



Neutral Citation [2020] EWHC 30 (Ch)

Claim No: F30CF015

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
INTELLECTUAL PROPERTY LIST (ChD)**

Cardiff Civil Justice Centre
2 Park Street
Cardiff CF10 1ET

Date: 17 January 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

TBD (OWEN HOLLAND) LIMITED

Claimant

- and -

**(1) ANDREW SIMONS
(2) G2A LIMITED
(3) OBCON SOLUTIONS LIMITED
(4) OSL RAIL LIMITED
(5) JOHN O'BOYLE
(6) KELF ENGINEERING SASA
(7) MATHIEU POMMELLET**

Defendants

Mr Nicholas Caddick, QC and Mr Jonathan Moss (instructed by **Simon Burn Solicitors**) for
the **Applicants** (the Third, Fourth and Fifth Defendants)

Mr Andrew Butler, QC and Mr Mitchell Beebe (instructed by **Acuity Law Limited**) for the
Respondent (the Claimant)

Mr Andrew Simons, the **First Defendant**, in person

Hearing dates: 28 and 29 November 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice Marcus Smith:

A. INTRODUCTION

1. By an application dated 9 August 2019, Obcon Solutions Limited (“Obcon”¹), OSL Rail Limited (“OSL”) and Mr John O’Boyle sought various orders in relation to proceedings (the “Proceedings”) commenced by TBD (Owen Holland) Limited (the “Company”).
2. The Proceedings were commenced by the Company on 27 June 2018, against three defendants, the “First Defendant”, the “Second Defendant” and the “Third Defendant”. The Third Defendant was Obcon. It will be necessary to describe all three of these Defendants in greater detail below.
3. It will also be necessary to describe the history of the Proceedings in some detail. For the present, it is simply necessary to know that:
 - (1) On 7 November 2018, the Company applied for a search order (the “Search Order”) against the First and Second Defendants, but not against the Third Defendant. The Search Order was executed on 9 November 2018. Although the Search Order specified a return date of 16 November 2018, that return date did not take place until 18 February 2019.²
 - (2) The Search Order, as I will describe, made provision for the “cloning” or “imaging” of documents from computers (broadly defined) at the premises to be searched. It is appropriate that I define briefly what I mean by these terms, since they are central to this application:
 - (a) “Cloning” and “imaging” both involve taking copies of digitally stored data, whether held on a hard-drive, memory stick, disk or other device. Both involve creating a back-up or copy of this data.
 - (b) Imaging creates a compressed version of the data held that can be restored later, whereas cloning involves taking an exact replica.

For present purposes, the difference does not matter, and I shall use the term “imaging” to refer to all forms of global copying of digital data. By global copying, I mean to refer to the copying of the entire data contained on a hard-drive or other

¹ A list of the terms used in this Judgment, together with the paragraph in the Judgment in which such terms are first used, is at Annex 1 to the Judgment.

² Earlier orders also make reference to a return date. It is certainly fair to say that the sort of return date that one would expect consequential upon a search order being made *ex parte* never took place.

device, without reference to subject-matter. Obviously, a subject-specific search, to retrieve specific data, would require a file-by-file review of the data.

- (3) Digital data at the premises searched pursuant to the Search Order was imaged. I understand some 400,000 files were obtained pursuant to this process, which I shall describe as the “Search Order Material”. The Search Order Material was searched, using keywords, to produce a sub-set of the Search Order Material, comprising some 100,000 documents (the “Searched Material”).³
 - (4) Between the execution of the Search Order, resulting in the Search Order Material, and the production of the Searched Material, the Third Defendant (Obcon) successfully had the claim against it struck out (on 18 February 2019).
 - (5) The Searched Material was then used, by the Company and its solicitors, for a variety of purposes. One of these was to cause the Third Defendant (Obcon) to be re-joined to the proceedings, together with OSL (the “Fourth Defendant”) and Mr O’Boyle (the “Fifth Defendant”) – as well as Kelf Engineering SASA (“Kelf”, the “Sixth Defendant”) and Mr Mathieu Pommellet (the “Seventh Defendant”).
4. I shall refer to the Third Defendant (Obcon), the Fourth Defendant (OSL) and the Fifth Defendant (Mr O’Boyle) collectively as the “Applicants”. The Sixth Defendant (Kelf) and the Seventh Defendant (Mr Pommellet) did not appear before me on the hearing of the Applicants’ application.
 5. The Applicants contend that the Searched Material was obtained and used by the Company in breach of the Search Order,⁴ and they seek appropriate relief against the Company’s infringement of the Search Order. At its most extremely, the relief sought by the Applicants is the striking out of the claims against them, but the Applicants also contend for lesser relief, as appropriate, should I not be minded to strike-out the claims against them.
 6. It will be necessary to set out, in some detail, the procedural history of the Proceedings, including in particular the terms of the Search Order and its execution. This is done in Section B below.
 7. Although it was the alleged breach of the Search Order that formed the principal basis for the Applicants’ application, other points were relied upon by the Applicants. In Section C below I state my reasons for declining to have regard to these other matters in determining the application.
 8. Section D below considers the question of whether there has been a breach of the Search Order at all and, if so, how serious that breach was. Here, I should record that the position

³ The precise number of documents comprising the Search Order Material and the Searched Material does not matter; nor do the exact processes by which the Search Order Material and the Searched Material were obtained.

⁴ It was said on the Company’s behalf that, at least in some cases, it might be said that the Company did not actually breach the Search Order in the sense of doing something that was forbidden or not doing something that was ordered. Rather, it was suggested, the Company went beyond what the Search Order permitted, and that the language of “breach” was inappropriate, and that it was more appropriate to refer to the “abuse” of the Search Order. I am troubled by the fine nature of this distinction – the notion that the Search Order could be “abused” without being “breached” is a difficult one – but to the extent that it matters I use the term “breach” to embrace an “abuse” of the Search Order.

of the parties was diametrically opposed. Mr Andrew Butler, QC, for the Company, contended that there had been no breach of the Search Order or, if there had been, it was venial at most. Mr Nicholas Caddick, QC, for the Applicants, contended that there had been a breach of the Search Order and that that breach was extremely serious.

9. Section E below considers what I shall term the question of “standing”. The Search Order was obtained against the First and Second Defendants, and not against the Applicants. Mr Butler, QC contended that it was not open to the Applicants to complain about any breach of the Search Order (assuming, contrary to his primary submission, that there had been such a breach) because the Search Order was not directed at the Applicants.
10. If there was a breach of the Search Order (considered in Section D below) and the Applicants are entitled to be heard on the question (considered in Section E below), the question of relief or remedy arises. This is considered in Section F below.
11. My conclusions, and my summary as to how the application is to be disposed of, are stated in Section G below.

B. THE PROCEDURAL HISTORY

(1) The claim

12. The Company is engaged in the design and production of products used in the aviation industry, such as baggage trolleys, steps and similar equipment.
13. The Proceedings allege a conspiracy to infringe the Company’s database and intellectual property rights. Before issuing the Proceedings, the Company sought to deal with its concerns by way of (multiple) letters before action. These letters before action resulted in no outcome satisfactory to the Company. The Company commenced the Proceedings on 27 June 2018 against:

- (1) *The First Defendant, Mr Andrew Simons*. Mr Simons was a former employee of the Company who, when he left the employment of the Company to work for the Second Defendant, took with him some documents that he had acquired whilst he was the Company’s employee. After initial evasion and denial, he now admits wrongdoing and admits fabricating a document in an attempt to justify his taking and possession of these documents. Mr Simons presently acts as a litigant in person.

Although not a party to the application, Mr Simons was present in court on the hearing of the application. I permitted him to intervene as he saw fit. I am grateful to him for his interventions, and to the courtesy of counsel in facilitating this.

- (2) *The Second Defendant, G2A Limited (“G2A”)*. G2A is the company that employed Mr Simons and of which he was a director. G2A sought to compete against the Company in supplying similar equipment to that supplied by the Company to the aviation sector. G2A is now in insolvent liquidation.
- (3) *Third Defendant (Obcon)*. The basis of Obcon’s joinder was that it was the sole shareholder in the Second Defendant (G2A).⁵

⁵ See paragraph 4 of the Particulars of Claim.

(2) The injunction

14. Having issued proceedings, the Company applied, on notice, for an injunction requiring delivery up of all of its property in the possession of the First, Second and Third Defendants, together with schedules of the third parties to whom quotations relying on this material had been provided. This application came before His Honour Judge Jarman, QC on 4 July 2018. On this occasion, none of the First, Second and Third Defendants attended before the court.
15. At the hearing on 4 July 2018, Judge Jarman made an order (the “4 July 2018 Order”) which (in broad summary):
 - (1) Enjoined the Defendants from infringing the Company’s copyright in certain copyright works (the “Copyright Works”);
 - (2) Enjoined the Defendants from manufacturing, importing, selling, offering for sale, exhibiting, advertising or otherwise dealing in any engineering works which reproduced (in whole or in part) the Copyright Works;
 - (3) Required the Defendants to deliver up all of the Company’s property in their control, as well as all products resulting from infringement of the Company’s copyright in the Copyright Works;
 - (4) Required the Defendants to provide a schedule of any sales and supplies made by the Defendants of products reproducing (in whole or in part) the Copyright Works; and
 - (5) Required the Defendants to provide a schedule of all third parties to whom quotations had been provided for the supply of products reproducing (in whole or in part) the Copyright Works.
16. Thereafter, the Defendants engaged in the Proceedings, acting through Simon Burn Solicitors (at this point in time acting for all three Defendants). On 1 August 2018, by consent, the Defendants agreed to an order (the “1 August 2018 Order”) obliging them (amongst other things) to swear affidavits providing certain information relating to the Company’s claims against them.
17. Pursuant to the 1 August 2018 Order, the Defendants swore affidavits providing the information required. The gist of their position – to quote from paragraph 7 of the Company’s written submissions before me – was that “the only infringing documents they had in their possession, and the only customers they had approached, were those [the Company] already knew about”.

(3) Service of defences

18. On 23 August 2018, the Defendants filed defences in the proceedings. At this point in time, the First Defendant (Mr Simons) was acting in person, and he served his own Defence. However, that Defence in large part adopted the Defence of the Second (G2A) and Third (Obcon) Defendants. The Defence of the Second and Third Defendants – which was settled by counsel, the Second and Third Defendants continuing to retain Simon Burns Solicitors – contended that “they had been provided with the allegedly infringing material by the company subsequently joined as [the Sixth Defendant

(Kelf)]...Kelf, it was said, had obtained the material from an Indian entity called Transtec, which acted under licence from [the Company]. Thus, it was claimed, the material had come into the possession of [the Second Defendant (G2A)] legitimately”.⁶

(4) The Search Order

19. Subsequently, the Company learned that another customer of it – not identified by the Defendants in the affidavits sworn by them – had been approached by the Second Defendant (G2A) and had received promotional material, the existence of which had not previously been disclosed by the Defendants.
20. Inevitably, this raised questions regarding the Defendants’ compliance with the 4 July 2018 Order and the 1 August 2018 Order. On 7 November 2018, the Company applied without notice for a search order against the First (Mr Simons) and Second (G2A) Defendants. No order was sought against the Third Defendant (Obcon).
21. The Search Order was granted by His Honour Judge Keyser, QC. The Search Order was based on the standard form contained in the Civil Procedure Rules.⁷ Entirely unsurprisingly, the Search Order contained specific provisions – in particular as regards imaging – not contained in the standard form. The Search Order is central to this application, and it is necessary to set out its terms in some detail:

- (1) The Search Order bore on its face a prominent penal notice addressed to the First Defendant (Mr Simons) and the Second Defendant (G2A). Paragraph 4 of the Search Order contained the usual provision that reference to the “Defendant” meant reference to both Defendants.
- (2) Paragraph 3 of the Search Order specified a return date of 16 November 2018.
- (3) Paragraph 6 of the Search Order identified the persons authorised to enter certain premises:

“The Defendant must permit the following persons:

- (a) One of Ben Daniels, Simon Thomas and Lindsay Elliott of DAC Beachcroft LLP (the “Supervising Solicitors”);
- (b) Two of Hugh Hitchcock, Aisha Wardell, Natasha Nicholas, Jonathan Stroud, Steven Koukos and Charlotte Waite solicitors and/or trainee solicitors in the firm of Acuity Legal Limited, the Claimant’s solicitors; and
- (c) One of Dean Southworth, Jamie Sharpe, Patrick Nickleson, Alex Eames and Christopher Jackson of CY4OR, forensic computer specialists (the “Computer Experts”)

(together the “Search Party”), to enter each premises mentioned in Schedule A to this order and any other premises of the Defendant disclosed under paragraph 19 below and any vehicles under the Defendant’s control on or around the premises (the “Premises”) so that they can search for, inspect, photograph, copy, print, save, or dictate, and deliver into the

⁶ Again, I have quoted from the Company’s written submissions. Having reviewed the Defence of the Second and Third Defendants, I am satisfied that this quotation properly summarised the position taken.

⁷ A copy of the precedent referenced at CPR PD 25A (the “Search Order Precedent”) is at Annex 2 hereto.

safekeeping of the Claimant's solicitors all the documents and articles which are listed in Schedule B to this order (the "Listed Items").

(4) Schedules A and B, both mentioned in paragraph 8, are obviously significant:

(a) Schedule A identified the Premises as follows:

- (i) The residential address of the First Defendant (Mr Simons);
- (ii) The premises used by the Second Defendant (G2A);
- (iii) The residential address of a Mr John O'Boyle, a director of G2A. (Mr O'Boyle was not, at this time, himself a defendant to the Proceedings).

(b) Schedule B set out the Listed Items:

"THE LISTED ITEMS

All documents in the Defendant's possession which fall within one or more of the following three categories –

- (1) They contain material, the copyright of which belongs to the Claimant and shall include but not limited to:
 - a. Engineering designs;
 - b. Manufacturing designs and models;
 - c. Design specifications;
 - d. Technical publications;
 - e. Technical drawings;
 - f. Data sheets;
 - g. Operation manuals;
 - h. Images;
 - i. Photographs;
 - j. Quotations;
 - k. Pricing structures;
- (2) They are the property of the Claimant;
- (3) They consist of, or evidence, communication between the Defendant and any person and/or entity who is, or has been, a client of the Claimant, from 10 June 2016 until the present day, and contain or comprise or refer to items falling within categories (1) and/or (2) above.

For the purposes of the order “document” or “documents” mean anything in which information of any description is recorded and includes information held in hard copy or electronically.

If the Defendant thinks that a document might fall within the categories above, but is not sure whether it does or not, he is to provide it to the Supervising Solicitor who is to retain it pending the return date or further order of the Court.

...”

(5) Paragraphs 9ff contained the following (standard) terms restricting the search:

- “9 Before the Defendant allows anybody onto the premises to carry out this order, he is entitled to have the Supervising Solicitor explain what it means in everyday language.
- 10 The Defendant is entitled to seek legal advice and to ask the court to vary or discharge this order. Whilst doing so, he may ask the Supervising Solicitor to delay starting the search for up to 2 hours or such other longer period as the Supervising Solicitor may permit. However, the Defendant must:
- (a) comply with the terms of paragraph 23 below;
 - (b) not disturb or remove any listed items; and
 - (c) permit the Supervising Solicitor to enter, but not start to search.
- 11(1) Before permitting entry to the premises by any person other than the Supervising Solicitor, the Defendant may, for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period):
- (a) gather together any documents he believes may be incriminating or privileged; and
 - (b) hand them to the Supervising Solicitor for him/her to assess whether they are incriminating or privileged as claimed.
- (2) If the Supervising Solicitor decides that the Defendant is entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, (s)he will exclude them from the search, record them in a list for inclusion in his/her report and return them to the Defendant.
- (3) If the Supervising Solicitor believes that the Defendant may be entitled to withhold production of the whole or any part of a document on the ground that it or part of it may be privileged or incriminating, or if the Defendant claims to be entitled to withhold production on those grounds, the Supervising Solicitor will exclude it from the search and retain it in his/her possession pending further order of the court.
- 12 If the Defendant wishes to take legal advice and gather documents as permitted, he must first inform the Supervising Solicitor and keep him/her informed of the steps being taken.

- 13 No item may be removed from the premises until a list of the items to be removed has been prepared, and a copy of the list has been supplied to the Defendant, and he has been given a reasonable opportunity to check the list.
- 14 The Premises must not be searched, and items must not be removed from them, except in the presence of the Defendant.
- 15 If the Supervising Solicitor is satisfied that full compliance with paragraphs 13 or 14 is not practicable, (s)he may permit the search to proceed and items to be removed without fully complying with them.”
- (6) The Search Order made the following provision for the delivery up of articles or documents. The provisions at paragraphs 18 and 19 are non-standard, and paragraph 17 was materially revised:⁸
- “16 The Defendant must immediately hand over to the Claimant’s solicitors any of the Listed Items, which are in his possession or under his control, save for any computer or hard disk integral to any computer. Any items the subject of a dispute as to whether they are listed items must immediately be handed over to the Supervising Solicitor for safe keeping pending resolution of the dispute or further order of the court.
- 17 The Defendant must immediately give the search party effective access to the computers on the premises to include any online data storage, with all necessary passwords, to enable to computers to be searched, forensic images of the data to be taken, and access to all of the Defendant’s email accounts (including web-based email accounts) on which any of the listed items may be stored. If they contain any Listed Items, the Defendant must cause the listed items to be displayed so that they can be read and copied. The Defendant must provide the Claimant’s solicitors with copies of all Listed Items contained in the computers. All reasonable steps shall be taken by the Claimant, the Claimant’s solicitors and the Computer Experts to ensure that no damage is done to any computer or data. The Claimant and its representatives may not themselves search the Defendant’s computers unless they have sufficient expertise to do so without damaging the Defendant’s system.
- 18 The Computer Experts may take a copy of the files on any computers found on the premises for analysis by them following the completion of the search. Following this analysis, they may deliver into the safekeeping of the Claimant’s solicitors any further listed items which they recover.
- 19 For the purposes of this order, the term “computers” is not confined to conventional desk top or lap top computers but includes tablets, mobile telephones and any other form of storage or storage device for user generated computer readable information (including disks, USB sticks and external devices).”
- (7) The Search Order made provision for the Defendants to swear affidavits regarding the location of Listed Items.⁹

⁸ Emphasis added. I should stress that I am not making any criticism of these provisions. It is simply important, when understanding the mechanics of the order, to know which provisions are part of the standard form contained in the Search Order Precedent and which are not.

⁹ Paragraphs 20 and 21 of the Search Order.

- (8) Schedules C to F to the Search Order contained various undertakings, notably (for present purposes):
- (a) The following undertaking by the Company:¹⁰
- “The [Company] will not, without the permission of the court, use any information or documents obtained as a result of carrying out this order except for the purposes of these proceedings (and for this purpose, “these proceedings” includes any subsequent application to join further Defendants).”
- (b) The following undertaking by the Company’s solicitors:¹¹
- “Subject as otherwise provided in this order, the [Company’s] solicitors will retain in their own safe-keeping all items obtained as a result of this order until the court directs otherwise.”
- (c) The following undertakings by the Supervising Solicitor:¹²
- “(3) The Supervising Solicitor will retain in the safe keeping of his/her firm all items retained by him/her as a result of this order until the court directs otherwise.
- (4) Unless and until the court otherwise orders, or unless otherwise necessary to comply with any duty to the court pursuant to this order, the Supervising Solicitor shall not disclose to any person any information relating to those items, and shall keep the existence of such items confidential.
- (5) Within 3 working days of completion of the search the Supervising Solicitor will make and provide to the Claimant’s solicitors, the Defendant or his solicitors and to the judge who made this order (for the purposes of the court file) a written report on the carrying out of the order.”
- (d) The following undertakings by the Computer Experts:¹³
- “(1) The Computer Experts present during the search will not, without the permission of the court, use or disclose to anyone other than the Claimant’s Solicitors or the Supervising Solicitor any information obtained as a result of carrying out this order.
- (2) Following the completion of the analysis referred to in paragraph 18 hereof, the Computer Experts shall return to the Defendant any copy of the Defendant’s files which they have taken.
- (3) In the event that it becomes necessary to remove computer equipment from the premises, the Computer Experts shall complete the copying process, and shall return the computer equipment to the Defendants, as quickly as possible.”

¹⁰ Undertaking (2) in Schedule C.

¹¹ Undertaking (3) in Schedule D.

¹² Schedule E of the Search Order.

¹³ Schedule F of the Search Order.

(5) Execution of the Search Order

22. The search, pursuant to the Search Order, took place on 9 November 2018. Mr Simon Thomas, one of the Supervising Solicitors, provided a report (dated 13 November 2018) pursuant to the Search Order (the “Report”):¹⁴

- (1) In the Report, Mr Thomas described the search of the Premises used by G2A.¹⁵ The Search Order, which (as I have described) was against both Mr Simons personally and G2A, was served on Mr Simons (both for himself and G2A). The report notes that whilst “understandably shocked at the events taking place, Mr Simons was co-operative, helpful and accommodating throughout the execution of the Order”.¹⁶ The search was delayed, pending the arrival of Mr Simons’ solicitors (Hugh James Solicitors) and G2A’s solicitors (Simon Burn Solicitors).¹⁷
- (2) Turning, then, to the search itself, I propose to refer to “Non-Imaged Materials” and “Imaged Materials”. Non-Imaged Materials are those materials that have been identified pursuant to a subject-specific search (in the sense understood in paragraph 3(2) above): a subject-specific search, to retrieve specific data, requires a file-by-file review of this data. By contrast, Imaged Materials are those materials that have been obtained by the wholesale copying of digital data on or in a particular device, like a hard drive or memory stick. Self-evidently, Imaged Materials are not (unless coincidentally) subject-specific.
- (3) The distinction is not as straightforward as the distinction between “soft-copy” (i.e. electronic) and “hard-copy (i.e. physical) materials. It is possible, for instance, to search a file of soft-copy documents on a document-by-document basis, without imaging those files. Indeed, the Search Order envisaged this as an option (albeit with an alternative provision for imaging).¹⁸ Had the Company obtained the Search Order Material through a file-by-file search seeking, in the case of each file, to ascertain whether that file was a Listed Item, then the Search Order material would have comprised Non-Imaged Materials.¹⁹
- (4) The Company did, pursuant to the Search Order, conduct a file-by-file review of some items, which appear to have been hard-copy materials:

“11 **The Listed Items:** During the search, Charlotte Waite of the Claimant’s Solicitors made a list of the items thought to fall within the ambit of Schedule B of the Order, a copy of which appears at Appendix 1 to this report. The Claimant’s solicitors took into their possession the originals of those documents, in accordance with paragraphs 6 and 16 of the Order, following discussions between all of the parties – including Mr Simons, Mr Simons’ solicitors and G2A’s solicitors – as to whether the documents fell within the ambit of the listed items in Schedule B of the Order.

¹⁴ See Undertaking (5), quoted in paragraph 21(8)(c) above.

¹⁵ The Premises were defined in Schedule A to the Search Order: see paragraph 21(4)(a) above.

¹⁶ Paragraph 2 of the Report.

¹⁷ Paragraph 3 of the Report.

¹⁸ See paragraphs 17 and 18 of the Search Order, quoted in paragraph 21(6) above.

¹⁹ See paragraph 17 of the Search Order Precedent, which contemplates a search only on this basis.

- 12 There was some debate during the search as to whether some documents which were found at the Premises properly fell within the ambit of Schedule B of the Order. Mr Simons, Mr Simons solicitors and G2A's solicitors took an accommodating approach. It was decided that where documents were not disputed items, but it remained unclear as to whether they properly fell within the ambit of Listed Items, the documents were given to the Claimant's solicitors and were recorded as listed items, but that the three sets of solicitors at the Premises acting for the parties would seek to determine between them after the search whether they were all indeed documents which properly fall within Schedule B of the Order, with any unresolved points to be determined at the hearing on the return date...
- 13 Use was made of a scanner at the Premises. All of all of the listed documents were scanned and emails of them sent to each of the solicitors at the Premises. Copies of those documents appear at Appendix 2 of this report, comprising the listed items."

Thus, the materials so identified were, using my terminology, Non-Imaged Materials.

- (5) There were two disputed hard copy items, which are described in paragraph 15 of the Report. Their nature is immaterial. What is of interest is how the Supervising Solicitor dealt with them:

"In any event, I provided a separate list of those items to Mr Simons, which he checked, in accordance with paragraph 13 of the Order. A copy of that list was also provided to Mr Simons' solicitors and to G2A's solicitors. I await the further instructions of the Court in respect of those two original documents in my possession..."

- (6) As I have noted, paragraphs 17 and 18 of the Search Order provided – so far as soft-copy materials were concerned – an option, either to conduct a file-by-file review or to image. The Report stated:²⁰

"16 **Access to the images taken of the electronic devices:** There was some discussion between the parties during the search as to how best to implement some provisions in paragraphs 17 and 18 of the Order, given that:

- a. Mr Simons confirmed that the images of the electronic devices preserved by the Computer Experts will contain listed items as well as other documents which are outside the scope of the listed items in Schedule B of the Order, access to which the Claimant is not entitled;
- b. Mr Simons indicated that the imaged documents might also include privileged documentation, again to which the Claimant is not entitled; and
- c. The imaging itself took place during the Search Period (and in some instances after the search had completed, over the course of the weekend), such that it was impractical to examine the content of the electronic devices whilst they were being imaged.

- 17 The relevant parts of the Order which were discussed read as follows:

²⁰ Emphasis added.

“17 The Defendant must immediately give the search party effective access to the computers on the premises...If they contain any listed items, the Defendant must cause the listed items to be displayed so that they can be read and copied. The Defendant must provide the Claimant’s solicitors with copies of all listed items contained in the computers...”

18 Following this analysis, [the Computer Experts] may deliver into the safekeeping of the Claimant’s solicitors any further listed items which they recover...”

18 The parties took a sensible and pragmatic approach. It was agreed that the focus during the Search Period should be on the preservation of the contents of the computers and electronic devices by them being imaged. It was further agreed that there would follow discussion between the solicitors acting for the parties, after the search, as to how practically the Computer Experts would extract the listed items from the electronic devices, with any outstanding points between them to be held over for determination at the return date hearing.”

Thus, the approach taken was to obtain Imaged Materials, which were obtained by the imaging of devices without the conduct of any kind of subject-specific search intended to identify Listed Items.

(6) Affidavits made pursuant to the Search Order

23. The provisions of the Search Order required the swearing of affidavits.²¹ The First Defendant (Mr Simons) filed an affidavit sworn on 16 November 2018. At paragraph 4 of that affidavit, he disavowed his previous affidavit – referred to in paragraph 17 above – in the following terms:

“The entire content of paragraph 5 of my first affidavit is false and untrue. I have deliberately misled the Claimant and the court and made gross errors of judgement. I accept that I must deal with the consequences of my actions. I make this affidavit openly and in an attempt to remedy my wrongdoings and wish to wholeheartedly convey my sincere apologies to the court and the parties to this litigation.”

Mr Simons now accepted that he had taken material away from the Company when his employment ended. His affidavit was accompanied by some nine lever arch files of documents, some of which comprised the material that Mr Simons had improperly taken from the Company. Mr Simons did not implicate anyone else in this wrongdoing.

24. The affidavit of the Second Defendant (G2A) was sworn by Mr O’Boyle. G2A’s position was that, whilst in no way seeking to contest Mr Simons’ personal culpability, Mr O’Boyle had himself been taken in by the version of events which Mr Simons now said was false.²²

²¹ See paragraph 21(7) above.

²² That may or may not mean that G2A was innocent of Mr Simons’ wrongdoing. Even assuming Mr O’Boyle is to be believed, Mr Simons’ knowledge might very well be attributable to G2A.

(7) The applications to set aside the Search Order and the application to remove the Third Defendant (Obcon) from the proceedings

25. At this time, the Search Order Materials obtained as a result of the search had yet to be reviewed. Before that review could take place, the Second Defendant (G2A) applied to have the Search Order set aside. The Third Defendant (Obcon) – not a target of the Search Order – applied to have the proceedings against it struck out. A separate application to have the Search Order set aside was subsequently also made by the First Defendant (Mr Simons), no doubt as a result of being served with the application notice of the Second and Third Defendants.
26. The application came before His Honour Judge Keyser, QC on 10 December 2018. There was a lengthy hearing before Judge Keyser, and the Judge reserved his judgment. Judgment was handed down on 4 January 2019, but the parties had no opportunity to make submissions as to consequential orders. The hearing was accordingly adjourned, part-heard, and a further hearing took place before Judge Keyser on 18 February 2019, at which Judge Keyser made an order (the “18 February 2019 Order”). During this period, the First Defendant (Mr Simons) acted in person; the Second Defendant (G2A) acted by way of Mr O’Boyle;²³ and the Third Defendant (Obcon) was represented by counsel (instructed by Simon Burn Solicitors).
27. As regards the 18 February 2019 Order:

- (1) The first recital of the Order provides some context:²⁴

“**UPON** the adjourned hearing mentioned in paragraph 1 of the Order dated 4 January 2019 for consideration of the order to be made upon the application of the Second and Third Defendants by notice dated 20 November 2018 and upon the application of the First Defendant by notice dated 22 November 2018 and upon the return date of the Search Order made on 7 November 2018 and consequent to the judgment handed down on 4 January 2019”

- (2) The claim against the Third Defendant (Obcon) was struck out and the 4 July 2018 Order was discharged insofar as it related to the Third Defendant.²⁵
- (3) The Search Order was set aside insofar as it related to the home address of Mr O’Boyle.²⁶ Apart from that, the applications to have the Search Order set aside were dismissed.²⁷

Although the 18 February 2019 Order also made provision for amendments to the pleadings and for costs, there was no further consideration of matters that would ordinarily be the subject of a return date of a search order. That is, to say the least, curious,

²³ At least from 12 February 2019, when Simon Burn Solicitors came off the record.

²⁴ Emphasis added.

²⁵ See paragraphs 2 and 3 of the 18 February 2018 Order.

²⁶ See paragraph 21(4)(a) above.

²⁷ See paragraphs 5 and 6 of the 18 February 2018 Order.

given that the first recital (quoted above) expressly refers to 18 February 2018 being the return date for the Search Order.

(8) The search of the Search Order Material

28. It will be recalled that the Search Order originally specified a return date of 16 November 2018.²⁸ In correspondence shortly before that date, the parties agreed to adjourn the return date to an unspecified later date. In that correspondence, the question of searching the Imaged Materials (which, at least for the purposes of this Judgment, are the Search Order Materials) arose:

(1) In a letter to Simon Burn Solicitors, dated 13 November 2018, the Company’s solicitors stated:

“If the return hearing is to be adjourned then we would suggest that the parties use the intervening period to discuss and attempt to agree the parameters for our client’s search of the electronic data copied during the search order. To this end, we propose to provide you with a key word list to be used by the computer experts in filtering the relevant documentation.”

Although this letter referred to Simon Burn Solicitors as acting for the First Defendant (Mr Simons), the Second Defendant (G2A) and the Third Defendant (Obcon), this was not accurate as both the Company and the Company’s solicitors must have known. The First Defendant (Mr Simons) was represented by different solicitors at the time of the execution of the Search Order.²⁹ There appears to have been no response to this letter.

(2) On 15 November 2018, the Company’s solicitors again wrote to Simon Burn Solicitors, this time noting that Simon Burn Solicitors were acting for the Second and Third Defendants. This letter stated:

“Whilst the physical search has already uncovered a large amount of “listed items” considered relevant to the substantive proceedings, the scope of the search also extended to imaged data contained on electronic devices at the premises and we enclose a copy of the exhibit listing table provided by the instructed IT experts in respect of the same.

As you are aware, we are hoping to commence the electronic search of the imaged data as soon as possible as the information may assist the Court in dealing with matters raising [*sic*] at the return hearing. However, we appreciate that the parties must try to agree the parameters of the search and to this end our proposals are as follows:

1. We intend to ask the experts to collate photographs, images and drawings so that all files can be reviewed. We are confident that this will not be subject to contention, as you and your client will appreciate that keywords are unlikely to register any positive responses against these file types.
2. In respect of all other file types, we intend to apply a keyword search as per the attached draft. Please note that we have made further inquiries with the IT experts as to how the derivations of words are searched and await their response. Provided that the experts confirm that, for example, searching “trolley” will register positive

²⁸ See paragraph 21(2) above.

²⁹ See paragraph 22(1) above.

responses for “bottle trolley”, “oxygen trolley”, etc, it is possible for the keyword list to be reduced accordingly.

We look forward to hearing from you as a matter of urgency and for the avoidance of doubt by no later than **4pm on Friday 16 November 2018.**”

An equivalent letter was sent to Mr Simons’ solicitors (Hugh James Solicitors). In any event, despite chasers, no response was received from either firm.

- (3) Matters appear to have lapsed whilst the application to set aside the Search Order progressed. However, before the 18 February 2019 Order, on 14 January 2019, the Company’s solicitors again wrote to Simon Burn Solicitors. The letter is addressed to Simon Burn Solicitors as if that firm was acting for all three Defendants. This was clearly an error as far as Mr Simons was concerned – as the Company’s solicitors had previously corresponded with Hugh James Solicitors. By this time (as the recitals to the various orders at this time make clear), Mr Simons was acting in person. The letter to Simon Burn Solicitors stated:

“As you are aware, we are awaiting confirmation from the Court for the listing of the handing down of HHJ Keyser QC’s draft judgment and which will be combined with a CMCC.³⁰

On that basis, it is necessary for us to advance as far as possible all outstanding issues and in particular now undertake a proper analysis of the information that was seized as part of the search order undertaken on 9 November 2018. We would therefore be grateful if you could please now revisit the keyword schedule that was provided to you under cover of our letter of 16 November... We fully expect the Court will expect the parties to advance this issue as far as possible prior to the CMCC as inevitably this will have a bearing on the timetable and the appropriate directions.

As you are aware the search has already produced substantial information and which was exhibited by way of 9 lever arch files to the affidavit of Mr Simons...”

This letter was not responded to by Simon Burn Solicitors.

- (4) Notwithstanding the letter to Simon Burn Solicitors, the Company’s solicitors also wrote, in similar terms, to Mr Simons on 18 January 2019.
- (5) On 22 January 2019, the Company’s solicitors noted that a hearing had been listed for 18 February 2019 before His Honour Judge Keyser, QC. The letter was, again, erroneously addressed to Simon Burn Solicitors as the solicitors for all three Defendants (which continued not to be the case). The letter sought a response to previous letters regarding the searching of the Search Order Materials. Again, there was no response.
- (6) On 1 February 2019, the Company’s solicitors wrote to Simon Burn Solicitors expressing astonishment at the absence of a substantive response and stating:³¹

³⁰ The chronology is not altogether clear. It would appear that the judgment had already been handed down, and that consequential matters remained to be determined: see paragraphs 26 and 27 above. Nothing turns on this. What matters is that thought was being given, as the letter goes on to say, to advancing outstanding issues.

³¹ Emphasis added.

“With your application on behalf of G2A to set aside the search having been dismissed it is sensible for the hearing listed for 10:30am on 18 February 2019 to deal with the outstanding issues from the part-heard hearing, the proposed keywords list being one of increasing importance. We have provided you with sufficient opportunity to review, consider and provide further comment in respect of our client’s proposed keywords, however, it appears that neither you nor your client are prepared to sensibly engage on this issue. In fact, our requests and genuine attempts to agree this have simply been ignored.

We and our client cannot tolerate any further delays in the analysis of the data recovered from your client’s premises as evidently this will ultimately have a knock-on effect on the substantive proceedings and the issues for the Court to consider. We firmly believe it will considerably assist the Court at the hearing on 18 February if the analysis is already underway. We would remind you that it is now almost 3 months since the search order was executed and you have had the proposed word search in your possession as long. Accordingly, should we not hear from you in relation to any specific objections to any of the keywords by 2pm on **Tuesday 5 February 2019**, we will presume that they are agreed in their draft form and will proceed with our client’s IT experts on this basis. Counsel has actually pointed out there is in fact no obligation on us to agree this with you.”

A letter, in similar terms, was written to the First Defendant (Mr Simons).

- (7) Although Simon Burn Solicitors did not respond to this letter, Mr Simons did. In an email expressly referring to the 1 February 2019 letter, Mr Simons raised a series of objections to the keywords suggested by the Company for the purposes of reviewing the Imaged Materials. It is – for reasons that I give below – unnecessary for me to consider the cogency (or otherwise) of Mr Simons’ points. What is important is that he made clear that he had concerns and objections.
- (8) The Company’s solicitors responded to Mr Simons’ email in a letter dated 7 February 2019. It is unnecessary to set out the detail of this response, save to note that the Company’s solicitors took issue with the points raised by Mr Simons. Again, for reasons that I will give, it is unnecessary to consider these specific responses further. The letter concluded:

“On a general note, we highlight that the word search is not conclusive either way of the outcome of this claim or the pleaded issues but relates to potentially relevant information that has been gathered as a result of the search. We cannot see any of your objections to be remotely reasonable in the circumstances to prevent this information being looked at and, if having considered our explanation, it remains your case that all of these words are objected to then the only alternative would be to incur further costs in disputing this with you at the hearing on 18 February. We sincerely hope that can be avoided and would ask you to reflect immediately on the objections and/or properly particularise these in light of the above facts.”

- (9) Mr Simons responded, on 15 February 2019, further articulating his objections.

(9) The search and its consequences

29. In the event, the question of the search of Imaged Materials, which is what the Search Order Materials were, was never raised before a Judge, and the Company undertook a search – presumably based upon the keywords it had identified in correspondence – of the

Search Order Materials.³² Although the keywords used have been identified, it is not known precisely how the search of these materials was effected, nor indeed by whom.

30. The search winnowed the Search Order Materials down to the Searched Material, as I have defined these terms. The Company has (or, at least, had by or through its agents) full access to the Searched Material, the nature and scope of which is unknown to the Applicants (and, indeed, the other Defendants to the Proceedings).
31. However, it is clear that this material has certainly been useful, and perhaps even essential, in enabling the Company to develop its case.³³ More specifically, the Searched Material has been used for the following purposes:

- (1) *To seek to commence committal proceedings against Mr O’Boyle.* As to this:
- (a) The Company issued an application on 22 May 2019 pursuant to CPR 81.17 to issue committal proceedings against Mr O’Boyle. That application was supported by the affidavit of a Mr Hitchcock – a partner in the firm of solicitors instructed by the Company – sworn on 22 May 2019.
- (b) It is clear that the Searched Material was essential to this application. The essence of the grounds for committal alleged against Mr O’Boyle is that his contention that he was ignorant of Mr Simon’s wrongdoing is false and that in fact he knew and was party to it. In his affidavit, Mr Hitchcock puts the point in the following way:³⁴

“Matters uncovered by the Claimant’s search

- 13 Meanwhile, and following a delay during which the [Company] tried, but failed, to obtain the Defendants’ co-operation regarding search terms, the [Company] has progressed its search of the material obtained on 9 November 2018. This, so far, has revealed a very different picture to the one put forward by Mr O’Boyle and one which, in the [Company’s] respectful opinion, demonstrates beyond any doubt that he knew what Mr Simons was doing and indeed to some extent controlled it. It also reveals

³² As is usual, a draft of this Judgment was circulated to the parties for the identification of typographical and other obvious errors. A list of such errors was helpfully provided. Additionally, however, the Company provided further material regarding the manner in which the electronic searches were carried out, which was not in evidence previously and which might suggest that my description of the searches in this Judgment was not entirely correct. My Judgment was very careful to be based on the (limited) evidence before me, and I have been careful to qualify my description where doubt genuinely exists (e.g., “presumably”). I have not thought it appropriate to revise the Judgment in light of these subsequent points. Such detailed inaccuracies as may remain cannot affect the substance of my Judgment. They may be relevant to the consequential orders made in light of this Judgment and – to be clear – I do not propose to shut-out the Company from making more detailed points on process at this stage without first hearing from the Company.

³³ It is, of course, very difficult for the Court to assess this. The Court has not seen all of the documents obtained as a result of the electronic search, nor has it seen the hard copy material produced by Mr Simons and described in paragraph 23 above. However, the written submissions of the Company contain, in paragraph 20, a clear assertion that the Searched Material has been deployed by the Company in these proceedings and has been of material use in enabling the Company to develop its case.

³⁴ Emphasis added.

that he knew that some of the statements contained in the Defence, and in his Affidavits and witness statements, have been untrue.

- 14 First and foremost, as a result of the search, the [Company] has found a transcript of text message exchanges between Mr O’Boyle and Mr Simons...”

The text message exchanges are a collection of text messages, put into a single document (which I have seen printed out), between Mr Simons’ and Mr O’Boyle’s (mobile) telephones. It is worth noting that Mr Hitchcock does not understate the weight of this material: Mr Hitchcock says, on a number of occasions, that this material demonstrates Mr O’Boyle’s duplicity “beyond any doubt”.³⁵

- (c) The grounds on which Mr O’Boyle’s committal was sought are set out in grounds dated 3 June 2019.
- (d) Although permission was sought to issue committal proceedings against Mr O’Boyle, His Honour Judge Keyser, QC ordered that the application be adjourned for further consideration after the trial of the Proceedings, with liberty to apply should there be no trial.³⁶
- (2) *To join other Defendants.* A matter of days before the application for permission to commence committal proceedings against Mr O’Boyle, the Company applied to amend its pleadings. The application for permission to commence committal proceedings was issued on 22 May 2019; the application to amend was issued two days earlier, on 20 May 2019. Permission to amend was granted by order of His Honour Judge Keyser. By the amendments, the Third Defendant (Obcon) was rejoined to the proceedings and the Fourth (OSL), Fifth (Mr O’Boyle), Sixth (Kelf) and Seventh (Mr Pommellet) Defendants were joined. The basis for the joinder was that all of these Defendants were involved in the conspiracy against the Company. The details do not matter for present purposes. It is sufficient to say that the basis for the joinder of the Applicants – the Third to Fifth Defendants – is, at least in part, the Searched Material.
- (3) *To support committal proceedings against Mr Simons.* The Company also applied for permission to begin committal proceedings against Mr Simons. As to this:
- (a) The application was made on 12 February 2019. Permission was granted by His Honour Judge Keyser, QC in paragraph 7 of the 18 February 2019 Order.
- (b) The grounds on which the application for committal are to be made are dated 3 April 2019. Grounds 1 and 2 focus on Mr Simons’ admitted breach of the 4 July 2018 Order and the affidavit sworn by Mr Simons, which he has admitted is false.

³⁵ See, for instance, paragraphs 13 and 19 of Mr Hitchcock’s affidavit.

³⁶ The Judge made this ruling on essentially case management grounds. He did not consider it appropriate for the committal proceedings and the Company’s claim to proceed in parallel. Mr O’Boyle contended that the application should be refused and not merely adjourned. That decision is presently under appeal by Mr O’Boyle.

(c) Ground 3, however, reads as follows:

“On 23 August 2018, Mr Simons signed a Statement of Truth on a Defence which contained a number of statements which were to Mr Simons’ knowledge false, including the following:

3.1 at paragraph 9:

3.1.1 a statement that Mr Simons adopted paragraphs 8 to 12 of the defence of G2A and the Third Defendant (“Obcon”) (this carrying with it the implication that those paragraphs were true);

3.1.2 a denial that Mr Simons had used the [Company’s] trade secrets or analogous confidential information as alleged or at all;

3.2 at paragraph 10, a denial that Mr Simons (inaccurately there referred to as “the claimant”) had breached clause 24.1 of his contract of employment with the [Company];

3.3 at paragraph 11, a statement that “in all respects” Mr Simons “accepts and endorses the defence of G2A and Obcon”.

In point of fact, the Defence of G2A and Obcon was false in a number of respects including in particular the averment at paragraph 9 that the documents of which complaint was made by the [Company] were supplied to G2A by Kelf Engineering who in turn obtained them from Transtec Overseas, acting under licence from the [Company]. This averment was developed in paragraphs 20-31 of that document by reference to a number of documents which, Mr Simons knew, had been falsely created.”

Although, carefully construed, Ground 3 is confined to Mr Simons’ knowledge of the falsity of the Second and Third Defendants’ Defence, it is easy to see how Ground 3 could involve an exploration of the knowledge of others, notably Mr O’Boyle. It is also entirely likely that – were Mr Simons to contest Ground 3 – the evidence obtained from the Search Order might well be deployed in order to make good this ground.

(d) Permission having been given to progress the application to commit Mr Simons for contempt, there is no reason why that process cannot begin now and be determined in advance of the Proceedings. However, it would appear that His Honour Judge Keyser, QC, has indicated that the proceedings against Mr Simons should be at the same time as the any proceedings against Mr O’Boyle.

(4) *To obtain evidence from third parties.* The Applicants have identified letters written to third parties by the Company’s solicitors, using Searched Material in order to obtain further information. For example, on 8 April 2019, the Company’s solicitors wrote to the accountants of G2A regarding the ownership of G2A. It will be recalled that the basis for the claim against the Third Defendant (Obcon) was that it was the owner of the shares in the Second Defendant, i.e. its parent. This is

denied by the Defendants, and the letter to the accountants sought to explore this point. In doing so, the Company referenced the Search Order material.³⁷

C. COLLATERAL ISSUES

32. By their application notice dated 9 August 2019, the Applicants seek a variety of orders regarding the Proceedings brought by the Company. Essentially, they seek:

- (1) To strike out various parts of the Amended Particulars of Claim which are based, or appear to be based, on the Searched Material. In particular, they seek to strike out the claims against the Applicants.
- (2) Disclosure of the third parties to whom the Searched Material has been disclosed.
- (3) An injunction enjoining the further disclosure of such material.
- (4) Protection in relation to any privileged material contained in the Search Order Material.
- (5) Security for costs.

33. As I have noted, the essential basis for this relief is the Applicants' contention that the Searched Material had been obtained improperly and in breach of the Search Order. The opening paragraphs of the Applicants' written submissions state:³⁸

- "1 This is [the Applicants'] skeleton argument for their application seeking to strike out the whole or parts of [the Company's] case against them and/or for other relief including, if the claim is not struck out, security for costs.
- 2 [The Applicants] rely on various matters. However, the most serious relates to the improper use that [the Company] has made of documents in its solicitors' possession for safekeeping as a result of a Search Order made against [the First and Second Defendants]. In essence, [the Applicants] say the [the Company] and [the Company's] solicitors, in breach of their undertakings under the Search Order, carried out their own far-reaching and unauthorised search of those documents without paying any proper regard to issues of privilege, confidentiality, the scope of the Search Order, or relevance to the then issues in the action. Having identified over 100,000 documents as a result of this search, [the Company] has used some of those documents as the basis for new claims against [the Applicants] (which it then joined as parties to this action). It has, moreover, sent some of these documents to various third parties.
- 3 Importantly, [the Applicants] do not deny that [the Company] has been wronged (although the sums involved are minimal). However, [the Company] was wronged by [the First and Second Defendant] and not by [the Applicants]. Significantly, despite having (wrongfully) had access to all of [the First and Second Defendants'] records, the case that [the Applicants] participated in [the First and Second Defendants'] wrongdoing relies almost entirely on inference."

³⁷ Specifically, a letter to Mr O'Boyle dated 1 April 2019 was referenced and enclosed. This letter referenced the Search Order material.

³⁸ Emphasis added.

34. Thus, whilst the breach of the Search Order formed the essential basis for the application, the Applicants relied upon other matters in support of their application. In particular:
- (1) It was suggested that this was disproportionate litigation, in that “the game was not worth the candle”, and that the claim should be struck out on this basis. The Applicants relied upon *Sullivan v. Bristol Film Studios*,³⁹ where the Court of Appeal upheld the strike out of a copyright and breach of contract case where the damages were far outweighed by the costs, and where a disproportionate amount of court time would be taken up were the claim to proceed to trial.
 - (2) It was suggested that the Company’s overall conduct of this litigation warranted, if not a striking out of the claim, then some other form of court control. The Applicants relied upon the following contentions (which, it goes without saying, were by no means accepted by the Company):
 - (a) The fact that the Company had failed clearly to plead its claim to own the copyright that formed the basis for its claims. Complaints were made about other aspects of the Company’s pleading, also.
 - (b) The fact that, in the past, the Company had failed to provide to the Applicants copies of the confidential annexes to the Amended Particulars of Claim (although it was accepted that, by the time of the application came to be heard, this particular issue had been resolved).
 - (c) The fact that the Company was asserting dishonesty against the Applicants.
 - (d) The fact that the re-joinder of the Third Defendant was an abuse.
 - (e) The Company’s generally aggressive conduct of the litigation.
35. In my judgment, it will be a rare case where proceedings can be struck out by reason of a variety of factors, none in themselves strong enough to justify the striking out of those proceedings. It seems to me that either the conduct of the Company in using the Searched Material has been so egregious as to justify striking out the statement of case (or parts of it) or it is not, in which case the fact that the Company has behaved badly in other, unrelated, ways, ought not to permit the application to succeed where it would otherwise fail.
36. It seemed to me, therefore, that it would be entirely wrong for me to take into account, when considering the conduct of the Company in relation to the Search Order, the general conduct of the Company in the course of these Proceedings. If and to the extent that such conduct requires the intervention of the court (for instance, if pleadings need to be particularised) then that is a matter that must be separately and distinctly addressed and remedied. It should not be subsumed into another, different and unrelated, issue.
37. Equally, if a claim warrants striking out because “the game is not worth the candle”, that is a matter that should be contended for separately, and not in combination with an altogether different reason for striking out. In this case, the Applicants did not press this contention very hard. It is easy to see why: the Company adduced evidence that its claim

³⁹ [2012] EWCA Civ 570.

was worth significant amounts of money, and even without this evidence I was not in a position to be able to say that the Company's claim was so insubstantial that – even though arguable – it should not proceed because “the game is not worth the candle”.

38. I made clear to the parties that it seemed to me that the application stood or fell on the Search Order point and, for the reasons given above, I did not invite Mr Butler, QC to respond to these collateral points which Mr Caddick, QC (to be fair to him) did not press very hard. Mr Caddick's focus, entirely correctly, was on the Search Order.
39. I therefore proceed to consider the three matters described in paragraphs 8, 9 and 10 above:
- (1) First, has there been a breach of the Search Order and, if so, just how serious?
 - (2) Secondly, assuming a breach of the Search Order, is this a matter that the Applicants can rely upon, given that the Search Order was made not against them, but against the First and Second Defendants?
 - (3) Thirdly, assuming (i) a breach of the Search Order and (ii) standing on the part of the Applicants to raise the matter, what (if any) remedy should the Court impose?

D. BREACH OF THE SEARCH ORDER?

(1) The meaning of the search order

(i) Introduction

40. Given that search orders have been granted since the mid-1970s,⁴⁰ and that CPR PD 25A appends a standard form search order for use as a precedent, it is perhaps surprising that the operation of search orders should be a matter of uncertainty, particularly as regards Imaged Materials.
41. In order to understand the scope and operation of the Search Order, this section considers:
- (1) The general purpose of search orders;
 - (2) The search order regime so far as Non-Imaged Materials are concerned. It is appropriate to begin with such documents, because this constitutes the paradigm case which – one would expect – will at least inform how Imaged Materials are to be dealt with.
 - (3) The recent developments in the case-law regarding Imaged Materials.

⁴⁰ See, for example, *EMI Limited v. Pandit*, [1975] 1 WLR 302; *Anton Piller KG v. Manufacturing Processes Limited*, [1976] Ch 55.

(ii) *Purpose of search orders*

42. The essential purpose of a search order is not to provide early disclosure, but rather to preserve documents necessary for the proper conduct of litigation before these courts.⁴¹ Generally speaking, “proper conduct” refers to the need to preserve the disclosure process that is a vital part of the procedural law of England and Wales, but it is fair to say that the jurisdiction extends to the preserving of evidence generally.
43. Originally, search orders were made under the inherent jurisdiction of the court, but they now have a statutory basis, namely section 7 of the Civil Procedure Act 1997, which provides as follows:

“Power of courts to make orders for preserving evidence

- (1) The court may make an order under this section for the purpose of securing, in the case of any existing or proposed proceedings in the court –
- (a) the preservation of evidence which is or may be relevant, or
 - (b) the preservation of property which is or may be the subject-matter of proceedings or as to which any question arises or may arise in the proceedings.
- (2) A person who is, or appears to the court likely to be, a party to proceedings in the court may make an application for such an order.
- (3) Such an order may direct any person to permit any person described in the order, or secure that any person so described is permitted –
- (a) to enter premises in England and Wales, and
 - (b) while on the premises, to take in accordance with the terms of the order any of the following steps.
- (4) Those steps are –
- (a) to carry out a search for or inspection of anything described in the order, and
 - (b) to make or obtain a copy, photograph, sample or other record of anything so described.
- (5) The order may also direct the person concerned –
- (a) to provide any person described in the order, or secure that any person so described is provided, with any information or article described in the order, and
 - (b) to allow any person described in the order, or secure that any person so described is allowed, to retain for safe keeping anything described in the order.

⁴¹ See *A v. B and Hewlett Packard Enterprise Company v. Manchester Technology Data (Holdings) Ltd*, [2019] EWHC 2089 (Ch) (“*Hewlett Packard*”) in particular at [15]-[17], where Mann J considered the origins and history of search orders, concluding that this was their purpose. If the purpose were simply early disclosure, many of the more draconian elements of the search order could be dropped. They exist because of the need to prevent disclosure being thwarted by the destruction of documents.

(6) An order under this section is to have effect subject to such conditions as are specified in the order.”

44. Very significantly, section 7 refers to preservation; there is no reference to disclosure. The relevant part of the CPR is to similar effect. CPR 25.1(1)(h) states:

“The court may grant the following interim remedies –

...

(h) an order (referred to as a “search order”) under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence, etc)…”

45. Of course, what is permitted under a search order depends upon its terms. The point is well-put by *Matthews & Malek*:⁴²

“The wording of the order may be limited to search and delivery up initially, leaving it to the *inter partes* hearing to determine whether the claimant can examine the material taken. This may be appropriate where large amounts of electronic data are concerned and images are taken of storage devices. The court may decide that disclosure in the normal way should follow by the defendant and not permit the claimant or his forensic expert to do so.”

46. I shall deal specifically with Imaged Materials below. For the present, it is only necessary to observe that even in the case of Non-Imaged Material, that is susceptible to and will have been the subject of, a subject-specific search, it may be appropriate to leave over the question of disclosure (as opposed to preservation) to the return date. Although – given the criteria that have to be satisfied in order to obtain a search order – it may be practically speaking impossible to contend that the uplifted documents are not disclosable where they are Non-Imaged Materials, there may be other interests at play: for instance, the interests of non-parties, who have an interest in keeping such material confidential.

(iii) *Search orders and hard-copy documents*

47. In *Hewlett Packard*, Mann J was concerned with the process on the return date of a search order where digital data had been obtained, in large amounts, in the form of Imaged Material. His starting point was to consider how search orders fitted into the litigation process:

“21 In my view one should answer the question of what should now happen in relation to inspection by going to the central purpose of a search and seizure order, by reference to the authorities and statute, and carefully considering how it fits into the normal established way of conducting litigation.

22 If one starts from the disclosure end, then 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 relevant but damaging documents). 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

⁴² *Matthews & Malek*, *Disclosure*, 5th ed (2017) (“*Matthews & Malek*”) at §2.20.

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 31.5(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.

23 With that in mind, it becomes necessary to look at the problem from the search and seizure end. As pointed out above, the prime reason for making such an order (in relation to documents) is the preservation of those documents, in order to avoid the risk that they will not be available at the disclosure stage, whenever that might be. Its main source is not a jurisdiction to give the claimants a form of disclosure exercise which is (a) early and (b) a do-it-yourself form of exercise which would not normally be done as part of standard disclosure. Section 7 [of the Civil Procedure Act 1997] is not even aimed primarily at documents, although it undoubtedly covers them.

24 The reason that, to a degree, the old form of [search order] in relation to documents seems to involve a disclosure exercise is because the exercise of preservation in relation to physical documents necessarily involves a search and assessment by the claimant. If one is preserving physical documents from a potentially predatory party then there is no other way of going about it. The same is true of digital documents which are not imaged (see the standard form of order). But that should not disguise the fact that the exercise is usually intended to be a preservation one, not (at that stage) a disclosure one."

48. I entirely accept this analysis which, if I may respectfully say so, helpfully and clearly places the search order in context. The following propositions, as it seems to me, emerge:

- (1) A search order is concerned with the preservation of evidence, not with early disclosure. Of course, the CPR contains provision for ordering early disclosure, and it may be that in some cases preservation and early disclosure naturally go hand-in-hand. But that is not necessarily the case.
- (2) In the case of Non-Imaged Materials, an exercise very similar to that of disclosure – but conducted by the applicant for the search order and not the disclosing party – will be undertaken. That is because the only way to identify material responsive to the search order – the so-called "listed items" – is (in the cases of Non-Imaged Materials) by item-by-item search. As I have noted,⁴³ generally-speaking the documents can appropriately be the subject of an item-by-item search will be hard-copy documents, but there may be soft-copy documents that can also be searched in this way.
- (3) Although the process bears some similarity to a disclosure exercise, it is not disclosure. Of course, an applicant for a search order will not obtain a search order at all unless he, she or it can demonstrate – amongst other things – that relevant documents will be at the respondent's premises. In such circumstances, a court may very well be prepared to order that the documents so obtained do stand as disclosure, either when the search order is granted or on the return date. But that is a matter that must specifically be raised with the court, either on the application for

⁴³ See paragraphs 22(2) and (3) above.

the search order or at the return date and specifically provided for in an order of the court.

- (4) The Search Order Precedent – which the Search Order in this case tracks, so far as hard-copy documents are concerned – bears this out. Paragraphs 8 to 15 contain a series of restrictions on the search, ensuring that: the effect of the order is explained before search;⁴⁴ that there is opportunity to delay the start of the search;⁴⁵ that the respondent may isolate incriminating or privileged documents (but not confidential documents) and hand them to the supervising solicitor;⁴⁶ and that the supervising solicitor him- or herself retains a role in seeing that incriminating or privileged material is isolated.⁴⁷
- (5) It will readily be noted that these processes only work where it is possible to consider material on an item-by-item basis. This is the paradigm search process described by Mann J in *Hewlett Packard*. Once this process has been completed, the respondent is obliged to hand over to the applicant's solicitor the items responsive to the search order,⁴⁸ with items in dispute being held by the supervising solicitor.⁴⁹
- (6) Neither the Search Order Precedent nor the Search Order in this case makes any provision for disclosure. In my judgment, the Search Order Precedent and the Search Order simply make provision for preservation of documents. That is consistent with the undertaking given by the applicant's solicitor that all items obtained will be retained in their own safekeeping until the court directs otherwise.⁵⁰ There is no permission to use the documents.
- (7) The only inconsistency with this interpretation is the undertaking by the applicant only to use any information or documents for the purposes of the proceedings.⁵¹ That implies disclosure is ordered by the court, but it seems to me that (where disclosure is not specifically ordered in the body of the order) such an undertaking is redundant, albeit harmless.

⁴⁴ Paragraph 9 of the Search Order Precedent; paragraph 9 of the Search Order, set out in paragraph 21(5) above.

⁴⁵ Paragraph 10 of the Search Order Precedent; paragraph 10 of the Search Order, set out in paragraph 21(5) above.

⁴⁶ Paragraph 11(1) and (2) of the Search Order Precedent; paragraph 11(1) and (2) of the Search Order, set out in paragraph 21(5) above.

⁴⁷ Paragraph 11(3) of the Search Order Precedent; paragraph 11(3) of the Search Order, set out in paragraph 21(5) above.

⁴⁸ Paragraph 16 of the Search Order Precedent; paragraph 16 of the Search Order, set out in paragraph 21(6) above.

⁴⁹ Paragraph 16 of the Search Order Precedent; paragraph 16 of the Search Order, set out in paragraph 21(6) above.

⁵⁰ Schedule D(3) of the Search Order Precedent; Schedule D of the Search Order, set out in paragraph 21(8) above. See also the similar undertaking given by the supervising solicitor: Schedule E(3) of the precedent; Schedule E of the Search Order, set out in paragraph 21(8) above.

⁵¹ Schedule C(4) of the precedent; Schedule C of the Search Order, set out in paragraph 21(8) above.

(iv) *Soft-copy documents*

(a) *The provisions in the Search Order Precedent*

49. The Search Order Precedent treats soft-copy documents as if they were hard-copy documents. In other words, it treats such material as if Non-Imaged Material and, as such, susceptible to an item-by-item search. Thus, paragraph 17 of the Search Order Precedent states:⁵²

“The Respondent must immediately give the search party effective access to the computers on the premises, with all necessary passwords, to enable the computers to be searched. If they contain any listed items the Respondent must cause the listed items to be displayed so that they can be read and copied. The Respondent must provide the Applicant's Solicitors with copies of all listed items contained in the computers. All reasonable steps shall be taken by the Applicant and the Applicant's solicitors to ensure that no damage is done to any computer or data. The Applicant and his representatives may not themselves search the Respondent's computers unless they have sufficient expertise to do so without damaging the Respondent's system.”

50. The Search Order Precedent does not deal with documents which, by their nature, are not susceptible of an item-by-item search.

(b) *How to deal with Imaged Material*

51. What the Search Order Precedent envisages is an (electronic) item-by-item review, whereby the respondent facilitates the display of a listed item, so that that item can be read and copied. It is obvious – as, indeed, footnote 10 in the Search Order Precedent recognises⁵³ – that this unlikely to be a practical way forward in any normal IT environment. The fact is that imaging is both less disruptive for the respondent and a more efficient way to proceed with a search.

52. However, it implies the production by the respondent to the search order of material that almost certainly will include non-listed items and may well include privileged and incriminatory items. An imaging approach, self-evidently, cannot accommodate the item-by-item approach to searching that is possible in the case of Non-Imaged Materials.

53. In these circumstances, it is difficult, if not impossible, to see how disclosure can be combined with preservation. *Ex hypothesi*, the documents obtained through imaging will contain documents that are not listed items, and such items – as well as being irrelevant – may be confidential, privileged or incriminatory. The fact is that the steps described in paragraph 48(4) above, which serve to protect a respondent where there is an item-by-item search, cannot operate where there is an imaging of files. It is, therefore, impossible to see how disclosure can take place without a clear order of the court.

54. Whilst such an order might be given prior to the return date, as a specific provision in the search order, such a course must be exceptional, since one does not know the nature and extent of what has been imaged until the imaging has taken place. Even then, one will not know what has been imaged. Absent exceptional circumstances, it seems to me that

⁵² Emphasis added.

⁵³ Reproduced in Annex 2 as footnote 79.

the respondent – and any other interested party – ought to be heard before disclosure of the Imaged Material is granted.

55. This accords with the view expressed in the case-law. In *Hewlett Packard*, Mann J said this at [26]:

“I therefore agree with the submissions of the defendants in both cases that if there is to be an inspection of documents on the images at this stage and by the claimants⁵⁴ then it needs to be justified as a separate exercise, and analysed in terms of the disclosure jurisdiction. The process of looking for relevant documents is akin to disclosure if it is not actual disclosure (as that process is understood under the CPR). I do not accept the submissions of Mr Cavender, QC, for the claimant in *A v. B*, that the inspection of the image is ancillary to the [search order], or at least it is not ancillary in any meaningful way. If anything, the search and seizure order is ancillary to disclosure, because it enables documents to be preserved for that purpose, but without necessarily determining who should do the disclosure...”

56. Mann J referred with approval to the decision of Tugendhat J in *CBS Butler Limited v. Brown*,⁵⁵ which concerned a search order which required the defendants to permit access to the defendant’s premises specifically to take an image of the computer disks there. No provision was included for inspection. In a subsequent application, the claimant sought to review the imaged files through keyword searches, with no anterior review for relevance (or anything else) by the defendant. Tugendhat J considered that there was nothing in the order that should be read as displacing the normal rule that it is the producing party – the party whose documents they are – that undertakes disclosure and that if the usual rule should be departed from, it should be justified and the subject of a specific order of the court.⁵⁶ I respectfully agree.

57. Mann J sought to articulate the factors that a court might seek to take into account when making provision for disclosure of imaged files at [30]. There are a number of other cases considering this – very fact-specific – question, notably *McLennan Architects v. Jones and Roberts*⁵⁷ and *Hi-Level Enterprise v. Levine*.⁵⁸ It is unnecessary for me to consider what would be the appropriate disclosure order in the present case, because no-one is seeking that such an order be made. It is for this reason that I do not need to consider the terms of the key-word searches proposed by the Company, nor Mr Simons’ objections, nor yet the silence of Simon Burn Solicitors in light of the Company’s solicitors’ statements that a key-word search was going to be undertaken. The question is not what disclosure the Search Order sanctioned, but rather whether it sanctioned disclosure at all. It is to that question that I now turn.

⁵⁴ Mann J was thus, quite correctly, noting two unusual aspects of the disclosure process being sought by the claimants: (i) it was early; and (ii) it was proposed that it be conducted not by the producing party, but by the receiving party.

⁵⁵ [2013] EWHC 3944 (QB).

⁵⁶ See *Hewlett Packard* at [28] to [30], which sets out the relevant passages in *CBS Butler Limited*.

⁵⁷ [2014] EWHC 2604 (TCC).

⁵⁸ [2018] EWHC 1822 (Ch).

(c) *The provisions in the Search Order*

58. As I have noted, the Search Order made specific provision for the imaging of files on computers. It is worth repeating paragraph 18 of the Search Order:

“The Computer Experts may take a copy of the files on any computers found on the premises for analysis by them following the completion of the search. Following this analysis, they may deliver into the safekeeping of the Claimant’s solicitors any further listed items which they recover.”

59. It is very difficult to know what to make of this provision. Obviously, it permits the imaging of computers (widely defined in paragraph 19 of the Order⁵⁹). It also permits the Computer Experts to analyse the images following the completion of the search. Quite how the Computer Experts are supposed to do this – not being lawyers and one would assume having no understanding of the nature of the dispute between the Claimant and the First and Second Defendants – is impossible to say. How are computer experts to discern what falls within and what falls without the Listed Items defined in Schedule B?

60. It might be said that it is for the Claimant’s solicitors to assist in the search. That, in my judgment, is not the case:

(1) First, it would have the effect of depriving the First and Second Defendants in relation to Imaged Materials of substantially all the protection that they have in relation to Non-Imaged Materials – in particular, protection in relation to privileged and incriminatory material.

(2) Secondly, paragraph 18 refers to “analysis by them”, which seems to me to refer only to the Computer Experts and to exclude the possibility of outside assistance.

61. In these circumstances, it is difficult to see how paragraph 18 is workable. It seems to me that the Computer Experts will never be in a position to deliver “into the safekeeping of the Claimant’s solicitors any further listed items which they recover”.

62. Assuming, contrary to what I have said about the Computer Experts being able to identify further Listed Items, that the Computer Experts could in fact combine both an IT and a litigation function and sift the Search Order material to find Listed Items, then the Search Order envisaged the handing over of these documents “into the safekeeping of the Claimant’s solicitors”.

63. Assuming this had occurred – it did not, as I shall describe – then the question is whether the handing over of such items to the Company’s solicitors would entitle the Company (through its solicitors) to use such materials for the purpose of the Proceedings. In my judgment, the Search Order sanctions no such use of such materials:

(1) The analysis of Mann J that preservation and disclosure are separate matters forms the starting point. Although the decision in *Hewlett Packard* post-dates the Search Order, the fact is that Mann J’s analysis builds on the approach in *CBS Butler Limited*, which dates from 2013. The same distinction between preservation and disclosure is also made in one of the leading text-books on disclosure – *Matthews & Malek* – in the passage set out in paragraph 45 above. In other words, when

⁵⁹ Set out in paragraph 21(6) above.

construing the Search Order, it is necessary to distinguish between preservation and disclosure and to see whether the order sanctions only preservation or both preservation and disclosure.

(2) In this case, the Search Order certainly does not specifically sanction anything more than preservation. It is not possible to point to any words in the body of the Search Order that permit the review by the Company's solicitors of any Listed Items produced to them by the Computer Experts. To the contrary, paragraph 18 refers to the Computer Experts delivering Listed Items "into the safekeeping of the [Company's] solicitors". Safekeeping means exactly that: preserving something in a safe place. The word does not, in its ordinary meaning, involve using the thing being preserved.

(3) That analysis is consistent with my finding as to how the Search Order operates in relation to Non-Imaged Materials: see paragraphs 47ff above.

64. Accordingly, I conclude that even if the Computer Experts had handed over Listed Items to the Claimant's solicitors, their use was not permitted by the Search Order, absent further order of the Court.

65. No doubt because paragraph 18 of the Search Order is – for the reasons I have given – unworkable, what actually happened was not what was provided for in the Search Order in any event.

(d) *What actually happened?*

66. I have described what occurred on the search pursuant to the Search Order at paragraph 22(6) above. The Supervising Solicitor's Report is clear that paragraphs 17 and 18 of the Search Order were specifically discussed between the parties – all of whom were represented by solicitors at that time. Between those parties and their solicitors, it was agreed:

(1) That the focus during the search was on the preservation of documents.

(2) That there would then follow "discussion between the solicitors acting for the parties, after the search, as to how practically the Computer Experts would extract the Listed Items from the electronic devices, with any outstanding points between them to be held over for determination at the return date hearing".⁶⁰

67. The solicitors – as stated in the Report – thus reformulated the terms of the Search Order, recognising: (i) that the Computer Experts could not identify, on their own, the Listed Items; and (ii) that if Listed Items were to be extracted in any other way, it had to be done with the agreement of the Defendants or else at the direction of the court.

68. This represented an entirely appropriate course of action.

(2) Was the Search Order breached?

69. From the foregoing analysis, it follows that there has been a significant and unjustifiable breach by the Company of the terms of the Search Order. The short point is that the

⁶⁰ Emphasis added.

Search Order contains no provision sanctioning anything other than the preservation of Listed Items, whether these be Non-Imaged Materials or Imaged Materials.

70. Had the Company, through its legal team, inspected and deployed in the Proceedings Listed Items that were Non-Imaged Items and so subject to the protections described in paragraph 48(4) above, that would be one matter. But the Search Order Materials comprise Imaged Materials, to which none of the safeguards contained within the Search Order so far as irrelevant, confidential, privileged and incriminating documents are concerned, apply. *Ex hypothesi*, these protections cannot apply to the Search Order Materials, because they are Imaged Materials that have not – by reason of their nature – been the subject of an item-by-item search. In my judgment it is plain that the Search Order contains no provision justifying either the search by the Company’s solicitors of the Search Order Materials, still less the use of the Searched Material resulting from a search. A unilaterally conducted keyword search over the Search Order Materials was a serious and completely unjustified breach of the terms of the Search Order;⁶¹ the use of the Searched Material was similarly a serious and completely unjustified breach of the terms of the Search Order.
71. These breaches are compounded by the following factors:
- (1) The Company’s solicitors were entirely aware that before doing anything by way of inspection of the Search Order Materials, the consent of the First and Second Defendants was required. That much is clear from the Report⁶² and the *inter partes* solicitor correspondence.⁶³
 - (2) The fact that there was, on 18 February 2019, the return date of the Search Order.⁶⁴ It was incumbent upon the Company to raise the question of inspection of the Search Order Material with the court. Given that this was a course of action expressly adverted to by the Company’s solicitors, it is very difficult to understand why this course was not taken. The fact that the Defendants themselves did not raise the matter with the court is nothing to the point. If the Company wanted disclosure – and of course it is completely understandable why the Company would want disclosure – then it was incumbent upon the Company to obtain an appropriate order from the court.
 - (3) Of the Defendants, Mr Simons did object. It is unnecessary for me to determine whether these objections were well-founded or not. The fact is that it is for the court to determine whether objections are well-founded, not for one of the parties unilaterally to override such objections, which is what the Company did when carrying out the keyword searches that resulted in the Searched Materials. The Company’s conduct was particularly serious because it was on notice that the

⁶¹ That is the case no matter how carefully constructed the keywords were nor how carefully undertaken the search of the Search Order Materials was.

⁶² See paragraph 22(6) above.

⁶³ See paragraph 28 above.

⁶⁴ As I have noted, the return date of the Search Order was never given the priority it needed. That, generally speaking, is a matter for the party who has obtained the search order.

Search Order Materials might contain privileged material.⁶⁵ The sensitivity of such material is difficult to overstate.

- (4) Notwithstanding these facts, the Company not only caused the Searched Materials to be produced, but then deployed those materials in the manner that I have described.⁶⁶

72. Mr Butler, QC did attempt some justifications on behalf of the Company:

- (1) He stressed the fact that the Company's solicitors had attempted to obtain agreement as to the search terms that should be applied to the Search Order Material, and that Simon Burn Solicitors had proved to be unco-operative. I am prepared, for the sake of argument, to accept that Simon Burn Solicitors were being unco-operative.⁶⁷ However, that does not alter the fact that Mr Simons did engage with the Company – to object to the searches proposed⁶⁸ – and, more fundamentally, that it was for the Company and not the Defendants to bring this matter before the court. Yet more fundamentally, the fact is that even an unjustifiable lack of co-operation does not justify a wholesale breach (or any breach) of a Search Order. The appropriate course, as I say, is to return to court for direction.
- (2) He stressed that the liquidator of G2A had not objected to the deployment of the Search Material in Mr Hitchcock's evidence. On 24 May 2019, the liquidator wrote as follows:

“Further to my appointment as a liquidator of this company with effect from 23 April 2019, I confirm that I have no objection to the use of the documents exhibited at pages 1-10 of Mr Hitchcock's affidavit of 22 May 2019.”

That material comprised or included Searched Material.

A fuller consent was given on 16 August 2019.

I do not consider that a liquidator's after-the-event sanctioning of a use of the Searched Material (whether general or specific) can in any way justify an anterior breach of the Search Order which resulted in the Searched Material being produced in the first place. The fact remains that, absent agreement from both the First and the Second Defendants, the Search Order Material should have been safeguarded and left unused until the court made an order regarding disclosure.

⁶⁵ See paragraph 22(6) above. Mr Simons' objections also made this point.

⁶⁶ See paragraph 31 above.

⁶⁷ See the correspondence referenced at paragraphs 28 above. As I noted in paragraph 28(3) above, the Company's solicitors' letters warranted at least the response that Simon Burn Solicitors were not on the record for the First (Mr Simons) or Second (G2A) Defendants, who were the only targets of the Search Order. However, the fact remains that the relevant Defendants were not being addressed in this correspondence.

⁶⁸ See paragraphs 28(7)-(9) above.

E. STANDING

73. The Company contended that the Applicants had no standing to complain of these breaches of the Search Order. The Search Order was directed against the First (Mr Simons) and Second (G2A) Defendants, and only they had the right to complain of any breaches of the order by the Company.
74. I reject this contention. A breach of a court order is not to be analogised to a private law claim or to a claim to review judicially the conduct of a public body.⁶⁹ A court is directly concerned in the way in which its orders are carried out and it is entirely appropriate that any party to litigation before the court be permitted to raise questions regarding the conduct of the proceedings, even if it concerns an order not made directly against that party. The Applicants' application is made under CPR 3.4(2)(b), which provides that the court may strike out a statement of case "if it appears to the court...that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings".
75. By their application, the Applicants seek to have the claims against them (which can be made only by virtue of the Search Order Material) and the claims pleaded using that material struck out. Whether that is an appropriate remedy is a matter I will consider in due course. But I consider it entirely open to me to hear the application. Indeed, it would be a dangerous outcome were a technical point, regarding the person against whom an order was made, to preclude the court's consideration of the manner in which that order had been carried out.⁷⁰

F. REMEDY

(1) Striking out all or part of the statement of case

76. I do not doubt that I have the jurisdiction to strike out the Company's statement of case – in whole or in part – for its breach of the Search Order. As the notes in *Civil Procedure* make clear,⁷¹ the categories and definition of abuse are not closed. Nevertheless, "the striking out of a statement of case is one of the most powerful weapons in the court's

⁶⁹ In *WA Sherratt Ltd v. John Bromley (Church Stretton) Limited*, [1985] QB 1038, the Court of Appeal considered the status of a payment into court under RSC Order 22, now CPR 36. Although it was contended that the payment in should be regarded as a debt, Oliver LJ rejected that analysis (at 1056-1057): "...in my judgment a defendant paying into court...parts outright with his money. I doubt whether it can be said that the Accountant General is a trustee in whose hands his money can be traced. Nor is there a "debt" or chose in action in the accepted sense of the word. The money becomes subject entirely to whatever order the court may see fit to make and to treat it as the defendant's property available for distribution in his bankruptcy is to assume, for the purpose of exercising the court's discretion, the very situation which will only arise if the court exercises its discretion in a particular way."

⁷⁰ A point was also taken that the matter could and should have been raised sooner by the Applicants. Whilst the lateness of an application is a factor that courts take into account – particularly in relation to costs – it is difficult to discern what, if any, prejudice arose. Also, the timing of this application is as much a function of the somewhat unusual way in which these issues have come before the court.

⁷¹ Vos (ed), *Civil Procedure 2019*, at §3.4.3.

case management armoury and should not be deployed unless its consequences can be justified”.⁷²

77. Although I find the Company’s breach of the Search Order to have been flagrant and very serious, I do not consider that it would be appropriate at this point in time to strike out all or any part of the Company’s statement of case. In paragraph 66 of their written submissions, the Applicants said this:

“...There is no way [the Applicants] can now have a fair trial in light of [the Company’s] conduct. [The Company] has gained a deliberate tactical advantage through its search undertaken in flagrant disregard for the rules. Worryingly, [the Company] and [the Company’s] solicitor maintain to this day that they were entitled to act in this way and can see no problem with their having had access to any privileged and confidential information contained in the [First and Second Defendant’s electronic files].”

78. In my judgment, this over-states matters. The fact is that the Applicants are unable to make good the contention that they cannot have a fair trial:

- (1) In the first place, it seems to me highly likely that had the Company, at the return date for the Search Order, sought some form of disclosure of the Search Order Material, this would have been granted by the court. Given Mr Simons’ statement that the imaged files contained privileged material, I doubt very much whether a key-word approach would have been acceptable. Nor would it have been possible to have the First and Second Defendants’ solicitors go through the material on an undertaking not to allow their clients to interfere in the process: that is because neither party actually had solicitors on the record at this time. Nor – given that it was not their documentation – would it have been appropriate to entrust this task to the Applicants’ solicitors. In my judgment, a likely outcome would have been to instruct third-party solicitors to undertake a privilege, self-incrimination and relevance review. I strongly suspect that the outcome of such a review would have been to disclose the material which has been used to join the Applicants. So there is to my mind no necessary injustice in the Applicants being joined.
- (2) Secondly, the Applicants do not know the composition of the Search Order Material, still less the composition of the Searched Material. They know the Searched Material comprises some 100,000 documents, and they know what some of those documents are – because these documents have been deployed by the Company in the manner described in paragraph 31 above. However, the Applicants simply cannot say what (if any) privileged, incriminatory or confidential material the Company actually holds as part of the Searched Material.
- (3) Thirdly, Mr Butler, QC made the point that it is rare for a court in this jurisdiction to strike out a statement of case because it, or the claim it articulates, is based upon evidence improperly obtained.⁷³ There is force in this submission: I would – and

⁷² See *HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v. Apex Global Management Limited*, [2014] UKSC 64 at [16]; *Walsham Chalet Park Limited (t/a The Dream Lodge Group) v. Tallington Lakes Limited*, [2014] EWCA Civ 1607 at [44].

⁷³ See, for instance, *Energy Solutions EU Limited v. Nuclear Decommissioning Authority*, [2016] EWHC 1988 (TCC); *Hughes Jarvis Limited v. Searle*, [2019] EWCA Civ 1.

should – be reluctant to strike out what would otherwise be a perfectly good claim because the evidence on which it rests has been obtained in some way improperly.

79. I do not consider, therefore, that the Applicants are in a position, as matters stand, to make good their contention that a fair trial is impossible. However, that is at least in part because the Applicants do not know what the Company holds in the form of the Searched Material. Were it to be the case – and I certainly do not dismiss the possibility – that the Company holds privileged material of the First and Second Defendants, then it may well be that the Applicants’ point is a good one.
80. Accordingly, I am not – at the moment – going to strike out the Company’s Amended Particulars of Claim, whether in whole or in part. I am, in the first instance, going to seek to order a rectification of the breaches of the Search Order. I appreciate that a retrospective attempt at correcting these breaches will never restore the *status quo ante* and will not enable the court to put the parties in the position they would have been in, had the breaches never occurred. Nevertheless, an attempt to do so represents the appropriate starting point. The following represents a broad statement of the steps that I consider need to be taken. Naturally, the detail will have been thrashed out at a hearing of consequential matters, when no doubt Company can provide further information as to the material it and its agents hold. With those *caveats* well in mind, I consider that:
- (1) The Company will have to provide, in short order, a comprehensive list of the documents comprising the Searched Material.
 - (2) The Company will hand over all of the imaged files – that is, all of the Search Order Material – to a third-party firm of solicitors, who will carry out the process I described in paragraph 78(1) above, although it seems to me that instead of searching for Listed Items, the exercise that should be conducted is as follows:
 - (a) To weed out any privileged and self-incriminatory material, and to identify whether such material formed part of the Searched Material in the hands of the Company.
 - (b) To identify relevant material, by which I mean material relevant to the issues arising out of the pleadings as they presently stand.
 - (3) The Company must also explain, in detail (but without invading any privilege that may exist) what use it has made of the Search Material in terms of approaches to third parties.
 - (4) Until this process is complete, the Proceedings will be stayed in all other respects, and the Company will be enjoined from deploying the Search Order Material and/or the Searched Material in any way.
81. These steps will be at the cost of the Company in any event and irrespective of the outcome of these proceedings, since it has, through its conduct, brought about the present situation. When the process described in paragraph 80 above is complete, then all parties will have a liberty to apply to the court for further directions. It may be that the material held by the Company is such that the point made in paragraph 77 above has such force that the striking out of all or some of the Company’s Amended Particulars of Claim will have to be contemplated. I have no desire to pre-judge whether such an application can

or should be made and – if made – whether it should succeed. However, I should be clear that nothing in this Judgment precludes the making of such an application by the Applicants, if so advised.

82. There are two other areas which need to be considered:

- (1) The committal proceedings commenced (or attempted to be commenced) by the Company, as described in paragraphs 31(1) and 31(3) above.
- (2) The question of security for costs.

(2) The applications for committal

83. As I have described, the Company has permission to commence committal proceedings against Mr Simons; the Company attempted to get permission to commence committal proceedings against Mr O’Boyle, but His Honour Judge Keyser, QC held that the question of permission should be addressed at the conclusion of the Proceedings. That decision is presently under appeal by Mr O’Boyle.

84. Before me, the Applicants did not seek to mount any attack on the attempts, by the Company, to commit Mr Simons and Mr O’Boyle. I nevertheless raised the matter with Mr Butler, QC, who contended that it remained in the public interest that the prospect of committal continue both as against Mr Simons and Mr O’Boyle. I am not persuaded that that is the case, for the following (related) reasons:

- (1) Committal for contempt of court is a public remedy often brought, not by a public officer like the Attorney-General, but by the counterparty in other litigation against the alleged contemnor. In other words, a party to previous litigation then separately brings committal proceedings. Inevitably the motivations for such a course – which is rarely inexpensive – may have little to do with the public interest. For this reason, the courts tread carefully when giving a private person permission to pursue committal proceedings.⁷⁴
- (2) Here, I am very conscious that permission to proceed against Mr Simons has already been given; and that the question of permission to proceed against Mr O’Boyle has been “parked” until the Proceedings have concluded. In these circumstances, it is right that I should be most careful not to intervene in matters that have already been the subject of judicial consideration, unless new factors, not before the court previously, have come to my attention and are material to these matters.
- (3) In the present case, the new factor, which I consider to be material, is the fact that the Company is in clear and material breach of the Search Order. That has resulted in the Company having material that it should not have. I have already commented on the fact that English law does not have a particularly strong exclusionary rule when it comes to evidence improperly obtained. I have taken that rule into account

⁷⁴ See *Patel v. Patel*, [2017] EWHC 1588 (Ch) at [17]ff.

when considering whether these proceedings should be struck out.⁷⁵ However, it seems to me that, in the case of a committal application, matters are very different.

- (a) First, it seems to me that when considering the public interest in commencing committal proceedings, it is relevant to take into account the fact that the material that has been deployed in support of such proceedings has been obtained in clear breach of one of the court's most intrusive forms of order (a search order), the proper execution of which the court must be careful to police.
 - (b) Secondly, as I have described, the Search Order contained an undertaking not to use materials obtained thereunder for collateral purpose without the permission of the court.⁷⁶ Commencing or seeking to commence committal proceedings using such material is a breach of this undertaking. The committal proceedings contemplated against Mr O'Boyle (and Mr Simons) are separate proceedings.⁷⁷
- (4) In my judgment, the proceedings against Mr O'Boyle ought to be stopped, in their tracks, now. I discern a regrettable over-enthusiasm in the Company's pursuit of committal proceedings against Mr O'Boyle, which is evidenced both by the aggressive nature in which such proceedings have been threatened, the fact that the "letter before action" has been sent, not merely to Mr Boyle, but to third-parties, and the fact that it was attempted to gain permission to bring committal proceedings whilst the Proceedings (which involve Mr O'Boyle and traverse the same subject-matter) were on-going. His Honour Judge Keyser, QC was – if I may respectfully say so – entirely right in pushing off the application to commit Mr O'Boyle until the trial of the Proceedings had concluded. However, the present factors militate strongly in favour of ensuring that the threat of committal proceedings do not continue to hang over Mr O'Boyle's head.
- (5) The same, I consider to be true of the proceedings against Mr Simons, for which permission to proceed has been obtained, but where the Company has failed to take matters further. Although, as I have noted, Grounds 1 and 2 against Mr Simons do not depend upon the Search Order Material, Ground 3 almost certainly does.⁷⁸ Equally, it seems to me that if it is against the public interest to proceed against Mr O'Boyle, the same is true of Mr Simons, particularly given the premise of the Company that it is Mr O'Boyle that is the mastermind behind the breach of the Company's rights, and Mr Simons, who has provided a public and very full apology, is merely his pawn

85. Accordingly, for the new reasons outlined above:

- (1) Permission to commence committal proceedings against Mr O'Boyle is refused, and not merely adjourned to after the Proceedings.

⁷⁵ See paragraph 78(3) above.

⁷⁶ See paragraph 21(8)(a) above.

⁷⁷ See Hollander, *Documentary Evidence*, 13th ed (2018) at §2-10; *Dadourian Group International v. Simms (No 2)*, [2006] EWCA Civ 1745.

⁷⁸ See paragraph 31(3)(c) above.

- (2) The permission that has been given to the Company to proceed against Mr Simons for committal (but which has not yet been exercised) is revoked.

(3) Security for costs

86. Under CPR 25.12, a defendant to any claim may apply for security for his costs. The court is entitled to make a costs order for security for costs in favour of a defendant where:

- (1) It is satisfied, having regard to all the circumstances of the case, that it is just to make such an order;⁷⁹ and
- (2) The claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so.⁸⁰

87. The Company concedes that the second requirement is met.⁸¹ However, an order for security for costs was resisted by the Company on two grounds:

- (1) First, it was contended that this was one of those cases where the conduct of Mr O'Boyle (and the companies in which he is involved, notably G2A and Obcon) should be taken into account as a factor pointing against the granting of security.
- (2) Secondly, it was contended that an award of security for costs would stifle the Company's claim. This was because the amount of the security sought by the Applicants was in the region of £1,000,000, representing their total anticipated costs of defending the claims against them. The Company submitted that it would not be able to pay costs in this amount, and that the Proceedings would, if such an order were made, be stifled.

88. I shall consider these two points in turn.

89. In *Absolute Living Developments Limited v. DS7 Limited (in liquidation)*,⁸² I expressed the view that a defendant's conduct in bringing about the claimant's difficulty in providing security was not a relevant factor in determining whether security for costs should be ordered. That remains my view, but I do not need to consider this legal question in order to determine this point.

90. The fact is – as the Company acknowledged⁸³ – that it is not easy to correlate the Applicants' conduct with the Company's financial position. The Applicants' conduct of their defence of the Proceedings (which is relied upon by the Company) cannot possibly explain the Company's financial position. More plausible is the contention that Mr O'Boyle, in directing Mr Simons' infringements of the Company's rights, has brought about the Proceedings, thus involving the Company in significant cost and significant

⁷⁹ CPR 25.13(1)(a).

⁸⁰ CPR 25.13(1)(b) and CPR 25.13(2)(c).

⁸¹ Written submissions of the Company at paragraph 47.

⁸² [2018] EWHC 1432 (Ch).

⁸³ Written submissions of the Company at paragraph 53.1.

cost exposure. That, however, is precisely the matter in dispute and I cannot determine this (highly contentious) matter against the Applicants. As I have noted, the Company’s lawyers have labelled this contention as “beyond any doubt”.⁸⁴ I do not accept this: it seems to me that the point is arguable: but I am not prepared to say (at this stage at least) that the point has any more weight than that.

91. I turn to the question of whether the proceedings would be stifled. As to this:

- (1) The Company provided me with some evidence regarding the Company’s financial affairs, notably the evidence of Mr Hitchcock (a solicitor retained by the Company) and the evidence of Mr Steve Meredith, the managing director of the Company. These statements have exhibited a number of documents regarding the Company’s financial position.
- (2) The most important document is the annual report of the Company for the year ended 31 March 2018. This report is dated 21 December 2018 and it represents the most recent reliable statement of the Company’s financial position. It is not a very recent report, and I infer that the annual report of the Company for the year ended 31 March 2019 must be in fairly advanced draft, given that I heard this application on 28 and 29 November 2019. However, no draft annual report, showing figures for the year ended 31 March 2019 was produced to me.
- (3) The report for the year ended 31 March 2018 shows:

	Year ended 31 March 2017	Year ended 31 March 2018
Dividends paid	Nil	£384,526
Gross profit	£4,094,171	£2,975,516
Administrative expenses	(£3,258,220)	(£2,566,401)
Bank overdrafts	(£527,992)	(£1,213,619)

This information – which, of course, represents a highly selective statement of what the reports say – shows:

- (a) An improving position in terms of dividends paid.
 - (b) A high gross profit in both 2017 and 2018, substantially eroded by significant administrative expenses, which Mr Butler, QC was unable to explain the nature of.
 - (c) A deteriorating position in terms of bank borrowing, which however, has improved in 2018/2019, for it was the evidence of Mr Meredith that the Company was now operating within an overdraft facility of £675,000.
92. This information suggests that the Company might well have difficulty in funding, in short order, a sum of the order of £1,000,000, but that the Company would have no difficulty in funding a reasonably substantial payment each month to stand as security

⁸⁴ See paragraph 31(1)(b) above.

for the Applicants' costs. Indeed, I note that the Company is paying its solicitors a monthly retainer of £25,000.

93. I consider that it would be wrong to require the Company to pay "up-front" a sum amounting to several hundred thousand pounds. Such an order might very well stifle the Proceedings and provide the Applicants with an excess of security, given the present stage of the Proceedings: the Applicants have not yet incurred costs of £1,000,000. Accordingly, and again the detail will need to be spoken to in a consequential order, I am going to direct that the Company pay to the Applicants' solicitors (for them to hold to the order of the court in a segregated account) the sum of £100,000 within a short period of the handing down of this judgment and £25,000 each month during the pendency of the Proceedings, and taking account of any stay until further order of the court or until the Proceedings have concluded.
94. That, to my mind, properly protects the Applicants, but ensures that the Proceedings are not stifled. It seems to me that the Company can and should make provision for an adverse outcome of the Proceedings, but that it has shown an unwillingness to do so, suggesting that if (at the conclusion of the Proceedings) a costs order of the order of £1,000,000 were made against it, it would be unable to pay. That, I accept, is likely to be the case, if no provision in advance is made. The effect of my order is to compel the Company to make such advance provision by paying the sums specified in paragraph 93 above to the Applicants' solicitors.

G. CONCLUSIONS AND DISPOSITION

95. For the reasons I have given:
- (1) There has been a most serious breach of the Search Order by the Company and those instructed by it: see Section D above.
 - (2) Although not the subject of the Search Order, the Applicants are entitled to raise these breaches with the court, for the reasons I give in Section E above.
 - (3) I do not consider that it appropriate, as matters stand, for the Company's Amended Particulars of Claim to be struck out, either in whole or in part. However, I consider that that question may have to be revisited after the steps that I have described in paragraph 80 above have been completed. I do consider, however, that certain steps to remedy – or, perhaps more accurately, ameliorate – the breaches of the Search Order that have occurred need to be taken. These involve:
 - (a) The steps described in paragraph 80 above.
 - (b) The termination of the applications for committal of Mr O'Boyle and Mr Simons.
 - (c) A provision of security for costs.

My reasons for ordering these steps – and for not striking out the Amended Particulars of Claim – are set out in Section F above.

96. There is one other matter on which I have been asked to rule. I have described the hearing before His Honour Judge Keyser, QC in paragraph 31(1)(d) above, at which Judge

Keyser ordered that the application to commence committal proceedings against Mr O'Boyle be adjourned until after the Proceedings had concluded. That application will now not take place, by reason of this Judgment. However, I have been asked to determine who should bear the costs of this application. In my judgment, the Company should bear these costs, because it should have appreciated that committal proceedings against Mr O'Boyle constituted separate proceedings, such that any use of the Searched Material would require the consent of the court. It seems to me that the failure to draw this to the Judge's attention was principally that of the Company, and that this would have made a material difference to the outcome of the hearing.

ANNEX 1

TERMS USED IN THE JUDGMENT

(Paragraph 1 footnote 1 in the Judgment)

TERM	FIRST REFERENCE IN THE JUDGMENT
Applicants	Paragraph 4
cloning	Paragraph 3(2)
Company	Paragraph 1
Computer Expert(s)	Paragraph 21(3) (in quotation)
Copyright Works	Paragraph 15(1)
Fifth Defendant	Paragraph 3(5)
First Defendant	Paragraph 2
Fourth Defendant	Paragraph 3(5)
G2A	Paragraph 13(2)
<i>Hewlett Packard</i>	Paragraph 42 foot 37
imaging	Paragraph 3(2)
Imaged Materials	Paragraph 22(2)
Kelf	Paragraph 3(5)
Listed Items	Paragraph 21(3) (in quotation)
<i>Matthews & Malek</i>	Paragraph 45 footnote 38
Non-Imaged Materials	Paragraph 22(2)
Obcon	Paragraph 1
OSL	Paragraph 1
Premises	Paragraph 21(3) (in quotation)
Proceedings	Paragraph 1
Report	Paragraph 22
Search Order	Paragraph 3(1)
Search Order Material	Paragraph 3(3)
Search Order Precedent	Paragraph 21 footnote 5
Search Party	Paragraph 21(3) (in quotation)
Searched Material	Paragraph 3(3)
Second Defendant	Paragraph 2
Seventh Defendant	Paragraph 3(5)
Sixth Defendant	Paragraph 3(5)

Supervising Solicitor(s)	Paragraph 21(3) (in quotation)
Third Defendant	Paragraph 2
1 August 2018 Order	Paragraph 16
4 July 2018 Order	Paragraph 15
18 February 2019 Order	Paragraph 26

ANNEX 2

PRECEDENT SEARCH ORDER AT CPR PD 25A

(Paragraph 21 footnote 5 in the Judgment)

SEARCH ORDER

IN THE HIGH COURT OF JUSTICE

[] **DIVISION**

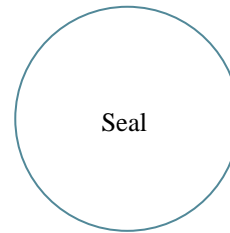
Before The Honourable Mr Justice

[]

Claim No.

Dated

Applicant



Respondent

PENAL NOTICE

IF YOU [] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS THE RESPONDENT TO BREACH THE TERMS OF THIS ORDER MAY ALSO BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS SEIZED.

THIS ORDER

1. This is a Search Order made against [] ('the Respondent') on [] by Mr Justice [] on the application of [] ('the Applicant'). The Judge read the Affidavits listed in Schedule F and accepted the undertakings set out in Schedules C, D and E at the end of this order.
2. This order was made at a hearing without notice to the Respondent. The Respondent has a right to apply to the court to vary or discharge the order—see paragraph 27 below.

3. There will be a further hearing in respect of this order on [] ('the return date').
4. If there is more than one Respondent–
 - (a) unless otherwise stated, references in this order to 'the Respondent' mean both or all of them; and
 - (b) this order is effective against any Respondent on whom it is served or who is given notice of it.
5. This order must be complied with by–
 - (a) the Respondent;
 - (b) any director, officer, partner or responsible employee of the Respondent; and
 - (c) if the Respondent is an individual, any other person having responsible control of the premises to be searched.

THE SEARCH

6. The Respondent must permit the following persons⁸–
 - (a) [] ('the Supervising Solicitor');
 - (b) [], a solicitor in the firm of [], the Applicant's solicitors; and
 - (c) up to [] other persons being [*their identity or capacity*] accompanying them,

(together 'the search party'), to enter the premises mentioned in Schedule A to this order and any other premises of the Respondent disclosed under paragraph 18 below and any vehicles under the Respondent's control on or around the premises ('the premises') so that they can search for, inspect, photograph or photocopy, and deliver into the safekeeping of the Applicant's solicitors all the documents and articles which are listed in Schedule B to this order ('the listed items').
7. Having permitted the search party to enter the premises, the Respondent must allow the search party to remain on the premises until the search is complete. In the event that it becomes necessary for any of those persons to leave the premises before the search is complete, the Respondent must allow them to re-enter the premises immediately upon their seeking re-entry on the same or the following day in order to complete the search.

RESTRICTIONS ON SEARCH

8. This order may not be carried out at the same time as a police search warrant.
9. Before the Respondent allows anybody onto the premises to carry out this order, he is entitled to have the Supervising Solicitor explain to him what it means in everyday language.

10. The Respondent is entitled to seek legal advice and to ask the court to vary or discharge this order. Whilst doing so, he may ask the Supervising Solicitor to delay starting the search for up to 2 hours or such other longer period as the Supervising Solicitor may permit. However, the Respondent must—
 - (a) comply with the terms of paragraph 27 below;
 - (b) not disturb or remove any listed items; and
 - (c) permit the Supervising Solicitor to enter, but not start to search.

11. (1) Before permitting entry to the premises by any person other than the Supervising Solicitor, the Respondent may, for a short time (not to exceed two hours, unless the Supervising Solicitor agrees to a longer period) –
 - (a) gather together any documents he believes may be incriminating or privileged; and
 - (b) hand them to the Supervising Solicitor for him to assess whether they are incriminating or privileged as claimed.

(2) If the Supervising Solicitor decides that the Respondent is entitled to withhold production of any of the documents on the ground that they are privileged or incriminating, he will exclude them from the search, record them in a list for inclusion in his report and return them to the Respondent.

(3) If the Supervising Solicitor believes that the Respondent may be entitled to withhold production of the whole or any part of a document on the ground that it or part of it may be privileged or incriminating, or if the Respondent claims to be entitled to withhold production on those grounds, the Supervising Solicitor will exclude it from the search and retain it in his possession pending further order of the court.

12. If the Respondent wishes to take legal advice and gather documents as permitted, he must first inform the Supervising Solicitor and keep him informed of the steps being taken.

13. No item may be removed from the premises until a list of the items to be removed has been prepared, and a copy of the list has been supplied to the Respondent, and he has been given a reasonable opportunity to check the list.

14. The premises must not be searched, and items must not be removed from them, except in the presence of the Respondent.

15. If the Supervising Solicitor is satisfied that full compliance with paragraphs 13 or 14 is not practicable, he may permit the search to proceed and items to be removed without fully complying with them.

DELIVERY UP OF ARTICLES/DOCUMENTS

16. The Respondent must immediately hand over to the Applicant's solicitors any of the listed items, which are in his possession or under his control, save for any computer or hard disk integral to any computer. Any items the subject of a dispute as to whether they are listed items must immediately be handed over to the Supervising Solicitor for safe keeping pending resolution of the dispute or further order of the court.

17. The Respondent must immediately give the search party effective access to the computers on the premises, with all necessary passwords, to enable the computers to be searched. If they contain any listed items the Respondent must cause the listed items to be displayed so that they can be read and copied.⁸⁵ The Respondent must provide the Applicant's Solicitors with copies of all listed items contained in the computers. All reasonable steps shall be taken by the Applicant and the Applicant's solicitors to ensure that no damage is done to any computer or data. The Applicant and his representatives may not themselves search the Respondent's computers unless they have sufficient expertise to do so without damaging the Respondent's system.

PROVISION OF INFORMATION

18. The Respondent must immediately inform the Applicant's Solicitors (in the presence of the Supervising Solicitor) so far as he is aware—
- (a) where all the listed items are;
 - (b) the name and address of everyone who has supplied him, or offered to supply him, with listed items;
 - (c) the name and address of everyone to whom he has supplied, or offered to supply, listed items; and
 - (d) full details of the dates and quantities of every such supply and offer.
19. Within [] working days after being served with this order the Respondent must swear and serve an affidavit setting out the above information.

PROHIBITED ACTS

20. Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly inform anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 p.m. on the return date or further order of the court.
21. Until 4.30 p.m. on the return date the Respondent must not destroy, tamper with, cancel or part with possession, power, custody or control of the listed items otherwise than in accordance with the terms of this order.
22. [Insert any negative injunctions.]
23. [Insert any further order]

COSTS

24. The costs of this application are reserved to the judge hearing the application on the return date.

⁸⁵ If it is envisaged that the Respondent's computers are to be imaged (i.e. the hard drives are to be copied wholesale, thereby reproducing listed items and other items indiscriminately), special provision needs to be made and independent computer specialists need to be appointed, who should be required to give undertakings to the court.

RESTRICTIONS ON SERVICE

25. This order may only be served between [] a.m./p.m. and [] a.m./p.m. [and on a weekday].
26. This order must be served by the Supervising Solicitor, and paragraph 6 of the order must be carried out in his presence and under his supervision.

VARIATION AND DISCHARGE OF THIS ORDER

27. Anyone served with or notified of this order may apply to the court at any time to vary or discharge this order (or so much of it as affects that person), but they must first inform the Applicant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Applicant's solicitors in advance.

INTERPRETATION OF THIS ORDER

28. Any requirement that something shall be done to or in the presence of the Respondent means—
 - (a) if there is more than one Respondent, to or in the presence of any one of them; and
 - (b) if a Respondent is not an individual, to or in the presence of a director, officer, partner or responsible employee.
29. A Respondent who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.
30. A Respondent which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

COMMUNICATIONS WITH THE COURT

All communications to the court about this order should be sent to —

[Insert the address and telephone number of the appropriate Court Office]

If the order is made at the Royal Courts of Justice, communications should be addressed as follows —

Where the order is made in the Chancery Division

The Senior Associate, Fifth Floor, The Rolls Building, 7 Rolls Building, Fetter Lane, London EC4A 1NL, quoting the case number. The telephone number is 020 7947 6733. The office is open between 10 a.m. and 4.30 p.m. Monday to Friday

Where the order is made in the Queen's Bench Division

Room WG08, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 020 7947 6010.

Where the order is made in the Commercial Court

Room EB09, Royal Courts of Justice, Strand, London WC2A 2LL quoting the case number. The telephone number is 0207 947 6826.

The offices are open between 10 a.m. and 4.30 p.m. Monday to Friday.

SCHEDULE A

THE PREMISES

SCHEDULE B

THE LISTED ITEMS

SCHEDULE C

UNDERTAKINGS GIVEN TO THE COURT BY THE APPLICANT

- (1) If the court later finds that this order or carrying it out has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make. Further if the carrying out of this order has been in breach of the terms of this order or otherwise in a manner inconsistent with the Applicant's solicitors' duties as officers of the court, the Applicant will comply with any order for damages the court may make.
- [(2) As soon as practicable the Applicant will issue a claim form [in the form of the draft produced to the court] [claiming the appropriate relief].]
- (3) The Applicant will [swear and file an affidavit] [cause an affidavit to be sworn and filed] [substantially in the terms of the draft affidavit produced to the court] [confirming the substance of what was said to the court by the Applicant's counsel/solicitors].
- (4) The Applicant will not, without the permission of the court, use any information or documents obtained as a result of carrying out this order nor inform anyone else of these proceedings except for the purposes of these proceedings (including adding further Respondents) or commencing civil proceedings in relation to the same or related subject matter to these proceedings until after the return date.
- [(5) The Applicant will maintain pending further order the sum of £ [] in an account controlled by the Applicant's solicitors.]
- [(6) The Applicant will insure the items removed from the premises.]

SCHEDULE D

UNDERTAKINGS GIVEN BY THE APPLICANT'S SOLICITORS

- (1) The Applicant's solicitors will provide to the Supervising Solicitor for service on the Respondent—
 - (i) a service copy of this order;
 - (ii) the claim form (with defendant's response pack) or, if not issued, the draft produced to the court;
 - (iii) an application for hearing on the return date;
 - (iv) copies of the affidavits [*or draft affidavits*] and exhibits capable of being copied containing the evidence relied upon by the applicant;

- (v) a note of any allegation of fact made orally to the court where such allegation is not contained in the affidavits or draft affidavits read by the judge; and
 - (vi) a copy of the skeleton argument produced to the court by the Applicant's [counsel/solicitors].
- (2) The Applicants' solicitors will answer at once to the best of their ability any question whether a particular item is a listed item.
 - (3) Subject as provided below the Applicant's solicitors will retain in their own safe keeping all items obtained as a result of this order until the court directs otherwise.
 - (4) The Applicant's solicitors will return the originals of all documents obtained as a result of this order (except original documents which belong to the Applicant) as soon as possible and in any event within [two] working days of their removal.

SCHEDULE E

UNDERTAKINGS GIVEN BY THE SUPERVISING SOLICITOR

- (1) The Supervising Solicitor will use his best endeavours to serve this order upon the Respondent and at the same time to serve upon the Respondent the other documents required to be served and referred to in paragraph (1) of Schedule D.
- (2) The Supervising Solicitor will offer to explain to the person served with the order its meaning and effect fairly and in everyday language, and to inform him of his right to take legal advice (such advice to include an explanation that the Respondent may be entitled to avail himself of [the privilege against self-incrimination or] [legal professional privilege]) and to apply to vary or discharge this order as mentioned in paragraph 27 above.
- (3) The Supervising Solicitor will retain in the safe keeping of his firm all items retained by him as a result of this order until the court directs otherwise.
- (4) Unless and until the court otherwise orders, or unless otherwise necessary to comply with any duty to the court pursuant to this order, the Supervising Solicitor shall not disclose to any person any information relating to those items, and shall keep the existence of such items confidential.
- (5) Within [48] hours of completion of the search the Supervising Solicitor will make and provide to the Applicant's solicitors, the Respondent or his solicitors and to the judge who made this order (for the purposes of the court file) a written report on the carrying out of the order.

SCHEDULE F

AFFIDAVITS

The Applicant relied on the following affidavits–

[name]	[number of affidavit]	[date sworn]	[filed on behalf of]
(1)			
(2)			

NAME AND ADDRESS OF APPLICANT'S SOLICITORS

The Applicant's solicitors are—

[Name, address, reference, fax and telephone numbers both in and out of office hours.]