Neutral Citation Number: [2019] EWHC 324 (Ch)

Case No: HC-2016-001519

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

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

Date: 21/2/2019

Before:

MASTER CLARK

- -

Between:

KEVIN TAYLOR	**Claimant**
- and -	
(1) VAN DUTCH MARINE HOLDING LTD **(2) VAN DUTCH MARINE LTD** **(3) HENDRIK R ERENSTEIN** **(4) RUUD KOEKKOEK**	**Original Defendants**
(5) MOHAMMED KHODABAKHSH **(6) NEW BEGINNINGS TECHNOLOGIES LLC** **(7) RHINO OVERSEAS INC (aka Rhino Overseas Limited)**	**Additional Defendants**

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James Ramsden QC and **Samar Abbas** (instructed by **Keystone Law**) for the **Claimant**
Lance Ashworth QC and **Jonathan McDonagh** (instructed by **Archerfield Partners LLP**) for the **Fifth, Sixth and Seventh Defendants**

Hearing dates: 29 January and 6 February 2019

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Approved Judgment

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

.....

Master Clark:

1. This is my judgment on the application dated 7 December 2018 ("the Application") of the claimant, Kevin Taylor ("C") in respect of disclosure by the fifth to seventh defendants. These defendants were added to the claim by a consent order dated 21 September 2017 ("the joinder order") and I refer to them as the Additional Defendants.

2. As originally framed, the Application sought an unless order in respect of disclosure obligations contained in my order dated 7 November 2018.

3. That order provided at para 8(1):

> "By 4pm on 28 November 2018, the Additional Defendants shall:
> (1) file and serve a further Form N265 listing all documents disclosable pursuant to paragraph 10 of the Order of Deputy Master Linwood dated 19 February 2018, such a list
> (i) to be compiled after carrying out a reasonable search of all electronic devices in the control of the Additional Defendants (and, in respect of the custodians identified by the corporate Defendants, the custodians so identified);
> (ii) to include all documents in the control (not just possession) of the Additional Defendants, including the documents referred to at sub-paragraph (c) below; and
> to be signed by a properly authorised person on behalf of each Additional Defendant"

4. The order made further provision in respect of disclosure at sub-paras 8(2) and 8(3), but no complaint is made as to compliance with those sub-paras.

5. Although the Application was heard after the commencement of the Disclosure Pilot (CPR PD 51U), it concerned obligations under the pre-existing regime in CPR Part 31.

Parties and the claim

6. C is an individual based in the UK.

7. The first defendant ("D1"), Van Dutch Marine Holdings Limited, is a Maltese registered company. The second defendant ("D2"), Van Dutch Marine Limited, is a UK registered company and is a wholly owned subsidiary of D1.

8. The third defendant ("D3"), Hendrik Erenstein, and the fourth defendant ("D4"), Ruud Koekkoek, are Dutch nationals usually resident in Monaco. They each own 50% of the shares in D1, and are the controlling minds of D1 and D2.

9. The fifth defendant ("D5"), Mohammed Khodabakhsh, is a US national residing in California. The sixth defendant ("D6") is a company incorporated in a US state. The seventh defendant ("D7"), Rhino Overseas Inc, is a Panamanian company. The Additional Defendants' Defence sets out that
   (1) in May 2015, D5 became the transferee of shares in D7 for D6's benefit;
   (2) since June 2015, he has been the Chief Technology Officer of D6;
   (3) on 27 January 2017, D6 became the legal owner of all the shares in D7.

10. The claim arises out of a loan of about $1.6 million given by C to D1 and/or D2 pursuant to heads of terms entered into on 25 July 2015 ("the Heads of Terms"); which was followed in November 2015 by a loan agreement ("the Loan Agreement") between C and Ds1-4.

11. Ds1-4 have never defended the claim. On 2 August 2016 judgment in default was entered against them for a liquidated sum of about US$2.6 million plus further damages to be assessed. That judgment remains unsatisfied. C also pursued committal proceedings against D3 and D4. In the course of those proceedings, they filed an affidavit dated 14 December 2016 by D5 in which he stated at para 5:

> "When [D7] was acquired, an agreement was already in place with [D2], whereby [D2] acts as a UK Offshore Nominee Company acting as an Agent for [D7] in the operation of a yacht business. As a result of this agreement, all of the assets related to the yacht business belong to [D7] and not to [D2]."

12. D5 exhibited to his affidavit an agreement dated 15 October 2007 ("the 2007 agreement"). This recites:

> "(A) [D7] carries on or intends to carry on the Business of trading in the buying of pleasure yachts from the Netherlands and selling worldwide ("the Business").
>
> (B) [D7] wishes to appoint [D2] to carry out duties ("the Duties") in connection with the Business as its agent on behalf of [D7] but in the name of [D2]."

13. C's case against the Additional Defendants is that in all his dealings with Ds1-4, including entering into the Heads of Terms and Loan Agreement, they were acting as agents for the Additional Defendants as undisclosed principals. He specifically relies upon the 2007 agreement between D2 and D7 as creating a relationship of agency between them, and alleges that that relationship continued at all material times.

14. C also alleges that all the defendants have conspired to injure him by unlawful means causing him loss and damage and/or unjustly enriching themselves. The agreement alleged is pleaded to have been entered into in about May 2015.

15. The Additional Defendants deny all knowledge of or involvement in the discussions and transactions between C and Ds1-4. Their Defence at para 6(8) alleges that the 2007 agreement was superseded by an agreement dated 1 April 2013 ("the 2013

agreement"), which, they allege, provides only for D2 to hold assets as agent for and on behalf of D7. The Defence includes a denial that:

(1) there existed any general or unlimited power of agency or agency relationship between D2 (as agent) and D7 (as principal) at all contained either within *or outwith* the 2013 agreement;

(2) there has ever been any agency relationship at all between any of the Additional Defendants and any of Ds1-4.

16. As to the conspiracy claim, the Additional Defendants accept that there were discussions in 2014 and 2015 between D5 and D3 and D4 with a view to their investment in certain technology being developed by D5. This is said to have concluded in 2 agreements dated 30 May 2015:

(1) a joint venture agreement between D1 and D6 (although D6 was not incorporated until June 2015);

(2) a share sale agreement between D2 and D5 under which D2 agreed to sell all of the shares in D7 to D5.

17. The bundle included a case summary showing the following agreed issues:

> "(a) The nature of the relationship of D5-D7 with D1-D4 at all material times (including the rights and obligations of D5-D7 in respect of assets held in the names of D1-D4).
>
> (b) Was D2 the agent of D5 and/or D6 and/or D7 in the alleged dealings and/or alleged agreements with C?
>
> (c) Was D3 acting on behalf of D5 and/or D6 and/or D7 in his alleged dealings with C?
>
> (d) C's entitlement (if any) against D5-D7 arising out of the aforesaid relationships, including any contractual liability owed to C by D5-D7."

18. The trial is listed as floating in a 5 day window commencing on 1 April 2019.

Background to the Application

19. The joinder order also provided at para 7 for disclosure in the following terms:

> "The Additional Defendants shall each by 4pm on 9 November 2017 give disclosure pursuant to CPR 31.12 by list, and concurrently provide copies, of all documents in their respective possession, custody, power or control that relate to:
>
> (a) the existence, scope and nature of the agency agreement between [D2] and [D7];
>
> (b) the beneficial ownership by each and any of the Additional Defendants of assets nominally held by [D1] or [D2], and, in particular, intellectual property rights and construction moulds held in the name of [D2]; and
>
> (c) the ownership of [D7]."

20. The Additional Defendants' lists of documents ("the first lists") pursuant to that order are dated 9 November 2017. Each list set out that the search is limited to the

categories identified by the joinder order. D5 and D6's (but not D7's) lists refer to searching email accounts and document files.

21. The lists had what I consider to be (for reasons explained below) the following deficiencies:
    (1) on the face of the lists, the search was, contrary to the terms of the joinder order, confined to documents in the possession of individuals, rather than "the possession, custody, power or control" of the relevant Additional Defendant. The only exception was D6, where the search was said to extend to documents in the possession and control of Mr Mike Zarei (said to be Chief Executive Officer of D6);
    (2) neither list of the corporate defendants referred to documents in the possession or control of that defendant itself;
    (3) none of the lists set out details of the search for electronic documents;
    (4) none of the lists identified the date range of the search for documents generally or for electronic documents;
    (5) D5 and D6's lists identified "mobile phone" as the only place searched, when it is now their position that documents are held in cloud-based data storage;
    (6) D7's list gives no details at all of the search for electronic documents.

22. On 19 February 2018 at the case and costs management conference, DM Linwood ordered ("the CCMC order") the parties to give standard disclosure by list; and ordered the Additional Defendants to provide metadata for the electronic documents disclosed pursuant to the joinder order. It is common ground that the effect of that order was to require the Additional Defendants to provide copies of electronic documents in their native format.

23. The Additional Defendants' lists for standard disclosure ("the second lists") are dated 19 April 2018. The categories of documents identified as having been searched for are "documents relevant to the issues in dispute". The second lists have the same deficiencies as identified in respect of the earlier lists; and indeed, the only obvious difference between them and the first lists is that description of the categories of documents.

24. On 14 May 2018, C made a further application for disclosure.

25. On 11 July 2018, Terry Vechik, who describes himself as having been since January 2017 the interim Chief Executive Officer of D7, made a first witness statement setting out the steps taken by him to fulfil D7's duty of disclosure. This included at paras 4, 5, 7 and 9:

> "4. [D7] was and is a Panamanian company the directors of which had been from the outset either Panamanian lawyers or employees of a corporate services company in Monaco called International Corporate Structuring ("ICS"). ICS is a company which provides corporate services to a very large number of companies.
>
> 5. … When I searched for documents in this case I did not limit the search in any way. I set out to locate all documents which could be said to be under the control of [D7]. [D7] did not have any computers from which

to search through and I made enquiries of the company which had always provided corporate services and directors to [D7] for any hard copy documents.

…

7. When [D6] acquired the shares in [D7] in May 2015, [D5] and I were told by [D3] and [D4] that all rights and equipment to build Van Dutch yachts were held by [D7] which was its sole activity - it was not a trading company dealing with third parties. It was a non-operational company which invested in the assets which were used to build Van Dutch yachts. We were told by [D4] and D3] that [D7] had appointed [D2] for the purpose of arranging the building and marketing and sale of the boats.

…

9. In January 2017 Christian Ekeberg was appointed the sole director in Europe of [D7] - the other directors being based in Panama. I became interim COO of [D7] at this time. Mr Ekeberg was appointed in view of this experience in and knowledge of the yachting industry and was approved by ICS and the Panama directors. Following his appointment I asked Mr Ekeberg to obtain from ICS any documentation they were holding in relation to [D7]. I understand from him that he did so and he provided me with a box of documents that I went through and copied for my use and that of attorneys I was working with at the time. The Panamanian directors were also contacted by Mr Ekeberg and I subsequently received a small amount of documentation from Panama. I also personally visited the offices of ICS and it was confirmed to me that I had received all documents that had been in their possession relating to [D7]. All these documents have subsequently been passed to [D7]'s solicitors. In carrying out the search referred to in the disclosure statements I have made in these proceedings, I spoke again to Mr Ekeberg and directly to ICS to see if they could locate any further documentation relating to [D7]. However, I was told by each that there were no other documents."

I mention that Mr Vechik's evidence is that he was the Chief Operational Officer of D6 from its incorporation (June 2015) to January 2017.

26. On 7 November 2018, at the hearing of C's application dated 14 May 2018, I made the order in terms I have already set out.

27. The third set of disclosure lists made by Additional Defendants, dated 28 November 2018 ("the third lists"), state on their face that they give disclosure pursuant to the joinder order, the CCMC order and my order dated 7 November 2018.

28. On 28 November 2018, D5 also made a witness statement, which describes itself as being in compliance with the order of 7 November 2018. It included at para 3:

"3. In relation to electronic documents, neither I nor [D6] have ever had at any material time any servers or backup tapes and all data/documents in the control of [D6] or myself are held in the "cloud" accessible from any mobile telephone or laptop. Cloud storage services such as iCloud

> and Gmail (operated by Apple and Google respectively) provide their users with the means to store data-documents, email, photographs etc. - on remote servers owned and managed by Apple and Google. Increasingly in recent years "cloud computing" has replaced dedicated physical servers and backup tapes. [D6] has never had any computer equipment at all and no data has been stored on any hard drive of any device in the control of [D6] or myself. [D6] and I have used a number of email accounts since 2013 namely nbtllc@icloud.com, mm@nbsite.com, tv@nbsite.com, mohammedkhodabakhsh@gmail.com, mrk1970@icloud.com, dakiaglobal@gmail.com, centrifugalpower@icloud.com and sales@bmwautoparts.com. All electronic communications on behalf of [D6] or myself are made using these email accounts/addresses and all have been searched to locate any disclosable documents in this case."

29. On the same date, Mr Vechik too made a further witness statement on D7's behalf, setting out the Gmail accounts used by him since January 2017, when his involvement with D7 commenced.

30. Following the issue of the Application on 7 December 2018, there was no substantive response in correspondence or evidence. On 18 December 2018, C's solicitors wrote a letter to the Additional Defendants' solicitors which, amongst other things:
    (1) set out a list of professional third parties involved in the affairs of the Van Dutch group (which included D7) who could be expected to hold disclosable documents;
    (2) highlighted the absence of any inquiries having been made of former officers, employees and agents of D7.

    This letter remained unanswered.

31. On 27 January 2019 (Sunday), C served the 18th witness statement of Mr Pennal of the same date. This set out C's solicitor's efforts to identify the directors of D7 before Mr Vechik's appointment, and exhibited the letter dated 18 December 2018.

32. The Additional Defendants' first substantive response to C's application was in a witness statement dated 28 January 2019 of their solicitor, Kevin Bays.

33. The first hearing of the application was on 29 January 2019, at which C was represented by his junior counsel. It was adjourned to 6 February 2019, where C was represented by leading counsel. At the adjourned hearing, C no longer pursued an unless order, or an order as formulated in his application notice. His counsel produced a draft order the terms of which I will return to. This had the unsatisfactory consequence that the court had no skeleton arguments directed to the orders sought in the draft order, which were addressed in oral submissions only by both sides.

C's complaints

34. C's complaints about this disclosure are set out in the 16th and 18th witness statement of his solicitor, Patrick Pennal; although they were developed in the skeleton argument and submissions of C's counsel.

35. C's first complaint is that the Forms N265 are not fully completed, in that they fail to explain the search parameters applied: dates, locations and categories of documents. As Mr Pennal points out, the Additional Defendants have not ever provided an Electronic Documents Questionnaire. I agree that this is unsatisfactory.

36. C's counsel developed this by referring to, and relying upon CPR 31.10, which provides:

> "(1) The procedure for standard disclosure is as follows.
> (2) Each party must make and serve on every other party, a list of documents in the relevant practice form.
> (3) The list must identify the documents in a convenient order and manner and as concisely as possible.
> (4) The list must indicate –
> (a) those documents in respect of which the party claims a right or duty to withhold inspection; and
> (b) (i) those documents which are no longer in the party's control; and
> (ii) what has happened to those documents.
> (Rule 31.19 (3) and (4) require a statement in the list of documents relating to any documents inspection of which a person claims he has a right or duty to withhold)
> (5) The list must include a disclosure statement.
> (6) A disclosure statement is a statement made by the party disclosing the documents –
> (a) setting out the extent of the search that has been made to locate documents which he is required to disclose; … "

37. He submitted that there is no description of the Additional Defendant's methodology in carrying out the searches: how the emails are harvested and how they were assessed for relevance. As for custodians, there is, he said, no evidence as to who had executive control of D7 before Mr Vechik was appointed COO in January 2017. D7 has not identified employees or officers at the relevant time, whose documents may include relevant documents and should be searched. Finally, he said, none of the Additional Defendants have identified the date ranges of their searches.

D5 & D6's lists and D5's witness statement dated 28 November 2018

38. D5 & D6's third lists are both signed by D5. C's specific criticisms of these documents are that:
    (1) they do not state the date range of documents searched for;
    (2) they do not refer to any category of documents other than emails;
    (3) they do not identify or refer to employees or officers of D6 at the relevant time, or set out what steps have been taken to search for documents in their possession;
    (4) they do not list documents no longer in control of the defendants.

D7's list and Mr Vechik's witness statements dated 11 July 2018 and 28 November 2018

39. D7's list is signed by Mr Vechik. C's specific criticisms of these documents are that:
    (1) no steps have been taken to contact former directors or officers of D7;
    (2) Mr Bays' witness statement shows that no steps were taken to contact current directors until 28 January 2019 (as noted below, this is only partially correct, in that Mr Vechik's first statement does set out the steps that have been taken in respect of Mr Ekeberg);
    (3) Neither the N265 or Mr Vechik's statements deal with searches in respect of the period prior to his involvement with D7;
    (4) The information provided does not enable C to assess the adequacy of the searches carried out:
        (i) no date range is provided;
        (ii) the locations of documents are not adequately identified;
        (iii) the custodians of electronic documents are not identified.
    (5) the schedules to the 3rd list are identical to those of the earlier lists;
    (6) they do not list documents no longer in control of the defendants.

C's draft order

40. C's draft order
    (1) identifies specific issues (and date ranges), and requires the Additional Defendants to set out the extent of their searches in respect of those issues (para 2 a i);
    (2) requires the Additional Defendants to identify documents for which they have not searched on the grounds that to do so would be unreasonable (para 2 a ii);
    (3) requires the Additional Defendants to list documents which become available as a result of certain specified searches required by the order (para 2 a iii);
    (4) requires the Additional Defendants to produce a further list in respect of documents already disclosed – this is intended to require the Additional Defendants to list the 2 different versions of the agreement dated 1/4/2013 it has provided to C (para 2 a iv);
    (5) requires D5 to make a witness statement setting out:
        (i) how 2 documents (items 49 & 50 of Sch C) came into his control;
        (ii) whether any similar documents emanating from Ds1-4 are within his control
        (iii) confirming that any such documents within his control and which are disclosable will be listed in his revised form N265;
        (para 2 b)
    (6) requires an officer of each of D6 and D7 to serve a witness statement stating
        (i) what steps they have taken to procure disclosable documents relating to the Issues and under its control from
            (a) its current or former directors or officers; and
            (b) third parties who may be in possession of such documents.
        (ii) confirming that any documents which are within its control for the purposes of CPR 31.8(2) and fall within its standard disclosure obligations pursuant to CPR 31.6 will be listed in its revised Form N265.
        (para 2 c)

Additional Defendant's submissions

41. The Additional Defendants' counsel's submissions were made at the adjourned hearing, and were primarily directed to the draft order put forward by C. He accepted in principle that it was desirable for an order for disclosure to identify the issues in respect of which disclosure was to be given.

42. His first submission was that a disclosing party is not required to set out the extent of the search made for disclosable documents.

43. He submitted that the Additional Defendants had fulfilled their obligation to give standard disclosure. The third lists were, he said, fully completed by the disclosure statement being completed stating that the defendant had carried out a reasonable and proportionate search. There was, he submitted, no obligation to give details of the search, unless a limit was placed on its scope so as to exclude, on grounds of reasonableness and proportionality, otherwise disclosable documents.

44. I reject that submission. I accept C's counsel's submission that the disclosure list should enable the court and the opposing party to evaluate the adequacy of the search carried out. Disclosure is a transparent, not an opaque process. This is clear from CPR 31.6(a), which requires a party in their disclosure statement to set out the extent of the search which has been made to locate documents which they are required to disclose.

45. It is also clear from PD31B, which provides for EDQs in respect of electronic documents. Much of the time and expense incurred in respect of disclosure in this case could have been avoided if the Additional Defendants has completed EDQs at an early stage. In addition, in respect of electronic documents, the N265 form itself prompts the party to "list what was searched and extent of search".

46. A list compliant with CPR 31.6 must, in my judgment, include:
    (1) the location of the documents
        (i) if hard copy documents, the physical/geographical location
        It is not generally sufficient to refer to documents which have been delivered to the party's solicitors' offices as being held there; the original location should be identified;
        (ii) if electronic documents, the data sources - as are now conveniently set out in the Section 2 questionnaire of the Disclosure Review Document. It is not in my judgment sufficient to refer, as the Additional Defendants do, to the "cloud" and "cloud facilities". Any cloud based storage should be identified by reference to the storage provider and the name (and user ID) of the account holder.
    (2) the identity of third parties, such as agents or advisers (and in the case of companies, directors, officers and employees) who have relevant documents under the disclosing party's control.
    (3) the types of electronic documents available;
    (4) a list of the custodians whose files have been searched;
    (5) the date ranges of the search;
    (6) the keywords used for searching electronic documents;
    (7) whether and to what extent documents are irretrievable due to their loss or destruction.

47. This last requirement is sometimes overlooked, and is an important one. The court and the opposing party are entitled to be provided with sufficient information to be satisfied that a proper and careful search has been carried out by the disclosing party. This includes investigating and disclosing the extent to which disclosable documents have been lost or destroyed. It enables the opposing party, if appropriate, to interrogate the disclosing party as to the reasons why disclosable documents are no longer available. Accordingly, it is not sufficient in the form N265, simply to leave blank the box dealing with documents no longer in the disclosing party's control.

48. The Additional Defendants' third lists do not comply with these requirements. It is necessary therefore to consider whether the witness statements supplementing them do provide the requisite information.

49. As to D5's statement dated 28 November 2018 on behalf of him and D6:
    (1) he does not set out the date range searched;
    (2) he does not clearly identify the types of documents held in "cloud" storage: whether they are confined to emails or include other types of electronic documents, and if so, what types;
    (3) he does not identify specific cloud based storage providers, or the name of the account holder; indeed, it is unclear whether or not D6 is an account holder;
    (4) he does not identify the employees, officers or other persons who have acted on D6's behalf (other than himself); or state what searches have been carried out of documents held by them;
    (5) although Mr Vechik was COO of D6 from its incorporation in June 2015 to January 2017, he does not identify him as a custodian or set out any searches in respect of his emails or documents held by him;
    (6) he does not identify any third parties who have relevant documents under D5 and/or D6's control; or state what searches have been carried out of documents held by them;
    (7) he does not explain how he has searched for electronic documents, and, in particular, whether he conducted a keyword search, and, if so, what the keywords, were;
    (8) he does not list documents no longer in these defendants' control, including documents which are irretrievable due to loss or destruction.

50. As to Mr Vechik's statements of 11 July 2918 and 28 November 2018 on behalf of D7:
    (1) he does not set out the date range searched;
    (2) his first statement (at para 13) says that D7 does not have any electronic documents under its control which could fall within its disclosure obligations;
    (3) his second statement refers only to email accounts used by him on behalf of D7 since January 2017;
    (4) he set out that he has searched "all cloud facilities", but does not clearly identify the types of documents held in "cloud" storage: whether they are confined to emails or include other types of electronic documents, and if so, what types;
    (5) he does not identify the cloud based storage provider or the name of the account holder; again, it is unclear whether or not D7 is an account holder;

(6) he does not identify the officers, employees or other persons who have acted on D7's behalf (other than himself and Mr Ekeberg – both of whom were appointed after the events giving rise to this claim); or state what searches have been carried out of documents held by those persons;
(7) he does not identify any third parties who have relevant documents under D7's control; or state what searches have been carried out of documents held by them;
(8) he does not explain how he has searched for electronic documents, and, in particular, whether he conducted a keyword search, and, if so, what the keywords, were;
(9) he does not list documents no longer in these D7's control, including documents which are irretrievable due to loss or destruction.

51. In my judgment, the Additional Defendant's disclosure lists (and the witness statements) manifestly fail to satisfy the requirements of CPR 31.6(a), by not adequately setting out the searches carried out by them.

Para 2 a i 1 of the draft order

52. The Additional Defendants' counsel's submissions as to para 2 a i 1 were that:
(1) the formulation of the issue was too vague in its reference to "the nature of the relationship";
(2) the period was too extensive, relying on the fact that the conspiratorial agreement alleged by C is said to have been made in May 2015;
(3) C had not shown that there was a document or class of documents which must exist, and which have not been disclosed which support the allegation of a conspiracy.

53. As to the formulation of the issue, I refer to the agreed list of issues which includes the expression "the nature of the relationship". I do not consider this formulation to be too vague - the disclosable documents in respect of this issue being all correspondence and other documents which evidence or record communications and dealings between the relevant defendants; and which support or undermine either their case or C's case as to the nature of the relationship between them.

54. As to the period, the Additional Defendants plead that discussions and dealings took place between them in 2014 and 2015 and the nature of those discussions and dealings. C takes issue with the Additional Defendants' case as to the nature of those discussions and dealings. I therefore consider that the relevant period for disclosure in respect of this issue is from 2014 onwards.

55. As to the Additional Defendants' counsel's submission that C must identify missing documents that support his allegation of conspiracy, I reject that submission. Standard disclosure is to be given of documents that support a party's case as well as those adverse to it. C's primary complaint is that the third lists do not show that adequate searches have been carried out, and this does not require identifying apparently missing documents.

Para 2 a i 2 of the draft order

56. The Additional Defendant's counsel's submissions as to para 2 a i 2 were that there were no disclosable documents in respect of the agency alleged by C between D2

and D7. This was, he said, because the only issues between the parties were issues of construction of the 2013 agreement:

(1) whether the 2007 agreement was superseded by the 2013 agreement;
(2) whether the 2013 agreement restricts the powers of the nominee so that it had no power to enter into the loan.

57. It is common ground that the 2007 agreement appointed D2 as D7's agent. The Additional Defendants' case is that D7 has never been and is not a trading company dealing with third parties, and is and has only ever been an investment company holding IP rights. However, this is inconsistent with the available evidence. The 2007 agreement, in its recital at (A) (set out above) refers to D7 as carrying on the business of buying and selling pleasure yachts. Mr Vechik's first statement, although it refers to D7 as a non-trading company, continues by saying that [D7] had appointed [D2] for the purpose of arranging the building and marketing and sale of the boats. The 2013 agreement itself also provides for the proceeds of trading to be remitted to D7. In these circumstances it is far from clear that there are no documents recording and evidencing dealings and communications between D7 and Ds1-4.

58. I accept that issues of construction arise in respect of the 2013 agreement. However, it is clear that there is also a factual issue between the parties as to whether D2 was D7's agent after the date of the 2013 agreement. In para 8A(1) of the Amended Particulars of Claim, C alleges that at all (material) times, D7 was the undisclosed principal on whose behalf D2 (through D3 and D4) operated.

59. The Additional Defendants' position in their Defence is that there has not been an agency relationship between D2 and D7 within *or outwith* the 2013 agreement. C's Reply pleads that the agency relationship persisted at all material times. In these circumstances, in my judgment, documents in relation to that issue are disclosable.

60. As to the period for disclosure, in my judgment, this should extend back to 1 April 2013, which is the date when the Additional Defendants allege that the agency came to an end.

Para 2 a ii of the draft order

61. The Additional Defendants' position in respect of this is that there is no category or class of document falling within CPR 31.6 which it would be unreasonable or disproportionate to search for. Since the obligation under CPR 31.7(3) only arises where the disclosing party asserts that there is such a category or class (and has limited their search accordingly), this order is, he submitted, not required. I agree. If the effect of widening the extent of the search to be made by the Additional Defendants is that there are otherwise disclosable documents that fall into that category, those defendants will of course need to identify them in their disclosure list.

Para 2 a iii of the draft order

62. This requires the Additional Defendants to list documents disclosed as a result of searches in paras b and c of the order, which I consider below.

Para 2 a iv of the draft order

63. The background to this paragraph of the draft order is that there are 2 versions of the 2013 agreement. A single document of that description and date was listed in the Additional Defendants' first lists; and a copy provided to C's solicitors. They requested a better copy and the second version with different wording was sent. Mr Bays' evidence is that his clients' solicitors' failure to disclose both documents was a matter of oversight as to the difference in the wording: the second version includes the words "*nullifies 8 March 2013*". The Additional Defendants' counsel submitted that it would be disproportionate to require the Additional Defendants to produce a revised containing both versions. I disagree. A disclosure list is a document verified by a statement of truth, and a failure to include a document in it is not a trivial failure. I will therefore grant that order.

Para 2 b

64. This relates to 2 emails listed at items 49 and 50 of Sch C to the Additional Defendants' third list. They are emails dated 17 and 19 February 2014 setting out flight details for D3 (and his wife), D4 and one Martin Raken for flights from Miami International to Cancun, Mexico.

65. C's complaint is that there is no indication in the Additional Defendants' list or witness statements as to how these documents came into the Additional Defendants' possession or control, when none of the parties to the emails are listed as sources of documents and the date of the emails predates the time when, on the Additional Defendants' case, D6 acquired an interest in D7, and when D5 had not yet met D3 or D4.

66. Mr Bays provides an explanation in his witness statement. He says that item 49 "was sought out by my clients" without identifying from whom; and that item 50 was provided to D5 by D3 "to counter the unfounded allegation that D5 had been in Cancun in February 2014" – although in fact all it shows is that D5 was not on the flight to Cancun on which D3 and D4 flew.

67. The Additional Defendants' counsel's primary submission was that these documents were not disclosable, since they went solely to credit. It was common ground that documents which go solely to credit are not disclosable in standard disclosure: see *Favor Easy Management v Wu* [2011] 1 WLR 1803. He submitted that since the conspiracy alleged by C is alleged to have been entered into in about May 2015, the 2 emails in 2014 do not relate to an issue in the claim. He also submitted, referring me to CPR 31.2 that a disclosing party is under no obligation to say how documents came into their control.

68. As to this, first, the documents have been disclosed by the Additional Defendants as disclosable documents in a list supported by a statement of truth. The Additional Defendant's counsel's submission that they are not in fact disclosable documents is therefore contrary to his own client's confirmation that they are. Secondly, the Additional Defendants' case (in its Defence at para 3) is that there were discussions between D5 and D3 and D4 in 2014 and 2015, on topics and for purposes unrelated to the subject matter of this claim. There are therefore factual issues in the claim as to when and where these persons met, and what transpired at those meetings. Documents in the Additional Defendants' control evidencing meetings at which D3

and D4 were present (and D5 was or was not present) are therefore relevant to that issue, and are not, in my judgment, documents which go only to credit.

69. On the face of the Additional Defendants' third lists, the emails were obtained from a search of the Additional Defendants' cloud based facilities. In my judgment, where documents have been obtained from third parties, the requirement to "set out the extent of the search to locate documents" obliges the disclosing party to identify the source of the documents. This has been done in part by Mr Bays. C is entitled to have confirmation of the source of the documents from D5; and also, confirmation of whether he has within his control any other disclosable documents emanating from any of Ds1-4.

Para 2 c

70. C's complaint here is that D6 and D7's third lists (and accompanying witness statements) do not:
    (1) extend to documents which are disclosable in respect of the 2 issues;
    (2) identify the persons or sources of documents under their control.
    C's primary complaint relates to D7. Mr Vechik has not identified the persons who had executive control of D7 between May 2015 (when D5 acquired its shares) and January 2017 when he was appointed. There is nothing on the face of the lists to show that he has taken any steps to obtain documents from them. Such documents would be in D7's control.

71. In his witness statement, Mr Bays exhibits emails showing enquiries made by him of D7's current directors, Eugenie Lurvink and Christian Ekeberg. They also show that he has also made enquiries of various third parties, some of whom state that they have never acted for D7.

72. One company, Accendium BV, replied on 15 January 2019 stating that it held the entire financial and administrative archive of D2 during the period 2008 to 2014; but that it had never been instructed by D7. Its owner, Chris Jansen, was willing to provide the documents held by it only if all outstanding judgment debts (about €145,000) of D2 were paid. C's counsel submitted that this was sufficient for the documents to be in D7's control. He relied upon a passage in Mr Jansen's email:

> "To me [D7] and [D2] are a tandem, legally and logically 100% linked together as one, and therefore [D7] and [D2] are one and the same, two companies as one, with 2 shareholders whom I have worked with 46-7 years, and who now have failed to date to fulfil their financial obligations…. If [D7 does not want to pay the outstanding amounts, then I do not want to cooperate. If [D7] does want to fulfil the payment obligations of [D2]…, then I am happy to cooperate with [D7, and I may have much valuable information."

73. I reject C's counsel's submission in so far as it relates to D2's documents. D2 and D7 are separate legal entities; and it is clear from Mr Jansen's email that the legal obligation to pay Accendium is that of D2. However, Mr Jansen states that Accendium also holds D7's documents, the retention of which would appear not to be justifiable on the ground that D2's indebtedness remains unsatisfied. These documents are therefore prima facie in D7's control. They are therefore

disclosable, unless D7 is able to show that they are not, in fact, in its control because there are no practicable means of obtaining them. As things stand, the court has no evidence as to whether the documents could be obtained.

74. Turning to ICS (who provided corporate directors for D7 until 2017), Mr Bays' enquiries elicited the following response on 22 January 2019 from Riccardo Spigolon of ICS:

> "With reference to your request, please note that we do not manage this company since 2017 and that copies of all the documents have been delivered to the client.
>
> As you can easily understand, cannot release documents to third parties except to the client himself and everything has been delivered to Mr Ekeberg.
>
> With reference to your request for correspondence/emails, being internal documents and related to past years, we need a written request from the client and we should ask to a specialised IT company to find these emails upon payment of the necessary expenses."

75. On 28 January 2019, in his email to Mr Bays, Mr Spigolon stated:

> "I confirm to you that all corporate documents have been delivered to Mr Ekeberg in the past.
>
> I confirm to you that we have to held (*sic*) corporate documents for 5 years, after that, the documents have been destroyed and only scanned copies are held on our server."

76. Although the position is not entirely clear, on balance, I consider that this evidence shows that Mr Spigolon does have potentially disclosable documents which are in D7's control and for which a search should be made.

77. In any event, the obligation to give disclosure is that of the disclosing party, and the disclosure statement must be signed by the party and not their solicitor. The appropriate person to set out and confirm the steps taken to obtain documents from:
(1) the current or former directors or officers of D7;
(2) the persons who had day to day conduct of D7's affairs at the material times;
(3) third parties holding documents in D7's control;
(including the belated steps taken by Mr Bays set out in his witness statement of 28 January 2019) is an officer of D7.

78. The position is the same in respect of D6. It is notable that although Mr Vechik was COO of D6 until January 2017, he is not listed as a custodian, nor referred to in D5's evidence as being in possession of relevant documents.

79. I will therefore make an order in terms of para 2 c of C's draft order.