Neutral Citation Number: [2021] EWHC 849 (Ch)

Claim No. BL-2018-001982

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

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: Friday, 16 April 2021

Before:
MR. ROBIN VOS
(Sitting as a judge of the Chancery Division)
(Remotely via Microsoft Teams)

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Between:

BERKELEY SQUARE HOLDINGS LIMITED & OTHERS	**Claimants/ Respondents**
- and -	
(1) LANCER PROPERTY ASSET MANAGEMENT LIMITED	
(2) JOHN TOWNLEY KEVILL	
(3) DUNCAN ROBERT FERGUSON	
(4) ANDREW JOHN WINDLE LAX	**Defendants/ Applicants**
(5) BYRON HOWARD PULL	
(6) LANCER PROPERTY HOLDINGS LIMITED	

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MR. PHILIP MARSHALL QC, MR. JONATHAN HARRIS QC (HON.), MR. JUSTIN HIGGO QC, MR. OLIVER JONES and **MR. JAMIE RANDALL** (instructed by **Eversheds**) appeared for the **Claimants/Respondents.**

MR. ADRIAN BELTRAMI QC, MR. RICHARD MOTT and **MR. OSCAR SCHONFELD** (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Defendants/Applicants**

Hearing Date: 23-25 March 2021

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Approved Judgment

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

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MR ROBIN VOS:

Background

1. This is the third judgment relating to a number of applications made by the parties and which I heard between 23-25 March 2021. The application which I deal with in this judgment is an application made by the defendants on 9th February 2021 for a series of orders under paragraph 17 of Practice Direction 51U (**PD51U**) to remedy perceived failings by the claimants in complying with the original order for model D extended disclosure made on 21st January 2020 following a case management conference on 14th January 2020.

2. The claimants are BVI companies which own or have owned properties in the UK. The ultimate beneficial owner of those companies is His Highness Sheikh Khalifa bin Zayed Al Nahyan, the President of the United Arab Emirates (or, in one case, a family member).

3. The majority of the claimant companies have, as their sole shareholder, a company in the UAE, Overseas Real Estate Investment Company – Sole Proprietorship LLC (**Overseas**). Overseas is owned by another UAE company, Circle Holding Company – One Man Company LLC (**Circle**). Circle is owned by the Private Department of the President (**PDP**), an office which exists to manage Sheikh Khalifa's personal assets and which sits within the Ministry of Presidential Affairs (**MOPA**).

4. Since 2018, the claimant companies have had a corporate director, Craft Overseas Management – Sole Proprietorship LLC (**Craft**). Craft is also owned by Circle.

5. The head of the PDP is Dr Al Mazrouei. Dr Al Mazrouei is also responsible for the management of Craft, Circle and Overseas.

6. The first defendant, Lancer Property Asset Management Limited (**Lancer**), was appointed to manage the portfolio of properties owned by the claimant companies; the second to fifth defendants are the directors of Lancer; the sixth defendant was, until sometime in 2017 or 2018, Lancer's parent company.

7. The claimants appointed Dr. Al Ahbabi as their representative in relation to the property portfolio owned by them. Dr. Al Ahbabi was the chairman of the Department of the President's Affairs (**DOPA**) in Abu Dhabi (DOPA was the forerunner to the PDP). He was assisted by Mr. Ismail.

8. The claims relate to payments made by Lancer to two BVI companies, Becker and Reilly, which are said to be beneficially owned by Dr. Al Ahbabi and Mr. Ismail respectively. The claimants say these payments were arranged dishonestly by Dr. Al Ahbabi and Mr. Ismail without the knowledge or approval of either the claimants or Sheikh Khalifa. The defendants, on the other hand, say that the claimants and/or Sheikh Khalifa knew and approved of the payments and the circumstances giving rise to them.

Procedural Background

9. Turning to the procedural background, the claim was served on 13th December 2018. The defendants requested further information which was provided on 1st April 2019. They filed their defence on 24th April 2019. The claimants' reply was served on 6th June 2019. They also requested further information which was provided by the defendants on 1st July 2019. The claimants served amended particulars of claim on 7th November 2019.

10. A case management conference took place on 14th January 2020. At the case management conference, the issues for disclosure were debated. The judge (John Male QC) ordered that 43 issues out of a list of 47 should be issues for disclosure. In the disclosure review document, the claimants listed a number of entities in section 2(J) of the questionnaire as "third parties who may have relevant documents which are under your control" (being various professional advisers and also Craft). In section 6, various individuals were listed as "custodians". These lists were supplemented as a result of correspondence between the parties after the case management conference. In particular, the list of individuals was expanded to include Sheikh Khalifa, His Excellency Ahmed Juma Al Zaabi (Mr Al Zaabi), a minister within MOPA and a director of DOPA, Mr Al Mansouri, the Under Secretary (Deputy Head) of the PDP and Dr Al Mazrouei.

11. The defendants produced an amended defence and counterclaim which was served on 6th May 2020 with further amendments on 26th May 2020. The claimants served an amended reply on 27th May 2020.

12. Disclosure took place on 11th September 2020, although, as a result of correspondence following disclosure, this process is ongoing, with further documents recently having been provided by the defendants to the claimants, and both parties having made applications for further disclosure. The defendants' application is the subject of this judgment.

13. On 25th February 2021, Green J allowed an extension of time for filing witness statements to 1st April 2021. The claimants are due to serve expert evidence relating to accounting issues on the same day. Both parties are to serve expert reports from chartered surveyors by 7th April 2021. The pre-trial review is listed for a three-day window starting on 4th May and the trial itself is listed for 18 days in a five-day window starting on 8th June 2021.

Documents under the control of the claimants

14. On 8th September 2020, the claimants provided their disclosure certificate confirming compliance with the disclosure order made by John Male QC following the case management conference, subject to the limitations specified in the disclosure certificate. The disclosure certificate was signed by Dr Al Mazrouei on behalf of the claimants. It explained that the disclosure exercise had been led by Mr Bhatti who was described as the Chief Operating Officer – Compliance of Circle but who is also a lawyer who works for Hadef & Partners in the UAE and is qualified as an English solicitor. The disclosure certificate went on to explain that Mr Bhatti worked closely with FTI (an electronic disclosure specialist) and the claimants' solicitors, Eversheds Sutherland.

15. Before looking at the specific orders sought by the defendants, it is necessary to address the issue as to which documents are under the control of the claimants. The reason for this is that the claimants contend that any documents held by the PDP, Circle or individuals connected with those entities are not under the control of the claimants, being neither employees nor agents of the claimants.

16. The claimants also say that, in any event, the defendants cannot go behind a sworn statement that documents are not under control of the claimants. I will address this aspect first although I should say that, although it is a point raised in Mr Marshall's skeleton argument, it is not one in respect of which he made any oral submissions.

Is a sworn statement in relation to disclosure conclusive?

17. The claimants submit that a sworn statement that they do not have control over documents is conclusive. This submission is based on the decision of the Court of Appeal in *Al-Fayed v. Lonrho Plc (No.3)* (the Times 24th June 1993). The Al-Fayed brothers had sworn affidavits relating to disclosure. The claimants believed the affidavits to be untrue and obtained an order that they should be cross-examined on those affidavits. The purpose of the cross-examination was to obtain an order under what was then Order 24 Rule 16 of the Rules of the Supreme Court to strike out the Al-Fayed brothers' defence should it be established that the Al-Fayed brothers had not disclosed all of the documents which they should have disclosed. It is important to note that the affidavit being challenged was not the affidavit supporting the results of the first disclosure exercise but was an affidavit supporting a second disclosure following an application for specific disclosure under what was then Order 24 Rule 7.

18. Having reviewed numerous authorities, Stuart-Smith LJ concluded that:

> "those authorities lead me to the conclusion that on whatever ground the order for a further affidavit is made, whether because of some admission by the deponent or the belief of the opposite party that other documents exist, the oath of the deponent in answer is conclusive; it cannot be contravened by a further contentious affidavit and cannot be the subject of cross-examination."

19. Stuart-Smith LJ explained that the reason for this rule is that:

> "in the great majority of cases where it is alleged that one party or the other has suppressed documents, this issue will be crucially relevant to the issues in the trial and can only properly be determined after the judge at trial has heard all the evidence. To try the issue at an interlocutory stage could involve injustice to both sides."

20. The Court of Appeal however made it clear that this rule did not preclude an application for specific disclosure saying:

> "with regards to those affidavits of documents – if there is reasonable suspicion a further affidavit will be required. That case makes it plain that there was a procedure, even before the

> procedure of Order 24 Rule 7 was introduced in 1893 for obtaining a further affidavit of documents; but the oath of the deponent on the further affidavit was conclusive."

21. It is therefore clear from *Al-Fayed v. Lonrho* that a sworn statement does not prevent the court from making a further order for specific disclosure in circumstances where it is satisfied that the initial disclosure is inadequate.

22. Mr Marshall also referred in his skeleton argument to the decision of Waksman J in *Lakatamia Shipping Co Limited v. Nobu SU* [2021] EWHC 203 (Comm). In that case, one of the defendants had provided sworn statements that she did not have any relevant custodians. Waksman J commented [at 53] as follows:

> "I take the point which Mr Phillips QC accepts which is that you must not on an interlocutory hearing make a concluded finding about whether someone has possession or control of a document, particularly if that same issue is going to arise in the substantive trial because otherwise you are pre-judging it. It is not quite the same here but once a party has said on the underlying facts that they do not have control in the required sense, it is very difficult to see what more the court can do about it."

23. This was not however a reserved judgment and it is not apparent what authorities were drawn to the judges' attention. In addition, the facts were very different given that the defendant maintained throughout that she had no custodians and so had provided only very limited disclosure whereas, in the present case, the claimants have provided significant disclosure of documents held by those persons whose documents they now say are not under their control. I do not therefore read *Lakatamia* as authority for the general proposition that I cannot make an order to remedy any perceived inadequacy in the first round of disclosure based simply on what is said in a sworn statement.

24. In any event, as Mr Beltrami points out, there is no sworn statement which makes it clear that, other than the documents held by the President himself (and possibly any documents held by the PDP), the documents in question are not within the control of the claimants. The disclosure certificate says nothing at all about control. The witness statement provided by a representative of the claimants' solicitors in response to the disclosure application, whilst asserting that documents held by Sheikh Khalifa and the PDP are not under the control of the claimants, at the same time refers more than once to documents which are under the control of the claimants. By way of example, the witness statement mentions that:

> "to the extent that individuals have potentially relevant documents within the claimants' control, they were held on servers outwith the claimants' control (specifically, the servers of PDP and Circle)"

25. Other than in relation to the President himself, I do not therefore find that there is any conclusive sworn statement that potentially relevant documents held by the other individuals listed as custodians are not within the control of the claimants.

26. As I have already concluded, even if there were such a sworn statement, this would not prevent the court from making an order under paragraph 17 of PD51U if it considers that the disclosure which has already been provided is inadequate. In this context, I note that, although paragraph 18 of PD51U deals with varying an order for extended disclosure and for making an additional order for disclosure of specific documents, the provisions of CPR Rule 31.12 dealing with specific disclosure are intended to apply to situations where the initial disclosure is believed to be inadequate (see paragraph 5.1 of practice direction 31A). An order under paragraph 17 of PD 51U therefore falls within the same category as an order for specific disclosure which was expressly stated in *Al-Fayed v. Lonrho* to be an exception to the general rule that a sworn statement in relation to disclosure is conclusive.

Are documents held by the PDP, Circle or individuals connected with them within the control of the claimants?

27. The definition of control for the purposes of PD51U (paragraph 1.1 of Appendix 1) is the same as the definition in CPR Rule 31.8(2). The authorities dealing with the question of control in that context are therefore relevant to the question in this case whether relevant documents held by PDP, Circle or by individuals who are employed by or connected with one or both of those entities, including Sheikh Khalifa, Mr Al Zaabi, Mr Al Mansouri, Mr Al Mazrouei, Dr Abbas (a lawyer working for the PDP) and Mr Bhatti, are within the claimants' control.

28. The starting point is that a party will not normally have control over documents held by a third party unless it has a legal right to access those documents. This is the case even if there is a close relationship between the persons in question. Mr Marshall notes that the House of Lords for example made it clear in *Lonrho v Shell* [1980] 1 WLR 627 that a parent company does not automatically have control of the documents held by a subsidiary. The question in that case was whether the documents were in the "power" of the parent but the parties do not suggest that there is in reality any difference between this and the current terminology of "control".

29. In *Lonrho v Shell* the parent companies were BP and Shell. Lord Diplock decided that documents held by the subsidiaries were not within the power of the parent companies commenting [at 634E-F]:-

> "It is the board that has control of the company's documents on its behalf; the shareholders as such have no legal right to inspect or take copies of them. If requested to allow inspection of the company's documents, whether by a shareholder or by a third party, it is the duty of the board to consider whether to accede to the request would be in the best interests of the company."

30. As far as voluntary consent from the subsidiaries is concerned, Lord Diplock observed [at 636H] that:-

> "It may well be that such consent could be obtained; but Shell and BP are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of

> documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made."

31. Mr Beltrami however submits on behalf of the defendants that, even if the documents held by these people are not under the legal control of the claimants, they are under the practical control of the claimants as a matter of factual reality and that the authorities establish that this is sufficient to mean that the claimants have control for disclosure purposes.

32. Mr Beltrami referred first to *North Shore Ventures Limited v Anstead Holdings Inc* [2012] W.T.L.R. 1241. In that case, two individuals had arranged for assets to be transferred into trust. The question was whether those individuals had control over documents held by the trustees. Floyd J held that they did. The Court of Appeal (Toulson LJ), in upholding his decision, concluded [at 38-40] that:

> "[38]…The circumstantial evidence gave reasonable ground to infer that there was in truth some understanding or arrangement between the appellants and the trustees by which they were to shelter the appellants' assets, consistent with the appellants' real aims, and that the nature of that understanding and arrangement was such that the trustees would take whatever steps the appellants wished in the administration of the trusts….
>
> [40] …In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of "right to possession" in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency. But even if there were on a strict legal view no "right to possession", for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party within the meaning of CPR 31.8(1)."

33. The second case which Mr Beltrami referred to (and which was mentioned in *North Shore*) is *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat). The question in that case was whether a parent company had control over documents held by its subsidiaries. On the initial disclosure of documents, Schlumberger did not disclose any documents at all. A letter from its solicitors explained that it had taken into account documents which might exist within the group

and that it had received co-operation from other group companies. The judge found that certain companies within the group had consented to an examination of their files. Having considered the decision of the House of Lords in *Lonrho v Shell*, Floyd J stated [at 21] that:

> "I accept that the mere fact that a party to a ligation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that the position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way of the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation, subject only to the caveats contained in paragraph 4 of Mr Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests."

34. The final authority which Mr Beltrami relies on is the decision of Andrew Baker J in *Pipia v BGEO Group Limited* [2020] 1 WLR 2582. This is another case relating to a parent company and its subsidiaries. The subsidiaries had signed a letter agreeing to provide documents relating to the defendant's initial disclosure and such documents were duly provided. As a result of subsequent developments relating to disclosure, the defendant applied to the court for a declaration that it did not have control over the documents held by the subsidiaries in question.

35. It was accepted by the parties in *Pipia* [at 10] that an arrangement or understanding may be sufficient to give a parent company control over documents held by a subsidiary even if that arrangement is not legally enforceable.

36. The judge in *Pipia* quoted extensively from the decision of Males J in *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm). Having referred to *North Shore* and *Schlumberger*, Males J observed [at 10] that:-

> "It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there

> would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access."

37. Males J then summarised [at 13-14] the position as follows:-

> "[13] ….First, it remains the position that a parent company does not merely by virtue of being a 100[%] parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests by made the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in *Lonhro*, there is no obligation even to make the request, ….
>
> [14] Fourth, however, a party may have sufficient practical control in the sense which the *Schlumberger* and *North Shore* cases indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access."

38. Andrew Baker J's conclusions [at 50] in *Pipia* were as follows:-

> "A true analysis is that there are three elements to the question whether a third party's documents, or particular such documents or classes of such documents, are within the "control" of a party so as to be within the scope of its disclosure obligations in English civil litigation, by virtue of some standing consent given by the third party to the disclosing party in respect of its (the third party's) documents that fall short of an enforceable contract:
>
> (i) firstly, the scope (subject matter) of the consent – the documents or types of documents covered by the consent;
>
> (ii) secondly, the type of the consent – how, under the consent given, the disclosing party will get hold of those documents (e.g. by looking through the documents for itself and taking copies if it wishes, or by having documents located and sent (or copied) to it, or by having documents located and sent (or copied) to it to the extent that they match some further (review) criteria);
>
> (iii) thirdly, the quality of the consent – whether it involves free and unfettered access to the documents covered, of which (or copies of which) the parties will get hold in that way."

39. He added [at 51] that:-

> "These elements are distinct in concept; and the question of control is concerned only with the third element, the quality of the consent."

40. Mr Marshall points out that there are no cases in which a subsidiary has been held to have control of documents in the custody of a shareholder or parent. All the cases have been the other way around. *North Shore* for example dealt with individuals who had created a trust having control over trust documents and *Schlumberger* and *Pipia* were both cases where parents were held to have control over documents in the custody of their subsidiaries. There is however, in my judgment, no reason in principle why such an arrangement cannot exist whatever the relationship between the parties. Whether or not there is such an arrangement is a matter of fact. The judge in *Schlumberger* went out of his way [at 21] to make this point.

41. In addition, in Mr Marshall's view, the requirement for the claimants to have "free access" to the documents which are said to be in their control is the important feature (see *Ardila* [at 10] and *Pipia* [at 50(iii)]).

42. I find the references to free or unfettered access to documents unhelpful. Such terms can lead to confusion as to whether, in order to have control of documents held by another, there must be an arrangement which allows a party to access the documents by whatever means they see fit. However, it is clear that Andrew Baker J in *Pipia* distinguished [at 50] between the type of consent (by which he meant how the party would get hold of the documents) and the quality of the consent (which is the context in which he referred to free and unfettered access to the documents).

43. Andrew Baker J acknowledged [at 54] that it may not always be easy to separate out the different elements of consent:-

> "Where the existence or terms of any standing consent is a matter of inference or implication, it may not always be possible or appropriate to consider separately the three elements I have said are distinct in concept. In particular, what can be inferred as to the scope and type of any consent might perhaps be also to the quality of consent in a particular case."

44. Looked at in context, what I understand Andrew Baker J to be saying in *Pipia* and Males J in *Ardila* is that there must be some understanding or arrangement that the party who is said to have control will be able to access the documents held by the custodian one way or another, even though it may still need to be agreed precisely how that access should be achieved. This is, I think, consistent with the formulation of Floyd J in *Schlumberger* who referred [at 21] to the need for the party in question to:-

> "enjoy the co-operation and consent of the third party to inspect his documents and take copies".

45. It is clear that such co-operation and consent may be inferred. This was the case in both *North Shore* and *Schlumberger*. It was accepted as a possibility in *Pipia* and *Ardila*. Whether there is such an arrangement or understanding can only be determined by reviewing all the relevant circumstances but it is clear that one relevant

factor will be whether access has been permitted in the past (see *Ardila* [at 14] and *Schlumberger* [at 21]). Having said that, it is also clear that compliance with a particular request for assistance is not, of itself, sufficient to establish the existence of such an arrangement or understanding. As Males J said in *Ardila* [at 17]:-

> "It is one thing to undertake specific obligations of that nature, it is quite another to permit free range through the documents, including those held electronically, of the subsidiary company, potentially extending much more widely."

46. Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:

i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;

iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature.

47. Turning to the evidence, there is no doubt that the people whose documents are said to be under the control of the claimants have permitted their documents to be searched as part of the disclosure exercise which has already taken place. The question is whether there is some sort of understanding or arrangement that the claimant should have ongoing access to those documents, to the extent that they are relevant.

48. Mr Beltrami submits that this is the case. He makes the following points:-

i) It was, he says, always understood that this is what would happen. For example, when discussing the terms of the disclosure review document, there was no suggestion that there would be any need to obtain specific consent from the persons whose documents were to be searched.

ii) Access was in fact given by the persons in question.

iii) The description of the disclosure exercise undertaken by the claimants set out in their solicitors' letter dated 29 January 2021 is consistent with a normal disclosure exercise where the documents are under the control of the party in question. This, for example, confirms that:

a) there was no limitation on the search conducted by the claimants;

b) the "custodians" were notified of their "obligations" in relation to disclosure (not a term, Mr Beltrami suggests, which would be used where consent was being sought);

c) individuals were interviewed by FTI (the independent consultants) to find out what documents they had in their possession and to supervise a collection of data from personal email accounts. Again, this does not, in Mr Beltrami's view suggest there was any restriction on access to documents or any specific consent which had to be obtained.

49. Mr Marshall however argues that the only access obtained by the claimants resulted from a request for assistance and co-operation by the people involved. He points out in particular that the addition of Sheikh Khalifa, Mr Al Zaabi, Mr Al Mansouri and Dr Al Mazrouei to the list of custodians followed a request from the defendants' solicitors. As far as Sheikh Khalifa was concerned this was on the basis that he would no doubt want to assist the claimants by providing any relevant documents. This, he submits, is consistent with voluntary co-operation and not an ongoing, standing consent to access the documents held by those people.

50. On the basis of the available evidence, I am satisfied that there has always been, and continues to be, an arrangement or understanding that the claimants would be able to access the documents held by the PDP, Circle and the various individuals connected with those entities who are named as custodians other than Sheikh Khalifa.

51. The reason for this is that, as Mr Beltrami has pointed out, at the time the disclosure review document was being discussed, throughout the disclosure process and in the claimants' disclosure certificate, there has never been any suggestion that the documents held by these people and which are relevant to the claim were not under the control of the claimants. Indeed, it is apparent that the disclosure exercise proceeded on the basis that disclosure of relevant documents held by these people was expected. The issue of control was only raised relatively recently when the defendants complained about the extent of the disclosure given. The only reasonable explanation for this is that it had always been understood and agreed that the claimants would have access to the documents held by these people.

52. That is not a surprising conclusion. It is freely accepted that the claimants themselves hold no documents. Throughout the relevant period, they have been managed and controlled by DOPA and then by the PDP through their employees or agents. It is only to be expected, in these circumstances, that the claimants would be able to access the documents held by those persons whether or not they had a strictly legally enforceable right to do so.

53. Sheikh Khalifa is however, in my view, in a different category. Although it appears that he may on occasion have had to authorise certain transactions undertaken by the claimants (and I express no view on the extent or the implications of this), there is no evidence that he is involved in the work of DOPA/PDB/Circle in the same way as the other individuals who are named as custodians.

54. This distinction between Sheikh Khalifa and the other individuals appears to have been recognised by the defendants' solicitors when they requested that Sheikh Khalifa and various individuals should be added as custodians as it was only Sheikh Khalifa who was singled out as wanting to assist the claimants, the assumption apparently being that the documents held by all of the other individuals would in any event be disclosable. Given that he has not in fact disclosed any relevant documents (even though that may have been on the basis that he does not believe he has any), I am not satisfied that there is the same arrangement or understanding in relation to documents held by him as there is in relation to the individuals who are employees or agents of DOPA, the PDP and Circle.

55. There is no evidence that the understanding or agreement which I have found to exist has been terminated. The claimants do not suggest that anything has changed. Indeed, on the contrary, their argument is that the documents held by the relevant persons were never under the control of the claimants. Based on this, I find that the arrangement or understanding is a continuing one.

56. There is one further point which I should mention in the context of control and third parties. Mr Marshall drew attention the decision of the court of appeal in *Phones 4U Limited v EE Limited* [2021] EWCA Civ 116. The question in that case was whether certain employees or ex-employees could be required to allow work related communications (which were accepted to be within the control of the defendants) to be retrieved from their personal electronic devices. The court confirmed [at 24] (based on *Lonrho v Shell*) that it had no jurisdiction to order a defendant to disclose or allow inspection of documents which are not within its control. However, the court of appeal accepted [at 28] that a court may order a party to request a third party to assist in the search for a relevant document as long as such an order is proportionate. In the context of the orders sought by the defendants in their application, this is potentially relevant to, for example, a request to retrieve work related documents from a personal email account.

The background to the disclosure application

57. The defendants' overriding concerns in relation to the claimants' disclosure exercise is that, as they see it, surprisingly few documents have been disclosed, in particular internal documents to which the defendants were not a party.

58. Mr Beltrami points out that there were 43 separate issues for disclosure spanning a period of 15 years with over 20 electronic email accounts being searched. Despite this, less than 8,000 documents were disclosed of which close to 2,000 were Lancer's own invoices.

59. As far as emails are concerned, the defendants say that the claimants have disclosed only 447 separate email chains of which 413 include one or more of the defendants. This means that only 34 email chains are internal to the claimants throughout the

entire 15 year period. The defendants find it implausible that there should be so few internal documents which are disclosable.

60. Against this, the claimants say that the defendants should not be surprised at the level of disclosure given that, in these sorts of cases where there are allegations of fraud and breach of duty, there is often a significant asymmetry of information between the claimant and the defendant (referring to the comments of Richard Salter QC in *Ventra Investments Limited v Bank of Scotland plc* [2019] EWHC 2058 (Comm) [at 36]).

Approach to applications for further disclosure

61. Paragraph 17.1 of Practice Direction 51U gives the court power to "make such further orders as may be appropriate" where there has been or may have been a failure adequately to comply with an order for extended disclosure. This includes an order requiring a party to undertake further steps, including further or more extended searches (paragraph 17.1(2)).

62. However, an order should only be made if the court is satisfied that making the order is reasonable and proportionate (paragraph 17.2). This requires the court to take into account the factors described in paragraph 6.4 of Practice Direction 51U including, perhaps most importantly in this case, the overriding objective, the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence and the need to ensure that the case is dealt with expeditiously, fairly and at a proportionate cost.

63. Mr Higgo stressed the importance of any order being reasonable and proportionate referring to the well-known comment of the Chancellor (as he then was) Sir Geoffrey Vos in *UTB LLC v Sheffield United Limited* [2019] Bus LR 1500 [at 75] that:

> "the Pilot was intended to effect a cultural change. The Pilot is not simply a rewrite of CPR part 31. It operates along different lines driven by reasonableness and proportionality (see paragraph 2 of PD51U) with disclosure being directed specifically to defined issues arising in the proceedings."

64. The Chancellor went on to emphasise [at 79] that:-

> "Extended Disclosure is not, therefore, something that should be used as a tactic, let alone a weapon, in hard-fought litigation. It is all about the just and proportionate resolution of the real issues in dispute."

65. Based on this, Mr Higgo submits that the defendants must show some basis for going behind the process which has already been carried out and the certification of that process in the disclosure certificate which has been signed on behalf of the claimants by Dr Al Mazrouei. I would agree with this. In circumstances where a detailed disclosure exercise has already been undertaken, it is not sufficient that the party seeking disclosure simply speculates that further documents may or should exist or that it is implausible that they do not. Something more is needed to show that there is a likelihood (as opposed to a possibility) of further relevant documents existing.

66. Having said that, I would echo the comments of Richard Salter QC in *Ventra* [at 37] that:-

> "the process of disclosure is one of the most powerful tools available for achieving justice."

and [at 39] that PD51U:-

> "is not intended to hinder the just resolution of substantial cases… by making it more difficult for [parties] to get at the central documentary evidence that they need."

67. I would equally wholeheartedly endorse his conclusion [at 40] that:-

> "What is required from the parties and the court is a pragmatic, flexible approach to the scope of disclosure, taking into account (as paragraph 9.5 of PD51U requires) "all the circumstances of the case, including the factors set out in paragraph 6.4… and the overriding objective". The court is required to strike a practical balance, in order to decide in each particular case what specific reasonable and proportionate additional disclosure (if any) is necessary for the just disposal of the proceedings."

68. With this in mind, I will go on to consider the individual provisions of the order sought by the defendants.

The Draft Order

69. Paragraph 1 - this relates to Sheikh Khalifa's capacity and has fallen away following my decision to strike out the relevant paragraph in the defendants' defence.

70. Paragraphs 2/3 – these relate to documents held by Sheikh Khalifa. As I have found that those documents are not under the claimants' control, the order must be refused (*Lonrho v Shell*; *Phones 4U*).

71. Paragraph 4 – this paragraph relates to documents connected with the retirement of Dr Al Ahbabi and changes to the arrangements for the management of Sheikh Khalifa's assets which took place in 2015/2016. Whilst Mr Beltrami argued that these documents were relevant to the extent of Sheikh Khalifa's knowledge and approval in respect of the payments made to Becker and Reilly, it is clear from the witness statement filed in support of the disclosure application that the main purpose of this paragraph is to seek further information in relation to Sheikh Khalifa's capacity. As that is no longer one of the issues contained in the defendants' pleading, it would not in my view be reasonable or proportionate to require the claimants to carry out the further searches proposed by this paragraph.

72. Paragraph 5 – this is accepted by the defendants as relating to Sheikh Khalifa's capacity and is therefore no longer pursued.

73. Paragraphs 6 and 7 – these paragraphs relate to Mr Al Zaabi, Mr Al Mansouri and Dr Al Mazrouei. The background is that Mr Al Zaabi and Mr Al Mansouri have both

said that they have no relevant documents. Dr Al Mazrouei has said that any relevant emails which he has sent would have been copied to Mr Bhatti. As a result, no search has been carried in relation to the documents held by any of these individuals.

74. The order sought in paragraph 6 of the draft order requires a partner of Eversheds Sutherland to explain to each of these individuals their disclosure obligations and the types of documents which may be relevant to the issues for disclosure and then to find out from them the whereabouts of any potentially relevant documents. The claimants would then be required to search for and review the documents which are potentially relevant and then to disclose the relevant documents which are not privileged.

75. Paragraph 7 requires the relevant partner from Eversheds Sutherland to provide a witness statement confirming the explanations and enquiries which have been made.

76. I will deal separately with Mr Al Zaabi and Mr Al Mansouri on one hand and Dr Al Mazrouei on the other given that Dr Al Mazrouei is in a different position as he accepts that he does have potentially relevant documents and is also the person with overall responsibility for the claimants' disclosure exercise (having signed the disclosure certificate).

77. The defendants' concern is that Mr Al Zaabi and Mr Al Mansouri, given their senior positions within DOPA and/or the PDP may have documents which are relevant to the issue of Sheikh Khalifa's knowledge or approval of the payments to Becker and Reilly as well as the extent to which Sheik Khalifa's knowledge can be attributed to the claimants. Their main complaint is that the disclosure exercise has been deficient on the basis that it is implausible that Mr Al Zaabi and Mr Al Mansouri have no potentially relevant documents and that there is no evidence that the disclosure exercise was ever properly explained to them.

78. The evidence provided by the claimants shows that the request for disclosure from Mr Al Zaabi was made by Dr Faraj, the managing partner of the UAE law firm, Hadef & Partners, whilst the request for disclosure from Mr Al Mansouri was made by Mr Bhatti who, as mentioned above, is qualified as an English solicitor and works both for Circle and for Hadef & Partners.

79. The claimants' solicitors say that Mr Al Zaabi and Mr Al Mansouri "were made aware of the nature of the proceedings and informed of the claimants' wish to acquire and ascertain from them what, if any, potentially relevant documents they hold." The response was that they do not hold any potentially relevant documents in any format.

80. Mr Beltrami criticises the claimants' solicitors for not exercising greater oversight of this process. He drew attention to the comments of Ward LJ in *Hedrich v Standard Bank London Limited* [2008] EWCA Civ 905 who referred [at 14] with approval to various extracts from chapter 14 of the third edition of Matthews and Malek on disclosure including the following:-

> "14.07 The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client… the client should not be allowed to decide relevance - or even potential relevance

> – for himself… it is then for the solicitor to decide which documents are relevant and disclosable"

81. Mr Marshall points out that the extracts in question refer only to the solicitor's duty in relation to his client and says nothing about any responsibility in respect of third parties. He goes on to point out that the extracts include (at paragraph 14.09) the following:-

> "he need not go beyond taking reasonable steps to ascertain the truth. He is not the ultimate judge and if he has decided on reasonable grounds to believe his client, criticism cannot be directed at him."

82. Whilst I would accept that it is incumbent on a party's solicitor to exercise supervision over a disclosure process and, in particular, to explain the requirements of the process to his client, this does not necessarily mean that the solicitor must have direct contact with every individual or organisation who is being asked to search for potentially relevant documents. It will depend on the circumstances and solicitors must use their judgment.

83. In this case, Mr Al Zaabi and Mr Al Mansouri are very senior individuals. The claimants say that it would have been inappropriate for Eversheds Sutherland to approach them directly. I can quite understand this. Instead, they arranged for Dr Faraj and Mr Bhatti to discuss the disclosure requirements with them. Given that both of them are senior lawyers and that Mr Bhatti is qualified as an English solicitor, it was not in my view unreasonable for Eversheds Sutherland to approach the matter in this way and to accept the response which was given.

84. I can understand that the defendants feel aggrieved in that they are convinced that Mr Al Zaabi and Mr Al Mansouri must have relevant documents. I also accept that the issues to which any such documents could be relevant are important ones. However, the defendants have no evidence of the existence of relevant documents held by Mr Al Zaabi or Mr Al Mansouri other than a general assertion that it is implausible that they do not have any and a suspicion that the two individuals were not given a sufficiently full explanation as to what was required. This is, in my view very far from a sufficient basis to require the claimants to renew their enquiries. It would be neither proportionate nor reasonable to do so.

85. The position might be different if there was some tangible evidence that these individuals were in fact involved in any relevant events or that they hold relevant documents, but I have not been provided with any such evidence. The most that Mr Beltrami was able to say was that the claimants had listed them as potential witnesses, but it cannot in my view be inferred from this that they must hold relevant documents. The claimants have now confirmed that they do not intend to call Mr Al Zaabi and Mr Al Mansouri as witnesses which perhaps supports the claimants' assertion that they had little involvement in the matters at issue in this claim although, of course, there could be other reasons why they have made this decision.

86. I will not therefore make any order in relation to documents held by Mr Al Zaabi and Mr Al Mansouri.

87. I should record that Mr Marshall made certain submissions in relation to state immunity which, he suggested, would in any event prevent the court from making any order in respect of the documents held by Sheikh Khalifa, Mr Al Zaabi and Mr Al Mansouri. Mr Marshall did, I think, eventually accept that the court could make an order requiring the claimants to make requests of these individuals. It was also not apparent to me that any immunities would extend to Mr Al Zaabi and to Mr Mansouri. However, given my conclusion that no order should be made, I do not need to reach any decision in relation to these issues.

88. The position in relation to Dr Al Mazrouei is, in my view, completely different. He is the individual who took ultimate responsibility for the disclosure exercise on behalf of the claimants. It is to be expected that, in that capacity, Eversheds Sutherland would have discussed the claimants' disclosure obligations in detail with Dr Al Mazrouei. However, all that the claimants say in their evidence is that Dr Al Mazrouei was fully aware of the claimants' disclosure obligations. It is not said that Eversheds Sutherland explained those obligations to him directly. Indeed, as far as his own disclosure is concerned, it is clear that his response was conveyed to Eversheds Sutherland by Mr Bhatti who reported simply that Dr Al Mazrouei had confirmed that any potentially relevant emails that he sent would have been copied to Mr Bhatti. On this basis alone, it appears to have been decided that no search needed to be made in relation to Dr Al Mazrouei's documents.

89. As Mr Beltrami points out, this begs a number of questions:-

    i) it does not deal with emails which Dr Al Mazrouei may have received rather than sent;

    ii) it does not deal with documents other than emails;

    iii) it is in any event implausible that Dr Al Mazrouei would be able to be certain that all potentially relevant emails which he had sent were copied to Mr Bhatti;

    iv) even if they were, it appears that there is no central server where emails are stored and so if Mr Bhatti had deleted the email from his own inbox, it would not have been retrieved as part of the search of Mr Bhatti's emails.

90. The claimants have little response to these criticisms. They say that Dr Al Mazrouei must be taken to have been aware of his disclosure obligations given that he signed the disclosure certificate. They also say, on the authority of *Al-Fayed v Lonrho* that the defendants cannot go behind the confirmations in the disclosure certificate. In addition, they say that any further order in relation to Dr Al Mazrouei's documents would be disproportionate as there is no evidence that he has any documents which might have probative value in relation to the issues in dispute, bearing in mind in particular that he only came on to the scene when he replaced Dr Al Ahbabi as the head of the PDP in 2015/16 which post-dated the alleged fraud.

91. Given Dr Al Mazrouei's admission that he has sent potentially relevant emails, I find it extraordinary that the claimants, their solicitors and Dr Al Mazrouei himself (as the person responsible for the disclosure exercise on behalf of the claimants) did not consider it appropriate to conduct a search of his emails. For the reasons put forward by Mr Beltrami, it is entirely inadequate to suggest that all potentially relevant emails

could be obtained by searching Mr Bhatti's email account instead. Given that Dr Al Mazrouei has sent relevant emails, it must be likely that he has also received relevant emails. Dr Al Mazrouei of course has no control over whether such emails would have been copied to Mr Bhatti. In addition, given Dr Al Mazrouei's seniority relative to Mr Bhatti, it is perfectly possible that he would have both sent and received emails which it may not have been appropriate or necessary to copy to Mr Bhatti.

92. There is no dispute that Dr Al Mazrouei's documents are under the control of the claimants. I will therefore make an order that the claimants must:-

i) make further enquiries of Dr Al Mazrouei in relation to the whereabouts of any potentially relevant documents;

ii) duly harvest and review (if such documents are in Arabic, by an Arabic speaking lawyer) all potentially relevant documents including, at a minimum, a search of all relevant email accounts held by Dr Al Mazrouei. Bearing in mind the observations in *Phones 4U*, to the extent that these are personal email accounts, Dr Al Mazrouei should be requested to permit a search to be undertaken. The order should include any necessary protections in relation to personal information; and

iii) produce all relevant, non-privileged documents no later than 30 April 2021.

93. I do not consider it necessary or proportionate to require a partner of Eversheds Sutherland to produce a witness statement confirming any explanations provided or enquiries made given that Dr Al Mazrouei himself will need to sign a revised disclosure certificate confirming compliance with the order.

94. Paragraph 8 – this requires the claimants to instruct Dr Abbas not to delete any further emails from his Hotmail account. This has arisen as a result of the claimants disclosing that Dr Abbas' normal practice is to delete emails received into that account which he is copied into and which require no further action. The defendants have understood from this that Dr Abbas may therefore currently be deleting emails sent to him during the period for disclosure (which only extends to 2017). However, it is clear to me that all that is being said is that if Dr Abbas receives an email which is simply copied to him for information, he may well delete it on a contemporaneous basis. There is no suggestion that he might be going back and deleting old emails. This order is not therefore in my view necessary, particularly as he has already been informed of the requirement to preserve relevant documents.

95. Paragraph 9 – this requires the claimants to take a full image of Dr Abbas' Hotmail account so that the agreed searches can be run on the claimants' UAE disclosure platform. The background to this is that the original search was carried out using the search function within Hotmail itself. This revealed 812 documents but none of them were considered to be relevant.

96. The defendants have however identified 11 email chains, all or part of which were sent to Dr Abbas' Hotmail account. Two of these emails attach what has become a key document known as the "Becker Authority" and one of those two emails is an email from English lawyers which asks Dr Abbas to respond to a number of specific questions.

97. Mr Beltrami submits that these emails clearly show that there are relevant documents contained in Dr Abbas' Hotmail account. Whilst it may have been Dr Abbas' practice to delete emails which were copied to him and required no specific action from him, the second email clearly does not fall into this category as it poses a number of questions which he is asked to respond to.

98. In the light of this, Mr Beltrami suggests that the only reasonable explanation for this email not being disclosed following the search of Mr Abbas' Hotmail account is that the search process was defective. He bases this on the suggestion, raised in correspondence by the defendants' solicitors, that the limitations of the Hotmail search function do not allow a comprehensive search to be carried out. This can only be done by taking an image of the email account and then carrying out a search on a proper disclosure platform.

99. Mr Higgo, who was responding to the individual points in relation to the proposed disclosure order, points out that Dr Abbas could have deleted the email after he had dealt with it. He also submits that it would not be reasonable and proportionate to require the claimants to carry out a further search of Dr Abbas' email account particularly bearing in mind this particular email account has only been in existence since 2014, Dr Abbas did not have significant involvement in relation to the overseas properties held by the claimants and it would require arrangements to be put in place to safeguard personal emails.

100. Mr Higgo also notes that, in any event, the court can only order the claimants to make a request of Dr Abbas given the limitations explained in *Phones 4U* where documents under the control of a party are held by a third party.

101. The claimants have not challenged the suggestion by the defendants that taking an image of Dr Abbas' email account and conducting a search through the UAE disclosure platform would provide a more reliable result. Although I have not seen any evidence in relation to this, I will therefore accept it as correct.

102. As Mr Higgo has pointed out, it is important in relation to disclosure to focus on the real issues. There is no doubt that, in this case, one of the key issues is the extent to which Sheikh Khalifa may have known or approved of the payments to Becker and Reilly. The email identified by the defendants which was sent to Dr Abbas' Hotmail account, but which has not been disclosed by the claimants, goes directly to that issue. Therefore, whilst the claimants may be right that it is unlikely that very many further documents would be revealed by carrying out an additional search, it is quite possible that any documents which do turn up could be very relevant indeed.

103. The exercise which the defendants are asking the claimants to undertake is not an onerous one. It relates to a single email account over a period of 3-4 years. On the basis of the claimants' own case, it is unlikely to reveal a large quantity of documents which will need to be reviewed. It should not therefore be time consuming to carry out this exercise.

104. Bearing in mind the potential importance of the issues to which the documents could be relevant and the relatively light burden which would be placed on the claimants, I consider it appropriate to order the claimants to request Dr Abbas to provide an image of his Hotmail account so that the same searches can be carried out using the

claimants' UAE disclosure platform as they attempted to carry out through the Hotmail search function. The claimants should manually review all responsive documents and produce all relevant non-privileged documents to the defendants no later than 30 April 2021. The order will need to make provision for the safeguarding of any personal emails contained in the account.

105. Paragraph 10 – this has been dealt with by the parties in correspondence and so no order is needed.

106. Paragraph 11 – the request here is that an image is taken of the email account of Tim Straw for the period between December 2005-May 2006. Mr Straw is a partner at Arnold Hill, accountants who have acted for the claimants.

107. The defendants say that the documents they are seeking are those which relate to payments made to Becker in relation to specific transactions which took place during the relevant period.

108. The claimants have explained in their evidence that, at their request, Arnold Hill have carried out an extensive exercise, providing access to over 700 hard copy files. These files included printouts of emails. Arnold Hill have not however provided electronic access to Mr Straw's email inbox.

109. It is also apparent that the documents disclosed by the claimants which come from Arnold Hill's files include documents relating to payments made to Becker during the relevant period. The claimants therefore quite fairly ask what exactly the defendants think is missing in respect of this part of the disclosure. Mr Beltrami's response to this was a suggestion that Mr Straw's emails might also include information about the ownership of Becker. This was however a completely new suggestion and is certainly not the basis on which the application was made as explained in the witness statement supporting that application which only referred to evidence of payments made to Becker and said nothing about the ownership of Becker.

110. In my view, the exercise which has already been carried out is more than adequate. The hard copy files contain printouts of emails. Whilst it cannot be guaranteed that every single email was printed out and placed on the file, it is a fair inference that any important emails would have been placed on the hard copy file. In addition, it is clear that documents have already been provided which are relevant to Arnold Hill's knowledge of the payments which were made to Becker in respect of the relevant transactions.

111. On top of this, Mr Straw's email account no doubt contains numerous confidential emails relating to other clients. Taking all of this into account, it would in my view be disproportionate to require the claimants to try and persuade Arnold Hill to carry out further searches particularly if, as it appears, the defendants are, in reality, looking for information about other issues in respect of which they have provided no evidence which might suggest that there are any relevant documents held by Arnold Hill.

112. Paragraph 12 – the proposed order in paragraph 12 asks the claimants to carry out a further search for documents relating to three specific matters. I will therefore deal with each of them separately.

113. The first matter relates to any investigation, appraisal or handover process at the time of Dr Al Ahbabi's retirement in 2015. This is prompted by a reference in a note of a meeting which took place in 2015 to a partner of Eversheds Sutherland having previously referred to an investigation being carried out in Abu Dhabi. In January this year, the partner is said to have clarified that, as far as she can recall, she was speaking in broad terms about the management of the property portfolio being looked at following Dr Al Ahbabi's retirement and that it was not a reference to any formal investigation. Mr Beltrami however says that, even if this was the case, it is clear that there was some sort of review or discussion of the relevant arrangements and that documents relating to those discussions may well provide evidence as to what the claimants knew about the payments to Becker and Reilly and when they acquired that knowledge. Their complaint is that no such documents have been produced.

114. Mr Higgo points out that a limited number of documents relating to the change in the arrangements for the management of the claimants and their portfolios have been produced, whilst others have been withheld on the grounds of privilege. The claimants have agreed to review documents in respect of which privilege has been claimed and will disclose any documents which are found not to be privileged (if any).

115. I accept Mr Higgo's submission that there is no proper basis on which the defendants can say that the exercise which has been carried out is inadequate. A search clearly has been carried out and documents have been disclosed as a result of that search. The defendants might have hoped and expected that more documents relevant to this issue would have been identified but, on its own, that is not a sufficient basis to order a further search to be carried out. There must be some more tangible evidence of the existence of documents which have not been identified or disclosed.

116. I also bear in mind the further search I have said I will order to be carried out in relation to Dr Al Mazrouei's documents. Given that he succeeded Dr Al Ahbabi as the head of what is now the PDP, it might well be expected that this would reveal the documents the defendants seek, if they exist. I will not therefore make a separate order in relation to this issue.

117. Paragraph 12.2 is a somewhat strange request. Mr Bhatti attended a meeting in May 2017 at which he was told by one of the defendants of the payments to Becker and is said to have responded that any such payments were not authorised (in fact that is arguably not what the note of the meeting records). The request asks Mr Bhatti to carry out a further search for any documents evidencing the basis for his understanding that the payments to Becker have not been authorised.

118. Again, in my view, there is simply no basis for asking Mr Bhatti to carry out a further review of his documents. There may be any number of reasons why Mr Bhatti reacted as he did. It certainly cannot be said that this episode is sufficient evidence of a failure to disclose relevant documents to justify a further search. The request for such an order is therefore refused.

119. The final issue in paragraph 12.3 of the draft order relates to notes or records of meetings which took place between one of the defendants and Dr Al Mazrouei and Mr Bhatti in May 2017.

120. As far as Dr Al Mazrouei is concerned, given the order I propose to make in relation to a search of the documents which he holds, there is in my view no need for a separate specific order in relation to this matter.

121. Turning to Mr Bhatti, there is again no basis for requiring Mr Bhatti to carry out a further search. He has said that he does not routinely make handwritten notes of such meetings and he has already carried out a search of his documents. If he had anything relevant which was not privileged, the likelihood is that it would have been disclosed. The defendants have no basis for suggesting that Mr Bhatti in fact holds any documents relevant to this issue which may have been missed and therefore not disclosed. It would be disproportionate to ask him to carry out a further search, even though, in this case, it may be one which could be carried out relatively easily.

122. Paragraphs 13 and 14 of the draft order require the claimants to ask each of their custodians to undertake a further search for notes or records of internal meetings, calls or discussions as well as any relevant handwritten documents.

123. The justification for this is that no such documents have been produced and that it is inherently implausible that none of the claimants' custodians hold any such documents. The suggestion is that it was not explained clearly to the custodians that these sorts of documents were part of the review.

124. The claimants' response is that the disclosure exercise was carried out properly and that relevant, non-privileged documents were disclosed. They explain that the search involved hundreds of thousands of documents, including hard copy documents which were duly searched. The claimants' evidence is that custodians were specifically asked whether they had any relevant hard copy documents.

125. In the light of this, it would be wholly unreasonable to ask the claimants, in effect, to re-run their disclosure exercise in relation to such documents where the only basis for doing so is the fact that the previous search did not produce any disclosable documents and I decline to do so.

126. Paragraph 15 - The defendants have expressed significant concerns about the way in which documents which are wholly or mainly in Arabic have been dealt with by the claimants. Paragraph 15 of the draft order would require the claimants to manually review all Arabic documents which have not already been reviewed. This is on the basis that the defendants have not been able to understand the way in which the claimants' English search terms have been translated in Arabic.

127. There is some uncertainty as to how many Arabic documents would need to be reviewed if such an order were made. The claimants are unable to say how many Arabic documents there are in total. However, they do say that, having applied their original list of Arabic search terms, this generated just under 28,000 documents. These documents were reviewed and any relevant documents disclosed (unless privileged).

128. Following discussions with the defendants, the claimants applied a different search which generated a further 6,500 potentially relevant documents. The claimants are in the process of reviewing these documents.

129. The claimants say that they have now undertaken a further exercise which has generated an additional 4,459 documents which now need to be reviewed. It is not however apparent to me or to the defendants what different searches the claimants have carried out in order to identify these documents.

130. The claimants now say that there are 10,523 predominantly Arabic documents which have not yet been reviewed (as the searches have not identified them as being potentially relevant). However, there are also an unidentified number of documents which contain Arabic terms and which have not been reviewed.

131. It is apparent to me that the real issue is whether the agreed English search terms have been translated into Arabic and applied to the predominantly Arabic documents in a way with which the defendants are satisfied. In the light of this, it would in my view be disproportionate to require the claimants to carry out a manual review of over 10,000 unreviewed Arabic documents. Instead, it would make much more sense to require a process to be carried out which enables the defendants to be satisfied that the right search terms have been applied. I would therefore propose to make an order along the following lines:-

    i) no later than seven days from the date of the order, the claimants must provide to the defendants a table which shows the Arabic translation which has been used for each of the unique terms in the agreed English language search strings;

    ii) no later than seven days after this table has been produced, the defendants must provide any comments to the claimants including any proposals for alternative or additional Arabic translations;

    iii) should any proposed amendments not be agreed, the claimants and the defendants shall arrange a discussion involving their respective Arabic language speakers with a view to resolving any differences and agreeing a single Arabic search string which can be applied to all predominantly Arabic documents no later than 30 April 2021;

    iv) the claimants are to manually review any further potentially relevant documents identified by the application of the agreed search string and to disclose any disclosable documents no later than 14 May 2021;

    v) liberty to apply should the claimants and the defendants be unable to reach agreement on the Arabic search string. I would however remind the parties and their legal representatives of their duty to co-operate with each other in relation to the disclosure exercise and would very much expect that no further application should be necessary.

132. Paragraph 16 of the draft order requires the claimants to conduct a further review of privileged material. This is under way and the parties are agreed that the court should order the claimants to disclose any documents which are found not to be privileged within seven days of the date of the order.

133. Paragraphs 17 and 18 of the draft order are intended to address what the claimants say are deficiencies in the disclosure certificate. The first is that the certificate does not

itself set out the limits to the disclosure exercise which were contained in the disclosure review document or agreed in subsequent correspondence.

134. Paragraph 18 is intended to clear up a discrepancy under which the claimants initially suggested that Dr Al Mazrouei signed the disclosure certificate in his capacity as chairman of the PDP but later clarified that he in fact signed in his capacity as Chief Executive of Craft (the corporate director of the claimants). They also wish the claimants to clarify whether Mr Bhatti (who is described in the disclosure certificate as the Chief Operating Officer – Compliance of Circle) led the disclosure exercise in that capacity or in some other capacity.

135. Given that the claimants will in any event need to produce an updated disclosure certificate, I do not consider it to be necessary or appropriate to make any order in respect of these issues. They will however no doubt be dealt with by the claimants when the revised certificate is prepared.