

Neutral Citation Number: [2020] EWHC 1002 (Comm)

Case No: CL-2017-000583

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 30 March 2020

Before:

Mr Justice Butcher

Between:

Eurasian Natural Resources Corporation Limited
- and -
(1) Dechert LLP
(2) Mr. David Neil Gerrard and
(3) The Director of the Serious Fraud Office
(Third Party)

Claimant
Defendants

Anna Boase QC, Tamara Oppenheimer QC, Tim Akkouch, Alyssa Stansbury and Samuel Rabinowitz (instructed by Hogan Lovells) for the Claimant
Michael Bools QC and Edward Harrison (instructed by Clyde & Co) for the Defendants

Hearing dates: **26th, 27th, 30th March 2020**

APPROVED JUDGMENT

Mr Justice Butcher
(3:08 pm)

Monday, 30 March 2020

Judgment by **MR JUSTICE BUTCHER**

1. This has been an application for specific disclosure made by the Defendants against the Claimant. Various aspects of the application as originally issued have been dealt with by agreement or are no longer for decision, but may be of some relevance to costs in due course.
2. What has remained of this application has been dealt with in three broad parts as follows: firstly, in relation to the adequacy of the search terms employed by the Claimant in its conduct of disclosure; secondly, in relation to the Claimant's approach to withholding documents or parts of documents on the grounds of privilege; and, thirdly, a number of further matters which have been debated today.
3. I will give my decisions in relation to the first two of those areas now. As I have said to the parties, I will deal with the third area by a written judgment in tabular form in relation to a schedule which I have asked the parties to compile, which will summarise but not add to the arguments which have already been adduced orally and in writing on that third area.
4. Before turning to the first of the two areas which I am going to deal with today, it is necessary to say at the outset something briefly about the nature of the action and the legal framework for the application.
5. The Claimant, ENRC, brings claims against its former solicitor, Dechert LLP, and the partner of Dechert with conduct of the retainer, Neil Gerrard, in negligence, breach of fiduciary duty and, in the case of Dechert, breach of contract.
6. The claims arise out of ENRC's retainer of Dechert in the period April 2011 to March 2013, in relation to an internal investigation and engagement with the Serious Fraud Office. During the course of that retainer the Defendants investigated allegations of wrongdoing by or against the interests of ENRC and its subsidiaries in Kazakhstan and in Africa and conducted interviews with members of the staff of ENRC and of a number of its subsidiaries, and reviewed a large amount of

documentation collected from ENRC, part of which was brought to the United Kingdom from Kazakhstan and Africa.

7. The allegations made include some which are fairly typical of allegations in actions for professional negligence, for example the giving of wrong advice on a range of matters, a failure to establish the scope of the Serious Fraud Office's concerns, and a failure to protect ENRC's privilege. But the claim also involves allegations that Mr Gerrard made a series of damaging and unauthorised disclosures of confidential information relating to ENRC, and that he and Dechert unnecessarily expanded the scope of the investigation.
8. Those are undoubtedly serious allegations. They include that in the summer of 2011 Mr Gerrard deliberately leaked his own client's confidential and privileged documents to The Times, which published an article based upon those documents; that he made a large number of covert disclosures to the SFO, which were damaging to ENRC's interests, without authority to do so; and that he deliberately expanded the scope of the internal investigation that his firm was instructed to conduct to an unnecessary and disproportionate level in order to gain increased levels of fee income.
9. The losses which ENRC claims fall into four categories. Firstly, in relation to the fees which ENRC paid Dechert, ENRC claims that £11.9 million of a total of some £16 million in fees related to unnecessary work carried out from mid-2011 onwards. Secondly, ENRC claims about £10 million in relation to what it says were unnecessary third-party fees that were incurred as a result of the Defendants' various alleged breaches of contract or negligence. Thirdly, ENRC claims damages for lost management and employee time. And, fourthly, ENRC claims for the legal costs incurred in connection with the SFO's ultimately unsuccessful claim for a declaration that certain of ENRC's documents were not subject to legal professional privilege.
10. For their part, the Defendants strongly deny all allegations of wrongdoing. They say that Dechert's retainer was terminated because they believed that they had uncovered evidence of

serious wrongdoing on the part of senior ENRC executives, and that the present allegations are wholly unfounded.

11. The case has already been the subject of a certain amount of case management by the court. For present purposes it is necessary to mention only certain features of it. A CMC was held in this case before Bryan J on 7 December 2018. Part of that hearing was occupied by the court ruling on disputed points on a list of issues and the result is that there is an extensive 19-page list of issues in the case.
12. The order made at that CMC contains two important provisions in relation to disclosure. Firstly, that standard disclosure should be given by 31 July 2019. That deadline was later extended by consent to 30 September 2019. Secondly, that standard disclosure should be suspended in relation to two categories of documentation, which have been called the 'common pool'. Those categories are the documents which the First Defendant produced pursuant to notices dated 27 March 2013 and 8 April 2013, served on it by the Serious Fraud Office pursuant to section 2 of the Criminal Justice Act 1987. That is a category which I understand to comprise some 7,692 documents. Secondly, the documents which the First Defendant provided to Fulcrum Chambers, that is to say ENRC's replacement solicitors, on the termination of its retainer with the Claimant. The number of documents falling into that category is apparently in the order of 1.28 million. In total, therefore, there is a so-called common pool of documents which comprises some 1.3 million documents.
13. The disclosure exercise was not completed by 30 September 2019. Since that date ENRC has provided additional disclosure, on 20 December 2019, on 6 and 27 January 2020, and on 19 and 25 February 2020. ENRC has put in evidence which shows that the disclosure exercise which it has performed has been a significant one. That evidence is to the effect that the exercise has involved the collation of millions of documents, the manual review of over 260,000 documents by a team of 20 full-time reviewers, half being paralegals, which is the first level, the other half being

locum lawyers, that is the second level, and then by a team of ten lawyers at Hogan Lovells' offices, obtaining assistance from counsel as necessary, which is the third level.

14. The evidence is further to the effect that millions of pounds have been spent on the exercise, including £2.5 million-odd in relation to Birmingham-based paralegals and locums, and the exercise has resulted in the disclosure of some 50,000 documents.
15. One further aspect of the case deserves mention by way of background, and that is that after the CMC in this action, namely on 25 March 2019, ENRC issued further proceedings in the Chancery Division, this time against the SFO, but not against Dechert or Mr Gerrard. There is an overlap between the allegations made by ENRC in both sets of proceedings.
16. By a Part 20 claim form, issued on 24 July 2019, the SFO joined Dechert and Mr Gerrard to the claim BL-2019-000613, and by Part 20 claim form issued on 27 November 2019, Dechert and Mr Gerrard joined the SFO as a third party to claim 2017-000583. In both cases the Part 20 Claimant or Claimants are seeking a contribution under section 1 of the Civil Liability (Contribution) Act 1978.
17. Following an application by the SFO, by an order dated 14 February 2020, Teare J ordered that, subject to the approval of the Chancellor, the proceedings in the Chancery Division should be transferred to the Commercial Court and that both actions should be case-managed and tried together. The Chancellor consented to the transfer on or around 28 February 2020.
18. The Defendants' initial application for disclosure, which was dated 19 December 2019, sought orders under CPR 31.12 and paragraph 5.1 of Practice Direction 31A. ENRC objected that Practice Direction 51U, the Disclosure Pilot, was applicable to this application. The Defendants issued an amended application on 5 February 2020, making reference to PD 51U, but did not at that stage accept that it was applicable. That point has not however been contested and has been conceded before me by the Defendants, and I think it is clear that that concession was rightly made. PD 51U has a commencement date of 1 January 2019. Under paragraph 1.2 of PD 51U, it

is said that ‘the Pilot applies ... to existing and new proceedings in the Business and Property Courts.’

19. The implications of this were confirmed in Sir Geoffrey Vos C's decision in April 2019 in UTB LLC v Sheffield United [2019] EWHC 914 (Ch), at paragraphs 11 to 17. As Sir Geoffrey Vos C explained at paragraph 17:

‘To be clear, I am quite satisfied that the Pilot was intended to apply and does apply, to all relevant proceedings subsisting in the Business and Property Courts, whether started before or after 1 January 2019, even in a case where a disclosure order was made before 1 January 2019 under CPR part 31.’

20. In this case, Teare J has already indicated that the order for standard disclosure, which was made at the CMC prior to the commencement of PD51U, should be treated as an order for Model D disclosure across all issues.

21. A number of the provisions of PD51U are of particular relevance in the present application. Under paragraph 2.4 of that practice direction it is provided:

‘The court will be concerned to ensure that disclosure is directed to the issues in the proceedings and that the scope of disclosure is not wider than is reasonable and proportionate (as defined in paragraph 6.4) in order fairly to resolve those issues, and specifically the Issues for Disclosure ...”

22. Under paragraph 6.4, it is provided:

‘In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors -

- (1) the nature and complexity of the issues in the proceedings;
- (2) the importance of the case, including any non-monetary relief sought;
- (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
- (4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.’

23. As I have already said, the pre-Pilot order for disclosure is to be treated in this case as an order for Model D disclosure across all issues. Under paragraph 8.3 Model D is as follows:

‘Model D: Narrow search-based disclosure, with or without Narrative Documents.

(1) Under Model D, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure.

(2) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model D disclosure has been ordered. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document.

(3) The order should specify whether a party giving Model D disclosure is to search for and disclose Narrative Documents. If the order does not so specify, Narrative Documents should not be disclosed.

(4) For the avoidance of doubt, a party giving Model D Disclosure must still comply with the duty under paragraph 3.1(2) above to disclose known adverse documents; these will include any arising from the search directed by the court.’

24. As is referred to there, under the Pilot, disclosure is to take place in relation to Issues for Disclosure. In the present case, there is no list of Issues for Disclosure. As happened in UTB v Sheffield United, however, the list of issues for decision can be used as the basis for the Issues for Disclosure, but not all the issues on the list of issues will be relevant for disclosure purposes, only

those issues to which undisclosed documents are likely to be relevant and important for the fair resolution of the claim.

25. The present application, as revised, is made under paragraph 17 of PD51U. Paragraph 17 of the Pilot is in these terms:

‘17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to -

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement.’

26. With that introduction, therefore, I turn to the first of the heads where the Defendants contend that there has been a failure adequately to comply with the order for disclosure made at the CMC. That first group of alleged inadequacies relates to the search terms employed.

27. What is applied for in the revised draft order, at paragraphs 6 and 7, is that ENRC should apply the key words listed in schedule 1 to the revised draft order across all recovered repositories of documents applying a date range filter of 20 December 2010 to 6 June 2013, and apply the key words listed in schedule 2 to the revised draft order across all recovered repositories applying a date range filter commencing on 20 December 2010 and ending on 1 April 2014.

28. In relation to the schedule 1 key words, the essential issue was this: The Defendants say that it is inappropriate that these should have been searched with connectors and, in particular, in relation to many of them, connectors involving what have been called the Board Terms (that is to say, "board pack" or "board agenda" or "board minutes" or "board meeting" or "board report" or "senior management report"). In some cases, it is also said that the use of other connectors is inappropriate.
29. ENRC says that its use of connectors has been appropriate and that there has been no breach of the order for standard disclosure or Model D disclosure because a reasonable and proportionate search has been made.
30. There is relevant context to this issue in what happened before and at the CMC held before Bryan J. Thus, the parties proposed key words for their own searches at the same time as their EDQs, which were dated 23 November 2018. ENRC suggested 17 key words of general application and 18 key words that would be applied in relation to specific date ranges. In their EDQ the Defendants checked the "no" box next to the question: 'Do you at this stage have any proposals about the keyword searches which should be applied by other parties?' What instead the Defendants said was that they would comment on the Claimant's proposed key words once EDQs had been exchanged.
31. On 29 November 2018 the Defendants wrote proposing an additional 84 key words, with no suggestion of connectors. ENRC adopted two of the proposals and at the CMC on 7 December 2018, Bryan J commented on the proposals by saying that there appeared to be a number of key words which were individual words, some of which were very generic, and that it might be sensible for there to be a proposal of linkage of some of them. The judge said, amongst other things, this: '... one, the wording should be as targeted and focused as possible. Two, if possible, there should be multiple links between the wording which cuts it down. Three, at first blush there seem rather a lot here and some of them seem very generic...'

32. On 7 March 2019 the Defendants asked ENRC to apply 82 further terms plus "Mark Hollingsworth", and to confirm the number of responsive documents after de-duplication and having applied the relevant date range and custodian filters. ENRC responded on 3 May 2019. The number of hits was some 395,000, or more than 600,000 with family documents. ENRC then proposed a list of search terms with what it called appropriate connectors as envisaged by the judge, which resulted in some 52,700 hits, or about 98,000 with family documents.
33. The Defendants sought further information on 3 June 2019 and said: 'Once our clients have received this information, they will then be able to consider whether the use of connectors as proposed by your client is appropriate. In the meantime, our clients' position as to the use of connectors, both at all and in terms proposed by your client, is strictly reserved. Prima facie our clients do not accept that reviewing 600,000 documents in a claim of this nature is unreasonable or disproportionate.' The Defendants did not propose rival connectors at that stage.
34. It is pertinent to note that, as I have been told, it has been common ground that the allegations of wrongdoing against ENRC, namely those which were being investigated by the Defendants during the retainer, do not have to be explored at the trial of this action, in the sense that the investigation does not have to be redone and that both sides have accepted that it is not reasonable and proportionate for disclosure to be given based simply on whether it relates to that wrongdoing. What is more important is what knowledge of wrongdoing there was on the part of relevant senior levels within ENRC, what steps ENRC took or should have taken to investigate it, and whether there was obstruction of the Defendants' investigation.
35. It is also of relevance to consider the other search terms which ENRC has employed. These include, in items 1 to 19 of the search terms listed in the Claimants' list of documents: Gera*, Dech*, Serious Fraud Office*, SFO Raid, NG, NeilG, DLA, Bridge2, Bridge 2, Cameron, Findl*, Trevelyan, Rob T, Cyntel, self-report*, full and frank, audit committee, investigation, Commit*, special investigation*, as well as Operation Maria, Maria Project, Operation Kitchen, Kitchen,

permanently delete, wipe and wiping. Those include the names given by ENRC and their representatives to the Defendants' investigation.

36. Those terms were run across the email repositories for all the ENRC custodians proposed by the Defendants, including ENRC's board members, general counsel, heads of compliance and IT, as well as relevant third-party advisors, for the period 20 December 2010 to 6 June 2013.
37. It is said by ENRC, plausibly as I think, that if there were, for example, knowledge on the part of the board of ENRC of obstruction of the Defendants' investigations, these terms would be likely to reveal the relevant documents.
38. ENRC also used the other 84 search terms which had been proposed by the Defendants prior to the CMC but with connectors.
39. I turn to consider the cases in which the Defendants' principal concern is with the application of the Board Terms as connectors. This is dealt with in paragraph 43 of Mr Bools QC's skeleton argument. I understood this to apply to the following: Godwin Beene, Grayston, Haline, Improm, Pierre Prosper, Protector Services, PSG, SAR and suspicious activity, Serious Organised Crime Agency and SOCA, and Transminerals, Shawn McCormick and valuation within five of Chambishi.
40. In the case of Godwin Beene and the others, except McCormick and Protector Services and PSG, there are other connectors, but those were not, save in the case of Godwin Beene, objected to.
41. I have considered Mr Bools' careful submissions in relation to these search terms. With two exceptions, I was unconvinced that the application of the connectors had made ENRC's search less than reasonable and proportionate. Thus, I was not persuaded that there had been a failure to comply with the existing order for disclosure.
42. In reaching that conclusion I took into account, first of all, that the parties were invited by Bryan J to consider carefully limitations which were based on connectors and, secondly, the extent of disclosure which there has been based on the 'common pool' and the generic words which I have

already mentioned and, thirdly, the fact that there does not have to be disclosure going to the wrongdoing of ENRC per se.

43. I will take the example of Godwin Beene. Mr Beene was Permanent Secretary to the Zambia Ministry of Mines shortly after the Chambishi acquisition. It was said by the Defendants that Mr Beene was instrumental in arranging meetings between ENRC and the Zambian Government and that it was discovered during the investigation that ENRC had awarded a scholarship to his son. Bearing in mind that the objective is not to investigate ENRC's wrongdoing per se but to investigate knowledge of any wrongdoing there may have been at the appropriate level within ENRC and how that related to the investigation conducted by the Defendants, it appeared to me that it was appropriate to apply this term with connectors. Godwin Beene is not a central figure in the case. He is the subject of only one mention in the 162 pages of the defence.
44. Much the same can be said about Haline, to take another example. Without connectors, the search appears to be directed to finding out about underlying wrongdoing and, thus, not to go to a key issue in the action.
45. If one takes another example, Pierre Prosper, it appeared unlikely that the search proposed by the Defendants would produce any significant non-privileged documents which the Defendants did not already have access to.
46. As to another case, there was no attempt in the evidence to justify the Defendants' stance in relation to "SAR" or "suspicious activity" or "Serious Organised Crime Agency" and "SOCA".
47. There are, however, two exceptions where I consider that the term should be applied without the Board Terms. The first is in relation to "Protector Services" and "PSG". Mr Bools QC told me that Protector Services provided encrypted BlackBerrys to ENRC employees and that these may have been used to obstruct Dechert's investigation. While I accept that this point may be covered by some of the general terms and possibly by string 72, I consider that it is reasonable and

proportionate for this search term to be applied without reference to the Board Terms as connectors.

48. The other exception is “Shawn McCormick”. Mr McCormick was an individual whose involvement with ENRC was viewed by the Defendants as a red flag. I am told that he was interviewed during the course of the investigation but refused to answer questions or to provide documents. The application of the Board Terms as connectors has reduced a number of responsive documents from 4,019 hits to 240. It appears to me that it would be reasonable and proportionate here to carry out the search without the Board Terms connectors.
49. There is then a further group of seven issues which are the subject of paragraph 44 of Mr Bools QC's skeleton argument. With one exception, here again I was not persuaded that any of these involved searches which had not been reasonable and proportionate or that there was any need for a modification of the searches which have been carried out. As for the first of these, “Billy Rautenbach”, “Billy”, “Rautenbach” and so on, there are a number of searches which involve this individual. A search of "Machado" and "Rautenbach" and the Board Terms together is consistent with the Defendants' pleaded case that they told ENRC that Rautenbach and Machado were the same and that it was an alias. I was left unpersuaded that further searches into this individual would much advance the investigation of the key issues, as opposed to involving a further investigation of any underlying wrongdoing.
50. As to the term "David Perry QC", I considered that it made sense to have the connectors included, given the terms of the Defence. I should also add that the search relating to his name had not in fact just been for the Additional Period, as the Defendants appeared at one time to have suggested, given the terms of search 41 as it appears on page 1B/8, page 98.
51. As to the term "red flag", it seemed to me entirely reasonable to link that general term to the pleaded issues by the use of a connector. Given the inclusion of searches in relation to “self-

reporting” it also appeared to me to be reasonable to include a connector of "SFO" with "voluntary report".

52. "Whistle-blower" seemed to me to be adequately dealt with, with the connectors used, given the general search terms at items 1 to 19.
53. The term "wrongdoing" is a generic one, particularly for an FTSE company with corporate governance obligations, and one with a large compliance function, especially one preparing for the implementation of the Bribery Act. I do not consider that it has been unreasonable to apply the connectors used in relation to that term.
54. The one exception here is "falsify" and "falsification" and "forge". They have been run in connection with the Board Terms. If there were falsification or forgery of documents to hinder the investigation, that would of course be of great relevance. The application of these terms on a stand-alone basis yields only 1,380 hits and I consider that it is reasonable and proportionate to search on that basis. There needs however to be an exclusion of documents sent to or from Tess Forge.
55. I turn to deal with paragraph 7 of the revised draft order, which is the schedule 2 key words. These are the subject of paragraphs 45 to 47 of Mr Bools QC's skeleton. What is at issue are the terms "magic" and "magician", "Findlay" and "Trevelyan" and "Hollingsworth". It is sought, at least in the revised order, that these should be searched for the period 20 December 2010 to 1 April 2014.
56. It is to be noted that ENRC has already searched for "Cameron Findl*" and for "Trevelyan" and "Rob T" for the period 20 December 2010 to 6 June 2013. So, what is involved is an extra ten months.
57. ENRC had also already agreed to search the term "Mark Hollingsworth" but there was an application that there should be a search for "Hollingsworth" alone and for a more extended period.

58. I have not been persuaded that any of these searches need to be run, save that it does seem to me that the search in relation to Mr Hollingsworth should be for "Hollingsworth" on its own and, as I understood from Ms Boase QC in her submissions today, there is no objection to that.
59. As to the period up to and just after the end of the retainer, it is already covered adequately, in my judgment, by the searches which have already been used or which will be covered by the additional search for "Hollingsworth". I did not consider that it was established that it would be reasonable and proportionate to extend that period beyond June 2013.
60. As to "magic" and "magician", they appear to have been a codeword for Mr Trevelyan used in Mr Hollingsworth's own emails, but these, as Ms Boase QC told me, have been manually searched. Given the risk of false positives in relation to such words, it did not appear to me reasonable and proportionate to have these words as searches.
61. That then deals with the first of the two broad aspects of the application which were dealt with last week and which I am giving judgment on now.
62. The second broad aspect concerns privilege. What is sought in paragraph 11 of the revised order is that ENRC should provide the Defendants with a schedule of all documents to which redactions have been applied or for which a placeholder has been inserted and that that schedule should provide particulars for each document to explain the reason for the document being redacted or withheld, together with an assertion, supported by a statement of truth from the solicitor responsible for the redaction process, that the redaction or placeholder has been correctly applied. This is said, in paragraph 48 of Mr Bools QC's skeleton, to be consistent with paragraph 16.2 of PD 51U.
63. The basis on which this order is being sought is said to be 'numerous inadequacies in the redactions that have been applied by ENRC' and that 'the scale and nature of the problems suggest that, rather than being attributable to one-off errors, there have been systematic problems in the approach that has been taken by ENRC'.

64. It has been important to identify what this case is. It is not that there has been any systematic attempt to conceal documents or parts of documents which are unhelpful to ENRC. Mr Bools QC made it clear that the Defendants were not suggesting that. Equally, no contention was persisted in that the principle of implied waiver of privilege extended to any documents which were relevant to the proceedings, even if the Defendants had not had access to them at the time of the retainer.
65. What the Defendants contended was that there were errors in the assertion of privilege and that they were of a number and seriousness that I could conclude that something had gone seriously and systematically wrong, and therefore that the order which was sought was appropriate. To this end, Mr Bools QC showed me a number of examples of what he said were myriad others.
66. I considered this aspect of the case carefully, but I was entirely unpersuaded by the examples given that there was a systematic problem involved. In their skeleton argument the Defendants identified 24 complaints where they said that there was an error. This, it should be said, is in the context in a review exercise involving 260,000 documents. Of the 24 complaints, nine are based on the fact that the reviewer did not appreciate that the Defendants had at the time of the retainer been privy to a particular communication. Some such mistakes are unsurprising in an exercise of this magnitude. I also consider that it was not unreasonable for a relatively cautious approach to be adopted in this area, namely one by which reviewers would only allow inspection of an otherwise apparently privileged document if they had clear evidence that the document had been shared with Dechert at the time or its contents were not confidential, given that if the document had in fact been seen at the time by the Defendants they would have it and so it would not cause prejudice, and also because ENRC remains the subject of an ongoing criminal investigation by the SFO.
67. ENRC has, however, offered to go back through a document which contains a list of minutes which were received by Dechert during the retainer, which was not a document of which the

reviewers at Hogan Lovells were aware until the third level review team was doing its work, and check that those minutes have been disclosed, if relevant. That, as Ms Oppenheimer QC made clear, was a standing open offer and it is one which will therefore be complied with.

68. Two of the complaints raised in Mr Bools QC's skeleton do not relate to legal privilege. One relates to Swiss data protection law and the other is a redaction relating to the content of a suspicious activity report. They do not indicate any systematic issue and, still less, one relating to claims for privilege. In relation to the document which is referred to in paragraph 62.6 of Mr Bools QC's skeleton, the redaction to paragraph 10 was a claim for litigation privilege, not legal advice privilege.
69. Some of the complaints were as to what were said to be incorrect redactions. In relation to the email from Alex Gaft to Glynis Appelbe, as I understand it, the three bases for different redactions have been explained and they are no longer contested. In relation to the item in paragraph 65.2 of Mr Bools QC's skeleton, there has been an explanation that no privilege is being claimed on the basis that Mr Morrison was a client of ENRC for the purposes of legal advice privilege. The only privilege claimed is in communications passed between Ms Chodieva, Mr Ehrensberger, who was general counsel, and Sion Richards and Vica Irani of Jones Day. There seems, as I understand it, to be no challenge to that assertion. It is true that there was a mistake about the redaction of one email, but that has been corrected and does not seem to me to indicate any systematic issue.
70. The point dealt with at paragraph 65.3 of Mr Bools QC's skeleton relates to a set of questions and answers prepared as a script for ENRC's AGM. There were redactions initially made on the basis that the reviewers did not think that the privileged content had lost its confidentiality. On re-review, it became apparent that confidentiality had been lost because the document had been made public. It was then agreed that this would be made available for inspection. Again, I do not see any indication of systematic error or a reason to believe that there would have been widespread wrongful redactions.

71. The document referred to in paragraph 66.1 of Mr Bools QC's skeleton, where both a redacted and unredacted version were served, discloses what seems to me to be an arguable point as to whether there was privilege. Again, I do not regard it as establishing a systematic problem.
72. Various other complaints were not dealt with in Mr Bools QC's oral submissions. I took it from that that they were thought to be less impressive examples than those which had been. ENRC said that there were answers to all of them.
73. All of this left me unpersuaded that there was here evidence of anything having gone systematically wrong with the claims made for privilege by ENRC.
74. There remained however the question of whether, in any event, there should have been, but has not been, compliance with paragraph 16 of PD 51U in relation to redactions. This was an issue which came more clearly in to focus during the course of the hearing.
75. Paragraph 16 of PD51U provides as follows:
- ‘16.1 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is -
- (1) irrelevant to any issue in the proceedings, and confidential; or
 - (2) privileged.
- 16.2 Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement.’
76. The terms of paragraph 16 may be compared with the terms of paragraph 14 in relation to claims of a right to withhold production of documents other than by reason of Public Interest Immunity. Paragraph 14 provides as follows:

‘14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within its obligations of Initial Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to -

- (1) describing the document, part of a document or class of document; and
- (2) explaining, in the Disclosure Certificate, the grounds upon which the right or duty is being exercised.

A claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with.

14.2 A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.’

77. It is also of some relevance to compare these provisions with those of CPR Rule 31.19. That rule provides:

‘(3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document, must state in writing -

- (a) that he has such a right or duty; and
 - (b) the grounds on which he claims that right or duty.
- (4) The statement referred to in paragraph (3) must be made -
- (a) in the list in which the document is disclosed; or
 - (b) if there is no list, to the person wishing to inspect the document.

78. The mandatory practice form applied for standard disclosure under CPR Part 31 appears to envisage the listing of privileged documents in the same way as non-privileged documents. It has however been standard practice for solicitors to make claims for privilege in lists of documents in generic terms. In a number of cases, however, the courts have considered it appropriate for there

to be an individual listing of privileged documents with a sufficient indication of the nature of the privilege to allow it to be challenged, provided that such identification does not undermine the claim for privilege itself.

79. In the present case both parties prepared lists of documents which stated that they were lists for standard disclosure and referred to the rules in Part 31 of the CPR. They both contained claims for privilege in generic terms. Neither enumerated specific documents which had been redacted or identified the reasons for particular redactions.
80. The Defendants, having modified their earlier position, now contend that PD 51U is applicable to this action and should have been complied with, in particular in relation to compliance with paragraph 16.2; and they contend that paragraph 16.2 requires, even if Part 31 did not, an individual identification of redacted documents and a sufficient statement of the reason for the redaction to allow a challenge to the claim of entitlement to redact.
81. For its part, ENRC has argued that the order for disclosure was actually made before the commencement of the Disclosure Pilot and, that pursuant to paragraph 1.3 of PD 51U, that order was not disturbed by the commencement of the Pilot. ENRC argues that the result of paragraphs 1.2 and 1.3 of the Pilot is that it is applicable to applications made in relation to disclosure in this action after the commencement date and thus is applicable to the Defendants' application for further disclosure which has had to be made under paragraph 17 of the Practice Direction, but does not mandate compliance with paragraph 16 in relation to a disclosure exercise which had already been begun under an order pre-dating the commencement date.
82. ENRC says that this can be tested in this way: supposing a disclosure exercise was well advanced by 1 January 2019, the introduction of the Pilot would not require it to be redone in order to comply with paragraph 16 of the Pilot. It can make no difference, ENRC argues, that the disclosure order was actually made, as in this case, shortly before the Pilot commenced.

83. ENRC also argues that, while there does not appear to be any authority directly on the issue of whether there must be compliance with paragraph 16.2 after the commencement of the Pilot even though the order was made pre-Pilot, the authorities on the Pilot that there are tend to suggest that there does not have to be. In particular, ENRC made reference to the decision in Brearley v Higgs & Sons [2020] EWCH 376 (Ch) which concerned an application for specific disclosure in a case where a standard disclosure order was made pre-Pilot and disclosure was given post-Pilot. Falk J stated, at paragraphs 6 to 7, that the Pilot did not affect the order for standard disclosure but would be relevant to further applications for additional disclosure.
84. ENRC further argues that, even if paragraph 16 of the Pilot is applicable, it can be satisfied by a generic identification of the reasons for the redactions and, in particular, an identification as to whether they are on the grounds of (i) irrelevance and confidentiality or (ii) privilege. Further, that in the present case, the exercise not having been done in relation to the various documents individually, it would be very expensive and time-consuming for that now to be ordered and would be of very little utility in circumstances where it is known that the vast majority of the documents redacted have been redacted for reasons of privilege and not of irrelevance.
85. In my judgment paragraph 16 of the Pilot is in principle applicable to proceedings which were extant as at the commencement date, even though an order for disclosure may have been made before that date. Save in the case of an exceptional order for disclosure, there will have been no particular provision as to how a claim of entitlement to redact should have been made. The provisions of paragraph 16 will not, in general, disturb an order for disclosure made prior to the commencement date, even if it can be said that paragraph 16 requires something more specific by way of enumeration and justification of redactions to documents than was required under CPR Part 31.

86. I consider that my conclusion that the Pilot is in principle applicable in this way is consistent with what was said in UTB v Sheffield United, especially at paragraphs 16 to 17 by Sir Geoffrey Vos C.
87. On the other hand, as was emphasised by Sir Geoffrey Vos C, in paragraph 24 of the same case, the courts will seek to interpret PD 51U in a way that makes it work effectively when disclosure has already been ordered under Part 31 before its commencement date. In a case such as this one, where the parties have proceeded on the basis that the process of disclosure was conducted under Part 31 and neither sought to comply with any new requirements that paragraph 16 of PD 51U might involve, the court will consider carefully whether there can be said to have been a failure adequately to comply with an order for Extended Disclosure within paragraph 17 and also whether it would be reasonable and proportionate to make any further order requiring further steps to be taken in relation to the process of redaction and the reasons therefor.
88. The issue of what exactly paragraph 16 of PD51U requires has been the subject of debate. Paragraph 16 has no equivalent of the provision in paragraph 14 that claims for privilege may be made in a form that treats privileged documents as a class. The terms of paragraph 16.2, and in particular the words ‘any redaction must be accompanied by an explanation’, might seem to suggest that each redaction should be separately identified and justified.
89. On the other hand, it would be somewhat surprising if a markedly more onerous requirement were imposed in relation to itemising and justifying the redaction of parts of documents than is imposed in relation to withholding the whole of documents under paragraph 14. In relation to that paragraph, Sir Geoffrey Vos C said this in UTB v Sheffield United at paragraph 83:
- ‘... I do not accept that the party claiming privilege has to make that claim with particularity in relation to each document for which privilege is claimed. Paragraph 14.1 of PD51U provides that “[a] claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with”. It is

fair to say, however, that particular circumstances may make it desirable for a clear explanation of the claim to be provided. It is all about the collaborative exercise of giving disclosure on which PD51U concentrates.’

90. I do not think that a great deal can be inferred as to the specificity or otherwise with which a claim for entitlement to redact must be made can be drawn from the last sentence of paragraph 16.2. While it was argued by Mr Bools QC that that sentence indicates that there must be enough specificity in relation to each claim of entitlement to redact a document to allow that claim to be challenged, it is notable that paragraph 14.2 also contains a provision relating to challenges to claims for privilege, but that is in the context of what would be likely to be a claim in respect of a class of documents.
91. I consider that what is ordinarily required under paragraph 16.2 is a list of documents which have been redacted which identifies for each the reason for the redaction, namely whether it is irrelevance and confidentiality, or privilege. The list can be drawn up in such a way that documents can be listed by number and given a code to say which basis for redaction applies to each, provided that a legal representative with control of the disclosure process is able to confirm that each redaction falls within the relevant category. If different passages in a document are redacted for different reasons, then more than one code will apply to that document.
92. Depending on the case, it may also be desirable for an additional ‘clear explanation’ (to use the words of Sir Geoffrey Vos C in UTB v Sheffield United) of the claim of entitlement to redact also to be provided. This may well be appropriate in cases where the basis for redaction is unlikely to be apparent. In such cases, the explanation required would, in any event, not be such as would undermine any privilege involved. The exercise should be undertaken, as Sir Geoffrey Vos C pointed out, in the collaborative spirit which underlies PD 51U.
93. What I therefore have to decide in the present case is whether there should be an order requiring further particularisation of the basis on which redactions have been made. I have decided that

there should not. In my judgment, it would not be reasonable and proportionate to make such an order. In relation to this, I have had regard to the factors in paragraph 6.4 of PD 51U. It is of course correct to say that the case is large and in some respects complex, that it is important to the parties, and that the parties are well-resourced. Nevertheless, to order the parties to conduct a further exercise of giving more details in relation to the redactions made would not, in my judgment, be a valuable use of the parties' time and resources. There are a large number of documents which have been redacted by ENRC and any further exercise in relation to them would be expensive. I doubt, moreover, that it would be of very much assistance. The vast majority of the documents, I am told, have been redacted for privilege. The parties have already explored extensively the nature of the privileges which may be in issue.

94. What I have seen on this application indicates to me that there is no reason to doubt that privilege is being properly claimed in respect of the vast majority of documents concerned. There may, as in any exercise of this size, have been a few mistakes, but the evidence with which I have been presented does not suggest that they are at a rate which would justify any further order specifying the basis on which the redactions have been made.
95. Accordingly, I will not make the order sought in paragraph 11 of the revised draft Order.