Neutral Citation Number: [2020] EWHC 3307 (QB)

Case No: QB-2019-002382

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 December 2020

Before :

THE HON. MR JUSTICE MURRAY

- -

Between :

GUEST SUPPLIES INTL LIMITED	**Claimant**
- and -	
(1) SOUTH PLACE HOTEL LIMITED	
(2) D&D LONDON LIMITED	**Defendants**

- -
- -

Mr Nicholas Trompeter (instructed by **Ince Gordon Dadds LLP**) for the **Claimant**
Mr Gary Lidington (instructed by **Emmerson Law Limited**) for the **Defendants**

Hearing dates: 3 and 6 July 2020

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Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE MURRAY

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 3 December 2020.

Mr Justice Murray :

1. In relation to this claim for breach of contract, brought by Guest Supplies International Limited ("GSIL") against South Place Hotel Limited ("SPHL") and D&D London Limited ("D&DLL"), I have before me the following three applications:

   i) the defendants' application dated 24 April 2020 for further security for its costs;

   ii) GSIL's application dated 19 May 2020 for release of the security for the defendants' costs it had previously provided; and

   iii) the defendants' application for specific disclosure and inspection dated 24 April 2020.

2. In addition to these applications, I am asked to determine the reserved costs of an earlier application dated 2 September 2019 for specific disclosure made by SPHL before D&DLL was joined to this action.

3. The defendants also made an application dated 25 June 2020 (sealed by the court, it appears, on 29 June 2020, although the bundle copy is difficult to read) to extend the trial window to 30 July 2021. This was opposed by the claimant. Given limited time for this hearing, which occupied most of two days, I considered that this could be dealt with on a subsequent occasion by the assigned Master. Following the hearing, the matter was resolved by consent.

4. The trial of this claim is due to be heard in a trial window opening on 19 April 2021, with a time estimate of six days.

Background

5. The claimant, GSIL, is a supplier of branded amenities products for hotels. The sole director of GSIL is Mr Aristos Aristodemou.

6. The first defendant, SPHL, is a company that operates the South Place Hotel in the Moorgate area of the City of London. The second defendant, D&DLL, is a company that provides management, accounting, and administration services to companies within the D&D London group of companies, including SPHL.

7. By its claim GSIL seeks damages for breach of contract, payment of outstanding invoices and loss of profits for the period of an exclusivity agreement that it says was part of the contractual arrangements between the parties. The defendants deny the existence of the exclusivity agreement, in the absence of which the defendants assert that GSIL is entitled only to a small fraction of what it is currently claiming. SPHL also seeks to assert a set-off, against any amount due to GSIL, of a sum that SPHL says is owed to it by GSIL for wrongful detention of goods owned by the defendants.

8. GSIL asserts that there were three relevant agreements between the parties. Brief details of these agreements are as follows:

i) First, there was a written agreement, signed by Mr Aristodemou for GSIL on 3 June 2014 and by Mr James Dempsey, Group Purchasing Manager, for an entity described as "South Place Hotel" on 14 June 2014 ("the First Agreement") for the supply of specified branded products to the South Place Hotel. GSIL maintains that D&DLL was its contracting party or, if that is not right, then SPHL was its contracting party. The defendants deny that D&DLL was a party to the First Agreement or any other relevant agreement with GSIL.

ii) Second, there was an oral agreement made in October or November 2014 ("the Second Agreement") under which GSIL agreed to purchase a stock of branded amenities for the South Place Hotel from a prior supplier, namely, Bunzl UK Ltd, trading as Buwier Finest Guest Amenities ("Buwier"), and to store the stock ("the Buwier Stock") in its premises at no cost to the defendants. There is a dispute as to whether the Second Agreement was concluded orally over the course of the period from about 23 October to mid-November, as GSIL asserts, or via an exchange of emails on 23 and 28 October 2014, as the defendants assert. GSIL says that the Second Agreement also included a term to the effect that GSIL would become the exclusive supplier of branded amenities to SPHL for a period of five years on the terms of the First Agreement, applied *mutatis mutandis*. The defendants deny that the Second Agreement included any such exclusivity term.

iii) Third, there was an oral agreement made in a meeting held on 3 February 2016 between Mr Aristodemou, Ms Eve McIlvaney, the Group Purchasing Manager for D&DLL, and others. It is common ground that some sort of oral agreement was concluded at the meeting on 3 February 2016, but the terms of, and parties to, that agreement are disputed, as discussed in more detail below.

9. The Second Agreement came about because in or about August 2014 Buwier informed the defendants that it intended to start charging a fee for storage of the Buwier Stock. GSIL says that Mr Michael Patterson, the Group Category Manager for D&DLL, then approached Mr Aristodemou, seeking his assistance to avoid that fee.

10. In his second witness statement dated 16 June 2020 Mr Aristodemou said that GSIL agreed to purchase the Buwier Stock for £56,039.25, lending that sum interest-free to SPHL to repay at the rate of about £5,000 per month. GSIL also agreed to store the Buwier Stock, comprised of some 500 large boxes, in its warehouse without charge. He asserted that this arrangement made no commercial sense for GSIL without an agreement by the defendants that, once they had finished calling off the Buwier Stock, they would call off GSIL's equivalent stock exclusively for five years.

11. On 7 January 2016 Ms McIlvaney sent an email to Mr Aristodemou giving notice "to end the contract between South Place and Guest Supplies". The email also said that "we will not be authorising any further orders and if placed will not be liable for payment …". GSIL says that this represented a repudiatory breach of the Second Agreement.

12. There then followed the meeting on 3 February 2016. The respective positions of the parties on the terms of the oral agreement said to have been reached at that meeting are set out in the pleadings. In the Amended Particulars of Claim at paragraph 22, GSIL alleges:

> "At the Meeting, the parties: (i) ratified, confirmed and/or elected to continue the Second Agreement; or in the alternative (ii) concluded a new oral agreement between the Claimant and the Second Defendant, alternatively between the Claimant and the First Defendant … under which it was agreed that the Claimant would be appointed the exclusive supplier of the Products to the Second Defendant, alternatively to the First Defendant, for a period of five years on the terms of the First Agreement (mutatis mutandis)."

13. In the Amended Defence at paragraph 27, the defendants allege:

> "… at the meeting on 3 February 2016, the First Defendant … and the Claimant entered into a new oral agreement …, on the following terms:
>
> a. the obligations under the First Agreement were mutually discharged;
>
> b. the Claimant would continue to act as a supplier to the Defendant of the branded goods identified in the First Agreement at the prices in the First Agreement;
>
> c. the existing stock held by the Claimant would not be replaced after it was purchased by the First Defendant;
>
> d. there would be no minimum quantities of stock held by the Claimant."

14. GSIL contends that following the meeting on 3 February 2016 Mr Aristodemou accurately reduced to writing the oral agreement reached at the meeting ("the 2016 Document"). He did not do this immediately following the meeting, for reasons set out in his witness statement dated 7 February 2020, but initially created the 2016 Document on 29 April 2016 on a computer at his place of work. He then copied his initial draft of that document on to a USB stick and took it home to continue working on it, making his final changes on 23 May 2016 and creating a cover letter. Mr Aristodemou signed the 2016 Document and sent two hard copies of it, with his cover letter, via the post to D&DLL for counter-signature. GSIL has, however, never received from D&DLL a counter-signed copy.

15. In his witness statement dated 7 February 2020, Mr Aristodemou said that he does not have an original copy of the 2016 Document in its finalised form in hard copy or in its original electronic format. He did not keep a hard copy when he sent it to D&DLL on 23 May 2016, as he intended to rely on the electronic copies on his laptop and on the USB stick. His laptop and the USB stick were, however, both stolen when his home was burgled in September 2016. When GSIL decided to bring this claim, Mr Aristodemou found that he was unable to locate a final signed version or the digital version of the 2016 Document.

16. Mr Aristodemou's witness statement of 7 February 2020 continued at paragraphs 11-12 as follows:

> "11. … Without waiving privilege, I therefore took the version [of the 2016 Document] that I had on my computer at the time, which was the version which was created on 29 April 2016 …, and recreated the final version of the agreement as it would have been and sent this to my former solicitor to give him an accurate version of what the final agreement **would** have looked like. I recreated the agreement and sent it to my former solicitors on 11 February 2019. … [emphasis in original]
>
> 12. It was never said by me (to my former solicitors or the Court) that this was the actual final version of the agreement and, if this is how it is reflected in the particulars of claim by my former solicitors, I can only apologise for the manner in which they have drafted the Particulars of Claim. Without waiving privilege, we intend to amend the Particulars of Claim to resolve this issue now that new solicitors have been instructed. …"

17. Attached as Annex 2 to the Amended Particulars of Claim is the written document ("the 2019 Document") that Mr Aristodemou referred to in the evidence above as his re-creation of the 2016 Document.

18. In their Amended Defence at paragraph 31, the defendants deny the existence of the 2016 Document and maintain that the 2019 Document is not a re-creation of an earlier document but "was created on or about [February 2019] for the first time by Mr Aristodemou for the purposes of this litigation."

19. GSIL says that on 27 March 2017, one or both of the defendants acted in repudiatory breach of the Second Agreement or, as the case may be, the oral agreement reached on 3 February 2016 reflected in the 2016 Document. GSIL accepted the repudiatory breach, thereby bringing the Second Agreement or, as the case may be, the later oral agreement to an end, entitling GSIL to bring this claim for damages.

Procedural history

20. The claim was filed on 1 July 2019, at that stage only against SPHL.

21. On 11 July 2019, the defendants' solicitors wrote to GSIL's then solicitors, Fahri LLP, seeking security for costs. On 16 July 2019, GSIL confirmed through Fahri LLP that security for costs would be provided by Mr Aristodemou paying £50,000 to Fahri LLP to hold on trust. At this point, GSIL's accounts for the year ending 31 January 2018 were overdue and its accounts for the year ending 31 January 2017 showed negative net assets of £19,609 and a cash balance of £6,748.

22. On 18 August 2019 a consent order was approved by Master Yoxall reflecting the parties' agreement:

> "1. The Claimant give security for the Defendant's costs of these proceedings in respect of all stages in the case up to and including the first Costs and Case Management Conference (to be listed) in the proceedings as follows:
>
> 1.1 by not later than 30 July 2019 Aristos Aristedemou [sic] shall pay the sum of £50,000 into the client account of Fahri LLP; and
>
> 1.2 immediately upon receipt of the payment Fahri LLP shall give a written undertaking to the Defendant's solicitors to hold the sum of £50,000 (and any other amount that is agreed or ordered to be paid by way of security for costs) and not to pay out any part of that security other than with the permission of the Defendant's solicitors or order of the court."

23. Fahri LLP provided the undertaking referred to in the consent order on 30 July 2019.

24. On 27 August 2019, SPHL filed its defence. Among other things, SPHL denied that there was any exclusivity agreement between the parties. SPHL also denied that the 2019 Document recorded or supplemented the terms of any agreement between the parties.

25. On 2 September 2019, SPHL filed an application for specific disclosure of the original digital copy of the 2019 Document ("the Earlier Specific Disclosure Application"). Due to difficulties with accommodating the matter in the Master's list, the hearing of the application was not listed until 14 February 2020.

26. On 7 February 2020, GSIL filed its evidence in response to the Earlier Specific Disclosure Application, including the witness statement of Mr Aristodemou of 7 February 2020, to which I have already made reference.

27. On 12 February 2020, Deputy Master Leslie approved a consent order between the parties resolving the Earlier Specific Disclosure Application. GSIL was to provide the electronic form of certain documents exhibited to Mr Aristodemou's statement of 7 February 2020 to the defendants' solicitors. The parties had permission to file amended statements of case, by dates specified in the order. The hearing listed for 14 February 2020 was vacated. Costs were reserved for the costs and case management conference ("CCMC") listed for 5 May 2020.

28. On 6 March 2020, GSIL filed its Amended Particulars of Claim, annexing, among other things, the 2019 Document.

29. On 18 March 2020 GSIL applied to join D&DLL to the proceedings.

30. On 9 April 2020, SPHL and D&DLL filed the Amended Defence, setting out SPHL's amended defence and D&DLL's defence.

31. On 15 April 2020, GSIL's solicitors wrote to the defendants' solicitors in response to letters seeking further security for costs. GSIL's position was that it would not consent to providing further security for costs and that it would seek for the earlier security to be released. This letter enclosed draft restated accounts for 2018, 2019 and 2020, showing a significant positive change in GSIL's financial position as discussed further below.

32. On 18 April 2020 Master McCloud approved a consent order granting permission to join D&DLL to these proceedings and making other directions.

33. On 24 April 2020, the defendants filed the present application for further security for costs and for the security held by Farhi LLP in the amount of £50,000 to be paid into court.

34. On 24 April 2020, the defendants also filed the present application for specific disclosure, seeking disclosure of any communications between GSIL and its former solicitors, Farhi LLP, or counsel:

> "which deal with the creation, provenance and/or authenticity of the document exhibited at Annex A of the Particulars of Claim and/or the matters stated at paragraphs 11 and 12 of the First Witness Statement of Aristos Aristodemou".

35. On 5 and 12 May 2020, Master McCloud heard the CCMC. By her order dated 14 May 2020 (sealed on 15 May 2020), the Master, among other things, directed that the trial, with a time estimate of six days, should take place within the window of 22 February to 28 May 2021. The Master also gave directions for the hearing of the present applications and reserved the costs of the Earlier Specific Disclosure Application to this hearing.

36. On 19 May 2020, GSIL filed an application for the earlier security of £50,000 to be released by its former solicitors to its current solicitors and seeking an order that the former solicitors be released from their undertaking.

37. I will deal first with the defendants' application for additional security for costs and GSIL's application for release of its initial security for costs, then with the defendants' new application for specific disclosure. Finally, I will deal with the costs of the Earlier Specific Disclosure Application.

Defendants' application for additional security for costs

The evidence

38. The security for costs application was filed by the defendants on 24 April 2020, supported by the fifth witness statement dated 24 April 2020 of Mr Simon Emmerson, a solicitor and director of Emmerson Law Limited, the defendants' solicitors.

39. Master McCloud's order had required GSIL serve any evidence in opposition to the defendants' applications of 24 April 2020 by 26 May 2020 and had given the defendants permission to serve any evidence in reply and in opposition to GSIL's then merely intimated application for release of its initial security for costs by 9 June 2020.

40. In response to the defendants' application for additional security for costs, GSIL filed two witness statements, the witness statement dated 6 May 2020 of Mr George Georgiou, a director of Pronumero Limited ("Pronumero"), a firm of Chartered Certified Accountants, and the second witness statement dated 19 May 2020 of Mr Philip Cohen, the Senior Litigation Partner at Ince Gordon Dadds LLP, GSIL's solicitors. Mr Cohen's witness statement also deals with the defendants' application of 24 April 2020 for specific disclosure.

41. In reply, the defendants filed the eighth witness statement dated 9 June 2020 of Mr Emmerson.

42. GSIL responded with the second witness statement dated 16 June 2020 of Mr Aristodemou, although this was not contemplated by Master McCloud's order of 14 May 2020. The defendants did not object to the admission of that witness statement as they had had time before the hearing to consider and reply to it, which they did in the tenth witness statemented dated 1 July 2020 of Mr Emmerson. I considered it appropriate, therefore, to admit Mr Aristodemou's second witness statement and Mr Emmerson's tenth witness statement.

43. On 2 July 2020, the day before the hearing, GSIL filed a third witness statement dated 1 July 2020 of Mr Aristodemou, which primarily dealt with the defendants' application to extend the trial window, but also sought in a few paragraphs to respond to the tenth witness statement of Mr Emmerson. I excluded this third witness statement of Mr Aristodemou on the basis that it was unfair to admit it as it was simply too late to be dealt with properly by the defendants before the hearing.

44. GSIL's evidence, in summary, was that its financial position had been misreported in its financial accounts prepared and submitted to Companies House by its previous company accountants, LessTax2Pay Limited ("LT2P"), and that it had more recently corrected the position. In this regard, GSIL relied in particular on the evidence of Mr Georgiou.

45. In his witness statement dated 6 May 2020, Mr Georgiou said that on 13 August 2019 he met with Mr Aristodemou with a view to conducting a financial review of GSIL's business. During the meeting Mr Georgiou was provided with GSIL's financial statements for the years ending 31 January 2012 to 31 January 2016, which had been prepared by LT2P, signed by Mr Aristodemou and filed at Companies House. The principal of LT2P, Mr Ray Fagan, had acted for Mr Aristodemou over a period of many years, and they were apparently close.

46. During the meeting Mr Georgiou came to the view that there were irregularities in those statements. His evidence was as follows:

> "6. I was advised by AA that the business generated turnover of between £500,000 to £700,000 annually from key hotel chains throughout the UK. This appeared to be at odds with the level of turnover disclosed within the various sets of financial statements prepared by LTTP. The financial statements reflected [an] average annual turnover of below £200,000."

47. Mr Georgiou said that he confronted Mr Aristodemou at the meeting with this anomaly, and "his immediate reaction was that of surprise and shock". Mr Aristodemou told Mr Georgiou that Mr Fagan had died the prior week after a long period of illness, and that he would contact LT2P to obtain a copy of GSIL's files to see if they shed light on "the difference in disclosed turnover and potentially other differences". Mr Georgiou advised Mr Aristodemou to rectify the incorrect position and to file amended financial statements with both HMRC and Companies House for the past six years. He agreed to assist GSIL in reconstituting its financial statements for those years.

48. On 13 August 2019 Mr Aristodemou contacted LT2P and was told by Mr Fagan's daughter, Ms Nicola Sorrell, who was continuing Mr Fagan's accountancy practice, that unfortunately the files relating to GSIL could not be found. He relayed this information to Mr Georgiou, who contacted Ms Sorrell the next day to confirm the position.

49. In his witness statement dated 16 June 2020 Mr Aristodemou said the following:

> "22. … As their trading name suggests (Less Tax 2 Pay) my former accountants' USP was that they minimised their clients' tax bills. I assumed they did this by legitimate means. The Claimant paid them to prepare accounts each year. They produced the accounts; the accounts were laid before the board, and I then signed them off and filed them in the belief that the professionals had done their job properly, that the company had complied with its obligations, and pleased that we didn't have a lot of corporation tax to pay. I now believe that the former, deceased accountant must have achieved this by cutting a corner too many, and I have caused correct accounts to be filed. …"

50. After carrying out client due diligence on GSIL, Pronumero was formally engaged by GSIL on 14 August 2019 to restate the accounts for the past six financial years. After a period of annual leave, Mr Georgiou commenced work on the restatements on 9 September 2019. On 13 December 2019 he contacted Ms Sorrell again. She accepted that the accounts prepared by LT2P were incorrect, but she had not located GSIL's missing files in the meantime and could provide no further assistance.

51. On 17 April 2020 Mr Georgiou completed the restated accounts. These were signed by Mr Aristodemou. Amended accounts for the financial years ending 31 January 2015 to 2019, together with the accounts for the financial year ending 31 January 2020 were filed at Companies House on 5 May 2020. The amended accounts for 2018 and 2019 and the accounts for 2020 were appended to Mr Georgiou's witness statement dated 6 May 2020.

52. The accounts for the year ending 31 January 2020 showed that the total assets of the company were then £743,429. This figure was made up of stocks, trade debtors, cash, and certain tangible assets. The total liabilities due within one year were £358,355. Total assets less current liabilities were therefore £385,074 as at 31 January 2020.

After deducting amounts falling due after more than one year (£57,427), net assets were £327,647.

53. The restated accounts for the year ending 31 January 2018 showed net assets of £153,878, whereas the original accounts had shown net assets of only £31,495 for the same period. The restated accounts for the year ending 31 January 2019 showed net assets of £229,606, whereas the original accounts had shown net assets of only £46,783 for the same period.

54. In his second witness stated dated 16 June 2020 Mr Aristodemou stated that he expected that, as a result of these restated accounts, GSIL would be subject to significant corporation tax liability, and possibly penalties and interest, "that completely dwarves the sum the Defendants seek by way of additional security". He also stated that Mr Georgiou was in the process of negotiating staged payments of any corporation tax due with HMRC.

55. In his second witness statement dated 19 May 2020, Mr Cohen gave similar evidence as to the likelihood of GSIL incurring significant additional corporation tax liability as a result of the restatement of the accounts. He also noted that GSIL's accounts for the year ending 31 January 2020 showed that GSIL had net assets of £327,647, which he submitted was sufficient to satisfy any costs order that might be made against GSIL, particularly bearing in mind that such costs would not be ordered until conclusion of the trial between February and May 2021, during which time GSIL expected to make further profits.

56. As to the future prospects of GSIL, Mr Aristodemou gave the following evidence in his second witness statement dated 16 June 2020:

> "14. I should explain that we are currently supplying hotels who are still open and accommodating essential workers, principally NHS staff, such as Claridges, the Berkeley and the Connaught. Our prestigious clients include the foremost hotels in the country, including: [*15 hotels then listed, including those just named*].
>
> 15. I do not believe that the temporary crisis [*namely, the COVID-19 pandemic*] is going to prevent clients such as these honouring their liabilities to the Claimant; in fact the only problem customers we have are the Defendants.
>
> 16. Some of our smaller and less illustrious clients are in trouble and have requested deferments. … [W]here some of our small customers have requested deferments until they are able to get back on their feet, we have agreed. We are not writing debts off; we are engendering goodwill in long term relationships … . The majority of our hotel clients re-opened in one shape or another from 6 June.

> 17. Also, where some see challenges, I see opportunities. I was quick to respond to the crisis. We used our existing relationships with our factories in China to adapt so that they are now manufacturing PPE, Dental Masks, surgical masks, and we have set up our own online distribution networks and are also in discussion with Amazon, eBay and the British Dental Association for distribution of our PPE products, which should yield a good year in terms of positive financial results. In addition to our core business of amenity products, we will also be able to sell PPE products to those hospitality clients who will have additional requirements for such products as well as branded amenity products, plus we can sell the PPE products direct to members of the public and health workers. A significant new market has therefore opened up … ."

57. In his fifth witness statement dated 24 April 2020 made in support of the defendants' application for additional security for costs, Mr Emmerson said that the defendants' likely costs were increased by the claimant's amended pleadings and the addition of D&DLL to the claim, the principle of the claimant providing security by consent was already established, there were reasons to doubt the quality of the financial information provided by the claimant given the discrepancies between the original and restated financial accounts provided and the claimant's case is improbable. For these reasons, Mr Emmerson said, there is reason to believe that GSIL will not be able to pay the defendants' costs if ordered to do so at the end of the trial.

58. In his eighth witness statement dated 9 June 2020, made following the CCMC and approval by the Master of the parties' respective costs budgets, Mr Emmerson noted that the defendants' budgeted costs to the conclusion of trial are £323,336.70. He also set out the defendants' reply to the evidence of Mr Georgiou and of Mr Cohen, raising various points about the restated accounts, including complaining of a lack of corroborating evidence for the restated accounts and "unexplained differences" between the original and restated accounts for particular years. In his witness statement, Mr Emmerson set out a table comparing the original and restated accounts for the year ending 31 January 2019, noting the differences between a number of line items. To give just two examples:

    i) stocks are valued at £32,000 in the original accounts for that year and at £230,493 in the restated accounts, a difference of £198,493;

    ii) shareholders' funds are shown as £46,783 in the original accounts and at £229,600 in the restated accounts, a difference of £182,823.

59. Mr Emmerson noted that, despite these and the other "stark" differences between the original and restated accounts, Mr Aristodemou had signed off on both sets of accounts, original and restated, as accurate. Mr Emmerson also noted that the restated accounts for the financial years ending 31 January 2018 and following depend on the accuracy of the accounts for the preceding years ending 31 January 2015, 31 January 2016 and 31 January 2017, however GSIL's accounts for the year ending 31 January 2014 do not correspond to the figures shown for the same period in the restated

accounts for the year ending 31 January 2015. He gave the example of there being total net *liabilities* of £67,481 in the accounts for the year ending 31 January 2014, but total net *assets* of £10,239 for the same period in the restated accounts for the year ending 31 January 2015. He noted that Mr Georgiou failed to explain how he had come to restate this figure for purposes of the restated accounts for the year ending 31 January 2015.

60. In his eighth witness statement of 9th June 2020, Mr Emmerson said that GSIL had provided no evidence as to its current trading or cash position, noting that the 31 January 2020 accounts preceded the period of Covid-19 lockdown. Mr Emmerson also drew attention to HMRC rules regarding the imposition of penalties for inaccurately stating liability to pay corporation tax and noted that penalties and interest are potentially payable for each of the last six years. Mr Emmerson also noted that HSBC Invoice Finance (UK) Limited had registered fixed and floating charges against relevant assets of GSIL, limiting GSIL's ability to satisfy its liabilities.

61. Finally, in his tenth witness statement of 1 July 2020, Mr Emmerson responded to the evidence of Mr Aristodemou in his second witness statement dated 16 June 2020, for example, disputing Mr Aristodemou's evidence that various hotel clients of GSIL named in Mr Aristodemou's witness statement were open for business as of 6 June 2020, giving examples of various hotels on that list that remained closed as at 30 June 2020.

62. It will perhaps be seen from even this summary of Mr Emmerson's evidence that much of his evidence is, in fact, comment and submission rather than factual evidence. Mr Trompeter drew my attention to the comments of Andrew Baker J in *Skatteforvaltningen v Solo Capital Partners LLP* [2020] EWHC 1624 (Comm) at [83] onwards, where the judge criticised the factual witness statements provided by both sides in relation to a summary judgment application for, to a substantial extent, being not witness evidence but argument. While similar criticisms could be made of Mr Emmerson's evidence, they can also be made of Mr Aristodemou's various witness statements and, to a lesser extent, of Mr Cohen's second witness statement dated 19 May 2020 (but not Mr Georgiou's witness statement dated 6 May 2020). Sadly, this is an all-too-common failure in witness statements provided in civil litigation.

Legal principles

63. The application is brought under CPR rules 25.12(1) and 25.13, in particular relying on rule 25.13(2)(c), which provides:

> "**25.13**
>
> (1) The court may make an order for security for costs under rule 25.12 if –
>
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
>
> (b) (i) one or more of the conditions in paragraph (2) applies,
>
> …

> (2) The conditions are –
>
> …
>
> (c) The claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;
>
> …"

64. The condition in CPR rule 25.13(2)(c) requires a court to have "reason to believe" that GSIL will be unable to pay the defendant's costs if ordered to do so. As was explained by Sales LJ in *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120 at [11]-[14], this does not require the defendant to prove on the balance of probabilities that the claimant will be unable to pay; all that is required is reason to believe the claimant will be unable to pay.

65. The law applicable to the determination of an application for security for costs was helpfully summarised by Briggs J (as he then was) in *Chemistree Homecare Ltd v Teva Pharmaceuticals Ltd* [2011] EWHC 2979 (Briggs J) at [3]:

> "Happily there has been no dispute about the law, recently comprehensively restated by the Court of Appeal in *Jirehouse Capital v Beller* [2009] 1 WLR 751. For present purposes the relevant principles are as follows:
>
> (1) the applicant must show that on all the material presently available to the court there is reason to believe that the claimants will be unable to pay the applicant's costs if ordered to do so.
>
> (2) The question is whether the claimant companies will, rather than might, be unable to pay.
>
> (3) Inability to pay means to pay when the costs fall due for payment (see *Re Unisoft Group (No 2)* 1993 BCLC 532 at 534, approved in *Jirehouse Capital* at paragraph 23). This calls for an assessment of what the claimants may be expected to have available for payment at the due date or dates in the form of cash or other readily realisable assets (see *Longstaff International v Baker and McKenzie* [2004] 1 WLR 2917 at paragraphs 17 and 18).
>
> (4) In respect of a costs order made at the end of a two-week trial, where there is no possibility of summary assessment, the relevant due dates, as it seems to me, are (a) the payment date of any order made by the trial judge for a payment on account, and (b) the date when

an order for the balance is made upon completion of detailed assessment.

(5) If this ability to pay threshold is passed, then the court has a broad discretion whether to order any, and if so how much, to be paid or secured by way of security. The reported cases have identified specific aspects which have to be taken into account (see for example *Sir Lindsay Parkinson and Co v Triplan* [1973] QB 609 per Lord Denning, summarised in the White Book at paragraph 25.13.13).

(6) But overall the question is whether the court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order (see CPR 25.13(1)(a)).”

66. It is clear from this that the claimant’s ability to pay must be assessed by reference to the future date when the liability may arise and that this assessment involves consideration of the nature and liquidity of the claimant’s assets: *Thistle Hotels Ltd v Gamma Four Ltd* [2004] EWHC 322 at [11], citing *In Re Unisoft Group Ltd (No 2)* [1993] BCLC 532 (Sir Donald Nicholls V-C) at p 533 (approved by the Court of Appeal in *Jirehouse Capital v Beller* [2008] EWCA Civ 908 at [23]-[24]).

67. The court must determine the question based on all the evidence before it, including the absence of relevant evidence. As Sales LJ noted in *Sarpd Oil* at [19], any evaluation has to be made on the “totality of the evidence before the court; part of that totality is the absence of relevant evidence from the only party who is able to provide it”.

68. If the condition in rule 25.13(2)(c) is satisfied, the court may make an order if, having regard to all the circumstances of the case, it would be just to do so. This discretion allows the court to consider a number of factors, such as whether the claim would be stifled if security were ordered and whether the application was made at a late stage of the proceedings: White Book 2020, para 25.13.13.

69. Finally, as a general rule, the court when considering an application for security for costs will not normally consider the merits of the claim, unless it can be demonstrated one way or another that there is a high degree of probability of success or failure: *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 WLR 420 at p 423 (Sir Nicholas Browne-Wilkinson V-C).

Is there reason to believe GSIL will not be able to pay?

70. Mr Gary Lidington, of counsel, for the defendants submitted that there was reason to believe that GSIL would not be able to pay the defendants’ costs, which are likely to be in the region of £320,000 by conclusion of the trial in accordance with the defendants’ approved costs budget. His primary submission was that GSIL’s financial position, as recorded in a series of unaudited accounts, contained discrepancies for which no adequate explanation has been provided. His secondary submission was that even if the court were to take the most recent restated accounts at face value, those

accounts showed a business with illiquid assets, significant upcoming liabilities, and an uncertain future.

71. Turning to the defendants' primary submission regarding various unexplained discrepancies, GSIL had initially agreed to provide security in circumstances where its original accounts for the year ending 31 January 2017 showed a negative net asset balance. Mr Lidington made a close comparison of the original sets of filed accounts for 2018 and 2019, each showing a modest profit, and the restated accounts, showing much larger profits. For example, comparing the original and restated accounts for the year ending 31 January 2019, he noted that the value of GSIL's stocks had changed by more than 700% (from about £32,000 to £230,493), and the value of debt owed by trade debtors had changed by more than 200% (from £162,665 to £332,158). These matters were not explained by GSIL beyond Mr Georgiou's evidence that he realised and then informed Mr Aristodemou at a meeting on 13 August 2019 that there were serious irregularities in the GSIL financial statements he reviewed at that meeting. Mr Lidington submitted that a proper explanation of these irregularities was called for.

72. Mr Lidington submitted that the changes reflected in the restated accounts, such as stocks and trade debts, were based on matters within Mr Aristodemou's knowledge, for example, as reflected in GSIL's documentary record of invoices and inventory, with which, given the modest size of GSIL, Mr Aristodemou could be presumed to be familiar. These accounts did not raise complex accounting issues. The discrepancies between the original and the restated accounts therefore required an adequate explanation, and none had been forthcoming from GSIL. Mr Lidington noted that the defendants' solicitors wrote to GSIL's solicitors on 2 June 2020 asking for the financial documents that Mr Georgiou in his witness statement said had been provided to him by GSIL. These financial documents have not, however, been provided to the defendants by GSIL.

73. In response to Mr Aristodemou's evidence about GSIL's previous accountants "cutting a corner too many" as an explanation for the irregularities, Mr Lidington pointed out that, as the principal director of GSIL, Mr Aristodemou had signed off on the original accounts, confirming that they gave a true and fair view of the assets, liabilities, financial position and profit of GSIL. He would have been involved in the provision of the underlying information on the basis of which LT2P had prepared the original accounts. Similarly, Mr Aristodemou provided the information on the basis of which Pronumero prepared the restated accounts. He had signed off on the restated accounts to confirm that they too gave a true and fair view of GSIL's financial condition for the relevant periods. Given those circumstances, Mr Lidington submitted, Mr Aristodemou had failed to provide a proper explanation of the irregularities. The blame could not simply be shifted to the former accountants.

74. Mr Lidington's secondary submission was that even if the court considered the most recent restated accounts for the year ending 31 January 2020, which showed the strongest position, the court would have reason to believe that GSIL would not be able to pay the defendants' costs. Mr Lidington made four points regarding the liquidity of GSIL's assets by reference to the principles set out in *Thistle Hotels Ltd* at [11]:

i) First, GSIL is a cash-poor business, with cash in its bank account amounting to £14,075 for the year ending 31 January 2020.

ii) Second, the tangible assets amounting to £106,269 consisted of fixtures, fittings, and equipment. These were depreciating assets whose resale value was not known; there was no real estate.

iii) Third, the stocks, valued at £225,780, consisted of hotel amenities supplies, some of which were in China and which would have a small resale market in any event.

iv) Fourth, the value of debt owed by trade debtors amounting to £397,305 would itself be impacted by the Covid-19 pandemic given the likely impact of the pandemic on those trade debtors. Also, it was unclear whether that debt was easily realisable as cash.

75. Mr Lidington also noted that there were fixed charges registered at Companies House against the company's debts. Notwithstanding Mr Aristodemou's evidence that these fixed charges had long since been discharged, Mr Lidington submitted that the fact that they remained registered against GSIL affected GSIL's creditworthiness in relation to any potential lender or trading partner.

76. As to GSIL's liabilities, Mr Lidington submitted that on GSIL's own case it was likely that it was going to have to satisfy a significant corporation tax liability to HMRC in addition to the costs of these proceedings. Its accounts also showed significant liabilities would fall due within one year of 31 January 2020. There was also insufficient evidence as to whether staged payments were going to be agreed with HMRC and, if so, what the terms of that arrangement would be.

77. Mr Lidington referred to *Marine Blast Ltd v Targe Towing Ltd* [2003] EWCA Civ 1940, a decision in which Mance LJ had found reason to believe a claimant would not be able to pay a defendant's costs in circumstances where its evidence was in part unexplained and incomplete (see *Marine Blast* at [5]). Mance LJ also took into account that it was the claimant's own fault in that case that the information was incomplete. Mr Lidington submitted that the same was true in this case. GSIL had provided evidence regarding the irregularities in its financial statements that was in incomplete and failed to provide a proper explanation.

78. Finally, Mr Lidington noted that the most recent re-stated accounts of GSIL are for the financial year ending 31 January 2020. They therefore do not take into account what is likely to be the significant impact of the Covid-19 pandemic on the financial condition of GSIL, given that its business is concerned with the hard-hit hospitality sector. Accordingly, its current and short-term future financial condition was likely to be worse than indicated by the latest accounts.

79. Mr Nicholas Trompeter, of counsel, for GSIL relied on the restated accounts as evidence of GSIL's true financial position. He submitted that the thread running through the defendants' challenges to the financial accounts was an allegation that Mr Aristodemou or Mr Georgiou or both were being dishonest. In such circumstances, he submitted, the defendants ought to have applied to cross-examine GSIL's witnesses

rather than challenging what was otherwise credible documentary evidence: *Long v Farrer* [2004] EWHC 1774 (Ch) at [57].

80. Mr Trompeter submitted that on the totality of the evidence before the court there was no or insufficient evidence to satisfy the jurisdictional threshold in CPR 25.13(2)(c) that the court has reason to believe that GSIL will (as opposed to may) be unable to pay the defendants' costs if order to do so at the conclusion of the trial of the action in 2021.

81. Mr Trompeter noted that, as at 31 January 2020, GSIL had an amount of shareholders' funds that he characterised as "far in excess" of the defendants' budgeted costs for the remainder of the litigation. He submitted that GSIL had a viable and prosperous on-going business, with a number of high-end hotels as clients and "a significant new market" opening up in light of the current Covid-19 pandemic. He referred to Mr Aristodemou's evidence in his witness statement of 16 June 2020, which I have set out at [56] above.

82. Mr Trompeter did not otherwise attempt to provide a detailed answer to the various criticisms made by Mr Lidington of the restated accounts.

83. As to GSIL's present and short-term future financial condition, Mr Trompeter submitted that GSIL could engage in factoring financing to improve its cash flow position and noted that its liabilities were likely to be paid off in stages, which meant that GSIL would have the cash to pay the defendants' costs, should it be required to do so. Finally, he submitted that the question for the court was what the position would be at a future date, after trial and detailed costs assessment, and that in 2021 or 2022 the position could be quite different to the position today.

84. On any view, there are significant discrepancies between GSIL's original and restated accounts. GSIL's explanation for this is simply that its previous accountants were cutting corners and that its new accountants were presenting the position correctly. But as Mr Lidington pointed out, the information on which both the original accounts and the restated accounts were prepared would have been provided by GSIL itself. That information would have been under the control and provided to the accountants under the direction of Mr Aristodemou, GSIL's principal director.

85. It is relevant that GSIL is not a large company. Mr Aristodemou would be expected to have a good grasp of the financial condition of his company, as to profit and loss, assets, liabilities and cash flow. Moreover, as a director Mr Aristodemou had a statutory obligation under section 393 of the Companies Act 2006 not to approve GSIL's accounts unless he was satisfied that they gave a true and fair view of the assets, liabilities, financial position and profit or loss.

86. Accordingly, some explanation is called for in relation to the discrepancies between the original and amended accounts beyond Mr Aristodemou's supposition that LT2P had been cutting corners and his assertion that he simply assumed that accounts prepared by accountants must be accurate and he therefore simply signed what was put in front of him.

87. It is particularly of concern that GSIL filed its original accounts for the year ending 31 January 2018 on 14 August 2019, the day *after* Mr Aristodemou had been told that

there were irregularities in the accounts for the years ending 31 January 2012 to 31 January 2016, which would, until restated, have impacted on the accuracy of the accounts for the year ending 31 January 2018. 14 August 2019 was also the day that Pronumero was formally engaged to investigate and rectify the company's accounts.

88. Despite having just been informed of irregularities in the accounts, Mr Aristodemou as a director of GSIL signed off on the accounts for the year ending 31 January 2018 as presenting a true and fair view of the financial position of GSIL. To be fair, it may be that matters were already in hand to file the 31 January 2018 accounts on behalf of GSIL and that it was simply unfortunate timing that the accounts were filed just after Mr Aristodemou personally had been made aware of the irregularities in the earlier accounts.

89. However, the *original* accounts for the year ending 31 January 2019 were filed on 17 December 2019, roughly four months after Mr Aristodemou had become aware of the financial irregularities in the earlier accounts. Despite this, Mr Aristodemou as a director of GSIL once again signed off on those accounts as presenting a true and fair view of the financial position of GSIL.

90. On 5 May 2020, as already noted, amended accounts were filed at Companies House, including for the years ending 31 January 2018 and 31 January 2019, also signed off on by Mr Aristodemou as presenting a true and fair view of financial position of GSIL, despite the discrepancies between the original and amended accounts.

91. Given GSIL's small size, its accounts were not subject to the statutory audit requirement applicable to larger companies. None of GSIL's accounts were audited. It was therefore important for GSIL to explain, even in brief terms, why the original financial statements reviewed by Mr Georgiou in August 2019 were so drastically different from the true position. Such an explanation might have included an explanation for a different basis of accounting for certain assets or measuring their value. It may not have been necessary for GSIL to put forward all of its invoices or accounting information, but it would have been prudent for GSIL to have provided some evidence to explain how and why it was underreporting its current assets and liabilities to such a significant degree for so long.

92. GSIL is a small business, with, until recently, only two directors, and currently only one, Mr Aristodemou, who is clearly the dominant force behind GSIL. It is reasonable to expect that Mr Aristodemou had oversight, control, and a good understanding of GSIL's finances, and, of course, he had a duty to have that oversight, control and good understanding. It is not disputed that there are significant discrepancies between the original and the restated accounts. Those discrepancies should be explained at least in general terms. This is especially the case when GSIL relied on those former accounts when consenting to give security for costs in the past.

93. Mr Trompeter is correct to point out that if an allegation of dishonesty is made or a document that is otherwise credible is challenged, that should be done by way of cross-examining the relevant witnesses, as per *Long v Farrer* at [57].

94. It seems to me, however, that Mr Lidington did not go that far in his submissions. He submitted that the changes reflected in the restated accounts called for some explanation, which was not forthcoming. Under CPR rule 25.13(2)(c), even though

the burden is on the defendant, it is GSIL who has the relevant information to show that it can pay the defendants' costs.

95. As was said in *Sarpd Oil* at [19], an evaluation has to be made on the totality of the evidence, which includes the *absence* of relevant evidence from the only party able to provide it. The court can and should take into account that GSIL has failed to provide relevant evidence to explain the discrepancies between the original and restated accounts. The number of marked differences between the original and restated accounts calls for an explanation. The absence of that explanation gives the court reason to believe that GSIL will be unable to pay the defendants' costs if ordered to do so.

96. Furthermore, even if one considers the latest restated accounts for the period ending 31 January 2020, the defendants are right to point out that those assets appear to be illiquid for the most part. It is difficult to see, based on the balance sheet and the anticipated liabilities to HMRC in relation to corporation tax as a result of the amended accounts, how GSIL will be able to pay the defendants' costs, perhaps amounting to as much as £320,000, in what is likely to be 12 to 18 months' time.

97. GSIL had no real answer to these concerns raised by the defendants, beyond Mr Aristodemou's optimistic evidence regarding hotels re-opening (which was in part disputed by Mr Emmerson in his evidence) and regarding possible opportunities in the form of business distributing PPE products to health workers and members of the public. Mr Aristodemou may be genuinely optimistic, but *Long v Farrer* does not require the court to accept Mr Aristodemou's own assessment of GSIL's short and medium-term prospects, particularly having regard to the points raised by the defendants, as summarised at [74] above. These matters also give the court a reason to believe that GSIL will not be able to pay the defendants' costs should the defendants be awarded them following trial.

Should the discretion be exercised?

98. In respect of the court's discretion, Mr Trompeter pointed out that GSIL is a company operating in an industry that has been severely impacted by the Covid-19 pandemic. It would not be just, in his submission, to order GSIL to pay large sums into court at a time when it, and the rest of the hospitality sector, is coping with the impact of the pandemic.

99. It is true that the Covid-19 pandemic has caused significant disruption to the hospitality industry, and GSIL is very likely to have been affected, although Mr Aristodemou's evidence regarding this, as I have already noted, tended to minimise the impact and to assert, in fact, that new business opportunities had been generated by the crisis. I also note that it is not asserted by GSIL in its evidence that ordering security for costs would stifle the claim, other than an assertion made in correspondence by GSIL's former solicitors, Farhi LLP, that has since been withdrawn.

100. In any event, however, the Covid-19 pandemic also affects the risk that the defendants are taking in the circumstances in continuing to defend the claim. It would not be fair to the defendant to have to bear the cost of an unsuccessful claim in the future.

Furthermore, the discretion of the court can be exercised to ensure that staged payments are ordered in a way that does not unduly burden GSIL.

101. I conclude, therefore, that the court has reason to believe that GSIL will not be able to pay the defendants' costs should its claim fail, and that, having regard to all the circumstances of the case, it is just to make an order against it for security for costs.

Claimant's application for release of its initial security

102. Given my conclusion in relation to the defendants' application for additional security, it naturally follows that there is no basis for GSIL to have its initial security of £50,000 released.

103. It is just and convenient for the monies currently held by Farhi LLP to be paid into court and held together with the additional security for costs that GSIL will be ordered to pay.

Defendants' application for specific disclosure

104. The defendants' application for specific disclosure and inspection under CPR rule 31.12 was made on 24 April 2020. The defendants seek the following orders:

> "… the Claimant shall:
>
> 1.1 undertake a search for any documents containing communications in any medium in which they exist passing between the Claimant and its former solicitors, Fahri LLP and/or Counsel instructed by Fahri LLP to act for the Claimant limited to communications which deal with the creation, provenance and/or authenticity of the document exhibited at Annex A of the Particulars of Claim and/or the matters stated at paragraphs 11 and 12 of the First Witness Statement of Aristos Aristodemou filed in these proceedings;
>
> 1.2 disclose the communications (including corresponding original metadata) to the Defendant;
>
> 1.3 permit any request by the Defendant for inspection of the original communications within 7 days following disclosure; and
>
> 1.4 file and serve a witness statement of an officer of the Claimant verifying the extent of the searches undertaken and if it be the Claimant's case that the relevant communications no longer exist and cannot be retrieved, set out with full particularity what has become of the communications, and why they are no longer in the Claimant's possession, custody or control, including but not limited to the circumstances

> and date of their disposal or destruction and the efforts made to retrieve them."

105. As explained above, Annex A to the original Particulars of Claim is the 2019 Document, which appears to be signed by Mr Aristodemou and is dated 29 April 2016.

106. The defendants accept that the material they are seeking, being communications between GSIL and its former solicitors and counsel, is subject to legal professional privilege. However, they submit that GSIL has waived privilege in respect of that material. The defendants rely on paragraphs 11 to 12 of the witness statement dated 7 February 2020 of Mr Aristodemou, which was made in response to the Earlier Specific Disclosure Application, which sought the disclosure of the original digital version of the 2019 Document attached as Annex A to the original Particulars of Claim. The relevant passages of Mr Aristodemou's evidence are set out at [16] above.

107. The defendants submit that Mr Aristodemou, as a director of GSIL, in these paragraphs waived GSIL's privilege in respect of communications between GSIL and its solicitors about the creation, provenance and/or authenticity of the 2019 Document. Mr Lidington submitted that in substance Mr Aristodemou was casting blame on the solicitors for pleading the claim on the basis that the 2019 Document was contemporaneous, because this was not in accordance with his instructions. This allegation relies on communications between GSIL and its solicitors and counsel about the 2019 Document.

108. GSIL submits that paragraphs 11 to 12 of Mr Aristodemou's witness statement of 7 February 2020 do not have the effect of waiving privilege. Mr Trompeter submitted that there is no sufficient reference to any privileged document or communication in either paragraph. There is at best a passing narrative reference to what Mr Aristodemou did not tell his solicitors. These passages simply offer an apology if a misleading impression was created by the original Particulars of Claim. Even if there is sufficient reference to a privileged document or communication, Mr Trompeter submitted that any such document or communication was not being relied upon in any substantive sense or for any relevant purpose. Although any waiver is denied, Mr Trompeter submitted that if the court finds, nonetheless, that there has been a waiver of privilege, the scope of any waiver must be limited.

109. The principles arising when considering whether there has been a waiver of privilege were summarised recently by Waksman J in *PCP Capital Partners v Barclays Bank* [2020] EWHC 1393 at [47]-[48]:

> "47. I begin with a number of overarching points.
>
> (1) Legal professional privilege is regarded as a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore to be carefully controlled;
>
> (2) Generally, privileged documents cannot be ordered to be provided in litigation by the party

> whose privilege it is unless this is as a result of a waiver;
>
> (3) Absent waiver, the fact that such documents might be highly relevant does not entail their production;
>
> (4) Applications for documents based on a waiver of privilege entail at least the two following fundamental questions:
>
> (a) Has there been a waiver of privilege?
>
> (b) If so, is it appropriate to order production of privileged documents other than those to which reference has been made which was the foundation for the waiver?
>
> (5) The concept of fairness underpins the rationale for having a concept of waiver which can then entail the production of further privileged documents. This is because if the party waiving is, by the waiver thereby creating a partial picture only of the relevant legal advice, it is unfair to the other party to allow him to 'cherry pick' in this way.
>
> (6) That said, it is also clear that the question of whether or not there has been a waiver is not to be decided simply by an appeal to broad considerations of fairness.
>
> 48. As to the question of waiver itself, it is not easy to find a succinct and clear definition of when it arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case. But on any view in my judgment, first, the reference to the legal advice must be sufficient (a point I return to below) and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide."

110. The traditional distinction in the context of waiver was between: (i) reliance on a document's effects, which did not amount to a waiver; and (ii) reliance on a document's contents, which could amount to a waiver. However, as Waksman J explained in *PCP Capital Partners* at [55], the effects/contents distinction should not be applied "mechanistically". As was recognised in *Brennan v Sunderland City Council* [2009] ICR 479 at [65], the earlier authorities ought not be applied as if they had "the sanctity of statute". Also, whether or not there has been a waiver is not to be decided simply by a broad appeal to fairness.

111. In *PCP Capital Partners* at [60], Waksman J observed that the effects/contents distinction should be viewed through the prism of: (i) whether any reliance is placed on the privileged material to which reference has been made; (ii) what the purpose of that reliance is; and (iii) the particular context of the case in question.

112. If it is found that privilege has been waived, it is necessary to consider the scope of that waiver, guided by the principle of fairness. If privilege has been waived, the applicant is entitled to see otherwise privileged documents or communications falling within the scope of the relevant "transaction" or issue: *PCP Capital Partners* at [85]-[86]. The party claiming privilege cannot "cherry pick" or be selective about material on that subject matter so as to create a misleading impression. The identification of the transaction must be approached realistically, avoiding artificially narrow or wide outcomes.

113. The defendants also relied on a criminal case, *R v Seaton* [2010] EWCA Crim 1980. In *R v Seaton*, the defendant had given inconsistent statements and in examination-in-chief had blamed his solicitor for making an error when preparing his witness statement. In explaining the applicable principles, the Court of Appeal observed at [46] as follows:

> "…
>
> c) … [T]he defendant is perfectly entitled to open up his communication with his lawyer, and it may sometimes be in his interest to do so. One example of when he may wish to do so is to rebut a suggestion of recent fabrication. …
>
> d) If the defendant does give evidence of what passed between him and his solicitor he is not thereby waiving privilege entirely and generally, that is to say he does not automatically make available to all other parties everything that he said to his solicitor, or his solicitor to him, on every occasion. He may well not even be opening up everything said on the occasion of which he gives evidence, and not on topics unrelated to that of which he gives evidence. The test is fairness and/or the avoidance of a misleading impression. It is that the defendant should not, as it has been put in some of the cases, be able both to 'have his cake and eat it'."

114. Mr Lidington submitted that, although *Seaton* is a criminal case, there is no reason in principle why this guidance should not also apply in a civil context.

115. Finally, it should be noted that Mr Aristodemou's saying "without waiving privilege" in paragraphs 11 and 12 of his witness statement does not change the position (although, to be fair, GSIL did not take this point). It is clear that the question of whether privilege has been waived must be determined objectively: *Digicel (St Lucia) Ltd v Cable & Wireless Plc* [2009] EWHC 1437 (Ch) at [31].

116. The issues to determine on waiver of privilege are:

i) whether there was sufficient reference to privileged communications in paragraphs 11 to 12 of Mr Aristodemou's statement of 7 February 2020;

ii) whether reliance was placed on those communications and, if so, for what purpose, bearing in mind the context of the case; and

iii) if a waiver of privilege is established, what the scope of any disclosure should be.

117. As to the question of whether sufficient reference has been made to privileged communications in paragraphs 11 to 12 of Mr Aristodemou's witness statement, Mr Lidington submitted for the defendants that it was not relevant that Mr Aristodemou was explaining what he did not say ("It was never said by me …"). Mr Lidington relied on *PCP Capital Partners* at [97] where Waksman J said that a statement being couched in negative terms makes no difference to the question of whether reference has been made to privileged material. Waksman J explained that the real question is what, on a fair and objective analysis, in substance is being asserted about the privileged communications and the purpose of that assertion, rather than its form.

118. Mr Lidington submitted that, on Mr Aristodemou's evidence, the 2019 Document was given to the solicitors to show what it "would have looked like". If nothing was said by Mr Aristodemou about the nature and purpose of the 2019 Document in his communication accompanying the sending of it to his solicitors, they would naturally have assumed that the 2019 Document, given that it was apparently signed by Mr Aristodemou and dated 29 April 2016, was a contemporaneous document, not a re-creation. It follows that some communications must exist between GSIL and its legal team which explain the creation, provenance and/or authenticity of the 2019 Document.

119. Mr Trompeter submitted that there was simply no reference to any communication or document in paragraphs 11 to 12 of Mr Aristodemou's statement, so that the waiver argument does not get off the ground. All that was said in paragraphs 11 to 12 was that the 2019 Document was "sent" to GSIL's solicitors and that "it was never said" by Mr Aristodemou that it was the final agreement. This was unlike the usual cases of waiver where a party or witness references a particular document or a communication setting out legal advice. At most, there was mere "narrative reference" to the fact that the 2019 Document had been provided to the solicitors: see *PCP Capital Partners* at [49].

120. As to the question of reliance for a particular purpose, Mr Lidington made extensive submissions about the significance in the context of this case of paragraphs 11 to 12 of Mr Aristodemou's witness statement of 7 February 2020. He submitted that the existence of an exclusivity agreement was at the heart of the dispute, and the alleged agreement is the basis for most of the damages claimed. The 2019 Document was put forward by GSIL in correspondence, its Particulars of Claim and its Amended Particulars of Claim as a record of that exclusivity agreement.

121. Mr Lidington submitted that GSIL had put forward at least four different accounts of how the exclusivity agreement was reached and communicated to the defendants:

i) The first version was in the pre-action protocol letter sent by Farhi LLP to SPHL on 28 February 2019. That letter referred to the exclusivity agreement having been reached at a meeting on 3 April 2016 rather than 3 February 2016. That can perhaps be explained as simply an erroneous factual reference. More importantly, however, it is clearly implied by Farhi LLP that the exclusivity agreement originated with SPHL: "Mr Aristodemou signed these terms on behalf of GSI on 29th April 2016 and *returned the original* to SPH." (emphasis added) Mr Lidington also noted that there was nothing in the pre-action protocol letter to suggest that the 2019 Document, which is set out in Annex 4 to that letter, was a re-creation by Mr Aristodemou of the 2016 Document.

ii) The second version is in the original Particulars of Claim dated 2 July 2019, where it was asserted at paragraph 3 that an oral agreement that GSI would be appointed the exclusive supplier to SPHL for a five-year period was reached at a meeting on 3 February 2016 and at paragraph 6 that "[t]he Exclusivity Agreement was then reduced into writing or alternatively supplemented by the written terms served herewith and attached as Annex A." It is common ground that Annex A to the original Particulars of Claim is the 2019 Document. Paragraph 7 says that "[t]he original hard copy of the written terms was signed by Mr. Aristodemou and sent by Federal Express to the Head Office of D&D London." There is, once again, no reference to the original document being lost and no explanation that the document set out in Annex A is a re-creation.

iii) The third version is that set out in Mr Aristodemou's witness statement of 7 February 2020 at paragraphs 3, 5, 7 to 8, immediately preceding Mr Aristodemou's evidence at paragraphs 9 and 11 regarding the loss, due to a burglary at his home in September 2016, of his laptop and a USB stick, which he said contained electronic copies of the original written document created in 2016. In this version of events, Mr Aristodemou noted that the final changes to the written agreement were made on 23 May 2016 and sent with a cover letter to SPHL. No explanation was given as to why the written agreement was back-dated to 29 April 2016 (although I note that Mr Aristodemou says at paragraph 5 of his witness statement that the document was created on 29 April 2016, which would perhaps explain the appearance of that date on the document).

iv) The fourth version is that set out in the Amended Particulars of Claim dated 6 March 2020 at paragraphs 21 to 23, where it is said that Mr Aristodemou created the written document following the meeting on 3 February 2016 and transmitted an original signed copy "via the postal system", rather than via Federal Express, as stated in the original Particulars of Claim, which would have resulted in a traceable record of the delivery. The 2019 Document was set out in Annex 2 to the Amended Particulars of Claim and said to be a "true copy" of the document allegedly created by Mr Aristodemou in 2016 to record the exclusivity agreement, and this is said to be the entire agreement between the parties and not merely supplementing their oral agreement (as pleaded, in the alternative, in the original Particulars of Claim).

122. Mr Lidington submitted that in letters sent by Emmerson Law Limited to Farhi LLP on 18 June, 24 June and 18 July 2019, the authenticity of the 2019 Document was

clearly put into issue. The defendants requested disclosure of the original or digital version of the 2019 Document in June and July 2019, as per their right under CPR rule 31.14, but GSIL did not consent, so the defendants filed the Earlier Specific Disclosure Application on 2 September 2019. The 2019 Document was then revealed to be a re-creation in Mr Aristodemou's witness statement of 7 February 2020.

123. Mr Lidington submitted that Mr Aristodemou was asserting in substance that he had never suggested to GSIL's solicitors that the 2019 Document was anything but a re-creation. In paragraphs 11 to 12, Mr Aristodemou was relying on communications between him and his solicitors about the 2019 Document to make this point. Whether GSIL's version of events is true, namely, that the 2019 Document was never put forward to the solicitors as the original agreement, goes to the question of whether there was a contemporaneous record of the alleged oral agreement at all. Mr Lidington went through the procedural history in detail to show that even though the parties were corresponding about their disputed agreements as early as June 2017, the 2019 Document did not come to light until February 2019, when Mr Aristodemou created it. It was submitted that the entire claim is affected by how the 2019 Document came to exist and how it came to be presented by GSIL's legal representatives as a document contemporaneous with its apparent date of 29 April 2016.

124. In response, Mr Trompeter submitted that the claim has always been made on the basis that there was an oral agreement between the parties. The original Particulars of Claim and the Amended Particulars of Claim allege that there was an oral agreement reached in the meeting on 3 February 2016. The 2019 Document is not determinative of the issue and is, at most, supporting evidence for that oral agreement. He pointed out that there was other evidence, independent of the 2019 Document, which GSIL would seek to rely on at trial, such as other correspondence and the background of the agreement relating to the Buwier Stock that explained the commercial rationale for the exclusivity agreement.

125. Mr Trompeter submitted that it was significant that Mr Aristodemou's statement was made in response to the Earlier Specific Disclosure Application, which sought disclosure of an original or digital version of the 2019 Document. In his statement, Mr Aristodemou explained why those documents did not exist. The purpose of the witness statement was to explain why the original digital document and metadata sought by the defendants were no longer available (namely, because Mr Aristodemou's laptop computer and USB stick were stolen from his home during a burglary in September 2016) and why there was no hard copy. In paragraphs 11 to 12 of his first witness statement, Mr Aristodemou was making a separate point, that is, apologising to the court for the impression created by the original Particulars of Claim. This did not amount to reliance on those communications for any substantive issue in the Earlier Specific Disclosure Application or in respect of the main claim.

126. On the question of scope, the defendants submitted that they were entitled to see all communications dealing with the creation, provenance and/or authenticity of the 2019 Document. This is because the scope of the transaction or "topic" in question is the creation, provenance and authenticity of the 2019 Document. The defendants submitted that it could not be narrower than that because, for example, if, when the 2019 Document was sent by Mr Aristodemou to GSIL's solicitors, there was a reply

from the solicitors asking for clarification as to the nature and origin of the document, that reply should be available to the defendants as well.

127. GSIL submitted that if there was any waiver, which was not accepted, the scope of the waiver should be limited to documents evidencing what if anything was said by Mr Aristodemou on behalf of GSIL to its legal advisers when preparing the original Particulars of Claim. The defendants submitted that this was too narrow, for example, because the 2019 Document was first created and sent to the claimant's solicitors on 11 February 2019, months before the original Particulars of Claim were filed, so it would create a misleading impression to focus only on documents created at the time of the original Particulars of Claim.

128. In my view, it is clear that Mr Aristodemou makes reference to privileged communications with his former solicitors at paragraphs 11 to 12 of his witness statement of 7 February 2020. It is unlikely that he sent the 2019 Document to his solicitors without any form of communication to explain what he was sending and why, but, even if he did, the sending of the 2019 Document was itself a communication with GSIL's solicitors.

129. Assuming for the sake of argument that there was no accompanying cover message, the 2019 Document, given its appearance, including Mr Aristodemou's signature and the dating of the document, would quite naturally have been interpreted by his solicitors as being a copy of a document produced and, indeed, signed on behalf of GSIL in 2016. The likelihood is that there would have been some form of cover message to explain and/or confirm Mr Aristodemou's instructions in relation to the document, and if GSIL's solicitors at the time were unclear as to those instructions, they would have sought clarification. Be that as it may, however, the reference to sending the 2019 Document to his solicitors is, in context, sufficient reference to a privileged communication.

130. Turning to whether this reference constitutes a waiver of privilege, the first point to note is that whether there is a waiver is to be assessed objectively. Mr Aristodemou's words "[w]ithout waiving privilege" in paragraphs 11 and 12 of his witness statement of 7 February 2020 do not have the effect of avoiding a waiver: *Digicel* at [31].

131. In paragraphs 11 and 12 of the witness statement of 7 February 2020, Mr Aristodemou is clearly relying on his communication with his solicitors to make the point that he never put forward the 2019 Document as being the contemporaneous document he says that he created in 2016. The existence of such a document is disputed. That issue goes to the heart of this case, namely, whether there is an exclusivity agreement between the parties.

132. The creation, provenance and authenticity of the 2019 Document is disputed. The credibility of Mr Aristodemou's account of the origin and transmission to the defendants of the document he says he created in April/May 2016 to document the oral agreement reached on 3 February 2016 and the credibility of his account of the creation and transmission to GSIL's solicitors of the 2019 Document will be important and relevant factors in the resolution of the question of whether the parties entered into an exclusivity agreement and, if so, the terms of that exclusivity agreement.

133. In paragraphs 11 to 12 of his witness statement of 7 February 2020, Mr Aristodemou relies on the substance of his communication in February 2019 with his former solicitors to bolster his credibility. In the witness statement, Mr Aristodemou blames his former solicitors for drafting the Particulars of Claim in an apparently misleading way (I note in passing that the Particulars of Claim were settled by GSIL's former counsel, Mr Mark Stephens), given that he "never said" to the solicitors that the 2019 Document was, in fact, the 2016 Document. This, in my view, is more than a mere "narrative reference".

134. Having viewed the matter through the prism referred to by Waksman J in *PCP Capital Partners* at [60], I conclude that there has been a waiver of legal privilege by Mr Aristodemou in paragraphs 11 to 12 of his witness statement of 7 February 2020. As the principal director of GSIL, he clearly has authority to waive GSIL's legal privilege.

135. The remaining question, then, is the fair scope of the "transaction". In my judgment, the fair scope is self-evidently that set out in paragraph 1.1 of the draft order sought by the defendants, which I have set out at [104] above. To have a proper understanding of the communications between Mr Aristodemou and his former solicitors on which GSIL is seeking to rely, it is not appropriate to limit the scope of the waiver to Mr Aristodemou's relevant communication(s) to them. If there was a reply from the former solicitors to Mr Aristodemou asking for clarification of the nature and origin of the 2019 Document, that too would be material, as would any further reply by Mr Aristodemou to such a request for clarification. It would be unfair for the defendants not to have the full picture. The scope sought by the defendants is, in my view, neither too wide nor too narrow.

136. For the foregoing reasons, I will make the order sought by the defendants in paragraph 1 of the draft order, as set out at [104] above.

Costs of the Earlier Specific Disclosure Application

137. As already noted in this judgment, the costs of the Earlier Specific Disclosure Application were reserved to this hearing.

138. SPHL says that it should have its costs of the Earlier Specific Disclosure Application, having achieved the alternative basis of relief that it sought, namely a witness statement by an officer of GSIL setting out why the documents sought could not be provided. That was the witness statement of Mr Aristodemou dated 7 February 2020.

139. Mr Lidington submitted that had GSIL responded to SPHL's reasonable requests in this respect made by its solicitors, Emmerson Law Limited, in its letters to Farhi LLP dated 18 June, 24 June and 18 July 2019, SPHL would not have needed to make the Earlier Specific Disclosure Application. The unhelpful response from Farhi LLP in its letter to Emmerson Law Limited dated 23 July 2019 was that GSIL had no requirement to provide anything more than was set out in the Particulars of Claim and that the original document was with SPHL. That missed the point. SPHL's request was directed at the original electronic form of the 2019 Document, and it was a document that SPHL was entitled under CPR rule 31.14(a) to inspect, having been mentioned in the Particulars of Claim.

140. Mr Trompeter for GSIL submitted that the Earlier Specific Disclosure Application was unnecessary and unjustified. GSIL's case relies on there having been an oral agreement concluded on 3 February 2016, which does not depend solely on the 2016 Document, of which the 2019 Document is a re-creation. Furthermore, the Earlier Specific Disclosure Application did not achieve anything but did have the effect of delaying the proceedings by four months. The issues, for example, were not narrowed ahead of the CCMC nor did the application result in a more focused and efficient approach to disclosure.

141. Mr Trompeter submitted that the Earlier Specific Disclosure Application was, in fact, a thinly-veiled attempt to find evidence to undermine the credibility of Mr Aristodemou, which is not an appropriate use of the specific disclosure jurisdiction.

142. Finally, Mr Trompeter submitted that the Earlier Specific Disclosure Application was premature. The defendants could and should have waited for standard disclosure in the usual way and only then, if unsatisfied, applied for specific disclosure, as contemplated by paragraph 5.1 of PD31A.

143. In response to the prematurity point, Mr Lidington noted that the White Book makes clear at paragraph 31.12.1.1 that there is no requirement to wait for any particular stage in the proceedings to make an application for specific disclosure. Awaiting standard disclosure would have simply delayed the application, not prevented it.

144. On the prematurity point, I note that in addition to paragraph 31.12.1.1, paragraph 31.12.2 of the White Book also makes clear that an application for specific disclosure does not have to wait for standard disclosure to have occurred:

> "The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case: *Commissioners of Inland Revenue v Exeter City AFC Ltd [2004] B.C.C. 519*. The court has a discretion as to whether it makes the order. It may make an order at any time, *regardless of whether standard disclosure has already occurred*; and it may make orders for specific disclosure against a claimant before the service of the defence where it would assist the defendant to plead a full defence rather than an initial bare denial: *Dayman v Canyon Holdings Ltd, 11 January 2006, unrep.*, Ch D, HH Judge Mackie QC." (emphasis added)

145. SPHL challenged the authenticity of the 2019 Document in correspondence in June 2019 before the claim was issued, as they were entitled to do. GSIL could have dealt with the matter then but chose not to. SPHL warned GSIL that an application for specific disclosure would be made if the information were not forthcoming. The Earlier Specific Disclosure Application resulted in evidence finally being provided by GSIL in relation to the creation of the 2019 Document.

146. I have accepted in relation to my consideration of the defendants' application for specific disclosure of communications dealing with the creation, provenance and/or authenticity of the 2019 Document that the authenticity and history of the 2019

Document is an important issue in the proceedings and goes to the most important issue in the litigation, namely, whether there was an exclusivity agreement between the parties. Accordingly, I do not accept GSIL's submissions that the Earlier Specific Disclosure Application was unnecessary and unjustified. The application may not have resulted in the issues between the parties having been appreciably narrowed, but that is, at least in part, a result of the nature of the evidence supplied by GSIL in response to the application and its subsequent amendment of its Particulars of Claim.

147. SPHL achieved one of its principal objectives in making the Earlier Specific Disclosure Application, namely, the obtaining of evidence regarding the creation of the 2019 Document from Mr Aristodemou on which it can cross-examine him at the trial. SPHL was substantially successful on the Earlier Specific Disclosure Application and therefore should have its costs of the application.