Neutral Citation Number: [2024] EWHC 3074 (Comm)

Case No: CL-2023-000013

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/11/2024

Before :

CHRISTOPHER HANCOCK KC

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Between :

SFL ACE 2 COMPANY INC.	**Claimant**
- and -	
(1) DCW MANAGEMENT LIMITED (FORMERLY ALLSEAS GLOBAL MANAGEMENT LIMITED) ~~**(2) DAVID JAMES AMBROSE**~~	**Defendant**
- and -	
(1) MITCHELL BRENNER **(2) ALLSEAS GLOBAL LOGISTICS LIMITED** **(3) DKT ALLSEAS SHIPPING LIMITED**	**Third to Fifth Defendants**

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Mark Tushingham (instructed by **Tatham & Co**) for the **Claimant**
Eleanor Campbell (instructed by **Bermans**) for the **Third Defendant**
Gideon Shirazi (instructed by **Myton Law**) **for the Fourth and Fifth Defendants**

Hearing dates: 7 October 2024

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Friday 29 November 2024.

Christopher Hancock KC :

Introduction

1. This hearing was originally listed for 2 hours as the hearing of the Claimant's application pursuant to Section 51 of the Senior Courts Act 1981 and CPR 46.2, for an order that the Third to Fifth Defendants pay its costs of the proceedings (the "**Costs Application**"). The Claimant's costs of the proceedings, which are to be assessed, are said to be £268,483.32.

2. By application dated 25 September 2024 however, the Claimant sought an order for search-based (or "*extended*") disclosure against the Third-Party Respondents (the "**Disclosure Application**"). The hearing before me on 7 October became the hearing of that latter application.

3. By the Disclosure Application the Claimant sought:

   (1) Disclosure of all communications from January 2023 to date, in relation to (1) the Defendant, (2) the Fourth Defendant ("**AGL**") or (3) Fifth Defendant ("**DKT**"), between, on the one hand, Mr Brenner, and on the other hand, Mr Wright (sole director and shareholder of the Defendant) and/or Mr Ambrose (CFO and a director of AGL and DKT); and

   (2) Disclosure of further specific documents or categories of documents.

4. For details of the claim itself, I would refer the reader to my judgment, which was handed down in July 2024, and which arose out of the alleged guarantee (which I held to be established) of the obligations of the Charterer ("**Charterer**") of a vessel which had repudiated that charter.

Mr Brenner.

5. Mr Brenner's company 1st Containers Ltd ("**1st Containers**"), became a 50% shareholder in the Charterer in the summer of 2021, and Mr Brenner became a director of the Charterer on 20 August 2021. He remained a director for a little over a year, from 20 August 2021 to 6 September 2022, and was therefore a director at the time the Charterer entered into the Charterparty ("**Charterparty**") and at the time when the Charterparty was terminated on 25 August 2022. The Charterer went into administration in October 2022, and was not a party to the proceedings. Mr Brenner was not called to give evidence at trial.

6. Two days after I handed down judgment, the Claimant issued the Costs Application against Mr Brenner, DKT and AGL (which were in the same group as the Defendant until a restructuring finalised in December 2023, as I set out below). The witness statement of Mr Hickland of the Claimant's solicitors, Tatham & Co ("**Hickland 1**"), served in support, alleged that Mr Brenner had funded the Defendant's defence and that he had de facto control of the Defendant together with Mr Wright. Mr Hickland further alleged that Mr Brenner and Mr Wright had benefitted from the Defendant's defence and would have benefitted further had the defence succeeded.

7. On 17 September 2024 Mr Brenner served a detailed witness statement in response to the Costs Application ("**Brenner 1**"), which sought to rebut the suggestions in Mr Hickland's statement.

8. Mr Brenner exhibited c.160 pages of contemporaneous supporting documents in support of the matters set out in Brenner 1. Mr David Ambrose served a further witness statement with a similar volume of evidence on behalf of the Fourth and Fifth Defendants.

9. By letter dated 30 July 2024, Tatham & Co wrote seeking disclosure from the Third-Party Respondents of the documents now sought.

10. Mr Brenner's solicitors, Bermans, responded to Tatham & Co's letter, disclosing three further documents, and contended that the Claimant was not entitled to any further disclosure from Mr Brenner. The following day, the Claimant issued the Disclosure Application.

DKT Allseas and Allseas Global.

11. DKT and AGL say that the Charterer was a joint venture company between the Defendant (DCW Management Limited (formally Allseas Global Management Limited)) ("**AGML**") (the holding company for the Allseas group, 100% owned by Mr Wright) and 1st Containers, a company 75% owned by Mr Brenner, as I found in paragraph 8 of my judgment.

12. There were two main trading businesses that were subsidiaries of AGML: AGL and DKT. The evidence of Mr Ambrose is that:

    (1) Each was operated as a separate company (and had e.g. separate IT systems, etc.).

    (2) Companies in the group would give loans to other companies when it was in the interests of that company to do so. Payments of this sort were recorded as loans and expected to be repaid.

13. In September 2022, the Claimant at Genoa arrested bunkers on board the vessel the *Seren* chartered by the Charterer. The vessel was released after payment of EUR 600,000 into escrow. Payment was made by AGL. Mr Ambrose explains that the Charterer did not operate any EURO banking facilities. AGL made the payment through its foreign exchange provider Privalgo, and the Charterer repaid Privalgo on the same date.

14. AGML instructed Hill Dickinson to defend the claim. The Claimant now asserts that AGML's defences "*were speculative and had no documentary evidential foundation*". But, say DKT and AGL:

    (1) AGML received advice that it had a reasonable defence to the claim.

    (2) The Claimant did not apply for summary judgment at any stage. If AGML's case really were speculative, said the Fourth and Fifth Defendants, then it is remarkable that no such application was made.

15. AGML, say these Third to Fifth Defendants, was at all material times a non-trading holding company. It follows that it relies on dividend payments and loans in order to make payments. Mr Ambrose testifies that "*when it was necessary and in the interests of each business, AGL and DKT provided loans to AGML. The intra-group payment would be recorded as a loan in the accounts and it would always be paid back as and when AGML was able to repay it*". AGML obtained funding to fight the case in this way from AGL and DKT; and also under a facility agreement from Mr Brenner.

16. On 21 December 2023, the ordinary share capital of AGL, DKT and Allseas Global Supply Chain Limited ("**AGSC**") (another AGML subsidiary) were sold to Notus Investments Limited ("**Notus**") as part of a restructuring of the group. Mr Ambrose's evidence is that "*The restructure was carried out under an advisory engagement by a licensed insolvency practitioner, following an independent arm's length valuation of the shareholdings, with appropriate legal advice and consent of all security holders.*"

17. These Respondents point out that the Charterers' liquidators (and AGML's administrators) have not raised any claim based on this restructuring.

The Claimant's factual contentions.

The Asset Stripping Scheme.

18. The Claimant asserts that at or around the time when the Claimant commenced its claim against AGML in 2023, a scheme was hatched (the "**Asset Stripping Scheme**") to make AGML judgment-proof for the benefit of the Third to Fifth Defendants and to frustrate the Claimant's ability to enforce a judgment against AGML. The Claimant asserts that the Asset Stripping Scheme appears to have been implemented in three stages:

    (1) In April 2023, AGML granted a fixed and floating charge over all of its assets (including AGML's shareholdings in AGL and DKT) in favour of Mr Brenner.

    (2) In December 2023, AGML transferred its shareholdings in AGL and DKT to Notus for £1 each. Mr Brenner states that he consented to the transaction by which AGL was transferred to Notus and that he was aware that the ownership of various companies was transferred to Notus. According to Companies House, Mr Wright owns between 25-50% of Notus.

    (3) In July 2024, Mr Brenner appointed administrators over AGML pursuant to the charge which was granted in his favour in April 2023.

19. The Asset Stripping Scheme was not disclosed by Mr Ambrose or Mr Wright at the trial of this action. The Claimant says that it believes that the Third to Fifth Defendants were involved in the Asset Stripping Scheme, though they cannot say precisely how. They seek disclosure now of documents to enable them to make these assertions good, and to justify a third party costs order.

20. Accordingly, the Claimant contends that the Third to Fifth Defendants funded AGML's defence to buy time to implement the Asset Stripping Scheme for their own benefit. It says that this case bears a striking resemblance to Total Spares & Supplies Ltd v Antares SRL [2006] EWHC 1537 (Ch) where non-party costs orders were made in favour of

the claimant when the defendant had transferred its business and related assets to a related company (prior to judgment) at an undervalue to prevent the claimant from enforcing any judgment. At present, the Claimant's case is based on inferences drawn from the limited facts which have been disclosed. However, the Claimant believes that its case will be borne out by the documents sought by the Claimant in this application.

The structure of the Allseas group.

21. The Allseas Group comprised several companies and trading subsidiaries which carried on business in shipping and freight forwarding. The Group was managed by a single or common management, including Mr Wright and Mr Ambrose. The structure of the Group was depicted in a chart dated 19 May 2022, which was signed by Mr Ambrose and was provided to the Claimant during the charter negotiations, and which was produced at trial. This chart stated that AGML (*i.e.* the Claimant's intended contractual counterparty) owned:

    (1) 100% of the shares of each of DKT, AGL and AGSC; and

    (2) 50% of the shares of Allseas Global Projects Limited; the remaining 50% of the shares were owned by 1st Containers.

22. The chart stated that 1st Containers was owned by Mr Brenner.

23. AGML's consolidated accounts for the year ended 31 December 2022 stated that AGL and DKT were the "two main trading subsidiaries" of AGML. The accounts recorded that AGL, DKT and AGSC had aggregate capital and reserves of over £4.5 million for the financial year ended 31 December 2022.

The allegations of funding.

24. On 24 August 2022, as I found at trial, the Charterer repudiated the charter. In October 2022, the Charterer went into administration. At the trial of this action, Mr Ambrose explained that after the Charterer went into administration, the "whole group was exposed" and "we have had to inject quite a significant amount of capital back into the trading businesses to keep them going. Mr Brenner being a key part of that."

25. There is a dispute as to the circumstances of that funding. Mr Brenner says he was a disinterested funder who was not involved in the business or management of the Allseas Group and who simply provided arm's length funding. The Claimant denies this, saying that, for example:

    (1) Mr Brenner states that in November 2022 he personally negotiated (on behalf of DKT) with a creditor of DKT after it had threatened a lien over containers which were owned by 1st Containers.

    (2) Mr Brenner states that he was "owed other debts by companies within the Allseas Group". The amount of these debts has not been disclosed.

    (3) Mr Brenner states that 1st Containers also owed a debt of approximately USD 9 million to a leasing creditor where liability was "joint and several" with DKT and AGL "but those other companies had no means to share the financial burden".

(4) Mr Ambrose and Mr Brenner communicated "on a regular basis" and "[t]he vast majority of those communications would relate to the day-to-day operation of the business".

26. Mr Brenner says that he provided an initial tranche of funding of £800,000 to AGML "on the request of Mr Wright who offered me security over both the Allseas Group and his personal assets". It appears that this funding was provided in December 2022. The Claimant say that Mr Brenner has disclosed no documents evidencing Mr Wright's request for £800,000.

27. Mr Ambrose asserts that the funding provided by Mr Brenner to AGML was subsequently advanced to DKT by way of a further loan entered into on an unspecified date. No documents have been disclosed to substantiate the amount of this loan or the date when funding was advanced by AGML to DKT.

28. On 17 January 2023, the Claimant commenced its action against AGML. The Claimant's claim was for over USD 27 million. The Claimant's claim evidently posed a threat to the Allseas Group, says the Claimant, as well to Mr Brenner and 1st Containers. If the Claimant was successful, it would then be able to enforce any judgment against AGML and its assets (including AGML's shareholdings in DKT and AGL).

The purpose of the alleged asset stripping scheme.

29. As I have already noted, the Claimant contends that at or around the time when it commenced its claim against AGML, the Asset Stripping Scheme was hatched. The Claimant submits that it is to be inferred that AGML needed to buy time to defend the Claimant's claim so that steps could be taken to implement the Asset Stripping Scheme. Whilst, in their witness statements, the Third to Fifth Defendants deny that they engaged in any dissipation of AGML's assets, the Claimant argues that Mr Ambrose admits that:

> *"[…] It is nothing but reasonable for those involved in the management and control of those companies within a group, if they take the view that the future survival of one member of the group is in the balance, to position the other companies within the group to ensure their survival. […]"*

30. Moreover, the Claimant says, Mr Ambrose has exhibited an email sent by Mr Wright to Mr Ambrose and Mr Brenner dated 24 December 2022 which stated as follows:

> *"What we do need to do is protect ourselves should the business fail within 2 years so that repayment could not be challenged. I also think it might be a good idea for Mitch to retain security and perhaps even do so on my own property as a bit of an Insurance policy should the worst happen. Maybe it's a good idea for all of us to meet Will early in the New Year to discuss the strategy?"*

The transfers at an undervalue.

31. The Claimant then relied on the existence of various other documents which had been disclosed in the context of the Costs Application, beginning with documents relating to the valuation of the companies which were transferred, in the event, to Notus. On 21 March 2023, Mr Wright and Mr Ambrose caused AGML to engage Mr Trevor Binyon of Opus Restructuring LLP ("**Opus**") to conduct "[a]n urgent review of the Allseas Group Structure to assess the efficiency of the Group in the event of an attack from any litigious creditors and recommend a revised Group structure if necessary". Mr Ambrose states that Opus were engaged "against the backdrop of the Claimant's contingent claim".

32. On 19 April 2023, AGML entered into the written agreement with Mr Brenner (the "**Facility Agreement**") in relation to the revolving credit facility of up to £1.25 million which I have already referred to. On the same date, AGML also granted a fixed and floating charge over all of its property (including AGML's shareholdings in AGL and DKT) in favour of Mr Brenner, ostensibly to secure sums owed by AGML (the "**Composite Guarantee and Debenture**").

33. The Claimant says that these were not "arms length business transactions", relying, by way of example, on the fact that Mr Brenner's address (as listed in both the Facility Agreement and the Composite Guarantee and Debenture) was "Adelaide Mill, Gould Street, Oldham", which was the same address as AGML's registered office.

34. On 21 June 2023, SRLV LLP ("**SRLV**") wrote to Mr Ambrose and Mr Wright and supplied a 3-page valuation of DKT, AGL and AGSC. The SRLV valuation refers to certain attachments, but none have been disclosed. The valuation stated (*inter alia*):

> *"We have not carried out an audit nor independently verified the information that has been provided by the management of the businesses which has been accepted in good faith.*
>
> *[…] we are unable to apply a positive value to these two businesses in combination but recognise there may be certain parts thereof which a third party buyer may find of value."*

35. The Claimant submits that this conclusion is surprising given that AGML's most recent accounts had recorded that AGL, DKT and AGSC had aggregate capital and reserves of over £4.5 million for the year ending 31 December 2022. The Claimant also notes that between June and July 2023, Mr Ambrose sent various emails to Mr Binyon of Opus, as well as to Barclays Bank, with attachments which have not been disclosed.

36. It appears that draft sale and purchase agreements were then prepared to document the "sale" of DKT, AGL and AGSC from AGML to Notus. The signed sale and purchase agreements have not been disclosed. However, it has since emerged that the consideration payable by Notus under the sale and purchase agreements was apparently "£1 per entity".

37. On 21 December 2023, AGML transferred its shareholdings in DKT, AGL and AGSC to Notus. The Claimant submits there is credible evidence that this transfer was entered into in furtherance of the Asset Stripping Scheme. Mr Brenner states that he consented

to the transaction by which AGL was transferred to Notus and that he was aware of the transfer of "various companies" to Notus. Mr Brenner has not disclosed his communications with Mr Wright or Mr Ambrose in this regard.

38. Mr Brenner asserts that AGML and Notus are both "100% owned" by Mr Wright and he says that "documents filed with Companies House confirm this". However, says the Claimant, records available on Companies House in fact show that Mr Wright owns "more than 25% but not more than 50%" of the shares of both AGML and Notus. Pending disclosure, the Claimant says that it believes that Mr Brenner is the other 50% beneficial owner of AGML and Notus.

Further funding by Mr Brenner and the exercise of the charge.

39. Between November 2023 and February 2024, Mr Brenner advanced a further £650,000 to AGML. These funds appear to have been used by AGL and DKT, says the Claimant. On 13 April 2024, Mr Brenner advanced a further £63,862 to be used towards the payment of AGML's legal fees. The balance of AGML's legal fees (of £204,851) had previously been funded by loans apparently provided by DKT and AGL to AGML on unspecified dates.

40. On 22 July 2024, I handed down my judgment in favour of the Claimant. Mr Brenner asserts that he "only found out about the judgment from an industry contact who picked up on it in the industry press", but the Claimant says that Mr Brenner has not disclosed any documents to substantiate this assertion, nor has he disclosed any communications with Mr Wright or Mr Ambrose in the period between 17 May 2024 (when the Court circulated its judgment in draft to the parties) and late July 2024. However, the following facts, says the Claimant, do not appear to be in dispute:

    (1) On 24 July 2024, Mr Brenner's solicitors (Bermans) wrote to AGML: (*i*) demanding the repayment of sums said to be due under the Facility Agreement (on the basis that the Court's judgment against AGML constituted an "Event of Default"); and (*ii*) stating that, in default of payment, Mr Brenner reserved the right to exercise his power under the Composite Guarantee and Debenture to appoint Administrators.

    (2) On 25 July 2024, Mr Brenner approached Quantuma Advisory Limited ("**QAL**") stating that he was looking to appoint Administrators over AGML pursuant to the Composite Guarantee and Debenture. On 31 July 2024, Mr Brenner appointed Chris Newall and Jo Leach of QAL as Joint Administrators of AGML. Mr Brenner has also paid £30,000 on account of their fees.

41. At the trial, Mr Wright confirmed that AGML has no assets. The Claimant then asked, rhetorically, why did Mr Brenner therefore place AGML into administration and what does he hope to achieve? When the Claimant's solicitors (Tatham & Co) asked this question to Mr Brenner's solicitors in correspondence, their response was that Mr Brenner "does not have knowledge of the extent of [AGML's] assets" and that he "appointed administrators, following their filing consents to act confirming that it is reasonably likely that they can achieve the purpose of administration." The Claimant does not accept Mr Brenner's explanations in this regard. The Claimant says that it believes that, in truth, Mr Brenner placed AGML into administration in order to

frustrate the Claimant's ability to enforce its judgment, in furtherance of the Asset Stripping Scheme.

42. Against the background of these factual assertions, I turn to consider the relevant principles.

The proper approach to disclosure in applications for non-party cost orders

43. I start with the submissions made on behalf of Mr Brenner. The general principles applicable on an application for a non-party costs order, it was said, were set out by Lord Brown in Dymocks Franchise Systems (NSW) Pty Ltd v Todd [2004] 1 WLR 2807 at [25]-[29]. He said (at [25]) that the ultimate question on any application for a non-party costs order is whether it is just in all the circumstances to make an order; this is to some extent a fact-specific jurisdiction. He explained that 'pure funders', that is to say, "*those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course*" ought not be susceptible to non-party costs orders.

44. He continued:

"*Where, however, **the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them**, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs**. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is 'the real party' to the litigation**, a concept repeatedly invoked throughout the jurisprudence-…. Consistently with this approach, Phillips LJ described the non-party underwriters in TGA Chapman Ltd v Christopher [1998] 1 WLR 12 , 22 as '**the defendants in all but name'**.*" (emphases added)

45. Counsel for Mr Brenner argued that a non-party costs order should not be made where the relevant costs would have been incurred anyway without the involvement of the non-party, citing Dymocks Franchise Systems v Todd at [18]-[20] and Systemcare (UK) Ltd v Services Design Technology Ltd [2011] 4 Costs L.R. 666 at [23].

46. It was then submitted that it is well established that the procedure to be adopted on a non-party costs application is a summary procedure, without disclosure orders or cross-examination of witnesses. In Deutsche Bank AG v Sebastian Holdings Inc [2016] 4 W.L.R. 17, Moore-Bick LJ, who gave the judgment of the Court of Appeal, referred to the decision of the Court of Appeal in Symphony Group plc v Hodgson [1994] Q.B. 179 and said (at [17]):

"*First, we think it is clear that all three members of the court assumed that **the procedure to be adopted for deciding whether a third party should bear all or part of the costs of the litigation should be summary in nature, in the sense that the judge would make an order based on the evidence given and the facts found at trial, together with his assessment of the behaviour of those involved in the proceedings. Second, in order to justify the adoption of a summary procedure the third party must have had a close connection of some kind with the proceedings**. Staughton and Balcombe LJJ both emphasised that **the court should not make an order for costs against a third party unless it is just and fair that he should be bound by the evidence given at trial***

and the judge's findings of fact*. Whether that is so in any given case will depend on the nature and degree of his connection with the proceedings*." (emphases added)

47. He referred to the passage from the speech of Lord Brown in the Dymocks Franchise case set out above, and concluded, at [21]:

"*When an order for costs is sought against a third party,* ***the critical factor in each case is the nature and degree of his connection with the proceedings, since that will ultimately determine whether it is appropriate to adopt a summary procedure*** *of the kind envisaged in the authorities…*"

48. On a non-party costs application therefore, Counsel for Mr Brenner submitted that I had to consider whether the Court is able to determine the application proportionately and justly on a summary basis. This would be most likely to be possible if the respondent had a close connection to the proceedings. In some cases even then, a summary determination will not be possible. In Deepchand v Sooben [2020] Costs L.R. 1633, the judge at first instance refused to make directions sought by the applicant for disclosure and cross-examination, and instead dismissed the application. The Court of Appeal held that the non-party should also have been awarded its costs. Arnold LJ, with whom Lewison LJ agreed, said (at [35]):

"…***An application for a non-party costs order,*** *and in particular an application for such an order against the opposing party's lawyers,* ***should only be made if it can be determined proportionately by means of a summary procedure****: see Symphony Group plc v Hodgson [1994] QB 179 at 193 (Balcombe LJ), Re Freudiana Holdings Ltd (Times, 4 December 1995) , Medcalf v Mardell [2002] UKHL 27; [2003] 1 AC 120 at [24] (Lord Bingham of Cornhill), Sims v Hawkins [2007] EWCA Civ 1175; [2008] CP Rep 7 at [57] (Rix LJ), Systemcare (UK) Ltd v Services Design Technology Ltd [2011] EWCA Civ 546; [2011] 4 Costs LR 666 at [65] (Lloyd LJ) and Kagalovsky v Balmore Invest Ltd [2015] EWHC 1337 (QB); [2015] 3 Costs LR 531 .* ***If the application cannot be determined proportionately, then it should not be made.*** *This supports, rather than undermines, the proposition that Mr Sooben should be responsible for the costs of making an abortive application*."[1]

49. In other cases the court may conclude that, notwithstanding the disputes of fact between the parties to the application, it is able to deal with it fairly on a summary basis (see, for example, Total Spares & Supplies Limited v Antares SRL [2006] EWHC 1537 (Ch) at [48], David Richards J; Centrehigh Ltd v Amen [2013] 4 Costs L.O. 556 at [41] and [45], Morgan J).

50. Consistent with these principles, whilst the Court has jurisdiction to give case management directions in s.51 applications,[2] it was submitted that orders for disclosure

[1] For a further example of a case where a non-party costs application was dismissed because it could not be determined summarily see Barndeal Ltd v Richmond Upon Thames [2006] 1 Costs L.R. 47. In that case there was no evidence that the respondent had funded the litigation or controlled the parties to it. Instead, the Court was asked to infer that he had done so from the fact that the respondent attended trial and was apparently able to give instructions on behalf of the parties. Newman J concluded that he could not make any findings to that effect without them being put to the respondent in cross-examination, and he therefore dismissed the application (see [18] – [22]).

[2] See for example, Thomson v Berkhamsted Collegiate School [2010] C.P. Rep 5 at [14].

must be rare, and justified in only the most unusual case. In Systemcare (UK) Ltd v Services Design Technology Ltd [2011] 4 Costs L.R. 666 Lloyd LJ said:

"*I would criticise the application by the claimant for discovery to be made by the appellant which was made to the judge below in support of the application and, even more so, the application made to this court for discovery against the liquidator.* ***If a s 51 application cannot be made on the documents already available it should not normally be made at all.*** *....*" (at [64])

51. In Thomson v Berkhamsted Collegiate School [2010] C.P. Rep 5 Blake J applied a "*high test of what is considered necessary for the fair determination of proceedings that are essentially summary in nature*" (at [16]), and set out the factors he considered relevant to whether disclosure of communications between the third party and the unsuccessful claimant's solicitors should be ordered, at [19]:

"*In considering whether, in the light of the particular facts and issues in the case, disclosure is necessary for the fair determination of the application I conclude that I should consider:*

i) The strength of the application as it now appears unassisted by disclosure;

ii) The potential value to the fair determination of the application of the documents of which the claimant seeks disclosure and whether they are likely to elucidate considerations highly probative of the exercise of the court's discretion, or threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue;

iii) Whether on a summary assessment it is obvious that the documents for which disclosure is sought will be the subject of proper legal professional privilege;

iv) Whether the likely effect of any order the court might be minded to make will be proportionate and just in all the circumstances."[3]

52. At first instance in Deutsche Bank AG v Sebastian Holdings [2014] Costs L.R. 711 Cooke J said, at [37], that an order for cross-examination even in a complex case of that kind would not be appropriate "*unless that was* ***essential to determine crucial disputed factual issues*** *which I had not already determined at trial.*"

53. Turning to the submissions made on behalf of AGL and DKT, these largely tracked what was said on behalf of Mr Brenner. Thus, it was accepted that section 51 of the Senior Courts Act 1981 empowers the court to make costs orders against non-parties to proceedings, and it was also accepted that this includes an implied or inherent power to order disclosure of the identities of funders and of associated documents necessary to resolve a non-party costs application.

54. They again noted that the circumstances in which such an order should be made were summarised by Blake J in Thomson v Berkhamsted Collegiate School [2009] EWHC

[3] Thomson v Berkhhamsted Collegiate School was cited with approval by the Court of Appeal in Flatman v Germany [2013] 1 W.L.R. 2676, which concerned applications for disclosure of funding arrangements (see [7] and [10]).

2374 (QB) (endorsed by the Court of Appeal in Flatman v Germany at [48ff]). In addition to the passage already quoted above, Blake J said:

"16. ... I am un-persuaded that the appropriate course is to identify the nearest appropriate practice rule applicable to a full trial and add or subtract from the requirements of that rule. I consider that I should apply a high test of what is considered necessary for the fair determination of proceedings that are essentially determined speedily after the conclusion of a trial by the trial judge and bearing in mind the over-riding objective…

17. Before considering whether it is necessary to make the orders the defendant seeks, or any orders, the court needs to consider when a third party costs order is likely to be made in cases of this sort. If the case is weak it is inherently improbable that an order would be made. Alternatively, if it is so overwhelming it seems unlikely that ancillary orders for disclosure, inspection cross-examination of otherwise will be considered really necessary.

18. For present purposes I consider that the law as to third party costs is sufficiently stated at page 1334 of Civil Procedure 2009 and the judgment of Lord Browne in Dymocks Francise Systems (NSW) PTY Ltd v Todd [2004] UK PC 39; [2004] 1 WLR 2807 . I have been assisted by other references to decided cases cited by both counsel in their helpful skeleton arguments on the substantive issues. From this learning I deduce the following general principles of potential relevance to the present case:

i) The order for payment of costs by a non-party would always be exceptional and any application should be treated with considerable caution.

ii) The application should normally be determined by the trial judge who could give effect to any views he had expressed as to the conduct of the non-party without constituting bias or the appearance of bias.

iii) The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the successful party. Pure funders, as described at the case of Hamilton v Al-Fayed No. 2 [2002] EWCA Civ 665 reported [2003] QB 117 at [40], will not normally have the discretion exercised against them. That definition of "pure funders" means those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business and in no way seek to control its course.

iv) It is relevant but not decisive that the defendant has warned the non-party of the intention to seek costs or that the non-party's funding has caused the defendant to incur the costs it would not otherwise have had to incur;

v) The conduct of the non-party in the course of the litigation and other than as a pure witness of material fact is of relevance and potential weight.

vi) Most of the decided cases on the exercise of the court's discretion under section 51 concerned commercial funders or corporate bodies closely associated with the party

who incurred the costs liability which they were unable to satisfy. In the family context, the courts have been reluctant to impose third party costs orders against those family or friends who in the interests of access to justice assist a party to come to court for philanthropic and disinterested reasons.

vii) In determining these applications the court must exercise its case management powers to ensure that the application does not turn into satellite litigation that results in prolonged, complex and over-extended arguments about costs about costs. For that reason the inherent strength of the application is always a relevant factor.

55. Additional caution, it was said, is required where a funder is a separate company in the group. There is a fundamental principle of company law that a company is a separate legal person to its shareholders and directors. The corporate veil can be pierced only in limited exceptional circumstances. That rule is not thrown out of the window simply because one company in a corporate group pursues litigation. Thus, in the context of non-party costs orders against directors, Coulson LJ identified in Goknur Gida Maddaleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanati AS v Aytacli [2021] EWCA Civ 1037 [40] (quoted in the White Book at 46.2.3) the following factors:

"a)An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case …

b)The touchstone is whether, despite not being a party to the litigation, the director can fairly be described as 'the real party to the litigation' …

c)In the case of an insolvent company involved in litigation which has resulted in a costs liability that the company cannot pay, a director of that company may be made the subject of such an order. Although such instances will necessarily be rare …, s.51 orders may be made to avoid the injustice of an individual director hiding behind a corporate identity, so as to engage in risk-free litigation for his own purposes … . Such an order does not impinge on the principle of limited liability …

d)In order to assess whether the director was the real party to the litigation, the court may look to see if the director controlled or funded the company's pursuit or defence of the litigation. But what will probably matter most in such a situation is whether it can be said that the individual director was seeking to benefit personally from the litigation. If the proceedings were pursued for the benefit of the company, then usually the company is the real party … . But if the company's stance was dictated by the real or perceived benefit to the individual director (whether financial, reputational or otherwise), then it might be said that the director, not the company, was the 'real party', and could justly be made the subject of a s.51 order …

e)In this way, matters such as the control and/or funding of the litigation, and particularly the alleged personal benefit to the director of so doing, are helpful indicia as to whether or not a s.51 order would be just. But they remain merely elements of the guidance given by the authorities, not a checklist that needs to be completed in every case …

f)If the litigation was pursued or maintained for the benefit of the company, then common sense dictates that a party seeking a non-party costs order against the director will need to show some other reason why it is just to make such an order. That will commonly be some form of impropriety or bad faith on the part of the director in connection with the litigation …

g)Such impropriety or bad faith will need to be of a serious nature … and … would ordinarily have to be causatively linked to the applicant unnecessarily incurring costs in the litigation."

56. DKT and AGL submitted that the same considerations must apply when considering other group companies (especially where the central allegation is that they have common directors) because the same fundamental point about the corporate veil applies.

57. Finally, it was noted that CPR 31.14 provides an additional basis for disclosure: where a document is "mentioned" in a witness statement. The White Book notes at 31.14.2:

> *"The statement of case, witness statement, witness summary or affidavit must specifically identify or make direct allusion to the document or class of documents in question. It is insufficient that a witness statement etc. refers to a transaction which on the balance of probabilities will have been effected by the document for which inspection is sought; the document itself needs to be mentioned or directly alluded to."*

58. Turning to the submissions of the Claimant, it was accepted that a non-party costs application is ordinarily determined in a summary procedure. However, it said, "*it does not follow that an application can be made only where the facts are not in dispute*".[4] Moreover, the Court can order disclosure if this is necessary for the fair determination of a non-party costs application. Again reference was made to the decision of Blake J in Thomson v Berkhamsted Collegiate School at [14]:[5]

"No formal procedure is set out for applications for disclosure, cross-examination, service of skeleton arguments and the like. In my judgment this is because any orders that the court considers necessary are made in accordance with its discretionary judgment in pursuit of its inherent jurisdiction having regard to the over-riding objective and the intended summary nature of the proceedings. However, summary proceedings are not a term of art, and such a description is not inconsistent with whatever other orders the court might consider necessary to expeditiously and fairly determine the substantive issue."

59. In deciding whether disclosure was necessary for the fair determination of the non-party costs application, Blake J held at [19] that the four factors set out above were relevant.

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4 Total Spares & Supplies Ltd v Antares SRL [2006] EWHC 1537 (Ch) at [48].

5 See also Grecoair Inc v Tilling [2009] EWHC 115 (QB) at [21]-[22] and [39]-[48] (where orders for disclosure and cross-examination were made); Turvill v Bird [2016] EWCA Civ 703 at [10] and [16] (where the non-party costs application was heard over three days with cross-examination in respect of a claim to recover costs of around £370,000); Deutsche Bank AG v Sebastian Holdings Inc [2014] EWHC 2073 (Comm), [2014] 4 Costs LR 711 at [34].

Having regard to those four factors, the Claimant submitted that disclosure in this case is necessary for the fair determination of the Claimant's application:

(1) The Claimant's application has (at the very least) a real prosect of success on the merits. In the light of the matters set out above, there is a credible basis to infer that the Third to Fifth Defendants funded AGML's defence to buy time to implement the Asset Stripping Scheme for their own benefit and to frustrate the Claimant's ability to enforce any judgment against AGML. In these circumstances, and applying the test set out in *Dymocks* as quoted above, the Claimant submits that justice requires that the Third to Fifth Defendants should pay the Claimant's costs (the Claimant having succeeded at trial).

(2) The documents will be of real value to the fair determination of the application and to the considerations which are relevant to the exercise of the Court's discretion. At present, the Claimant's case rests on inferences drawn from limited facts disclosed in Brenner 1 and Ambrose 1. However, the extent of the Third to Fifth Defendants' involvement in and benefit from the Asset Stripping Scheme will be revealed in documents which are exclusively within their control. The Claimant submits that it is far preferable for the Court to make findings of fact in relation to the Asset Stripping Scheme based on documentary evidence, rather than simply seeking to draw inferences.

(3) It seems highly unlikely that the documents sought by the Claimant will be the subject of any claim of privilege (and no assertion of privilege has been made).

(4) In all the circumstances, the Claimant submits that an order for disclosure would be proportionate and just.

The documents sought.

60. In the light of this account of the relevant principles, I turn to the submissions of the parties as to the specific categories of document sought. I start with the Claimant's submissions as to each category and its alleged relevance. The following paragraphs (up to paragraph 68) summarise the Claimant's submissions. My own findings are set out in the section headed "Discussion and Conclusions" below.

Communications between Mr Brenner, Mr Wright and Mr Ambrose

61. The first category of documents sought by the Claimant was communications between Mr Brenner (on the one hand) and Mr Wright or Mr Ambrose (on the other hand) in relation to AGML, DKT and AGL from early 2023 to July 2024. The Claimant submitted there is credible evidence that the Third to Fifth Defendants were involved in the Asset Stripping Scheme and it is reasonable to infer that there were communications between Mr Brenner (on the one hand) and Mr Wright or Mr Ambrose (on the other hand) in relation to the Asset Stripping Scheme between the commencement of the Claimant's claim (in January 2023) and AGML being placed into administration (at the end of July 2024). Such documents will be highly probative to the issues which are relevant to the exercise of the Court's discretion under s.51 of the Senior Courts Act 1981.

62. In this regard, Mr Ambrose has recently identified a "very extensive WhatsApp chat history sent between Mr Brenner, Mr Wright and himself". If the Third to Fifth Defendants were truly disinterested commercial funders undertaking arm's length transactions with AGML, who did not stand to benefit from AGML's defence or the Asset Stripping Scheme, one would not expect to see such an extensive WhatsApp chat history. The Claimant said that it believes that these WhatsApp messages will support the Claimant's case that the Third to Fifth Defendants funded AGML's defence to buy time to implement the Asset Stripping Scheme. As for proportionality, the process of downloading this WhatsApp chat history ought to take no more than a couple of hours, said the Claimant: WhatsApp itself has a function which enables a chat history to be exported as a ZIP file. Similarly, the process of locating any emails between these three individuals ought to be straightforward: Mr Ambrose appears to accept that this can be done by asking AGL/DKT's IT providers to identify the relevant emails.

63. The Claimant had narrowed down the time period for this request so that it covered the period between January 2023 and August 2024 (shortly after judgment was handed down). To reduce the costs for the Third to Fifth Defendants, the Claimant said that it was content for the entire WhatsApp chat history and the entire set of emails to be produced, without the Third to Fifth Defendants' solicitors undertaking multiple levels of review for relevance. There is a suggestion that documents may need be redacted. But unless any material is privileged, there would be no proper basis to undertake an extensive redaction exercise.

64. At my suggestion, during the hearing, a revised and narrowed class of documents was produced. For the reasons I go on to give below, I was not satisfied that this revision met the legitimate concerns of the Third to Fifth Defendants.

Funding requests made by AGML to Mr Brenner

65. The second category of documents sought by the Claimant were the funding requests made by AGML to Mr Brenner prior to and after the date when the Facility Agreement was signed on 19 April 2023. These requests, it was said, were mentioned in Brenner 1. Mr Brenner has only exhibited two written requests (from November 2023 and February 2024) but it is clear from these emails that other requests were also made. Mr Brenner asserts that Mr Wright's request for £800,000 in late 2022 was "agreed orally". However, it is fanciful to suppose there are no documents at all evidencing this request.

Agreements dated 21 December 2023

66. The third category of documents are the agreements dated 21 December 2023 by which AGML "sold" its shareholdings in DKT, AGL and AGSC to Notus. These agreements were directly alluded to in Ambrose 1. AGL and DKT initially confirmed that enquiries would be made for these documents to be provided "as soon as practicable". However, AGL and DKT have since reversed course and they are now refusing to give disclosure. The agreements are obviously relevant and the request is not disproportionate.

Attachments to the SRLV valuation dated 21 June 2023

67. The fourth category of documents sought by the Claimant are the attachments to the SRLV valuation dated 21 June 2023. The Claimant submitted that the SRLV valuation

was mentioned in Ambrose 1 and a draft version was exhibited to Ambrose 1, and the finalised version has subsequently been disclosed. However, they argued that the attachments, which form the basis for the SRLV valuation have still not been disclosed. The Claimant argued that the attachments are obviously relevant and the request was not disproportionate.

Email attachments

68. The fifth category of documents sought by the Claimant were attachments to the emails sent by Mr Ambrose to Mr Binyon of Opus and to Barclays between June and July 2023. These emails are mentioned in Ambrose 1 and they purport to outline the rationale for the proposed transfers of AGL, DKT and AGSC to Notus. In the light of the Claimant's allegations concerning the Asset Stripping Scheme—and given that Mr Ambrose has specifically relied on these emails—these attachments are relevant and the request is not disproportionate.

69. I turn to consider the case put forward by, first, DKT and AGL, and then Mr Brenner.

The position of DKT and AGL.

70. DKT and AGL made two overarching submissions.

(1) First, they submitted that the application for disclosure should be dismissed because the Costs Application was unlikely to succeed; and indeed the application for a third party costs order should also be dismissed.

(2) Secondly, they submitted that the disclosure sought was disproportionate.

71. This and the following paragraphs (to paragraph 75 below), are a summary of the submissions made by DKT and AGL; again, my findings are set out in the section headed "Discussion and Conclusions". DKT and AGL submitted as follows:

(1) First, AGL and DKT are pure funders. The evidence is that they lent money to AGML expecting only repayment of that money and so there was no return on the investment based on the outcome of the proceedings. The Claimant makes perhaps four allegations of benefit, none of which is the type of "benefit" that the case law refers to. None have any merit:

(a) The only solid allegation made against either AGL or DKT of potential benefit was that AGL could stand to recover repayment of a loan of EUR 600,000 paid to secure the release of the *Seren*. But that loan was repaid the very same day it was made and so this argument is hopeless.

(b) Second, there is some allegation that charges were removed during the restructuring. But the restructuring took place independently of AGL and DKT lending money to AGML which AGML used to fund the litigation. There are also a series of generalised allegations that AGL or DKT stood to benefit in some generalised way because they were companies in the same group as AGML (and so they could benefit by publicity). But that is not enough. Otherwise, any group company which lent money could always be subject to a non-party costs order.

(c) Third, there are allegations that the litigation gave AGML, Mr Wright (and, apparently, Mr Brenner) time to make AGML judgment-proof. Those allegations are speculative, denied and hopeless. Even if they were correct (which they are not), they would at most be a benefit to AGML, Mr Wright and Mr Brenner – not to AGL and DKT.

72. It is not clear whether the Claimant alleges that AGL or DKT controlled the litigation. If so, that is (obviously) hopeless. The litigation was directed by AGML's directors in that capacity.

73. Further, to obtain an order against sister companies, the Claimant would need to show that either (a) the proceedings were not being pursued for the benefit of the company but **instead** for the benefit of its sister company, or (b) there was serious impropriety or bad faith by the sister company which is causatively linked to the Claimant unnecessarily incurring costs in the litigation. There is no evidence supporting either proposition.

74. In circumstances where the Costs Application is hopeless, I was invited to dismiss the disclosure application (and the Costs Application).

75. Turning to the second proposition put forward, it was submitted that the disclosure sought was disproportionate.

(1) First, this is a summary process. Disclosure in this process is exceptional. It should be ordered only where the "*high test of what is considered necessary for the fair determination of proceedings that are essentially determined speedily after the conclusion of a trial by the trial judge and bearing in mind the over-riding objective*" is satisfied. The disclosure sought here really consists of an unfocussed fishing expedition in the hope that something might come up. That is not necessary for the fair determination of these summary proceedings.

(2) Second, the disclosure sought is vastly disproportionate. Request 1 seeks "*All communications (including emails, WhatsApp messages, voice messages and text messages) between Mr Brenner, Mr Wright and Mr Ambrose from January 2023 to date in relation to: (1) the Defendant; and/or (2) Allseas Global Logistics; and/or (3) DKT Allseas Shipping Limited.*" This is remarkably broad. It is even broader than the *Peruvian Guano* approach to disclosure that is broader even than the norm for trials. At least around 3,000 emails would need to be reviewed as well as WhatsApp messages. Mr Habergham (a solicitor for DKT and AGL), an experienced solicitor, testifies that a "*conservative estimate*" for this disclosure exercise is around £79,600. That is almost half the realistic value of the claim, and almost one third the value of the Claimant's total costs.

(3) Third, the documents have little relevance to the issues in the dispute and are generally sought to raise arguments about credibility. For example:

(a) The Claimant attempts to justify its first request by saying that "*Brenner 1 contains… unsubstantiated allegations*". It then concludes that these communications "*will enable the Court to make appropriate findings of fact as to Mr Brenner's true control over the Defendant (as well as DKT and AGL)*". But there is no evidence that Mr Brenner has any control over the

Defendant (other than as a creditor). This is in reality a fishing exercise in the hope of building some kind of case.

(b) Whether Mr Brenner controlled AGML, AGL and/or DKT is not even the relevant issue in a non-party costs application. The only issue that could be relevant is whether Mr Brenner was controlling the litigation. But Mr Ambrose has testified that the AGML's litigation was directed by its two directors – Mr Wright and Mr Ambrose. And Hill Dickinson have confirmed that they did not receive instructions from Mr Brenner. No further documents are needed.

(c) Further, there is no justification for AGL and/or DKT being ordered to disclose documents. Whatever the position of Mr Brenner, whether he was controlling AGML, AGL, DKT or the litigation is irrelevant to the question whether AGL or DKT are liable for non-party costs.

(d) Another example is request 9. Mr Ambrose points out in his evidence that the liquidators have been investigating and producing reports for creditors and the liquidators have not challenged the arm's length nature of the relevant relationships. There is no contradiction of this evidence. The Claimant then confirms that it seeks disclosure of Mr Ambrose's correspondence with the liquidators because it "*impacts on his credibility as a witness more generally*". But even in trial litigation, parties do not get disclosure that goes only to credibility, let alone credibility on minor points.

(e) While the other document requests are narrower, they still have little relevance to the dispute; and they are not "mentioned" in Mr Ambrose's witness statement such that they fall within CPR 31.14. Some are also privileged.

(4) Fourth, even if the documents have some limited relevance, the potential value to the fair determination of the application of the documents of which the Claimant seeks disclosure is limited. The documents are unlikely to elucidate considerations highly probative of the exercise of the court's discretion. Rather, they threaten to drag the application into a side alley of satellite litigation with diminishing returns for the overall issue.

(5) Fifth, the risk of oppression is substantial. Given the high level of costs associated with this exercise in a summary process in which the costs are already mounting, the level of irrecoverable costs and the commercial pressure associated with that is significant. That is particularly true given that this application has been made against AGL and DKT where the real focus of the application appears to be Mr Brenner.

Whether the disclosure sought is essential/necessary: Mr Brenner's case.

76. I turn to Mr Brenner's case. In the paragraphs which follow (up to paragraph 90), I set out the submissions made on his behalf. Again, I make clear that these paragraphs

simply contain a statement of Mr Brenner's case. My findings are set out in the section headed "Discussion and Conclusions".

77. In order to assess whether this is one of the exceptional cases in which it might be appropriate for the Court to order search-based disclosure, it is necessary to identify the issues of fact that fall to be determined in the Costs Application. On analysis, many of the relevant facts are clear. Where there are disputes of fact these are capable of being determined on the material already before the Court. There are no issues of fact between the parties which are sufficiently significant to necessitate – or justify – the extensive disclosure sought by the Claimant.

Whether Mr Brenner "funded" the Defendant's defence

78. The first issue on the Costs Application as against Mr Brenner will be whether he "funded" the Defendant's defence. The Claimant's case when it issued the Costs Application was based on some imprecise statements of Mr Ambrose in evidence at trial.

79. Mr Brenner has now explained the true position. The Court will need to consider whether in those circumstances it is even arguable that Mr Brenner "funded" the Defendant's defence in the relevant sense, and indeed whether Mr Brenner's agreement, after the event, to advance money to enable the Defendant to pay its outstanding legal bills, had any impact on the Defendant's defence. The relevant facts are, however, clear.

Whether Mr Brenner substantially controlled the Defendant's defence

80. Mr Laskaris (a solicitor for the Claimant who made a witness statement in support of the application for disclosure) says that the first key issue on the Costs Application is whether the Third – Fifth Defendants "s*ubstantially controlled the Defendant*". The real issue however, is whether the Third – Fifth Defendants controlled the Defendant's defence, such that they are to be regarded as the "*real party*" to the Claimant's claim.

81. There is no evidence that Mr Brenner controlled the Defendant's defence. There can be no dispute that he did not appear as a witness, nor did he attend trial. There is no evidence of him ever having given instructions on behalf of the Defendant to Hill Dickinson whilst they were acting. Mr Ambrose has confirmed that Mr Brenner had no such involvement. The Partner at Hill Dickinson with conduct of the litigation has confirmed in writing that he did not.

82. The Claimant says that Mr Brenner's evidence in this regard is "*wholly implausible*". In truth, it is entirely consistent with all the established facts. The Court is able to decide whether Mr Brenner controlled the Defendant's defence on the basis of the evidence already adduced in the Costs Application, and indeed its understanding of how the Defendant's defence was prepared and presented.

Whether Mr Brenner controlled the Defendant (and AGL and DKT)

83. No doubt recognising the lack of any evidence of Mr Brenner's involvement in the running of the Defendant's defence, the Claimant seeks to construct a case that he controlled the Defendant together with Mr Wright. Even if this were correct, it would

not show that Mr Brenner controlled the Defendant's defence and thereby became the "*real party*" to the proceedings.

84. In any event, the facts in relation to the matters relied on by the Claimant are addressed in the evidence served by the parties in the Costs Application. Many aspects of the facts are not in dispute. Where they are, the Court is in a position to resolve the dispute on the basis of the documents and the witness statements. Each of the supposed factual bases for the contention that Mr Brenner controlled the Defendant are addressed in the evidence as follows:

(1) The Claimant relied first on the fact that Mr Brenner was copied on communications relating to the negotiation of the charter which was the subject of the dispute. Mr Brenner has explained he was involved in these communications because he was then a director and 50% shareholder of the Charterer. The Court is able to decide whether Mr Brenner's involvement in such decisions in relation to the Charterer is evidence of his control over the Defendant – or the Allseas Group as a whole. The facts however, are clear.

(2) The Claimant relied on a "Q1 Management Report" document, which related to 1st Containers and the "Allseas Group of Companies". Mr Brenner has explained his understanding of the purpose of this document and the reasons that 1st Containers was included in it. The Court is in any event able to consider whether this document demonstrates that Mr Brenner controlled the Defendant and the Allseas Group by examining that document.

(3) The Claimant relied on the fact that Mr Brenner had provided funding to the Allseas Group, and suggested that this suggests he, with Mr Wright, is the beneficial owner of the entire Allseas Group. Again, the facts in relation to the funding provided by Mr Brenner are clear, and the Court will be able to determine whether these matters demonstrate that Mr Brenner controlled the Defendant with Mr Wright.

(4) Finally, the Claimant relies on the floating charge granted by the Defendant to Mr Brenner pursuant to the Composite Guarantee and Debenture dated 19 April 2023, which he said gave Mr Brenner "*significant legal control over* [the Defendant's] *assets*". The Court will be able to consider whether the terms of the Composite Guarantee and Debenture demonstrate that Mr Brenner controlled the Defendant.

85. The Claimant also alleges that Mr Brenner controlled AGL with Mr Wright, and that "*it is a vehicle that is used by them to whatever end they wish*". Even if Mr Brenner did control AGL, it would not follow that he controlled the Defendant or its defence. Again however, the matters relied on by the Claimant in support of the contention that Mr Brenner and Mr Wright controlled AGL have been addressed in the evidence:

(1) The Claimant refers to the transfer of the shares in AGL to Notus in January 2024, which he seeks to characterise as a dissipation of assets by the Defendant. There is no evidence that Mr Brenner owns or controls Notus. He has confirmed that he does not. The Claimant did not put forward any evidence of Mr Brenner's involvement in the alleged dissipation. In Brenner 1 however, Mr Brenner explained that he consented to the partial release of his charge over the

Defendant's shares in AGL pursuant to the Composite Guarantee and Debenture, which consent was necessary for the transfer of AGL to Notus to take place. He has explained that Barclays Bank PLC, the other charge holder, also consented. Mr Ambrose has explained that this was part of a restructuring undertaken on professional advice. The Court will be able to consider, on the basis of all these materials, whether the transfer of AGL to Notus was a dissipation as alleged and if so, whether it evidences any control by Mr Brenner over AGL (or for that matter, the Defendant).

(2) The Claimant relies on a payment made to Tatham & Co by AGL in September 2022, as security for the Claimant's claims against the Charterers and the Defendant. It does not allege that such payment evidences any control by Mr Brenner over AGL (still less, the Defendant).

(3) Finally, the Claimant relies on Mr Ambrose's evidence at trial in relation to the genesis of the Charterer's business, which was that initially the business which came to be the business of the Charterer, was run by AGL. Mr Brenner has confirmed this was the origin of the business which became that of the Charterer. There is no factual dispute here for the Court to resolve. The only issues relate to whether this is of any relevance to the Costs Application.

86. The Claimant also makes a number of allegations about the affairs of DKT, and refers to an entirely separate company of which Mr Wright and Mr Brenner were directors (in relation to which no further disclosure is sought). These matters have been addressed in the evidence of Mr Brenner and Mr Ambrose. Even if correct, the Claimant's allegations would not demonstrate that Mr Brenner controlled the Defendant, still less the Defendant's defence.

Whether Mr Brenner benefitted (or would have benefitted) from the Defendant's defence if it had succeeded

87. The Claimant contends that no rational third-party funder would have funded the Defendant's defence to the Claimant's claim. He therefore seeks to identify the benefits which the Third to Fifth Defendants supposedly gained by (allegedly) doing so. The matters relied on are highly speculative and, to a significant degree, contingent on the Claimant's case that Mr Brenner controlled the Defendant. To the extent that they raise questions of fact, these are capable of being determined on the documents:

(1) The Claimant says that defending the claim bought the Defendant time to make it judgment proof. Unless Mr Brenner had an interest in the Defendant however, this would be of no benefit to him. In any event, and as set out above, Mr Brenner and Mr Ambrose have explained the restructuring. The Court will be able to decide whether that constituted a dissipation of the Defendant's assets in advance of judgment.

(2) The Claimant says that if the Defendant had successfully defended the claim, the EUR 600,000 paid into escrow on behalf of the Charterers would have been released to the Charterers to the benefit of AGL (which he says funded the payment into escrow). Even if that were right, in view of the insolvency of the Charterer, it is difficult to see what relevance, if any, such putative recovery by AGL could have.

(3) The Claimant suggests that if the Defendant had successfully defended the claim they would have avoided the risk of the Claimant seeking to "*pursue individuals for wrongful trading, fraudulent trading and/or various possible torts that might have been committed.*". This theory is contingent on Mr Brenner having been involved in any wrongful transactions in the first place.

(4) Finally, the Claimant suggests that if the Defendant's defence had succeeded this would have avoided reputational harm to Mr Brenner and Mr Wright. The Court can consider whether Mr Brenner would have benefitted from any protection of the Allseas brand without the need for any further disclosure from the Third to Fifth Defendants.

Whether the defence to the Claimant's claim was contrary to the interests of the Defendant

88. Even if the Court were to find that Mr Brenner did in fact control the Defendant with Mr Wright, and that he controlled its defence to the Claimant's claim, it would not follow that the defence was pursued in their interests, rather than in the interests of the Defendant. Mr Ambrose has explained that the Defendant obtained advice from two Counsel that the Claimant's claim was not indefeasible and that the Defendant's defence was properly arguable. The Court will also be able to refer to its own appreciation of the merits of the arguments as presented at trial in order to determine this important question (which is not addressed in Hickland 1).

89. In summary, Mr Brenner has addressed the allegations in Hickland 1 in detail and has already disclosed the documentation on which his evidence is based. The Court is in a position to consider whether, in light of that evidence Mr Brenner was the "*real party*" to the proceedings. Even if the Claimant is able to identify some issue or issues of fact which could not be resolved on the basis of the material already provided, it would be wholly disproportionate to the importance of any such issue, to require Mr Brenner to give the disclosure sought.

90. In truth, the Disclosure Application is an aggressive fishing expedition pursued in the hope of improving the merits of the Costs Application. If the Claimant is determined to pursue the Costs Application in light of the evidence of the Third to Fifth Defendants, however, it should do so on the basis of the evidence as it stands.

Discussion and conclusions.

91. I start with the procedure to be adopted on an application for third party costs, which, as I have stated, is common ground between the parties. That is a summary procedure, and is designed to be exercised in most cases by the trial judge at the end of the trial, on the basis of the materials which have become available during the trial. Disclosure is thus, in my view, the exception rather than the rule, as is most clearly illustrated by the statements in the cases that third party costs orders should not generally be made unless they can be justified on the basis of the documents already available; and that a high test should be applied.

92. Secondly, I bear in mind the touchstone which I have already identified. The question is whether the third party is the "real party to the litigation", for whose benefit the litigation is being carried out.

93. With these principles in mind, I turn to the various documents and categories of documents sought, beginning with those sought from Mr Brenner, namely category 1, being all emails and WhatsApp messages between Mr Ambrose or Mr Wright, on the one hand, and Mr Brenner, on the other, between January 2023 and July 2024. In my judgment, this is far too broad a category.

(1) First, the relevance of these messages would have to be with regard to the issue of whether Mr Brenner funded the litigation and whether this funding was to benefit Mr Brenner. The category sought would go far beyond this.

(2) The category was narrowed during the hearing so that it now related to emails and WhatsApp messages from January 2023 to July 2024 relating to the Claimant's claim; the Defendant's restructuring and the engagement of Opus; the valuation of the Defendant's assets in June 2023; the documents relating to the sale to Notus; and the appointment of administrators in July 2024. However, in order to ensure that the documents disclosed were confined to these narrower categories, then, in my view, a disproportionate amount of work would have to be done by way of review.

(3) I accept the submission made on behalf of Mr Brenner that the request for disclosure was essentially speculative. That Mr Brenner lent money to the Defendant was not in dispute. The circumstances in which he did so were attested to by Mr Brenner, who said he was providing funding to protect his own commercial interests. This disclosure was essentially being sought to seek to challenge Mr Brenner's evidence, in order to establish that:

93.3.1. The real reason for the provision of funding was to enable the defence to be carried on long enough for the Asset Stripping Scheme to be put into practice;

93.3.2. The beneficiary of that scheme was Mr Brenner.

(4) This request, in my judgment, goes well beyond anything that was, or could have been, suggested at trial or at the end of trial on the basis of the evidence that I saw. In those circumstances, in my judgment, the request is indeed properly to be described as a fishing expedition, and I am not prepared to make the order, even in its narrowed down form.

94. I turn to the next set of requests, being requests 2-5.

Funding requests made by AGML to Mr Brenner

95. The second category of documents sought by the Claimant, as already noted, were the funding requests made by AGML to Mr Brenner prior to and after the date when the Facility Agreement was signed on 19 April 2023. The documents here are in the possession of Mr Brenner, or so it is said. Mr Brenner's evidence is that there were no documents under this head, since the requests were made orally. In my judgment, from the Claimant's perspective, the important point is that monies were lent by Mr Brenner to AGML, which is common ground. In essence, in my view, what the Claimant is seeking to obtain is material to suggest that this funding was for a reason other than that which Mr Brenner suggests in his witness statement, ie to challenge that evidence. The

natural progression would thus be to seek to cross examine Mr Brenner, which is clearly, in my view, neither desirable or allowable in the context of this type of application. Accordingly, I reject this application for disclosure.

Agreements dated 21 December 2023

96. The third category of documents are the agreements dated 21 December 2023 by which AGML "sold" its shareholdings in DKT, AGL and AGSC to Notus, which, it is said were directly alluded to in Ambrose 1. It is said that these documents are in the possession of DKT and AGL. It is common ground that there was such a sale, and common ground that this was for a total sum of £2, as I understand it. It is therefore not clear to me what the agreements themselves would add, and I decline, in the exercise of my discretion, to order such.

Attachments to the SRLV valuation dated 21 June 2023

97. The fourth category of documents sought by the Claimant are the attachments to the SRLV valuation dated 21 June 2023. It is said that the SRLV valuation was mentioned in Ambrose 1, and that it has been disclosed, but that the attachments, on which it was based, have not. Again, this category is said to be within the possession of DKT and AGL. The relevance of the documentation is said to be that DKT and AGL provided funding to AGML in order to allow time for the Asset Stripping Scheme to be effected. Again the fact of the provision of funding is common ground. The question is therefore the motivation for the provision of funding, whether this was in fact to allow time to enable an asset stripping scheme to take place, and whether the continuation of the litigation benefitted DKT and AGL.

98. In my judgment, then the most important and obvious point here is that any transfer of the shares in DKT and AGL did not benefit those companies. I do not think that these documents can be said to be relevant to the issue of whether these two parties were the real parties to the litigation. It is also my view that there is a real danger that an order for disclosure is really being sought to try to strengthen a case for reversal of the share transfer. Any such claim would be one for the liquidators of AGML, and would be the subject of consideration by the insolvency courts. This adds to my concern about ordering this type of disclosure, and I decline to do so.

Email attachments

99. The fifth category of documents sought from DKT and AGL were attachments to the emails sent by Mr Ambrose to Mr Binyon of Opus and to Barclays between June and July 2023, in which the rationale for the transfer of the shares in DKT and AGL was set out. Once again, I take the view that this request is really simply a speculative one and is a fishing expedition. The rationale for the transaction is, in my view, clear from the emails themselves, and it is unlikely that the attachments will add anything. Moreover, it is still more unclear why any material in those attachments will be of relevance to the central issue on the application for third party costs orders, ie whether DKT and AGL were the "real parties" to the litigation. I am not prepared, in the circumstances, to order such disclosure.

100. In summary, in my judgment, the Claimant have not made out their case for saying that this is an appropriate case to order what is, in my view, an exceptional remedy, namely disclosure in support of their application for a third party costs order. I am not prepared to strike out the application for that order, as Mr Shirazi invited me to. However, it will be apparent from what I have said in the course of this judgment that I do not wish to give any encouragement to the Claimant in this regard, particularly given the amount of money that has been spent already on what is aptly described as satellite litigation to satellite litigation in the context of a claim in relation to which costs were relatively limited.