Neutral Citation Number: [2022] EWHC 51 (Comm)

Case No: **E40LS635**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
CIRCUIT COMMERCIAL COURT (QBD)

Leeds Combined Court Centre
1 Oxford Row, Leeds LS1 2BG

Date: 13 January 2022

Before :

HH JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

VITRITION UK LIMITED	**Claimant**
- and -	
(1) TIMOTHY JOHN CAINE **(2) JOANNE DOROTHY CAINE** **(3) EMMA CAINE** **(4) JACK CAINE** **(5) DANIEL CLAY** **(6) SACHETPAK LIMITED** **(7) BEAUTYCOLL LIMITED** **(8) HEALTH INNOVATIONS UK LIMITED**	**Defendants**

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- -

Mr Martin Budworth (instructed by **Lupton Fawcett LLP**) for the **Claimant**
Mr Dirk van Heck (instructed by I**CL Commercial Law Ltd**) for the **1st to 7th Defendants**
The 8th Defendant was not represented and did not appear

Hearing dates: 22, 23 April 2021, 15 June 2021

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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.

....

HH JUDGE DAVIS-WHITE QC (SITTING AS A JUDGE OF THE HIGH COURT)

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HH Judge Davis-White QC :

Introduction

1. This is another chapter in the saga of the above-named proceedings between Vitrition UK Limited and eight named defendants. It relates primarily to an application by the Defendants for relief from sanctions (the sanctions being the striking out of the defence and an order debarring the relevant Defendants from defending the proceedings) in respect of alleged multiple failures to give disclosure as ordered and a cross-application for judgment in default of defence. The relevant Defendants also seek further disclosure orders against the Claimant.

2. Proceedings commenced in October 2018 with an application for injunctive relief both in terms of delivery up of documents (and/or electronic records of documents) and ceasing to or not trading in certain respects. At that stage, the relevant Defendants offered undertakings to the court which were accepted. At that stage, the relevant Defendants were represented by solicitors, Williams & Co.

3. In April 2020 a costs and case management conference listed before HH Judge Klein had to be adjourned, once more. It had originally been listed for September 2019, but was then adjourned by consent. Criticism was made of the delays in the case.

4. In August 2020, the costs and case management conference finally took place. Among the orders made by HH Judge Klein on 18 August 2020 was an order for extended disclosure pursuant to CPR Part 51U to take place by 13 November 2020. This was by reference to a Disclosure Review Document annexed to the order. In all cases Extended Disclosure Model D was specified with, in some cases, the addition of "with narrative documents". The use of model D was largely agreed but in the case of some issues the Claimant had asked for Model E.

5. As is well-known, Model D involves narrow, search based disclosure, with or without narrative documents. As regards the scope of disclosure what is required is the disclosure of (a) documents which are likely to support or adversely affect the party's claim or defence or that of another party in relation to one or more of the Issues for Disclosure and (b) known adverse documents, including any arising from the search directed by the court. The search required is "a reasonable and proportionate search" with any appropriate limits to the scope of that search being determined by the court, if they cannot be agreed.

6. No limits to the relevant search required were specified in Judge Klein's order and I suspect none were sought. On a number of occasions Mr van Heck, counsel for the relevant Defendants, complained to me about the wide terms of the order for disclosure to which I had attached a sanction in the event of non compliance and submitted that the searches required had not been limited by the court in the conventional way. Insofar as this seems to have been a criticism of the August order I reject it. The searches required are those set out in paragraph 8 of the Practice Direction: a reasonable and proportionate search. It is for the parties to discuss and seek to agree the scope of the searches required (see paragraph 9.6). The court may give directions with regard to searches but is likely to do so only when the matter is agreed or where specific issues or problems are raised, the parties are unable to agree a solution, resolution of the

dispute will be appropriate to save time and costs in carrying out the search and the court is able to understand the issues raised.

7. It was not suggested that specific search issues were raised at the CCMC. Indeed, as Mr van Heck confirmed, his note of the hearing before Judge Klein was to the effect that the Judge orally expressed two markers. First, that the parties should engage with each other in seeking to agree the scope of searches and that if they could not agree what would be a reasonable and proportionate search then they should come back to the court either for a hearing or a disclosure guidance hearing. Secondly, that there might be costs consequences if unnecessary searches were carried out.

8. As it happens I am satisfied from the correspondence that the Claimant's solicitors did seek to engage. On the other hand I cannot see that the Defendants raised any issue about proportionality or the reasonableness of the scope of searches or of limiting searches and I am unable to detect how it is said that the absence of limitations on the scope of searches in some way explains why the Defendants were "floundering" in giving extended disclosure or that it in any way excuses the failures to give disclosure that I identify below. In my assessment the submissions, correspondence and evidence show that the Defendants were "floundering", as Mr van Heck put it, not because of the width of the searches required nor because of the number of disclosure issues which the parties had agreed in the Disclosure Review Document (22 in all) but because the Defendants did not seek timely and proper advice but instead took their own course and then, too late, sought advice from their professional advisers Mr Robinson of ICL Commercial Law (not a firm of legal representatives) and Mr Van Heck at a late stage on a piecemeal basis and when neither were in a position to give full, proper and adequate advice covering the whole range of disclosure, with the result that disclosure after 27 November 2020 was given by them, as Mr van Heck put it, "in dribs and drabs".

9. As regards compliance with an order for extended disclosure, paragraph 12 of the Practice Direction specifies that the compliance involves three steps: service of a Disclosure Certificate supported by a statement of truth signed by the party or an appropriate person at that party that all known adverse documents have been disclosed, service of an Extended Disclosure List of Documents (unless dispensed with by agreement or order) and production of the documents which have been disclosed over which no claim is made to withhold production and, if a particular document cannot be produced, a description of each such document with reasonable precision and an explanation with reasonable precision of the circumstances in which, and the date when, the document ceased to exist or left its possession or any other reason for non-production. If it is not possible to identify individual documents then the class of documents must be prescribed with reasonable precision.

10. The first to seventh defendants failed to give disclosure as and by the time originally ordered. The Claimant made an application dated 17 November 2020 seeking an "unless order" in relation to those defendants' disclosure obligations. On 27 November 2020, I made an order against the first to seventh defendants, extending the time for disclosure until 4pm on that day but providing that unless they did so their defence would be struck out and they would be debarred from further defending the proceedings. Such debarring or unless order was expressed as not applying to a matter referred to as "Tracmil Limited" to which I will return. The short reasons that I gave on that occasion were later amplified by me in an approved written judgment.

11. Unless otherwise stated, references to the "Defendants" will henceforth be to the first to seventh defendants. The eight defendant has, in effect, taken a passive role in these proceedings for some time.

12. The circumstances in which I made the "unless order" on 27 November 2020 are set out in my judgment given then, as further amplified by me in, and when approving, the transcript but, put briefly, they were as follows:

    (1) On 17 November 2020, the Defendants, though Counsel, assured the court that they had then (belatedly) complied with the requirement to give extended disclosure. They did so on 17 November when they served a revised disclosure certificate which was then signed by all relevant parties or on their behalf. They had earlier served one the evening before - which only contained one signature and was therefore, they accepted, defective.

    (2) The Defendants submitted, in summary, that there had been faults on both sides but that ultimately an extension of time to comply with the extended disclosure order was the correct course and it was neither just nor proportionate to apply some other sanction. The Claimant's application, they said, had been made prematurely and was not justified given the court's approach to such matters and the overriding objective. Further, disclosure had by then been given so there was no point in extending time and making an "unless" order by way of sanction.

    (3) I found that any fault was referable to the Defendants, not the Claimant and that had no disclosure been given as at 17 November 2020, I would have made an unless order. Having been assured by counsel for the defendants that disclosure was then complete, but the Claimant indicating that, on the cursory examination it had been able to carry out, it did not consider that disclosure was complete, and bearing in mind the history, I considered that the correct course was to impose the sanction requested rather than expect yet a further application for compliance to be made in the future. However, disclosure in relation to Tracmil, being an issue fairly recently raised, would not fall within the sanction.

13. By application dated 31 December 2020, the Defendants applied for orders (a) granting relief from the sanction imposed by my order of 17 November 2020; (b) that the Claimant take a number of steps to give complete extended disclosure as ordered by HH Judge Klein.

14. By application dated 4 February 2021, the Claimant sought judgment on the basis that the "unless" order of 17 November 2020 had taken effect and there was no defence (the "Claimant's Application").

15. Both applications came on for hearing before me on 16 February 2021. The Defendants sought an adjournment of that hearing to enable them to file further evidence. The hearing was adjourned by me and directions given for the further service of evidence, but on "unless" terms.

16. The applications came before me on 22 and 23 April 2021. The hearing was not able to be concluded on 23 April 2021, despite the court sitting late on the 22 April and early on 23 April 2021. It was adjourned part heard and ultimately the hearing concluded on

15 June 2021. I apologise to the parties for the delay in preparing this judgment after that date.

17. As in November 2020, Mr Martin Budworth appeared for the Claimants and Mr Dirk van Heck appeared for the Defendants. I am grateful to both of them for their written and oral submissions. The eighth defendant continued to play no role in these proceedings. From hereon in this judgment when I refer to the "Defendants" I mean all defendants other than the eighth defendant.

The Proceedings

18. For ease of reference, I repeat what I have set out in my approved judgment of 27 November 2020 (the "November 2020 Judgment").

19. The Claimant company carries on business as a manufacturer of food supplements and is based in West Yorkshire. The first to fourth defendants are members of the Caine family. The first and second defendant are husband and wife. The third and fourth defendants are their children. The fifth defendant is the partner of the third defendant. The sixth defendant is a company of which the third defendant, and her partner, the fifth defendant, are directors and 59% shareholders. The third defendant is the director and sole shareholder of the seventh defendant.

20. Members of the Caine family originally established the Claimant. In about 2015 they sold the Claimant to Health Innovations (UK) Limited for about £1.1 million. The share purchase agreement (the "SPA") contained various covenants by the vendors. In addition, members of the Caine family thereafter remained as directors of the Claimant and/or were thereafter employed by the Claimant under various service contracts, again each one containing a number of covenants by the relevant employee. Such positions as directors and employees have since come to an end.

21. The claim brought (again describing it in general terms) is, in a nutshell, one alleging an improper business diversion. The claim form was issued on 22 October 2018. An application for interim relief was made on 22 October 2018. That resulted in various undertakings being given to the court by the Defendants with regard to their working and the delivery up of various items and documents. Those undertakings are recorded in a court order dated 26 October 2018.

22. A number of causes of action are pleaded in the amended particulars of claim. For present purposes, it suffices to say that the main allegations are that, in breach of various duties under the SPA, their respective contracts of employment, and as directors of the Claimant, relevant defendants have set up in competition and/or diverted the Claimant's business or had business of the Claimant's diverted to them, and/or misused confidential information and/or misappropriated tangible property containing confidential information. The causes of action pleaded, as well as breach of contractual and fiduciary duty, also include claims by way of breach of confidence, economic torts and conversion and theft. Claims for damages, accounts of profits, equitable compensation and injunctive relief are all put forward. For present purposes, this very broad description of the proceedings suffices to explain the background and the claim.

23. On 17 April 2019, a CCMC was ordered to take place on 5 September 2019. In August 2019, that date was vacated by consent. In December 2019, a new date was fixed for April 2020.

24. The procedural history up until 27 November 2020 is set out in more detail in my earlier November 2020 Judgment. For present purposes it suffices to repeat that on the evening of the hearing documents purporting to comply with paragraph 12 of the Practice Direction were served and lodged on behalf of the Defendants. The disclosure certificate was signed by the first Defendant on behalf of all others. At the hearing before me it was said that this would be corrected and separate disclosure certificates for each Defendant would be lodged. This technical point would not change in substance the content of what was being certified and disclosed by the Defendants, which I was assured was now complete.

The procedural history after the hearing on 27 November 2020

25. The Defendants assert that non-disclosure by the Claimant forms part of the circumstances against which their claim to relief must be determined. Accordingly, I address further below the matters relied upon by the Defendants in this respect.

26. An initial matter that I should clarify is that the Defendants claim to be litigants in person. Although ICL Commercial Law Limited ("ICL") acts for them it is not on the record for them as a lawyer acting on their behalf. In effect, it is what Mr Van Heck describes as a "professional agent". Its website claims:

> *"ICL Commercial Law Ltd is an innovative and dynamic legal practice specialising in company and commercial law, debt recovery and insolvency. Headquartered in Leeds with nine regional office facilities in London, Manchester, Liverpool, Birmingham, Newcastle, Bristol, Reading, Oxford and Cambridge, ICL Commercial Law Ltd is well placed to service the needs of commercial clients who demand a high quality service from their legal service providers."*

27. In this case it seems to act as if it is the Defendant's lawyer without in fact being its lawyer on the record. The legal qualifications of Mr Robinson, the person with conduct of ICL's role with the Defendants remained unclear to me. As I commented in the course of the hearing, it is one thing for the court to receive witness evidence about the procedural aspects of a case from a qualified lawyer who is on the record, it is another thing for a litigant in person's evidence to be put forward by a "professional agent" whose qualification and understanding of the legal processes and what he might be expected to have advised the Defendants is unclear. It is unsatisfactory that much of Mr Robinson's evidence is put forward on the basis that it sets out his "instructions". Thus, there is no evidence from the Defendants themselves, even though Mr Robinson puts forward what he has been "instructed" on their behalf, which includes statements as to what they have done and what they thought and the reasons why they acted as they did, but of course on the face of it such matters are not properly verified by any statement of truth. Further, it seems that at least some of that evidence is second hand hearsay because at least to some extent the litigation appears to be run by one of the Defendants on behalf of the others. Indeed, although Mr Robinson says in global terms that he believes the content of information that he sets out as having been received from third parties, it is difficult to understand what this belief is founded upon.

28. Matters are complicated by the fact that Mr Robinson apparently works part-time as a consultant for ICL, the majority of his time being taken up in working in a family funeral director business. All the evidence from the Defendants has been put forward by Mr Robinson. As I shall explain, that evidence is highly unsatisfactory in, among other things, lacking detail, and changing explanations of the factual position without proper, or indeed, any explanation. At various points during the hearing Mr van Heck appealed to me to allow him to give evidence on instructions (which I refused given the history of this matter and the detailed timetable for evidence laid down, with another unless order in relation to that timetable in the case of the Defendants) or to "infer" things from the evidence. It is unsatisfactory that appeal was made to the difficulties of "litigants in person" when (a) those litigants in person have not put forward their own evidence and explanations supported by a statement of truth and (b) there is so little transparency as to what they were being advised to do and what they have been telling their "professional agent" over time.

29. On the afternoon of 27 November 2020, further disclosure certificates were served by or on behalf of each of the Defendants. No further documents were disclosed as a result. However, the disclosure certificates stated that a search had been undertaken of all documents handed to MD5 (i.e. including the documents that were not on the platform referred to in the November 2020 Judgment). Again, in summary, this platform contained documents extracted from various devices handed over by the Defendants or some of them in 2018. However, it was created following the application of search terns to the mass of data so received and did not contain all of the documents on the devices that I have referred to.

30. By letter dated 2 December 2020, Lupton Fawcett LLP ("LF"), solicitors for the Claimant, indicated that they had then had an opportunity to consider the disclosure given on 27 November 2020 by the Defendants. They referred back to a letter dated 18 September 2020 from ICL, agents for the Defendants, in which agreement had been expressed that the Defendants needed to give extended disclosure in relation to a number of categories of documents as set out in an earlier letter from LF dated 3 September 2020. Five categories of disclosure were identified from that letter as not having been given but which needed to be given. Further, the December letter asserted that there had been no reference to searches of email accounts of the Defendants in respect of the period after October 2018 (when, as I have said, a number of devices had then been delivered up for imaging and searching) and no email correspondence had been disclosed that had been generated after October 2018. The letter closed by asserting breach of the "unless" order, that the strike out of the defence and debarring from defending had taken effect and that an application for relief would now be sought.

31. By letter dated 7 December 2020, having set out various reasons why disclosure had been given or could not be (and was not required to be given) of certain documents, ICL asserted that there had been no relevant breach of the unless order, that the sanction had not taken effect and that the Claimant itself was in breach of the original extended disclosure order of HH Judge Klein, as explained in an earlier letter from ICL dated 23 November 2020. In the event that the Claimant did not withdraw its allegation of breach of the unless order then an application would have to be made for relief from sanctions.

32. In addition, the letter referred to "accounts information" relating to Beautycoll (the 7th defendant) said to have been retrieved from Tracmil. Tracmil was said to have acquired

the trademarks of Beautycoll and all its documents. This documentation was made available via a link but no new disclosure certificate was filed at this stage. The covering email gave the link in question and referred to there being "some other documents that will be uploaded later today". Apparently some 43 documents were available on the link at the time that the email was sent (7:08am). These included (among other things) payslips, a Beautycoll balance sheet and profit and loss accounts for the 12 months ending 28 February 2020, various cash book records, a fixed asset register as at 28 February 2020, and various tax returns of the 2nd Defendant said to be "90% complete" for the years 2018-19 and 2019-20.

33. Later that day a further email was sent at 11:53 informing LF that a further tranche of documents was available via an electronic link as provided. Some 59 documents or categories of documents were disclosed. In the main these were bank statements for Beautycoll and Derma Developments.

34. By letter also dated 7 December, replying to ICL's letter of 7 December, LF, among other things, made clear that it expected to receive an application for relief from sanctions the following day. It also made the point that in the light of the extra disclosure that day it was hard to see how the position could be maintained that the "unless order" had not been breached.

35. By letter dated 10 December 2020, ICL confirmed that the Defendants would be making an application for relief from sanctions. A draft of the application was promised for the following day.

36. By email dated 11 December 2020, Mr Robinson of ICL sent a draft of the application but explained that he was unable to send his witness statement in support at that stage because he only worked part-time for ICL and his time had been taken up by his work within his family funeral directing business which took up the majority of his then time. He referred to two particular recent deaths in which he was involved in the aftermath of.

37. In the light of Mr Robinson's personal position, LF indicated that they would ask for the witness evidence (and availability) to be provided by 10am on 16 December 2020.

38. By email dated 15 December 2020, ICL attached some "LinkedIn" messages regarding the 2nd defendant. "LinkedIn" is an on-line service, operating through websites and mobile phones, which is primarily used by professionals and businesses to promote themselves. There is a messaging facility. The relevant messages were said to have been (recently) restored, the 2nd defendant not knowing that this was possible until a few days earlier.

39. By email dated 16 December 2020, further documents were attached "by means of further disclosure". These included a tax return for Beautycoll for the period ended February 2020 which was said not to have existed before that day when it had been sent to HMRC. Whilst filing this return it had been found that it was possible to retrieve a copy of the 2019 return which was also attached. A P&L account and balance sheet for Derma Holdings, also compiled that day, were also attached as were 4 copy invoices relating to transactions between Beautycoll and Chrysalis. The latter dated back to between September and December 2018.

40. On 18 December 2020, ICL finally sent the draft application and supporting documents (the latter primarily being a signed second witness statement of Mr Robinson, containing a signed statement of truth). Paragraph 5 of the latter draft confirmed that Mr Robinson had now concluded "that the sanction [in the "unless" order] has indeed taken effect".

41. By email dated 22 December 2020, Mr Robinson of ICL confirmed that 7 scans of bank statements were not included in the upload on 7 December 2020. This was discovered when preparing a schedule of the documents disclosed after 27 November 2020. He attached them by way of disclosure and confirmed that his witness statement was being updated.

42. By further email dated 31 December 2020, ICL sent LF disclosure certificates by way of service, one for each Defendant, certifying the disclosure made to date. This revealed "Tracmil" to be one of the custodians of the, or some of the, relevant documents disclosed. On the same day a (revised) second witness statement was signed by Mr Robinson, being the chief evidence in support of the Defendants' applications for relief from sanctions and for an order for further disclosure against the Claimant. As I have said, the application notice was formally issued on 31 December 2020. A tracked version of the witness statement of 31 December 2020 is in evidence showing changes from the 18 December 2020 version. The changes are substantial and substantive. Paragraph 5 was amended to acknowledge not only that the sanction in the unless order had taken effect but also to confirm the conclusion reached by Mr Robinson that further additional disclosure by the Defendants was required and was in effect outstanding.

43. The third witness statement of Mr Lockley, of LF, was signed on 4 February 2021. This contained the evidence in answer to the Defendants' application and the evidence in support of the Claimant's application, which was issued on the same day.

44. On 16 February 2020, on the Defendants' application, I adjourned the hearing of the two substantive applications until 23 and 24 April to enable the Defendants to file further evidence. I set a timetable for service of any further evidence. That included an "unless order" as regards service of the defendants' evidence.

45. The third witness statement of Mr Robinson was signed on 4 March 2021. It contains the evidence in reply on the Defendant's applications and the evidence in answer on the Claimant's Application.

46. The fourth witness statement of Mr Lockley was signed on 19 March 2020. It contains the final round of evidence on behalf of the Claimant. A point was taken as to whether permission was required for parts of that evidence to be admitted. Given there had been plenty of time to deal with the evidence and in all the circumstances and to the extent necessary I allowed that witness statement into evidence.

47. In his skeleton argument, Mr van Heck stated the following:

> *"40. Whilst Ds admit that their disclosure remained incomplete until 16.02.21, the date of the last hearing, and that the breach was serious and significant, they assert that it has been complete since that date."*

48. In paragraph 56 of his third witness statement, Mr Lockley of LF identified 23 categories of documents in relation to which he said that disclosure was and remained unsatisfactory. Submissions centred around these categories.

49. In what follows I have attempted to summarise the key points made by the witness statements which unfortunately went off into explorations of rabbit holes that were not, or turned out not to be, immediately relevant to the issues before me.

50. As a generality, I should however record the concession by Mr van Heck in response from an observation by me:

> "JUDGE DAVIS-WHITE: Yes. If your clients engaged with this process a lot earlier on this may not have arisen. I mean what you seem to be saying is that after the unless order your clients eventually in a drib drab sort of way when they eventually got round to seeking legal advice realised they still hadn't given disclosure properly and that further steps were needed and therefore it's all very unfortunate. But the short response to that is well if they had engaged with this whole process a lot earlier on all of this would have happened earlier on.
> MR VAN HECK: Yes, I accept that my Lord, I must accept that. It was a mammoth exercise undertaken by litigants in person supported by a part-timer who is not a lawyer with occasion input from me when I had the time. It took over three months and they weren't realistic about it and I have to accept that."

51. I should also stress that the unless order had been made in circumstances where I had been assured by Counsel for the Defendants that disclosure was then complete (subject only to lodging of separate certificates for each Defendant in the same terms as that already lodged by the first Defendant on behalf of all Defendants).

52. Before turning to the detailed 23 categories of document identified by Mr Lockley as being inadequately disclosed, there were three major points that Mr van Heck sought to deal with by way of submission based on his instructions, although he accepted that there was not evidence (or adequate evidence) on these points on behalf of the Defendants and that he could not see a further adjournment to put such evidence before the court given the procedural history (including a further "unless" order by me in relation to the filing of evidence by the Defendants in relation to the applications before me). In summary, the three matters related to:

    (1) Disclosure in relation to Beautycoll and the apparent changing evidence as to the extent that documents of Beautycoll were under the control of Tracmil and had been searched;

    (2) Whether or not proper searches had been undertaken of the data handed to MD5 and which had not been uploaded to the platform following the application of search terms. For an understanding of the generality I refer back to my earlier judgment.

    (3) Whether or not proper searches had been undertaken in relation to Kingsway Restaurant Group Limited ("Kingsway") which operated a restaurant. Kingsway was a restaurant business with which the First Defendant was involved whilst working for the Claimant. One disclosure issue specifically related to Kingsway.

On instructions Mr van Heck told me that a search had not been carried out in relation to the relevant data that had been stored on a USB stick.

Beautycoll

53. Beautcycoll is the 7th defendant. The particulars of claim assert:

(1) It was incorporated on 4 February 2015 and at all material times the third defendant, Emma Caine, was its sole shareholder and director.

(2) From around July 2016 onwards, and in breach of various duties owed to the Claimant, Tim Caine, Joanne Caine, Emma Caine, Jack Caine and/or Daniel Clay wrongfully diverted or sought to divert the custom and business of existing and potential customers of Vitrition to Beautycoll and/or a company called Sachetpak Limited. Part of the relevant pleaded facts relate to an allegation as to the purchase of machinery for or by Beautycoll.

54. The order of HH Judge Klein dated 18 August 2020 required extended disclosure according to Model D in relation to two issues regarding Beautycoll:

(1) The development of Beautycoll's business from 1/6/16 to date and any resulting diversion of business away from the Claimant (disclosure issue 3[1], including narrative documents);

(2) The purchase of Beautycoll's machinery (disclosure issue 4).

55. By letter dated 3 September 2020, LF made clear that one of the areas of disclosure to be given was in relation to quantum, in what was later described as paragraph (a) of the itemised list:

> "(a) Quantum - the Defendants' Counsel accepted at the CCMC that the Defendants' Extended Disclosure would need to include documents as to quantum. For example, the Claimant will expect Beautycoll and Sachetpak to disclose full accounts and financial records. We refer you to disclosure issues 3 and 5 in this regard."

56. By letter dated 18 September 2020, this paragraph of the LF letter was specifically agreed (among others) by ICL. In terms the letter said that: "The only disclosable documents produced after November 2018 will relate to quantum."

57. By letter dated 2 December 2020, LF expressed concern about a failure by the Defendants to give adequate disclosure and referred specifically (among other things) to a failure to give any disclosure regarding quantum after November 2018.

58. Some accounts information ("consisting of financial records held by Tracmil and accounts prepared by the First Defendant upon receipt of those records") and bank statements relating to Beautycoll were then disclosed (by providing links to where the

[1] As taken from the Disclosure Review Document appended to and forming part of the court order of August 2020.

documents might be downloaded from) respectively at two stages on 7 December 2020. I have dealt with this earlier in this judgment.

59. On 16 December and 22 December 2020 further disclosure of Beautycoll documents were made as I have set out above. Among other things the Beautycoll bank statements previously disclosed (with a few omissions) by providing a link to them on 7 December 2020 were sent to LF on 22 December 2020, together with the extra statements that had not been accessible via the earlier electronic link. The fact that they had not been sent earlier to LF was explained in Mr Robinson's second witness statement as a mistake.

60. In his second witness statement, made in support of the defendant's application for relief from sanctions and dated 31 December 2020, Mr Robinson asserted:

> "I was advised by Mr Van Heck (after 27 November 2020) and believe that, since Beautycoll's records had been within [Beautycoll's] control before its trademarks were acquired by Tracmil, they should be included in the Defendants' Extended Disclosure. The First Defendant has told me that he did not appreciate this at the date of the deadline for giving Extended Disclosure and I must admit I did not, either."

61. It is surprising, to put it mildly, that a person apparently giving legal advice on a professional basis about the conduct of litigation should not have understood this point. In any event, this was clearly a fundamental failing on the part of the Defendants. Further, the assertion was clear, control now vested in Tracmil. This was explained in paragraph 15 of the witness statement:

> "15. I have been instructed as follows in respect of Beautycoll Ltd. It is a dormant company that has not traded since 16 May 2019. The trademarks that were held by Beautycoll were acquired by Tracmil Ltd when the former ceased trading. <u>All documents relating to Beautycoll</u> have since been held on Tracmil's server and have not been under the Defendants' control since then. None of the Defendants hold any documents in relation to Beautycoll's finances, but following my receipt of the Letter, they took steps <u>to try and obtain financial records</u> relating to Beautycoll from Tracmil." (Emphases supplied).

62. In his third witness statement dated 4 February 2021, Mr Locke made a number of points regarding disclosure in relation to Beautycoll. Among others these included:

(1) Emma Caine was and at all times had been employed at Tracmil, in reality she had access to Beautycoll records assuming they had been passed to Tracmil;

(2) The relinquishment of Beautycoll documents to Tracmil in May 2019 was an apparent breach of the Disclosure Pilot (duty to preserve documents re-iterated in paragraph 3.1) applicable to the Business and Property Courts. This is said to have happened in May 2019 at a time when the Defendants were represented by solicitors who must have advised upon disclosure obligations, such advice being given at the latest in February 2019 when the Defendants gave initial disclosure at the time of the serving of their defence.

(3) There had been limited or no disclosure regarding the following categories of documents which must exist or have existed in connection with Beautycoll's trading:

a. all invoices post 30 October 2018 (although it was noted that two invoices after 30 October 2018 had been disclosed on 16 December 2020);

b. documents dealing with the transfer of Beautycoll Limited's assets and undertaking to Tracmil Limited ("Tracmil") including: (i) any sale/transfer of the 4-lane stick pack machine purchased from PMM and financed by Tim/Joanne Caine whilst directors of the Claimant and (ii) the transfer of customer and supplier lists, pricing lists, formulation for the manufacture of product, product formulations, technical, quality and works manuals and procedures. In other words all of the information and know-how Tracmil would require in order to run the business operated by Beautycoll;

c. Beautycoll Limited's full accounts and financial records;

d. Email and other communications with (or records of communications with) Beautycoll Limited's customers, suppliers and third parties

(4) The latest Disclosure Certificates served by the Defendants dated 31 December 2020 indicated that they had *"requested documents under the control of Tracmil'* although no particulars of the request were given. The fact Beautycoll Limited's records were no longer under the Defendants' control meant that they had not been searched.

(5) Assertions that Beautycoll ceased to trade in May 2019 were belied by evidence regarding its website after that date, its winning awards (or being a finalist for an award) after that date, testimonials on its website after that date and it having paid from its bank account for its director to attend an awards event after that date.

(6) There was no disclosure regarding the acquisition and financing of fixed asset machinery shown in Beautycoll's accounts.

63. In his third witness statement dated 4 March 2021, Mr Robinson:

(1) Re-iterated that Beautycoll ceased trading in May 2019 (though accepted insurances had continued to be paid in a "run off" period). He explained that the relevant awards had been in October 2019 and had related to the Beautycoll product not Beautycoll itself and that Beautycoll had paid for attendance at the October 2019 awards because Tracmil had insisted that the obligation had been incurred by Beautycoll prior to May 2019;

(2) Confirmed Emma Caine had access to the Beautycoll records now retained by Tracmil but did not have control over them;

(3) Accepted that "some" records have been transferred to Tracmil (without identifying what records). He also asserted that "There would have been no benefit in the Defendants making use of "customer and supplier lists, pricing lists, formulation for the manufacture of product, product formulations, technical, quality and works

manuals and procedures. In other words all of the information and know-how Tracmil would require in order to run the business operated by Beautycoll". This was on the basis that Tracmil had developed its own distinct products. However, he did not say whether or not such documents existed and whether or not they had been handed to Tracmil or not. Whether or not Tracmil used them, they were of course highly material to Beautycoll's position;

(4) Denied that documents had not been preserved, on the basis that there had been disclosure of some documents;

(5) Asserted full disclosure had been given of all financial records and of all customer, supplier and third party communications.

(6) Asserted that Tracmil records HAD been searched and appropriate disclosure given accordingly.

(7) Asserted that until they saw Mr Lockley's Third Witness Statement, the Defendants were under the misapprehension that they believed they were only being asked for invoices to 31 October 2018. This is difficult to credit given the letter of 3 September and is another example of inadequacy in the evidence before me.

(8) As regards fixed assets asserted that "all assets" are listed on a fixed asset schedule provided to the Claimant.

(9) Asserted that all financial information had been provided by way of HMRC print outs. As such Mr Robinson seems to focus on disclosure of information rather than disclosure of documents.

64. In oral submissions Mr van Heck accepted that the question as to what documents now at Tracmil had been searched was not clear on the evidence. He told me that his instructions were that there had been searches of Beautycoll documents now held by Tracmil and the following exchange then took place:

> "MR VAN HECK: That what has not been searched is only documentation regarding transactions of Tracmil following the assignment of the Beautycoll copyright. So everything concerning Beautycoll Limited has been accessed, searched and full disclosure given.
> JUDGE DAVIS-WHITE: And this is simply because that's what he has been told, Mr Robinson has been told? You are getting these instructions from Mr Robinson because that's what he has been told?
> MR VAN HECK: Yes."

65. I am not prepared to accept this as proper evidence.

66. In summary, my conclusions with regard to Beautycoll and disclosure issues 3 and 4 are that even now I am not satisfied that proper searches and disclosure has been undertaken and given.

(1) As regards Beautycoll's machinery (disclosure issue 4) and fixed assets it is no answer to say that the assets have been listed on a fixed asset register. Disclosure

of documents regarding the acquisition of the same (which is likely to include invoices, orders and emails/letters) needed to be given. There is no clear statement in evidence that such documents either did not exist or that they have been searched for.

(2) As regards the development of the Beautycoll business, again the evidence as to what did exist in terms of discoverable documents and what has been searched for is woefully inadequate. I deal with further points of detail in the next paragraphs of this judgment.

(3) No good explanation has been given as to why such extra disclosure that has been given in relation to Beautycoll after my November order imposing sanctions was not given at an earlier stage.

(4) Any relevant issues regarding Tracmil taking over Beautycoll's business are excluded from the sanction by my order, I therefore leave any disclosure failings in that regard out of account when considering whether the sanction has come into operation. However, it is relevant when considering the Defendants' approach to disclosure and whether I can be satisfied that disclosure is complete regarding disclosure relating to Beautycoll and its business.

The Platform

67. My earlier judgment dealt in some detail with what has been described as "the Platform". In summary, a whole cache of electronic documents had been handed to the Claimant by the Defendants pursuant to undertakings at the start of the proceedings in response to an application for an injunction. That data was held by a company called MD5. In my earlier judgment I referred to this data as the "Overall Data". Certain search terms were applied to the Overall Data resulting in a selection from that cache of a number of documents which were placed on the Platform. As I explained in my earlier judgment:

> "10. The search terms applied by MD5 at the request of the Claimants in 2018 were on the limited basis of their then state of knowledge. Since then, the issues in the case have developed considerably and the number of search terms and issues is probably much, much wider now than it was back in 2018. So the defendants were unable to rely upon the platform by itself as resulting in documents that they might have to disclose. It was the position that they needed to look both at the platform and at the documents not on the platform held by MD5. I should stress that the images, and the documents selected from such images, are all images/documents of the defendants."

68. Failures of the defendants to instruct a consultant to assist in the disclosure process as regards the Overall Data (and possibly a misunderstanding on their part of the difference between the Overall Data and the Platform and the need to consider both), was in large part responsible for the failure to comply with the relevant earlier orders for extended disclosure and was the reason for the unless order that I made in November 2020.

69. The disclosure certificate provided on the eve of the November 2020 hearing did not make clear that the Overall Data (rather than the extracts from the same on the Platform) had been searched. The new certificates provided on the afternoon of the day that the November unless order was made, stated that a search had been undertaken of documents off the platform (i.e. the Overall Data): "the captured images [given to MD5] were searched in their entirety."

70. In his 4th witness statement Mr Lockley exhibited an email from MD5 dated 19 March 2021 confirming that the documents on the Platform amounted to some 93,591 and that the application of search terms to the remaining parts of the Overall Data that were not on the platform resulted in a further 576 items being identified so that in total some 94,095 items needed to be reviewed for disclosure purposes by the Defendants. However, it appeared to MD5 that access had only been given to Joanne Caine (the 2nd defendant) for these purposes. This evidence came in after the time for the Defendants to respond. However, as the hearing was not until over a month later I let this evidence in at the hearing. The Defendants decided not to deal with it on the basis that permission would need to be sought by the Claimant to allow the same.

71. One overall point that Mr van Heck sought to deal with by way of confirmation to the court of his instructions, although the same was not in evidence, was the manner in which the relevant documents had been reviewed by the Defendants. His instructions were that the review had not been conducted by the Second Defendant alone but each of the four individual Defendants had examined the documents "as appropriate" before disclosure was given (in fact no further disclosure arising from such review was identified in the evidence before me). The relevant exchange between Mr van Heck and myself then proceeded as follows:

> "JUDGE DAVIS-WHITE: As I understand it factually what is said has happened is that the search mechanically was done by inputting agreed search terms. That will then produce a whole lot of documents presumably, and then as I understand it what Mr Van Heck is saying is that each defendant then looked at all those documents, is that right Mr Van Heck, i.e. the documents produced by the search?
> MR VAN HECK: Not that each defendant looked at all the documents but each defendant looked at the documents which may conceivably have been relevant to that defendant.
> JUDGE DAVIS-WHITE: Who decided which were relevant to which defendant and that they should only look at those documents?
> MR VAN HECK: Presumably, although I am assuming this, it was decided by reference to which search terms gave rise to the document.
> JUDGE DAVIS-WHITE: Okay, well in a moment you can take me to the evidence such as it is on this search point. But at the moment it sounds like a lot of this isn't in evidence at all.
> MR VAN HECK: Well these are specific issues of concern and which I have taken instructions because they remain outstanding and of concern.
> JUDGE DAVIS-WHITE: Yes, I understand that. We have now got to the 22nd April, when can I expect some more evidence on this then, do you want another adjournment to put in evidence about all this confirming your instructions?
> MR VAN HECK: No my Lord, we were given the opportunity to respond to Mr Lockley's fourth witness statement and we didn't take it so I can hardly ask for permission for more evidence now.

JUDGE DAVIS-WHITE: Why am I now getting information from you on instructions rather than in evidence?
MR VAN HECK: I'm afraid I can't answer that question my Lord."

72. As Mr Budworth submitted, it is hard to see how individuals reviewed documents if they did not have access to the electronic data and apparently that access was given only to the second defendant. Even on instructions, Mr van Heck was unable to explain to me how documents were selected for each relevant individual to review. The disclosure certificates did not make clear the process as described by Mr van Heck.

73. In short, on this issue too, I am not satisfied that proper disclosure has been given.

Kingsway

74. The First Defendant's "involvement with Kingsway 3/6/16 to 15/10/18" formed Disclosure issue 12 on the Disclosure Review Document as appended to the August 2020 order for disclosure. The Third Defendant's work for Kingsway June 2016 to October 2018 formed Disclosure Issue 15. This was against the backdrop of allegations that (a) the First Defendant had held office as sole director of Kingsway and was involved in a managerial capacity in the restaurant operated by that company in breach of his service contract, his fiduciary duties owed to the Company and/or his relevant statutory duties and (b) that in breach of her duty of fidelity, the Third Defendant carried out work for Kingsway during her working hours with the Claimant.

75. The skeleton argument lodged by Counsel for the Defendants dated 12 February 2021 asserted that the First Defendant had mistakenly believed that disclosure issues relating to Kingsway was not relevant to Disclosure Issues. This document was explained to me as "work in progress" and it was submitted I should ignore the position there stated regarding (inter alia) Kingsway. In this respect reliance was placed by Mr van Heck on a statement that the skeleton argument reflected:

> *"tentative, potential instructions (to which Ds should not be held, since they are not final due to insufficient time, but have been included to offer the court the best information currently available), received from D1 via Mr Robinson regarding each of the 23 categories* [identified by the Claimant as being areas where disclosure remained inadequate)]."

76. However, the skeleton argument must have been prepared on the basis of instructions and it was deployed. Accordingly I consider that the Claimant is entitled to rely upon it and on subsequent discrepancies between it and other documents deployed by the Defendants, at the least without there being any or any satisfactory explanation for the inconsistencies.

77. I also note that it is hard to credit how the stated belief about Kingsway documents set out in the skeleton argument could have been held, given the express terms of the August 2020 Order and the annexed list of disclosure issues.

78. In the third witness statement of Mr Robinson, made on 4 March 2021, it is stated that the First and Third Defendants "do not believe that there is anything to disclose."

79. In his 4th witness statement Mr Lockley referred to the fact that the Claimant has provided disclosure showing that the First Defendant transferred sums for Kingsway on 30 June 2016, at a time when he was employed by the Claimant. No disclosure had been provided in relation to Kingsway.

80. However, before me Mr van Heck asserted that there were relevant Kingsway documents but that these had not been searched for. He told me that they were contained on a USB stick that had been delivered up at the start of the proceedings and that the device was held by the Claimant and/or MD5 the defendants had not been able to search for it.

81. As regards this, first, this explanation is not set out in evidence and Mr van Heck told me there was no relevant correspondence between the parties explaining the position further; secondly, these documents appear to be in no different position to the documents delivered up electronically and which were not on the Platform (though it is unclear to me whether they have been imaged). Further there is no explanation as to why they do not remain available to the Defendants for the purposes of searching and complying with disclosure obligations as do all the other documents delivered up and ultimately taken possession of by MD5; thirdly, there therefore appears to be incomplete disclosure by the Defendants. The history again reveals a casual if not cavalier approach to disclosure and to providing the court with evidence in support of an application for relief from sanctions.

The 23 categories of documents where disclosure is alleged to be inadequate and incomplete

82. I turn now to the 23 categories of documents identified by Mr Lockley in paragraph 56 of his third witness statement of 4 February 2021 as being ones where disclosure has been inadequate and remains incomplete. For these purposes I identify the relevant category numbers, as allocated by Mr Lockley, by a number in square brackets.

83. [1]: Invoices of Beautycoll issued after 1.11.18: two invoices were disclosed in February 2021 on the basis that the Defendants mistakenly thought they were being asked only for invoices up until 31 October 2018. As I have said, this explanation makes no sense. However, I am not satisfied that these are the only invoices in question. Mr Robinson’s witness statement (paragraph 56(1)) does not in terms say so but simply avoids dealing with the point.

84. [2]: Beautycoll’s full and unabbreviated accounts for the years ended 28.02.19 and 29.02.20: Again I am not satisfied that disclosure has been given. What has been provided is accounts data set out on an excel spreadsheet which is said to have been taken from an HMRC website, the source of such data being said to be data filed with HMRC. That does not amount to the actual accounts. There is no clear statement that accounts do not exist. Indeed, Mr Robinson in his witness statement simply ignores the question of whether there are relevant accounts and simply asserts that tax returns have been filed and disclosure of the tax return is adequate because it contains the relevant information. However, some of that information must be assumed to come from accounts that the board of Beautycoll approved as its accounts. Some other documents is not sufficient. Mr Robinson ends the relevant passage of his witness statement by asserting that “the full accounts and financial records have been disclosed” but that is

at odds with the preceding 10 sentences of the paragraph (paragraph 56(2) of his third witness statement of 4 March 2021 ("Robinson 3rd WS")).

85. [3], [4]: Documentation relating to the assignment of the Beautycoll Trademark, assets and undertakings and transfer of its books and records to Tracmil: Some documentation was disclosed in terms of the assignment of the trademark and a lawyer's bill, but as late as 16 February 2021. There is no satisfactory answer as to why this material was not disclosed much earlier. However, I am not satisfied that all that should have been disclosed has been disclosed. There would then at least have been correspondence with the lawyers over the assignment of the trademark and the idea that there are no other documents is risible. Mr van Heck suggested that it might be that all negotiations were concluded orally and not recorded/evidenced in writing anywhere but that suggestion is not contained in evidence. At its highest I have a bare assertion from Mr Robinson that relevant documentation was disclosed. He goes on to say that the relevant agreements were included in a transfer agreement and legal transfer of the trademark. However, the document produced simply comprises an assignment of trademarks for one pound. Mr van Heck told me that the deal involved more than that and that what Beautycoll, or those behind it, attained was "an injection into the business of a six figure sum, and the rescue of the business from a situation where it was impossible to carry on because of the terms of the orders made in 2018". That agreement is not in the documents that were disclosed and there must have been some relevant documentary evidence recording such deal or the possibility of the same and setting up oral meetings etc. including (apparently) the employment of the Third Defendant by Tracmil which appears to have been part of the deal. Indeed, Mr Lockley asserts that the explanation given by the Defendants has been that the investment was in part made by the forgiveness of debt owed by Beautycoll to another company and I accept the submission that the likelihood is that this would have been recorded somewhere in writing. Because this matter relates to Tracmil taking over (or the allegation that it took over) Beautycoll's assets and business, I do not regard any failing in this respect as falling within the terms of the sanction imposed by the November order. However, the Defendants' approach on this issue I do take into account as confirming my view that I am not satisfied that adequate disclosure as ordered has taken place and that, as regards disclosure to which a sanction was applied in default, I consider that the Defendants remain in default.

86. [5]: Documentation relating to the acquisition by Beautycoll of fixed asset(s) as shown in financial information for the period ending 28 February 2019: no documentation has been provided and Robinson 3rd WS simply goes off at a tangent by saying that the asset is revealed in a fixed asset register, which is not to the point. Disclosure has not been given and there is no evidence the relevant documents do not exist. In his fourth witness statement Mr Lockley also raises a point regarding a "high speed four lane stick packer". Mr van Heck told me this was purchased by the first Defendant personally and then sold to Beautcycoll, the purchase price being left outstanding as a debt. The machine was then transferred to Tracmil. However, there must be documentation for each of these three stages of the acquisition (by the First Defendant, by Beautycoll and by Tracmil) yet there has been no disclosure. I am not satisfied that there has been disclosure by the Defendants in relation to fixed assets of Beautycoll.

87. [6]: Documentation regarding Beautycoll having ceased to trade: a declaration was made to HMRC about this but the Claimant's point is that there must be other

documents relevant to show Beautycoll having ceased to trade. No such documents of any sort have been disclosed and equally the Defendants have not said that such documents do not exist. Indeed, Mr Robinson refers to run off insurance having been put in place. Documentation regarding this must exist. Mr van Heck accepted that such documentation could be relevant, especially to the defence case. Again, I am not satisfied that adequate disclosure as ordered has been given.

88. [7]: Documentation regarding the Defendants' use of the documentation referred to in paragraph 41 of the amended particulars of claim (being documents confidential to the Claimant and used in developing and/or in the business of (among other entities) Beautycoll). Disclosure of such documentation formed Disclosure Issue 11. The Claimant asserts that disclosure of documents after October 2018 has not been given. Two points are made: first, Beautycoll records have not adequately been searched. Secondly, the answer by Mr Robinson that personal devices had been surrendered in October 2018 does not deal with personal devices that were not surrendered on that date but which were acquired and/or used after that date. I have dealt with the Beautycoll position. As regards personal devices, Mr van Heck pointed me to correspondence apparently recognising that personal devices (other than those delivered up in October 2018) should be searched and asked me to infer from that that such devices had been searched. I am unable to do so. The evidence from the Defendants is inadequate. I am not satisfied on the balance of probabilities that the devices have been searched and proper disclosure was given. In effect the issue was raised by the Claimant's evidence but not dealt with in the evidence that has been filed on behalf of the Defendants.

89. [8]: Documentation regarding the Defendants' use of the Claimant's confidential information referred to at paragraph 27 of the amended particulars of claim. This is disclosure issue 19. The position mirrors that under [7]. As Mr van Heck properly conceded in the course of the hearing before me, the answer given in evidence on behalf of the Defendants simply does not cover off the ground to demonstrate that disclosure is complete. As he said to me "[it] suffers from the same problem that it is not a full answer to the question" as was the position with [7].

90. [9]: Documentation regarding trading undertaken with whatever vehicle or entity the Defendants are trading with-via for the purpose of exploiting business opportunities including disclosure relating to Tracmil. In terms of breach of the unless order I ignore non-disclosure of matters relating to Tracmil. This issue covers disclosure issues 3, 5-10, 20 and 22. The Defendants agreed to give disclosure in relation to this generic matter in their letter of 18 September 2020. I am not satisfied that full disclosure has been given. However, this point goes wider than Tracmil and therefore I am not satisfied there has been compliance with the disclosure order to the extent that a sanction was imposed in relation to it. However, this is really a repeat of the point established in relation to other heads.

91. [10]: Disclosure relating to Kingsway: I have already dealt with this head so far as it relates to disclosure issue 12 relating to the first defendant. So far as disclosure issue [15] is concerned, which relates to work that the Third Defendant is said to have carried out for Kingsway, the Defendants appear to have accepted that, as with the First Defendant, she carried out work for Kingsway but none of that design work has been disclosed. As I pointed out in the course of the hearing, there is no clear statement that there is nothing to disclose simply a statement of belief that there is nothing to

disclose but no explanation as to why not. In further submissions, Mr van Heck asserted that the First Defendant had spent no time on the Kingsway business (and therefore there were no relevant disclosable documents) because there was a separate manager and the First Defendant was simply the owner of the business (or of the company owing the business). I do not accept this: it seems to me likely that there must be relevant documents which must at some time have been within the First Defendant's control e.g. dealing with refurbishments and the First Defendant's authorisation of the same. On the face of the evidence I am not satisfied that disclosure is complete.

92. [11]: the First Defendant's personal tax returns covering the period October 2018 to date. This arises from Disclosure Issue 22 (The Claimant's losses as a result of alleged breaches of duty). A tax return for 5 April 2020 was disclosed as lodged with HMRC apparently by the First Defendant's accountant but not a signed and dated version. Mr van Heck accepted in the course of the hearing that at the least there must be an email or something containing verification from the First Defendant that he agreed the figures in the tax return but that there had been no disclosure of the same. As regards the tax year ending 5 April 2019, a tax computation but no tax return had been disclosed. No explanation was proffered in evidence as to why the tax return had not been disclosed. I am not satisfied that disclosure by the Defendants is complete.

93. [12]: the second defendant's personal tax returns covering the period October 2018 to date. Again this arises in relation to disclosure issue 22. The relevant returns that have been disclosed are not on their face authenticated. The same point arises as in relation to the First Defendant's unsigned disclosed tax return for 5 April 2020 as considered under [11]. Again, I am not satisfied that disclosure by the Defendants is complete.

94. [13], [14] and [15]: personal tax returns for the Third, Fourth and Fifth Defendants. Mr Budworth accepted that the evidence was that there were none and that a point taken by the Claimant about receipt of dividends in at least one case was, on the face of things, answered by the explanation that the dividends in question fell below the relevant threshold for the requirement for a tax return to apply. Accordingly, Mr Budworth did not rely upon these three items.

95. [16] : Absence of email communications after October 2018: to some extent this is a repeat of or overlap with others of the 23 items of complaint. Indeed the disclosure issues referred to are 3-10 and 19-22. The answer given is that in October 2018 undertakings were given and devices handed over so there is nothing to disclose. That point is certainly bad as regards (for example) Beautycoll as I have discussed earlier. Accordingly I am not satisfied that the Defendants' disclosure is complete.

96. [17]: Emails referred to in the Second Defendant's LinkedIn Messages. This is said to arise from Disclosure issues 19, 20 and 22. The relevant LinkedIn Messages on the Second Defendant's account show messages in which a sales@tracmil email account address has been sent out. Mr Budworth accepted that (a) if disclosure should be given and has not been these matters appear to relate to Tracmil and therefore fall outside the sanction that I am considering and (b) any resulting emails are probably emails which are within the control of Tracmil and therefore I cannot be satisfied at this stage that the Defendants have failed to disclose the same in breach of the orders for disclosure in this case.

97. [18], [19]: Whatsapp messages referred to in Second Defendant's LinkedIn messages; Alibaba account referred to in Second Defendant's LinkedIn messages. These items are similar in that the LinkedIn account reveals apparent communications between customers/suppliers in the business line of which the diversion compliant is made in the proceedings and the second defendant through other electronic messaging services and which have not been disclosed. The explanation for non-disclosure of the messages in such other electronic accounts (Alibaba and Whatsapp) is a simple assertion of "irrelevance". Mr van Heck accepted that there is simply an assertion of irrelevance. However, on the face of it, at least one of the parties communicating (a bottle manufacturer) would be relevant. Further, if the communications are innocent they may well undermine the Claimant's case and be relevant on that score as well. In short, given the prima facie relevance and the absence of a proper explanation of irrelevance I am not satisfied that disclosure by the Defendant is in this respect complete.

98. [20], [21]: Messages from the LinkedIn accounts of each of the Third Defendant and the First Defendant. These relate to disclosure items 3, 19, 20 and 22. The explanation given as regards these accounts is that they are not used. However, no explanation is given as to when they ceased to be used (or they had never been used) or whether they have been searched for messages and there are none. Given that the Third Defendant's account revealed some 97 connections it was clear that it had been used at some time, connections not being possible unless the connection is invited or an invitation from the connection is accepted. Again, I am not satisfied that disclosure by the Defendants is complete.

99. [22]: Documents relating to the creation and financing of the Sixth Defendant's (Sachetpak Limited's) website. This relates to disclosure issue 5 and the development of the Sachetpak business including its development and incorporation. Sachetpak Limited ("Sachetpak"), with Beautycoll, is alleged to be the business names/entities through which the individual Defendants wrongfully carried on business or took steps in the preparation of carrying on business in competition with the Claimant. In his second witness statement Mr Robinson asserted that Sachetpak was a dormant company that had never traded and there was nothing to disclose and there were no accounts or financial records. In his Third Witness Statement, Mr Lockley pointed out that Sachetpak had a website and Mr Robinson had not explained the financing of the same. In his third witness statement Mr Robinson asserted that the website was financed by the Third Defendant who purchased the domain name by using her debit card and the expenditure was limited to the cost of the domain name (implicitly said to be 86p). However, even at that stage no disclosure of the credit card statement was made. Mr van Heck accepted that the relevant evidence of purchase (i.e. by credit card statement if nothing else) would assist the Defendants in proving their case. His point was that the failure was de minimis. I do not accept this, especially once the matter had been identified and accepted by Mr Robinson's 4 March 2021 witness statement. Mr van Heck then moved ground and said that there was no purchase and nothing to disclose because of an earlier passage in Mr Robinson's witness statement which, inconsistently, seemed to suggest the domain name had been free. He then, as I understood him, accepted that there was no ambiguity and that the reference to something being "free" was to the build of the website using wix.com but not to the acquisition of the domain name. This is confirmed by what Mr Robinson later says in his witness statement when dealing with the 23 items, item by item. I am not satisfied that the defendants' disclosure is complete on this point and cannot accept the submission that there was no

payment made when in terms the witness statement concludes that a payment was made.

100. [23]: Correspondence sent by Mr Beer to the First Defendant as referred to in Mr Robinson's second witness statement (paragraph 29). This relates to disclosure issue 20 (the Defendants' business dealings with customers of the Claimant (including all or any listed at paragraph 56 of the amended particulars of claim). In his second witness statement, at paragraph 29, Mr Robinson confirmed that there had been dealings between the Defendants (or one or more of them) and a Mr Beer who was a director of each of Innovate Limited and Slimsticks Limited. The Claimant had for a time manufactured a product, Slimsticks, for Mr Beer/Slimsticks Limited. Mr Robinson went on to say:

> "Following subsequent quality and supply problems, the First Defendant was approached by Mr Beer asking if he could resume making Slimsticks for him. The First Defendant made it very clear to Mr Beer that he could not do any business with him whilst he was still a customer of the Claimant and he would require documentary evidence that Mr Beer had terminated his relationship with the Claimant. For the avoidance of doubt, and cognisant of his undertakings to the court, the First Defendant sent a copy of the termination letter to his legal representatives to validate that he was no longer prevented from doing business with Slimsticks since Mr Beer was no longer the Claimant's customer (nor did the Claimant hold any intellectual property in Slimsticks).

101. The Claimant's position was that disclosure should have been given (and had not been) of this "termination letter" and any other documents provided by Mr Beer which were sent to the legal representatives so far as not the subject of legal professional privilege.

102. Mr Robinson's response in his third witness statement was that Extended Disclosure does not extend to a requirement to disclose copies of documents referred to in a witness statement and that the correspondence was not relevant to the issues so is not disclosable. As Mr van Heck agreed, the first point made by Mr Robinson is irrelevant, the documents were not being sought by the Claimant on the basis that they were referred to in a witness statement but on the basis they fell within the duties to give extended disclosure as provided for by court order. Mr van Heck told me that the document was in fact "a key document in relation to" the disclosure issue in question. I am not satisfied that the Defendants' disclosure is therefore complete in this respect.

Other matters

103. A raft of other matters were raised in the evidence. In most cases they seemed to go to question of credibility of each side's case and/or substantive trial issues rather than disclosure issues. I am satisfied that the issues I have already considered are sufficient to enable me to deal with the applications for relief from sanctions and/or for judgment in the sense that (a) the extra materials and issues raised do not assist the Defendants in terms of any failings of disclosure on their part that have been identified and dealt with by me earlier in this judgment and (b) though some of the matters may be further examples of inadequate disclosure on the part of the Defendants, the matters that I have

already considered in this judgment are such that further examples do not really assist or strengthen the Claimant's case on disclosure/judgment.

104. For completeness I set out the following conclusions, though I do not take them into account in my consideration of the Claimant's case resisting relief from sanctions and seeking judgment:

(1) Personal email accounts: Mr Lockley asserts that no disclosure has been made of emails from the relevant Defendants personal email accounts that he identifies. In particular he refers to emails apparently forwarded from the First Defendant's email account with the Claimant to his personal email account which emails have apparently not been disclosed. The Defendants' case is that there are no emails to disclose because after giving their undertakings they complied with the same. This does not answer the point about the forwarded emails.

(2) Minutes of a meeting between some of the Defendants, as representatives of Beautycoll, was disclosed by the Claimant, apparently as having been located among the data which eventually ended up with MD5, taken from the devices handed over by the Defendants. However, the Defendants have not disclosed that document which suggests they have failed to give proper disclosure and confirms concerns about the search undertaken of the data that ended up with MD5. In evidence Mr Robinson denied that there had been any such meetings other than at the Claimant's premises but the minutes give the lie to that. How Mr Robinson came to make that statement, admitted by Mr van Heck to be incorrect, and why it was not corrected by a further witness statement remained unexplained.

Disclosure by the Claimant

105. Paragraph 2 of the Defendants' application notice dated 31 December 2021 seeks an order in the following terms:

> "2) An order pursuant to CPR PD 51 U, para 17, that the Claimant: (i) serve a further, or revised, Disclosure Certificate; (ii) undertake further steps to ensure compliance with the order for Extended Disclosure dated 18 August 2020; (iii) provide a further or improved Extended Disclosure List of Documents; (iv) produce additional documents; and (v) make a Witness Statement explaining any apparent remaining omission from its Extended Disclosure after it has carried out steps i to iv above."

106. The Claimant initially took the view that the appropriate course was to address the issue of alleged non-disclosure by the Claimant only if relief from sanctions was granted to the Defendants. However, the Defendants submitted that non-disclosure by the Claimant formed part of the "circumstances" that the court had to take into account in considering, under the third limb of the test adumbrated in the *Denton* case, whether relief from sanctions should be granted. In light of that submission I determined that I would hear argument on the issue of alleged non-disclosure by the Claimant, even though the Claimant was of course not subject to any unless order or other sanction (other than the inability, without court permission, to rely on non-disclosed documents under CPR PD 51U paragraph 12.5).

107. The position regarding alleged non-disclosure by the Claimant developed as follows.

108. By letter dated 23 November 2020, ICL alleged inadequate disclosure on the part of the Claimant but with no particulars and asking if LF were "prepared to engage in discussion".

109. By letter dated 24 November 2020, LF responded asking for particulars and saying they would respond to the same when provided.

110. By letter dated 7 December 2020, ICL contended that the Defendants were not in breach of the unless order applying to them (although also on that date disclosing a significant number, 105, further documents) and identified nine categories of document which, it was alleged, the Claimant had wrongly failed to disclose.

111. By letter of the same date, LF responded that the Defendants should seek relief from sanctions. They asked to be provided with the papers prior to issue so that the proposed application could be considered by them. The application was provided in draft on 18 December and revealed what, as issued, was paragraph 2 of the application notice seeking an order regarding alleged failures of disclosure by the Claimant.

112. LF responded by saying that the issue of relief from sanctions should be addressed first, to save time and costs.

113. As I have said, I indicated that I would hear argument on both matters. This resulted in a letter from LF dated 21 January 2021 setting out, by way of a schedule, the Claimant's answers to the points raised about its disclosure. Eleven items were identified in that schedule. By paragraph 11 of that letter additional disclosure was given of an exchange of text messages between Clare Campbell (of the Claimant) and the first defendant in August/September 2018 "relating to the sick leave that he took whilst dishonestly working on setting up Beautycoll Limited". The Schedule set out, in tabular form, the category of additional disclosure/alleged defective disclosure, Mr Robinson's comments about this in his 2nd witness statement dated 31 December 2020 and the Claimant's response. That letter and schedule was exhibited by Mr Lockley in his third witness statement dated 4 February 2021. As recorded in the Schedule, certain further disclosure was given at that stage in respect of specific categories of document identified by the Defendants.

114. In his third witness statement dated 4 March 2021, Mr Robinson of ICL responded to the Schedule but also identified a further 4 categories of documents in relation to which disclosure by the Claimant was said to have been inadequate.

115. Mr Lockley gave further evidence on such matters in his fourth witness statement dated 19 March 2021.

116. In submissions to me, the evidence (and instructions) as to what had or had not been done and what was said to be inadequate and why was hopelessly confused. Far too much time was taken in trying to establish on the basis of instructions what had or had not taken place. Further key documents, such as the Claimant's certificate of compliance, was not in evidence and Mr van Heck took the position that he could not be satisfied as to what was in it. However, it was for the Defendants to get their case and evidence in order and to demonstrate failures in disclosure. Matters were not assisted by Mr Budworth raising new issues for the first time in submission which had not even been adverted to in his skeleton argument (for example, that a tranche of

disclosure sought was outside the existing disclosure issues and thus the Defendants needed to apply to expand the disclosure issues). Finally, both counsel, largely following the way the evidence developed, were prone to raising other issues in a scattergun way rather than focussing on the particular category that I was attempting to deal with at any one time.

117. A great deal of time was taken in establishing basic facts as to what searches had or had not been made of the images retained by MD5, some of which had been abstracted and placed on the platform and some of which had not. As I understand the final position, based on instructions given to counsel in the course of the hearing, the Claimants had carried out a manual review of documents on the platform. As regards images retained by MD5 that were not on the platform, key word searches had been undertaken and the Defendants had reviewed such documents thrown up by such search (though see above about the lack of clarity as to which defendants had undertaken which review). The Claimants had not reviewed those documents thrown up by the keyword searches. Whether or not the Claimants should be ordered to carry out a further review of the same documents is a moot point. Arguably, it would be a disproportionate exercise. Given the confusion on the evidence and instructions reported to me I am unable to say that the Claimant's failure to review the pool of documents obtained from applying a key word search to those images retained by MD5 that had not already been put on the platform discloses any serious failing by the Claimant or casts in doubt its approach to disclosure or that an order for such a search should now be made. I would need to hear further argument on the course to be taken but based on proper evidence from each side confirming the instructions conveyed to me and setting out the matter in proper detail.

118. Matters were not assisted when Mr van Heck sought to depart from his skeleton argument and when I asked him whether his clients had approved it I was told that they had not.

119. The first category of documents identified in the Schedule sent under cover of LF's letter of 25 February 2021 (the "LF Schedule") was email correspondence between the First Defendant and Andrew Davies (of another, third party company) regarding prospective collaboration with Hothouse. This was a category that Mr Budworth suggested was not relevant to the extant disclosure issues. Be that as maybe (and I reach no firm view on the point given the paucity of the evidence and the late stage at which this was raised, after the hearing had already lasted a day and a half), it is clear that the Claimant had asked Mr Davies voluntarily to search for relevant emails falling within this category and he had not found them. There was a dispute as to whether these emails, if existing, would or would not have turned up among the MD5 documents: in any event they had not been located there. Mr van Heck's main position, as I understood it, was that the emails would be on the Vitrition email servers and that inadequate searches had been undertaken. However, precisely what searches had been undertaken was unclear. This was in part covered by the missing (from evidence) Claimant's disclosure certificate. However Mr Lockley has given evidence that searches were carried out of the servers. Mr van Heck asserted such searches were inadequate because the emails did not come to light. However the existence of the emails is based on the Defendants say so. I am not satisfied on the evidence before me that the searches by the Claimant were inadequate. In any event, I am satisfied that the Claimant did undertake searches and that this is no an example of a misapprehension

as to its duties to search and give disclosure or a failure to carry out searches with a view to giving disclosure.

120. The second category of document sought as contained in the LF Schedule was a letter from LF to Hothouse warning that company off from working with the Defendants. That letter (dated 15 October 2018) had been disclosed with the LF Schedule and Mr van Heck did not rely further on this category.

121. The third category in the LF Schedule was documentation in respect of works orders and/or sales orders of the Claimant for Beautycoll. It was said by Mr Lockley that there was no dispute as to the orders placed. Nevertheless this was clearly an aspect relevant to disclosure issue 3 (the development of Beautycoll's business) and disclosure by both sides was required. I note the Defendants do not seem to have disclosed these documents. With the LF Schedule the Claimant disclosed a ledger summary of all sales made by the Claimant to Beautycoll. I accept that at this stage ordering disclosure of underlying documentation in terms of orders and invoices would be disproportionate without some explanation (as to which I had none) as to why such further documentation was needed. Again, I do not regard any failure to provide the ledger summary at an earlier stage as manifesting any underlying failure to understand and attempt to comply with disclosure duties under the relevant court orders.

122. The fourth category on the LF Schedule is the Claimant's monthly audit reports for the period in which it was selling products to Beautycoll. The detail of the evidence on this point was unfortunately confusing and incomprehensible to me. Mr Budworth was unable to explain it without taking instructions which seemed to contain information not in evidence. As I understood matters the bottom line point being made by Mr Lockley was that the relevant information about margins was in fact set out on the last page of the audit reports (as disclosed with the LF Schedule). That last page only had been provided to Mr Doyle (save in the case of one month) and was in effect a separate document to the entire audit report which the Claimant retained. Given the confusion on this issue I would have ordered disclosure of the full audit reports and would have required the Claimant to confirm what I was told in evidence by way of a further witness statement. Again however, the Claimant responded when the issue was raised and I do not regard the history regarding this matter as disclosing any systemic failure by the Claimant with regard to disclosure.

123. The fifth category on the LF Schedule is documentation in respect of employee/performance reviews during the First Defendant's period as managing director. This was said to be relevant to disclosure issue 14 (the First Defendant's management of his staff team at Vitrition and fulfilment of duties of role). In particular paragraph 45.5 of the amended particulars of claim makes various allegations of a failure by him to manage and develop the staff under his control. Accompanying the LF Schedule were a number of documents from the HR files for 5 persons covering a range of departments, performance reviews of the two members of the Caine family and a schedule of staff reviews that the First Defendant carried out in 2017. Mr van Heck told me that the Defendants were content with this disclosure and took the point no further. In my judgment the Claimants' response was prompt and proportionate once the issue had been identified and I do not regard the relevant history as disclosing any systemic failure buy the Claimant with regard to disclosure. Later in the hearing Mr van Heck sought to backtrack and re-open the issue of whether all the performance

reviews of all staff should be disclosed. His submissions did not cause me to change my conclusions that I have already set out.

124. Item 6 on the LF Schedule was all correspondence from the Claimant to the Second Defendant in respect of her not performing in her role as Sales Director between 1 September 2017 and 17 October 2018. Mr Robinson then went on to expand that request in his witness statement by saying that there should also be disclosed all documentation in respect of the second defendant's dealings with the Claimant's customers, new business enquiries and product development in her role as sales director, and in particular her dealings with Leiden Pharma (Netherlands) ("Leiden") (see disclosure issue 13). The main response of Mr Lockley was to confirm that:

> "Subject to relief from sanction being obtained the Claimant proposes to search customer account folders for the material period for any evidence of sales visits to customers and /or communications relating to proactive business and sales development with customers (including new business enquires), redacted as appropriate to preserve commercial confidentiality.
>
> So far as Leiden Pharma is concerned, subject to relief from sanction being obtained, the Claimant proposes to disclose emails from the customer file redacted as necessary to preserve confidentiality."

The Claimant had already disclosed emails to the second defendant requesting her to engage more with customers and to arrange visits/meetings with them.

125. In my judgment, the Claimant's proposals were proportionate and appropriate. Again, when the point was raised the Claimant dealt with it. The relevant history does not reveal any systemic failing in the Claimant's approach to disclosure. Mr Robinson's third witness statement on this point was unfortunately unnecessarily provocative, used unnecessarily emotive language (the Claimant's submissions being described as "laughable" and "ridiculous") and allegations made in it were not made out before me.

126. Item 7 on the LF Schedule was all documents evidencing delivery of the Claimant's company handbook to the Fourth and Fifth Defendants and any other employees of the Claimant (including but not limited to Ruth Moules, Abigail Goodwill and Edward Hallas), and their signed acceptance of the same. Various documents were disclosed by the Claimant with the LF Schedule in relation to this issue and Mr van Heck informed me that the Defendants took no point on this item.

127. Item 8 on the LF Schedule was the original version of the Company's handbook. That was disclosed at the same time as the LF Schedule was sent. Mr van Heck informed me the Defendants took no further point on this item.

128. Item 9 on the LF Schedule was the terns of engagement of a cosmetic consultant in purported mitigation of its loss. The relevant contract was disclosed with the LF Schedule. No further point was taken by Mr van Heck as regards this item.

129. In his third witness statement Mr Robinson departed on a number of submissions which are more appropriate for trial and do not seem to lead anywhere in terms of disclosure in relation to the disclosure issues as identified by the August 2020 court order. Mr van Heck revisited this point later in the hearing and asserted that Disclosure Issue three

(which was the development of Beautycoll's business) was an issue that required disclosure more widely than had been given of the Claimant's experience and expertise in cosmetics. I could not and cannot see how an issue about Beautycoll can be read as an issue regarding the Claimant. I reject Mr van Heck's submissions on this point.

130. Item 10 on the LF Schedule was the undisclosed balance of the Claimant's New Product Development monthly meeting minutes of 15 May to 18 October 2018. The Claimant's response on the Schedule was that all minutes had been disclosed. Where no minutes for a particular meeting in a particular month had been disclosed that was because there was no meeting in that month. Mr Robinson then sought, by his third witness statement, disclosure of internal minutes and memos to confirm arrangements for monthly meetings "to corroborate" that all minutes had been disclosed. In my judgment (a) this category had not been sought in the application notice and (b) went to collateral credit matters on the written evidence as to what existed and was not something that I would have ordered disclosure of. In effect, what was sought was disclosure, by way of fishing expedition, to produce material which it was hoped might show the evidence that disclosure had been given to be incomplete. For the purposes of the final day of the hearing Mr van Heck helpfully confirmed in one of his further written skeleton arguments that there was authority supporting the position that I had taken in oral argument and which I have set out above: there is, he said, "authority to the effect that the court has no power to direct the disclosure of documents evidencing whether a disclosing party has complied with their disclosure obligation: *Eurasian Natural Resources Corp Ltd v Qajygeldin* [2021] EWHC 462 (Ch)." Accordingly, this wider disclosure point was not being pursued.

131. Item 11 on the LF Schedule was emails from Principle Healthcare and/or Health Innovations (UK) Ltd. The challenge was that proper searches had not been undertaken, on the basis of the evidence filed by Mr Lockley Mr van Heck correctly conceded that he could not take this point any further. The point appeared to have been that that the searches should have been undertaken by keyword search and not in the manner that the Claimant had made them. As such this repeated a point made in relation to other items. In the light of Mr Lockley's evidence this was simply a bad point. As Mr van Heck properly conceded, he weas unable to show on the evidence that the result of the searches carried out by the Claimant were inadequate such that a keyword search was required. I note, in particular, that the individuals in question working for outside organisations had voluntarily allowed their relevant email accounts to be searched and everything that had come to light had been disclosed.

132. Mr Robinson, effectively in evidence in reply, sought to raise non-disclosure in relation to another 4 categories of document. These fell outside the scope of the Defendant's application notice. I was told that the points had been raised in correspondence in 2020 but when taken to the correspondence in question it did not demonstrate that. Accordingly, I refused to consider such matters in detail. Quite apart from anything else, if they had indeed been raised in correspondence then they should have been included in the original application and evidence in support. Having looked at them again and the relevant evidence before me they do not affect my general conclusions about the approach of the Claimant towards disclosure.

133. Great reliance was also placed on what was said to be a failure by the Claimant to produce an updated schedule of loss as ordered on 27 November 2020. This is

something that would have to be considered when the matter returned to the court but in my judgment not to serve such a schedule was a reasonable course to take in circumstances where the defence had apparently been struck out and when the question of disclosure by the Defendants remained outstanding. The schedule was ordered on the basis that such disclosure was complete.

134. There are four further points that I should make.

135. First, in opening on the question of disclosure by the Claimant, Mr van Heck asserted that the fact that the Claimants had carried out manual searches rather than key word searches electronically raised serious non-disclosure issues so far as the Claimant's disclosure was concerned: "if the defendant's proposed key words had been used it would have yielded thousands of documents many of which would have been relevant to the defendant's defence." This assertion, on instructions, was unable to be made good whether by reference to the evidence filed or otherwise. Further, it was a point that went nowhere. Had the pool of thousands of documents been searched then those meeting the disclosure test would have had to have been identified. It could not be demonstrated that the result would have been the disclosure of more documents than the Claimant in fact disclosed. This was a typical wild assertion which should never have been made.

136. Secondly, Mr van Heck fairly made the point that disclosure by the Claimant was incomplete because no revised Disclosure Certificate (and/or Extended Disclosure List of Documents) had been filed by the Claimant to take account of further physical disclosure of documents by the Claimant after November 2020. Given the terms of the witness evidence before me this was something of a technicality. Obviously I would have ordered service and filing of the same if the relief from sanction application succeeded.

137. Thirdly, for reasons that will become clear I have not found it necessary to determine whether the application by the Defendants for further disclosure by the Claimant should properly have been brought under paragraph 18 rather than paragraph 17 of the Practice Direction (as submitted by Mr Budworth) and, if so, whether the evidence was inadequate to justify an order being made. In the Defendants' favour I have glossed over this point and addressed disclosure on the merits.

138. Finally, I have referred to not being satisfied of certain matters or being satisfied of certain matters. As has been frequently pointed out, the incidence of the burden of proof once evidence from each side has been considered is rarely determinative of an issue. I should confirm that none of my findings or conclusions have turned on the incidence of the burden of proof and that accordingly my conclusions can be stated in either way (i.e. I am satisfied of X or I am not satisfied of Y).

Has the sanction taken effect against the Defendants?

139. First, I should make clear that I consider it be absolutely clear that the sanction in my order of 27 November 2020 has taken effect. It might be surprising to the reader that I have to state this conclusion, in terms, given not least (a) the history of disclosed documents by the Defendants after 27 November 2021; (b) the fact that the application by the Defendants for relief from sanctions was the primary relief sought and not e.g. a determination that the sanctions had not taken effect and in the alternative, relief from

the sanctions; (c) Mr Robinson's second witness statement where he says that having taken advice from Mr van Heck he had come to the view that the sanction had taken effect and (d) Mr van Heck's original skeleton argument dated 19 April 2021 and the first two days of the hearing before me were premised and proceeded on the basis that the sanction had taken effect. The need arises because in his written submissions dated 10 May 2021 Mr Van Heck asserted that "*The better view (which has always been the view of Ds themselves) is that the sanction did not take effect*".

140. The basis of Mr van Heck's revised position appears to be, as I understand it, that Disclosure Certificates and an extended Disclosure List of Documents and production of documents was made in accordance with paragraph 12.1 of the Practice Direction and that therefore the order of November 2020 was complied with. The short answer, if I have understood the point and I probably have not, is that paragraph 12 requires all relevant documents to be disclosed in accordance with the court's order. Otherwise paragraph 17 of the practice direction would make little sense. Further, the fact that the order in this case did not limit or give specific directions about the scope or manner of any searches does not leave a void: the position remains that searches are required by virtue of paragraph 8 of the Practice Direction, being a reasonable and proportionate search in the case of Model D. Further, the terms of the Disclosure Certificate required to be signed put the matter beyond doubt.

141. Finally in this context I note that none of the defects that I have identified in the Defendants' disclosure relate to problems about the scope or extent of any searches or any question of proportionality or reasonableness.

The Defendants: breach by each, relief for each?

142. Technically the position of each Defendant should be considered separately. However, the Defendants have all put forward a case where they stand or fall together. Further, it is clear from the evidence that disclosure was left to the First Defendant, at least up and until 27 November 2020. No submissions were made trying to distinguish between different Defendants, either in terms of breaches of my order or in terms of relief from sanctions. Accordingly, I consider the Defendants as a group and disclosure by them and relief from sanctions against them on a group basis rather than on an individual basis.

143. I also note what was said by Blackburne J in *Arrow Trading v Edwardian Group Limited* [2005] 1 BCLC 696 which has resonance both so far as concerns disclosure (adapted of course to the current Practice Direction) and to the circumstances of the evidence before me put forward by Mr Robinson:

> "[43] The two lists and disclosure statements to which I have referred fall short of what is required for each of the four reasons set out in Mr Lightman's skeleton submissions at para 30, namely, (1) none of the parties giving disclosure (other than Jasminder Singh) has deposed that he or she is aware of and understands the duty of disclosure; (2) none of them (other than Jasminder Singh) appears personally to have carried out that duty; (3) it is not clear what, if any, search any of the shareholder Respondents has made to locate documents which are to be disclosed; and (4) it is not clear which documents have been (and have not been) disclosed by each of the shareholder Respondents.

> [45] I do not agree with Miss Nicholson that the non-compliance is a mere technicality in this case…The purpose of the rule is to bring home to each party his or her individual responsibility for giving standard disclosure. Except to the extent permitted by the rules, it requires the party himself to make the disclosure statement. This clearly has not happened. The Petitioners are entitled to complain that it is not. It is not a mere technicality. It follows, therefore, that this part of the Petitioners' application succeeds.”

Relief from sanctions

144. The principles to be applied derived from the *Denton* case (*Denton v T H White* [2014] EWCA Civ 906; [2014] 1 WLR 3296) were not disputed. Essentially the court has to consider three matters:

(1) Is the relevant breach serious and/or significant;

(2) Why did the relevant breach or default occur?

(3) If the breach was serious and/or significant and there is an inadequate reason for the default then the court must consider all the circumstances to decide whether or not relief should be granted or not. In so doing the court will give weight to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules practice directions and court orders.

145. It seems to me that the three categories of the *Denton* test are not watertight: the reasons why the breach occurred may also be relevant to the seriousness of the breach. Similarly, the reasons why the breach occurred, if not sufficient of themselves to justify relief from sanctions, are part of the matrix that has to be considered when the court considers “all the circumstances”.

146. Mr van Heck properly conceded that the breach in this case was serious and significant because of the “drip feed” (as it was put by Mr Budworth) of further document disclosure up to 16 February 2021. That conclusion is reinforced by my conclusions as to (a) the reasons why there was default and (b) the fact that I am not satisfied that full disclosure had been given by the Defendants even by the time of the hearings before me.

147. I turn to the reasons for the breach. In his written closing dated 10 May 2021, Mr van Heck submitted that:

> “The writer’s instructions are that the “drip-feeding” (as it is referred to by Mr Budworth) of that further disclosure was due to advice being given by Mr Robinson and the writer on an ongoing basis and due to further disclosable documents coming into Ds’ control.”

148. As regards this, it is unsatisfactory that “instructions” rather than evidence have to be relied upon. However, I consider that there is adequate evidence before me that the reason that disclosure by the Defendants continued up to 16 February, was indeed because they had simply failed to engage and take obvious advice that they needed to. Another aspect of this led to the making of the unless order in the first place: which was the delay in instructing an expert to deal with the searches of the documents on the

platform and those images not on the platform but which were retained by MD5. (I was told, somewhat ironically, that at the end of the day the searches on the documents retained by MD5 were carried out by MD5 and not by the Defendants' proposed expert.) In short, the Defendants appear to have buried their heads in the sand.

149. As regards to "further disclosable documents coming into the Defendants' control", I do not accept this. As regards Tracmil the position on the evidence remains contradictory. Either the Defendants did not have access to and control over documents held by Tracmil (which documents they have never clearly identified) or, as has been said on their behalf more recently, they did. However, even on the first hypothesis the Defendants have to accept that when they sought access it was granted. There is no reason why that could not have been sought earlier and indeed the location of the documents and any potential difficulties identified. As regards certain LinkedIn messages, the ability to restore deleted messages may have come to their attention late but there is no reason why the disclosure of the existence of such documents as a class should not have been made earlier even if the individual messages could not be produced. That is what the Practice Direction envisages.

150. In a number of respects there is a suggestion that the blame for non-disclosure is that of Mr Robinson. For example, he claims that he did not realise until advised by Mr van Heck that since Beautycoll's records had been within its control prior to its trademarks being acquired by Tracmil they should be included in the Defendants' extended disclosure. As regards this I make the following points:

(1) Any initial belief does not forgive continued failure to give full disclosure after that belief has been exploded.

(2) Paragraph 11 of Mr Robinson's second witness statement dated 31 |December simply reports that he held this belief and that the First Defendant had the same belief. He does not suggest that the First Defendant's belief was as a result of anything said or advised by Mr Robinson: simply that their beliefs were found to be in alignment when the issue was (belatedly) raised. In short, the point only emerged when legal advice was belatedly sought.

(3) The stated beliefs (of both Mr Robinson and the First Defendant) are incredible. As regards Mr Robinson, his belief seems irrelevant but is extraordinary given his position as a consultant to a firm apparently offering litigation advisory services. The concept that disclosure covers documents formerly within a party's possession or control is no new one and (as I set out below) is fully and clearly set out in the current Practice Direction. As regards the Defendants themselves, they never confirmed nor denied that competent disclosure advice was given to them by their original solicitors at the time of the handing up of devices or subsequently and it beggars belief to assume that no such advice was given.

(4) As I have said the Practice Direction makes clear that control is the key concept which includes both present and past possession, rights to possession and rights to inspect or take copies (see paragraph 1.1 and 1.4 (definitions of control and disclose) Appendix 1 to the Practice Direction and e.g. paragraphs 2.8, 3, 12.3 and the form of Disclosure Certificate itself).

(5) Even if I am wrong and the First Defendant did genuinely hold the belief attributed to him, that does not deal with the other Defendants (who, the evidence appears to show, left disclosure to the First Defendant, at least up until signing separate Disclosure Certificates) and such belief was quite simply unreasonable in the light of (4) above.

151. As a generality, Mr van Heck's submission was that the disclosure was "a mammoth exercise, undertaken by litigants in person, supported by a part-time litigation agent with ad hoc input from Direct Access Counsel". I do not accept that the exercise was that mammoth: what was required, though broken down into different issues, was fairly clear and related to business apparently carried on by the Defendants while or after parting from employment/engagement by the Claimant. In any event, and going back to his overall point and as Mr van Heck properly conceded, for that reason alone the Defendants were at fault. I add that there is no explanation as to why the Defendants took the course that they did of leaving things to the last minute and relying on a part-time litigation agent and ad hoc input from Counsel.

152. I do not accept that the disclosure order was "wide and general" such that this helps explain why the Defendants had difficulty in compliance: it contained carefully constructed issues which the Defendants had agreed and was determined at a hearing at which Mr van Heck represented the Defendants. There was no appeal and no attempt to apply to the court to vary, to determine searches or to seek guidance. I also reject the submission of Mr van Heck that the problem was in part a lack of any judicially directed searches or that the Claimant took a unilateral approach to the exercise or that anything the Claimant did either materially contributed to any difficulties in compliance with the court order by the Defendants or that it amounted to some form of unjustified unilateral approach.

153. In short, in my judgment the failings were down to the Defendants themselves and are wholly inexcusable with no material mitigation.

154. I therefore turn to all the circumstances.

155. Apart from the overall history and the situation regarding the breaches and apparent continuing failure to give full disclosure, Mr Budworth submitted that the application for relief was made at a late stage and that that should weigh in the balance against the Defendants. I reject that submission. Once the Defendants (belatedly) started making further disclosure, apart from an ill-founded assertion that there was no need to seek relief from sanctions, the application for relief was mounted. There were problems about the availability of Mr Robinson (busy dealing with funerals and the sad death of a colleague) and Mr van Heck (in the course of getting married) and as a consequence LF indicated that they considered that the application should be launched by 16 December 2020. By the 18 December, Mr Robinson indicated that he was ready to issue the application (with witness statement) but then there was a delay until 31 December. During that period there was further disclosure and the Christmas holidays. Although the evidence is somewhat unsatisfactory about this delay, in the circumstances I do not consider that delay in issuing the application is a factor which has any weight in this case.

156. Mr Budworth also invited me to take into account that the Defendants' previous solicitors accepted (by letter dated 12 November 2018):

> " In general terms it is admitted that Mr Tim Caine, Emma Caine and Jack Caine have been in breach of obligations that they owed to the Vitrition UK Limited. However, all will say that any loss to Vitrition UK Limited as a result of any such breach is nominal.
> Insofar as it is alleged, if at all, Mrs Joanne Caine has not misused, disclosed and copied company know-how and confidential information for the use and benefit of Beautycoll and/or Sachetpak.
> Insofar as it is alleged if at all Mr Daniel Clay has not misused, disclosed and copied company know-how and confidential information for the use and benefit of Beautycoll and/or Sachetpak.
> Insofar as it is alleged, if at all, it is denied that Sachetpak as ever traded and as such has ever misused confidential information and/or company know-how belonging to Vitrition UK Limited."

157. I accept the limits on this admission, relied upon by Mr van Heck including its general terms, the time it was made (before service of the amended particulars of claim), the limit on the parties admitted to be in default and the denials of particular breaches, nevertheless it is a relevant factor that weighs in the balance as it appears to detract from or mitigate the prejudice of the sanctions taking effect.

158. Mr van Heck relied heavily upon what he says were the difficulties faced by the Defendants and I have addressed those points.

159. Mr van Heck's main point however was that the Defendants' disclosure was complete and that the Claimant's disclosure was not. I have already said that I am satisfied that the Defendants' disclosure was not complete.

160. As regards the Claimant's disclosure and the Defendants' disclosure, my judgment is that the failings in question are of quite a different nature and magnitude. Disclosure by the Claimant after 27 November 2020 did not arise from any serious misunderstandings of the disclosure process, cavalier failure to address disclosure in a timely manner or failure to engage promptly and act appropriately when issues arose. This contrasts with the Defendants' failings as to which the exact opposite applied.

161. On the whole the Claimant's extra disclosure arose in respect of disclosure issues that were on the periphery and were either straightforward points that were rectified by immediate production of (a) document(s) or were points that related to width of searches, as to which a sensible approach was suggested and if necessary guidance from the court could have been sought. On the other hand, the Defendants' failings relate to wide tranches of obviously disclosable documents (most notably in relation to the trading of Beautycoll but also covering their personal positions) which were key areas of disclosure that had to be given.

162. Finally, and most worryingly, I have held that the Defendants' disclosure still remained incomplete on the state of the evidence before me and the Defendants put forward no proposals to deal with the same or any indication of when the matters could be dealt with.

163. The different position regarding disclosure means that I do not consider that the disclosure sought against the Claimant has much weight in considering relief from the sanctions imposed against the Defendants.

164. It was suggested that the trial date could have been retained if relief was granted. In my judgment that would not have been possible. The trial was due to take place in November 2021 over 15 days. There was a considerable amount of outstanding trial preparation as at June 2021 which hinged on disclosure. Indeed, trial proximity and the need for further pre-trial procedural steps was one of the reasons for the original unless order.

165. I also take into account the past delays in this case by the Defendants which HH Judge Klein criticised and when he indicated that early applications should be made.

166. I also take into account the manner in which there was a drip feed of disclosure and the state of and lack of clarity of the Defendants' evidence and instructions as referred to me earlier.

167. I have considered whether the sanction remains proportionate in the light of all the circumstances and have concluded that it does.

168. Weighing all relevant circumstances, my firm view is that this is a case where relief from sanctions should not be given and I dismiss the application for such relief. It seems to me that judgment on liability should follow, as the parties appeared to be agreed before me. My preference would be for an order to be agreed as far as possible. To the extent that the order is not capable of being agreed, there should be a short further hearing to deal with the order dealing with the immediate ramifications and effect of my judgment. If further ongoing directions are required about any inquiry as to loss or account of profits then that can be handled by a further CMC.