Neutral Citation Number: [2020] EWHC 2106 (Ch)

Case No: FL-2016-000019

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (Ch D)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: 31/07/2020

Before :

THE HONOURABLE MR JUSTICE HILDYARD

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Between :

(1) MANNING & NAPIER FUND, INC. **(a company incorporated in the United States of America)** **(2) EXETER TRUST COMPANY** **(a company incorporated in the United States of America)** **(the "MLB Claimants")**	**Claimants**
- and –	
TESCO PLC	**Defendant**

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- -

Peter de Verneuil Smith QC, Philip Hinks and Dominic Kennelly (instructed by Morgan Lewis & Bockius UK LLP) for the **MLB Claimants**

Laurence Rabinowitz QC, David Mumford QC, Conall Patton QC, Michael Watkins and Henry Hoskins (instructed by Freshfields Bruckhaus Deringer LLP) for the **Defendant**

Hearing dates: 23 – 24 July 2020

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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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 02:00 pm.

Mr Justice Hildyard:

1. This judgment addresses two applications heard at the PTR in these proceedings which occasioned extended argument. The first is an application by the Defendant ("Tesco") for specific disclosure of documents evidencing the supervision by the Second Claimant ("ETC") of its investments in Tesco in accordance with ETC's duties as a trustee ("the Specific Disclosure Application"). The second is an application by the MLB Claimants for permission to rely on further evidence in relation to a claim for loss of the profits (the "Lost Profits Claim") they allege they would or might have gained had their money not been invested and tied up in shares in Tesco.

The Specific Disclosure Application

2. The Specific Disclosure Application has substantially been resolved, in that a draft order which reflects my views as expressed in the course of argument has been provided for my approval.

3. Put briefly, the documentation sought relates to the relationship between the MLB Claimants and their investment adviser and manager ("the Advisor") and more particularly the Claimants' case that the decision to invest in and/or retain and/or sell the shares in Tesco acquired for the MLB Claimants was in every instance made and implemented by the Advisor acting as their agent.

4. The legal nature of the relationship is important because the MLB Claimants do not allege that they themselves made any decisions to purchase, hold or sell Tesco shares in reliance on the published information. Instead, they allege that such decisions were made on their behalf by the Advisor, which (they allege) did rely on the published information. If there was no legal relationship of agency, the MLB Claimants cannot show either reliance or causation, and their claims will fail.

5. It was common ground between the parties that:

   (1) There has been a pleaded issue as to the existence of the alleged agency relationship ever since Tesco first served its Defence in January 2017.

   (2) However, until 8 June 2020, the MLB Claimants had not given disclosure or adduced any witness evidence in relation to the alleged agency relationship.

   (3) On 8 June 2020, the MLB Claimants sought permission to rely on a witness statement from Ms Sarah Turner ("Turner 3") which (a) explained an error as to the name and identity of the Advisor and (b) exhibited certain Advisor agreements between the investment managers and the MLB Claimants which had not previously been disclosed.

   (4) The newly-disclosed documents included an Investment Advisory Agreement which makes clear that ETC, in its role as trustee of the relevant funds, had a significant supervisory and directional role over the activities of the Advisor.

6. It is also common ground that:

   (1) although the original order for disclosure in these proceedings was made in December 2017 and thus before the Disclosure Pilot in CPR PD51U came into

force, the application is governed by the Pilot: *UTB LLC v Sheffield United Ltd.* [2019] EWHC 914 (Ch);

(2) the original order for disclosure must be treated as if it were an order for Extended Disclosure under PD51U (see *Ventra Investments Ltd v Bank of Scotland plc* [2019] EWHC 2058 (Comm));

(3) what was formerly an application for specific disclosure under CPR 31.12 is treated as an application under PD51U to vary or rectify a failure to comply with an order for Extended Disclosure; and

(4) when deciding whether to allow such an application the court must consider (a) whether the application is *"reasonable and proportionate having regard to the overriding objective"* (see para. 6.4 of PD51U), and (b) in particular, (i) the likelihood of documents existing that will have a probative value in supporting or undermining [one party's case], (ii) the number of documents involved and (iii) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

7. Tesco submitted that these criteria were satisfied in that:

(1) Understanding the supervision exercised by ETC over the Advisor would be likely to assist in identifying the true nature of the relationship between them, and in particular whether it was that of principal and agent, which is a key issue (it being the only basis on which the relevant acts of alleged reliance are said to be attributable to ETC);

(2) Such documents are also necessary and reasonably required in relation to ETC's allegations that decisions to buy, hold or sell Tesco shares were taken (a) in reliance on the alleged misstatements and (b) by the Advisor, which would be directly relevant both (i) to the issue of why and by whom decisions were made to buy, hold or sell Tesco shares and (ii) the counterfactual question of what ETC and the Advisor would or might have done but for the alleged misstatements.

8. The MLB Claimants submitted that these arguments were misconceived on the grounds that:

(1) The MLB Claimants have made no allegation that ETC itself read or relied on Tesco's published information or made any relevant investment decision: only the Advisor did;

(2) It follows, they submitted, that documents evidencing consideration by ETC itself of the Tesco investment decisions can shed no light on whether the Advisor relied on Tesco's published information or on whether or how it would have acted differently if that published information had not contained misstatements;

(3) There can be no reason to suppose that any general discussions by ETC could have any relevance to the issues of reliance and causation; and

(4) The question whether the Advisor was acting as ETC's agent must turn on the nature and scope of its powers to deal in securities on ETC's behalf, which are set out

clearly and definitively in the Investment Advisory Agreement, which is thus the only evidence required.

(5) In short, the documents sought by Tesco are not relevant to the issues in dispute. Moreover, producing these documents would impose a substantial and disproportionate burden on the MLB Claimants at a time when they are heavily engaged in preparing for trial. In the circumstances, the Defendant had failed to establish that the proposed order is necessary for the just disposal of the proceedings, and reasonable and proportionate: and so it should be rejected accordingly.

9. As I indicated during the course of the hearing, I do not agree with the MLB Claimants. In my judgment:

(1) the issue as to the true nature of the relationship between ETC and the Advisor, and in particular whether it is one of agency and whether the investment decisions made in relation to the relevant Tesco shares were taken by the Advisor in reliance on published information, is an important one capable of being determinative;

(2) the MLB Claimants' confirmation that they rely solely on the investment decisions made in relation to the Tesco shares by the Advisor without involvement by ETC highlights rather than disposes of the issues of (a) agency and (b) reliance and causation. The Investment Advisory Agreement is not necessarily definitive of the legal characterisation of the relationship;

(3) the Investment Advisory Agreement expressly stipulates that the Advisor is to be subject to the supervision of the Trustees (ETC) (see clause 2.2), that it is for ETC to set investment guidelines and procedures (see clause 2.2(a)) which the Advisor must comply with (see clause 2.3), and that ETC must establish and maintain *"auditable records as to its compliance with the foregoing procedures"*, including its obligation to supervise the Advisor's determination of investments (see Attachment A). Those provisions invite rather than foreclose enquiry as to how and by reference to what information, guidance or criteria the investment decisions in relation to Tesco shares were made;

(4) documentation relevant to such matters is likely to be relevant to the issues of agency, reliance and causation identified above;

(5) the requirement to establish and maintain *"auditable records"* should mean that there is an available corpus of documents which (though the MLB Claimants told me no-one had ever asked to see them) should be readily accessible; and more generally, I would in any event expect a trustee responsible ultimately for the supervision of the Advisor, the development of investment guidelines and procedures to be adhered to by the Advisor, and the conduct of at least annual reviews, to maintain and keep accessible the documentation necessary to enable that to be done, and record that it has been done;

(6) accordingly, it is appropriate and proportionate the MLB Claimants should collate and disclose all documents within their possession or control for the period 5 November 2009 to 31 December 2014 evidencing ETC's supervision of the relevant investments in Tesco shares (as required by clause 2.2) in accordance with the

Trustee's duty to maintain substantial investment responsibility in relation to those assets (as acknowledged by clause 2.3), including (but not limited to)

(a) Records of the (at least) annual meetings required to be held between the Trustee and the Advisor throughout the Relevant Period pursuant to clause 2.2(d), together with any agendas, minutes, or meeting notes relating to the same, and any documents produced for, or considered at or for the purpose of, such meetings;

(b) Any reports provided to the Trustee by the Advisor pursuant to clause 4.2 to the extent those reports contain material relating to Tesco and/or the overall strategy of the series in respect of which the MLB Claimants claim;

(c) With respect to Attachment A:

(i) documents evidencing the review of the relevant transactions in Tesco shares against the Trustee's policies and procedures; and

(ii) documents evidencing those "*policies and procedures*", save to the extent already referred to in Attachment C.

(7) However, bearing in mind the imminence of trial, and the requirement of proportionality and reasonableness, I do not consider that for the purpose of identifying documents which the MLB Claimants are required to disclose pursuant to paragraph 2 of this Order, the MLB Claimants should be required to undertake any 'key word' search of any documents.

The MLB Claimants' applications to rely on further evidence re their Lost Profits Claim

10. The MLB Claimants' primary claim for damages is based on an allegation that but for the alleged misstatements, they would not have purchased Tesco shares. The MLB Claimants have sought to calculate their loss in various different ways, including by reference to the difference between the purchase price of the Tesco shares and the value of those shares on 23 October 2014 (when Tesco published its interim results for the 2014/15 financial year and stated the "expected impact" of the overstatement (of £263 million) in its previous profits guidance statements). The issues of reliance and causation relating to this claim are central questions to be determined at the trial now commencing in October 2020 ("Trial 1", which was originally fixed to start in June 2020 but was postponed in light of the Covid-19 pandemic). According to orders previously made after consideration whether a 'split' trial should be directed, only quantification is to be left over to a subsequent trial ("Trial 2"), if it arises at all.

11. This second application relates to a claim that will be established only if the MLB Claimants establish Tesco's primary liability. This claim, which was in substance pleaded from the beginning, is based on an allegation that but for the alleged misstatements, the MLB Claimants would have made alternative investments with the funds which they used to buy Tesco shares (the "Lost Profits Claim"). The MLB

Claimants seek to measure the Lost Profits Claim according to the average rate of return for each of the Claimants. So calculated, it is a substantial claim in the amount of some $58 million. It is the fact that the Lost Profits Claim depends on a prior finding of liability and is, in a sense, part of the calibration of overall loss which may have given rise to the misunderstanding that has led to this application (as explained below). However, although issues of quantification may also arise, the Lost Profits Claim gives rise to prior questions of reliance and causation.

12. Notwithstanding that the Lost Profits Claim has always been part of the MLB Claimants' case, until late on 20 July 2020, no witness evidence had been served in support of it and there had (and has) been no disclosure in relation to this part of the case either. As elaborated below, the MLB Claimants have sought to explain this as the consequence of the fact that they mistakenly considered that all issues relating to the Lost Profit Claim were to be determined not at the first (main) Trial (Trial 1) but at the second (quantum) trial (Trial 2). They have explained that they assumed that Tesco shared that understanding; and that they only sought to file evidence for Trial 1 when Tesco made clear that it considered that the orders previously made clearly required all aspects of such a claim except its mathematical calculation to be dealt with at Trial 1.

13. Having belatedly appreciated that the issues of reliance and causation relating to the Lost Profit Claim were (and Tesco expected them to be) matters for Trial 1, under cover of a letter dated 20 July 2020, the MLB Claimants provided to Tesco revised supplemental statements from Mr Donlon and Mr Andreach (both of whom are existing witnesses), which now address the Lost Profits Claim.

14. The difficulty for the MLB Claimants is that this supplemental evidence is well out of time, and that though it is accepted that there would be disclosure to make, none has been given. Accordingly, if they are to rely on this supplemental evidence, they must not only obtain permission to do so, but also satisfy the requirements for the grant of relief from sanctions as a precursor. The latter is a considerable hurdle to surmount so late in the day.

15. To determine whether they can surmount it, it is necessary to elaborate upon the background, both to assess in more detail how this problem has arisen, and to weigh whether there is any good reason for it and whether there is any sufficient fair solution to it having regard to the prejudice which the late admission of evidence and the grant of relief from sanctions may cause to Tesco, and to other court users.

16. I can take the following description of the development of the relevant orders determining which issues should be heard at Trial 1 and which (if arising) should be determined at Trial 2 very largely from Tesco's skeleton argument:

    (1) Prior to the first CMC in this matter ("CMC1"), in November and December 2017, the SL Claimants (who were the claimants in a concurrent trial against Tesco but whose claims have been settled on confidential terms) proposed a split trial whereby all issues of fact relating to reliance, causation and loss would be dealt with at a second trial, with the first trial focussing only on the allegations of falsity and dishonesty, together with certain issues of law relating to reliance, causation and loss.

(2) The MLB Claimants initially supported that proposal, but they then changed tack during the hearing and pressed for a single trial of all issues.

(3) At CMC1, the Court decided to order a single trial but to reserve the question whether "*quantum calculation issues*" should be decided separately: CMC1 Judgment, §78 and CMC1 Order, §9.

(4) I think it is clear from the wording of the CMC1 Order, and consistent with what I understood to be the consensus at CMC1 between the MLB Claimants and Tesco in this context, that all issues of reliance and causation fell within the scope of Trial 1. That included the issues of reliance and causation relating to the Lost Profits Claim: there was no suggestion or intention of dividing up the issues of reliance and causation, such that only some of them were the subject of evidence at the first trial.

(5) At the second CMC ("CMC2"), between 23 and 25 October 2018, the Court revisited the question as to the appropriate split, and ordered that "*issues of quantum calculation shall be dealt with at a subsequent hearing, if necessary*": CMC2 Order, §14(2). The MLB Claimants did not suggest at that time that issues of reliance and causation relating to the Lost Profits Claim were an "*issue of quantum calculation*" that fell to be determined (if necessary) at a subsequent trial. Tesco made clear to me at the present hearing that any such suggestion would have been opposed because (amongst other things) it would have given rise to a prospect of the same witnesses giving evidence in relation to reliance and causation on two separate occasions.

(6) Accordingly, the issues of reliance and causation relating to the Lost Profits Claim, if they were to be pursued at all, ought to have been addressed in the MLB Claimants' witness statements served in July 2019. As it was, those witness statements said nothing about such issues.

(7) The Lost Profits Claim was not addressed in the MLB Claimants' first set of supplemental witness statements either. In their covering letter to Tesco's solicitors, dated 3 April 2020, the MLB Claimants acknowledged that the issue had not been addressed in those statements and asked Tesco to confirm (for the first time) that "*this is a matter for Trial 2*". (The MLB Claimants maintained that they assumed that Tesco shared this understanding and they were simply seeking confirmation of that *"out of an abundance of caution"*.)

(8) In its letter of 1 May 2020, Tesco indicated that it disagreed with the MLB Claimants' construction of the CMC2 Order, on the ground that all issues of reliance and causation fell to be determined at the first trial, and that if the MLB Claimants contended that "*but for the alleged misstatements, they would have invested their funds elsewhere, it was incumbent upon [them] to lead the evidence needed to establish such a case*".

(9) The MLB Claimants responded with a suggestion that all parties should agree to all aspects of the Lost Profits Claim being deferred to Trial 2. Tesco rejected that proposal on 3 July 2020 (which would, of course, have required the Court to depart from its previous orders). The MLB Claimants then indicated in a letter dated 7 July 2020 that they were willing to proceed on the basis that these issues are within the

scope of Trial 1. In that letter, the MLB Claimants said that they would provide the relevant witness statements "*as soon as possible and in good time before the PTR*".

(10) In the event, the further supplemental witness statements on which the MLB Claimants now seek to rely at Trial 1 were not served until late on 20 July 2020.

17. To this chronology I would add, though the dates were not relied on by any of the parties, that further to my own enquiry on 6 April 2020, on 8 April 2020 the trial was deferred from June to October 2020, and the PTR originally fixed for the week commencing 22 April 2020 was relisted for July 2020.

18. Initially, and indeed until 22 July 2020, the MLB Claimants' position was that they did not require relief from sanctions in relation to the supplemental evidence: all they required was permission to rely on evidence out of time. They submitted that since, though it had always been pleaded, Tesco had previously never sought disclosure or to file evidence in respect of the Lost Profits Claim, Tesco could not credibly suggest that it would be prejudiced by the lack of disclosure, nor that it had any need to file further evidence. Accordingly, the MLB Claimants submitted, there was no material prejudice to Tesco, and (since the trial date would not be upset nor the trial timetable substantially extended) there was none to other court users either. Further the court would be assisted by the evidence. On that footing, the MLB Claimants' request for permission should be granted.

19. Tesco's skeleton argument for the PTR made clear Tesco's position that the Lost Profits Claim could not fairly be accommodated in the time available before the commencement of Trial 1 because the supplemental evidence (i) gives rise to the need for further disclosure and (ii) may also necessitate additional expert evidence. That skeleton argument also emphasised that, in Tesco's view, permission to rely on the supplemental evidence should only be granted if the conditions applicable to the grant of relief from sanctions were satisfied, and that they were not.

20. In a witness statement (Mr Peter Sharp's sixth) dated 22 July 2020, served very shortly before the PTR was to commence, the MLB Claimants responded to the effect that:

(1) Tesco was not in a position to complain about the lack of disclosure: Tesco had never previously raised the issue of disclosure nor sought to explain what disclosure could sensibly be given in support of the Lost Profits claim: it was *"extremely unfortunate that Tesco had waited this long to do so…and thereby prevented meaningful discussions taking place between the parties as to what disclosure can be given in relation to the lost profits claim"*;

(2) Given that the MLB Claimants do not advance a case that, absent the investment in Tesco, they would have invested in specific, named investments, but rather seek to contend by the evidence of Messrs Donlon and Andreach, that excess cash would have been invested but it is impossible to say precisely what investments would have been acquired, any disclosure exercise could not be confined to specific proposed alternative investments. It would be potentially an enormous task since searches *"would have to be undertaken in relation to all actual and proposed investments made by the MLB Claimants in the period of approximately five years from 2009 (the date of the first investment in Tesco) until 2014 (when the MLB Claimants began selling some of their holdings in Tesco shares);"*

(3) Accordingly, giving disclosure now *"is likely to be impracticable and would not be in accordance with the overriding objective, in that (i) providing such disclosure would be an immense task which would inevitably cost hundreds of thousands, if not millions, of pounds, but (ii) it is unlikely that this would produce evidence of any significant value;"*

(4) Further, even if it might be possible to frame the disclosure searches more narrowly, Tesco had "*effectively prevented this from happening by failing to engage in a disclosure discussion in relation to this claim until the PTR."*

(5) In such circumstances, either (a) the MLB Claimants should be permitted to rely on the supplemental evidence without further disclosure and *"if necessary"* granted relief from sanctions for that purpose; or (b) if disclosure should be thought necessary, the orders made at CMC1 and CMC2 should be varied to direct that the Lost Profit Claim should be deferred until Trial 2 *"where it can properly be case managed".*

21. Thus, prior to the hearing, the MLB Claimants' acceptance of the need to comply with the criteria for relief from sanctions was rather hesitant, even grudging. However, at the hearing itself, when I questioned him, Mr de Verneuil Smith QC accepted *"in broad terms"* that his clients did need relief from sanctions as a precondition of permission to rely on the evidence; but he refined this later to say that he accepted (having regard to *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472 and *Canning v Network Rail* [2014] EWHC 2104 (QB)) that this issue *"is governed by principles equivalent to those of relief from sanctions and that that is the approach you should adopt."*

Principles as to the grant of relief from sanctions

22. There was in consequence no dispute as to the principles to be applied: they are authoritatively explained by the Court of Appeal in *Denton v TH White Limited* [2014] 1 WLR 3926, which specified a three-stage test in addition to the requirement that any application for relief from sanctions must be supported by evidence and made promptly.

23. Accordingly, three questions arise:

(1) Was the failure to adduce evidence on this topic serious and significant?

(2) Was there a good reason for the failure to adduce such evidence?

(3) In all the circumstances, should the MLB Claimants be granted relief from sanctions (having regard to the specific factors identified in CPR 3.9)? See *Denton v. TH White Limited* [2014] 1 WLR 3926, §24.

23. The burden of proof on all three elements is on the MLB Claimants as the party seeking relief: CPR 3.9(2).

24. As to the first question, Mr de Verneuil Smith accepted that the MLB Claimants could not realistically contend that the breach was not serious: it was not a trivial but a serious breach, given that the need for and application to introduce the evidence was made very late in the day and long after any supplemental witness statements were due.

25. As to the second question, however, he submitted that there was a good reason for the failure to comply, which was that after the order for a split trial at CMC 2, the MLB Claimants honestly considered, albeit erroneously, that the loss of profits claim was to be part of Trial 2, and not Trial 1; and Tesco's conduct in accepting disclosure proposals which did not cover the claim had contributed to the MLB Claimants' formation of and perseverance in that mistaken view. Mr de Verneuil Smith stressed especially that Tesco had always known that a loss of profits claim was pleaded by reference to the average returns of the series and had never sought disclosure or intimated any need for evidence. He also referred to the fact that there had never been any suggestion that expert evidence regarding the average rate of return might be required in relation to the claim. This seemed to connote that the MLB Claimants considered that they had in part been lulled into the assumption that consideration of the claim was to be deferred until after determination of primary liability.

26. As to the third question, Mr de Verneuil Smith noted that the majority in *Denton* had made clear that the court could still grant relief even if the applicants failed at stages 1 and 2 of the enquiry if the circumstances merited it; and he submitted that when all the circumstances fell to be considered, they weighed in favour of granting relief. He stressed in particular:

(1) The MLB Claimants do not have a history in these proceedings of non-compliance: they had complied throughout until now, and their default is the product of an honest misapprehension and not a breach of any rule;

(2) The MLB Claimants have conducted this large scale financial litigation with a high degree of co-operation with Tesco and it was and remains reasonable for them to have expected that if Tesco was concerned about the absence of disclosure in respect of a pleaded issue in Trial 1 it would have raised it much sooner than it did;

(3) Although the Loss of Profits claim is large in value, the supplemental evidence goes to a very narrow issue, being (a) whether there is a loss of opportunity head of claim and, if so (b) whether the average rate of returns (excluding from Tesco shares) is an appropriate measure. Tesco has not advanced a case that no claim for loss of opportunity can arise in principle, and it has simply not admitted (without any positive averment) that average rates of return are an appropriate measure for that loss;

(4) Tesco's complaint that substantial disclosure would be required if the supplemental statements were to be admitted rings hollow in circumstances where (a) Tesco has never suggested that any disclosure was necessary in respect of this claim which was pleaded at the outset; (b) Tesco has known from the disclosure already provided what the MLB Claimants' parameters of investment are, and in particular known that the series and CITs consist of pure equities in some, and a mix of equities and fixed income in others. The suggestion implicit in its submissions that it needs suddenly to know the precise proportions should be given little weight or credence; (c) in any event, the disclosure now said to be required is not likely to be probative but would be an enormous and disproportionate task;

(5) Tesco's further suggestion that expert evidence would or might also be needed is unfounded, and Tesco, which has been able to see from the MLB Claimants' schedule of loss what percentages have been calculated in respect of average

returns, has never previously suggested its need, nor did it raise the issue at CMC2 when the scope of expert evidence was determined, as it should have done if it thought it potentially necessary;

(6) Whereas Tesco would be able to make submissions to the effect that the MLB Claimants' case is too speculative to justify this head of claim, and/or that average rate of returns is not a suitable proxy, without reference to further evidence and would not be materially prejudiced, the MLB Claimants would be significantly prejudiced if the evidence is not permitted to be relied on. The supplemental statements are short but important to the MLB Claimants in setting out the evidential basis for the contention that their investment managers cannot know what precisely would have happened, and cannot sensibly advance a case as to how any cash surpluses would have been allocated, but can say that they would have been re-invested. Whilst the MLB Claimants do not accept that their case would fail entirely without that evidence, it will be weaker and *"significantly damaged if this evidence is not permitted"* and given the monetary size of the claim that would be highly prejudicial;

(7) It would in any event be more efficient to defer the Loss of Profit claim to Trial 2, so that it can be considered in the light of findings at Trial 1 (especially as to when the Tesco shares would have been sold) and with orderly exchange of evidence and disclosure.

(8) The application had been made promptly as soon as it was clear that no agreed solution (in particular, deferring the claim to be dealt with in Trial 2) could be achieved.

27. Mr Laurence Rabinowitz QC, on behalf of Tesco, submitted that the MLB Claimants had not discharged the burden on them, and in particular had persisted in the misunderstanding that had occasioned the mistake they had made in failing even at this stage to distinguish issues of fact relating to reliance and causation (which were always to be part of Trial 1) from issues of quantification (which were, if they arose, issues for Trial 2). More particularly, he submitted that:

(1) The question whether to have a split trial had been carefully considered at CMC1 and the directions had been refined at CMC2, after some months had elapsed; the orders made at each stage were clear.

(2) There was no good reason for the mistake. There was no circumstance preventing or impeding adherence to the directions ordered. Misunderstanding or overlooking the effect of a clearly expressed direction was an explanation but not a good reason for failing to comply. The MLB Claimants' apparent attempt to shift the blame for their misunderstanding of the clear provisions of the orders on to Tesco was entirely misplaced and reflected badly upon them. Tesco was entitled to take it that the MLB Claimants were treating the availability of the head of claim as being a legal issue and the selection of an appropriate measure as requiring no evidence, and it was not obliged to assist the Claimants to prove their case or point out any deficiencies.

(3) Nor was there any good or sufficiently good reason for revising the directions at CMC1 and CMC2. The 'split' between Trial 1 and Trial 2 was not only clear but plainly sensible and sustainable (as well as long and carefully considered). The

court's view that only matters of quantum calculation should be deferred was reasonable and sensible and clearly expressed. Amending the directions to provide for some parts of reliance and causation to be tried at Trial 1 and others at Trial 2 would cause its own difficulties and there was no lack of certainty, latent confusion or change of circumstances which would begin to justify it. It was not an appropriate basis for amending an order that a party should be saved from its own mistake.

(4) The MLB Claimants, upon discovering their mistake and a deficiency in their evidence, had shilly-shallied and sought to resolve the matter by bundling up issues plainly appropriate for Trial 1 into Trial 2, rather than candidly accepting it and immediately seeking relief. The application for relief from sanctions should have been made, with candid acceptance of a mistake, very soon after 3 April 2020, rather than, with little contrition, on 22 July, after exchange of skeleton arguments.

(5) Once the need for evidence was identified, the need for disclosure whereby to test it was clear and could not fairly be avoided. It would plainly be prejudicial to Tesco to permit the MLB Claimants to rely on evidence late and without disclosure if, had the evidence been adduced earlier, it would have been recognised to necessitate disclosure.

(6) The court should also bear in mind the prejudice to Tesco inherent in having at such a late stage to consider and respond to such late evidence and assess any disclosure.

(7) The further possibility of the supplemental evidence and disclosure requiring additional expert evidence was difficult to measure: but it might be necessary in order to explore the validity of the counter-factual case (what would have happened if the MLB Claimants had not invested); and if it transpired that it was necessary because of the supplemental evidence and disclosure it would plainly be prejudicial to Tesco if the pressures of time meant that it could not be brought forward.

(8) In short, refusing the application would admittedly be harsh; but allowing it would be harsher still on Tesco; and the MLB Claimants would still have an alternative claim for statutory interest.

My assessment and approach

28. I have already explained why I have concluded that (a) the MLB Claimants' application should be dealt with in accordance with the three-stage test applicable in the case of an application for relief from sanctions under CPR 3.9; (b) the failure to serve any witness evidence relating to a claim for in excess of $58 million, followed by a very belated effort (almost a year out of time) to remedy the omission by supplemental evidence, and then delay in bringing that forward for resolution, is serious and significant for the purpose of the first stage of the test. Indeed, and as indicated above, I understand that now to be conceded on behalf of the MLB Claimants.

29. As to the second question, in my judgment the explanation offered as to the reason for the failure is readily understandable; the error made is the sort that can be made in the course of preparation of a complex matter; and its revelation so late in the day was no doubt very unsettling. But, the order being clear, error indeed it was; and I do not think it is a justification amounting to "good reason" for the purpose of the second stage of

the test. I am fortified in that by further factors which compounded the initial error, and especially:

(1) the delay since 3 April 2020 when the omission now sought to be cured was identified by the MLB Claimants;

(2) the (to my mind) unsatisfactory justification for that further delay (the suggestion that the MLB Claimants were hoping for consent appearing to be thin, given the existence of a clear court order);

(3) the consequences of the delay, including the somewhat frenzied context in which the MLB Claimants have had to bring forward proceedings after their previous shilly-shallying and the resulting increased difficulty of determining their adequacy;

(4) the fact that but for the deferral of the trial date in consequence of the pandemic and its effects the MLB Claimants would have had no realistic prospect at all of introducing supplemental evidence for Trial 1; and of course

(5) the imminence of trial and the legitimate interest of Tesco in proceeding with its preparation for it without unexpected dislocation.

30. The MLB Claimants, who I fully accept have until now been co-operative and efficient in their conduct of the proceedings, have heaped difficulties upon themselves by failing to face up candidly to their mistake; and their failure at each of the first two stages of the test mandated must be weighed against them in determining the third stage or question: but not necessarily decisively (see *Denton* at [32]). The court must have regard to all the circumstances of the case so as to deal with the application justly.

31. That brings in such considerations as the harshness of denying successful claimants the fullest recovery which might be the result of refusing relief from sanctions, and also my appreciation that errors such as this do happen in the course of heavy trial preparation without egregious fault. However, it also requires such considerations to be balanced against any material prejudice to Tesco. Taken together with the answers to the first two questions, if there would be material prejudice to Tesco (apart from losing the windfall of being rid of a large claim) that would probably be decisive.

32. It is also relevant to consider the diversion of judicial resource (in this case, largely my own time) to deal with a matter which would not have been likely to require determination if it had been dealt with regularly and in accordance with the orders made.

33. The reality is that apart from some weight to be given to the MLB Claimants' point that Tesco's apparent agreement not to press for disclosure in relation to the pleaded Lost Profit Claim fed the MLB Claimants' mistaken assumption that the issue was to be dealt with in Trial 2 (limited, in my view, since I broadly accept Tesco's point that it was not for it to press for disclosure when no evidence had been offered), the only point of real substance and weight in favour of the MLB Claimants (apart from their previously notably efficient and reasonable conduct of the proceedings) is the obvious one: that a decision to refuse relief may well have the effect that the Lost Profits Claim, though always on the pleadings, fails at trial for want of proof. However, that is a matter entitled

to great weight: for the overriding duty of the court is to deal with the application justly, having regard also to the effect that it will have on the proceedings.

34. Those considerations have weighed heavily with me. I must admit to some overall reluctance to deprive the MLB Claimants of bringing forward their Lost Profit Claim if it could fairly be accommodated, notwithstanding my answers in respect of the first two questions.

35. Probably because of that, in the course of the first day of the hearing, I was tempted by the suggestion of an amendment to the orders made at CMC1 and CMC2 so as to defer all aspects of the Lost Profit Claim to be heard at Trial 2. However, and as I indicated on the second day of the hearing, on reflection I did not consider that to be an appropriate solution. Although I consider that I would have jurisdiction to make such an amendment to an interlocutory order, even in the absence of some revealed error or change of circumstance, I do not think the court should ordinarily depart from its own clear orders simply to achieve a solution for an applicant who has fallen into error. I do not think that the circumstances are such as to warrant what I take to be an exceptional course.

36. On the second day of the hearing, therefore, I encouraged instead detailed consideration of whether a disclosure exercise might be fashioned which, contrary to the prediction of all parties in their skeleton arguments, could be undertaken within a limited time and yet would be sufficient to enable a fair assessment at Trial 1 and avoid material prejudice to Tesco then and in the extra work required in the meantime. It seemed to me that the possibility of such a solution might not have been adequately addressed in the course of applications made at the last minute (and in the case of the MLB Claimants, perhaps with insufficient attention to the ramifications of their error and the real change in the scope of evidence and disclosable material sought to be introduced). I directed that efforts to formulate what might be termed a 'Goldilocks solution' should continue after the hearing, and that any proposals should be sent to me for consideration, accompanied by short supplemental observations on the proposals from each side.

37. The result was an exchange of draft orders, in the course of which, inevitably, the MLB Claimants sought to confine the required exercise whilst Tesco sought to expand it so as to demonstrate that in reality it could not be undertaken within a fair and reasonable time-frame and would in the end be deficient.

38. The MLB Claimants proposed that they should, as a condition of being granted relief from sanctions and permission to rely on the supplemental evidence, provide disclosure by 14 August 2020 of the following for the period ("the Relevant Period") between 5 October 2009 or 2010 (according to the order of the court) to 31 December 2014 in relation to the funds in respect of which damages are claimed in these proceedings:

    (1) documents recording the policies and/or practices governing the levels of cash that could or should be held by each Fund;

    (2) monthly account statements recording the levels of cash actually held by the Funds; and

    (3) any meeting minutes recording requests for instructions, and the instructions actually given, for the purposes of reducing the cash position of the Fund;

(4) in respect of any reductions in the cash position of the Funds which arise from an instruction to reduce the cash position of the Funds not disclosed at (3) above the documents constituting the instruction. The search for such documents shall be by key words "cash" and "reduction" or "reduce" or "weight" or "target" applied to the custodians who are members of the SRG or Portfolio Objectives Group across the Relevant Period (but so that for the purposes of this paragraph a reduction in the cash position of the Funds excludes reductions caused by the payment of fees or other administrative expenses).

39. Further, in respect of each decision to alter the weighting of Tesco shares during the Relevant Period, for each of the Funds the MLB Claimants proposed that they should (by 14 August 2020) also produce:

(1) Unredacted minutes of the most recent meeting of the senior research group ("SRG") or, as applicable, the core team (the "Core Team") at which investment proposals were considered;

(2) Copies of all documents recording investment proposals considered by the SRG or, as applicable, the Core Team, at that meeting;

(3) Documents recording the investment decisions in relation to those investment proposals.

40. The MLB Claimants stipulated one caveat: that *"for the avoidance of doubt, and with the exception of paragraph [38(4)] above, the Claimants should not be required to carry out "key word" searches to identify any of the documents which are responsive to paragraphs [38] and [39] above."*

41. The MLB Claimants submitted in their further Note on these proposals, which provide for manual review but not key word searches except as regards documents described in paragraph 38(4) above, that their effect is that *"within the bounds of reasonableness and proportionality, disclosure will be given of all documents recording requests for cash reduction instructions and the instructions themselves irrespective of whether such matters were discussed at a meeting of the SRG or Portfolio Objectives Groups"* (the two groups which the MLB Claimants maintain are the relevant teams within the Advisor *"with responsibility for making and implementing decisions concerning reductions in the cash position of the Funds").*

42. After considering these revised proposals, Tesco submitted the following objections in writing:

(1) It is unrealistic to expect the parties to begin a new disclosure exercise now, some two months before written openings are due to be filed, and unfair to expect Tesco to process, review and digest such disclosure in the six-week period between 14 August 2020 and 2 October 2020 (when Tesco's written opening is due);

(2) Because the MLB Claimants have left it so late, the proposed disclosure exercise has been fashioned in haste and there is a real risk that it would be repented at leisure: it would be wholly unsatisfactory if the disclosure were to prove inadequate, particularly since there will be no time for any further specific disclosure, leaving

Tesco to defend a claim for $58 million or more on the basis of incomplete disclosure.

(3) In any event, it is already plain that the proposals are inadequate in a number of respects, and would need to:

(a) extend over a broader time period (from 5 October 2009, not 5 October 2010);

(b) cover additional categories, as follows:

(i) weekly rather than monthly statements as to levels of cash held;

(ii) account statements recording cash levels on 11 specified dates when Tesco's weighting was changed (as I had floated might be appropriate);

(c) include further keyword searches (as specified in a revised draft order provided) to capture other committees identified by Tesco as having been involved in the process of selecting investments, being the Portfolio/ Asset Allocation sub-group and the Portfolio Objectives Group, and custodians who were members of them.

43. Tesco also asked for the following measures to facilitate their review of disclosure:

(1) The MLB Claimants must first have reviewed such documents for relevance and must only disclose documents which fall within the categories identified in this order and which are relevant to the issues in dispute.

(2) The MLB Claimants must deduplicate the disclosure as against documents already disclosed in the proceedings.

(3) The MLB Claimants must provide unredacted copies of documents previously disclosed in redacted form by way of replacement versions, not as new versions of the documents. Reproduced versions should maintain their original Bates numbering.

(4) The MLB Claimants must disclose documents in full families with placeholders for documents that MLB consider to be irrelevant.

(5) The MLB Claimants must organise the disclosure so as to show the paragraph of this order under which they have been disclosed.

(6) The documents must be disclosed with full metadata.

My decision

44. I have not found the balance easy. My attempts to find a Goldilocks solution have prompted the crafting of proposals and counter-proposals which suit their proponents but do not, at least without revision, provide a resolution of the issue of prejudice.

Further, there is force in, and weight to be given to, Tesco's objection that any substantial exercise will inevitably distract them from trial preparation.

45. Notwithstanding my reluctance to make an order which may deprive an otherwise successful claimant of full recovery, I have concluded that the MLB Claimants' application should be refused unless and until I am satisfied that (a) the MLB Claimants can and do provide sufficient disclosure in a digestible form by no later than 14 August 2020, (b) the resulting extra work for Tesco in processing the disclosure is fairly and proportionately manageable and (c) the disclosure does not result in a justified need for expert evidence.

46. Accordingly, I propose to order in the first instance that, assuming the MLB Claimants continue to press for the admission of the supplemental evidence having regard to the feasibility and costs of the exercise, the MLB Claimants provide by 14 August 2020 disclosure in accordance with their proposals but amended (and thus extended) as follows:

(1) The Relevant Period shall run from the earlier date of 5 October 2009, as Mr Sharp himself had envisaged in his sixth witness statement on behalf of the MLB Claimants;

(2) If, as Tesco understands, the cash position of the funds was monitored weekly, weekly account statements should be provided: if monitoring was monthly, monthly statements will suffice, subject to (3) below;

(3) If there are account statements for the 11 specified dates on which Tesco's weighting was changed and those were considered by any of the relevant groups or teams they too should be provided;

(4) Paragraph 3(4) should extend to both requests for instructions and the instructions actually given for the reasons identified by Tesco;

(5) The key words should be extended as proposed by Tesco and set out in Appendix 1 and these should be applied to the custodians who are members of any team or group responsible on behalf of the MLB Claimants for considering investment proposals for the investment or retention of cash (which shall be confirmed by a witness statement expressly stating each team, their constitution and their roles, to be provided by the MLB Claimants to Tesco within 7 days);

(6) Likewise, the minutes of any team responsible on behalf of the MLB Claimants for considering investment proposals for the investment or retention of cash should be disclosed, and the amendments to the MLB Claimants' proposal proposed by Tesco to paragraph 4(2) shall be adopted;

(7) I do not require the additional key word searches proposed by Tesco in paragraphs 4(4) and (5) of their amended draft;

(8) As to the matters proposed to assist Tesco in the task of reviewing such disclosure, I consider that:

(a) The MLB Claimants must first have reviewed such documents for relevance and must only disclose documents which fall within the categories identified in this order and which are relevant to the issues in dispute.

(b) The MLB Claimants must provide unredacted copies of documents previously disclosed in redacted form by way of replacement versions, not as new versions of the documents. Reproduced versions should maintain their original Bates numbering.

(c) The MLB Claimants must disclose documents in full families with placeholders for documents that MLB consider to be irrelevant.

(d) The documents must be disclosed with full metadata.

(e) It would be preferable if the MLB Claimants organise the disclosure so as to show the paragraph of this order under which they have been disclosed.

(f) It would also be preferable if the MLB Claimants can deduplicate the disclosure as against documents already disclosed in the proceedings.

(g) Neither (e) or (f) was discussed at the hearing; and if either is not possible within the time-scale, the MLB Claimants must explain why that is so, and I will give formal directions.

47. Once disclosure is provided, Tesco must have a limited time (I have in mind 14 days) to determine and set out in a witness statement (a) whether they have any further objections or require further disclosure and (b) whether they consider that expert evidence would be necessitated. The MLB Claimants may respond within 7 days. The MLB Claimants will no doubt bear in mind that any deficiencies in disclosure will affect the reliability of their supplemental evidence; and Tesco will no doubt have that in mind also.

48. After disclosure and these exchanges, the matter must then be restored to me. I make no order for relief from sanctions until then. I propose finally to determine the matter according to whether after the exercise is achieved I consider that the disclosure is sufficient to enable Tesco to test the Loss of Profits Claim so that it may be determined justly, and that further expert evidence is not necessary.

49. I appreciate that this cautious, incremental approach is burdensome. It is also burdensome for the court. It is regrettable: but it is the consequence of my view that although I do not regard the MLB Claimants' error and subsequent conduct as entirely disqualifying them, and although in my view, the task of processing well-ordered disclosure on what is in the end a fairly discrete part of the case has been rather exaggerated by Tesco and I consider that I can fairly expect Tesco and its impressive array of lawyers to deal with limited dislocation, I must not in all the circumstances I

have described admit supplemental evidence if thereby material prejudice to Tesco in testing it will be caused, or if it becomes clear then that it would necessitate expert evidence which would dislocate the trial timetable.

50. Much or all of this is the consequence of the MLB Claimants' mistaken assumption, compounded by a failure to acknowledge and deal with its consequences head-on and immediately. It seems to me to be likely that the MLB Claimants will have to pay the costs, though I defer adjudication of costs to be dealt with at the hearing which I have indicated will be required, or on paper if the matter is resolved between the parties without the need for one.