Neutral citation number: [2023] EWHC 2713 (Comm)

CC-2022-MAN-000017

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS IN MANCHESTER

CIRCUIT COMMERCIAL COURT (KBD)

B E T W E E N:

REEDS CARPETING CONTRACTORS LIMITED

Claimant

-and-

(1) MARTIN CAIRNS
(2) BE FLOORING LIMITED
(3) BE CARPETS LIMITED
(4) BEECHWOOD EVENT FLOORING LIMITED
(5) BEECHWOOD EVENTS LIMITED

Defendants

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Mr Martin Budworth instructed by **DTM Legal LLP** for the **Claimant**

Mr Tony Watkin instructed by **Lodders Solicitors LLP** for the **Defendant**

Hearing date: 6 September 2023

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JUDGMENT

INTRODUCTION

1. This is my judgment on various applications in this claim which relate largely to disclosure issues following a hearing on 6 September 2023.

2. The Claimant is a supplier of carpets and flooring to the events and exhibitions industry. The First Defendant was an employee of the Claimant from 1992 and acted as a de jure director from 1999. In addition, he is the sole director and

shareholder of the other four Defendants which were incorporated in 2020 and 2021.

THE CASE IN SUMMARY

3. It is the Claimant's position that the First Defendant left his employment and resigned his directorship of the Claimant on 22 January 2021, owing the relevant directors' duties until that date. This is disputed by the First Defendant who alleges that he submitted his resignation on 6 April 2020, and, pursuant to a series of agreements, his employment terminated on 11 September 2020. His case is that his duties as a director ceased before this date because he was excluded from any role in the management of the Claimant company and he only remained a director of the company after this date in order to exercise powers as a trustee of a pension fund.

4. The Claimant contends that, as an employee and director, the First Defendant owed it various duties pursuant to common law, the written terms of his employment contract and/or statute. Alternatively, the First Defendant is to be treated as trustee of such of the Claimant's assets and properties as were in his possession and/or under his control during his employment with the Claimant.

5. The claim centres around the alleged unlawful diversion of business by the First Defendant, in breach of his duties which was said to be with the assistance of the other Defendants, from a number of the Claimant's clients to the Defendants. The relevant clients are detailed in the Particulars of Claim.

6. The First Defendant denies that he solicited business from the Claimant's clients and instead contends that he and the other four Defendants were approached by such clients directly. None of the Defendants' dealings with those clients amounted to a breach of his duties.

7. The Claimant also contends that the First Defendant contacted the Claimant's mobile phone provider to arrange for a handset and contract used by him for work purposes to be transferred to him personally. The Claimant believes that this was an attempt to divert business communications away from the Claimant. This is denied by the First Defendant. He asserts that he was the owner of the

telephone number 07XXX XXX257[1] and that he was permitted to use his phone by the Claimant for business use on the basis that it paid his bill and call charges.

8. The Claimant's claim includes a claim for damages to compensate for the alleged loss and damage suffered as a result of the First Defendant's breach of his fiduciary duties owed to the Claimant. The Claimant also claims that the other four Defendants have knowingly assisted the First Defendant's breaches and are also liable in damages.

9. This detail is by way of background information only. The merits of the case are largely irrelevant to the issues before me.

THE LITIGATION

10. The claim was issued on 21 February 2022. Following service of the Particulars of Claim and Defence, the Defendants filed an amended Defence and Counterclaim to which the Claimant responded by way of Reply and Defence to Counterclaim.

11. The first Case and Costs Management Conference took place on 21 July 2022. The orders made included the following relating to disclosure:

"*6. Disclosure of documents will be dealt with as follows:*

(a) Each party shall give extended disclosure pursuant to Practice Direction 51U[2] as agreed in the Disclosure Review Document ("DRD") by 4pm on 13 October 2022.

(b) Disclosable electronic documents shall be provided in the PDF format, unless the native format is appropriate (such as an excel spreadsheet) or a specific request has been made by the parties for the native format to be disclosed.

[1] Number anonymised for the purpose of the judgment.
[2] PD51U was the disclosure pilot in the Business and Property Courts which is force until 30 September 2022. On 1 October 2022, Practice Direction 57AD replaced it. For the purpose of this application, there are no material differences.

(c) Disclosable hard copies shall be provided in electronic PDF copy unless a request is made by the parties 7 days prior to the deadline for hard copies to be provided.

(d) The approved wording for section 1A of the DRD (subject to addition for the counterclaim) is as follows:

Issue 1 – The First Defendant's resignation from the Claimant and his role up to and including 22/1/21.

2 – The parties' arrangements with regard to mobile phone number 07XXX XXX257 and the circumstances surrounding the transfer of that number.

3 – The Defendants' retention and use of documents belonging to the Claimant or created or held by the First Defendant during his employment and directorship.

4 – The Defendants' contact with the Claimant's established or prospective customers.

5 – The business carried out by the Defendants with the Claimant's established or prospective customers.

6 – Dissatisfaction, if any, expressed by the Claimant's established or prospective customers with its level of service."

The directions required service of witness statements by 16 December 2022 and set a trial window of 27 February 2023 to 6 April 2023.

12. By Application Notice dated 6 October 2022, the Defendants sought an extension of the time for disclosure and for service of the witness statements. That application was ultimately resolved by an order of HHJ Hodge KC dated 30 October 2022 made by consent. This provided that the time for compliance with the disclosure obligation in paragraph 6(a) of the order of 21 July 2022 be extended to 4pm on 14 November 2022. Consequential orders extended time for service of witness evidence (28 February 2023) and set a new timetable for the pre trial review and trial, with a trial window of 9 May 2023 to 11 July 2023.

13. The Defendant's Disclosure was given by the service of form N265 (which relates to standard disclosure) and a list of documents by email on 15 November 2022. In total, 34,922 documents were produced via electronic link on or about 16 November 2022 (two days late).

14. By letter dated 8 December 2022, the Claimant complained of the adequacy of the disclosure that the Defendant had given. Its complains can be summarised as follows:

    14.1. The disclosure statement was erroneous in referring to standard disclosure and did not certify compliance with extended disclosure obligations;

    14.2. Both the list and the documents themselves were produced late.

    14.3. The Disclosure Certificate was in the wrong format and did not certify compliance with PD57AD.

    14.4. Not all documents had been produced in native format. For example, some emails were converted to PDFs.

    14.5. The disclosed documents included many irrelevant documents.

    14.6. There was considerable duplication of documents.

    14.7. Documents were out of order and/or misdescribed;

    14.8. there were obvious omissions of documents within the disclosure.

15. On 20 January 2023, the Claimant issued an application seeking:

    "*an Order pursuant to (but not limited to) CPR r1, r3.1(1)(a) and (m) and PD57 on the following [sic]:*

    1. The Defendants to comply with its duties of disclosure under PD57AD and to re-serve its disclosure on the Claimant in a compliant and timely manner as the Court sees fit, failing which its Defence is struck out.

    2. The Defendants to provide a witness statement to confirm the extent to which they, the Defendants and the Software Company have been involved in the direction to give extended disclosure, including the extent to which they had been advised by their solicitors of their obligations.

3. A variation in the directions timetable in accordance with the outcome of this application.

4. The Claimant do have permission to revise its costs budget in respect of the direction for disclosure.

5. The Defendants' costs incurred in dealing with disclosure to date be the Defendants' costs in any event.

6. The Defendants do pay the Claimant's costs of the application.

16. In support of the application, the Claimant relied upon a statement from Mr Jonathan Partridge of its solicitors, dated 20 January 2023[3].

17. The application was resolved by a consent order made by me on 8 February 2023[4], which provided:

"*The Defence shall stand struck out, unless by 29 March 2023,*

(1) the Defendants re-provide inspection of documents so as to:

(i) ensure that documents held electronically are disclosed are in their native format with accessible metadata;

(ii) remove duplication;

(iii) comply with paragraph 3.1(6) of PD 57AD in removing documents which are irrelevant, save that if the Defendants have reasonable doubts about the Claimant's agreement as to irrelevance they will liaise with the Claimant's representatives for a resolution, failing which either party may seek disclosure guidance; and

(iv) apply the ordered date range of 1 January 2018 to date.

(2) Mr Cairns on behalf of the Defendants files and serves a witness statement addressing:

[3] This was the first witness statement of Mr Partridge in these proceedings. I shall refer to it as "Partridge 1" to reflect the fact that this is his first witness statement. I shall adopt this naming convention in respect of the numerous other witness statements referred to in this judgment.
[4] This order is significant to what is now being sought. Given its nature, I shall refer to it as the "Unless Order."

(i) the Claimant's concerns about documentation which appears to be missing as set out at paragraph 8 of the letter dated 8 December 2022;

(ii) the issue of the laptop as referred to at paragraphs 23-29 of the second witness statement of Mr Partridge dated 3 February 2023 and the apparent inconsistency of explanations to date."

18. The order of 8 February 2023 went on to deal with directions to trial, including a further revised trial window of 1 August 2023 to 20 October 2023.

19. On 29 March 2023, the Defendants served a disclosure certificate, a list of documents, a statement dated 23 Marach 2023 signed by the First Defendant[5] and a link to the documents.

20. Notices of hearing were sent out on 26 April 2023 in respect of:

    20.1. A Pre Trial Review on 4 August 2023;

    20.2. Trial on 6 September 2023.

21. On 19 May 2023, the Claimant filed a request for judgment on the ground of non compliance with the Unless Order. That request was supported by a witness statement from Mr Partridge dated the same date. Within his statement, the following broad complaints are made:

    21.1. That documents were missing from the disclosure;

    21.2. That documents had been provided in the first disclosure process that should have been re-provided in the second process.

    It is fair to say that the Claimant placed more emphasis on the first issue than the second.

22. I heard that application on 21 June 2023. For reasons given at the time, I concluded that, though there were undoubted failings in the Defendants' disclosure, the Defendants were not in fact in breach of the unless order. I made an order of my own motion requiring the Claimant to serve a letter identifying the alleged failures of disclosure and giving the Defendants the opportunity to

[5] This statement asserts at its head that it is his first witness statement, though Mr Cairns had signed a statement dated 29 March 2022 which appears to have been by way of original defence. In any event, I shall treat it as his first statement and call it "Cairns 1".

respond to the letter and to file a new and updated disclosure certificate consistent with the letter by 28 July 2023. I anticipated that there might yet be further issues with the adequacy of the Defendants' disclosure and gave a general liberty to the Claimant to apply on the disclosure issue and extended time for service of witness statements to 28 July 2023.

23. On 21 July 2023, the Defendants issued an application seeking an extension of time for service of the disclosure certificate and further relief. The grounds for that application are set out in the statement of Mr Andrew Wylde, the Defendant's solicitor, of the same date[6]. He confirmed that the letter from the Claimant identifying the failures of disclosure had duly been sent and that, on reviewing the disclosure that had been given so far, it became apparent that the Defendants had failed to give disclosure from 4 email addresses, all associated with the Defendants' sales team, and from the First Defendant's Hotmail account. These documents had been identified and uploaded to the electronic disclosure platform. In total, around 135,000 documents had been uploaded of which 98.863 were to be reviewed in addition to the original disclosure. The Defendants' solicitors were in the process of manual review and were expecting to be able to file a further certificate of disclosure and produce the further documents by 28 July 2023. Mr Wylde's statement finishes: "*Although this is a regrettable mistake for which I apologise on behalf of my client, I do respectfully invite the court to find that there has been no deliberate attempt to deceive anyone. The Defendants have previously uploaded 56,000 plus documents to this firm and a large number of documents have been disclosed to the Claimant, indeed all of these documents were provided to the Claimant in the first instance. All efforts are being made to provide any additional relevant documents as soon as possible*."

24. The circumstances of the errors in disclosure are also referred to in a statement from the Defendant himself dated 21 July 2023[7]. Of this he says,:

"*I accept that I have made an error in failing to upload all documents held by the Defendants, in particular the fifth Defendant. This was a combination of*

[6] "Wylde 3."
[7] "Cairns 3."

human error on my part and the lack of a full understanding with regards to the extent and scope of document locations and sources to search. With regards to the 5th Defendant, I had not considered the company email accounts of employees of D5 to be relevant to the case, considering that the email accounts did not exist until 18th May 2021. With regards to the 1st Defendant and specifically my Hotmail email account, there was a discrepancy between the disclosures from November 2022 and March 2023, with some emails being present in the former, but missing in the latter. This again was human error to not tick the box in the document search software, (DISCO), and include subfolders from the archive email accounts, in the search criteria."

25. On 1 August 2023, the Claimant made a further application generated by concerns about disclosure but not seeking strike out as the primary remedy. The application notice seeks:

"*an Order pursuant to (but not limited to) CPRr1, r3.1(1) [8](a),(f) and (m), r3.4(2)(c), r3.5(1) and (2), and PD57AD on the following:*

1. Judgment to be entered in favour of the Claimant. It follows from the Defendants' application dated 21 July 2023 that there has been serious non-compliance with the unless order with the effect that the Defence stands struck out.

2. Alternatively, an order requiring the Defendants to carry out further specific searches – the Claimant was given express permission to apply for such searches by the Court's last Order dated 21 June 2023.

3. Further or alternatively, orders pursuant to paragraph 17 PD57AD requiring the Defendants to:

3.1. serve a further, or revised, Disclosure Certificate;

3.2. undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure

3.3. provide a further or improved Extended Disclosure List of Documents;

[8] Sic – this should refer to CPR3.1(2).

3.4. produce documents;

3.5. make a witness statement explaining any matter relating to disclosure.

4. Further or alternatively sanction pursuant to paragraph 20 PD57AD."

5. Subject to the above, variation of the timetable for outstanding directions and pre-trial steps.

6. The Defendants do pay the Claimant's costs of the application."

26. The application of 1 August 2023 was supported by a statement from the Claimant's solicitor, Mr Jonathan Partridge dated 1 August 2023[9]. It generated responses from Mr Wylde in a statement of 16 August 2023[10] and Mr Cairns in a statement of 15 August 2023[11]. In turn, Mr Partridge responded in a statement of 23 August 2023[12].

27. I was separately invited to make a further order by consent extending time for the service of the trial witness statements to 11 August 2023. I duly made that order.

28. In the meantime, the hearing of the Defendant's application of 21 July 2023 and the Claimant's application of 1 August 2023 took place on 4 August 2023 at the Pre Trial Review, very shortly before I went on annual leave, with the trial due to commence on 6 September 2023, that is to say less than 4 weeks later. For reasons given at the time, I concluded that there was no prospect of a fair trial taking place on 4 August. The parties agreed that I could not hear the Claimant's application to strike out the defence (because of the short notice that had been given) and I therefore vacated both the Pre Trial Review and the trial. I relisted the applications before me on 6 September 2023, and having heard submissions, reserved judgment. For those who might have hoped that I would have immediately written this judgment in the remaining 5 days of the trial listing, I was in fact taken up with covering other cases in both the Business and

[9] "Partridge 4"
[10] "Wylde 4"
[11] "Cairns 5"
[12] "Partridge 5"

Property Courts and the Administrative Court. To that extent, it might at last be said that judicial resources, namely time that I would otherwise have spent hearing the trial, were able to be redeployed, albeit not as efficiently as one would hope.

29. The effect of the variations to the timetable and the vacation of the trial windows and ultimately the fixed trial date can be seen here:

	Due date for disclosure	Due date for service of witness statements	PTR date	Trial window/ date
Original directions of 21.7.22	13.10.22	13.12.22	11.1.23 – 27.1.23	27.2.23 – 6.4.23
Order of 30.10.22	14.11.22	28.2.23	14.3.23 – 28.3.23	9.5.23 – 11.7.23
Order of 8.2.23	29.3.23	19.5.23	1.6.23 – 16.6.23	1.8.23 – 20.10.23
Notices of hearing - 26.4.23			4.8.23	6.9.23
Order of 21.6.23	28.7.23	28.7.23[13]		
4.8.23			No date fixed	No date fixed
22.8.23		11.8.23		

30. It is highly unlikely that it would be possible to relist this trial in 2023 even if the problems lay only with witness, lawyer and judicial availability. In fact, for reasons noted below, the Claimant contends that, if the claim is not struck out, there is a fair likelihood that there will be further delays with the amendment of statements of case, yet further disclosure and further witness statements.

[13] It is not entirely clear from the bundle what happened in terms of the service of witness statements between the order of 8 February 2023 and that of 21 June 2023. No party has taken an issue about this apparent default. It may be that the parties in fact agreed an extension. Given the ongoing disclosure issues, it would hardly be surprising if they had put the question of the service of witness statements on hold.

DISCLOSURE – THE LAW

31. The regime of disclosure within the Business and Property Courts set out in PD57AD need only be briefly summarised:

    31.1. From the moment that a person realises that it is or may be a party to proceedings, it is under various duties including to take reasonable steps to preserve documents, to comply with disclosure orders made by the court and to disclose known adverse documents.

    31.2. Separate from these duties, at the time of serving its statement of case, a party is under a duty to disclose documents upon which it relies and documents that may help the other party to understand its case ("initial disclosure");

    31.3. A party seeking disclosure beyond initial disclosure may seek an order for extended disclosure.

    31.4. The parties are under a duty to identify the issues to which disclosure is likely to be relevant and to identify which model of disclosure is appropriate, reasonable and proportionate.

    31.5. The parties' contentions on the appropriate scope of extended disclosure are to be identified, argued and, if possible, agree during the Disclosure Review Document.

    31.6. In determining what, if any, order is appropriate for extended disclosure, the court should have regard to:

    (a) the nature and complexity of the issues in the proceedings;

    (b) the importance of the case, including any non-monetary relief sought;

    (c) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

    (d) the number of documents involved;

    (e) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the

information available and on the likely accuracy of any costs estimates);

(f) the financial position of each party; and

(g) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

The classic expression of these principles is the analysis of Vos C as he then was in McParland v Whitehead [2020] EWHC 298 (Ch).

31.7. An order for Extended Disclosure is complied with by:

(h) service of a Disclosure Certificate substantially in the form set out in Appendix 4 to PD57AD, signed by the party giving disclosure, to include a statement supported by a statement of truth signed by the party or an appropriate person at the party that all known adverse documents have been disclosed;

(i) service of an Extended Disclosure List of Documents (unless dispensed with, by agreement or order); and

(j) production of the documents which are disclosed over which no claim is made to withhold production or (if the party cannot produce a particular document) compliance with paragraph 12.3 of the Practice Direction.

32. It should be noted that the Practice Direction distinguishes between the acts of serving a disclosure certificate, of serving a list of documents and of producing the documents. This distinction is similar, but by no means identical, to the process of disclosure in CPR Part 31. Part 31 is headed "disclosure and inspection of documents". The purist might think that the production of the list of documents under CPR 31 is the act of disclosure, in the sense of disclosing the existence of documents. "Inspection" is the later process pursuant to which the documents of which the existence has been disclosed are produced to the opposing party. On the other hand, PD57AD appears to use "disclosure" as an umbrella term for the whole process from Initial Disclosure, through the process for obtaining Extended Disclosure, as far as the production of documents that

are on the Extended Disclosure List. This slight difference is of largely academic significance save that it will be noted that the "unless order" made on 8 February 2023 contains an obligation to give "re-inspection." I shall return to that point.

33. As to non compliance with the Practice Direction:

33.1. The court has a menu of powers where there is a failure adequately to comply with an order for extended Disclosure. Para 17.1 provides:

> "*17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—*
> *(1) serve a further, or revised, Disclosure Certificate;*
> *(2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;*
> *(3) provide a further or improved Extended Disclosure List of Documents;*
> *(4) produce documents; or*
> *(5) make a witness statement explaining any matter relating to disclosure.*
>
> *17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4)."*

33.2. Paragraph 20 makes clear that the court retains its full powers of case management during the disclosure process, including, where there is non compliance with obligations under the Practice Direction, to adjourn a hearing and to make an adverse costs order.

33.3. Para 12.5 provides a specific sanction where a party does not disclose a document in accordance with its obligations, providing, "*A party may not without the permission of the court or agreement of the parties rely on any document in its control that it has not disclosed at the time required for Extended Disclosure …"*

WHAT ARE THE PARTIES SEEKING?

34. Within its Application Notice, the Defendants seek:

"*An order extending the time for the Fifth Defendant to file and serve its Disclosure Certificate pursuant to the order of HHJ Pearce dated 21 June 2023 and/or for relief from sanctions. Further insofar as necessary a request for an extension of time to comply with paragraph 2 of the order*."

35. Within the witness evidence, the solicitor for the Defendants concedes that similar relief is required on behalf of the First to Fourth Defendants and asks for permission to amend the Application Notice to seek the same relief on behalf of the further four Defendants. That application is not opposed.

36. The Claimant's application seeks judgment, alternatively a variety of further orders relating to disclosure as recorded above.

37. It will be noted that, whilst the notice of application refers to the power to strike out for non compliance with a rule, practice direction or order, through its reference to CPR3.4(2)(c), the expressed list of relief sought does not include an order for strike out.

38. Within his skeleton argument, counsel for the Defendants identifies the following issues (and deals with them in the following order):

    38.1. Is it necessary for any of the Defendants to seek relief from sanctions and/or an extension of time?

    38.2. Should leave be given to amend the Defendants' application to include the First to Fourth Defendants?

    38.3. Has the defence been struck out for failure to comply with the Unless Order of 8 February 2023?

    38.4. Should leave to extend time and/or grant relief from sanctions (as determined necessary) be granted to the First, Second, Third and/or Fourth Defendants? If so on what terms? If not what is the effect?

    38.5. Insofar as not struck out what other orders are appropriate in relation to disclosure orders sought by the Claimant?

    38.6. What other directions should be made?

38.7. What order for costs should be made in respect of these applications and is it appropriate to revisit the costs order made on 21 June 2023 when they were reserved to trial and if so what order should be made (the court having indicated that it wishes to revisit this order at this hearing)?

39. However, during argument, it became apparent that the Claimant was seeking strike out of the defence not solely on the narrow ground of non-compliance with the Unless Order, but on the broader grounds of non compliance with PD57 and the Defendants' disclosure obligations. There was some debate during submissions as to whether this position was in fact open to the Claimant. Whilst the Application Notice did indeed refer to this ground through its reference to CPR3.4(2)(c), that reference is no more than passing and is not carried through to the relief expressed in the paragraphs that follow.

40. Mr Budworth rightly drew my attention to paragraph 34 of Partridge 5, which is clearly referring to the loss of the chance of a fair trial, and the need to take a strict view of procedural non-compliance. This is more apt to deal with the broad striking out power of CPR3.4(2) than it is of the narrower issue of the breach of an unless order (where enforcement of the express terms of the order is automatic absent variation of the order). Certainly on reading that paragraph and Mr Budworth's skeleton argument, I had understood that the Claimant was seeking to argue the case for strike out both on the ground of non compliance with the Unless Order and on the ground of non compliance with disclosure obligations more generally. Mr Watkin saw things otherwise but in fairness did not argue that there would be any obvious prejudice to the Defendant if my reading were correct and he had misunderstood the Claimant's position.

41. Whilst the Claimant's position undoubtedly could have been made clearer, in my judgment the Claimant does sufficiently plead a case for strike out on the broader grounds covered by CPR3.4(2). Given Mr Watkin's sensible approach to the issue, it was not necessary to consider the argument that the application should be adjourned to allow the Defendant to deal with this broader case.

42. The Defendants' application came first in time but if the Claimant's application were to succeed, it would render further consideration of the Defendants' application academic. For this reason, I propose to address that application first. However in doing so, I shall conder many of the issues that are relevant to the Defendants' applicant if in fact the Claimant fails to achieve strike out.

43. In light of this, the issues in the application can sensibly be summarised as follows:

    43.1. Has the defence been struck out for failure to comply with the Unless Order of 8 February 2023? (Issue 1 – the Unless Order)

    43.2. If not, should the Defence be struck out for non compliance with their disclosure obligations? (Issue 2 – strike out for non-compliance)

    43.3. If not:

        (a) Should leave be given to the Defendant to amend its application to include the First to Fourth Defendants?

        (b) Is it necessary for any of the Defendants to seek relief from sanctions and/or an extension of time?

        (c) Should leave to extend time and/or grant relief from sanctions (as determined necessary) be granted to the First, Second, Third and/or Fourth Defendants? (Issue 3 – the Defendant's application)

    43.4. What consequential directions are required:

        (d) If the Defence is not struck out?

        (e) If the Defence is struck out? (Issue 4 – consequential directions)

    43.5. Costs:

        (f) What order for costs should be made in respect of these applications?

        (g) Is it appropriate to revisit the costs order made on 21.6.2023 when they were reserved to trial and if so what order should be made? (Issue 5 – costs)

ISSUE 1 – THE UNLESS ORDER

(1) The Claimant's case

44. The Claimant contends that the Defendants' admitted disclosure failures amount to a breach of the Unless Order. As Mr Budworth puts it at paragraph 18 of his skeleton argument. "*By the admitted raft of "missed" disclosure it follows that there has not been compliance with the unless order to provide re-inspection and apply the ordered date range. Absent a good application for relief the Defence already stands struck out."*

45. The Claimant acknowledges now, as it did on the previous application relating to the Unless Order, that the focus of the order is on inspection. Mr Budworth says of my judgment on the previous application that the Defendants "*avoided judgment being entered on 21 June 2023 because the strict working of the unless order as drawn did not explicitly require any fresh searches to be conducted but* [the Claimant] *was given express permission to cause further searches to be carried out."* That interpretation is based in part on paragraph (2) of the order which required the First Defendant further to address the Claimant's concerns about certain alleged missing documents (which inevitably on the Claimant's case would have required a further search to be made) but also on sub paragraph (iv) of paragraph 1 of the order which the Claimant contends amounts to an obligation to carry out a further search against the date range.

(2) The Defendant's case

46. For the Defendant, Mr Watkin argues that the Claimant is trying to relitigate matters that were dealt with on the previous application relating to the Unless Order. Whilst an order could have been drafted that required the Defendants to carry out further searches, in fact the express terms of the Unless Order only relate to inspection and the provision of a statement from Mr Cairns dealing with the Claimant's "concerns."

47. As to the inspection issue, the Defendants contend that their only obligation under the Unless Order was to apply the date range of sub paragraph (iv) to the body of documents of which disclosure had already been given and that had

been processed in accordance with sub paragraphs (i) to (iii) of the order. As to the obligation for Mr Cairns to provide a statement, that did not involve him searching for documents, simply providing answers to the "concerns" raised by the Claimant. In any event, the Unless Order would only bite if the First Defendant had not served a statement in accordance with the order. It would not bite simply because the Claimant did not accept the adequacy of his response.

(3) Discussion

48. I accept Mr Watkin's argument that the Claimant's application in respect of the Unless Order is an attempt to relitigate the issue that I determined in the hearing on 21 June 2023. Whilst it would have been possible for the Claimant to seek an order with the sanction of strike out based on an obligation to reconduct the disclosure exercise, that is not what was in fact put before the court in the consent order.

49. It is perfectly possible that this was drafting error and that the Defendants are the beneficiaries of the fact that the order did not adequately address what the Claimant was really seeking. However, the terms of the order are clear. An order on "unless" terms is a powerful weapon in the court's armoury (see for example Marcan Shipping v Kefalas [2007] EWCA Civ 463). Where its terms are invoked to deprive a party of the right to continue to participate in the litigation, it should be subject to careful scrutiny before the court conclude that its terms have that effect. In my judgment, the Unless Order simply fails to deal with the circumstances of which the Claimant complains. It follows that the Unless Order does not bite and the Defence does not stand struck out pursuant to it.

ISSUE 2 – STRIKE OUT FOR NON-COMPLIANCE OR SOME LESSER ORDER?

(1) The Claimant's case

50. This application is at the core of what the Claimant seeks. The Claimant contends that there has here been a wholesale failure by the Defendants to have regard to their disclosure obligations, in consequence of which the Court cannot have confidence that a fair trial is possible. However, where a party has been

given every opportunity to comply with its obligations but appears unable or unwilling to do so, it can have no complaint if the court refuses to permit it to take part in the action.

51. The Claimant's starting position is to look at the responsibility on a party giving disclosure to operate the process properly. Since both relevance and privilege are matters which are highly significant to determining what is disclosable but cannot simply be left to the client, a number of cases have emphasised the high responsibility that a solicitor bears – in particular, the Claimant lays emphasis on the decision of the Court of Appeal in Hedrich v Standard Bank [2009] PNLR 3. At [14], Ward LJ said:

> "*14. ... A party is required by CPR 31.7 to make a reasonable search for those documents adversely affecting his case. It seemed to be common ground between the parties that the duties of solicitors was correctly stated in chapter 14 of the third edition of Matthews and Malek on Disclosure.*
>
> *"14.02 A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that full and proper disclosure of all relevant documents is made. [Myers v Elman [1940] A.C. 282.] This duty owed to the court is "one on which the administration of justice very greatly [depends], and there [is] no question on which solicitors, in the exercise of their duty to assist the court, ought to search their consciences more" [citing Practice Note [1944] W.N. 49 and the Solicitors' Practice Rules 1990 R.1 (F)].*
>
> *"14.03 The solicitor's duty extends to explaining to his client the existence and precise scope of the disclosure obligation and the need to preserve documents. ...*
>
> *"14.07 The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client [Myers v Elman [1940] A.C. 282, at 322, 325, 338.] The best way for the solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance – or even potential relevance - for himself, so either the client must send all the files to*

the solicitor or the solicitor must visit the client to review the files or take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable…Again where the solicitor knows that his client has concealed relevant documents with a view to their not being disclosed, the solicitor must not act so as to suggest that full disclosure has been or will be given, and this may lead to his ceasing to act.

…

14.09 Once the documents have been produced by the client, the solicitor should carefully go through the documents disclosed to make sure, so far as is possible, that no documents subject to the disclosure obligation are omitted from the list … A solicitor must not necessarily be satisfied by the statement of his client that he has no documents or no more documents than he chooses to disclose. If he has reasonable grounds for suspecting that there are others, then he must investigate the matter further, but he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge and if he has decided on reasonable grounds to believe his client, criticism cannot be directed at him. …

14.10 If a solicitor is or becomes aware that the list of documents or any verifying affidavit or statement of truth is inadequate and omits relevant documents or is wrong or misleading, he is under a duty to put the matter right at the earliest opportunity and should not wait till a further order of the court. His duty is to notify his client that he must inform the other side of the omitted documents, and if this course is not assented to he must cease to act for the client. If the client is not prepared give full disclosure, then the solicitor's duty to the court is to withdraw from the case."

52. The Claimant also points to a postscript of Mr Jon Turner KC sitting as a Judge of the High Court in his judgment in Square Global v Leonard [2020] EWHC 1008:

"*200…It is fundamental that the client must not make the selection of which documents are relevant (cf. the allegation in this regard made on the Claimant*

side). The position is well summarised in Matthews and Malek, Disclosure (5th edition. 2017), at paragraphs 18-02 and 18-09:

> *"A solicitor's duty is to investigate the position carefully and to ensure so far as is possible that full and proper disclosure of all relevant documents is made. This duty owed to the court, is 'one on which the administration of justice very greatly [depends], and there [is] no question on which solicitors, in the exercise of their duty to assist the court, ought to search their consciences more.'*
>
> *"The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client. The best way for the solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents as early as possible. The client should not be allowed to decide relevance—or even potential relevance—for himself, so either the client must send all the files to the solicitor, or the solicitor must visit the client to review the files and take the relevant documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable."*

53. On this basis, the Claimant contends that the compliance with disclosure obligations should have been ensured by the Defendants' solicitors rather than the Defendants themselves having control of the process, particularly in light of the fact that it has been apparent for a considerable period that the Claimant is not happy with the adequacy of the disclosure that has been given. Further, the Claimant criticises the Defendants for not having produced evidence as to their methodology. The parties are obliged to keep records of their methodology (see the paragraph 7 of the "Guidance on process after any order for Extended Disclosure has been made" in the explanatory notes to the disclosure review Document under PD57AD). Where the process has gone as badly wrong as is the case here, one would expect the party in default to produce evidence of the methodology to show why it has gone wrong.

54. The failure of the Defendants (or their lawyers) properly to carry out searches has led to a situation where the Defendants have at the eleventh hour produced a

huge number of additional documents. However, their explanation for the late disclosure is difficult to fathom. The Claimant contends that the reference by Mr Cairns in Cairns 3 to "human error" and "lack of full understanding" are particularly opaque. It is inconceivable that anyone applying their mind to the Defendants' disclosure obligation could have excluded the email addresses of sales employees of the Fifth Defendant as relevant places to search. Whilst the email addresses may not have been created until May 2021, as asserted by the First Defendant in his statement, given the Claimant's pleading of continuing diversion of business from the Claimant's business to those of the Defendants in 2020 and 2021[14] , the Defendants must have been aware that the email accounts of sales staff of one of the companies that the Claimant complains diverted its business were relevant. There was no "human error" in not searching these accounts. No solicitor could have conceivably considered those accounts not to be relevant; the First Defendant could not honestly have thought this was so. If it was "an error of judgment" it was one so fundamental as to cause one to doubt that the Defendants could ever properly comply with their disclosure obligations.

55. The First Defendant's explanation about his own Hotmail accounts is similarly puzzling. It was obviously a relevant account to search. Seemingly, it was searched in the first tranche of disclosure but not in the second, simply because of the failure by Mr Cairns to tick a relevant box in the document search software. Whilst that might be caused by human error, the Claimant contends that it is an error by someone who simply does not care as to whether the disclosure that he is giving is complete.

56. The result of that late disclosure was to make it impossible for the trial to proceed on the listed date. Further, the consequences do not stop there. It is in the nature of cases based on allegations relating to the diversion of business by a Defendant from the Claimant to a new enterprise that much of the relevant information on diversion will lie in the control of the Defendant. Not only must the Defendant be trusted to give proper disclosure of that material, but its disclosure is liable to lead to the Claimant refining its case. Thus, when it has

[14] See paragraph 18 of the Particulars of Claim.

been possible for the Claimant to consider and digest the material that has been disclosed, this may lead to applications to amend its statements of case and/or to rely on additional evidence. Thus, the result of the inadequate and late disclosure here is likely to cause further delay in bring the case to trial even if there are no further disclosure issues.

57. But in reality, the Claimant says that it is self evident that there remain significant gaps in the Defendants' disclosure. In his skeleton argument, Mr Budworth draws particular attention to the following:

    57.1. The Claimant considers it to be inherently incredible that there are no invoices or trading documents disclosable for the period June to September 2020 even though the Defendants started trading ion 1 June 2020. The first disclosed invoice is that of 4 October 2020 referred to at paragraph 24 of Partridge 4. But, as Mr Partridge puts it, "*how did the invoice dated 4 October 2020 come about? … the Defendants have not disclosed all*[15] *documents and correspondence which gave rise to any invoices raised before 4 October 2020 or indeed the documents that resulted in the invoices from 4 October 2020*."

    57.2. The First Defendant has not yet searched for records relating to the use of the mobile phone number that the Claimant asserts belonged to it but that was transferred to the First Defendant. In Cairns 5, the First Defendant says that it had not been "on my radar" to search the records It defies belief that he is only now engaging with searching for the records.

    57.3. The Claimant contends that it is highly likely that there are documents relating to the Frieze Art Fair in New York in May 2021 that have not been disclosed. The work for Frieze was, the Claimant contends, complex, requiring considerable pre-planning. In fact there is evidence of the First Defendant having been engaged in such planning: in an email dated 13 October 2020 to the Claimant, Lousie Dixon, the Production Director for Frieze, stated "*Martin has reached out to me*

[15] Sic – in fact, it is clear that they have not produced any such documents.

with a proposal which we'll also be assessing and considering." No disclosure of material has been given from the Defendant side relating to this proposal. A further example is that the First Defendant sought to book a shipping container for the event on 22 January 2021 - yet there is no disclosure of material showing what the scope of the Defendants' work for the event was to be and in particular how it was known what capacity of shipping container would be required.

57.4. The Defendants have failed until now to disclose contact lists held on any devices, notwithstanding the clear obligation to do so in order to comply with the DRD. The existence of undisclosed lists can be seen in an email from the First Defendant to Frieze dated 1 February 2021 disclosed by the Defendants which refers to his having "*some contact details from previous years."*

58. Given these wide-ranging failures, the Claimant contends that the position is similar to that faced by the Defendants in Vitrition UK Ltd v Caine [2022] EWHC 51 (Comm). The Defendants were in serious breach of their obligations pursuant to disclosure orders including breaching an unless order. HHJ Davies-White KC found the breach to be serious and wholly down to the Defendants' own failings. In refusing relief from sanction, the learned Judge took into account a variety of factors including:

58.1. That the failings resulted from a serious misunderstanding of the disclosure process;

58.2. That the Defendants had failed to address disclosure in a timely manner, engaging promptly and acting appropriately when issues arose;

58.3. That in contrast the Claimant had approached disclosure issues conscientiously;

58.4. That the Defendant had still not adequately addressed the disclosure issue at the time of the hearing of the application for relief from sanction;

58.5. That a trial date had been lost because of the Defendant's conduct;

58.6. That there had been previous delays by the Defendants in the litigation.

59. In considering that test, the court is entitled to have regard to the principles that apply in a relief from sanction application. In support of the proposition, my attention was drawn to the decision of the Court of Appeal in Walsham Chalet Park v Talkington Lakes [2014] EWCA Civ 1607. The Judge at first instance had been faced with a Claimant who had failed to comply with court orders as to disclosure, the production of a schedule of account and the service of witness statements. This led to an application to strike out by the Defendant. At paragraph 44 of his judgment, Richards LJ, as he then was, observed:

> "*The judge treated the principles in Mitchell as "relevant and important" even though the question in this case was whether to impose the sanction of a strike-out for non-compliance with a court order, not whether to grant relief under CPR rule 3.9 from an existing sanction. In my judgment, that was the correct approach. The factors referred to in rule 3.9, including in particular the need to enforce compliance with court orders, are reflected in the overriding objective in rule 1.1 to which the court must seek to give effect in exercising its power in relation to an application under rule 3.4 to strike out for non-compliance with a court order. The Mitchell principles, as now restated in Denton, have a direct bearing on such an issue. It must be stressed however, that the ultimate question for the court in deciding whether to impose the sanction of strike-out is materially different from that in deciding whether to grant relief from a sanction that has already been imposed. In a strike-out application under rule 3.4 the proportionality of the sanction itself is in issue, whereas an application under rule 3.9 for relief from sanction has to proceed on the basis that the sanction was properly imposed (see Mitchell, paragraphs 44-45). The importance of that distinction is particularly obvious where the sanction being sought is as fundamental as a strike-out. Mr Buckpitt drew our attention to the recent decision of the Supreme Court in HRH Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd [2014] UKSC 64, at paragraph 16, where Lord Neuberger*

quoted with evident approval the observation of the first instance judge that 'the striking out of a statement of case is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified'."

60. The Claimant also relies on the comments of the Master of the Rolls in Clearway Drainage v Miles Smith [2016] EWCA Civ 1258, an appeal from a decision of Moulder J in which she had refused relief from sanction for the late service of witness statements. At paragraph 54 of his judgment, the Master of the Rolls stated:

"54. It is important in this area that there is consistency in the application of the legal principles which have been clearly laid down. It was made plain in Mitchell (at [1]) that the traditional approach of our civil courts used to be on the whole to excuse non- compliance if any prejudice caused to the other party could be remedied (usually by an appropriate order for costs) but that is no longer the correct approach. The new approach was stated in paragraph [37] of Mitchell as follows:

> *'We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned'.*

"55. That remains good law, as is shown in paragraph [32] of Denton as follows:

> *'We can see that the use of the phrase "paramount importance" in para 36 of Mitchell has encouraged the idea that the factors other than factors (a) and (b) [in CPR 3.9(1)] are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule'."*

61. The breaches by the Defendants here are serious and there is no good reason for them. A trial date has been lost. If this were an application for relief from sanction, it would not have succeeded. Paragraph 20 of PD57AD anticipates the imposition of sanctions for non-compliance with the disclosure process. If the court cannot have confidence that the Defendants have properly complied with their disclosure obligations even now, the only proportionate response to the repeated breach of disclosure obligations that have delayed the trial is to impose the ultimate sanction of strike out. The court could only properly mark the gravity of the Defendants' breaches by striking out the defence.

62. The Claimant points out that, were the defence to be struck out, this would not necessarily prevent the Defendants from taking any part in the remainder of the case. The trial judge might permit engagement in the trial by allowing cross examination and/or making submissions as appropriate.

(2) The Defendant's case

63. The Defendants' starting position is that a striking out order for non compliance with a rule, practice direction or order is a draconian consequence which is not justified on the facts of this case. My attention is drawn to the judgment of Sharp J, as she then was, in Hayden v Charlton [2010] EWHC 3144. This was a libel case where the Claimants were in repeated and serious breaches of order and the Judge struck out the claims. At paragraph 79 of her judgment, she

commented, "*I accept that there may be relatively few occasions when the court would make a straight 'striking-out' order, rather than imposing some lesser sanction; and that the burden is on an applicant seeking such an order*." In what is, on the Defendants' case, a much less serious case of non compliance, Mr Watkin argues that the Claimant does not discharge that burden here. The breaches here are not deliberate; this is not a case of the total disregard of orders; the Defendants have engaged with the process; and this is not a case such as Hayden v Charlton which involved a cause of action such as a libel claim that calls for particularly speedy disposal.

64. Turning to the specific allegations of disclosure failings:

64.1. As to the argument that the Defendants have failed to disclose documents prior to the invoice of 4 October 2020, the Defendants' case appears to be that there is simply nothing to disclose. The Claimant's assertion that the Defendants were trading from 1 June 2020 is based on an email from the First Defendant to Mr Gary Alp dated 1 February 2022 which asserts that "*the entire year from 1 June 2020 to 31 May 2021 was conducted under extended lockdown and the accounts are therefore totally useless for any company performance measurement for forecasting for credit purposes."* It is said in Wylde 4 that it is difficult to understand how the reader might draw the conclusion from this email that the Defendants were said to be trading from June 2020.

64.2. In respect of the mobile phone records, the Defendants assert in Wylde 4 that the Claimant has not previously sought disclosure of the records.

64.3. The Defendants contend at paragraph 39 of Wylde 4 that the Claimant is overstating the lead time for the Frieze even in May 2021. It is asserted that this started on 29 January 2021, but this was a pared down event so the work was less complex than it had been in previous years when the Claimant had serviced the contract. Paragraph 39 of Wylde 4 explains the work that was involved and points to relevant documentation.

64.4. As to contact lists, at paragraph 34 of Wylde 4, it is stated, "*At no stage prior to this application has the Claimant sought disclosure of the list of contacts held on any device."* In other words, the lists have not been disclosed because they have not been requested.

65. More generally, whilst acknowledging the Defendant's failures in respect of disclosure, the Defendant makes the point that the Claimant does not say that the material that has been disclosed late contains any documents of particular assistance to the Claimant – there is no "smoking gun" to support the contention that the Defendants have been deliberately withholding documents that they know is likely to harm their case. Indeed, the documentation that has been disclosed late goes to the period from May 2021, which is not the period on which the Claimant is primarily focussing on its contention that the First Defendant has acted in breach of his duties. So, though the Defendants must accept a serious failure in the discharge of their disclosure obligation, with the late disclosure of a very large quantity of documents, the court should not be misled into thinking that this is some kind of deliberate ploy by the Defendants to gain advantage in the litigation.

66. Moreover, the Defendants suggest that, even acknowledging the failures for which they accept responsibility, there is a sense of loss of perspective on the issue of disclosure. Put simply, whatever disclosure is given in this case, the Claimant is not satisfied with it and seeks further documents.

67. In his skeleton argument at paragraph 46, Mr Watkin for the Defendant gives examples of what he says are issues raised by the Claimant as to disclosure which are disproportionate and go beyond the constructive and cooperative work, referred to in paragraph 10.3 of PD57AD, that the parties needed to engage in to ensure proper disclosure which was emphasised by Vos C in in his judgment in McParland v Whitehead [2020 Bus LR 699.

68. The Defendant contend that the Claimant has taken a less than constructive stance on disclosure even though the Defendants have disclosed documents which are adverse to their case. Whilst one would not expect the Defendants to draw attention to material adverse to its case, in oral submissions Mr Watkin

gave as an example an email from the First Defendant dated 7 September 2020 to one Rachel Nichols stating:

"Hi Rachel.

Sorry I could talk more plainly earlier.

Please find my new contact details below for my own company, Beechwood Events.

Technically, I'm an employee and director of Reeds Carpets until the end of this week and for legal reasons, I cannot divulge any further information at this point. But I will contact you again early next week if that is ok.

In the meantime, I will respond to your email that was sent to my Reeds address separately.

Many thanks & speak soon..."

Mr Watkin says that it is a clear case of the disclosure of an adverse document, showing that the Defendants take their disclosure obligations seriously.

69. The Defendant rejects a criticism of the methodology applied in the search. As Mr Watkin points out, the issue of methodology is dealt with by the Defendant's solicitor at paragraphs 9 to 21 of Wylde 2[16]. In any event, the court should be careful about judging this issue on the basis of the methodology applied. Whether the failings here were down to methodological error or broader inattention to the disclosure obligation, that is a mater internal to the Defendants and their legal representatives. This is to be contrasted for example with the situation in Hedrich v Standard Bank where the court was concerned with an application for a wasted costs order against the solicitors and therefore where their conduct was in particular focus. The court should resist the temptation to try to resolve where the fault lies between lawyers and clients, where the lawyers are not in reality able to defend themselves because of their duties to their client.

[16] Mr Wylde's statement of 16 June 2023 prepared in response to the Claimant's previous application of 19 May 2023 for judgment on the Unless Order.

70. Mr Watkin contends that a relevant consideration is that the Defendants intend to call some of the Claimant's clients as witnesses, in support of the assertion that it was not the Defendants' doing that their business was diverted away from the Claimant. It is contended that the Claimant's ability to cross examine these witnesses should give the Court confidence that, even if there are failings in the disclosure process, any relevant material is likely to come to light. Of course, as Mr Watkin concedes, these witnesses are not themselves under any obligation of disclosure and it may be too late at trial to address any issues that do come to light which casts some doubt as to the adequacy of the Defendants' disclosure. Nevertheless, it is a relevant matter to bear in mind.

71. The Defendant makes the further point that, insofar as the Claimant may prove disclosure failures on the Defendants' part, the trial judge will be well placed to deal with that. A failure to give proper disclosure arising from a conscious decision by the party obliged to give disclosure may lead to the court drawing adverse inferences (see for example, Holander on Documentary Evidence, 14th Edition, para 11-23). Even the deliberate destruction of documents (which is not alleged here) does not mean that a fair trial cannot take place (see Dadourian Group v Simms [2009] EWCA Civ 169).

(3) Discussion

72. I agree with Mr Wakin that, at least on the facts of this case, it is not necessary for me to investigate the methodology applied by the Defendants in the disclosure process. The failings speak for themselves, whatever the cause. This is not a case where it is being suggested that the Defendants have deliberately breached their disclosure obligations. Equally, the court is not concerned to determine whether there is some specific failing by the solicitors that might, for example, justify a costs order against them. In those circumstances, the failure of the Defendants or their solicitors to produce a detailed account of their methodology and its application will not illuminate the issue.

73. Turning to the particular complains of non disclosure, I am conscious that the court is not generally well placed, without hearing evidence, to determine all issues on the adequacy of the disclosure that has been given. Often, it will only

be at trial that the court can confidently conclude whether disclosure obligations have been discharged. However the disclosure debate in this case has been going on for some time and a careful analysis of some of the examples raised by the Claimant as to the inadequacy of disclosure gives a tolerably clear picture of how the Defendants have approached their disclosure duties thus far.

74. Starting with the Claimant's complaint that the Defendants have failed to give proper disclosure of documents leading to the start up of the business, the email from Mr Cairns to Mr Alp dated 1 February 2022 appears on the face to be a clear assertion that the First Defendant was operating a business from 1 June 2020. What was "*being conducted"* in "*the entire year from 1 June 2020 to 31 May 2021"*? The answer is unambiguous - the First Defendant is saying that he was operating a business in that period. Later the email states "*throughout this period I was operating from home with a very small share of a friend's warehouse and no employees."* The reference to "*this period"* seems only capable of meaning the period 1 June 2020 to 31 May 2021 referred to in the previous paragraph. There is thus ample material from which the Claimant can seek to draw the inference that the First Defendant was in some way at the very least trading on his own account from 1 June 2020.

75. It is striking that the assertion that the First Defendant was operating from home for the period 1 June 2020 to 31 May 2021 is not denied or indeed qualified, whether by Mr Cairns himself or by Mr Wylde on his behalf[17]. Of course, merely because Mr Cairns may have been seeking to establish a business from 1 June 2020 does not prove that there are documents that he has failed to disclose. But it raises the inference that other documents were probably brought into existence yet the Defendants deny that there is anything to disclose prior to the invoice of 4 October 2020.

76. The Defendants' explanation that they had not previously given disclosure of mobile phone records is similar to their explanation as to why they had not previously disclosed contact lists, the fourth of the specific criticisms made by

[17] As the Defendants pointed out in response to sight of a draft of this judgment, the First Defendant denies that any invoices were generated before 4 October 2020 - see paragraph 7 of Cairns 7. That does not mean that he was not operating a business in this period.

the Claimant in Mr Budworth's skeleton argument. In each case, the Defendants' response to being criticised for non-disclosure is that the documents had not previously been requested. But that approach supposes that there is a duty on the Claimant to request specific documents. In fact, the structure of disclosure is the converse. The primary duty is on the controller of the documents to search and disclose that which is relevant. In a case of this kind, it is highly likely that a contact list would be relevant and therefore the omission of such documents would be likely to suggest inadequate attention to the disclosure process. Yet the Defendants' stance on both the mobile phone records and the contact lists appears to have been to wait for the Claimant to probe sufficiently deeply that it realises the omission before putting it right.

77. The Defendants' explanation for the lack of further documentation relating to the Frieze Art Fair is less obviously inadequate. It may be that this was a scaled down event with less work than had been required in the past. It may also be that the First Defendant worked in a different way than the Claimant creating less of a body of disclosable material. However, the very fact that the shipping container was booked before what the Defendants say was the start of the process leading up to the event is suggestive of there being further undisclosed material. This suggestion is substantially supported by the evidence that the First Defendant had pitched a proposal to Frieze in October 2020 of which he has not given disclosure.

78. Taken together, these examples give clear evidence of an inadequate approach by the Defendants to their disclosure obligations. I am satisfied on the material available to me that the Defendants have failed to give adequate disclosure beyond that which is accepted by Mr Cairns in Cairns 3. In particular, they have failed adequately to disclose:

    78.1. Evidence relating to the incorporation and establishment of their business in the period June 2020 to May 2021;

    78.2. Client contact lists;

    78.3. The circumstances of booking a shipping container for the Frieze festival in January 2021;

78.4. The proposal made to Frieze in or around October 2020.

79. Why have these specific failings, as well as the much broader failures acknowledged in Cairns 3 happened? One aspect of the Defendants' position in this application is that the Claimant has an insatiable appetite for disclosure which is leading to what Mr Watkin describes in his skeleton argument as "*relentless requests for disclosure (many made repeatedly despite explanations being given in correspondence and by witness statements).*" But an explanation of the issues raised by the Claimant shows that disclosure on several issues has only been proffered by the Defendants after repeated requests by the Claimant and (in some cases) with the accompanying excuse that the Claimant has not previously asked for the particular disclosure. I conclude from this that the Defendants' inadequate disclosure flows from their failure to take their disclosure obligations sufficiently seriously.

80. In considering whether strike out is the appropriate response to these disclosure failings, I bear in mind the authorities cited by the parties. In Biguzzi v Rank Leisure Plc [1999] 1 WLR 1926, Lord Woolf MR observed at 1933-1934: "*in many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out … In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result*" (emphasis added).

81. More recently, in Mozambique v Credit Suisse International [2023] EWHC 1650 (Comm), Robin Knowles J said at [72]: *"The Court is not persuaded that the litigation should be struck out now as a matter of principle, as a sanction for non-compliance with Court's orders. In the present litigation, the Court does not consider that it can be said correctly at this point that there is a substantial risk of an unfair trial, or that it can be concluded at this point that a fair trial is in jeopardy."*

82. One may draw the following from these authorities:

82.1. Strike out of a claim for procedural default is likely to be contemplated where there is a substantial risk of any trial being unfair or at the very least, a risk that a fair trial is in jeopardy;

82.2. Strike out of a claim or a defence is a draconian step that should normally only be taken where there is no lesser step available to the court.

83. In contrast, in Prince Abdulaziz v Apex [2014] UKSC 64 the Claimant was in breach of an unless order relating to the signing of a disclosure statement. Norris J entered judgement on the unless order and an appeal to the Court of Appeal was unsuccessful. In the Supreme Court, Lord Neuberger, with whom three of the other Justices, agreed said:

"*11. Subject to arguments based on (i) general disproportionality, (ii) the fact that there will be a trial in any event, and (iii) the strength of the Prince's case (arguments which I consider in the next three sections of this judgment), it appears clear to me, as it did to the Court of Appeal, that the decisions of Vos J, Norris J and Mann J, as summarised above, cannot be faulted…*

22. There is undoubtedly attraction in the contention that preventing the Prince from challenging his liability for $6m is a disproportionate sanction in circumstances where he appears to have what was referred to on his behalf at first instance as "a substantive defence" (and as it was put by Mann J in his first judgment). A stark view of the Court of Appeal's decision is that it deprived a defendant of the opportunity to maintain a defence to a claim for $6m simply because he has failed to comply with an order that he sign a document, when his solicitor was prepared to sign it on his behalf. Expressed thus, the decision may indeed look like an overreaction, and that is no doubt how it would strike the Prince.

23. This contention effectively involves saying that, although each decision on the way to the final result is unassailable (at least subject to the Prince's two remaining arguments), the final result is wrong on the ground of lack of proportionality. I suppose that may be logically possible, but it is a difficult position to maintain. More to the point, in my view, on analysis, the contention does not stand up. The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they

ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction.

24. In the present case, essentially for the reasons given by the three judges in their respective judgments, there do not appear to be any special factors (subject to what I say in the next two sections of this judgment). Further, it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place.

25. One of the important aims of the changes embodied in the Civil Procedure Rules and, more recently, following Sir Rupert Jackson's report on costs, was to ensure that procedural orders reflected not only the interests of the litigation concerned, but also the interests of the efficient administration of justice more generally. The Prince has had two very clear opportunities to comply with the simple obligation to give disclosure in an appropriate fashion, namely pursuant to the orders of Vos J and of Norris J. Indeed, there would have been a very good chance that, if he had offered to sign the relevant statement after judgment had been entered against him, the court would have set aside the judgment and permitted him to defend (provided that no unfair prejudice was thereby caused to the other parties, and he satisfied any appropriate terms which were imposed)."

84. In that case, the majority of the Supreme Court dismissed the appeal, allowing the judgment to stand. Lord Clark, dissenting, considered this to be a disproportionate outcome.

85. Important as the decision of the Supreme Court undoubtedly is, it is appropriate to note that that was a case involving the deliberate breach of an order where the Claimant had had every opportunity to put that breach right. The facts of this case are somewhat different in that it involves a breach of a disclosure obligation which, though serious (to the point on the Claimant's case of being reckless), was not deliberate.

86. The factors that exacerbate the Defendants' non compliance and point in the direction of the court taking a more serious view of matters are:

    86.1. The Defendants have been in continuing breach of their disclosure obligations, notwithstanding a series of court orders seeking to enforce those obligations.

    86.2. It is more probable than not that, even now, there are failings in the Defendants' disclosure.

    86.3. The Defendants' explanations of their default are difficult to fathom. The references to "human error" and "lack of a full understanding with regards to the extent and scope of document locations and sources to search" in Cairns 3 are opaque. The lack of an inadequate explanation for the deficiencies in disclosure points in the direction that the true explanation may be being covered up because it does not bear analysis.

    86.4. If this Defence is not struck out, a fair trial will not be possible unless the Defendants give further disclosure. Given their previous and continuing failures identified above, the only way to seek to achieve a fair trial is to make yet further orders for disclosure. The making of such orders is likely to divert disproportionate judicial resources to this claim[18] and may lead to further attempts by the Claimant to enforce such orders.

[18] Some might say that disproportionate resources have already been diverted to the claim.

86.5. Even now, the consequences of the Defendants' late disclosure are unclear. It is possible that applications to amend statements of case and/or for permission to rely on further witness evidence will need to be made.

86.6. A trial date has already been lost in this case because of the Defendants' defaults.

87. The factors that mitigate the non compliance and point towards a less draconian consequence are:

87.1. The Defendants are not in breach of an unless order. Whilst it is quite possible that an unless order covering disclosure as well as inspection could have been sought and might have been made at the hearing before me on 8 February 2023, and further that such an order could have been sought and might have been made at the further hearing on 21 June 2023, the Claimant did not in fact seek such an order and none was made.

87.2. Correspondingly, the making of an unless order now might achieve the end of obtaining proper disclosure from the Defendants, thereby allowing a fair trial to take place.

87.3. Whilst there are identified failings in disclosure, these are relatively narrow. In particular, the recent large scale disclosure that has arisen from the Defendants searching further devices has not led to the production of identified documents that are adverse to the Defendants' case. On the other hand, the Defendants gave timely disclosure of documents that are arguably adverse to its case.

87.4. More generally, this is not a case where the Defendants have failed to engage with issues about disclosure. Whilst there may have been errors in the disclosure process, the Defendants have continued to show a willingness to search for and disclose material.

87.5. It is a particularly serious matter to strike out the defence of a Defendant who has not chosen to be before the court than it is to strike

out the claim of a Claimant who has initiated the litigation. Either risks a meritorious claim or defence, as the case may be, on the substantive issues being disregarded by the court but where the Defendant is not the instigator of the claim, it is a particularly serious consequence not to allow it to defend the claim.

87.6. If a party in the position of the Defendants here fails to give proper disclosure, the court is well placed to deal with that by making appropriate adverse inferences.

88. I accept that, in considering the ultimate remedy of strike out, the court is not simply applying Denton v White criteria. Rather, whilst the court will be concerned with the seriousness of the default, the reasons for it and other circumstances, the court must also look at the proportionality of the sanction. It is a serious matter to strike out any statement of case, particularly that of a Defendant who does not choose to be before the court.

89. The arguments here are closely balanced. Considerable judicial resources have been given over to dealing with the disclosure issue already and it is difficult to see that a fair trial will be possible without further judicial input and oversight. Even with that input and oversight, if the Defendants decline to cooperate, a fair trial is put at risk. But on balance, and having regard to the overriding objective, I am persuaded that the court is not quite at the point where it should find that the Defendants have lost their right to defend a claim because of the inadequacies of disclosure.

89.1. Whilst the failings here are very substantial, the late disclosure that has been given does not lead me to the conclusion that the Defendants have deliberately concealed documents by neglecting to make relevant searches.

89.2. I accept that at least some adverse documents have been produced by the Defendants and that, for all of the inadequacies of the process, the Defendants have engaged to some degree with their obligations.

89.3. I further accept that the making of an "unless" order dealing with the specific outstanding disclosure issues is likely to focus the Defendants

minds on their continuing disclosure obligations, especially when they have in mind how closely I have come to acceding to the Claimant's application today.

90. Taking these points together, I conclude that it is still possible for a fair trial to take place so long as the Defendants are made the subject of further disclosure orders with which they comply, such orders being expressed in peremptory terms to ensure that, if there is default, further court time is not avoidably expended on this issue.

91. In coming to this conclusion, I bear in mind that not only has the Defendants' case narrowly survived being struck out but that the consequence of not striking out the claim is to make it unrealistic for the Court to refuse the Defendants' own applications for an extension of time and relief from sanctions, for reasons summarised below. It might be thought that the Defendants are doubly fortunate to be reprieved here. The corollary however is that, both in considering matters consequent to this judgement and in dealing with any further breaches by the Defendants, the court will bear in mind the narrow escape that the Defendants have managed to effect.

92. I propose to make an order in unless terms dealing with such further searches and disclosure as are proportionate to the issues in the case. The precise terms of that order will need consideration by the parties. Whilst I reject the suggestion that the Claimant has been uncooperative on the disclosure issue, I see some force in Mr Watkins' submission that there is a danger of the disclosure issue getting out of proportion. Whilst the Claimant has not acted disproportionately in bringing before the court the Defendants' disclosure failings, I am concerned that the Claimant's target in terms of disclosure has not been as closely defined as it might have been. It is my intention that any order made in consequence of this judgment is the last order requiring disclosure, so as to allow this matter to proceed to trial (or strike out if there is not compliance). If that order is breached, it will of course be possible for the Defendants to seek relief from sanction, but the serious historic breaches that I have reference to above will

undoubtedly be a factor that militates against any further indulgence of the Defendants.

93. I should make it clear however that the process of disclosure must be brought to a conclusion if this matter is ever to proceed to trial. Without prejudging the merits of any further applications relating to disclosure, I do not anticipate further court time being spent on the disclosure issue beyond resolving the issues referred to in the previous paragraph so long as the Defendants comply with the order that I propose to make.

ISSUE 3 – THE DEFENDANTS' APPLICATION

(1) The Defendants case

94. The Defendants' application notice dated 21 July 2023 seeks orders in favour of the Fifth Defendant extending time for service of the disclosure certificate and seeking relief from sanction. As noted above, the Defendants have, in the face of the court (through witness evidence) sought an amendment to the application to encompass the First to Fourth Defendants as well as the Fifth. This is not opposed.

95. The Defendants the seek an extension of time for the service of their Disclosure Certificates. The failure to serve Disclosure Certificates in accordance with paragraph 4 of the order of 21 June 2023 is accepted and explained in paragraph 10.2 of Mr Watkin's skeleton argument. In essence these breaches arise because of the failings in disclosure identified above. If the court is not to strike out the claim out, clearly an extension ought to be given.

96. There is a further acknowledged breach by the Defendants of paragraph 3 of the of the order of 18 June 2023 because the reply to the relevant letter was made at 17.04 on 21 July 2023 (rather than by 16.00 on that day, as required by the order). Again this was in the context of the late disclosure of documents.

97. As for the application for relief from sanction, Mr Watkin draws my attention to the terms of paragraph 12.5 of PD57AD, cited above. The automatic sanction for the late disclosure of documents pursuant to an obligation so to do pursuant

to an order for Extended Disclosure is that a party cannot rely on the document disclosed late without the permission of the court or agreement of the parties.

98. It has been recognised that there may be some difficulty in applying the Denton v White test in its pure form where issues of the late disclosure of documents arise. In McTear v Engelhard [2016] 4 WLR 108, Vos LJ, giving the judgment of the court, observed on the corresponding provision under CPR Part 31.

"*47. The judge relied on CPR r 31.21 which only provides that a "party may not rely on any document which he fails to disclose ... unless the court gives permission," but by the time of the hearing the defendants had not failed to disclose the new documents; they had served a list respect of them.*

48. The question, therefore, is whether the judge was right to treat the application in relation the new documents as purely one for relief from sanctions. I do not think that he was. The important question was whether, in all the circumstances, the defendants were to be permitted to rely upon them at the forthcoming trial. That depended, amongst other things, on considerations including whether the claimants would have wished to rely on them, the circumstances in which they had not been disclosed before, and their relevance to the issues.

49. I accept also that the failure to produce the documents at the initial disclosure stage was a significant breach. Parties must take seriously the need to conduct proper searches for documents in response to an order for standard disclosure by a fixed date. But here there was excuse, albeit one that was not very well explained in the second application. The documents had been thought to have been destroyed, but were discovered when new counsel emphasised the need to look for them. In these circumstances, the most important question was whether the claimants could properly deal with them at the forthcoming trial. In my judgment, they could have done so. They were not very important, had probably already been for the most part in the possession of the claimants, and did not require any significant work for accountants to digest. my judgment, the documents ought to have been admitted. I emphasise, however, that if the judge had been justified in thinking that the defendants had been trying to "bury" or

disguise significant documents by exhibiting them to a witness statement rather than openly disclosing them, he might have been justified in excluding them. In my judgment, however, the judge was not right to infer impropriety from the defendants' conduct. They did not behave correctly as I have explained, but that is a different matter."

99. In this case, the documents that were disclosed late may assist the Defendants, though it is possible that the Claimant may wish to rely on some of them. The Claimant will have every opportunity to consider those documents, given that the trial has been adjourned. It is unrealistic and disproportionate for the court tor the parties to look at the documents individually to determine whether some should be admitted or some not. In reality, they are either relevant to the Defendants' case, in which case it is in the interest of justice for permission to be given to the Defendants to rely on them or they are not in which case the Claimant may rely on them as a matter of right if they are relevant to its case or they will simply not be relied on at all.

(2) The Claimant's case

100. As I have indicated, the Claimant does not oppose the Defendants' application to amend this application to encompass all five Defendants.

101. As to the other applications made by the Defendants, the Claimant understandably focussed in submissions on its own application to strike out, pointing to the difficulties that would ensure in terms of how disclosure is to be dealt with henceforth if the defences are not struck out.

102. Of course, if the Claimant's own application had succeeded, the Defendants' relief from sanction applications would not have required consideration. In the event of it having failed, Mr Budworth says that the Claimant is in a very difficult position. Without thorough preparation, it cannot take an informed stance on which of the documents disclosed late it would wish to rely on. This is an example of the unfairness of the situation created by the Defendants' disclosure failings.

(3) Discussion

103. It is obviously in accordance with good and efficient case management that the application be treated as being made on behalf of all five Defendants, there being no discernible prejudice whether to the Claimant or the allocation of court resources so to do.

104. As to the Defendants' other applications for extension of time and relief from sanction:

    104.1. In my judgment the late production of disclosure lists and disclosure certificates is so closely connected to the underlying disclosure failures of the Defendants as to lead one to the conclusion that it is not realistically possible to decline to strike out but also to decline to give relief from sanction. These are serious defaults and the explanation for them is inadequate but, having declined to strike out the case, it would be inappropriate to achieve a similar route through the back door of refusing relief from sanction. In recognition of this, in determining the strike out application, I bore in mind that refusing the application would inevitably lead to a situation in which the Defendant's defaults were excused by extending time and granting relief from sanction.

    104.2. I reach the same conclusion in respect of the sanction under paragraph 12.5 of PD57AD. It is simply not proportionate for the court to have to deal with such documents on an individual basis. I am forced into the position in which, notwithstanding a serious breach with an inadequate explanation, the only practicable way to manage this a case is to permit the Defendants to rely on the documents disclosed late, by giving relief from sanction.

ISSUE 4 - CONSEQUENTIAL DIRECTIONS

105. Accordingly, I will dismiss the Claimant's application for judgment, but otherwise allow the Claimant's application of 1 August 2023, on precise terms to be agreed between the parties or determined by the court at a further hearing. Those terms will require further searches, the production of a further disclosure certificate and disclosure list to a proportionate extent and will be expressed in terms that in default the defences of the Defendants are struck out. I will

consider whether they should be backed up by a witness statement relating to the disclosure process though am not at the moment persuaded that this is necessary.

106. I allow the Defendant's application of 21 July 2023 for relief from sanction and for an extension of time for the service of the disclosure certificate.

ISSUE 5 – COSTS

107. The Claimant's application of 1 August 2023 seeks an order for costs in its favour. It will be apparent from this judgment that my decision not to strike out the claim was reached with some considerable hesitation in circumstances where there have been serious breaches of court orders. The Claimant has a very strong argument for the costs not only of that application, but also those consequential upon the trial being vacated (such costs having been reserved on 4 August 2023). Furthermore, the Defendants' late disclosure of material that should have been disclosed before the order of 21 June 2023 puts the question of the reservation of costs in that order in a different light.

108. The Defendants' application of 21 July 2023 is silent as to the costs order sought. As an application for relief from sanction, it might be thought that the Defendants are at considerable risk of an adverse costs order even though relief was granted.

109. I have not heard detailed submissions on costs, which inevitably can only be put in a tentative and provisional fashion until the parties have received my judgment on the substantive issues. Accordingly, l consider that it would be unfair to resolve those issue without the parties having a further opportunity to address the various points and will therefore reserve costs to the consequentials hearing (unless the parties are able to agree matters before then).

CONCLUSION

110. It follows from the above that:

    110.1. The Claimant is not entitled to judgment on the Unless Order.

    110.2. I do not strike out the Defendants' defence;

110.3. However I will grant relief in peremptory terms on the remainder of the Claimant's application of 1 August 2023 in terms to be agreed by the parties or determined at a further hearing.

110.4. I allow both limbs of the Defendants' application of 21 July 2023.

110.5. I reserve costs to the further hearing referred to above unless the terms are agreed by the parties before then. When considering this issue, the parties will wish to bear in mind my comments as to how close I have come to striking the defences out, in the context of admitted deficiencies in the Defendants conduct of the disclosure process.

111. The Claimant has indicated that it may seek to appeal this decision and has asked me to adjourn the making of such application and to extend the time for filing an Appellant's Notice. I will make such an order.