Neutral Citation Number: [2020] EWHC 476 (QB)

Case No: FJ22/19

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2020

Before :

MR JUSTICE EDIS

- -

Between :

COBUSSEN PRINCIPAL INVESTMENT HOLDINGS LIMITED	**Claimant**
- and -	
(1) GHOUSE AKBAR	
(2) LEGACY HOLDINGS LIMITED	
(3) MEHREEN AKBAR	**Defendants**

- -
- -

James Weale (instructed by **DWFM Beckman**) for the **Claimant**
William Edwards (instructed by **DWF Law**) for the **First Defendant**
Lisa Lacob (instructed by **DWF Law**) for the **Second Defendant**

Hearing dates: 27 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr Justice Edis:

1. This is my ruling on two applications by the claimant ("Cobussen"). The first and second defendants ("Mr. Akbar" and "Legacy" respectively, or "the Respondents" where it is not necessary to distinguish between them) are respondents to both. Legacy is a company incorporated in the Cayman Islands. The proceedings concern a charging order which Cobussen seeks to make final in relation to a valuable property in London called Apartment 2.5, 22 Trevor Square, London SW7 1EA ("the Property"). The third defendant ("Mrs. Akbar") is a party to these proceedings because she may have an interest in the Property or at least a right to live in it. She is not involved in either of the applications. I heard lengthy oral argument on 28th January 2020 which finished too late for me to give an oral ex tempore decision as I would normally have wished to do on an application for disclosure. I therefore had to reserve my decision which I now give in this written ruling.

These proceedings

2. By an application on Form N379 issued on 18th June 2019 Cobussen seeks a charging order on the interest of Mr. Akbar in the Property to secure payment of a judgment debt. The judgment was given in the Eastern Caribbean Supreme Court, BVI on 24th October 2018, and was registered in the High Court of Justice, Queens Bench Division on 20th February 2019. The debt totalled £15,792,071.94 at that date, including interest and costs. It remains unpaid, although Mr. Akbar consented to the judgment in the BVI and, apparently, has the assets to pay it if he chose to do so. It resulted from a Tomlin Order which was agreed in settlement of proceedings by Cobussen against Mr. Akbar and a company of which he was the majority shareholder, but which does not otherwise feature in this case. It is not irrelevant to what I have to decide that these proceedings are necessary because Mr. Akbar wishes to evade payment of a debt which he is legally obliged to pay. Cobussen obviously knows what that action was about, and it is briefly described by Ms. Moussaoui, its solicitor, in her first witness statement in these proceedings at paragraphs 5 and 6. Cobussen had invested a large sum in this company, and its assets had been "diverted, dissipated or misapplied, while significant borrowings were assumed against overinflated asset values". Mr. Akbar chose not to resist the claim that he was personally liable for this conduct. These matters are not irrelevant because the disclosure process depends on the parties dealing with each other and with the court in good faith. I am not making any finding of bad faith against Mr. Akbar, but the history of the debt, and certain matters of conduct and evidence identified below, combine to cause me to scrutinise the submission that full disclosure has already been given and that no further order should now be made with a considerable amount of care. This caution extends to Legacy because it is not clear to me who controls Legacy (it has a corporate director and its single share is held by corporate trustees), but there is evidence in an email from Mr. Akbar that he does, see [4] below.

3. On 21st June 2019, Jay J made an interim charging order and directed that unless an objection to its continuation were filed within 28 days a Master would consider without a hearing whether it should be made final. In the event that there was an objection, he directed that the application would be heard by a Master on 30th July 2019 and that the judgment debtor and any other person seeking to object should file and serve their objection and the grounds of it in writing not less than 7 days before the hearing.

4. The evidence in support of the application dealt with by Jay J was a witness statement by Ms. Moussaoui. It revealed, among other things, that there had been a disclosure order made on 15th April 2018 by Bryan J requiring HBL Bank UK to locate and disclose documents to Cobussen and exhibited some of them. Mr. Akbar had one or more accounts with that bank. The documents thus obtained by Cobussen included an email sent by Mr. Akbar on 4th April 2019 which Cobussen had obtained and had relied on in support of its applications. It was sent in answer to an email from HBL Bank UK asking for an explanation of why Mr. Akbar had paid personally a liability of Legacy, and asking him to confirm his "ownership". This says

> "Pls note that legacy is owned by me for which we have been paying the interest etc harneys is simply the legal firm that does the yearly compliance work for legacy which I have to pay."

5. Ms. Moussaoui says that although invoices for the service charge and quarterly rent payable under the 999 year lease to the freeholder, Harrods (UK) Limited are sent to Legacy, Mr. Akbar has been paying them himself. This assertion was derived from his bank statements, which she exhibited.

6. A witness statement of Mr. Jonathan Isaacs, solicitor, of DWF Law LLP, dated 26th July 2019 was served on behalf of Mr. Akbar in support of his opposition to the making final of the Interim Charging Order. Service was effected by email at 1823pm on Friday 26th July 2019, the hearing having been fixed for the following Tuesday, 30th July. This gave Cobussen, and the court, 1 clear working day to deal with it.

7. In paragraph 5, Mr. Isaacs apologised for the lateness of the statement and its exhibit. He said that his firm had been instructed on 23rd July 2019 and that

> "Mr. Akbar did not immediately pick up the papers which had been served upon him given various business travel commitments at the time".

8. In paragraph 2, on the previous page, Mr. Isaacs had said

> "The facts and matters set out in this statement are within my own knowledge unless otherwise stated, and I believe them to be true. Where I refer to information supplied by others, I identify the source of the information. Facts and matters derived from other sources are true to the best of my knowledge, information and belief."

9. I assume, but am not told, that the rather opaque explanation given for the lateness of Mr. Akbar's response in paragraph 5 had come to Mr. Isaacs from Mr. Akbar. Mr. Isaacs gives no reason, if it is the case, why he believes that it is true. Neither does he explain what he believes that it means. Mr. Akbar was apparently served with papers which he did not "pick up" because of business commitments. He must have "picked them up" from somewhere at some point before he instructed DWF on 23rd July, but the statement is silent about how or when that might have come about. Mr. Isaacs then sets out Mr. Akbar's case, which is that the Property is legally and beneficially owned by Legacy who had been served out of the jurisdiction without leave and that

this purported service was therefore defective. Mr. Isaacs sets out the structure under which the legal interest in the Property is held, presumably relying on documents which he has seen, and concludes with a bald assertion of fact: "In short, Mr. Akbar has no beneficial interest in the Property." This statement, again, seems to be based on documents, but he does not say which documents. He concluded "I believe that the Interim Charging Order should be discharged in its entirety." Since he has not identified the basis on which he has formed these beliefs, it is not possible to say whether he has seen and considered everything which might be relevant to their truth.

10. Mr. Isaacs exhibited a deed of trust called "The Garden Trust" dated 11th May 2009 by which EFG Trust Company Limited ("EFG") declared that it held £10 sterling on trust for the beneficiaries, namely Mr. and Mrs. Akbar and their two children, on the terms of the discretionary trust thereby created. By a Deed of Appointment Retirement and Indemnity dated 19th September 2016 EFG retired as trustee and was replaced by Equiom Trustees (Jersey) Limited. Mr. Isaacs says that he understands that 100% of the shareholding of Legacy is currently held by Aramis Services Limited, which ultimately holds those shares on trust for the Garden Trust. He then set out his instructions relating to the email the text of which is set out at [4] above. Mr. Isaacs says:-

> "I understand from Mr. Akbar, however, that his comment was simply shorthand to explain why he was making a payment related to the Property. I understand that it was not intended to be any indication that he was the beneficial owner of the property"

11. Again, this is rather opaque and it is not clear what it means. It seems to mean that Mr. Akbar is saying that his email to HBL Bank UK was untrue. There is no process of shorthand which converts truth into falsehood. Mr. Akbar has not committed himself to any explanation of this important document yet, although he has filed a witness statement. It is impossible to attach any weight to what he told Mr. Isaacs. For present purposes the Harneys email is evidence that Mr. Akbar is the real owner of Legacy and this evidence has not been explained in any real sense.

12. Mr. Isaacs then says that Mr. Akbar has lived in the Property, at most for a couple of months a year, but no longer does so. He confirms that it is a residential property and he says that

> "It is his estranged wife (and his minor children) who live there as her solicitor confirmed in his email dated 12 July 2019."

The hearing on 30th July 2019 and the directions then given

13. On this state of the evidence, the hearing before His Honour Judge Freedman, sitting as a High Court Judge, on 30th July 2019 did not resolve the claim. Judge Freedman instead made an order dealing with some third party debt orders with which I am not concerned. In relation to the Charging Order proceedings, he made an order which regularised service on Legacy which means that I am not concerned with that issue. He directed that Legacy and Mrs. Akbar should be joined as respondents to this aspect of the proceedings, and ordered that the interim charging order should continue until further order. He then made the following order

> 6. Pursuant to CPR 73.10A(3)(d), there shall be a trial of the following issues in respect of the Charging Order Application (a) whether the First Respondent has a beneficial interest in the Property, and, if so, the nature and extent of such interest; (b) whether the Third Respondent has a beneficial interest and/or rights of occupation in the Property and, if so, the nature and extent of that interest and/or those rights; (c) whether a final charging order should be made or the Interim Charging Order discharged, and (d) insofar as relevant to (a), (b) and/or (c) whether the First Respondent is a or the beneficial owner of the Second Respondent (the **Issues).**
>
> 7. In relation to the Issues, short pleadings shall be filed and served as follows:
>
> (a) By 4pm on 9th August 2019 the Applicant shall file and serve Points of Claim;
>
> (b) By 4pm on 23rd August 2019, each Respondent shall, if so advised, file and serve Points of Defence;
>
> By 4pm on 30th August 2019, the Applicant shall, if so advice, file Points of Reply.
>
> 8. By 4pm on 6th September 2019 the parties shall agree a list of issues for disclosure, with liberty to apply to a Master in default of agreement (such application, if any, to be made by 4pm on 9th September 2019).
>
> Each of the parties shall give simultaneous disclosure by list and inspection by 4pm on 29th September 2019.

14. The Order then gave directions for service of witness statements and directed a trial of the Issues in a trial window opening on 4th November 2019. Although the order included liberty to apply to a Master for such further directions in relation to the trial of the Issues as may be necessary, by some means which time did not permit me to investigate the subsequent disclosure application came before me, as indicated above. Some confusion may have arisen because the Order uses the word "issues" in two different contexts. The "Issues" to be tried are identified in paragraph 6. Paragraph 8 then requires a list of issues for disclosure which is obviously a different thing. It should not be forgotten, however, in construing the Order that the disclosure process it contains is intended to facilitate the fair trial of the paragraph 6 "Issues".

15. The form of the order for disclosure follows in part only paragraph 7 of Practice Direction 51U - Disclosure Pilot for the Business And Property Courts. In fact, that Practice Direction does not apply to these proceedings in the Queens Bench Division and no other part of it was incorporated by the Order. I approach the Order on the basis that Judge Freedman was intending that a List of Issues for Disclosure should be created using the term found in that Practice Direction, although the obligations of the parties as to disclosure are to be found in CPR Part 31, save as expressly varied in the Order.

16. Judge Freedman ordered that the Issues be tried, and that direction has not been appealed. There has been no attempt to strike out the claim as having no prospect of success. Judge Freedman was satisfied that Cobussen had established that its claim raises properly triable issues. The merits had also been considered by Jay J when making the interim Charging Order against the property. This is relevant to my approach to the Respondents' submission that the disclosure application is a fishing expedition to try and improve a weak case.

The pleadings and List of Disclosure Issues

17. Point of Claim were served on 9th August. Points of Defence were served by the Respondents on 23rd August 2019. A Reply to both Defences was served on 30th August 2019.

18. A draft list of Issues for Disclosure was served by Cobussen's solicitors on 5th September 2019. After some correspondence a list was agreed on the following day and lodged with the court. Some submissions have been made as to the consequences of the form of that list, and I will return to it.

19. The Points of Claim allege that Legacy holds the legal title to the Property on a resulting trust, alternatively as nominee, in each case for Mr. Akbar. It alleges that Legacy acquired the Property on or about 14th April 2004 but that the purchase price when it did so was paid by Mr. Akbar personally, by a mechanism of which Cobussen was unaware. It is claimed that the source of the funds was the sale of a McDonald's Franchise in Pakistan. It is alleged that the Property was bought for the use of Mr. Akbar and his family when they were in London, and that when they have used it they have not paid anything to Legacy. The Points of Claim repeat the allegation about the payment of the quarterly rent and service charges for the Property by Mr. Akbar personally. In the alternative, it is claimed that Mr. Akbar is the beneficial owner of Legacy, relying on the email set out above, and on the allegation that Legacy exists for no other purpose than to hold the Property (which appears to be true).

20. Mr. Akbar's Points of Defence allege that a relation of his, Mrs. Mumtaz, was the settlor of a Cayman Islands Trust which is called the 2003 Trust in the document. The 2003 Trust had as an asset the single issued share in Legacy "held via Buchanan Ltd. which held the Legacy shareholding from the 12th November 2003" until 2009. The 2003 Trust was wound up in 2009 and Mrs. Mumtaz directed that the share was to be transferred to "c/o Robert Mitchell, EFG Private Bank Ltd" in London. This was then acquired as an asset of the Garden Trust which was set up on the same day. It was held by EFG Nominees Ltd which held it as nominee of and trustee for EFG Trust Co, the trustee of the Garden Trust. Equiom Trustees (Jersey) Limited replaced EFG as Trustee of the Garden Trust, and the holder of the share became Equiom Nominees (No 2) Jersey Ltd. These last changes occurred in September and October 2016. It is denied that Mr. Akbar has any beneficial interest in the Property. It is alleged that Mrs. Mumtaz provided £643,000 towards the purchase price and that the balance was funded by a loan from Citibank. The pleading is not quite clear about who the borrower was in respect of that funding, but it seems likely that it was Legacy and that there was a charge on the Property and a personal guarantee from Mr. Akbar. That was certainly the way the refinancing was done in 2009, according to the Financial Statements of Legacy for 2010. The charge in favour of the bank by Legacy is confirmed in Legacy's Points of Defence, which is silent about any personal

guarantee there may have been. It is denied that any part of the sale proceeds of the McDonald's Franchise funded the purchase of the Property. It is alleged that the Akbar family have used the Property since its acquisition under the terms of a Licence Agreement dated 9th November 2011 which requires that they keep the property in good repair. It is said that Mr. Akbar has lent Legacy the money to pay the rent and service charge. It is admitted that Legacy carries on no trading or other activities and denied that Mr. Akbar is its beneficial owner. It does not say who is.

21. Legacy's Defence is attested by a Statement of Truth from a director of its corporate director, an Equiom company. The name is illegible. The document confirms what Mr. Akbar says about the holding of the share in Legacy between 2003 and 2009, and about the subsequent transfers to EFG and then Equiom. The document asserts that Mrs. Mumtaz was the settlor of the Garden Trust. It says that the Equiom Directors have at all times acted independently of the Garden Trust and its beneficiaries. The words "as did the EFG Directors" then follow. Nothing which has been disclosed reveals how the Equiom Director formed any belief about what the EFG directors had done, or why they had done it. There is a file, called the "corporate file" which contains a number of resolutions of the company during the period when EFG supplied its director but which contains very little underlying documentation to show why any of those things were done, or for whose ultimate benefit they were done. As to the purchase of the Property, the document says that the price of £2,398,000 was funded as to £643,000 by Mrs Mumtaz and as to the balance by a mortgage loan secured by a first legal charge over the Property executed by Legacy. This was refinanced in 2009 by a loan from EFG of £2,700,000, and refinanced again in January 2016 by a loan from Kleinworts. It says that Legacy was the borrower and had "responsibility for maintaining the mortgage loan repayments". It does not say whether that responsibility was ever discharged, or, if so, by whom. It confirms that there was a licence agreement, but does not say what Mr. Akbar's obligations are under it. It says that Mr. Akbar has provided loans to Legacy to "assist in the payment of mortgage loan interest and service charges". It does not say how or when Legacy proposes to repay those loans.

22. The Reply says that Mrs. Mumtaz is Mr. Akbar's aunt and has limited financial means. It says she is dependent on Mr. Akbar. Various points are taken about Mr. Akbar's case which are not material to the applications before me. In summary, his case is denied. A similar approach is taken to Legacy's Defence.

The Applications before the court now

23. They are as follows (stripped of detail):-

i) An application issued on 12th November 2019 ("the disclosure application") seeking

a) details of the searches which resulted in the disclosure given on 29th September 2019, and seeking details of any additional electronic devices which may hold relevant documents;

b) the execution of further keyword searches by DWF, the respondents' solicitors and disclosure of documents found by those searches;

c) the execution of further searches for specific classes of documents;

d) Details of any material which has not been disclosed and the reasons why it has not, including whether it has been lost or destroyed.

ii) An application issued on 15th November 2019 seeking an extension of time in which to file and serve its evidence on the ground that disclosure is incomplete. This is contingent on the success or failure of the disclosure application.

The disclosure process so far

24. DWF, on behalf of Mr. Akbar and Legacy, disclosed documents in purported compliance with the disclosure order on 27th September 2019. In letters accompanying the link by which that was done, they confirmed that each of their clients had carried out a reasonable and proportionate search to locate all the documents which are or have been in their control and which they are obliged to disclose. The letter in relation to Mr. Akbar says this, in addition:-

> "Given the adequacy of the disclosure given by Legacy Holdings Limited which responded to most of the Agreed List of Issues for Disclosure, a proportionate search was undertaken by our client for further documents that may assist. Please also note that many of the documents enclosed by our client were in fact given to our client by way of voluntary disclosure from Legacy Holdings Limited prior to it being formally joined to these proceedings."

25. Legacy was formally joined to the proceedings on 30th July 2019. Presumably this voluntary disclosure process occurred between the time when Mr. Akbar "picked up" the proceedings with which he was served and the date of Mr. Isaacs' first witness statement (26th July 2019) but as I have pointed out above, that document does not say what documents it is based on. This letter does not say which documents were voluntarily disclosed by Legacy to Mr. Akbar or when.

26. Cobussen responded by letter of 15th October 2019 complaining of deficiencies in disclosure, and followed it on 16th October with a lengthy list of further documents which they sought. These are, for the most part, the documents which must have existed if the transactions identified in the Points of Defence documents had in fact occurred. This became the template for the present application. The list attempted to tie the requests to the disclosure issues by number. There was no reply prior to 22nd October when a letter was sent seeking a reply. DWF on behalf of Legacy replied substantively on 24th October 2019 taking the point, at a number of stages, that particular disclosure requests were for material which was not required because of the scope of the List of Issues document. Interestingly, it was not suggested that this disclosure was not required by the issues as defined by the pleadings, but only by the way in which those issues had been condensed into the List of Issues for disclosure purposes. In other cases, it was said that the documents sought were not in Legacy's possession and that Legacy had already disclosed "the complete corporate records". A very similar letter was sent on behalf of Mr. Akbar on the same day, by the same solicitors. A common theme was that many of the documents are "third party papers"

which the Respondents do not have. Lengthy letters were sent in response on 29th and 30th October. By its letter of 1st November DWF said that they would respond fully with any further disclosure by the close of next week (8th November). They did not respond substantively by that date or at all, and nothing further has ever been disclosed.

27. The applications were issued on 12th November, and supported by a second witness statement from Ms. Moussaoui. Between then and 13th December there was silence from DWF while the solicitors for Corbussen were seeking "dates to avoid" in order that the hearing could be fixed. On that date DWF supplied dates when counsel could do the hearing. On 7th January 2020 DWF wrote and said, correctly, that the time estimate of 2 hours was inadequate and said that DWF intended to serve evidence. Nothing of substance was heard from DWF about the disclosure issues between 1st November 2019, when a promise was made which was not kept, and, I think, 23rd January 2020 when a witness statement by Mr. Isaacs dated 22nd January was served on behalf of both of his clients. On the same date Mr. Akbar served a statement, as did Laura Brown, of Equiom, on behalf of Legacy. A statement from Mrs. Mumtaz dated 21st January 2020 and a letter from a firm of lawyers who act for Mr. Akbar in Pakistan dated 22nd January 2020 was also served. This gave Cobussen two clear working days to deal with the evidence.

28. Mr. Akbar says in his witness statement that he carried out a thorough search of his documents in connection with the Property and sent them to DWF on 16th August 2019. He says that on receipt of the List of Issues he carried out further targeted searches of his personal records including his personal offices, emails, physical files and records held by his lawyers in Pakistan. This produced, he says, a small amount of further relevant documentation. He says he does not recall ever having or retaining that many papers relating to the Property. The purchase was 17 years ago, and he has changed his offices and computers since then. He says that he assumed Legacy would retain anything important. On receipt of the letter of 28th October 2019 he sought to undertake a further search but owing to pre-existing business commitments he was traveling overseas and not able to access his records to complete this process quickly. He therefore engaged the Pakistani lawyers to conduct further searches of his records in Pakistan. Their letter says that he has no further relevant records to disclose, and that they have searched his personal electronic devices, such as laptops, mobile phones, tablets and hard drives. They say they used the key words in appendix 2 of the Draft Order, but do not identify exactly what devices they used them on.

29. Mrs. Mumtaz's statement refuses to provide any information about her personal wealth, but asserts that she is a rich woman. Cobussen have obtained her tax records which appear to suggest that this is not true, and in her statement she objects to their having them, but does not explain how such a rich woman pays no tax, or if that is in fact the position. The rather "down at heel" property in Karachi which Cobussen photographed to show that she is unlikely to own a very valuable property in London, or at least to have paid for it, is, she says, her property. She says that she does maintain it but actually lives somewhere else. She gives an account of how the Property was purchased by her with the assistance (undefined) of Mr. Akbar for her daughter. She appears to agree that neither she nor her daughter ever used it, and says that she allowed Mr. Akbar and his family to live there. She does not explain how or why her asset is now owned by a company which is an asset of a trust whose

beneficiaries are Mr. Akbar and his immediate family, not including her. She says that she relied on advice from Citibank, the mortgagee, but does not say whether she actually borrowed the money from that bank. It seems unlikely, because the Unaudited Financial Statements of Legacy for the period to 31st December 2010 show that by that date (when the refinancing had occurred involving EFG Bank) the mortgage debt was owed by Legacy, who had granted a legal charge over the Property and supported by an unlimited guarantee from Mr. Akhbar. She does not say what she got in return for her £643,000 or whether she would like it back. She refuses to provide detail and, sensibly, Cobussen do not seek anything further from her in this application, in view of this evidence.

30. Laura Brown says that Equiom received documents from EFG when they became directors of Legacy on 12th October 2016. She lists the nature of these documents and says that they represent the only documents held by her company. All of this file has been disclosed along with some invoices in relation to the service charge and the Equiom group's own professional fees. This file does not include all the mortgage deeds, guarantees, credit facilities or all other documents concerning the acquisition by Legacy of the Property or of the two subsequent refinancing transactions. It seems unlikely that the EFG directors or the Equiom directors had the idea of refinancing the Property, or borrowing additional funds against the Property. It is far more likely that they agreed with someone else that these changes should be made. The documents are silent about whose idea this was, and for whose benefit it was done. According to the Legacy Unaudited Financial Statement referred to above, as at 31st December 2010 it had lent the Garden Trust $804,927. That statement was during the EFG era, and it seems odd that EFG had not kept any documents about this large loan which, presumably, they might wish to see repaid at some point. Laura Brown does not explain this. If that money has not been repaid, it is presumably now her job to collect it which she will have to try and do without any documents. She says this

> "Legacy will of course be providing a detailed witness statement in respect of the overarching proceedings in due course once the present application is dealt with. That statement will cover its history, administration and relationship with both Mr. Akbar and the Property with reference to the documents that have been disclosed."

31. It is not clear what that statement might cover, but it is clear that she does not intend to say anything about documents which have not been disclosed. One thing it could cover would be the "Transfer In Form" and "Compliance Pack" submitted by her company to Harneys in November 2016. Her company apparently supplied "Know Your Client" documents in relation to Legacy, having ticked boxes to show that this had happened. They also certified that the principal source of funds for the operation of Legacy was "accumulated earnings generated from the family business – the Akbar Group".

32. Mr. Isaacs' second witness statement says that the solicitors who acted on the purchase of the Property in 2003/04 have no documents left, and that the current trustees of the Garden Trust (a corporation in the same group of companies as that which employs Ms. Brown) take the view that they will not provide any documents because they are not a party to any proceedings. The beneficiaries have made no effort, it would seem, to procure documents in relation to the trust and legal

submissions have been made about that. Mr. Isaacs does not offer any explanation for his firm's failure to respond substantively by 8th November 2019 as promised in its letter of 1st November 2019. In relation to the complete silence about the substance of the disclosure issues between 12th November and 22nd January he says that after his October letters

> "Cobussen's application followed very soon thereafter and did not allow much follow up beyond that. Given that Cobussen's application largely ignores those 7-page letters, it would appear that further engagement on it might not have prevented the application in any event."

33. Given the critical role of solicitors in the disclosure process, this attitude is regrettable, and not reassuring. As in his first statement, Mr. Isaacs fails to keep to his promise to identify the source of some surprisingly confident assertions of fact he is prepared to make. He also fails to deal with the notion that a party can and must search for documents which are in its control, even if they are held to its order by someone else. Legacy's records and documents are documents which are or have been in its control, and it is not clear how there can be so little transactional (as opposed to corporate) documentation in its possession custody or control after an acquisition of property in 2003/04, and two substantial refinancing exercises since.

34. By means of an amended draft order sent by email to the court on the 27th January 2020, Cobussen narrowed the scope of the disclosure application, and substantially recast it. It is said that this was a response to the lately served evidence of the Respondents, comprising the 4 witness statements all dated 22nd January 2020. The first time when the Respondents indicated that they would be serving evidence was the letter about the time estimate for the hearing dated 7th January 2020, nearly two months after service of the disclosure application. A further fortnight then elapsed before the evidence was served, along with Skeleton Arguments from counsel. This conduct is a repeat of the conduct of Mr. Akbar prior to the hearing of 30th July 2019 described in detail above.

35. There is some force in the suggestion that the recasting of the application by Mr. Weale, who argued the case before me on behalf of Cobussen, is not merely responsive to the new evidence but also reflects something of a shift of approach. That shift is in favour of narrowing the disclosure requests. It seems to me that this question is one which may be relevant to costs and I should approach the application on the basis on which it is now put. It was not suggested that the Respondents would be prejudiced by that course, and given the chronology I have described with some care above, they are not well placed to complain about late served material.

Claimants submissions

36. Mr. Weale's Skeleton is dated 24th January 2020. It runs to 22 pages. It deals with the legal basis on which the claim for the Charging Order is made, and relies on *Prest v. Petrodel Resources* [2013] UKSC 34 [52] to submit that cases of this kind are very fact-sensitive. In this case, the Charging Order rests on facts which are inevitably beyond the direct knowledge of the claimant. Cobussen is a judgment creditor seeking to enforce against an asset, and not a party who had any previous involvement with that asset. Disclosure will be essential to the fair trial of the issues in respect of

which trial has been directed. Cobussen's pleading raises a triable issue concerning transactions to which it was a stranger.

37. I shall not seek to summarise the Skeleton in full, but the main themes are:-

i) The agreed List of Issues should be broadly construed and the Respondents' narrow construction of the document is opportunistic and unmeritorious. It is also technically unsound, because the disclosure obligation arises under CPR Part 31, and not the Pilot Practice Direction, and there is no provision in that Part, or in Judge Freedman's Order, that the issues in the pleadings are to be narrowed by the List of Issues in the way contended for. The purpose and effect of the List is not specified in the Order, and is not a mechanism found in CPR Part 31.

ii) All documents which are relevant to the transactions pleaded in the Points of Defence by the Respondents are relevant and disclosable. If it were not so, the Respondents would not be seeking to rely on those transactions in their pleadings.

iii) The Respondents have made no effort to recover documents from third parties, even where they are held to their order. As an example, Farrer & Co were instructed by Legacy in 2013 (the EFG era) and required "Know Your Client" documents. Their file is held to Legacy's order and should be recovered and considered for disclosure. Some parts may be privileged from inspection, but documents emanating from Legacy will not necessarily be privileged and may be relevant. If documents have existed and are no longer in the control of the Respondents, but are held by banks (copy mortgage deeds and guarantees for example) these can be obtained in all likelihood by the simple expedient of the Respondents asking for them as a customer or former customer of the bank. In this sense documents are in the control of the Respondents for the purposes of CPR Part 31 even if there is no legal right to them, see *North Short Ventures Ltd. V Anstead Holdings Inc* [2012] EWCA Civ 11, [40] per Toulson LJ. The court should therefore order the Respondents to make formal written requests of persons specified in Appendix 1 of the new Draft Order, and should disclose the requests and subsequent correspondence.

iv) Documents which must exist and are obviously relevant have not been disclosed, so "something has gone badly wrong".

v) The trustee of the Garden Trust should be compelled by Mr. Akbar as a beneficiary of the trust to provide documents. The correspondence between DWF seeking this material and the trustee refusing access to it has not been disclosed. Its effect is summarised by Mr. Isaacs in a passage referred to above but it seems on the face of it implausible that the trustee would actually say that they "have had no involvement with the Property" when the share in the company which owns it is, so far as is known, the only trust asset.

vi) Mr. Akbar has disclosed no emails sent by him, and only two received by him. The email in which Mr. Akbar says that he owns Legacy was obtained by a *Norwich Pharmacal* application and he has not disclosed it. This cannot be right.

vii) In reliance on *Suez Fortune Investments Limited v. Talbot Underwriting Limited* [2016] EWHC 1085 (Comm) [11] Mr. Weale submits that DWF should have played a far more active role in searching the documents held and produced by Mr. Akbar. They should have taken possession of all the original material as early as possible and taken relevance decisions themselves and not allowed the client to do so. The witness statement of Mr. Akbar taken with the letter from his Pakistani lawyers shows that DWF have not done anything like this. If it is their obligation, they are in breach. There should therefore be a witness statement from Mr. Akbar listing his email accounts and confirming that they have been made available to DWF so they can fulfil their duty.

viii) If nothing else, in relation to documents which were once, but no longer are, in the control of a party, these must be identified so that Cobussen can seek them from a third party, if so advised.

38. In his oral submissions, Mr. Weale drew my attention to the procedural history and explained that the directions by HHJ Freedman were given after very little time for reflection in the light of the Respondent's evidence. He submitted that the Pilot Scheme does not apply, and the List of Issues is simply a tool which does not limit standard disclosure which applies by default under CPR and not disapplied by this order.

39. He took me to the pleadings to identify the key issues, which I have attempted to summarise above. Mr. Akbar has paid all costs relating the Property. He pays the freeholder (Harrods) and the Trustee (Equiom). It is common ground that Legacy does not trade and only holds the Property. Points of Defence, paragraphs 5 and 7 refer to a declaration of trust which has not been disclosed. Bank borrowing from Citibank to Legacy, was guaranteed by Mr Akbar. That document, or even the fact of it, has not been clearly disclosed. The Mumtaz witness statement does not dispute she has not filed any tax return. The Isaacs second witness statement at para 16.1 sets out the ownership of legacy share at POD. They plead, but do not disclose any documents relating to, a Licence Agreement and loans by Mr. Akbar to Legacy to meet the service charges, rent to freeholder, and loan interest.

i) Mr Weale also submitted that the List of Disclosure Issues should not be narrowly construed and is in any event such as to trigger disclosure of all documents which are sought.

ii) There must be or have been many documents, and gaps are not explained. No financial statements for Legacy since 2014 have been disclosed by it. These will show loans from Mr. Akbar and are obviously relevant.

iii) Mr. Akbar has disclosed no email sent by him. Two emails to him have been disclosed, from 2004 and 2014. This implies some access to historic emails. Three emails have been disclosed by Legacy (but not Mr Akbar) although he was a party to one of them. He gave personal guarantees, and says loans were made and a licence drawn up.

iv) Mr Weale referred to Suez Fortune [2016] EWHC 1085 (Comm) [10] and [11] where Matthews & Malik was cited with approval concerning solicitors' duties. They should take possession of documents as soon as possible and

client not permitted to decide relevance. Mr. Akbar's witness statement at 485 [4] and [5] on page 486 shows that this did not happen.

v) The Farrers letter at p391, dated 25th March 2013, shows that they were Legacy's solicitors. Privilege is against production not disclosure. Legacy has not listed documents held by Farrers to Legacy's order, and DWF do not appear to have asked for them.

vi) In relation to requiring a party to make requests for documents from third parties which have been in the control of that party, it is submitted that there is jurisdiction to require such requests. Reliance is placed on the *North Shore* case, see the judgment of the Court of Appeal at [20]. Reasonable enquiries should be made of parties in new draft order Appendix 3.

vii) Mr Weale referred to Suez Fortune Appendix 3, only 16 complaints by Cobussen are said not to fall within the List of Issues. Mr. Akbar does not deal with all of them, but only plucks four examples, see paragraph 52 of his Skeleton.

40. Mr. Akbar's submissions were presented by Mr. William Edwards in a skeleton argument dated 23rd January 2020 and supplemented orally. Given that the re-formulation of the application occurred after he drafted his skeleton, it is the oral submissions which now matter most. In outline, he submits:-

i) The application as now presented is different from that which was made: it has been cut down, and is a reformulation. It was overbroad and has been cut down.

ii) It now focuses on seven main areas of complaint:-

a) Enquiries of previous directors of Legacy.

b) Emails

c) Farrers

d) Management company which was paid by Mr. Akbar, but has not been asked to produce any documents.

e) Banks have not been asked to produce documents.

f) The Garden Trust.

g) Appendix 3 to the new draft order, which contains 53 requests for searches. Number 12 (Mrs Mumtaz) is not pursued, and the words "and other documentation" have been deleted from Number 6.

iii) Mr. Edwards took me to the chronology of events.

a) Legacy was incorporated on 12th November 2003.

b) In December 2003 the Cayman Islands Trust was established with Mrs Mumtaz as settlor. This is referred to in the 2009 revocation document, but otherwise is no longer available.

c) April 2004, the 999 year lease of the Property was acquired. The Office Copy is held.

d) Between 2007-2010 transactions giving rise to the dispute occurred. In other words, the establishment of the trust and the acquisition of the Property were not done in order to avoid making payments to Cobussen.

e) In 2009 the Revocation of the 2003 Trust involving Cititrust took place, and new trust was settled involving EFG. This also was before the dispute arose. No trust deed exists, although subsequent documents refer to it.

f) On 12 October 2016 the Equiom directors company becomes director and the Equiom Nominees company hold the share, which is an asset of the trust of which the Equiom trustee company is trustee.

g) Cobussen asked for a Charging Order in July 2019, but the court gave directions for trial under CPR 7310A(3)(d). There was a short timetable for disclosure, which was not standard disclosure. The trial timetable did not allow for third party investigations, and no scheme for electronic disclosure was set up. Therefore, this was not contemplated and the disclosure now sought is outside the terms of the Order of Judge Freedman and should not be ordered now. There was no suggestion in July 2019 of keyword searches, or custodians or any suggestion that third parties should be approached. This did not arise until after disclosure was given, and this is too late.

h) The documents held by Harneys, and by the Management Company, and by the Bankers to Legacy, are not under Legacy's control.

iv) Disclosure should be ordered where proportionate and necessary. CPR 31.8 limits the disclosure obligation to documents which are or have been in the party's control.

v) Mr. Edwards submitted that the court has a supervisory discretion to grant a remedy to beneficiaries to have access to trust documents. He relied on *Schmidt v. Rosewood Trust Ltd* [2003] 2 AC 709, and on the *North Shore* case at [38], [40] and [43]-[45]. This is not the same as the beneficiaries being able as of right to call for trust documents which are not, therefore, in their control.

vi) He criticised the use of the word "Custodians" to describe the third parties who held material of which disclosure is sought, and submitted that it is control which governs what searches or request must be made of third parties.

vii) Electronic documents. This issue should have been flushed out before disclosure was given. If Cobussen sought electronic material, this should have

been made clear before disclosure. None of the usual steps relating to an exercise of this kind took place.

viii) Mr. Edwards submits that the current structure is irrelevant. Legacy owns the Property, and is controlled by professional directors. The trust holds the only issued share and Mr. Akbar is one of the beneficiaries of the trust. The application for the Charging Order is on a limited basis, so there is no basis for saying that the trustees act as puppets. The focus is on the source of the purchase price. I pointed out in argument that Paragraph 17 of Points of Claim says Legacy is a vehicle for the purpose of holding Mr. Akbar's beneficial interest in the Property. This appears to be an allegation about the current state of affairs. Mr. Edwards responded that the case nevertheless depends on who provided the purchase price. If he did not pay the purchase price then none of it goes anywhere.

ix) Did they give disclosure? The case is that he acquired an interest in 2004 and has held one ever since based on that. The evidence shows compliance with the duty to give reasonable disclosure in accordance with the issues. The subsequent documents sought are irrelevant.

x) Mr. Edwards submitted that the new Draft order is completely recast and made some further points:-

a) There is power to order a witness statement about the electronic disclosure, but how is it justified?

b) Requests for documents from third parties requires a search, or a series of requests directed to those in the much-amended Appendix 1 which now requires requests to be made of 14 bodies. They will probably refuse, and it is therefore disproportionate. Mr. Edwards did not dispute the power of the court to make such an order in a proper case, but submitted that this was not such a case.

c) There is no right to get Bank's internal documents. Numbers 10-14 in Appendix 1 list the various corporate trustees and the corporate nominees who are described in the Respondents' pleadings and who have held the share in Legacy or acted as directors of it. He submits that these requests cannot result in an order unless the documents are or have been under the control of the Respondents. In argument, I observed that the trustee companies and corporate directors are very likely to hold or at least to have held "Know Your Client" documentation which came from the Respondents. They are likely to have required the beneficial owner of Legacy to have been identified before agreeing to lend it a very large sum of money. They will have needed to know that Mr. Akbar was good for the sums guaranteed and to understand his relationship with the transaction. They will also have, or have had, documents concerning the transactions which they were invited to enter into. These documents, or at least copies of them, will have been under the control of the Respondents at the material time.

d) Mr Akbar did some searching of emails, see paragraph 5 of his witness statement. Appendix 2 keyword searches are required over a very long time period (not defined). The critical issue is what happened in 2004. It would be possible to expend a vast amount of time on this exercise for nothing at all. The search terms are now limited to searches required of Mr Akbar. They will produce false positives. They are not targeted or focussed, and are "one word" searches only. The main objection to the requirement for these electronic searches is that they are too unfocussed and broad to be proportionate.

e) Mr. Edwards submits that Appendix 3 requires disclosure whether relevant or not. I consider that this is true, and Appendix 3 requires to be amended so that it makes it clear that the obligation is to disclose only the relevant results of the searches in accordance with the Respondents' disclosure obligation.

f) Some of the Appendix 3 requests are unclear, No. 47 may not exist. It is not clear what advice or instructions should be disclosed under No 51, which relates to Farrers.

g) In relation to the application for documents referred to in the pleadings, Mr. Edwards says that they do not have these, and so cannot give inspection.

41. Ms. Lisa Lacob advanced Legacy's submissions in a skeleton argument and, in the same way as Mr. Edwards did, she supplemented that in oral submissions by reference to the new Draft Order. In those oral submissions:-

i) She adopted the submissions about the limited disclosure envisaged by original order. Legacy was not a party until that order was made and then brought into proceedings, but now faces applications for a whole host of orders. I have quoted at [24] above the passage from the letter giving disclosure on behalf of Mr. Akbar in which DWF say that Legacy had given disclosure voluntarily to Mr. Akbar before being formally joined into the proceedings which tends to undermine the suggestion that Legacy was taken in some way by surprise by being made subject to a disclosure order on the same day as it was joined into the proceedings.

ii) Ms. Lacob submits that there is no point to any of the orders sought today, which will only create expense. It is submitted that Legacy has gone beyond the disclosure order by disclosing the entire file. It is not surprising that there are only limited documents.

iii) Ms Lacob then reviewed the trust structure and history.

iv) She said that the present professional directors received the files from the previous directors. There are Board Minutes and Resolutions, which do not always have attachments. In relation to a credit facility, the loan facility agreement is an innocuous document. Legacy has produced invoices for service charges paid in respect of the property. DWF did ask for searches and applied search terms to email accounts. There is no point in an order which

requires disclosure of what Legacy does not have. EFG would have no reason to withhold documents from new directors. Company does not have offices and filing cabinets. Why would they take documents out of the file and hang on to them? Nothing which suggests a selective disclosure process. Not surprising that there is not a mass of material. It is not possible to get emails at this distance in time, and email habits have changed. In relation to this submission, I should record that I have been involved in two very long trials entirely based on email traffic which took place in 2002-2007. One of them involved the internal documents of the EFG Bank in Switzerland at this time, including its "Know Your Client" and anti-money laundering procedures. Whether emails still exist is one thing, but I reject the suggestion that simply by reason of the age of the transactions they will never have existed in the first place.

v) As to "Control" Ms. Lacob submits that there is an important distinction between proper third parties and entities within Legacy's control. She referred me to CPR 31 and CPR 31.8 in particular. *North Shore* and *Ardila Invesments NV v. ENRC NV and Zamin Ferrous Limited* [2015] EWHC 3761 (Comm) are cases about control of documents. The current and former shareholders are not agents and why would they have Legacy's documents? They would not have documents concerning the purchase of the property all those years ago.

vi) She concluded that there is no reason not to get on with this trial.

42. Reply by Mr. Weale

i) In answer to the suggestion that the court should not order a party to make requests of third parties for documents which were formerly under its control, Mr. Weale referred to paragraph 33.4 of his skeleton. And relied in CPR 31.5(8) in support of the broad jurisdiction for which he contended. My understanding of the submissions was that the power was not in doubt but that it was disputed that it should be exercised in this case in the way contended for.

ii) Mr. Weale accepted that it was a more streamlined order which was now put forward, but said that any suggestion an earlier request in this form might have been acceded to lacks credibility because the Respondents offered (and still offer) nothing.

iii) Appendix 1 lists companies who hold documents which are in the control of Legacy.

a) Harneys hold documents, including KYC documents. They were agents of Legacy.

b) Solicitors routinely destroy documents so there is no point asking for them? Mr. Weale invited me to reject this suggestion.

c) Managing agents will not have any relevant documents. Why? Their documents will show who really pulled the strings.

d) Proportionality: if these requests are not required, Cobussen would be required to make multiple 3rd party applications which would not be proportionate.

e) Mr. Weale made a number of further submissions in support of his suggested order which I do not think it necessary to rehearse here.

Discussion and conclusion

43. I agree with Mr. Weale that I should reject the submissions based on the scope of Judge Freedman's order and the List of Issues which it produced. It is true that the timescales were short and that the Judge clearly did not envisage a very long disclosure process, but this does not bind me. He gave liberty to apply to the Master and Cobussen has instead come to me. The way in which the Respondents waited until the last moment to reveal their position before the 30th July 2019 and again before the 28th January 2020 suggests a tactic designed to "bounce" an opponent and cause delay. This is to be deprecated, and in this case it may have resulted in a rather more rushed approach to the directions required in relation to disclosure than is desirable. The Respondents should not be permitted to benefit from that. I have set out above Mr. Isaacs' apology and explanation for the ambush in July. I am grateful for the apology, but attach no weight at all to the explanation. Mr. Isaacs says that Mr. Akbar did not "pick up" the documents with which he was served until some unspecified time, and I have indicated my concerns about Mr. Akbar's explanations given in evidence by Mr. Isaacs at [6]-[11] above. The inclusion of these assertions by Mr. Isaacs with the declaration that they are true to the best of his belief surprises me. There is no indication that Mr. Isaacs probed them in any way before deciding that he believed them. I don't doubt that he does, but since he does not explain why he believes this implausible material to be true, I attach no weight to what he says. The fact that the same approach was taken in January 2020 confirms to me in deciding that I should not allow the Respondents any tactical advantage from any loopholes there may have been in the Order of 30th July or the List of Issues which was agreed in September.

44. In any event, I construe the List of Issues as being quite wide enough to capture all the documents which are now sought. It falls to be construed as a summary of the issues revealed by the pleadings for ease of reference. It should not be construed narrowly so as to exclude some pleaded issues from being subject to the disclosure process. Any issues about the meaning of the words used in the List should be resolved by reference to the issues ordered to be tried and the issues raised in the pleadings. The language in the List is, construed on this way, wide enough. If accompanied by all the machinery of the Pilot Scheme, which it was not, it might have had some different purpose or effect but in the absence of that it can only have the function I have described.

45. On this basis, the searches and further disclosure sought are all necessary. There is no artificial limit on the ordinary disclosure process imposed by the List of Issues which was intended to assist by defining the scope of disclosure in this case, and not to restrict the disclosure required by the scope of the Issues which are to be tried and the pleadings by which the parties advance their cases on those issues.

46. I accept the submission that DWF have not been involved in the disclosure process as they should have been. I reject the submission that because there was no electronic disclosure regime referred to in Judge Freedman's Order, none was required. That submission is not, actually, Mr. Akbar's case, nor is it Legacy's case. Mr. Akbar's case is that he performed perfectly satisfactory electronic searches after the List of Issues was agreed, and that the exercise was repeated by reputable lawyers in Pakistan which showed that he had done it properly. That case is not persuasive and this case requires the usual assurance that the material has been available to a firm of solicitors in this jurisdiction and searched by them. This is a substantial case and the copying of the electronic devices and their provision to DWF in the UK is proportionate and is what ought to have happened already. They must then exercise their responsibility as solicitors instructed in litigation as described in the *Suez Fortune Investments Limited* case and ensure that their clients give proper disclosure. Legacy's case is that it has disclosed the whole of its file, and has nothing else. DWF's responsibility extends to emails and other digital material held by present or former directors of Legacy.

47. I reject the submission that making requests of third parties for documents is disproportionate. In each case there is good reason to believe that the third party may hold documents which were formerly in the control of the Respondents and that they may be relevant. Requiring the Respondents to instruct DWF to obtain them, if possible, by consent is a sensible and economical way of securing the material. It may be true that the third parties hold no documents in which case the cost of some correspondence will have been incurred without any benefit. On the other hand, Banks and so on are quite likely to hold files and are likely to supply material if their customer or former customer consents and if the material is material which was formerly in the control of the customer or former customer.

48. On the subject of proportionality more generally, these proceedings concern a substantial debt, but actually concern the part of it which may be satisfied by the sale of the Property. In one of the documents this is said now to be worth about £8m, and the size of the mortgage debt to Kleinworts is not, I think, in evidence. The action is therefore not very large in value, but it is not trivial either. The documents which are sought concern the acquisition and ownership of one property in London. Although considerable efforts have been made by someone to make that as complex as possible, the quantity of documentation must inevitably be quite limited, at least in the context of legal proceedings for large sums of money. Moreover, Mr. Akbar has been closely associated with the Property since, on his case, he assisted Mrs. Mumtaz to arrange its acquisition in 2004. It seems reasonable to suppose that he knows where all available documents may now be found, or at least where searches for them might usefully be made. If the court imposes a disproportionate exercise on him (and I do not believe that this judgment does so) that is because he has not demonstrated to the satisfaction of the court that he has performed his obligation already. For these reasons, I approach the Respondents submissions about proportionality with a degree of scepticism, not as to the central importance of the concept in the modern law of disclosure, but as to its application to the present facts.

49. The Appendix 3 requests amended as I have described above are reasonable. Number 12 (Mrs Mumtaz) is not pursued, and the words "and other documentation" have been deleted from Number 6. The order must make it clear that the obligation is to search

for documents within these categories and for DWF to examine them and disclose those which are relevant and which satisfy the test for disclosure.

50. These conclusions cut away most of the Respondents' submissions. I consider that the new Draft Order is proportionate and is within the power of the court. In essence this means that

i) The Respondents will be ordered to make a witness statement about email accounts. The order in respect of Legacy is against Legacy and not its current directors. They must do what it is necessary to ensure so far as possible that the company of which they are directors complies with the order.

ii) The Respondents will undertake searches by making the Appendix 1, as amended, requests and giving disclosure of the requests and the correspondence which results.

iii) DWF will collect all available electronic material identified by the Respondents in the paragraph 1 witness statement and otherwise for disclosure review and will provide a list of it which describes what it is, and where it has been held. They will then proceed in accordance with paragraphs 2 (b) and (c) of the new Draft Order which will be renumbered as 3 (a) and (b).

iv) I am not persuaded that paragraph 3 of the new draft order is required and decline to make it.

v) Paragraph 4 of the new Draft Order is appropriate and will be made.

vi) Paragraph 5 is not pursued.

vii) Paragraph 6 will be made.

51. I direct the parties to draw up an order reflecting the terms of this judgment including appropriate time limits. They should also include a provision for dealing with costs. If costs cannot be agreed and any party wishes to have an oral hearing about costs, they should say so giving reasons. If no party wants a hearing or if I decide one is not necessary, the parties should lodge short written submissions on costs within 7 days of the judgment being handed down and I will resolve the costs issue on paper without a hearing. A Statement of Costs should be supplied by any party who seeks an order for costs and I will consider whether I can assess them summarily.