Neutral Citation Number: [2025] EWHC 436 (Ch)

Case No: IL-2024-000161

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

Royal Courts of Justice
The Rolls Building
Fetter Lane
LONDON
EC4A 1NL

Thursday, 27 February 2025

Before :

MR JUSTICE FANCOURT

- -

BETWEEN:

(1) J&J SNACK FOODS CORPORATION
(2) ICEE CORPORATION

Claimants

- and –

(1) RALPH PETERS & SONS LIMITED
(2) MARK JEFFREY PETERS

Defendants

- -
- -

Mr Mark Handley, solicitor advocate (instructed by **Duane Morris**) for the **Claimants**
Mr David Cavender KC, Beth Collett and Katherine Boucher (instructed by **RPC**) for the **Defendants**

Hearing dates: 11 (pre-reading), 12, 13 February 2025

- -

APPROVED JUDGMENT

The draft judgment was sent to the parties on 24 February 2025

Mr Justice Fancourt:

1. On 3 December 2024, His Honour Judge Davis-White KC heard an application by the Claimants for a worldwide freezing injunction and an access and imaging order against both Defendants. The application was heard without notice to the Defendants and in private. The claim previously issued but not served was for the usual kinds of injunctive and declaratory relief in respect of alleged infringement of the Claimants' "Slush Puppy" and "Slush Puppie" UK and EU trade marks from June 2019 onwards, and for passing off from 2021 onwards, and alternatively for restitution of the amount by which the Defendants were said to have been enriched at the Claimants' expense.

2. The Judge granted the injunction and the access and imaging order in broadly the terms sought by the Claimants (together, "the 3 December Orders").

3. Although the Claimants had sought to freeze up to £10,000,000 of assets, the wording of paragraphs 5 and 8 of the Order effectively freezes £20,000,000 of assets, as "the Respondent" was defined as meaning either or both of them, and the freezing order was directed to each of them. The Order specifically freezes two houses in Barnes, London in the name of the Second Respondent ("Mr Peters") and his shares in the First Respondent ("RPSL"), among other assets. A return date of 12 December 2024 was specified.

4. As for the access and imaging order, although this was nominally made against Mr Peters and RPSL, in reality it was executed against a company called Frozen Brothers Limited ("FBL"), a subsidiary of RPSL, at its offices in High Wycombe, and nowhere else. RPSL is a non-trading holding company for FBL, which trades in the UK, and various sister companies of FBL that trade in Europe. Mr Peters, who is a director and shareholder of RPSL and a director of FBL, is a resident of Monaco, and he was out of the country at the time when the search order was executed on 5 December 2024.

5. The documents identified in schedule A to the Order held by FBL (or by RPSL) on servers in FBL's offices were successfully imaged on that day, and they are held by the Independent Computer Specialist, under the supervision of the Supervising Solicitor, in accordance with the procedures established by the Court of Appeal decision in <u>TBD (Owen Holland) v Simons</u> [2020] EWCA Civ 1182.

6. At the return date, Miles J gave directions for a further 2-day hearing of the applications and continued the freezing injunction until then. He varied the terms of the disclosure requirements and exceptions, so that the Defendants had to make an affidavit of their worldwide assets valued above £50,000 but the affidavit was to be held by a partner of their solicitors, RPC, to the Court's order until the further hearing date.

7. In giving judgment explaining the variations of the order, Miles J expressed cautious concern about the circumstances in which the orders had been sought and granted without notice when litigation between the Second Claimant ("ICEE") and FBL had been going on in Ohio since 2019. This included a counterclaim by ICEE for infringement of its trade marks by FBL equivalent to part of the claim now brought against the Defendants. He also expressed concern about the amount of the freezing injunction, since the quantum appeared to relate to profits arguably made by FBL, not profits made by Mr Peters or RPSL, who are essentially being sued as accessories to FBL's alleged infringement.

8. On 17 January 2025, the Defendants issued an application for an order discharging the 3 December Orders on the ground of a failure of fair presentation by Mr Handley at the without notice hearing. The hearing of that application was estimated by the Defendants to last 10 hours, and the application notice indicated that it should be listed in the same window that had been allocated for the hearing of the Claimants' application to continue the injunctions.

9. At the hearing before me, the Claimants were represented, as they had been previously, by Mark Handley, a solicitor advocate and partner of Duane Morris, the international law firm that has been acting for ICEE in the Ohio litigation and for the Claimants here. The Defendants (the respondents to the Claimants' application to continue the injunctions) were represented by David Cavender KC, Beth Collett and Katherine Boucher.

10. Having considered carefully all the submissions made to me, I am satisfied that the freezing injunction and the access and imaging order should be discharged, and that there are insufficient grounds for re-granting any freezing injunction. The Defendants have agreed that, despite their objections to the 3 December Orders and regardless of any order that I might make setting it aside, the documents imaged should be retained securely until at least the first CCMC in this case.

11. My reasons for my conclusion are explained below.

The allegations of failure of full and frank disclosure (or fair presentation)

12. The claim issued on 10 October 2024 (with full Particulars of Claim attached) is unusual in one important respect: the Claimants sue Mr Peters and RPSL as accessories to infringement by a person (FBL) who is not a party to the claim. Although the Particulars of Claim allege that "the Defendants acting together and/or as accessories of FBL" have done various infringing activities, in reality (as explained further below) the claim is against them as persons who are joint tortfeasors with FBL, either on the basis that they knowingly procured infringement by FBL, or on the basis that the infringement was in pursuance of a common design with FBL.

13. In order to succeed on that claim, the Claimants will need to prove the primary liability of FBL, the primary tortfeasor: <u>OBG Ltd v Allen</u> [2007] UKHL 21. Liability of a non-party to the claim is therefore a necessary precondition to the liability of the Defendants, but it is not sufficient: knowledge of the wrongdoing by FBL, or alternatively a common design, have to be established against the Defendants individually. Nor does any liability of FBL to account to the Claimants for its wrongly derived profits determine the amount of the Defendants' liability. If the liability of the Defendants is only accessory, they must account for any profits that they have received as a result of FBL's and their wrongdoing, not the profits that FBL made: <u>Lifestyle Equities CV v Ahmed</u> [2024] UKSC 17; [2025] AC 1 ("*Lifestyle Equities*").

14. The apparent failure of the Claimants to understand that this is what the Supreme Court decided is at the heart of the application to set aside the freezing injunction, as the amount of the claim against the Defendants (quantified in the claim form as £14,848,000, said to be the gross profits from revenue of about £24,000,000), and the amount of the freezing

injunction sought and granted, are based on gross profits that FBL has allegedly made, not on any profit received by either Defendant.

15. This is not, however, the only basis on which the Defendants seek to set aside or vary the 3 December Orders. Mr Cavender argued that something went seriously wrong with the presentation of the Claimants' case to Judge Davis-White KC, which was unfair and incomplete, and that it is clear from the transcript that Mr Handley made no proper attempt to explain:

    i) why it was appropriate for the applications to be made without any notice to the Defendants;

    ii) so that the Judge understood its implications, the distinction between the claim being brought in relation to the 2019-2021 period ("Phase 1") and the much larger claim being brought in relation to different alleged infringements in the period from 2021 to date, and continuing ("Phase 2");

    iii) what the solid evidence was on the basis of which there was said to be a serious risk of either Defendant dissipating assets or making itself judgment-proof;

    iv) the relevance to the questions of risk of dissipation and the need for a without notice hearing of the passing of time from 2020 (when the counterclaim against FBL in Ohio was brought in relation to Phase 1 infringement) and December 2024;

    v) the weakness of the Phase 2 claim and the impact of that for the quantum of the claim and the scope of the access and imaging order;

    vi) the argument based on *Lifestyle Equities* that gross profits made by FBL were not the proper basis for the quantum of a claim against the Defendants.

16. In short, and in respect of each of these matters, the Defendants say that Mr Handley failed to explain to the Judge what points or arguments would be likely to be made by them if they were present at the hearing of the application. The Defendants say that the burden on him was increased by the indication that the Judge gave, in response to a submission that there could be joint and several liability for infringement because it was a tort, that he was "not an intellectual property lawyer".

The duty of fair presentation at without notice hearings

17. The law on the duty of full and frank disclosure (or fair presentation) is clear. It can be found in numerous decisions. I can take it from a recent and comprehensive review of the principles by Carr J, as she then was, in <u>Tugushev v Orlov</u> [2019] EWHC 2013, which was cited with approval by the Court of Appeal in <u>Derma Med Ltd v Ally</u> [2024] EWCA Civ 175 at [29]:

> "i) The duty of an applicant for a without notice injunction is to make full and accurate disclosure of all material facts and to draw the court's attention to significant factual, legal and procedural aspects of the case;
> ii) It is a high duty and of the first importance to ensure the integrity of the court's process. It is the necessary corollary of the court being prepared to

depart from the principle that it will hear both sides before reaching a decision, a basic principle of fairness. Derogation from that principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. The court must be able to rely on the party who appears alone to present the argument in a way which is not merely designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make;

iii) Full disclosure must be linked with fair presentation. The judge must be able to have complete confidence in the thoroughness and objectivity of those presenting the case for the applicant. Thus, for example, it is not sufficient merely to exhibit numerous documents;

iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. The duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made. The urgency of a particular case may make it necessary for evidence to be in a less tidy or complete form than is desirable. But no amount of urgency or practical difficulty can justify a failure to identify the relevant cause of action and principal facts to be relied on;

v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise and the possible difficulties in the claim, but need not extend to a detailed analysis of every possible point which may arise. It extends to matters of intention and for example to disclosure of related proceedings in another jurisdiction;

vi) Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect;

vii) A defendant must identify clearly the alleged failures, rather than adopt a scatter gun approach. A dispute about full and frank disclosure should not be allowed to turn into a mini-trial of the merits;

viii) In general terms it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself;

ix) If material non-disclosure is established, the court will be astute to ensure that a claimant who obtains injunctive relief without full disclosure is deprived of any advantage he may thereby have derived;

x) Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is

> substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged;
> xi) The court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties;
> xii) The court nevertheless has a discretion to continue the injunction (or impose a fresh injunction) despite a failure to disclose. Although the discretion should be exercised sparingly, the overriding consideration will always be the interests of justice. Such consideration will include examination of i) the importance of the facts not disclosed to the issues before the judge ii) the need to encourage proper compliance with the duty of full and frank disclosure and to deter non-compliance iii) whether or not and to what extent the failure was culpable iv) the injustice to a claimant which may occur if an order is discharged leaving a defendant free to dissipate assets, although a strong case on the merits will never be a good excuse for a failure to disclose material facts;
> xiii) The interests of justice may sometimes require that a freezing order be continued and that a failure of disclosure can be marked in some other way, for example by a suitable costs order. The court thus has at its disposal a range of options in the event of non-disclosure."

18. In Uconinvest LLC v Jysan Holding LLC [2024] EWHC 1532 (Ch), having referred to this summary, I observed that:

> "Applications for without notice freezing orders, whether domestic or worldwide, are now a routine part of the business of the Chancery Division and the Commercial Court. It is easy therefore to regard them as "normal", but any hearing where only one side of the case is heard should be regarded as exceptional. Further, freezing orders that are broad in their reach are capable of having very serious consequences for a respondent. The price of obtaining such relief without notice to the respondent is a heavy responsibility to ensure that the matter is fairly presented to the court, not slanted or partial, and that the points that the respondent would wish to make were they present, so far as able to be anticipated, are fairly put before the court for consideration. That is particularly so when serious allegations are made against the absent parties."

This observation applies even more strongly when, as Mr Cavender put it, the Claimants are seeking to deploy both "nuclear weapons" in the court's armoury at the same time.

The appropriateness of a without notice hearing

19. The first criticism made by the Defendants was in relation to whether a without notice hearing was appropriate at all, and how this was dealt with at the hearing. The evidence in support of the application (First Affidavit of David Wolfsohn, sworn on 9 October 2024 ("Wolfsohn 1"), paras 110, 111) had asserted that notice would defeat the purpose of the access and imaging application, as Mr Peters had a record of dishonesty and fraud,

including a failure to preserve evidence following disclosure requests, and therefore the interests of justice were furthered by a without notice hearing. This was the only evidence seeking to comply with CPR rule 25.3(3), which requires evidence to explain why an application is made without notice.

20. In his skeleton argument, Mr Handley made similar assertions: he said that in relation to the freezing application and the imaging application, giving notice to Mr Peters would defeat the purpose of the application, and referred to evidence of Mr Peters having allegedly staged a theft of his laptops days after a discovery request was made in relation to their contents in Ohio.

21. So the only case made prior to the hearing why no notice should be given was the risk of destruction of documents. Relevant to that would have been the fact that discovery of FBL's documents relating to the Phase 1 claim had previously been given in Ohio; but that was not mentioned in the full and frank disclosure sections of Wolfsohn 1, nor in Mr Handley's skeleton.

22. At the hearing, the only exchange that took place touching on whether notice of the application should be given was as follows:

> "Judge: The second [housekeeping] point is that this hearing should obviously be in private so I will order that. That is in the interests of the administration of justice. The application is likely to be frustrated if it is in public, hence it has already been listed I think in terms of anonymity. So I will make that order.
>
> I have had the revised hearing bundle, your skeleton, for which thank you, and the authorities bundle.
>
> Mr Handley: As another housekeeping matter, my Lord's availability for today given the late start ……"

Nothing was said about whether notice could or should have been given to the Defendants.

23. In his judgment, Judge Davis-White KC said:

> "… I turn to the orders that are sought in this case. Before I do so, I should make clear that this is an interim hearing on an *ex parte* (without notice) basis at which Mr Peters and his company have not had an opportunity to make representations. Such a hearing is necessary in the particular circumstances of this case given the relief being sought. Nevertheless, I am not making final findings in relation to any of the matters that I have referred to. I simply have to consider, as it were, the evidence put before me at this stage, assume that (unless there are grounds to consider it untrue) factually what is put forward is correct and draw appropriate inferences from it."

24. I asked Mr Handley why the issue of notice was not raised with the Judge and he said that he understood at the time that the Judge had dealt with it, in the remarks in the transcript that I have quoted, and so it was unnecessary for him to address it further. I indicated that the Judge appeared to be dealing with whether CPR rule 39.2 was satisfied and required a private hearing. Mr Handley said:

> "I may have got this wrong on the day, I had understood the judge, almost the very first things he seemed to be saying, obviously this is ex parte, that is in the interests of the administration of justice, likely to be frustrated if it is in public, and moved on, thinking that the evidence that was in the skeleton had secured agreement from the court that ex parte was appropriate in this instance. The discussion that I had with the judge about the drafting of the imaging order, which goes on for quite a few pages, I would recommend my Lord read that, if you have a chance later on. He is very concerned about the tipping off of Mark Peters, that the imaging order be drafted in a way to make sure he does not get advance notice, which again, I apologise if I have misunderstood where the court was on the day, but I had understood that he was entirely with me on ex parte and was willing to craft the orders in a way that reflected that."

25. I read the passages of the transcript to which Mr Handley was referring, which are a discussion about the terms of the access and imaging order. There is a section of them where the Judge was resistant to what he called a "gagging order" being included, the purpose of which was, apparently, to stop anyone at FBL contacting Mr Peters to warn him of the imaging being conducted. The Judge accepted the concern about his being "tipped off", i.e. that it might lead to documents that Mr Peters had control of being lost or destroyed, but concluded that such a provision was not justified after the Order had been executed in High Wycombe. This passage supports Mr Handley's argument that the Judge accepted that there was a risk of tipping off that might lead to documents being destroyed.

26. However, none of this really addresses the Defendants' point, which is that what was required was a fair presentation of the case for and against the necessity for the hearing (or part of it) to be held without notice. Any hearing without the party against which relief is being sought is exceptional and needs to be justified. There must be a "well-founded fear that action to the detriment of the applicant might be taken by the respondent should notice be given" (per Trower J in <u>Piroozzadeh v Persons Unknown Category A</u> [2023] EWHC 1024 (Ch) at [11], paraphrasing what Hoffmann J said in <u>Re First Express Ltd</u> [1992] BCLC 824 at 828E.

27. Although it is often the case that a freezing injunction application and, even more so, a search and seize or access and imaging application, is heard without notice, that is only where it is necessary and if not hearing the other party is justified. The case for excluding the respondent has to be justified by evidence, be persuasive, and be explained to the judge at the hearing, and then there has to be a conscientious attempt to compensate for the (otherwise) one-sided nature of the hearing.

28. The only basis advanced (in writing only) for a hearing without notice was the risk of destruction of documents. That risk does not, on the face of it, justify hearing an application for a freezing injunction without notice. The Claimants did assert a risk of the Defendants seeking to make themselves judgment-proof as a reason why a freezing injunction should be *made*, but they did not rely on it as being a reason why, if 3 clear days' (or even 24 hours') notice of a hearing were given, there was a real risk that the Defendants would have made themselves judgment-proof by the time of the hearing.

29. Mr Handley was wrong to acquiesce in the initial views expressed by the Judge that a hearing in private was justified and not (a) seek to explain why both applications were

being pursued without any notice to the Defendants and (b) what issues might be raised by the Defendants about whether such reasons were good reasons. It is not a question of whether the Judge was satisfied, or appeared to be "with him" on the basis of the very limited justification provided in writing. Although there was, in my judgment, sufficient evidence about the prior conduct of Mr Peters to give rise to a well-founded concern that documents might become "lost" if any notice were given, there was nothing like sufficient evidence of a real risk of the Defendants (who were the holding company and director of a group of long-established, trading and profitable companies) making themselves judgment-proof overnight, if short notice of the freezing injunction application were given, or even within 3 clear days.

30. The only evidence of misconduct, on which the Claimants relied for the hearing without notice, was that of Mr Peters allegedly fabricating commercial documents or communications relating to a 2000 agreement between FBL and ICEE, and then somewhat implausible explanations provided on behalf of Mr Peters as to why he was unable to give disclosure of his laptops in the Ohio proceedings, and how an important file of papers appeared to have been lost.

31. A good deal of the evidence on behalf of the Claimants and their presentation before Judge Davis-White KC, and on paper before me, was devoted to these allegedly dishonest activities of Mr Peters. I indicated during the hearing that I was satisfied that there was a strong prima facie case of wrongdoing in relation to the alleged forgery of documents (though no finding of forgery has yet been made in Ohio or elsewhere). As a result of the argument that I heard, I am also satisfied that the circumstances of the alleged loss of laptops and a file of documents call for a proper explanation from Mr Peters and that – in the absence of any such explanation in evidence before me – the right conclusion is that a strong prima facie case of misapplication of documents required in litigation has been established.

32. Mr Handley suggested that these issues go to the heart of the claim against the Defendants (and so amount to sufficient evidence of a real risk of immediate steps to avoid a judgment) because the allegedly forged agreement provided the pretext for FBL to continue to trade using the Claimants' trade marks until 2021. He also submitted that the alleged dishonesty of Mr Peters justified a fear of his taking steps to make himself judgment-proof, and that the alleged misapplication of documents justified a fear that other documents required as evidence in this claim would be likely to be misapplied, if any notice of the Claimants' application was given to him, or to RPSL.

33. On the issue of fair presentation, however, the simple fact is that there was no attempt by Mr Handley to divert the Judge from jumping to a conclusion about the necessity for a without notice hearing, and to ensure that he placed fairly before the Judge facts that could point in a different direction. These would have included that, as far as the Phase 1 claim was concerned, the documents relating to FBL's trading in Phase 1 and its use of the Slush Puppie trade marks or names (which were the first tranche of documents sought to be imaged) had been disclosed in Ohio, so were safe from destruction; that the allegations of infringement during Phase 1 and a counterclaim for an account of profits and punitive damages had been live in Ohio for years without there being evidence that either Defendant or FBL had taken any steps to try to protect assets from the potential reach of a judgment creditor; that, on the contrary, FBL had continued to trade successfully during that period, had paid some royalties to the Claimants, and had assets in excess of £26,000,000, as shown in its published financial statements for 2021, 2022

and 2023; and that RPSL was no more than a holding company, whose only assets were the shares of its subsidiaries.

34. I will return later to whether there was a fair presentation of the issue of risk of serious dissipation in connection with the freezing injunction application. The failure openly to address the question of whether the hearing of both applications should proceed without notice, while a concern and in itself a failure of fair presentation, is in any event outweighed by other failures of fair presentation to which I will now turn.

The failure adequately to distinguish a good arguable case on Phase 1 from a good arguable case on Phase 2

35. Mr Handley did not make it clear to Judge Davis-White KC that he was seeking to include profits allegedly accruing to FBL in Phase 2 in the amount sought by way of freezing injunction, or that the second and very extensive class of documents sought to be imaged related to Phase 2, not Phase 1. He did not explain that, for those purposes, he needed to persuade the Judge that he had at least a good arguable case of infringement by FBL and accessory liability on the part of the Defendants (or primary liability of the Defendants) and/or of passing off in relation to FBL's (or the Defendants') use of the Slushy Jack's name and sign. Slushy Jack's was the name in which Mr Peters decided to re-brand in 2020, and the Claimants allege that this decision was taken once evidence before the Ohio court established that the 2000 agreement that FBL was relying on for continued use of the Slush Puppie marks was probably a forgery. The transition to Slushy Jack's took place during 2021 and is evidenced by letters written by Mr Peters on behalf of FBL to its customers.

36. What Mr Handley said in his skeleton, addressing the freezing injunction application under the heading *Good arguable case?*, was that:

> "Understanding the need to avoid a mini-trial, the Claimants particularly rely upon the incontrovertible evidence supporting the Phase 1 Claims."

There was nothing said in this section about a good arguable case on the Phase 2 Claims.

37. In relation to the access and imaging application, the skeleton addressed *Strong prima facie case* by stating only:

> "While it is recognised that the threshold of "strong prima facie" case (or the slightly lower "high degree of assurance") that the Claimants will be able to establish their claims (as per Nix v Emerdata Ltd [2024] EWHC 125 (Comm) … at [31] to [32]) is notably higher than a "good arguable case", nonetheless the evidence here of trade mark infringement, passing off and unjust enrichment is more than enough to satisfy this requirement."

The skeleton did not explain how it did.

38. In oral submissions, Mr Handley said:

> "We say, as my Lord has summarised, we sail over the good arguable case threshold and even the higher threshold for an imaging order, an extremely

> strong prima facie case or high degree of assurance that we would succeed at trial. There are different formulations of the same test. But we passed that as well.
>
> We rely in particular on the phase one claim at this interlocutory stage, obviously without in any way conceding that the phase two claims are weaker, but we recognise that under the Trade Marks Act for the phase two claims, we need to show things like confusion and damage to the goodwill and trademark of Slush Puppie, which is harder to do at this stage, so we place particular reliance on the phase one claims for the merits test that we need to meet."

At that point, the Judge diverted Mr Handley to the question of why the principal infringer, FBL, was not being sued, and the nature of accessory liability, and then Mr Handley embarked on the evidence of Mr Peters' alleged dishonesty, and what dishonesty was said to give rise to, namely a risk of dissipation of assets or making oneself judgment-proof in other ways.

39. After the short adjournment, Mr Handley returned to the access and imaging application and the higher merits test that applied to it – strong prima facie case or high degree of assurance of success at trial. After a short discussion about what the correct test was and what it meant, the following exchange took place:

> "Judge: Anyway, it does not matter. I think here I am satisfied whatever the test is you meet it so let's move on.
>
> Mr Handley: I think that is absolutely our submission and, in particular, at this interlocutory stage we relying on the Phase 1 claims. The best part of two years of continued use without the authority of the trade marks.".

The discussion then moved on to the risks that an imaging order was intended to mitigate and whether they were proved by the evidence.

40. Not only did Mr Handley say, in relation to the freezing injunction application and the access and imaging application separately that he was relying on the Phase 1 claims, but no exposition or argument was addressed at all to how, on the evidence, the Claimants established a good arguable case (much less a strong prima facie case) that the claims under s.10(2) and s.10(3) of the Trade Marks Act 1994, or a passing off claim, for Phase 2 were established to the requisite standard. Nor did he attempt to do so in front of me, on the application to continue the freezing injunction. Mr Handley tried to persuade me that saying that he relied primarily on Phase 1 did not mean that he was not also relying on Phase 2, which he was. I reject that. The clear message given to the Judge was that he did not need to trouble himself with whether a good arguable claim or a strong prima facie case was established on the Phase 2 claims.

41. The Phase 1 claims and the Phase 2 claims are very different in kind. The Phase 1 claim is an allegation of use of an identical sign, viz the Slush Puppie marks themselves, for the period June 2019 up to about mid-2021, with use of the marks tailing off significantly in 2021. FBL was using identical signs pursuant to its argument that it was entitled to do so, under the 2000 (allegedly forged) agreement. Upon the Ohio court determining that

the 1999 agreement had been lawfully terminated in 2019, and if the 2000 agreement was a forgery, FBL was apparently infringing after June 2019.

42. However, FBL stopped using the Claimants' marks and re-branded their business to Slushy Jack's. Mr Peters acquired a UK registered word mark "Slushy Jack's" and designed a figurative device that has been used by FBL as a sign since 2021. The word mark and the device are not identical with the Claimants' marks and therefore the claim of infringement depends on establishing either (a) that the signs are similar to the marks and there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the marks, or (b) that the sign is similar to the mark and takes unfair advantage of, or is detrimental to, the distinctiveness or repute of the mark (s.10(2), (3) of the 1994 Act).

43. Assessment of similarity requires a careful consideration of aural, visual and conceptual similarity, paying particular regard to any dominant features of the marks and signs; and assessing the likelihood of confusion for the purposes of s.10(2) of the Act is a multi-factorial assessment, not a simple exercise of comparison with both marks placed before one. The correct approach is set out in the judgment of Arnold LJ in Easygroup Ltd v Nuclei Ltd [2023] EWCA Civ 1247 at [75], with 11 different and overlapping principles that have to be borne in mind:

> "(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
> (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
> (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
> (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
> (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
> (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
> (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
> (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

> (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
> (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and
> (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion."

44. Similarly, on the assessment of infringement under s.10(3), there are eleven different requirements that may need to be addressed, set out by Arnold LJ in Match Group LLC v Muzmatch Ltd [2023] EWCA Civ 454 at [55]:

> "A proprietor of a registered trade mark alleging infringement under Article 9(2)(c) of the EUTM Regulation, Article 10(2)(c) of Directive 2015/2436 and section 10(3) of the 1994 Act must show that the following requirements are satisfied: (i) the registered trade mark must have a reputation in the relevant territory; (ii) there must be use of a sign by a third party in the relevant territory; (iii) the use must be in the course of trade; (iv) it must be without the consent of the proprietor; (v) it must be of a sign which is identical with or similar to the trade mark; (vi) it must be in relation to goods or services; (vii) it must give rise to a link between the sign and the trade mark in the mind of the average consumer; (viii) it must give rise to one of three types of injury, that is to say, (a) detriment to the distinctive character of the trade mark, (b) detriment to the repute of the trade mark, or (c) unfair advantage being taken of the distinctive character or repute of the trade mark; and (ix) it must be without due cause."

45. The Claimants appear to have been reticent about seeking to establish before Judge Davis-White KC that the requirements of s.10(2) or s.10(3) were satisfied to a standard of good arguable case in relation to the Phase 2 claims. Mr Handley did not take the Judge through the issues that had to be proved and certainly did not explain to the Judge the arguments that the Defendants might be expected to raise about why neither of the types of infringement claim, or the passing off claim, was established to the requisite standard, whether on the basis of similarity, confusion, detriment or otherwise.

46. What was done in the skeleton argument was to by-pass entirely the question of whether there was at least a good arguable case in relation to Phase 2 claims.

47. In Wolfsohn 1, the position on similarity was misrepresented. Mr Wolfsohn asserts at para 11 that there is a good arguable case in relation to all the claims "but the one that can most readily be identified without a mini-trial is the claim in the Phase 1 Claim under 10(1) of the TMA". He then asserts (para 39) that the Defendants transitioned the RPSL group's customers to a frozen drink product that was identical to Slush Puppie under the Slushy Jack's sign, and that this was in the guise of a re-branding exercise using the same recipe.

48. At para 42, Mr Wolfsohn says:

> "To further add to the confusion, the design of the Slushy Jack's logo was very similar to the Claimants' registered trade marks and other non-registered devices in which they had acquired goodwill. Indeed, as illustrated below, the Slushy Jack's devices used, among other things, similar colours and depicted characters in a similar stance, each holding outright a drinking container featuring a miniature version of the character."

There are then two colourful images side by side: one a device featuring a puppy, which is not one of the Claimants' trade marks; the other a device featuring a child in a fur hat and mittens holding out a drink. Both wear blue coloured clothing, which is the same colour as the frozen drink in the cup.

49. Although there is similarity of the devices, the issue of similarity under s.10 of the Act, which requires an assessment in relation to a trade mark of the Claimants, has nothing to do with the similarity of these devices, as the coloured puppy device is not a trade mark of the Claimants (whether in colour or in black and white). The trade marks are three word marks and black and white device marks with a puppy in a very different pose, surrounded by the words "SLUSH PUPPIE", and a different puppy's mouth device. At first blush, there is therefore little similarity between the Slushy Jack's devices and the Claimants' Slush Puppie word or figurative marks. Further, no attempt was made to establish the existence of goodwill connected to the Claimants' coloured puppy device.

50. At the hearing, the following exchange took place:

> "Judge: … at the point at which it looks like the fraudulent documents are all coming to light as being fraudulent, they move to what is described effectively as a rebrand into a new product they say called Slushy Jack's but which seems to be the same product or at least it is being sold to the public as being the same product full stop.
>
> Mr Handley: we take issue with the phrase rebrand because it suggests that they have any power over the slush puppy brand, but yes, they create a new trade mark, a new brand, which we say bears rather striking similarities ---
>
> Judge: striking similarity, and in fact it is all your product and recipes and everything else, probably.
>
> Mr Handley: yes, they may have changed the recipes since, but certainly at the initial change of brand, they are advertising it to the retailers as the same recipe that people always loved.
>
> Judge: they are selling them both side-by-side at one point as well?
>
> Mr Handley: yes, because there are thousands of these machines out there at retailers and it does take a while to change the covers of those machines and it takes a while, the retailers are allowed to keep using slush puppy cups and things like that even after the Slushy Jack's brand is launched, so yes, there is a period of transition where the two brands are being portrayed as twins.
>
> Judge: on the face of it, you produce quite convincing and large quantities of evidence about the way in which the trading has carried on in those two

> periods to justify the case. And you say in terms of the slightly different test for the merits of the claim, you certainly obviously passed, you say, the arguable test of the real prospect of success for a freezing injunction but you also pass the higher test for an imaging order.
>
> Mr Handley: yes, those are absolutely my submissions …"

51. This exchange did not address the points on which the Judge needed to be satisfied that there was a good arguable case for trade mark infringement in Phase 2 (or even the requirements of goodwill, misrepresentation and damage for a passing off claim, if it was to be relied on). Accordingly, the exchange with the Judge did not draw to his attention the arguments that the Defendants would be likely to raise against a conclusion of similarity, or any of the 11 requirements for establishing confusion of the public, or the requirements for establishing s.10(3) infringement, and in particular whether the case was put on the basis of detriment to repute, detriment to distinctiveness, or the taking of unfair advantage of distinctiveness or repute, or more than one of these.

52. Mr Handley allowed the Judge to talk himself into accepting that an even higher test of very strong prima facie case had been established in relation to the Phase 2 claim, indistinguishably from the Phase 1 claim, when in truth the Claimants had not surmounted (or properly addressed) the question of whether they had a good arguable case on the Phase 2 claim. They did establish a very strong prima facie case on Phase 1 against FBL, but that does not carry the Phase 2 claims with it.

Failure to differentiate the quantum of the Phase 1 and Phase 2 claims

53. The next failure of fair presentation comes in the way in which the Phase 2 claim, though not addressed or established as a good arguable claim, is nevertheless carried forward into the assessment of the quantum of the freezing injunction, and into the scope of the documents that are sought to be secured under the access and imaging order.

54. The freezing injunction was sought in the amount of £10,000,000 against both Defendants. But the evidence of the Claimants established only about £5,000,000 of sales in Phase 1. Their evidence was that, from the sales data provided in the Ohio proceedings (relating to Phase 1), approximately £5 million of revenue was recorded to the end of 2020, and that the same data showed that "during 2021 and 2022 the UK sales figures were approximately £4,000,000". That figure of £4,000,000 is then added to assumed sales for 2023, 2024, 2025 and half of 2026, at £9,000,000, so that "[t]he total Phase 2 sales would then be approximately £13m." EU sales of approximately £5.72 million are estimated, which leads to a total revenue figure of approximately £23.2 million, of which the Phase 1 sales are only £5 million.

55. Para 97 of Wolfsohn 1 states:

> "A damages report produced by FBL in the Ohio proceedings gave figures showing a profit margin of 64% on the syrup (DW1, page 1658), while the latest RPSL group accounts show a gross profit of nearly 50% (DW1, pages 1721). Using these figures for the margin and applying it to the revenues the total value of the claim could be as high as £14,848,000. Given the rough and

> ready nature of these calculations, however, the claimants do not seek an order for this amount but rather for a more conservative figure of £10m."

£14,848,000 is 64% of £23,200,000, so Mr Wolfsohn has applied the high syrup profit margin to reach the figure stated in the claim form, rather than the overall gross profit margin of 50%.

56. In his skeleton argument, Mr Handley said that the total value of the claim may be between approximately £12 million and £15.36 million. These figures were not explained, though the Phase 1 sales were separately identified as being £5 million.

57. The quantum of the claim was only briefly addressed in Mr Handley's oral presentation. The Judge had picked up the figures as stated in the skeleton argument. Mr Handley explained that the figures were a bit difficult because FBL had products other than Slushy Jack's, so the figures in FBL's accounts were not just for the allegedly infringing trading:

> "So what we have assumed, which may be wrong, but we have assumed that the proportion the UK EU sales that is generic across RPSL would apply to Slushy Jacks. That may be wrong but we have made that assumption and we have taken the sales figures that are have been disclosed in the Ohio proceedings and then without allowing for inflation, without allowing for any sort of growth we have just said those 3½ years have produced that level of sales. The next 3½ years from 2022, so we are already 2 years into that, would produce an exactly flat level of sales in the future….
>
> So it is rough and ready. It absolutely is, of necessity, and that is why we have not tried to go to the upper limit or even the average. The information on the gross profits is also a bit rough and ready. The account show just below 50% gross profit. There is an interim document which I can take you to potentially which shows a 64% gross profit on syrup sales. So there are some – and if they come back to us with evidence to say actually, applying your methodology, we get to a different number then that is fine. We can do that and maybe the order would need to be varied. But at this stage, on our best calculation, we wanted to come in quite a bit south of where the number has got to because the uncertainty, which is why we say 10 million."

That was the beginning and end of any discussion on quantum.

58. As can be seen, the Phase 2 sales were wrapped up indistinguishably with the Phase 1 sales for this purpose. While appearing to be reasonable, in making reductions from the grant total of between £12 million and £15.36 million, Mr Handley was in fact using all the Phase 2 sales (actual and assumed) in the UK and in the EU, for which no sufficient case of liability had been made out, and was applying the 64% gross profit proportion on syrup sales to all the revenue figures, before discounting the final figure.

59. No explanation was given in full and frank disclosure of a likely challenge to using Phase 2 sales at all, or to whether gross profit was the right approach to assessing profits (which is now seen to be strongly in issue), and if so what deduction should be made overall to achieve the gross profits figure (there is clearly a dispute about that, which might reasonably have been anticipated at an earlier stage). Mr Handley did not point out that, since he was relying only on Phase 1 at that stage, if the overall gross profit proportion

was 50%, the quantum for the freezing injunction was only £2.5 million maximum. (It is true that this figure does not include any inter-company sales, figures for which were not available to the Claimants at the time, but which now may justify a higher sales figure for Phase 1.) This point was not made to the Judge.

The significance of Phase 2 on the access and imaging order

60. In relation to the access and imaging order, Phase 2 was similarly wrapped up with Phase 1, and no attempt was made to distinguish the second class of documents sought (which relate to the introduction, establishment and trading of the Slushy Jack’s brand). The third class of documents was “the matters set out in the Particulars of Claim” and a substantial part of these too relate to Phase 2 allegations, not Phase 1 allegations.

61. In his skeleton argument, Mr Handley identified some examples of issues to which the documents sought to be preserved as evidence from the centrally stored data would be “highly relevant”. These were the design of the Slushy Jack’s logo, the Slushy Jack’s products that were allegedly exported as “instruments of deception”, and the transition from Slush Puppie to Slushy Jack’s. It was also said that the documents stored by Mr Peters on his own devices, not the centrally stored data, was highly relevant across the proceedings and at greater risk of destruction. So the documents were, apparently, principally of importance to Phase 2.

62. What was not said, in Mr Handley’s oral presentation, was that to obtain an order relating to documents that were highly relevant to Phase 2, the Claimants had to establish a strong prima facie case on the allegations in Phase 2 claims. As already observed, the satisfaction of that test was sidestepped, with Mr Handley reassuring the Judge that Phase 1 was being relied on. No attempt was made to show the Judge that numerous sub-categories of documents sought were Phase 2 documents, not Phase 1 documents.

The distinction between FBL’s liability and the Defendants’ liability

63. More seriously still, the figures that were relied on for quantum were those for the estimated infringing gross profits of FBL, and possibly EU sister companies too. But FBL was, by the Claimants’ choice, not a Defendant or respondent to the application. Only Mr Peters and RPSL were Defendants and respondents. That meant that the relevant question was not what profit FBL made from infringing trading, but what profits either Mr Peters or RPSL received: see *Lifestyle Equities*.

64. The Claimants’ case is that the Defendants, not just FBL, were using their intellectual property without permission to do so, and so were principal infringers too, but this was not clearly alleged in the Particulars of Claim, or in Wolfsohn 1. No particulars of any wrongdoing by RSPL (rather than by its subsidiaries) or by Mr Peters personally (rather than FBL, of which he was a director) were pleaded. At no stage did Mr Handley present to the Court the argument that the Defendants would obviously have made, namely that FBL’s gross profits (the indicated £12 million to £15.36 million) were not the Defendants’ profits, and that no profits made by Mr Peters personally or RPSL (a non-trading company) had been identified.

65. It became apparent in argument before me that one reason for this was that Mr Handley had persuaded himself that *Lifestyle Equities* could be distinguished, on the facts of this case, because the positions of RPSL and Mr Peters were equivalent to a sole trader conducting an infringing business, not a director of a limited company who received no dividends and was paid an annual stipend. For that reason, Mr Handley apparently felt that he did not have to raise the issue, or the reliance that the Defendants would have placed on it.

Is there a good claim against the Defendants as principals?

66. I will first consider whether there was or is a good arguable case of principal liability against the Defendants.

67. To start at the beginning, an allegation of trade mark infringement requires particulars to be pleaded of the unauthorised use of the sign said to infringe the claimant's registered rights. Each of subsections (1), (2) and (3) of s.10 of the 1994 Act starts: "A person infringes a registered trade mark if he uses in the course of trade a sign….[in relation to goods or services]". Subsection (4) reads, so far as material:

> "For the purposes of this section a person uses a sign if, in particular, he –
>
> (a) affixes it to goods or the packaging thereof;
> (b) offers or exposes goods for sale, puts them on the market or stocks them for those purposes under the sign, or offers or supplies services under the sign;
> (c) imports or exports goods under the sign;
> (ca) uses the sign as a trade or company name or part of a trade or company name;
> (d) uses the sign on business papers and in advertising; or
> (e) uses the sign in comparative advertising ……"

68. The description in subsection (4) of what amounts to use of a sign is not exhaustive, but these are the principal ways in which use of a sign can amount to infringing use. Any such use must be in the course of a trade, and be in relation to goods or services.

69. The Claimants' pleaded case, in relation to Phase 1, is that the Defendants infringed the UK marks by using in the course of trade an identical sign in respect of identical goods and services (para 118 of the Particulars), for the reasons given in paras 65 to 68. As to those:

i) Para 65 pleads that RPSL, FBL and Mr Peters engaged in a fraudulent scheme, by promoting the forged 2000 agreement as the basis of a claim that FBL had a continuing licence;

ii) Para 66 pleads, first, that various subsidiaries under RPSL's control, including FBL, continued to use the Claimants' marks; and that at the direction of Mr Peters, companies in the RPSL group held themselves out as entitled to sell Slush Puppie products;

iii) It also pleads that the Defendants and FBL (by means including the use of company names, social media accounts, email accounts and websites) impeded the First Claimant's ability to use its own marks in the UK and Europe;

iv) Para 67 pleads that Mr Peters and companies in the RPSL group falsely claimed to customers that they had the right to use Slush Puppie trade marks

v) Para 68 is then a wrapped up, formulaic plea as follows:

> "68. In the premises, in [Phase 1] the Defendants acting together, and/or as accessories with FBL, have in the course of trade and without authority:
>
> 68.1 affixed the UK Trade Marks to goods and packaging;
>
> 68.2 advertised and offered for sale products bearing the UK Trade Marks
>
> 68.3 imported and/or exported products bearing the UK Trade Marks;
>
> 68.4 used the UK Trade Marks in company names; and
>
> 68.5 used the UK Trade Marks on business papers."

70. The difficulty with this pleading is that it nowhere identifies the uses of the signs that Mr Peters and RPSL themselves are alleged to have made, in the course of a trade and in connection with goods or services, as distinct from the use made by FBL or any other trading subsidiary of RPSL in the group. The Claimants do not dispute that RPSL is a non-trading holding company, whose only asset of any value more than de minimis is its shares in its subsidiaries. All the subsidiaries are trading companies, and Mr Peters is a director of them, who does not appear to carry on his own trade or do any of the matters alleged on his own behalf, as distinct from as a director of FBL or one of the other trading companies.

71. On that basis:

i) Para 65 pleads a common design to assert that FBL had a licence, which if proved, and on the basis of FBL subsequently implementing the common design by trading using the signs, would make RPSL and Mr Peters accessories to FBL's tortious conduct, but it does not make Mr Peters (by acting as a director of FBL) or RPSL (by holding its shares) a principal infringer. No use of the signs specifically by either Mr Peters or RPSL, let alone in the course of their own trade in goods or services, is identified.

ii) Para 66 pleads, first, a case that could amount to accessory liability, if either Mr Peters personally or RPSL caused FBL or other subsidiaries to act unlawfully with knowledge of the facts that made the acts unlawful, but not a case of primary infringement.

iii) As for using company names and social media accounts, etc., the allegations pleaded are ones that sound in damages, rather than giving rise to profits; but in any event, there is nothing pleaded that amounts to use by Mr Peters personally, or by RPSL, rather than by its trading subsidiaries. Mr Peters was at all times a director of FBL and can be seen in the documents relied on by the Claimants to be acting in that capacity. It was FBL, by its former name, Slush Puppie Limited, and then later another subsidiary company, that used the company names, and Mr Peters' use of an @slushpuppie.co.uk email address was (so far as the evidence shows) use as managing director of FBL.

iv) There is no identified basis for Mr Peters and RPSL "acting together" in the course of trade and doing the matters listed in para 68 (which are simply a rehearsal of most of s.10(4) of the 1994 Act), apart from the fact that they are the director and holding company respectively of a company that allegedly did so, namely FBL.

72. In short, on the pleaded case and evidence as it stands, there is no good arguable case proved for liability as a principal tortfeasor rather than as an accessory to wrongdoing by FBL.

Quantum for accessory liability

73. That means that, if an account of profits is sought rather than damages (and the Claimants have not sought to advance any claim for damages as the basis of the freezing injunction sought), the relevant question is what profits Mr Peters and RPSL received as a result of FBL's wrongdoing.

74. In his skeleton argument, Mr Handley asserted that, in Phase 1, without authority, "the Defendants, and FBL continued to trade and operate as if the Agreements had not been terminated", thereby avoiding the question of who it was who was using the identical signs in the course of trade. The quantum was presented in the rough and ready way that I have already described, but nothing was said about what claim for principal infringement lay against Mr Peters or RPSL and what if any profits they received, nor was any reference made to *Lifestyle Equities* for the principle that accessories to others' wrongdoing are only liable for profits that they receive.

75. Judge Davis-White KC raised with Mr Handley the absence of FBL as a respondent to the application and the fact that RPSL had no assets of any significance other than the shares in its subsidiary companies. Mr Handley said:

> "It is not an accident that we did not join Frozen Brothers Limited as a defendant because it is the claimant in the Ohio proceedings and we did not want to invite accusations of an abuse of process unnecessarily. We think RPSL and Mark Peters is where the decision-making, is where the control is. We say we get to liability for those two companies even though it is FBL that is trading in such a way as to infringe the trade marks *through accessory liability*." (*emphasis added by me*)

76. After a brief diversion about the content of the proceedings in Ohio, Mr Handley resumed on the question of accessory liability:

> "… for the accessory liability of Mark Peters and RPSL in relation to FBL's infringement, it is in authorities bundle, tab 20, it is Lifestyle Equities v Ahmed from earlier this year in the Supreme Court which was the case to do with alleged trade mark infringement and the extent to which a director could

be liable for the trade mark infringement of a company that was trading. The conclusion is helpfully summarised at page 28, paragraphs 135 to 137 …

So we say the infringement was absolutely procured by Mark Peters. He was after all, we say, the forger of the documents. He is the driving force behind the entire group with RPSL procured but also assistance as per paragraph 136. It is the shareholder that could have voted to change the company names of Slush Puppie and so on sooner. And as the ultimate parent when it is shipping SLUSH PUPPIE products, which we understand are all manufactured in the UK, when it is shipping them across Europe, it is also assisting in the tort of passing off by the export of instruments of deception.

Now what paragraph 137 of Lifestyle Equities also shows where you are going for accessory liability, you need to show knowledge. We would not need to show that for FBL. We accept that, but as to Mark Peters's knowledge the e-mail correspondence where they are negotiating the contract shows a pretty good working knowledge of trade mark law. It is talking about confusion for members of the public, talking about registrations in the trade mark registry of particular classes of goods and so on. So we say that he is fully aware that what he is doing is trade mark infringement so the knowledge requirement under Lifestyle Equities would be more than met."

77. That was as far as any discussion of accessory liability went. There was no reference to the question of the profits for which a company director might be liable as an accessory.

78. It is clear that, in his oral presentation, Mr Handley was seeking only to establish accessory liability on the part of Mr Peters and RPSL, not primary liability for use of signs that infringed the trade marks. Mr Handley extracted from the first part of the Supreme Court's recent decision the requirement to establish knowledge of facts that amount to wrongdoing if a company director is to be liable as an accessory for his company's tortious infringement.

79. The part of Lord Leggatt JSC's judgment to which Mr Handley referred is that addressing the nature of accessory liability in tort. Paragraphs 135-137 summarise conclusions on the circumstances in which such accessory liability can arise, where knowledge of the essential features of the tort are necessary to justify imposing joint liability on someone who has not actually committed the tort, even if the tort is one of strict liability.

80. The Supreme Court's conclusion on the issue of accessory liability raised a second, important question, however: for what are accessories liable, where an account of profits is sought? In particular, are the profits those of the company, whose wrongdoing the director is alleged knowingly to have procured, or are they only his own profits derived from the wrongdoing? The answer was that "it follows from the very nature of the remedy of an account of profits that the only profits for which a person should be ordered to account are profits which they have made" (para 158). In that case, it was held that a loan made by the company to the defendants and contractual remuneration for the work done by them generally as directors were not profits.

81. A very important consideration therefore had to be addressed on the Claimants' application for a huge freezing order based on estimated gross profits that FBL had made:

was there at least a good arguable case that Mr Peters or RPSL received any of the profits, and if so how much?

82. It was known to the Claimants that FBL had not declared any dividends during the relevant period. There was no evidence that FBL's profits arising from trade in Slush Puppie during Phase 1 were otherwise distributed or capitalised. FBL does pay a consultancy fee for Mr Peters' services to the RPSL group of companies as a whole, in the amount of about £1 million a year, to an Isle of Man company believed to be controlled by Mr Peters.

83. Nothing was said to the Judge about this issue. No reference was made to the relevant part of the decision in *Lifestyle Equities*; no disclosure was made of the principle that it decides, in relation to an account of profits sought against an accessory; and no mention was made at any stage, even in full and frank disclosure submissions, of its being a point that the Defendants might raise as to why an injunction freezing £10 million of their assets was misconceived.

84. Mr Handley explained, when pressed by me about the obviousness of the point that needed to be raised with the Judge, that he had read *Lifestyle Equities* and understood that it did not apply in the circumstances of this case. What underlay that understanding is the belated assertion, nowhere pleaded or raised with the Judge, that FBL is simply the *alter ego* of Mr Peters, so profits received by it can be treated as profits received by him.

85. Whether that assertion was arguably right or demonstrably wrong is, in a sense, beside the point. The point is that Mr Handley was duty bound to raise the issue with the Judge, as an essential part of a fair presentation of the case for a worldwide freezing injunction in a large sum. That duty existed regardless of whether he thought that the authority was distinguishable on the facts. The failure to alert the Judge to the real possibility (to put it at its very lowest) that Mr Peters personally received only a small part of the profits made by FBL from its Slush Puppie sales and that RPSL received none, that this was at least arguably the limit of their possible liability, and that this would obviously be argued by the Defendants had they been present, is a very serious breach of the requirement of full and frank disclosure (or fair presentation).

86. Before me, but not before Judge Davis-White KC, Mr Handley relied on two authorities as justifying his argument that FBL's profits were to be treated as the Defendants' profits: Gencor ACP Ltd v Dalby [2000] 2 BCLC 734 ("*Gencor*"), as explained in Prest v Petrodel Resources Ltd [2013] UKSC 34; [2013] 2 AC 415 ("*Prest v Petrodel*"), and para 174 of the judgment of Lord Leggatt JSC in *Lifestyle Equities*.

87. *Prest v Petrodel*, it will be recalled, was the case in which the Supreme Court explained the circumstances in which the corporate veil could properly be pierced, and other cases in which the correct analysis was that the courts were doing no such thing. *Gencor* fell into the latter category. It was a case in which a company director, Mr Dalby, made a secret profit and diverted it to a BVI company called Burnstead. Mr Dalby was held to be accountable for the monies received from the claimant company by Burnstead. The trial judge held that Burnstead was no more than Mr Dalby's nominee to receive the unlawful payment, and that Burnstead held the money for Mr Dalby. Burnstead was no more than a "creature company" interposed in order to prevent equity's eye from seeing that the real recipient was Mr Dalby. As Lord Sumption explained, the result would have

been exactly the same if the recipient had been Mr Dalby's uncle instead of a corporate entity.

88. The position there is obviously not analogous to FBL receiving its own trading profits and paying a consultancy fee but no dividends to its director.

89. In *Lifestyle Equities*, Lord Leggatt, having dealt with the question of whose profits were to be regarded, then addressed whether the company's directors had made any relevant profit from the company's trade mark infringement. The two payments in question were a loan by the company to the Ahmeds and their remuneration as directors of the company. The Court of Appeal had rejected the case in relation to the loan but upheld the judge's assessment that part of the salaries could be treated as profits of the company received by them, despite his finding that the salary was a payment for work done, not a dividend.

90. Lord Leggatt explained at [173] that although an employee's services may be worth much more than they are paid, giving rise to a profit for the employer, the employee makes no profit if they are paid the fair market value of their services. In doing so, he disagreed with the analogy of a sole trader that had found favour in the Court of Appeal, and said, at [174]:

> "It is wrong, however, to equate a person who trades in goods and whose income consists of the proceeds of sale of goods with a person who is paid for their labour. A sole trader whose income is earned by selling goods herself may make a greater profit than if she employs an assistant to sell the goods for her because she has no labour cost to deduct. But that is a consequence of how she chooses to conduct her business. It does not mean that if someone is employed by a trader to sell goods on her behalf and is paid a salary or wage in return for his labour, the employee's remuneration is a profit. The two situations are not alike."

91. Mr Handley said that that passage was a reason to conclude that the decision in that case did not apply to Mr Peters. By implication, he was therefore treating Mr Peters as a person who trades in goods (a sole trader) to whom all the income after paying costs of sales is profit. (Nothing was said about how RPSL was to be treated, but presumably they could not both be treated as receiving all the gross profits.)

92. While it may be true that Mr Peters' position as director cannot be equated with that of an employee, Lord Leggatt was not identifying a binary choice that applies in all cases: he was illustrating why it is appropriate to focus on the nature of the payment that a defendant receives and the costs that they incur. Mr Handley's case was not just that Mr Peters should be treated as the recipient (by analogy with *Gencor*) of the £1 million per year that was paid to the Isle of Man company, which represented profits of infringement, but that he (or RPSL) should be treated as the recipient of <u>all</u> the gross profits generated by FBL (and presumably all its sister companies too), by virtue of his being effectively in control of the RPSL group of companies.

93. It is unnecessary for me to decide, on incomplete facts, what the true position is, as it may be an issue for determination at trial. However, it is difficult at this stage to see how a long-established trading company that is part of a corporate group can be treated as no more than an *alter ego* of Mr Peters. He is neither the sole shareholder of RPSL nor the sole director of that company or FBL, however influential his views may be on their

boards, and whatever majority he may have in general meeting. What Mr Handley appears to be trying to do is pierce the corporate veil and disregard the separate legal personality (and business) of FBL and the structure of the group that Mr Peters and his father established. There are obvious difficulties with such an argument – but more to the point, it could not reasonably have been concluded that the Claimants' argument was so obviously right on this point that there was no need for the Claimants to present the contrary argument to the Judge. This was a point that went directly to the "good arguable quantum" of the claim, and a fair presentation potentially very substantially eroded the amount of any freezing injunction.

94. Had Mr Handley raised this argument with the Judge, by reference to the relevant paragraphs in *Lifestyle Equities*, as he clearly should have done, I consider that the Judge would have taken a good deal of persuading that any part of the profits properly accounted for by the RPSL group of companies in its group financial statements could be treated as profits accruing to RPSL in its own right, or to Mr Peters personally, on the basis of the evidence as it stood. Instead, the Judge was led into believing that profits of at least £10,000,000 made by FBL in total from its various trading activities could be recovered from Mr Peters and RPSL as joint tortfeasors, on the same basis as damages could be recovered from all three.

95. These serious failings are enough to justify setting aside the freezing injunction part of the 3 December Orders in full.

Impact on scope of access and imaging order

96. Apart from the impact on the quantum of the freezing injunction, the failure to distinguish the strong prima facie case against Mr Peters on the Phase 1 claim from the Phase 2 claim, where no good arguable case was established, meant that the scope of the access and imaging order was much broader than was otherwise justified. The second class of documents listed in the schedule to the access and imaging order relates to the Phase 2 claim, and much of the third class does too.

97. There was also, in my judgment, an inadequate presentation by the Claimants of the question whether that order should, in effect, be made against a non-party, namely FBL. Although only the Defendants were named respondents to the application, the search was to be conducted at FBL's offices. It required compliance by any person having responsible control of the offices, and any other person having control of various identified databases and storage devices. Those would very likely belong to FBL, or at least be shared devices where the majority of documents on them were likely to be those of FBL and the other trading companies, not documents of RPSL or Mr Peters personally.

98. The Claimants sought to justify this on the basis that there was a pre-existing arrangement under which Mr Peters personally had control of FBL's documents. As to this, Wolfsohn 1 said, at para 103, that there were "bound to be key documents relating to the issues in dispute in electronic form on RPSL's computer systems". Examples were given of these, but they are all examples of documents that would be FBL documents, not the group financial and corporate structure documents generally held by a holding company that does not trade. Revealingly, the individuals who are identified as possible custodians of electronic documents are officers or managers of FBL and the design teams responsible

for Slushy Jack's. Although Mr Wolfsohn suggests that these are RPSL documents held on its systems, no explanation of that is given.

99. In Mr Handley's skeleton argument, it was fairly identified that the Defendants might argue that the servers and devices subject to the proposed order are not within the possession, custody or control of the Defendants, on the basis that a parent company does not without more have control of its subsidiaries' documents. It was accepted in principle that a "control arrangement" needed to be in place – but no evidence of such an arrangement between RPSL and FBL was identified. It was asserted that Mr Peters as a director would have control of the documents. It is correct that, as a matter of law, a statutory director has a right of access to their company's documents, but that does not mean that those documents would be in their possession at the time of the search.

100. In his oral presentation, Mr Handley did draw to the Judge's attention the fact that the documents and data were in the offices of FBL in High Wycombe, and so not in the custody of Mr Peters or RPSL. But it was asserted that there were good reasons for finding that both Mr Peters and RPSL controlled the documents. Mr Handley said that the offices were offices for the RPSL group, based on evidence given in depositions in Ohio. He argued that since the consent that Mr Peters would have to ask for was effectively consent from himself, as director of FBL, he did not need to ask.

101. Although the case for concluding, provisionally, that the documents were in the control of Mr Peters was made by Mr Handley, what was not said to the Judge was that it might be the case that all the documents were those of FBL or other trading subsidiaries, and that in practice the imaging would be conducted against the documents of FBL. However, the failure to spell that out might be regarded as a less serious omission, given that the hurdle that the Claimants had to surmount was explained to the Judge.

102. The access and imaging order is nevertheless set aside for serious failings in the duty to explain that Phase 1 documents held by FBL had already been discovered in Ohio and so were not able to be destroyed or lost without trace; that the documents that had not been disclosed were those on the missing laptops of Mr Peters and his hard copy file that went astray in Malaysia, or still held by Mr Peters, and so were not available at FBL's offices; that a substantial part of the application related to documents that related only to Phase 2 claims, for which the Claimants had to establish separately a strong prima facie case; and that the documents might well be exclusively in the control of FBL, which was not a party to the litigation.

103. Although the Claimants were fully entitled to advance their case that Mr Peters was in control of them because of a prior arrangement with FBL, or because he was a director of FBL with a right to call for the documents, the Claimants should have drawn attention to the likelihood of an argument by RPSL and Mr Peters that that did not amount to possession of the documents so as to entitle the Court to make an order that required (in effect) FBL to have its documents imaged. Although there was, on the evidence, a plausible risk of more documents becoming "lost", it was not explained to the Judge how these would be documents relating to Phase 1 claims that were not already secured and were likely to be in FBL's offices, as distinct from in the personal control of Mr Peters, or in the possession of RPSL.

Risk of judgment against Defendants remaining unsatisfied

104. In addition to the failures that I have dealt with in detail above, there are yet further questions about the fair presentation of the risk of dissipation, or loss or destruction of documents, and the relevance in that regard of the delay in bringing the claim and the application.

105. Curiously, the Claimants did not assert that there was a risk of dissipation of assets as such, but rather a risk that the Respondents would take steps to make themselves judgment-proof. What this might have encompassed, in this particular case, was not elaborated. The question to address was whether there was a real risk that a judgment would remain unsatisfied because of unjustified steps taken by the defendant to seek to defeat it, whether by dissipating assets, secreting them or moving them beyond reach: see Fiona Trust Holding Corporationi v Primalov [2007] EWHC 1217 (Comm) at [70], per David Steel J, and Fundo Soberano De Angola v dos Santos [2018] EWHC 2199 (Comm) at [86], per Popplewell J. It has been well-established for years that dishonesty alleged (or even proved) against a defendant is not of itself sufficient to justify the conclusion of a real risk of dissipation (etc.), and that the connection between the alleged dishonesty and the risk of dissipation needs to be explained and justified; but dishonesty that lies at the heart of the claim against the defendant may well give rise to such an inference: see VTB Capital plc v Nutritek International Corp [2012] EWCA Civ 808 ("*VTB v Nutritek*") at [176], [177], per Lloyd LJ.

106. In their skeleton argument, the Claimants relied on what they said were multiple examples of dishonesty by Mr Peters, directed at the Claimants, and which were for the purpose of obtaining an advantage in the conduct of litigation, and showed a disregard for the proper administration of justice. The use by Mr Peters of an offshore company was said to be relevant. The risk was said to be as great in the case of RPSL as it was in the case of Mr Peters because of his control of that holding company.

107. At the hearing before Judge Davis-White KC, Mr Handley accepted that dishonesty in a vacuum "in and of itself" is not sufficient, but he placed strong reliance on the nature of the dishonest acts that were alleged against Mr Peters. The Judge suggested that it was "not a million miles leap to say it is quite likely he will take steps to avoid a judgment" and Mr Handley agreed. The Judge was satisfied ("solid evidence of risk of dissipation") and Mr Handley moved on.

108. In his judgment, the Judge said only that he considered the case was obvious, and that the evidence of dishonesty pointed to a real risk that any judgment would be sought to be avoided by improper dissipation of assets.

109. What did not happen to any extent was identification of the points that Mr Peters would have been likely to make to the court if he had been present. The Court had been taken to a good deal of material relating to dishonesty alleged against Mr Peters, but nothing to counterbalance the argument that unjustified steps to defeat a judgment would be taken. Mr Cavender referred to Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc [1988] 1 WLR 1337, in which Dillon LJ said:

> "The judge seems to have thought that non-disclosure is only material as a basis for discharging the injunction if it affects some point which it is necessary for the applicant for the injunction to establish if he is to succeed in his claim. Therefore he said that the failure to disclose that the defendants knew about the company was not material, because it would have been no defence for the third party to say in answer to the charge of fraud: 'it was not I, it was my tame company who did it'.
>
> With all respect, I do not agree with the judge that the duty of disclosure is so limited. The applicant owes a duty of full and frank disclosure: if he puts in matters of prejudice he must put them in as fully as is necessary to be fair. He cannot pile on the prejudice and then when it is pointed out that he is told only half the story and is left out matters which give a quite different complexion, say 'Oh, well, it is not material. It is only prejudice, and so, on a strict analysis of the pleadings, does not have to be regarded'."

110. Mr Cavender says that this is exactly what the Claimants did. They heaped on the Judge lots of submissions about how Mr Peters had acted dishonestly but failed to provide the points that arguably went the other way, in terms of the significance of those allegations. What was not referred to were the facts that the content of the Phase 1 claims had been litigated in Ohio since 2019, and that even the Phase 2 claims had been raised for some time in those proceedings, in motions to amend and motions to dismiss; that there had been litigation in Germany against FBL, Mr Peters personally, RPSL and other companies controlled by RPSL since 2021; and yet in those 3-5 years there was no evidence that any of the defendants had sought to take steps to defeat any judgment against them. In that regard, Mr Peters was still the owner (or in one case, joint owner) of two houses in London, and FBL, which Mr Peters was said to control, was a substantial trading company with assets of over £26 million, all of which was known to the Claimants but was not mentioned.

111. Mr Handley's response was that the evidence of dishonesty was sufficient in itself because it was the very means by which the Defendants infringed the Claimants' marks, and so was closely connected with the subject matter of the claim. He also emphasised that the dishonesty here was an abuse of court processes because documents were destroyed or "lost" to perpetuate the lie about the 2000 agreement.

112. I do not agree that the dishonesty alleged by the Claimants against Mr Peters lies at the heart of their claim, in the sense in which Lloyd LJ used those words in *VTB v Nutritek*. The claim here is for infringement of trade marks, and Phase 1 was infringement by using identical signs to the trade marks on identical goods. FBL's attempted defence of similar claims in Ohio was that it was licensed to use the marks, and that the 1999 Agreement had not validly been terminated, in view of the 2000 Agreement. Assuming for these purposes only that the alleged forgery is proved, FBL's main defence to the alleged infringement will fail, and that defence will not avail the Defendants to defend the allegations of accessory liability in these proceedings either. But it is not right to say that the Claimants' claims against Mr Peters are for relief in relation to his allegedly dishonest conduct: they are for his knowingly causing FBL to use signs that are identical to the Claimants' trade marks, without permission. As Mr Cavender pointed out, there are no claims based on dishonesty or fraud. Accordingly, evidence of dishonesty does not of itself give rise to a strong inference of a risk of dissipation of assets.

113. Regardless of the probative force of the dishonesty alleged, the failure of fair presentation was that only one side of the argument was put before the Judge. The Defendants are in my view right to say that the points identified in [107] above, and the fact that discovery of Phase 1 FBL documents had been given in Ohio, were matters to which the Judge's attention should have been drawn.

Risk of destruction of evidence

114. Although the allegations against Mr Peters in relation to tampering with, destruction or "loss" of documents were of strong relevance to the access and imaging order application, so far as it related to documents that had not already been discovered in Ohio – the Phase 2 documents – there was no strong prima facie case established in relation to Phase 2. In relation to the Phase 1 allegations, there was self-evidently less risk that documents in FBL's offices would be concealed, as it had already given discovery of documents relevant to the equivalent claims against it. It may well be that, even if Mr Handley had fairly presented these points to the Judge, he would have come to the same conclusion on whether a real risk of loss of important documents existed, but, as the authorities make clear (see sub-paragraph (xi) in *Tugushev v Orlov*, above), that is not a material consideration on discharge for failure of fair presentation, though it may be relevant on the question of re-granting an injunction or continuing the effect at least in part of the search and imaging order.

Jurisdiction to re-grant the injunction

115. The Claimants sought, on paper only, to suggest that the freezing injunction could be re-granted even if discharged. They submit that the decision on whether to set aside, renew or vary is a matter for the Court's discretion and the questions of whether any breach was innocent and whether the injunction could properly have been granted if the relevant facts had been disclosed are relevant. They relied on the dicta of Christopher Clarke J in OJSC ANK Yugraneft v Sibir Energy plc [2010] BCC 475 at [106]:

> "The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the Court may be persuaded to continue or re-grant the order originally obtained"

and they said that where no advantage was obtained by non-disclosure, it would be inappropriate to set aside the orders in question.

116. In this case, equally apt observations of Christopher Clarke LJ are at [104] of his judgment:

> "The court will look back at what has happened and examine whether, and if so, to what extent, it was not fully informed, and why, in order to decide what sanction to impose inconsequence. The obligation of full disclosure, an obligation owed to the court itself, exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court is invited to make. The court's ability to set its

> order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him. This is particularly so in the case of freezing and seizure orders."

These dicta are reflected in sub-paragraphs (ix) to (xiii) of the summary in *Tugushev v Orlov*: see [19] above.

117. The position here is that there have been multiple and serious failures on the part of the Claimants to put matters fairly before the Court. This failure led directly to the grant of a worldwide freezing order for a hugely excessive sum, which has remained in place for 2½ months, and entry into the offices of a non-party and imaging of its documents relating (in large part) to a part of the claim on which there had been no attempt to establish a strong prima facie case. Without the serious failures that I have identified, I consider it unlikely that a freezing injunction would have been granted, except possibly against Mr Peters personally and at best for only a proportion of the consultancy fees that were paid to his Isle of Man company, for the period of the Phase 1 claim. That would have been for a few hundred thousand pounds at best. Even then, there would have been a real question about whether Mr Peters, for that amount of claim, would have sought to make himself judgment-proof.

118. I do not conclude that the serious failures that occurred in the presentation of the case were deliberate on the part of the Claimants. Having heard Mr Handley on the hearing before me, the failures derive from a lack of understanding of what "full and frank disclosure" means in this context. Although Wolfsohn 1, the skeleton and the oral presentation contained sections addressing "full and frank disclosure" – and so the authors were conveying to the court that they were aware of their duties in that regard – the points raised tended to be discrete points that might be raised by either Defendant (such as jurisdiction, abuse of process, service, the presence of other directors) rather than arguments that the Defendants could reasonably be anticipated to make against the cogency of key building blocks of the Claimants' case, whether on liability or quantum. The duty of fair presentation means that an advocate cannot simply acquiesce in indications by a judge that the judge agrees with the applicant, but they must nevertheless ensure that the judge understands the respondent's likely argument against the relief sought.

119. Anyone applying without notice for a freezing injunction or an access and imaging order, and especially if applying for both together, must understand that there is a very high duty on them to ensure that relief of that nature is not granted without the defendant's case, so far as it can be anticipated, being put squarely before the court, and any weaknesses in the applicant's case being identified. However much a judge may indicate that they see things the applicant's way, the absent respondent's likely case still needs to be articulated and understood before a decision is made.

120. Although the breaches of the duty of fair presentation were not deliberate on the part of Mr Handley, they were nevertheless so serious that it is inappropriate to re-grant a freezing injunction. I have not reached that conclusion without stepping back and asking myself whether, by refusing freezing relief, I am enabling a greater injustice to be done to the Claimants than they have perpetrated on the Defendants, or am failing to have

regard to the strength of the Claimants' underlying claim. For the following reasons, I am satisfied that that is not the case, and that even if a freezing injunction were re-granted, it would be at best for a small fraction of the amount currently frozen.

121. Taking proper account of the principles established in *Lifestyle Equities* and the evidence in this case, any injunction re-granted, if that was justified, would be (at best) for a proportion of Mr Peters' consultancy fees paid in relation to the period of the Phase 1 claim, in so far as it might exceed what would be a reasonable fee for his services to the RPSL group of companies. That is because:

i) The Claimants did not attempt to satisfy me that there is a good arguable claim on Phase 2 and I cannot conclude that there is, without a careful presentation of the merits of that claim;

ii) Regardless of the correct quantification of profits in the hands of FBL for Phase 1, the only receipt by Mr Peters in or relating to the Phase 1 claims was two annual payments of about £1m each, paid as consultancy fees to the IoM company;

iii) There was no evidence of any distribution or payment to RPSL in relation to the Phase 1 profits;

iv) There was no evidence about whether a consultancy fee of £1m p.a. was significantly higher than the market value of Mr Peters' services to the group of companies;

v) If there was any such excess that could properly be regarded as a payment of profits made by FBL, that excess amount would not all be attributable to profits made by FBL on infringing sales, as distinct from profits made on other sales, or profits made by other group companies;

vi) The correct apportionment of any excess is unclear;

vii) The amount is in any event likely to be relatively small;

viii) There would be no real risk of Mr Peters dissipating assets to avoid judgment on a claim of that size, given the value of the companies that he controls and in which he is the majority shareholder.

122. The Claimants also have an unjust enrichment claim, but since Mr Handley's skeleton states that the requirement of enrichment at the Claimants' expense is found through the infringement of the Slush Puppie trade marks, this does not add anything to the scope of the claim. The enrichment needs to be that of the Defendants, not FBL. It was not relied on at the hearing before me.

The position in relation to the imaging order

123. To the extent that the access and imaging order was not fully executed, because documents in the personal possession of Mr Peters were not available, that order will be set aside and so will not be executed further as such. That means that his laptop, mobile phones, USBs and hard drives, if any, have not been imaged or searched. The remaining

question is whether, and to what extent, any part of the imaging order should be re-issued. I have already indicated why this cannot go beyond the Phase 1 documents.

124. Any attempt by Mr Peters to destroy documents after the start of this litigation would be a serious breach of the duty that a litigant owes directly to the court, and so a contempt of court. His Counsel acknowledged at the hearing that the Claimants can regard themselves as protected by the duty that the Defendants owe to the court. However, in light of the evidence placed before me, the Claimants do not consider that any assurance by Mr Peters is worth having.

125. In my judgment, the duty that is owed by Mr Peters in any event should be reinforced by requiring from him personally an express undertaking that any documents in his possession or custody, or within his control as a director of FBL or RPSL, which relate to paragraph 1 of Schedule A to the Imaging Order dated 3 December 2024 will be preserved. If Mr Peters is unable or unwilling to give that undertaking, I will consider the terms on which a new order to image his documents should be made. I will not require the additional undertaking from FBL that the Claimants sought in relation to any further documents falling within Schedule A to the Imaging Order: the offered undertakings are sufficient.

126. The Imaging Order has been fully executed on FBL and RPSL and the imaged documents are held by the Independent Computer Specialist to the order of the Court. It is unnecessary to address what should happen to them because the parties are agreed in principle that, in order to release the Independent Computer Specialist and Supervising Solicitor from further involvement, the imaged documents should now be held by RPC to the order of the court, until at least the first CCMC in this claim. Undertakings by RPC and the Defendants relating to the imaged data and a litigation stop placed on the original documents are offered, which I will accept.

127. The parties should attempt to agree the terms of an order giving effect to my judgment and dealing with any consequential matters.