Neutral Citation Number: [2021] EWHC 3193 (Comm)

Case No: CL-2018-0000815

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 27 October 2021

Before :

THE HON. MR JUSTICE BRYAN

- -

Between :

JD CLASSICS LIMITED (IN ADMINISTRATION)

Claimant

-and-

(1) DEREK HOOD
(2) SARAH HOOD
(3) RICHARD GODDARD

Defendants

- -

Mr Adam Al-Attar and **Jamal Mustafa** appeared on behalf of the Claimants
The First Defendant appeared as a litigant in person
The Second and Third Defendants did not attend and were not represented.

Hearing Date 27 October 2021

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Approved Judgment

MR JUSTICE BRYAN:

F. JDCL's disclosure application

F1. Introduction:

1. I have already set out the background to this matter in my judgment in relation to DH's disclosure application which I delivered yesterday ([2021] EWHC 3189 (Comm)) and to which reference should be made.

2. Turning to the JDCL disclosure application, the agreed approach adopted before me was for each of the parties to address me in relation to each of the paragraphs in the order applied for, in the sequence set out in the JDCL disclosure order (the "**disclosure draft order**"), following which I have ruled in relation to that paragraph of the disclosure order that is sought..

3. All orders for disclosure applied for by JDCL relate to documents that DH has already been ordered to disclose by way of extended disclosure, pursuant to the disclosure order, but it is said by JDCL that DH has failed to do so adequately or at all, notwithstanding that DH filed a disclosure certificate dated 24 December 2020 certifying compliance with the disclosure obligations.

4. As has already been noted, such certification is not a bar to the court making an order under paragraph 17 of PD51U if the disclosure provided by DH is inadequate; see *Berkeley Square* supra, at [26]. As already addressed, where a party has failed to comply with an order for extended disclosure, paragraph 17.1 of PD51U provides that

> "the courts may make such further orders as may be appropriate",including an order that the party
> "undertake further steps, including further or more extended searches"
> or
> "produces documents".
> Pursuant to paragraph 17.2 of PD51U,
> "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)".

5. In this regard, I have already referred to what was said by Robin Vos (sitting as a deputy judge of the High Court) in the *Berkeley Square* case, supra, at [61] to [67], in particular (i), that some basis must be shown for going

> "behind the process which has already been carried out and the certification of that process",
> but (ii),
> "what is required from the parties and the court is a pragmatic and flexible approach taking into account … all the circumstances".

F2. Paragraph 1 of the draft order, subparagraph 1A

6. "all copies of the sales and purchase records, **including communication by which the first defendant negotiated any such sale or purchases**, in relation to all sales and purchases of vehicles by the claimant for the period ranging from January 2014 to January 2019 in

which the first defendant was involved" (emphasis added).

7. This request, which overlaps with many of the categories by its nature and breadth, arises from paragraphs 9 to 11 of the reamended points of claim, which allege that DH had principal control of high-value sales and control of production of sales and purchase records in relation to all sales conducted by him, and most high-value sales. It is also alleged that such sales comprise the alleged fictitious transactions in the RAPOC, and the date range has been identified and agreed by reference to those transactions. The request, therefore, relates directly to an issue in the proceedings, issue 1. Moreover, JDCL submits that there is a sufficient likelihood that such documents exist, as DH has admitted that while he was employed by JDCL, he had responsibility for JDCL's client relationships and sales, even after the acquisition (see paragraph 24 of Hood 1).

8. In this respect, DH stated in an email to Quinn Emanuel dated 21 May 2021 that:

> "any communications went through my company BlackBerry, iPad and PC. **I did not have a private mobile phone** during my ownership and during the Charme Capital period of JD Classics" (emphasis added).

9. DH further asserted in his second sworn witness statement (Hood 2), responding to the JDCL disclosure application, that (at paragraph E),

> "**all** my emails, both personal and company communications, regarding the business were through the company server and my company telephone, **which was my only telephone at the time**",
>
> (emphasis added)

i.e. at all times prior to exiting in June 2018. He referred to other personal email accounts, but said that he used these after exiting the company (at paragraph I).

10. In his skeleton argument filed in respect of the first disclosure hearing, he said that: *"the claimant has my BlackBerry phone, which I handed over along with my computer after I resigned. This was my only telephone at the time. My wife then bought me an iPhone in July-August 2018 for my personal use, and I later bought another BlackBerry also, for business use"*.

11. JDCL says that these statements are false – in particular, that there is evidence of other phones in use: an 005 telephone (reference being to the last three digits of the phone), believed to be a BlackBerry; a 464 telephone, which appears to have been in use from at least mid-April 2018, if not earlier; and a 755 telephone, in use from at least August 2018. Those dates, however, are only based on Richard Goddard's disclosure, Mr Al-Attar making the point that phones could have been in use from earlier dates.

12. For his part, DH says that the 464 number phone was bought for him by his ex-wife around July-August 2018, and he also says he was mentally all over the place, and he believed it was bought after he had left the company. As will be seen, this is contradicted by the evidence. He also says any sales were carried out by JD Classics, notwithstanding any communications between himself and Mr Goddard. Of course, that does not mean that there may not have been relevant communications between him and Mr Goddard. He also says he was very busy when doing disclosure on both trying to set aside his bankruptcy and dealing with an HMRC investigation. He says that it was a mistake that he did not reveal the 755

phone or any messages on it, and that he had purchased it after he left JDCL.

13. In Mr Goddard's disclosure are text messages between Mr Goddard and DH which include the telephone number from which it was sent. For example, on 21 May 2018 the 005 number sender is Mr Derek Hood. It is a BlackBerry, and then there are also a series of text messages on 17 April 2018 which are in the same format, including a message from Mr Hood from the phone ending 464. There are a series of messages between them in which Mr Goddard is complaining to Mr Hood about finance payments he has to make on cars that he cannot pay. Then DH says, "I'm on the case", and he tells Mr Goddard not to be dramatic; it is just a fact. JDCL says these are relevant, as they show Mr Goddard and DH dealing in respect of certain cars together and seeking finance for those cars, in the expectation that they can sell them before finance has to be paid, with a profit before the finance kicks in.

14. There are also expressions of sympathy and the question arises as to what those expressions of sympathy were about. Mr Al-Attar, on behalf of JDCL, submits that the reason can be seen from a text on 19 April, in which RG is asking how the news has gone down, and it appears that the previous day, on 18 April, Lavender J handed down the first judgment in the *Tuke* litigation, in which findings of dishonesty were made against DH.

15. The evidence, therefore, shows that RG and DH were texting one another on a phone that had not been disclosed or searched for, and the period in which that phone and those texts appear to have then been operating is the period from the hand-down of the Lavender J judgment to the administration. As pointed out, this is a most important period in the context of disclosure, as this is the period when allegations of wrongdoing escalated.

16. In further evidence, there is further phone evidence of text messages between them, and a text message using the phone 005. These are, I am satisfied, undisclosed repositories of documents. They were also linked to Mr Hood's Gmail, and at least one has been in use since May 2015, as shown in the electronic bundle, which is messaging on an iPhone between DH and RG. The earliest message that is there is dated 10 May 2015.

17. There is also a contemporaneous email from Valerie Shelton, DH's PA, with the subject line "Derek's iPhone", dated 17 April 2018, just under three months prior to the termination of DH's employment at JDCL. Accordingly, DH had an iPhone while at JDCL, and further, used that iPhone to discuss business dealings with RG. This contradicts DH's statement in the that I have already referred to that: *"all business, both company and personal, between the third defendant and myself was via telephone [sic], verbal handshake and JD email server*", which is equally inconsistent with RG's statement at Goddard 1 at paragraph 26 that: *"My business relationship with Derek was very informal. All our transactions were done via phone … email, text or handshake only".*

18. This email shows that Mr Hood had asked his PA to add a couple of email addresses to his new iPhone. Further and in particular, DH has failed to disclose any emails sent from, received by or copied to the two personal email accounts referred to, a "Wyckehill" email address and a "Derek Hood" numbered Gmail address (which I do not set out in full a public judgment) – and he denied using these accounts to conduct personal or JDCL business with RG, notwithstanding the fact that the disclosure that has been provided by RG shows DH using at least one of his personal email accounts – that is, a numbered Derek Hood Gmail account – to conduct business dealings, and also a personal mobile device, as is addressed by Mr Gailani in his second witness statement at paragraphs 25 to 27.

19. It is pointed out that the timing of this email is the day before Lavender J handed down his judgment in the *Tuke* litigation. It is submitted that DH will have seen the draft before the hand-down, and it is suggested that it is not coincidental that he is asking his PA to set up personal accounts on his iPhone. JDCL says that "the writing was on the wall" after the hand-down of that judgment, and investigations as to his conduct at JDCL then escalated, culminating in his dismissal. It is said that he took steps to put assets beyond his creditors. Those are pleaded allegations, for example in relation to the trustees. It is said that he created these email accounts so that there was a way of communicating that would not show up on the company email servers.

20. For his part, DH, in his oral submissions before me, accessed the Wyckehill address during the hearing. He says that the majority of emails started from 25 September 2018, and he also said that he will forward to JDCL any emails from that account. He also, accessed the Derek Hood Gmail address during the course of the hearing in his oral submissions before me. He said that the majority started from May 2018, and he could give disclosure of all emails on that account (assuming, of course, that emails were not privileged).

21. In reply, Mr Al-Attar pointed out that there was evidence about phones being in use from April 2018, and that the evidence that the particular mobile had only been purchased in July and August cannot possibly be true given the emails to which I have referred showing messages in April 2018. It is also relevant to note that while DH did indeed hand over his BlackBerry to JDCL's then solicitors, no working password was provided, as communicated by JDCL's then solicitors to DH's then solicitors. I should say, however, as I noted in my judgment yesterday, that DH has indicated that he would now hand over the password.

22. In the documentary material before me, there is also an address "derekhood" – with a number – "@icloud.com", which appears in the disclosure to date, but of which DH himself has remained silent and has not disclosed any documents. That address also indicates the use of an iPhone which is relevant to a later order that is sought.

23. Prior to this hearing, DH refused to produce documents such as these sought by JDCL, alleging that JDCL had withheld documents from him. I have already addressed the DH disclosure application, which has largely been unsuccessful, and like HHJ Pelling QC before me, I am satisfied that JDCL has complied with its disclosure obligations. In any event, DH's disclosure obligation is not conditional on JDCL disclosing documents to him, or indeed, had it been the case, whether or not JDCL had itself complied with its own disclosure obligations.

24. In any event, I am satisfied that in the above circumstances, there is a likelihood that documents exist within this category, by reference to the evidence that I have referred to, and that there are repositories of documents that exist at the relevant time in the form of the phones and their contacts and communications with RG in respect of relevant matters, and those have not been searched at all. In such circumstances, I am satisfied that there has been a failure to comply with the order for extended disclosure in relation to issue 1A, and that it is reasonable and appropriate to make the order sought in relation to this category.

25. I also do not regard the explanations given by DH for the non-disclosure of the phones or associated contacts as satisfactory. This, in and of itself, also reflects upon DH's approach to disclosure. In such circumstances, I make the order for disclosure that is sought, to which should be added at the end, "in particular", followed by an express reference to the phones concerned for the avoidance of any doubt. I make clear, however, that category 1A is not

limited to the content of those phones, but that it is purely to ensure that Mr Hood puts his mind to those phones in particular.

Subparagraph 1B provides: "all accounts and financial records of the claimant for the period ranging from January 2014 to January 2019".

26. This request for disclosure is a narrower subset of the documents in paragraph 1A, and arises from paragraphs 9 to 11 and 23 to 26A of RAPOC, which alleges that DH had effective control over the accounts and other financial records of JDCL. It is JDCL's case that these accounts and records inflated and misstated the financial position of JDCL on the basis of which the acquisition was undertaken. DH has not disclosed any documents in relation to this request covering the period January 2014 to 30 April 2015, which JDCL says is an obvious and material gap.

27. Included within this period are transactions in relation to:
(i) the Jaguar D type (chassis number XKD 548), referred to in paragraph 1, subparagraphs 2 to 4 of schedule 1 to the RAPOC;
(ii) the Jaguar XK120 (registration number AEN 546), referred to in paragraph 6.1 of schedule 1 to the RAPOC; and
(iii) the Ford GT40 Mark 3 (chassis number P1101/2), referred to in paragraph 17, subparagraphs 2 to 3 to schedule 1 to the RAPOC.

28. Given that DH was, as I understand it, both a director and CEO of JDCL during this period and, as I have already identified above, further appears to have conducted JDCL business from at least one of his personal email accounts, I am satisfied that there is a sufficient likelihood that such documents exist which go to an issue in the proceedings, as identified by Mr Gailani at paragraph 28 of his second witness statement.

29. In his previous written submissions, as repeated to me orally this morning, DH has simply asserted that such documents are within JDCL's control. As I have already identified, DH's disclosure obligations are separate from JDCL's disclosure obligations, and in any event, the evidence I have referred to in relation to request 1A shows that there is a repository of documents, which is outwith those documents which are within the control of JDCL, which have not been disclosed by DH.

30. I am satisfied that DH has not complied with the existing extended order for disclosure in relation to this category, and that it is reasonable and proportionate to make an order in the terms sought in paragraph 1B, and do so.

Subparagraph 1C is:

> "all communications and documents between DH and the second defendant that refer to the £9,700,000 of the initial consideration (as that term is defined in the claimant's reamended particulars of claim dated 17 June 2021) and all documents and communications that relate to the alleged 'loan' between himself and the second defendant that is detailed in paragraph 26B(2) of the first defendant's defence" (issue 3).

31. This request for disclosure is, again, a narrower subcategory and arises from DH's amended Defence at paragraphs 26A to C, responding to paragraphs 18E to F of RAPOC, in which DH alleges that the transfer of the sum of £9,700,000 of the initial consideration from

SH to him was a loan in response to JDCL's allegation that the aforesaid sum was received by SH as a volunteer or nominee for DH, and that the assertion that this was a loan was a fabrication in an attempt to secure approval of DH's IVA proposal dated 18 February 2019. DH has not disclosed any emails or other documents containing communications between himself and SH.

32. JDCL has further undertaken a comprehensive search for all emails sent by DH from his JDCL email account to SH and vice versa, and uncovered no emails relevant to the issues. JDCL says it is therefore to be inferred that DH did not use his JDCL email account to communicate with SH in relation to the subject matter of this request, and that any communications were made via his personal devices and email accounts, which JDCL says is further consistent with their (then) relationship as husband and wife, as addressed by Mr Gailani in his second witness statement at paragraphs 29 to 31.

33. By way of written response, Mr Hood asserts that all documents in relation to the initial consideration have been disclosed by him "and the third defendant", which is understood to be meant to be a reference to the second defendant, his wife. However, JDCL submits, for the reasons that I have identified, that he has not. No documents in this category have been disclosed, notwithstanding the fact that DH essentially is saying it is his wife's money, which was loaned to him, his wife is saying it was money that he took from her and JDCL is saying that SH is DH's nominee in relation to money that JDCL is entitled to an account for. It would be surprising, says JDCL, if there was no documentation between DH and SH at all, given their opposing cases. On the material disclosed to date, there is nothing to suggest that there was a loan, and the expectation is that any communications between them would be on their own personal mobile devices.

34. For his part, in his oral submissions before me today, DH says that the communications between him and his wife were mainly verbal up to their divorce, and that he did not need to communicate with his wife before 2018 on a mobile when he was at the company; rather, they spoke when he came home in the evenings. He did not believe that there were any records on the company server; he said there might have been the odd telephone call, and that after their relationship broke down, the main communications were between him and her solicitors.

35. In the context of the clear existence of personal mobile phones which had not been previously disclosed and the existence of email accounts which had not previously been disclosed or searched, I am satisfied that there is every likelihood that there will be correspondence between DH and SH in relation to the subject matter of subparagraph 1C, and that DH has not complied with his disclosure obligations for extended disclosure in relation to this, issue 3. Accordingly, I am satisfied that it is appropriate to make the order that is sought in relation to subparagraph 1C, that order being both reasonable and proportionate in the circumstances.

Subparagraph 1D relates to:

> "All documents and communications between (i) himself and the second defendant and (ii) himself and any third parties, including his nominee, Mr Tony Bayliss, and Mr James Gordon, in respect of the preparation of his IVA proposal dated 18 February 2019" (issue 3 and 23).

36. This request for disclosure arises out of paragraphs 42 to 49 of RAPOC, namely the allegations that SH was a volunteer and/or nominee for DH in respect of receipt of the initial consideration, and that the trust deeds were sham documents voidable under section 43 of the Insolvency Act 1986. DH has refused to provide these documents, on the basis that they are not relevant to the failure of JDCL, and because, it is said, communications with Mr James Gordon and Mr Tony Bayliss are privileged. So far as relevance is concerned, as JDCL submits and as I am satisfied is the case, they are relevant, because the failure of JDCL is not the only issue in the proceedings, and this documentation would go to issues 3 and 23. JDCL also makes the point, which may be a forensic point, that DH has not denied the existence of such documents.

37. Turning to the question of privilege in relation to communications with Mr James Gordon and Mr Tony Bayliss, JDCL's position is that reliance on privilege – at least, any blanket reliance on privilege – is misconceived. JDCL's stance is set out in a letter to DH dated 29 September 2021, in which they state that legal professional privilege only attaches to communications with a person who is a qualified and practicing barrister or solicitor and engaged by a client in that capacity, save in exceptional circumstances where, for example, the putative client was unaware that the barrister or solicitor with whom they had communicated had ceased to practise and they had engaged them on the basis that they acted in that capacity (*Walter Lilly & Company Ltd v MacKay & Anor* [2012] 6 Costs LO 809, at [17]).

38. In this regard, in Hood 2, DH exhibits a letter from Mr James Gordon, dated 16 September 2021, in which Mr Gordon states that he had a retainer with Freeths LLP and subsequently Fieldfisher LLP, who acted for DH at the time, and on which basis it is said his advice was privileged. There is no contemporaneous evidence before me in relation to that assertion. In any event, as is well established, legal professional privilege is a reason to refuse inspection, not disclosure.

39. Points are made that the retainer could itself be disclosed. JDCL also submit that the claim for privilege in respect of communications with Mr Bayliss is misplaced. It is said that he is not a lawyer, which appears to be true; nor, it is said, was he engaged by DH as such. Reference is made to *Dadourian Group International Inc & Ors v Simms & Ors* [2008] EWHC 1784 (Ch), at [122]. JDCL submit that the order sought should be granted in circumstances where DH does not appear to deny the existence of documentation, such documents are relevant to the issues in the proceedings and there is, in the circumstances, sufficient likelihood that they exist, as addressed in paragraph 32 to 33 of Gailani 2.

40. Summarising its position, JDCL makes the following points in its oral submissions before me. First, the IVA and trust deeds both occur after the dismissal and in the period November 2018 to February 2019, and therefore, even on DH's case, would not be captured by the JDCL servers in this period. They would, however, be caught by personal devices of DH which have not, as already identified, been searched. Secondly, and in this regard, there is the evidence about the handing in of the BlackBerry and the iPad, and the use of personal devices thereafter.

41. Thirdly Mr Al-Attar reiterates the point about privilege relating to inspection, which is distinct from disclosure, and also that Mr Bayliss was the nominee under an IVA proposal, and he is an insolvency practitioner and not a lawyer. Mr Gordon, it is accepted, is an SRA-registered lawyer, but it is not accepted by JDCL that he was communicating as a retained lawyer entitled to engage rights of privilege. JDCL reiterated the point again that privilege

and disclosure are different.

42. In his oral submissions before me today, DH quoted from an email he had received from Mr Gordon which contains assertions that there was indeed a retainer of him with Freeths and then Fieldfisher, although it is said that JDCL has no right to ask or see that, and Mr Gordon expresses views that communications are subject to legal professional privilege. He also said that Mr Bayliss was employed via Freeths, and so he says communications involving Mr Bayliss are themselves privileged.

43. By way of reply, JDCL pointed out that the relevant nominee is a statutory one, and the nominee, Mr Bayliss, is the nominee of the debtor, and it is the debtor that engages the nominee. Mr Al-Attar accepted that there may be communications between the lawyers and the nominee, in relation to which there could be legal advice privilege, because in the context of an insolvency it is possible that there could be communications between DH, the IP and legal advisers to take legal advice about the insolvency, but the likelihood is that there will be a whole series of communications between the debtor and the nominee not involving the law at all, and not involving in any way, shape or form legal advice: for example, the debtor having to make disclosure of his assets and loans to the nominee, which is conveying information, not legal advice.

44. I am satisfied that DH has not given disclosure of any non-privileged communications between himself and the second defendant – that is, between him and his wife; by their very nature, those are not privileged – and, secondly, between himself and third parties, including the nominee, Mr Tony Bayliss, and Mr James Gordon, to the extent that those communications are not covered by privilege. For the reasons identified above, it does not follow that all such communications will be privileged, and equally, even if any communications are privileged, the point goes to inspection rather than disclosure.

45. Accordingly, I am satisfied that there has not been compliance with the extended disclosure obligation in relation to issues 3 and 23 by DH, and that it is reasonable and proportionate to make an order in the terms sought. I would simply add, by way of clarification, that in compliance with subparagraph 1D, to the extent that documentation is privileged, DH would not be obliged to give inspection of such material, for the reasons that I have identified.

Subparagraph 1E is as follows:

> "All relevant communications with any of the following parties in relation to any of the transactions or vehicles listed in any of schedules A1, 1, 2 or 3 to the claimant's RAPOC:
> (i) Mr Richard Goddard/Guernsey Classic Cars Ltd ("JCC");
> (ii) Mr Jeff Lotman/Melhill Classic Cars LLC;
> (iii) Mr Curt Engelhorn/Kusama Classic Cars Ltd ("KCC");
> (iv) Mr Peter Heiland;
> (v) Mr Gruselli" (issues 5, 7, 8, 9, 10 and 11).

46. This is a narrow subset of paragraph 1A, which is all communications and all sales from the period January 2014 to 2019. Therefore, subparagraph 1E is a narrow subset thereof of particular transactions in respect of the FY2016 and the counterparties. The request arises from paragraphs 23 to 25A of the RAPOC and paragraphs 28 to 31 thereof,

which detail DH's alleged breaches of fiduciary duty by executing, approving or acquiescing, and the transactions set out in schedules A1, 1, 2 and 3 of the RAPOC.

47. DH's written riposte is to assert that all relevant documents in this regard are within JDCL's control. However, I am satisfied that this is inconsistent with the disclosure provided by RG, which includes text messages between DH and RG in respect of the business dealings, as I have already referred to, and evidence that DH used one of his personal email accounts, the "derekhood" with a number Gmail address, for business dealings, as I have also already addressed. I am satisfied that there is a sufficient likelihood that such communications exist, which go directly to a number of the issues in the proceedings, as identified by Mr Gailani in his second statement at paragraph 34 to 35.

48. Accordingly, for the same reasons as identified in relation to category 1A, I am satisfied that there has been a failure to comply adequately with the order for extended disclosure in relation to the issues I have identified, and that the order now sought is reasonable and proportionate.

49. In his oral submissions, DH sought to link this with his own disclosure application, and asserts that the majority of documents will have gone through the JDCL server. I have already ruled upon DH's disclosure applications as part of the DH application earlier in my judgment and, save in certain limited respects, for the reasons I have given, I have dismissed those disclosure requests.

subparagraph 1F provides as follows:

> "All relevant communications with any of the following parties in relation to any of the transactions or vehicles listed in schedule B1 or schedule 4 to the RAPOC:
> (i) Mr Richard Goddard/GCC;
> (ii) Mr Curt Engelhorn/KCC;
> (iii) Maranello Rosso Ltd;
> (iv) Mr Peter Heiland;
> (v) Mr Gruselli" (issues 6, 12 and 13).

50. Again, this is a subset of paragraph 1A. This request arises from paragraphs 26 to 26B, 28 and 31A to 32 of the RAPOC, which sets out DH's alleged breach of fiduciary duties by executing, approving or acquiescing in the transactions set out in schedules B1 to 4 of the RAPOC. It is addressed by Mr Gailani in Gailani 2, at paragraphs 34 to 35, and for the same reasons that I have given in relation to subparagraph 1E, following on from the reasons I gave in relation to paragraph 1A, I am satisfied that in this area, too, there has been a failure to comply with the order for an extended disclosure, and that it is reasonable and proportionate to make the order that is sought in subparagraph 1F, which I do.

Subparagraph 1G:

> "All relevant documents concerning Charme Capital Partners Ltd's alleged mismanagement of the claimant, including all relevant communications between the first defendant and Mr Christopher Fielding" (issue 15).

51. This request arises from DH's amended Defence, in particulars paragraph 42.5, which alleges that the failure of JDCL was due to mismanagement by Charme Capital Partners Ltd ("Charme"), not by any breaches of fiduciary duty on his part. DH has admitted that he has

documents responsive to this request, but essentially, his position in writing and repeated before me today is that he needs copies of JDCL's documents and communications with Christopher Fielding, and that those should be disclosed by JDCL before he discloses those that he has got.

52. The result is that while DH has disclosed some documents within the description of those contained within this part of the draft disclosure order, JDCL submits that there is a sufficient likelihood of further relevant documents existing that DH is withholding, on the erroneous basis that he considers his disclosure obligations conditional on JDCL's performance of theirs, which DH has submitted is inadequate and in relation to which, however, I have made findings in relation to DH's application.

53. In addition, and as I have also referred to previously, HHJ Pelling QC, dealing with other parts of DH's application, found specifically that there had been no failure by JDCL to comply with its disclosure obligations in respect of communications passing between DH and Mr Fielding; see, in particular, at [51] of the Pelling judgment.

54. So the position is as follows: there has been some disclosure from DH in relation to Mr Fielding. It is now known that there has not been disclosure of his electronic devices and personal email addresses, and so far as DH's application is concerned in relation to the matters concerned, those applications were essentially unsuccessful before me yesterday, for the reasons given by me. In any event, it is trite that the duty of disclosure is independent of other parties' duty to give disclosure.

55. In the course of Mr Al-Attar's oral submissions, he took me to DH's Defence, and the fact that DH's defence was that Charme caused the losses by excluding him from the management and taking over the business. The business failed, and the reason the business failed was because Charme had failed to invest £150 million to support and expand the business, as it is alleged they had promised they would do. JDCL, for its part, has searched its documentation and cannot find any such documentation, and equally, in the trial witness statements, there is no reference to any such documents having been revealed.

56. To the extent that DH did have dealings with Mr Fielding, and it is clear from the material that has already been disclosed that he did, then one would expect that within the material that has not been disclosed, i.e. those devices and email accounts that DH has, DH would be expressing dissatisfaction if he had been excluded from the management, or if he was displeased that there had been no injection of £150 million. If such evidence existed, it will, of course, be of great importance and relevance to DH's defence.

57. It is important, therefore, that the known repositories of documents are searched so that the true position in relation to whether or not any documents exist within this category is before the court. JDCL, of course, does not accept these allegations by way of defence, and therefore, on JDCL's own case, JDCL would say that there will not be any such documentation, but nevertheless, such documentation is clearly relevant, because it is relevant to the defence being advanced by DH. Indeed, DH asserts strongly that such material does exist.

58. In those circumstances – in particular, where such repositories of documents clearly do exist, for the reasons I have already identified in relation to previous categories, and that disclosure has not been given – I am satisfied that DH has not adequately complied with the

order for extended disclosure in relation to these issues, and that it is reasonable and proportionate to make an order in the terms sought in subparagraph 1G, which I do. Subparagraph 1H provides:

> "All documents relevant to the payment of £965,000 from the claimant to the third defendant, and a payment of an equivalent amount to the first defendant in January 2018, including all communications with the third defendant in respect of the same and which relate to the reasons for those payments (not merely the mechanics of those payments)" (issue 18).

59. This request for disclosure is not strictly a subset of 1A, which deals with purchases, whereas paragraph 1H and the next paragraph, 1I, deal with payments to RG in January and February 2018: the £965,000 and £900,000, the latter of which is now said to be for a Ferrari Daytona. Of course, if that is the case in relation to the latter, that would feed into paragraph 1A as a purchase.

60. The matter arises from paragraph 40A(2) of RAPOC, and the allegation that DH caused or directed payment of £965,000 to RG. There is a difference between DH and RG as to what this was about. Per DH the initial payment was a "mistake", whereas RG's evidence or understanding is that it was in furtherance of a disguising of a fictitious transaction; see RAPOC at paragraph 40D, subparagraph 1.

For his part, in his previous written submissions, DH has asserted, (1)that he has no documents falling within the description; (2) he requires access to JDCL's records to provide the documents sought; and (3) all business between him and RG, both through JDCL and personally, was conducted via telephone, verbal handshake or JDCL's email server, and has been disclosed or is within JDCL's control; more specifically, as stated in his skeleton argument for the first disclosure hearing that "most of the business with RG was conducted verbally".

61. But, as I have already addressed in the context of paragraph 1A, it is clear that there are, in fact, numerous text messages between RG and DH, some of which relate to payments, which obviously calls into question what is said about him not having any documents falling within the description and that all business between him and RG was conducted via telephone, verbal handshake or JDCL email server. Indeed, as in the case of paragraph 1A, those statements would not appear to be correct, as there is evidence of communications by a mobile phone and by personal email traffic. Set against that background, it is submitted that DH should be directed to carry out further searches for the relevant documentation, on the basis that there is a sufficient likelihood of such documentation existing, as addressed in Gailani 2, paragraphs 38 to 42.

62. Building upon these points, in his oral submissions, Mr Al-Attar points out that really, the groundwork for this paragraph has already been done in the context of paragraph 1A and the dealings which had been seen in relation to mobiles and personal devices which have not been disclosed.

63. For the purpose of this specific issue, I was taken to an additional text message which is in the electronic bundle, and which is timed at 18.11 on 6 August 2018, from RG to DH, which provides as follows:

> "Have you thought more about buying these cars from me one at a time and then adding them to your asset statement as per our conversation? Also, have

> you thought about sending me an email concerning the money that you have already sent towards the cars in case I get asked in the future?"

64. It is pointed out by JDCL that this email, in August 2018, is shortly before JDCL collapsed into administration, and RG is asking DH to write him an email in respect of monies that DH sent RG towards the cars in case he gets asked about it in the future. Whilst keeping his powder dry for cross-examination of RG in due course, Mr Al-Attar submits that this text message and other text traffic and phone traffic suggests that there will be documents of relevance which exist which have not as yet been disclosed in relation to the payments of £965,000 and £900,000.

65. Indeed, JDCL go so far as to make the allegation that there may even be an email manufactured by DH for the benefit of RG. That point, obviously, would be a matter for exploration at trial. Nevertheless, JDCL submits that text messages such as this illustrate and reiterate the fact that there is a likelihood of documentary material out there in relation to this issue which has not been disclosed to date.

66. By way of riposte orally, the only additional point made by DH was that if there were emails between him and RG, then that would be shown up on the disclosure of RG. The obvious point that might be said in rebuttal of that is that it does not necessarily follow that every email or text message or every evidence of telephone traffic will have been disclosed by RG. Without in any way casting any aspersions upon RG, it does not necessarily follow that any adverse document would necessarily have found its way into disclosure provided by RG. In those circumstances, I am satisfied that DH has not complied with his obligations in relation to extended disclosure in relation to the associated issues and that the order that is sought in relation to paragraph 1H is reasonable and proportionate.

Subparagraph 1I is as follows:

> "All documents relevant to the payment of £900,000 from the claimant to the third defendant, and payment of an equivalent amount to the first defendant in February 2018, including all communications with the third defendant in respect of the same and which relate to the reasons for those payments (not merely the mechanics of those payments)" (issue 18).

67. I have essentially already dealt with this request in the context of dealing with the previous request. It arises from paragraph 40A(2) of RAPOC and the allegation that DH caused or directed payment of £900,000 to RG. RG has admitted receipt and payment for an equivalent amount to DH in February 2018, on the purported basis that the initial payment by DH was in respect of a development project, in relation to which DH subsequently changed his mind and requested repayment; see paragraph 40D(2) of RAPOC. JDCL seeks disclosure of the documents answering the description quoted above, for the same reasons that were given in relation to subparagraph 1H.

68. The only additional point is as a result of a change in case by DH, because it is now said that the £900,000 relates to a purchase of a Ferrari Daytona. Therefore, if that is right, it would in fact fall within the rubric of category 1A. But in any event, and for the same reasons that I gave in relation to subparagraph 1H, I am satisfied that there has not been compliance with DH's disclosure obligations in relation to extended disclosure in relation to this category, and that it is also reasonable and proportionate to make an order in the terms there set out, and for the same reasons that I have previously given.

69. The next item arises from paragraph 40(a)(iii) of RAPOC and the allegation that *"DH called for directed cheques to be drawn in his favour by JDCL in breach of fiduciary duty"*. Per DH, so far as it concerns the £450,000 and the £500,000 payments by cheque, it is said to be a reimbursement of him for payments he made to Mr Dibble and Mr Christie for purchase of cars from them for JDCL. Logically, therefore, this aspect of DH's defence is a subset of paragraph 1(a) and I am satisfied that disclosure should be given for the reasons identified in relation to paragraph 1(a).

70. The £175,000 in relation to a cheque stub bearing the name Guernsey Classic Cars, the original case of DH was that that was in respect of a payment to him in respect of the dealing in respect of cars and, therefore, would also logically fall within paragraph 1(a). But, evidentially, DH now says that this amount was in relation to reimbursement of him for a finder's fee agreement to be paid to deCAR Partners and Mr de Cavaignac by JDCL. If that is right, then it is not part of the subset of paragraph 1(a).

71. However there is no documentation evidencing that arrangement with Mr de Cavaignac and it is said that that in itself would independently be a reason to search the unsearched repositories that I have already addressed in the context of paragraph 1(a). Orally, DH says that JDCL received the invoice payable to deCAR and has the invoice showing the 135k payable and payment was due to be paid by him on behalf of the company.

72. He also raises other allegations which I understand to be part of a purported counter-claim which he wishes to advance which is not part of the application before me today. I am satisfied that it is appropriate to make an order in the terms sought, firstly, so far as it relates, essentially, to paragraph 1(a) and a subset thereof for the reasons I have already given and, secondly, to the extent that DH's defence now raises questions about the relationship with deCAR Partners and Mr de Cavaignac.

73. I consider that there has not, to date, been any searching or disclosure of the documentary repository already identified in terms of the mobile phones or email traffic, such as there may be, and that DH has not given compliant extended disclosure in accordance with the existing order and that it is appropriate for the court to make an order in the terms which are sought, which I am satisfied are reasonable and appropriate.

Subparagraph (1)(k) provides as follows:

> "All documents relevant to the DH loan account (as that term is defined in the RAPOC) and the inclusion of an entry of £1,900,000 in respect of a transaction purportedly concluded on or after 31 October 2015 with Cottingham Blue Chip Ltd" (Issue 20).

74. This request is a subcategory of 1(a) and is looking for dealing with Cottingham Blue Chip in relation to a Ferrari 250 SWB. If true, that could justify the entries that arise but, of course, that is not accepted by JDCL.

75. The issue arises from paragraph 40(a)(iv) of the RAPOC, which alleges that DH inflated the DH loan account by including a transaction purportedly concluded with

Cottingham Blue Chip Ltd ("CBC") for a silver Ferrari 250 SWB on or about 31 October 2015 which JDCL alleges did not occur (as that Ferrari was, in fact, purchased by Ferrari Financial Services from DK Engineering Consultancy Ltd and for which, says JDCL, DH was therefore wrongly reimbursed through the DH loan account).

76. It is said that DH has failed to provide any documents in response to this request, and denies having any further relevant documents within his control. JDCL submits that it is likely that DH will have such relevant documents within his control because the transaction purportedly involved a payment by DH to CBC personally for which he was then reimbursed via the DH loan account and so documents currently available suggest that DH did not make any such payment to CBC and so he wrongly inflated the loan account.

77. DH's response, which is set out in paragraph 43(a)(iv) of the amended Defence, is that he did not. That leads JDCL to submit that an inference should be drawn that DH must have paid £1.9 million to CBC and have documents supporting such a payment within his control if that were to be true, hence JDCL seeks the disclosure that is sought. A point previously made by DH - which he repeats today and, in fact, mentioned yesterday as well - is that he resists giving disclosure of such documents on the basis of alleged inadequate disclosure by JDCL.

78. So far as the allegation itself is concerned, HHJ Pelling QC rejected that allegation at the first disclosure hearing (see at [21] and [33] to [34] of the Pelling judgment) and DH was no more successful before me yesterday in relation to the subject matter of his DH application. I consider that it is appropriate to make the order sought. Essentially, it is a subcategory of category 1(a) and, therefore, I repeat my reasons in relation to that.

79. The riposte of DH that JDCL has not complied with their obligations and, therefore, he is not required to give any more disclosure is wrong as a matter of principle. In any event, the allegation itself has not been substantiated and the contrary has been found by HHJ Pelling QC.

80. I am satisfied that DH has not complied with his obligations in relation to extended disclosure in relation to this issue, issue 20, and that it is appropriate to make the order in the terms sought which I am satisfied are reasonable and proportionate and I so order.

Subparagraph (1)(l) provides as follows:

> "All documents relevant to the creation and execution of the trust deeds as defined in the RAPOC with the second defendant, including: (i) all relevant communications with the second defendant in respect of the same, and (ii) all relevant communications with third parties in respect of the same, including his nominee, Mr Tony Bayliss" (Issue 23).

81. I have already addressed aspects of this issue in relation to categories 1(c) and (d). The request arises from paragraphs 42 to 49 of the RAPOC and the allegation that the trust deeds were a sham and designed to put DH's assets beyond the reach of his creditors by approval of an unfairly prejudicial IVA proposal. In response to this DH, firstly, does not dispute documents exist which respond to requests but has referred JDCL to his wife, SH and, secondly, asserted in his skeleton argument for the first disclosure hearing that the trust deeds

"were a genuine attempt to reconcile with my then wife of some 30 years plus".

82. It is said by JDCL that, implicit within the first of those responses, is the tacit acknowledgment that such documents exist, whilst in relation to the latter point, there are independent disclosure obligations of DH and SH and, whatever documents SH may have, DH has his own independent disclosure obligation in relation to them. Either way, these are not bases to refuse disclosure. It is also submitted that it is implausible that DH does not have any relevant documents within his control relating to the trust deeds that he is required to disclose for the reasons addressed in Gailani 2 at paragraphs 49 to 50, which I bear in mind.

83. In further support of its submissions in this regard, Mr Al-Attar refers me to a particular communication in the text messages which are available because of the disclosure of Mr Goddard. He refers to that message in support of the submission that, although DH has said that communications with his wife are about trivial matters, in particular when he comes home from the office, in the context of an alleged separation and informal communications between husband and wife, it is vital to see what communications there actually were, in the context of the allegation that the documents were a sham.

84. In this regard, I was taken to a message on 9 November 2018 at 7.23 am where DH texted Mr Goddard, stating:

> "Morning. More than busy. I have battled against some advice all week. Got a breakthrough last night on two important issues doing the work myself. Sarah [SH] has insisted I need a break, so we go off to Norfolk this morning for the weekend. I will talk to Neil next week. How is Japan?"

85. It is pointed out that 9 November 2018 was a Friday and the first of the trust deeds was executed on 12 November, which is the Monday. In other words, after a weekend in Norfolk the trust deeds were executed at a time when DH and SH are said to be in a state of serious acrimony in circumstances where SH is saying that he has taken £9.7 million without her consent and the evidence is that they are saying is that they are separating, subject to any question of reconciliation.

86. Mr Al-Attar fairly recognises that there may be an explanation for messages such as this which would be, of course, a matter for exploration at trial. But he says that communications of this nature, including informal communications, not only between DH and SH but also between DH and third parties such as this message with Mr Goddard, may well be of some considerable relevance in shedding light on what the true position was.

87. In his oral submissions, DH said the trust deeds were set up. He would not go into why they were going away for the weekend other than to say that things were getting back to some sort of normality. He also said that he believed that the trust deeds were set up by a lawyer and were subject to privilege. So far as that point is concerned, the trust deeds are, in fact, already part of the documentary material in the case.

88. So far as the reference to privilege is concerned, it may be that DH has got in mind part of the request, which at (ii) is:

> "All relevant communications with third parties in respect of the same, including his nominee, Mr Tony Bayliss".

89. I have already addressed the position in relation to Mr Tony Bayliss and any questions of privilege earlier in my judgment and I will not repeat those points. So far as any communication with any other third party which might be privileged, then the normal principles would apply in terms of the listing of privileged documents but the potential to resist inspection thereof. I am satisfied that this category is relevant and that it is reasonable and proportionate to make the order sought.

Subparagraph (1)(m) is as follows:

> "All documents evidencing the second defendant's alleged steps to initiate divorce proceedings in July 2018 and the alleged compromise agreed in the form of the trust deeds, including documents evidencing the alleged breakdown of his marriage with the second defendant".

90. This category is in similar territory as the previous category. It arises from paragraphs 42 to 49 and, in particular, 45 to 47 of the RAPOC, and the allegation that the trust deeds were executed as a "compromise" following SH's steps to commence divorce proceedings with a view to providing security to SH and reconciling their marriage.

91. JDCL submit that disclosure of these documents should be provided for substantially the same reasons as those sought under the previous category that I have already dealt with, i.e. that it is not disputed that relevant documents exist and it is implausible that DH has no such documents within his control and also, at least at first blush, that such documents are not privileged for the reasons given at paragraphs 49 to 50 of Mr Gailani's second statement. This may be a forensic point, but it is also pointed out that DH states in his skeleton argument filed in respect of the first disclosure hearing that SH bought him an iPhone in July/August 2018 which it may be said sheds some light on their relationship at that time.

92. So far as the hearing before me today and in terms of DH's oral submissions, DH stated that any documents were between himself and his divorce lawyer. So far as any documents which are not subject to privilege, I consider that they fall into the same category as all the other categories which relate to the phones and email traffic, none of which appear to have been searched, and in relation to which disclosure is relevant and necessary.

93. I am satisfied that in relation to this category, as with the previous category, there has been a failure to comply with the order for extended disclosure in terms of the associated issues and that it is reasonable and proportionate to make the orders sought. Again, the position vis-a-vis any privileged documents is as per my ruling in relation to subparagraph (1)(l).

Paragraph 2 of the Draft Order.

94. Subparagraph (2)(a) provides that DH shall:

> "… file with the court and serve on the parties to this proceeding a witness statement identifying his personal electronic devices and computers, including without limitation those which he has previously or currently operates either his personal email accounts [and that is the Wycke Hill one] and also the [Derek Hood numbered one @gmail.com]".

95. In relation to this request, there are a number of bases on which I am satisfied that the court is entitled to make such an order:
(1) pursuant to paragraph 17.1(5) of PD 51U, the court may, where appropriate (ie where it is reasonable and proportionate) order a party *"to make a witness statement explaining any matter relating to disclosure"*;
(2) equally, the court may make such an order pursuant to CPR 3.1(2)(m) *("To take any other step or make any other order for the purpose of managing the case and furthering the overriding objective ...")* - see *XYZ v Various* [2014] 2 Costs LO 197 at [36]. In that case, Thirwall J, as she was then, held that CPR 3.1(2)(m) gave the court power to order a party to provide a witness statement to the court setting out whether it had adequate insurance to fund the litigation to trial and the conclusion of any appeal; or (3) the court could make such an order pursuant to paragraph 3.10(b) *("Where there has been an error of procedure such as a failure to comply with a rule or practice direction ... (b) the court may make an order to remedy the error"*).

96. JDCL submits that the court should make the order ought by subparagraph (2)(a) for substantially the same reasons which I will come on to in relation to subparagraph (2)(b) in circumstances where subparagraph (2)(a) is designed to support, effectively, the imaging order that is sought in paragraph (2)(b). In this regard, and by way of support, they draw my attention to the case of *Eville v Jones (Group) v Dr Jason* Aldis [2021] EWHC 1310(QB) at [38].

97. Developing these submissions orally, Mr Al-Attar submitshat, really, the first reason is premised on the basis that it is necessary to get accurate information. The order is salutary in requiring DH to state what devices there are. The second reason, which is the main reason and really why the request is being made, is to support the order at paragraph 2(b) because, when asking a third party to search DH's devices, it is first necessary to tell them what those devices are.

98. For his part, DH in his oral submissions, submitted to me that I should not make such an order at this time, but should only consider making such an order if DH did not himself comply with the other disclosure orders, which he said is to be viewed in circumstances where the criteria and boundaries of what he has to do have been spelt out in the preceding categories which I have ordered there should be disclosure in relation to.

99. In the abstract, that is a perfectly reasonable proposition divorced from the history of this action and matters to date. However, I am satisfied that there are a number of reasons why it would not be appropriate to park any such application at this stage and only revisit it should there be evidence of non-compliance with any of my orders. The first, and an important one, is that (as it has been put) DH has form in this regard because, for the reasons I identified in relation to paragraph (1)(a), DH himself has historically made statements about what phones and what devices he has got which it has subsequently transpired were not correct.

In those circumstances, I consider it particularly important that DH is required to make a statement identifying what devices there are. It is perfectly possible that not all devices have so far been identified, not least in circumstances where the very reason why it is now known that certain devices exist is not because of any disclosure from DH but because of disclosure fortuitously given emanating from a third party in the case, namely Mr Goddard, as a result

of r Goddard's own disclosure obligations. Secondly, there has, as I have now found, been a number of failures to comply with the requirements of extended disclosure which are sought to be remedied by the orders that I am making. Again, set against that backdrop, I consider that is another reason why it is appropriate to make such an order at this stage.

The third reason is really more of a case management and pragmatic one, which is that this action is very close to trial in January of next year and it is important that all disclosure issues are fleshed out now and it is important that any source of relevant disclosure is identified as soon as possible and associated disclosure is given.

But, most fundamentally of all, and by far and away the most important reason to order such a statement to be given, is to assist in relation to the order that is sought in subparagraph (2)(b), assuming, of course, that JDCL persuade me that it is appropriate to make the order in subparagraph (2)(b).

100. Nevertheless, even if the order was not being made in support of subparagraph (2)(b) and for the earlier reasons that I have identified, I am satisfied that it would be appropriate to make the order that is sought. Accordingly, I make an order in the terms sought in paragraph (2)(a).

101. Subparagraph (2)(b) provides that DH shall:

> "… provide all of those personal electronic devices and computers to an independent court appointed third party expert with access to the personal email accounts referred to in subparagraph (a) above. He shall inspect those devices and accounts for the purpose of obtaining the documents that fall within the scope of the categories listed in paragraph 1 of this order so that they can be disclosed to the parties to these proceedings".

102. Subparagraph (2)(b) and following is a post-disclosure "imaging order" in respect of DH's personal electronic devices and computers. An imaging order is an order for the taking of images of the contents of storage media incorporated in or associated with computers without altering the data stored - see *TBD (Owen Holland) Ltd v Simons* [2021] 1 WLR 992. Such orders are often sought pre-disclosure as an alternative to a search order under section 7 of the Civil Procedure Act 1997 - see *TBD (Owen Holland) Ltd* (supra) at [180] and *A v B* [2019] 1 WLR 5832.

103. However, in the present case it is said to be justified by DH's failure adequately to comply with his disclosure obligations as opposed to a pre-disclosure imaging order sought as part of or as an alternative to a search order and provides for the interposition of an independent court appointed expert and supervising lawyer to assist DH in discharging his disclosure obligations. In this regard, there is the distinction between an imaging order as a means of preserving evidence and searching the material preserved.

104. The latter is a question of disclosure to be analysed in terms of the disclosure jurisdiction under which the default rule is that the disclosing party will carry out a disclosure exercise themselves - see *TBD (Owen Holland) Ltd* (supra) at [178] and [193], and *Vneshprom Bank LLC v Bedzhamov* [2021] EWHC 1368 (Ch) at [27], and *A v B* (supra) at

[22] to [26]. In the instant case, JDCL asked the Court to exercise its disclosure jurisdiction to ensure and/or facilitate DH's compliance with the disclosure order.

105. There are, I am satisfied, a number of bases on which the Court has jurisdiction to grant an order in the terms sought by paragraph (2)(b) and following of the draft disclosure order.

106. Firstly, pursuant to paragraph 17.1(2) of PD 51U as a *"further step ... to ensure compliance with an order for extended disclosure";* in addition, CPR 3.10(b) which provides that: *"Where there has been an error of procedure such as a failure to comply with a rule or practice direction ... the court may make an order to remedy the error"*, it being said that the error in this instant case is DH's failure to comply with the disclosure order as I have found - see also in this regard *Disclosure* 5th Edition at paragraphs 6.42 and 6.43.

107. Secondly, pursuant to paragraph 3.1(3) of PD 51U and/or CPR 3.1(2)(mm) and/or the court's inherent jurisdiction to which the former gives expression - see the White Book 2021 at paragraph 3.1(3); *Nolan Family Partnership v Walsh* [2011] EWHC 535 (Comm) at paragraph 10; *Vilca v Xtrata Ltd* [2016] EWHC 1824 (QB) at [33]; and *Various Claimants v MGN Ltd* [2018] EWHC 1244 (Ch) at [9].

108. It is well-established, however, that an imaging order is *"an intrusive order"* and could only be made *"when there is a paramount need to prevent a denial of justice"* to the party seeking the order - see *CBS Butler Ltd v Brown* [2013] EWHC 3944 (QB) at [38] per Tugendhat J. But, as he noted in that case: "*The need to avoid ... a denial of justice may be showed after the defendant has failed to comply with his disclosure obligations having been given the opportunity to do so"*, citing *Mueller Europe Ltd v Central Roofing (South Wales) Ltd* [2012] EWHC 3417 (TCC).

109. The jurisdiction conferred or codified by CPR 3.1(2)(m) is broad and extends to requiring disclosure in an appropriate case, notwithstanding the specific provision for disclosure in the CPR - see in *Re RBS (Rights Issue Litigation)* [2017] WLR 359 at [103] to [104]). In the *Mueller* case (supra), Coulson J (as he then was) made an order for a search to be carried out of the defendant's computers, back-ups, CDs and network drives on their behalf by a suitably qualified information technology consultant with experience in electronic disclosure as the defendant lacked the expertise to carry out the search themselves in compliance with their electronic disclosure obligations.

110. HHJ Richard Parkes QC sitting as a judge of the High Court in *Patel v Unite* [2012] EWHC 92 (QB) summarily granted a second Norwich Pharmacal order which included an order that an independent expert be permitted to make an image of a database and/or other such copy of the data stored on that database where the respondent had not adequately complied with the first Norwich Pharmacal order to ensure compliance with that first order, which he considered would be proportionate in the circumstances – see at [28] to [31].

111. Further, in *Owners of the Vessel Saga Sky and Owners and/or Demise Charterers of the Ship or Vessel Stema Barge II*, Teare J made an order upon the application for specific disclosure at [12] for a *"search of relevant electronic devices on board the ship and at the manager's office that includes the individual email accounts or addressed of the members of the ERT"*, albeit it appears without the interposition of a third party - see also *Barclay Square Holdings Ltd v Lancer Property Asset Management* at [91] to [92], [102] to [104], and *Phaestos Ltd v Ho* [2012] EWHC 2756 (QB) at [62] per King J.

112. Where an imaging order is made, the order should contain appropriate safeguards to protect personal, confidential and privileged information of the person subject to the order and third parties - see *TBD Owen Holland Ltd* (supra). The court has refused to grant imaging and similar orders where the order sought provided for no or inadequate safeguards - see, for example, *CBS Butler v Brown* (supra) and *Nucleus Information Systems v Palmer* [2003] EWHC 2013 (Ch) at [22].

113. As Arnold LJ stated in *TBD (Owen Holland) Ltd and Simons* (supra) at [193], in relation to a pre-disclosure imaging order: "*The basic safeguards required in imaging orders is that, save in exceptional cases, the images should be kept in the safekeeping of the forensic computer expert, and not searched until the return date"* as the *"presumption should be that it will be for the defendant to give disclosure of such documents in the normal way"* and *"there should be no unilateral searching of the images by or on behalf of the claimant: the methodology of the search must be either agreed between the parties or approved by the court"* - see also at [175].

114. Applying the principles and authorities that I have identified, I am satisfied that it would be appropriate for the Court to make an order in the terms sought by paragraph 2(b) and following and the draft disclosure order for the following reasons. First, the draft disclosure order does not deprive DH of the opportunity of considering whether to make disclosure or, indeed, to comply with the further disclosure orders I have made. DH has been given every opportunity to comply with the disclosure orders, but I am satisfied that to date he has failed to do so and, for whatever reason, not all disclosure that is required has been provided to date. I have already made various findings in relation to that, including statements previously made by DH. In the circumstances, I consider that the order is necessary and proportionate to ensure that the order for extended disclosure is not frustrated and to prevent a denial of justice to JDCL.

115. Secondly, it is clear from the *Mueller* case itself that the Court may appoint a suitably qualified third party to carry out a search of a party's devices where the relevant party lacks the expertise to do so. I am satisfied that that is apposite in the case of a litigant in person such as in the present case - see in this regard what is said by Mr Gailani in his second statement at paragraph 51 and the case of *Patel v Unite* (supra).

116. Thirdly, JCDL points out that many of the cases, including cases where it has not been appropriate to make an order, have been cases where a claimant wanted effectively disclosure in advance of the normal disclosure process and without giving the defendant an opportunity to respond. The present case is different because here it is post-disclosure, it is proposed there be the appointment of a third party IT expert with a supervising lawyer to protect Mr Hood's rights and it is submitted by JCDL - I consider with some force - that DH is a person who has been demonstrated to be unable to conduct satisfactorily disclosure searches himself, not least in the context of the findings that I have made in this judgment. He will have an opportunity to inspect material before handover and his rights are protected in terms of confidentiality and privilege by the use of the appointed independent lawyer.

117. Expanding on those points, Mr Al-Attar draws my attention to the evidence of DH and the correspondence with Quinn Emanuel that he only used the Blackberry and the communications were only through JDCL. Mr Al-Attar puts JDCL's case as high saying that those are deliberate false statements in the light of the material in terms of disclosure that has emerged from Mr Goddard's disclosure and what is now known, for example, about the existence of other phones and the existence of personal email accounts being used even

during a period of time when DH was still at JDCL.

118. In any event, Mr Al-Attar submits that, even if the Court is either unwilling or unable to make such a finding at what is ultimately an interlocutory hearing, nevertheless, as I have in fact found, statements have been made which are not correct historically in relation to available devices, which, if nothing else, I am satisfied would itself show and which has shown, a lack of understanding of what is required of DH and an inability to conduct the requisite searches. This is, I am satisfied, a further reason to appoint an expert bound by his own obligations as an expert, and a further reason to make the order that I propose to make.

119. In support of the submission that there is a history of DH making false statements, JDCL rely on matters identified in the witness evidence that is before me which gives a number of examples before previous judges, not only Lavender J and Jacobs J but also various other judges. I have read that material but do not consider it necessary to summarise it in this judgment.

120. For his part, Mr Al-Attar identifies two passages in two judgments which he says makes good his points as to why this aspect is a further reason why it is appropriate to make the imaging order. The first is the findings of Jacobs J in the case of *Michael Anthony Tuke v Derek Hood and JD Classics Ltd* [2020] EWHC 2843 (Comm), in particular at [26] to [32] where Jacobs J sets out his findings in relation to DH. Amongst other matters, he states at [28] that he did not consider he could place any reliance on Mr Hood's account of disputed events at least until it was supported by contemporaneous documentation or was inherently probable.

121. In addition, and more seriously at [32], Jacobs J said as follows:

> "Secondly, in the present proceedings, Mr Hood belatedly produced a letter dated 28 September 2010 in support of his case. I address this letter in detail in section C below. I am quite satisfied that this letter was neither written nor sent at the time".

That is a finding that that letter was fabricated. It is addressed in more detail by Jacobs J at [66] to [68] of his judgment. At [68], he says:

> "I have no doubt that this letter was not prepared contemporaneously and that it was not sent to Mr Tuke in September 2010. Rather, it was prepared by Mr Hood at around the time that he served his witness statement in February 2020. There are a number of reasons which lead to that serious conclusion".

The learned judge then set out his reasons at [69] and following.

122. It is submitted by Mr Al-Attar in relation to those findings, therefore, that in the previous and not unconnected Commercial Court proceedings DH has been found by another judge of this court to be someone who is prepared to fabricate evidence. Reference by way of example is also made to the observations of deputy Insolvency and Companies Court Judge Cheryl Jones sitting in the Insolvency and Companies List of the Chancery Division in a judgment at [25], where she said this in relation to DH:

> "My observations of him as he gave his evidence was that he is someone who will say anything that is convenient at the time.

> The evolution of his case in respect of Mr Hill's payment is a good example of how Mr Hood's evidence has gradually altered until it ends up at an entirely different place from where it started. At times, it seems that he almost convinces himself what he is saying is the truth".

And [26]:

> "I did not disbelieve all his evidence and where I have found that he has been less than truthful I explain why".

123. I bear in mind those findings in previous proceedings but do not consider that it would be appropriate for me to express any concluded views in relation to such matters relating to the character of DH, not least in circumstances where these proceedings are interlocutory and there will shortly be a trial at which the trial judge will no doubt have to assess for him or herself both the character of the first defendant and the veracity of his evidence.

124. However, I would say this. Such findings are entirely consistent with the fact that in this case, and as I have found, DH has made statements which are not correct, putting matters at their lowest, in relation to matters of disclosure and in relation to what mobile phones he has, to take but one example. I consider that in those circumstances this is a classic situation where DH is not himself fully capable of discharging his disclosure obligations, and it is entirely appropriate to make the order that is sought.

125. I am satisfied, as I have found in relation to the various headings of JDCL's applications, that, to date, proper extended disclosure has not been given and at least part of that explanation, putting it at its lowest, is that it would appear that DH has not fully understood the extent of his obligations. That itself is a justification for making the imaging order sought.

126. It is important that fairness is seen to be done to both sides and that the other party, the claimant, JDCL, does not have a sense of injustice as a result of there not being full and proper disclosure in this case. Far better that that material be secured now and examined by an independent expect with the protections of a supervising lawyer than there being gaps in the disclosure at trial. It is better that DH's disclosure obligations are discharged at least in part with the assistance of this procedure.

127. In terms of what DH said in response to the application, essentially, DH did not resist in principle the making of such an order if the Court was minded to make such an order, but he did stress that he wanted to ensure that someone independent looked at the computer and, equally, that there was an independent lawyer who would supervise the position and protect his rights in terms of the material generated in relation to that.

128. I can well understand why those would be the concerns of anyone in the position of DH and I am satisfied that the order that is sought caters for those concerns by the employment of an expert computer IT person independent, as has been confirmed, of JDCL and JDCL's instructing solicitors and, equally, a lawyer independent of not only JDCL but also Quinn Emanuel. That led to some discussion orally before me as to who would be an appropriate individual.

129. It was suggested on behalf of JDCL that, in fact, a junior commercial barrister would probably be best placed to protect DH's rights. I agree. There was then discussion as to what

attributes that barrister should have. I have indicated, and repeat now, that I consider they should simply be a junior commercial barrister specialising in the commercial sphere from a recognised set of commercial chambers, such as the junior counsel that had been identified by Quinn Emanuel. The only other governing criteria should be that that individual is not regularly instructed by Quinn Emanuel. By the same token, it is best that they do not come from the chambers in relation to which DH himself has had a connection.

130. I confirm that I am satisfied that paragraph 2(b) of the draft disclosure order includes both extensive and appropriate safeguards which will protect personal, confidential and/or privileged information of both DH and third parties. In that regard, and as I have already identified, there is the interposition of an independent third party expert to inspect the devices for documents falling within the categories listed in paragraph 1 of the draft disclosure order. Secondly, those searches are carried out by the expert not JDCL - another concern of DH - and that will be done by reference to the same key word searches as have been applied by JDCL through its own disclosure in schedule 1 and to section 2 of the DRD and agreed by the parties.

131. In addition, as I have identified, there will be the interposition of an independent junior barrister to review the documents obtained by the expert for confidentiality and/or privileged material which DH may withhold from inspection on any legitimate ground upon which inspection can be withheld, whether in whole or a part as appropriate to the document in question, and a provision that neither the third party expert nor the supervising lawyer may disclose any information they obtain in assisting DH in carrying out the order save as provided in the order itself. That is important because it is clear, meeting one of DH's concerns, that JDCL will not itself be carrying out or undertaking DH's disclosure obligations.

132. Instead, what the order will effectively facilitate is compliance of DH with his own obligations in relation to the material that is being imaged, although JDCL will pay for the costs of DH's compliance - see *A v B* [2019] 1 WLR 5832 at [22] and *Vneshprom Bank LLC v Bedzhamov* at [27] as well as *Mueller* (supra). I would add that I am also satisfied that the order sought is appropriate having regard to JDCL's pleaded case and the allegations of fraud within it - see, in that regard, *Nolan Family Partnership v Walsh* at [9].

133. In the above circumstances, I am satisfied that it is appropriate to make the order sought in paragraph 2(b) and following of the draft disclosure order, as well as that in paragraph 2(a) of the draft disclosure order which supports paragraph 2(b) and is, I am satisfied, itself an appropriate order to make for the reasons that I have already given and in that context.

134. An issue arises as to the timescale within which that imaging should take place. Following discussions during the course of the hearing with DH, DH has got other court commitments towards the end of this week and other commitments on Monday, Tuesday and Wednesday of this week due to preparing for a response to the HMRC inquiry that he faces. In those circumstances, although I consider it important that that imaging be done as soon as possible, I consider that the appropriate order to make is that imaging will take place next Thursday or Friday, whichever date is the more convenient to the IT expert. I have made it clear to DH that he must comply with that order on those dates or he would be in breach of the order.

G. The Unless Order Application

G1. Background.

135. The court has jurisdiction to make an unless order in terms such as that sought in the draft unless order under CPR 3.1(3) and CPR 3.4(2)(c) and/or pursuant to its inherent jurisdiction. CPR 3.1(3) articulates the jurisdiction of the court to make a conditional order whilst CPR 3.4(2)(c) expresses jurisdiction to strike out a statement of case in whole or in part for a failure to comply with a rule, practice direction or order. Taken together, these provisions provide the basis for "an unless order" where the sanction for non-compliance is strike-out - see the White Book 2021 at paragraph 3.4.19 - although the term can be used for any conditional order of the court whereupon a failure to comply brings into effect an automatic sanction, for example, a debarring order as in the present case.

136. The court has a broad jurisdiction to make conditional orders under CPR 3.1(3) "to enable the court to exercise a degree of control over the future conduct of the litigation". CPR 3.1(3) is accordingly concerned "with the basis on which the proceedings will be conducted in the future and that remains the case even when the condition is imposed in order to make good the consequences of some kind of previous misconduct" - see *Huscroft v P&O Ferries Ltd* [2011] 1 WLR 939 at [17] per Moore-Bick LJ.

137. But, as explained by Moore-Bick LJ in another case, *Marcan Shipping (London) Ltd v Kefalas* [2007] 1 WLR 1864 at [36]:

> "... before making conditional orders, particularly orders for the striking out of statements of case or dismissal of claims or counter-claim, the judge should consider carefully whether the sanction being imposed is appropriate in all the circumstances of the case ... a conditional order striking out a statement of case or dismissing the claim or counter-claim is one of the most powerful weapons in the court's case management armoury and should not be deployed unless its consequences can be justified".

138. Nevertheless, as Lord Neuberger stated in *Global Torch Ltd v Apex Global Management Ltd & Ors* (No. 2) [2014] 1 WLR 4495 at [23]: "... if persistence in the disobedience would lead to an unfair trial, it seems at least in the absence of special circumstances hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim".

139. This is consistent with "the philosophy underpinning CPR Part 3" which is "that rules, court orders and practice directions are there to be obeyed" - see *Sayers v Clarke Walker Practice Note* [2002] 1 WLR 3095 at [3100] per Brooke LJ and see also *Global Torch Ltd v Apex Global Management Ltd & Ors* (supra) at [25] in this respect: "There will be many cases in which it is only an unless order that will ensure compliance with orders made by the court" - see *JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB) at [38] per Christopher Clarke J, as he was; see also in this regard *Aramco Trading Fujairah FZE v Gulf Petrochem FC* [2021] EWHC 2650 (Comm) at [20].

140. Accordingly: "Before exercising the power given by Rule 3.1(3), the court should identify the purpose of imposing a condition and satisfy itself that the condition it has in mind represents a proportionate and effective means of achieving that purpose" - see *Huscroft v P&O Ferries* (supra) at [19] per Moore-Bick LJ. And the Court is "entitled to take into account the effect of making or not making the order sought on the overall fairness of the

proceedings and the wider interests of justice as reflected in the overriding objective" - *JSC BTA Bank v Ablyazov* (supra) at [41] per Christopher Clarke J.

141. It is well-established that the protection of a trial date or window is a material consideration for the court in relation to whether or not to make a debarring unless order, thus in *Maqsood v Mahmood* [2012] EWCA Civ 251 (which concerned a strike-out application) the strike-out of a claim was upheld where the claimant had failed to comply with orders for specific disclosure, exchange of witness statements and delivery of trial bundles in circumstances where the claimant's solicitors were aware of the trial window for five months or more and had shown "the most lamentable failure ... to ensure that the case was dealt with expeditiously and fairly" - at [44] per Ward LJ; *Munro v Northern Rock Asset Management Plc* [2015] EWHC 943 (QB) where it was "clear that without disclosure and service of witness statements before 6 December 2013 at trial on the dates fixed in December would not have been possible".

142. At [41], Slade J considered this circumstance which may justify the strike-out in some cases (such as *Maqsood v Mahmood*) was less powerful in the case before him because of the near three month delay between the issue and hearing of the strike-out application. On the facts, Slade J, therefore, did not uphold the order for strike-out made below on the grounds of non-compliance with the orders for disclosure and exchange of witness statements - at [42] to [43]. However, he noted that "the application made on behalf of Northern Rock for an unless order for failure to comply with orders of disclosure and service of witness statements is a proper reflection of the gravamen of the default" - at [42]. In the event, that application was not considered because of the striking out of the amended defence.

G2. Discussion

143. In the present case, JDCL does not seek the immediate strike-out of all of DH's amended Defence. Rather, JDCL seeks an order in the terms of the draft unless order in order to protect the trial date. Mr Hood says that there is considerable information outstanding by way of disclosure which he needs in order to make his witness statement. In relation to that, it will be apparent that his further applications for disclosure have substantially been dismissed (the DH application) and for the reasons that I have given. There were two limited categories that I permitted further enquiries to be made, one in relation to XJ13 emails and Mr Driscoll and the other in relation to Ronnie Spain and the report about the GT40 car. I will order that responses to that be provided by Friday 5 November.

144. Those are narrow points. Any other points which are narrow and concise which DH wishes to advance, he would need to raise in correspondence in the usual way which would no doubt be responded in correspondence by commercial solicitors such as Quinn Emanuel in constructive terms whilst having regard to the backdrop to all such requests. DH urges upon me that he wants as much time as possible before he has to put in his witness statement. He also urges that there is an application for third party disclosure against Charme this Friday, which may or may not produce further documentation.

145. In relation to that, JDCL point out by reference to the draft order that DH seeks that it is apparent from the terms of that order itself that the information he is seeking is not to supplement his own recollection of what he was involved in but, rather, is seeking orders and documentation for meetings and dealings to which he was not privy and that will not, therefore, prompt his personal recollections. DH essentially urges as much time as possible

as I am willing to give him before making any unless order.

146. DH also identified that he has many things on at the moment, both in advancing other third party disclosure applications, in resisting enquiries from HMRC and in relation to the preparation of expert evidence and marshalling the material that those experts require. He says that this is all a lot to do as a litigant in person, in particular –in circumstances where (as he asks me to bear in mind) he is someone who is on the autistic spectrum and also has Asperger's. I have had careful and appropriate regard to such matters.

147. I should say that DH has conducted himself entirely properly throughout this hearing and, indeed, has had a clear and sharp recollection of the important issues in this case and, indeed, does appear to have actual recollection of important events which it will be equally important for him to recount in his witness evidence. I am satisfied, subject to a point in relation to any further disclosure applications which I am going to come on to, that the sanctions proposed by JDCL are both proportionate and effective in achieving the purpose for which an unless order is designed and that it is appropriate to make an unless order in the terms sought in relation to factual expert evidence subject to timing, which I will come on to, and the associated paragraphs of the amended Defence for the following reasons.

148. First, JDCL does not seek the nuclear option of strike-out of all of DH's amended Defence. Rather, the strike-out sought is, I am satisfied, proportionate and circumscribed and it is limited to striking out those paragraphs of the amended Defence to which DH's witness evidence must go, absent which that part of the defence will fail - see *Al Zabiah v Al Zanya*(?) [2020] EWHC 3286 (Comm) at [47]. In this regard, I am satisfied that, as a matter of fairness, JDCL ought not to have to contest allegations which DH does not substantiate by witness evidence.

149. Secondly, and as I have already noted, DH's reason for not filing his witness statement, which is alleged inadequate disclosure, is not justified given the role and purpose of trial witness statements. In this regard, the Bryan Order ordered by consent that the parties exchanged signed witness statements of fact and hearsay notices required by CPR 33.3 by no later than 23 July 2021, that JDCL file and serve its expert reports by 30 July 2021 and that the defendants file and serve their expert reports by 4.00 pm on 3 September. JDCL and the second and third defendants thereafter agreed to an extension for the filing and serving of witness statements of fact to 30 July 2021 and for the filing and serving of JDCL's expert evidence by 6 August.

150. The other parties to the proceedings exchanged witness statements of fact on 30 July 2021 while JDCL filed and served its expert evidence on quantum by the extended 6 August deadline. JDCL was, however, unable to file its expert evidence on valuation by that deadline because of the illness of its proposed expert, but the draft order filed in support of the unless order application makes provision for JDCL's filing of expert evidence on valuation which provision is also proposed to be on unless terms applied to JDCL.

151. For his part, DH did not consent to the aforesaid extensions and has not filed any factual expert evidence in these proceedings whether in compliance with the Bryan Order or at all. JDCL submits that DH has provided no proper justification for his failure to file factual or expert evidence and the DH application itself includes an application for an extension of time for DH to file his evidence, but by its very nature that was parasitic on his application for specific disclosure.

152. However, and for the reasons I have already identified, save in the very limited respects that I have just identified, DH is not entitled to the further disclosure that he has sought in the DH application and for the reasons I have given. In any event, the link that DH seeks to make between provision of specific disclosure against JDCL and its third party disclosure applications against Charme and PwC and the timing of DH's evidence, such that he asserts that he cannot file his witness statement without such disclosure, is not, I am satisfied, sustainable as a matter of principle.

153. It is well-established that trial witness statements "must set out any matters of fact of which the witness has personal knowledge that are relevant to the case" - see paragraph 3.2 of Practice Direction 57AC (PD 57AC). Whilst a witness may refer to documents for the purposes of providing the evidence set out in their witness statement, provided those documents are identified in a list, paragraph 3.4 of the appendix to Practice Direction 57AC provides:

> "[A] trial witness statement should refer to documents, if at all, only where necessary" and it "will not generally be necessary for a trial witness statement to refer to documents beyond providing a list to comply with paragraphs 3.2 of [Practice Direction 57AC]".

154. Accordingly, trial witness statements should be based on the witness' own recollections rather than a reconstruction of events by reference to documents which, if accepted as genuine, can be admitted as evidence of the facts borne out by those documents. As is made clear in paragraph 3.15 of the appendix to Practice Direction 57AC, a "litigant in person should understand that any trial witness statement must set out only what the witness provided in the statement says are known personally to them or says they remember about matters witnessed personally by them".

155. I would only add that DH has already had sight of JDCL's witness statements of fact, including those from Mr Christopher Fielding of Charme and Mr Michael Woulfe, a professional finance director engaged by JDCL following a leveraged acquisition by Charme. He, therefore, knows the factual evidence he has to meet, while the issues to be addressed are themselves identified by reference to the statements of case and the list of issues. I am satisfied that, set against that backdrop and applying those principles, it is not appropriate for DH to maintain, as he has previously, that he was not willing to file and serve his witness statements of fact until he received further disclosure from, amongst others, JDCL.

156. The position now is that, save in very limited circumstances, I have ruled against DH in relation to the provision of any further disclosure from JDCL. DH's stance to date in respect of expert evidence is similar, that the provenance documentation is missing in respect of some of the cars to be valued. Again, and as was addressed yesterday, any relevant documentation will reside with the cars. It is a matter for the experts as to whether or not they will, in fact, require a physical inspection to complete their reports or whether they consider that the relevant cars can be valued on a desktop basis. There is certainly no expert evidence before me adduced by DH to shed light on such matters, but that would be a matter to be followed up by the experts with the entities concerned.

157. As I have already identified, the two sanctions which are sought in the order as follows. That if DH fails to serve his witness statements of fact and expert reports on valuation of quantum by 4.00 pm on 12 November: (i) the relevant paragraphs of the amended Defence

to which his witness evidence would be going will be struck out; and (ii) that he will be debarred from making any further applications for disclosure in the above proceedings without permission of the court. It also requires expert evidence on valuation, both JDCL's and DH's, to be served in unless terms by that date, otherwise the parties concerned will not be able to advance a positive case on valuation at trial.

158. I am satisfied that DH's reasons for not filing his witness statement to date, including inadequate disclosure, is not justified given the role and purpose of trial witness statements under PD 57AC as identified by me above. In any event, DH's application for specific disclosure, both already heard and now completed, has, to all intents and purposes, not been successful and there is no justification for any continued delay in service of DH's evidence.

159. I also consider it to have been of some relevance that the Bryan Order itself was a consent order and, as such, was therefore agreed to by DH rather than being the result of a court determined date. In this regard, at the time that DH agreed the Bryan Order, JDCL's disclosure was still inadequate on DH's case and, rather than making any application for specific disclosure, DH agreed to a deadline for the exchange of witness statements of fact with which he was to say he would not comply and despite being of the view, in the event mistakenly, that JDCL had not complied with its disclosure obligations.

160. It is right that, in correspondence, DH raised the purported inadequacy of JDCL's disclosure by way of response to Quinn Emanuel's letter of 30 April highlighting the inadequacy of DH's disclosure in these proceedings and, by email dated 19 May 2021 to Quinn Emanuel, he asserted that:

> "I am almost totally reliant on the disclosure process to answer the allegations that you have made against me and, to date, I believe you have failed to provide complete discovery to further your client's case, and that without access "to the accounting interests of the Sage and accessing(?) accounting systems" he could not "file any statements".

161. In that same email DH raised the possibility he might have to make *"an application for full disclosure"* saying he had *"been repeatedly asking for these documents since 2019 which he followed up by an assertion in an email of 2 June: "I believe, as before, you are once again attempting to use underhand practices to avoid providing me with documents that I and the court are rightly entitled to see before I can finalise my witness statements".* Notwithstanding that, and despite whatever caveats were in the Bryan Order, DH consented to an order in those terms.

162. I have to say that that does call into question whether or not DH did genuinely believe he could not serve his witness statements. However, it may well be the case that DH was not fully aware of the purpose of a witness statement and what the content of that witness statement should be, which I have identified based on the relevant principles and as has been explored during the course of this judgment. In any event, the disclosure applications now having been dealt with, there is no reason for any extended delay in witness statements now being provided accompanied by an unless order. I also consider that there has, in fact, been delay in serving applications for third party disclosure.

163. In any event, I am satisfied that, even if those applications may bear fruit, that is not a reason for not requiring DH to serve his witness evidence now given the purpose of witness statements, as already addressed, accompanied by an unless order to ensure compliance.

DH's obligation is to serve his witness evidence based on his recollection and the time by which he was ordered to serve such evidence has already expired. To defer the time for service, for example, until after any third party disclosure, which could take many weeks, would cause delay and would be likely to jeopardise the trial date.

164. In this regard, and as I foreshadowed to an extent earlier on in my judgment, DH has issued a number of third party applications, one against Charme on 11 August, against whom DH had first issued an application on 20 October 2020 but failed to serve it, against PwC on 21 September 2021 and HPS Investment Partners UK LLC on 29 September 2021. I understand, based on the evidence of Mr Gailani in his fourth statement at paragraph 20, that such conduct in terms of timing is consistent with what occurred in the *Tuke* litigation.

165. In any event, even if those applications bear fruit - and the first of those against Charme is being heard this Friday, 29 October 2021 - it is clear from the evidence filed in relation to that application that it relates to third party dealings and meetings rather than matters to which DH attended himself and also any disclosure produced from that may not be available for some time. I consider that the appropriate way forward, should such third party disclosure applications bear fruit, is that provision should be made for supplemental witness statements strictly limited to matters arising out of that disclosure and it is not a good reason to delay service of DH's witness evidence, which is overdue and has been overdue for some considerable time.

166. I am also satisfied that this is a case where the only realistic option to ensure compliance is an unless order. DH is an undischarged bankrupt such that any pecuniary sanction will likely not secure compliance. Equally, a committal application for breach of the Bryan Order, whilst a theoretical possibility, would not be a practical course of action since such an application would only draw time and resources away from the trial that the order sought is designed to protect.

167. , Additionally I am satisfied that the draft unless order proposed is justified on the grounds of fairness and to enable the Court to exercise control over the future conduct of these proceedings, absent which control the trial date set will be placed in real jeopardy. DH has not complied with his disclosure obligations, as I have found today in relation to the JDCL applications, and he has not complied with the Bryan Order in circumstances where it is now clear - if it was not always clear - that there was no justification for DH's delay in serving his evidence, as I have found. s As I have explained to him as part of this hearing, he has an obligation to provide his witness evidence in relation to matters within his recollection.

168. I am satisfied that fairness dictates that there is a level playing field in terms of the timely provision of evidence by all parties and a proper timetable for trial preparation. Further, there is, I am satisfied, as I have identified, no justifiable reason for DH's failure to comply to date, nor do factors exist militating against the making of an unless order. In this regard: (i) the draft unless order sought is one with which DH can comply, I am satisfied. The reasons given to date for his non-compliance being without justification (see *Goldtrail Travel Ltd (In Liquidation) v Onur Air* [2017] 1 WLR 3014 and *Athena Capital Fund Sicav - Fis SCA v Crownmark Ltd* [2020] EWHC 2945 (Comm) at [53].

169. I am satisfied that, on the facts of the present case, the fact that DH is a litigant in person does not militate against the making of an unless order - cf *Munroe v Northern Rock* (supra) on its own particular facts. Indeed, it is all the more important that the action remains

structured and existing orders are complied with so that all parties know the other's evidence in good time for the parties to prepare for a trial based on the evidence as served and crystallised.

170. DH has been given every opportunity to comply and will have a further short opportunity to comply, the unless order only biting upon any failure to comply with the order that I will now make. In this regard, DH has been found to be a capable witness in the *Tuke* proceedings, a view I have also formed during the course of this hearing. DH clearly has a good understanding and recollection of events and the case he wishes to advance, and I am satisfied he is in a position to give his factual evidence at this time as to his own actual recollection and he should do so. Should further documentary material emerge in due course from third party disclosure applications, it can fairly and properly be addressed in supplemental witness statements strictly confined to such material as emerges. Any other course would only be liable to result in delay, increased costs and a risk to the trial date.

171. Finally, I am satisfied that the draft unless order is in balanced terms and reflects the fact that JDCL's expert evidence is itself outstanding in part and sets the same date for service of that outstanding evidence as that set for DH in respect of his expert's reports and witness statements of fact, failing which JDCL too will be debarred from advancing a positive case on valuation at trial.

172. In the above circumstances, I am satisfied that it is appropriate to make an unless order in the terms sought subject to the point to which I now turn. JDCL also seek a sanction that DH is not permitted to make further disclosure applications in these proceedings without the permission of the court. JDCL recognised that this, in some respects, resembles a limited civil restraint order (LCRO) and that applications of this kind are generally brought under the specific provisions of CPR 3.11 and Practice Direction 3C - see *Sartipy v Tigris Industries* [2019] EWCA Civ 225 at [27] per Males LJ.

173. However, JDCL points out that the court retains the power to make such an order under its inherent jurisdiction. HHJ Pearl QC sitting as a High Court Judge in *Fabb & Ors v Peters* [2013] EWHC 296 (Ch) held at paragraph 29: "It is clear that the inherent jurisdiction [to make a civil restraint order] still exists", although the invocation of that jurisdiction "given that there is a detailed code under the CPR must be rare and the jurisdiction should be exercised with caution", citing *R on the Application of Kumar v Secretary of State for Constitutional Affairs* [2007] 1 WLR 536 at [62].

174. HHJ Pearl QC made at [46] a general civil restraint order against third parties controlled by an individual who had persistently made "totally without merit" applications or claims that had been made or threatened to make such applications or claims even though that third parties had not been associated with the past applications or claims that justified the order against the individual, ie otherwise than in compliance with CPR 3.11.

175. JDCL submits that the Court may make an order of the kind sought pursuant to its inherent jurisdiction, pointing out that the Court's inherent jurisdiction exists to "protect its process from abuse" - see *R on the application of Kumar v Secretary of State for Constitutional Affairs* (supra). It submits that DH's persistence in making applications for disclosure at such a late stage in the present proceedings is part of a concerted effort to derail the trial timetable approved by the Court and reprises his conduct in the *Tuke* litigation, and the order sought at paragraph 1(b) of the draft unless order is necessary for the Court to

exercise control over these proceedings.

176. It is said that the sanction is unlike an LCRO in so far as it is targeted to further disclosure applications by DH in the pre-trial period and, as such, is much more focused than a LCRO. It is said that its focus reflects the need to protect the trial date.

177. I have given careful consideration to JDCL's submissions, and a further submission made during the course of Mr Al-Attar's oral submissions that if I was not with JDCL in relation to that, then I should make a modified order in terms that any application other than an application for specific disclosure based on an individual document or a narrow class of document should fall within that rubric.

178. Nonetheless, I have concluded that it is not appropriate to make an order of the type that is sought. First, I do not feel able to make a finding that DH is trying to derail the trial process; rather, as a litigant in person, I consider that he made an extensive disclosure application which was not properly focused and which was, ultimately, largely unsuccessful.

179. During the course of the hearing, he has identified particular documents which he recollects existed but which it would appear that the disclosure exercise to date has not produced. He has had explained to him what specific disclosure is about and what it relates to. It is possible he may write to JDCL identifying individual documents which he does not have but he recollects existing. I would hope that any such correspondence would be entered into constructively. I do not consider that if such correspondence does not bear fruit that he should face any particular hurdle of seeking the court's permission to make any disclosure application.

180. I do not consider there should be any fetter at this stage on DH making any application for disclosure. Of course, if he were to make any application, in particular any application that was not focused on individual documents or a specific narrow class of documents, he would face a real risk of sanctions, including costs sanctions, were he to mount such an application which was to be found subsequently to be one that was totally without merit. But I do not consider it appropriate to introduce the hurdle of seeking the Court's permission before making any disclosure application.

181. Accordingly, I make an unless order in the terms that is sought in relation to the factual and expert evidence. That only leaves the question as to what the date should be for that. I have listened carefully to all the matters that DH has identified to me, including his personal circumstances and background and the other matters that he has to deal with at the present time. I appreciate it is going to be a busy time for him, but it is set against the backdrop of a failure to comply with previous court orders, including the Bryan Order, and a failure to comply with the disclosure orders. Accordingly, the further time which must be afforded to him should be the shortest in which I am satisfied that, in the interests of justice, DH can serve a witness statement which properly deals with the matters that are the subject matter of a witness statement.

182. During the course of the hearing, JDCL accepted that it would be prepared to modify its application to extend the period of time to 19 November. DH, essentially, said to me that he would like a date as far as possible in the future. Given the contemplation that the PTR is due itself in December and the trial is due to start on 17 January 2022, I consider that the relevant date for the purpose of the unless order should be 4.30 pm on Monday 22 November. I am satisfied that that gives DH proper time in which to comply with previous court orders

and serve compliant witness statements and expert evidence.

183. So far as the position in relation to expert evidence, which is also covered by the unless order, it is possible to foresee that, hereafter, experts instructed on either side may raise questions and may ask for further information which may mean that it is necessary for the court to revisit the timing of the expert evidence. There is always liberty to apply even when an unless order has been made. I can foresee that that could occur if there was a potential of change in circumstances in relation to the expert evidence.

184. Whilst I make the order that I do concerning expert evidence, I make clear that that is not intended to prevent any subsequent application by either party if there should be a change of circumstances in relation to the experts, either due to unforeseen events or because of information needed which has not to date been available. There is always liberty to apply in relation to that. But I do make the unless order in the terms that I make.

185. I am satisfied for all the reasons I have given that it is appropriate to make that order and that Monday 22 November is the latest date that I can grant DH consistent with compliance with court orders and with a fair trial for both parties given the impending PTR and the trial date of 17 January 2022. Accordingly, for all those reasons I make the order as sought with the modifications that I have identified.

H. Costs

186. So far as DH's disclosure application, I am satisfied that costs follow the event in relation to this matter. DH's disclosure application has been unsuccessful save in respect of very minor matters in relation to which, essentially, I have assisted DH by identifying very narrow queries in relation to two clusters of individual documents which further investigations are going to be made in relation to. Nevertheless, JDCL is in all respects the successful party in relation to that application.

187. Equally, in relation to the JDCL application, JDCL is also the successful party in relation to that, having obtained the relief which it sought. That is also true in relation to the unless order save in the relatively limited respects where I have varied the order, but JDCL needed to come to Court in order to get an order in the terms that it sought. Accordingly, I am satisfied that costs follow the event and that DH should pay JDCL's costs on both applications.

188. That just leaves the question as to whether those costs should be summarily assessed or whether they should be sent off for detailed assessment if not agreed. I consider that this is an application at the very boundaries of the situation in which a Court might be minded to deal with summary assessment. In fact, the truth of the matter is that, including the hearing before his HHJ Pelling QC, there have now been more than two and a half days of submission in relation to these matters and, absent active case management, the hearings could easily had utilised even more Court time.

189. I have also had an initial look at the sums involved. They are substantial. It is a matter within the discretion of the Court as to whether or not to proceed to summary assessment given the length of the hearings and the costs involved. I am urged to do so by JDCL to avoid the costs of a detailed assessment. DH, for his part, asks that the costs be subject to detailed assessment given the overall length of the hearing and the sums involved. This has been a lengthy hearing, the costs are substantial, and there may be issues in relation to

individual items in the bill of costs (time has not permitted the elaboration of such possible points). In such circumstances I am not minded, in the exercise of my discretion, to summarily assess those costs. I consider that they should be subject to detailed assessment if not agreed.

190. The final point is whether or not I should order an interim payment on account of those costs. In the abstract, that is an order that is normally made. The position in this case is complicated by the fact that DH is an undischarged bankrupt. He tells me he does not have any money to pay that order. The whole of this hearing and all the directions I have been giving are to ensure that a trial take places in January and a fair trial takes place in January.

191. It strikes me, DH being a litigant in person, that a potential stifling argument may arise in relation to this, and there could be consequences if he did not comply with any interim payment order which could have consequences as to whether or not his defence could be pursued.

192. I bear well in mind the points made by Mr Al-Attar, essentially at short notice whilst on his feet, about whether or not, in fact, DH has access to some money given that he is instructing experts for the trial. But I would be very concerned about any prospect of stifling the defence of his claim, not least in circumstances where this point was not fully argued before me and in such circumstances, I do not consider it would be appropriate to order an interim payment on account of costs on the particular facts of this case.