by Cs as adding nothing to, the finding already made in respect of the breach of confidence claim. It is also much narrower than the finding sought by Cs.

37 This brings me on to case management of these proceedings. The claim form put the estimate of damages at £50K to £100K and the court issue fee was paid on that basis. The particulars of claim are commendably clear and succinct, running to less than seven pages including one page for the relief claimed. The defence is also brief, running to five pages of narrative. No expert evidence was envisaged or required on liability issues.

38 The appropriate forum was addressed at the outset of the costs and case management conference on 12.4.18 by the procedural judge, Deputy Master Collins, who asked for a rough estimate of Cs' claims and was told that C1 had "invested" US$3.3million in, essentially, goodwill and that Cs put the value of the claim at £2million. On that basis the Deputy Master put aside consideration of transfer to the County Court. The value Cs attributed to their claim was not elaborated upon and was very different from the stated value of the claim when issued and the level of issue fee paid – at which time, of course, Cs knew full well how much they had invested in, or lent to, ECL and should be taken to have factored that into their estimate of the value of their claim when issuing proceedings. What Cs' submission may also have done is deflect the Deputy Master from any consideration of a transfer to the Intellectual Property Enterprise Court ('IPEC'). A four day trial on liability issues was listed because Cs anticipated, at that stage, "a raft of contentious issues". The transcript of the debate as to disclosure reveals a very wide casting of the net by Cs with some objections fairly made and the Deputy Master expressing concerns at the breadth of the disclosure sought by Cs.

39 On the topic of costs budgets, Cs' position was that considerable sums were being spent on the litigation because C1 would not have invested US$3.3million in a business unless it was expected to provide a return on that investment. Consideration of Cs' costs budget was then postponed generally. At various stages during the hearing the Deputy Master did attempt to raise and focus on what might constitute or amount to Cs' loss but was diverted onto the wrong track by reference to the amount that Cs, or C1, had "invested". In my view, neither the amount of C1's investment nor C1's expectation should drive or justify the costs

budget for this litigation. This is not a case about misrepresentation in relation to or breach of warranty in relation to ECL's business and business assets; it is primarily a case about short term misuse of a customer list in breach of an obligation of confidence. The driver for costs is reasonable and proportionate expenditure necessary to bring the real issues in the case forward for a just determination, either by ADR or at trial. Relevant factors to proportionality include the amount of money involved, i.e. at stake in the claim, the importance of the case, the complexity of the issues, and the financial position of each party. Moreover, saving expense is a fundamental tenet of the overriding objective.

40 Subsequently, there were delays on Cs' part in finalising its witness evidence. This was attributed to D1's inadequate disclosure. The point here is that Cs were concerned to establish whether D1 had contacted more than the 19 and the 109 customers on ECL's lists to whom emails were sent on 21.8.17 and 4.10.17 respectively. Disclosure was finally resolved at the PTR on 23.1.19, after consideration of applying the BPC disclosure pilot, by a specific disclosure order.

41 The upshot was a trial bundle comprising 35 lever arch files. The chronological bundle, comprising 28 files, contains more than 8,000 pages. If I understand it correctly, the structure appears to be that 19 files, labelled F1-F19, contain documents from Cs' disclosure and Ds' disclosure before the PTR. These total some 6,000 pages[1]. Of these pages, very many are in colour, not a few pages are wholly redacted and are entirely black or blank, and others have redactions rendering them unintelligible or useless as evidence. There are also a number of photographs, including photographs of tailors having nothing to do with these proceedings, which are of no assistance to the issues in this case. There is a very substantial volume of information about ECL's finances, and also records of the names of customers and the work and value of orders in particular years. The remaining chronological files, labelled F20-F28 are, or appear to be, drawn from D1's disclosure following the disclosure order made at the PTR. These files contain more than 2,000 pages and consist almost entirely of email communications between D1 and customers.

42 The other files in the trial bundle comprise files containing some 200 pages of statements of case, disclosure lists, orders and witness evidence; a further file

[1] ECL's lists were extracted from File F1 and included in bundles labelled with the prefix 'X' but are counted in the 6,000 pages.

contains full transcripts of all interim and procedural hearings running to another 200 pages; and, a yet further file contains some 200 pages of inter partes correspondence.

43 During the trial reference was made to something in the order of 200 to 250 pages from the 8,000 in the chronological files and approximately a further 200 pages from the other files, being predominantly the statements of case and witness statements.

44 I do not suggest that the trial bundle could or should have been limited to 450 pages. However, when pre-reading, throughout the trial, and when preparing this judgment, I have been at a loss to understand the thinking behind this trial bundle. During submissions Mr Reed, Cs' counsel, referred several times to an extensive "de-duping" exercise by which many repeat documents were weeded out and excluded from the trial bundle. Inevitably that exercise was not infallible and doubtless it was costly. However, the real point is that it suggests a thinning down from everything approach whereas what was needed was a building up from nothing approach.

45 One point that emerges very clearly from a scan of the index to and the financial documents in the chronological bundle is that scale of business operations achievable by D1 simply could not have made or make any significant use in the bespoke and made to measure market of a customer list comprising some 5,000 names and email contact details. Certainly, D1 sent an email to MW on 20.9.17 stating :

> "I'm sure you can understand that it's a bit of a concern to contact 5k of customers, plan to visit the US in November and then change our story a month later".

However, I read that as D1 being equivocal about contacting a large number of customers on ECL's lists. Moreover, D1's business after leaving ECL was a start-up with a few loyal staff and very little capital backing. This reality was recognised by Mr Reed in his closing submissions when he characterised the 5,000 names on ECL's lists as "a rainy-day pot as and when the funding comes along". It would have been a relatively simple disclosure exercise to establish that D1 never had funding let alone sight of a pot at the end of a rainbow. It is also abundantly clear that D1 regards himself as having suffered much more than badly burnt fingers as a result of dealing with commercial funders to expand his business; the

relevance of this is as to the likelihood of D1 even considering seeking such funding for his new business. Returning for a moment to the case management conference, adopting a reality check approach was a course the Deputy Master tried to encourage Cs to take by suggesting disclosure focussed on D1's business records.

46 D1 characterised this litigation as oppressive. I regard the scale of this litigation as completely out of proportion. I do not regard this to be the wisdom of hindsight. C1, through its principal witness, TE, and others connected to Cs, had dealt with D1 for over two years and, as business financiers, C1 and TE will have been no novices at assessing the financial standing of businesses in which C1 takes an interest. C1 may fairly be assumed to have paid attention to ECL's accounts and affairs and TE was a client as well as a partner in ECL's commercial funder. ECL's level of operations must have been readily apparent from ECL's annual 'Income by Contact' schedules, which may reflect cash flow rather than sales[2]; one example in the trial bundle, for the year to 30.9.16, details funds from C1 totalling £393K and income from customers – fewer that 100 - and all other sources, including VAT refunds, totalling £347K. At the material times, bespoke suits cost more than £2K each and made to measure suits more than £500 but less than £1K each. It must have been obvious that the genuine customer base was to be measured in the low hundreds of people, not thousands.

47 The content of the previous 10 paragraphs is relevant to costs, which are yet to be considered, but it is also relevant to a judgment on the trial. As already noted, no costs budget was considered or approved by the court. Cs' revised costs budget for the case through to conclusion of the liability trial prepared shortly before the PTR totalled more than £600K before VAT (if applicable). That is a very substantial sum to expend on a straightforward claim in which the claim form estimates likely entitlement to recovery at £50K to £100K.

[2] Income totalled £740K but turnover was stated in draft accounts at £270K.