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Neutral Citation Number: [2020] EWHC 2806 (Ch)

Case No: IL-2018-000095

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

7 Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/10/2020

Before :

MASTER KAYE

- -

Between :

(1) MR EDWARD CHRISTOPHER SHEERAN MBE **(2) MR STEVEN MCCUTCHEON** **(3) MR JOHN MCDAID** **(4) SONY/ATV MUSIC PUBLISHING (UK) LIMITED** **(5) ROKSTONE MUSIC LIMITED** **(6) SPIRIT B UNIQUE JV SARL** **(7) KOBALT MUSIC COPYRIGHTS SARL**	**Claimants**
- and -	
(1) MR SAMI CHOKRI **(2) MR ROSS O'DONOGHUE** **(3) ARTISTS AND COMPANY LIMITED**	**Defendants**

- -

Ian Mill QC and Jesse Bowhill (instructed by Brais & Krais Solicitors) for the **Claimants**
Hugo Cuddigan QC (instructed by Keystone Law) for the **Defendants**

Hearing dates: 16 July 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.

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MASTER KAYE

Master Kaye :

1. This was the hearing of the Costs and Case Management Conference and the Defendants application dated 8 May 2020 for an unless order that the Claimants do file and serve "complete and sufficient" responses to Requests numbered 1-18 of its Part 18 Request dated 1 April 2020.

2. The CCMC set a timetable for the future conduct of this case to trial which had been agreed between the parties for disclosure (27 November 2020), witness evidence (16 April 2021), expert evidence (June 2021 onwards) and a 15 day trial from January 2022. The parties had agreed the list of issues for disclosure in the DRD including the scope of the searches and costs budgets for future costs. The Claimants' future costs were agreed at approximately £1m. The Defendants' future costs were agreed at just over £1m. The parties anticipated that they would incur costs in the region of £3m between them on this dispute.

3. The only contentious issue was the Defendants' application.

Background

4. The First to Third Claimants are well known songwriters ("the songwriters"). The other Claimants are publishers. This litigation concerns a composition entitled "Shape of You" which is said to have been created jointly by the songwriters before being recorded by the First Claimant. It has been successful.

5. The Defendants allege that "Shape of You" infringes the First and Second Defendants' copyright in a composition called "Oh Why". The alleged infringements do not relate to the entirety of the composition only to particular phrases or lines.

6. In May 2018, the Claimants issued these proceedings for negative declaratory relief that they had not infringed the Defendants' copyright. In July 2018, the Defendants defended and counterclaimed for copyright infringement, damages, and an account of profits in relation to the alleged infringement. The reply and defence to counterclaim was served in November 2018 and the Defendants then filed a reply to that in March 2019. Pleadings had therefore closed in March 2019.

7. The proceedings have already had a long journey to get to the CCMC. Whilst a CCMC was originally listed in 2019 it was displaced by an application to strike out parts of the reply to the defence to counterclaim. That application was partially successful in June 2019. The Claimants' appeal against that order was dismissed by Nugee J in December 2019. The Claimants sought permission for a second appeal which was refused in February 2020. The CCMC, re-listed for 30 March 2020, was delayed again eventually being listed for hearing remotely on 16 July 2020.

8. In the meantime, the Defendants had made a Part 18 request in November 2019 to which the Claimants responded in December 2019. Following the refusal of permission to appeal the Claimants raised two Part 18 requests in March 2020 to which the Defendants responded, the last response being on 1 April 2020.

9. On 1 April 2020, the Defendants served their second Part 18 request ("the Request") on the Claimants. The Request consisted of 22 requests and sought a response by 15 April 2020, 14-days after service.

10. The Claimants did not respond to the Request either to acknowledge receipt, object or to seek an extended period of time to respond. The Claimants did respond to the email serving the Request on a different issue and there is no suggestion that the Request was not received. I note that the Claimants are represented by specialist solicitors and leading and junior counsel.

11. CPR r.18.1(1) provides that:

> "The court may at any time order a party to-
>
> (a) clarify any matter which is in dispute in the proceedings; or
>
> (b) give additional information in relation to any such matter,
>
> whether or not the matter is contained or referred to in a statement of case."

12. Practice Direction ("PD") 18 provides additional guidance on the manner in which the parties should approach a request for clarification or additional information.

> **1.1** Before making an application to the court for an order under Part 18, the party seeking clarification or information [the Defendants] should first serve on the party from whom it is sought [the Claimants] a written request for that clarification or information (a Request) stating a date by which the response to the Request should be served. The date must allow [the Claimants] a reasonable time to respond.
>
> **1.2** A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable [the Defendants] to prepare [their] own case or to understand the case [they have] to meet.

13. The Defendants say they complied with the requirements of PD18.1 by serving the Request on 1 April 2020 including a date for a response. The Claimants say that the Request is not concise and strictly confined to matters that are reasonably necessary and proportionate to enable the Defendants to understand the case they have to meet. They argue it is not a proper Part 18 request.

14. PD18.4 sets out what the Claimants should do if they object to the Request in whole or in part and/or require more time to respond.

> 4.1
>
> (1) If [the Claimants] objects to complying with the Request or part of it or is unable to do so at all or within the time stated in the Request [they] must inform [the Defendants] promptly and in any event within that time.

> (2) [They] may do so in a letter or in a separate document (a formal response), but in either case [they] must give reasons and, where relevant, give a date by which [they] expects to be able to comply.
>
> 4.2
>
> (1) There is no need for [the Claimants] to apply to the court if [they] objects to a Request or is unable to comply with it at all or within the stated time. [They] need only comply with paragraph 4.1(1) above.
>
> (2) Where [Claimants] considers that a Request can only be complied with at disproportionate expense and objects to comply for that reason [they] should say so in [their] reply and explain briefly why [they] has taken that view.

15. The Claimants did not do this prior to 15 April 2020 nor before the Defendants made their without notice application on 23 April 2020 or indeed at any time prior to serving their response on 6 May 2020.

16. PD18.5 provides:

> **"5.2** An application notice for an order under Part 18 should set out or have attached to it the text of the order sought and in particular should specify the matter or matters in respect of which the clarification or information is sought.
>
> **5.3**
>
> …
>
> (2) If a Request for clarification or information has been made, the application notice or the evidence in support should describe the response, if any."
>
> **5.5**
>
> (1) Where [the Claimants] has made no response to a Request served on [them], [the Defendants] need not serve the application notice on [the Claimants], and the court may deal with the application without a hearing.
>
> (2) Sub-paragraph (1) above only applies if at least 14 days have passed since the Request was served and the time stated in it for a response has expired.

17. The Defendants issued an application notice dated 23 April 2020 pursuant to PD18.5.5(1). They confirmed in the application notice, which was signed with a statement of truth, that they had had no response from the Claimants. They asked the court to deal with the application without a hearing in accordance with PD18.5.5.

18. By order dated 27 April 2020 ("the 27 April Order") the Claimants were ordered to file and serve their response to the Request by 4.30pm on 15 May 2020. The Defendants' costs were summarily assessed at £1055.

19. The court amended the draft Order such that the 27 April Order specifically included provision for any party to apply to set aside or vary the order by way of application to be made no later than 7 days from service of the order.

20. No application was made by the Claimants to seek to vary or set aside the 27 April Order:

    i) within 7 days of service of the Order;

    ii) in advance of 4.30pm on 15 May 2020; or

    iii) in advance of the CCMC on 16 July 2020.

21. Not only did the Claimants do nothing to seek to set aside or vary the 27 April Order, they both paid the summarily assessed costs and on 6 May 2020 they filed and served a response to the Request. In respect of requests 1-18 they responded:

> "This is an inappropriate use of CPR Part 18. Requests 1-18 are not confined strictly to matters which are necessary and proportionate for the Defendants to prepare their case, or to understand the case they have to meet, to the avoidance of disproportionate expense. The Defendants have sought to employ CPR Part 18 to compel the Claimants to engage in an analysis of documents provided to the Defendants at their request by way of voluntary disclosure and/or provide evidence in advance of the exchange of witness statements. Further, the Defendants have sought detailed further information relating to the composition and performance of the Oh-I Phrase, the Melody Line and the Harmony Line which the Claimants do not understand from the statements of case to be in contention."

22. This is what is commonly described in short form as the answer "not entitled" and I use that shorthand in this judgment.

23. The Defendants submit that the position on the authorities is that "not entitled" is non-compliance with the 27 April Order and is not a complete and sufficient response. They issued an application dated 8 May 2020 which so far as is relevant sought an order in the following terms:

> "Unless the Claimants file and serve complete and sufficient responses to each of the Requests numbered 1 – 18 of [the Request]: (a) The Particulars of Claim and the Defence to Counterclaim be struck out; (b) judgment will be entered for the Defendants; (c) the Defendants have permission to apply for relief consequential upon (a) and (b) above."

24. The Defendants see the application in simple terms. Having obtained the 27 April Order, they say it is too late for the Claimants to raise issues about the content of the Request or whether it was properly constituted. The Claimants could have raised objections to the Request when it was served: they did not. They could have applied to set aside or vary the 27 April Order: they did not. Thus, they say the only issue for the court to determine is whether the Claimants' "not entitled" response to the Request was sufficient to comply with the 27 April Order. If, as they argue, it was not they seek an order that the Claimants provide a complete and sufficient response.

25. The Claimants however, say that the court must start from a different place and first consider, consistent with the overriding objective, whether the Request is a request that would meet the requirements of CPR18.1 and PD18.2 having regard to: (a) the likely benefit which will result if the information is given; (b) the likely cost of giving it; and (c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with such an order: (18.1.10 of the White Book).

26. Thus, the Claimants, sought to keep their options open. If contrary to their argument the answer "not entitled" was not sufficient to comply with the 27 April Order they sought to object to the Request itself on this application. However, they sought to do so without having issued any application to set aside or vary the 27 April Order even out of time.

27. I do not agree with the Claimants' starting place. It seems to me that the starting place is, as Mr Cuddigan suggests, the 27 April Order. On 27 April in response to the Defendants' paper application and in accordance with the provisions of PD18 the court made an order requiring the Claimants to respond to the Request by 15 May 2020 and provided a mechanism for them to challenge that order. No application whether in time or at all was made in advance of this hearing. It would be inconsistent with the CPR and the overriding objective if a party could simply ignore a court order and, without more, simply seek to argue the position at this hearing as if the 27 April Order had never been made.

28. The 27 April Order provided on its face a mechanism for seeking to set it aside or vary it. It was by operating that mechanism that the Claimants would be provided with an opportunity to argue that the order should never have been made and that the Request was not a proper one pursuant to CPR18.1 and PD18.2. The starting place on this application is the 27 April Order and the response to the Request of 6 May 2020.

The Authorities:

29. In the Court of Appeal in *Fearis v Davies* [1989] 1 FSR 555 ("*Fearis*") the claimant had consented to an order to serve "the further and better particulars requested". The claimant provided some but not all the particulars requested. Further orders requiring the claimant to provide those further particulars were made by the District Registrar, and then, on appeal, the judge. On a further appeal, the key question for the court was what the claimant was obliged to do to comply with the original order. Did the claimant only have to respond to such of the requests as it thought the defendant could legitimately make? In effect the same question as here – is an answer "not entitled" sufficient in the face of an order to respond?

30. As May LJ explained, this was a matter of construction of the order [557]:

> "In my judgment, as a matter of construction, the order cannot be construed as meaning that the consent recited therein was a consent only to such particulars as could properly have been ordered had the request been contested. Where parties consent to an order for particulars, they consent to give particulars in accordance with the terms of the request, if the request is in the usual way annexed to the order. If it is sought to say that some of the particulars are not ones which should legitimately be given, then that is a point which must be taken at the hearing of the appropriate summons. Once consent has been given to an order in the terms that were made in the instant case, it is too late to seek in the answer to the request for further and better particulars, to take points that specific particulars were not properly asked for as a matter of law or practice. That I think is quite clear."

31. The 27 April Order is not a consent order. However, Nourse LJ agreeing with May LJ, then explained that it made no difference that the order in issue was a consent order:

> "Mr. McCormick submits that, because the order of 13 September 1985 was made by consent, it should be construed differently from an order in identical terms after a contested hearing. That is a novel and startling submission which, if it were correct, would have far wider consequences than those which would ensue in the present case. It cannot possibly be correct. **If a party against whom an order for particulars is sought wishes to contest the other party's right to them, he must do so when the application is heard.** If he consents to the making of the order, he waives his right to object and cannot thereafter decline to comply with the order so far as compliance is possible." (my emphasis)

32. Mr Cuddigan further argues relying on *Fearis* that once the 27 April Order was sealed requiring further particulars to be served, it is not open to the Claimants to say, in purported satisfaction of that order, that the requests were not proper and to respond as they did saying "not entitled".

33. The question of what amounted to a proper response was considered by the Court of Appeal in *QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd* [1999] C.P.L.R. 710 ("*QPS*").

34. In *QPS* the defendant had appealed against an order striking out parts of its defence and counterclaim on the basis that it had failed to comply with an unless order relating to the service of further and better particulars. The defendant had responded to each request, but the judge at first instance had found some to be inadequate. He said there were "substantial failures to answer many of the requests in both sets of requests" and

struck out the allegations to which the inadequate responses related. The Court of Appeal had to consider whether the responses were inadequate and amounted to a breach of the unless order.

35. Simon Brown LJ said [371]:

> "First, an order for further and better particulars (whether or not in Unless form) is not to be regarded as breached merely because one or more of the replies is insufficient. If the answers could reasonably have been thought complete and sufficient, then the correct view is that they require only expansion or elucidation for which a further order for particulars should be sought and made. …"

36. Waller LJ endorsing *Fearis* said [375-76]:

> "**It is clear that where an order for particulars is made it is in breach of that order to respond "not entitled" or to give an answer which suggests that the matter is already sufficiently pleaded or which does not deal in any way with the request** … It is also worth mentioning that if a pleading is defective for want of particularity, although it will not normally be struck out where that lack can be remedied, it may well be struck out if the failure to particularise is in blatant disregard of court orders … The extent and quality of the breach must obviously be taken into account in considering as a matter of discretion whether and to what extent the sanction should be enforced…" (my emphasis)

37. Mr Cuddigan argues that this provides a complete answer to the Claimants' approach to their response to the Request.

38. Mr Cuddigan submits the position on the authorities after *Fearis* and *QPS* (both of which are pre-CPR authorities) in the face of an order requiring a party to respond to a request was that:

    i) A response which challenged the entitlement to a substantive response was not legitimate.

    ii) A response which could reasonably have been thought complete and sufficient was a compliant response, albeit further particulars might yet be sought.

    iii) A response which, considered as a whole, could be regarded as falling significantly short of what was required would be not just a breach of the order but a breach liable to justify sanction from the court.

39. The authorities in this area were reviewed earlier this year by Butcher J in *The Owners of the Motor Vessel 'Gravity Highway' v The Owners of the Motor Vessel 'Maritime Maisie'* [2020] EWHC 1697 (Comm) ("*Gravity*"). Butcher J having considered both *Fearis* and *QPS* and the decision of Mr Monty QC (as he then was) in *Griffith v Gourgey* [2014] EWHC 4440 (Ch) and a subsequent decision in the same

case, [2015] EWHC 1080 (Ch) confirmed that the *QPS* approach was still the applicable approach under the CPR. He summarised the position at [33] as follows:

> "(1) In assessing whether there has been compliance with an unless order for the provision of further information **the Court will consider whether the information is plainly incomplete or insufficient given the terms of the order as to the information to be provided,** including the terms of any request which it has been ordered should be answered. The further information will be plainly incomplete or insufficient if it could not reasonably be thought to be complete and sufficient. (my emphasis)
>
> (2) In examining completeness and sufficiency, the Court is not concerned with the truth of the answers or with their logical coherence unless any lack of coherence goes to the completeness or sufficiency of the response.
>
> (3) If there is non-compliance with an unless order for further information, then the sanction will take effect unless there is relief from it…"

40. Mr Cuddigan's submissions are in brief that the Claimants are in breach of an existing order by providing the response "not entitled" and therefore cannot complain if they are now asked to comply with that order.

41. Mr Mill sought to distinguish the Claimants' position from these authorities. He submitted that *QPS* concerned an unless order for further and better particulars whereas here there was no unless order and the Claimants were only ordered to provide their responses. He noted that *Fearis* was a consent order in relation to which May LJ had said that once the consent order was made it was too late to take specific points objecting to the request and that such objections should have been raised in advance of the consent order being made. Thus, he sought to argue that as the Claimants had not yet had an opportunity to object and there was no unless order the Claimants were still able to object to the Request now.

42. He submitted that the Claimants did not apply to vary or set aside the 27 April Order as they did not need to as they were able to respond 9-days early on 6 May 2020. He submitted that the Claimants had assumed that the provision to apply back dealt only with timing. To my mind that submission does not adequately address the fact that the 27 April Order on its terms provided an opportunity for the Claimants to apply to set it aside. It would not be necessary to have permission to seek to set aside an order if the only option available were to apply to extend time.

43. Mr Mill argued that it could not have been the intention of PD18.5.5 that if the Claimants did not respond within the period specified in the Request they should be precluded from arguing that the Defendants were "not entitled" to the responses on some basis.

44. I agree that it was not the intention of PD18.5.5 to preclude a party from seeking to argue about the nature of the requests. It does not do that. The purpose of PD18.5.5 is to assist with the efficient management of cases such that where the responding party has not responded at all the court can make an order requiring a response within a given period of time. Even if it were not set out on the face of the order, as here, CPR 23.10 makes provision for a party to apply to set aside or vary an order where they were not served with the application notice before the order was made.

45. Mr Mill's submissions did not seem to me to assist the Claimants. He was seeking to rely on the use of pre-CPR language and procedure referred to in *Fearis* and *QPS* to support an argument that the authorities did not therefore apply in their full force to the position the Claimants found themselves in.

46. As Mr Cuddigan noted Simon LJ made clear in *QPS* that the approach in that case was not intended to be limited to unless orders. It seems to me that the need for consideration of compliance with court orders, unless or not, is even stronger following the implementation of the CPR. The overriding objective, in particular CPR1.1(2)(f), and the court's general case management powers in CPR 3 include consideration of compliance with rules and orders as part of the overall approach to conducting cases justly and at proportionate cost. This is not limited to unless orders.

47. Although *Fearis* is a pre-CPR case the rationale is clear and was subsequently reflected in CPR18 and PD18. A party who wishes to contest the entitlement to clarification or further information must initially do so within the timeframe set out in the request. A failure to do so entitles the requesting party to operate the mechanism in PD18.4 and 5 and seek to obtain an order without notice and on paper.

48. Such an order is consistent with the overriding objective and the need to manage cases justly and proportionately including consideration of the need to manage cases efficiently and at proportionate cost and having regard to other court users.

49. The CPR therefore provides a system of checks and balances, which would have entitled the Claimants to apply to set aside or vary the 27 April Order even if it had not said it on its face. The Claimants had a number of opportunities and mechanisms by which they could object to the Request in advance of having to comply with the 27 April Order. This is entirely consistent with Nourse LJ's approach in *Fearis* set out at paragraph 31 above.

50. Indeed the CPR is flexible enough that the Claimants could have made an application after the expiry of the 7 days and at any point prior to serving their response saying "not entitled" even though a later application would also have been an out of time application to which the three-stage test in Denton would have applied. I simply do not accept the submission that the Claimants did not have an opportunity to challenge the Request.

51. Mr Mill further argued that in any event the 27 April Order only required the Claimants to provide "responses" and that the order could therefore be distinguished from having to provide further and better particulars as required in *QPS.*

52. He argued that the Claimants had responded and complied with the 27 April Order by saying "not entitled". He said that the response given was not deliberate

obstructiveness but given in good faith believing that it was all that was required and that the Claimants would be in a position to argue about the appropriateness of the Request, should it become necessary, at a later date.

53. Mr Mill sought to persuade me that it was not in keeping with the overriding objective for the Claimants to be required to provide responses to the Request when he says they do not fall within CPR18.1.2. He argued that the Request was a combination of requests for early evidence and disclosure and in some cases not relevant to the issues in the case.

54. As the response to the Request in this case is limited to "not entitled" the question is whether such a response could ever reasonably have been considered to be complete and sufficient and thus a response that satisfied the 27 April Order.

55. As Butcher J made clear in *Gravity* it is the completeness and sufficiency of the response that the court must consider. Whether that is described as further and better particulars (as it was pre-CPR) or a response does not change the nature of what it was that the Claimants had to do pursuant to the 27 April Order. I do not consider that a requirement to respond to the Request, as recorded in the 27 April Order, can be considered to reduce or limit the quality of the answer required to provide clarification or further information in accordance with CPR 18.

56. Indeed, as Butcher J noted in *Gravity,* in which the order he was considering required the Claimants to "respond" to the requests for further information, applying the approach he had set out in [33] at [34]

> "…it is necessary to ask the question as to whether the further information provided by the Claimants on 17 January 2020 was, given the terms of the order pursuant to which it was being provided, 'plainly incomplete or insufficient'. I have reached the conclusion that it was not 'plainly incomplete or insufficient'. I say that for these reasons:
>
> (1) The order was that the Claimants should provide 'responses' to the Defendants' queries. It did not specify any degree of detail which the responses had to have.

57. Having considered the nature of the responses provided in *Gravity* he concluded that, in fact, the responses could be regarded as complete and sufficient and thus the unless order had not been breached.

58. Here there is no unless order, so the position is not as stark as the one Butcher J had to contend with. The question for the court is whether the 27 April Order has been breached. To determine that the court needs to consider the effect of the 27 April Order and whether the response "not entitled" is a complete and sufficient response.

59. If it is not a complete or sufficient response, the court needs to consider whether it should make an unless order or indeed any other form of order requiring the Claimants to respond to the Request.

60. Clearly, there is a qualitative difference between an answer that may not be complete and sufficient as was considered in *QPS* and in *Gravity* and the answer "not entitled".

61. In this case I do not need to go on to consider whether the answer to the Request was a complete or sufficient answer as had to be grappled with in *QPS* and *Gravity*.

62. The analysis of Waller LJ in *Fearis* set out at paragraph 36 above remains good law. It is plain on the authorities that "not entitled" is not good enough and certainly is not a complete and sufficient answer to the Request. It is a non-answer. The answer "not entitled" was a breach of the 27 April Order as differentiated from an attempt to respond as considered in *QPS* and *Gravity*.

63. Consequently, I find that there has been a failure to comply with the 27 April Order and the Defendants were entitled to issue the application of 8 May 2020 seeking an order that the Claimants provide a response to the Request.

64. In the absence of anything else the only consideration would have been the nature of the order to be made on the 8 May 2020 application. Mr Cuddigan made clear in his submissions that what he wanted was an answer to the Request and provided he got it he was not wedded to an unless order or indeed any particular time period.

65. Mr Mill made an oral application for an out of time extension of time to pursue an application to set aside the 27 April Order. An out of time application engages the three-stage Denton test. As the application was made orally it was not supported by witness evidence. To enable the Defendants to respond particularly on the exercise of discretion I permitted them to make brief written submissions after the hearing which I have taken into account.

66. Mr Mill had made detailed submissions on the inappropriateness of the Request and why the response "not entitled" was sufficient. In light of my decision as to the effect of the 27 April Order I consider those submissions as part of the consideration of all the circumstances and at stage three of the Denton test.

Denton and Discretion

67. In order to consider whether to allow the out of time oral application to extend time to apply to set aside or vary the 27 April Order I need to consider not only the three-stage test in Denton but also CPR 3.9 which provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

68. It considering the exercise of its discretion the court must have regard to the overriding objective and all the circumstances including the need to deal with cases justly and at proportionate cost. This includes considering both the prejudice to the Claimants if they are required to apply to set aside out of time and/or to comply with the Request and the prejudice to the Defendants, who validly obtained the 27 April Order.

Serious and Significant

69. The breach requires an out of time oral application for an extension of time in which to apply to set aside or vary the 27 April Order to enable the Claimants to seek to argue that they do not have to respond to the Request. It is a failure to comply with an order. It delays the progress of the claim, it takes up the time and resources of the parties and the court. It is plainly serious and significant.

Good Reason

70. The Request was made on 1 April 2020. There was no formal acknowledgment of the Request let alone any objection to it or even any request for more time to respond. Mr Mill tells me that both he and his junior Ms Bowhill were unwell with Covid-19 over the Easter period. He tells me that both Mr Forbes and Mr Goodbody of his instructing solicitors were unwell.

71. He prayed in aid the general disruption caused by Covid-19 and that this limited the opportunities for the legal team to discuss the case.

72. Covid-19 and lockdown are not a catch-all explanation for any delay or disruption to a procedural timetable or any failure to comply with an order. However, the court has to be realistic about the general disruption Covid-19 and lockdown caused at the beginning of this period. At the margins it might be appropriate for the court to be slightly more flexible when considering the exercise of its discretion where Covid-19 issues can genuinely be said to have had an impact on the conduct of a case. The court must necessarily accept that certainly in relation to the early part of the lockdown there is likely to be an absence of evidence, particularly medical evidence, and the court must do the best it can in assessing the position on the information available to it.

73. In this case it seems to me that at a stretch Covid-19 might be an explanation for not providing an immediate objection to the Request but it does not assist at all in explaining why there was no application to set aside or vary the 27 April Order. Nor does it explain why, once it was clear that the Defendants were pursuing a further unless order by their application notice dated 8 May 2020, no application, however, late was made to extend time to apply to set aside or vary the 27 April Order.

74. The Claimants did respond to the 1 April email serving the Request on 2 April 2020 although on another issue. As I noted above there is no suggestion that the Claimants did not receive the Request and they are represented by specialist solicitors and leading and junior counsel. It would require the clearest evidence to persuade me that there was no one available to respond to the Request, for a period of over a month, even if only to seek an extension of time, either before or after the 27 April Order.

75. As a consequence of the Claimants' silence the Defendants were in a position to obtain the 27 April Order on paper in accordance with PD18.4 and 5. As set out above no application to set aside or vary the 27 April Order was made and the response on 6 May, so far as it relates to paragraphs 1-18 was "not entitled".

76. The Claimants rely on ill health and Covid-19 as part of the reason why they did not apply to set aside the 27 April Order earlier. It may be that the ill health and Covid-19 explanation has slightly more merit in relation to the fact that the Claimants did not object to the Request in advance of the 23 April application but that does not assist them in relation to the question of whether there was a good reason for the non-compliance with the 27 April Order.

77. Whilst serious and debilitating illness could amount to a good reason for non-compliance with an order, I am not persuaded in this case that there is such a good reason. The non-compliance is with the provisions in the 27 April Order. The 27 April Order was served on about 28 April and the 7-day period to apply would have expired on about 5 May 2020. The Claimants were able to serve their "not entitled" response on 6 May 2020.

78. Mr Mill had also sought to suggest that the provision in the order permitting the Claimants to apply to vary or set-aside related to only a further extension of time. However, for the reasons set out earlier in this judgment I do not accept that such an explanation can reasonably be said to be a good reason nor indeed is it to my mind a correct interpretation of the clear meaning of the 27 April Order.

79. I remind myself that at this stage the court should be considering the reason for the non-compliance or breach for which relief is being sought and not any wider consideration. The explanation for the failure to apply to set aside or vary the order simply does not get anywhere near to persuading me that there is a good reason for the non-compliance and breach in this case.

All the Circumstances:

80. It is at this stage of the exercise that all the other factors are taken into account. This includes consideration of the overriding objective and the need to manage cases efficiently, fairly and at proportionate cost having regard to the complexity, importance, and value of the case. There are a number of competing factors to consider at this stage of the exercise. This includes the broader consideration of CPR 3.9.

81. As part of the overall consideration the court needs to consider delay in its broad context including in this case the fact that the application for relief was made orally part way through the hearing.

82. It is suggested that Covid-19 and lockdown played a part in the Claimants' approach. I do acknowledge that there was a national lockdown on 24 March 2020 and that people had to adapt to new ways of working. As set out above I accept that the lockdown may at the margins provide some explanation for the failure to grapple with the Request when it was served on 1 April. However, this hearing took place in July and still no application had been made.

83. The Defendants quite rightly highlight the Claimants' delays in addressing the Request. They highlight the initial failure to object and then the failure to apply to set aside and the failure thereafter to issue any application at all. This they say should militate against any exercise of discretion in favour of the Claimants.

84. Mr Mill says if the Claimants are wrong in their approach they apologise but that the failure to comply was not deliberate and has caused no prejudice to the Defendants.

85. The Claimants' approach to the Request including the response "not entitled" rather than engaging with the 27 April Order is a self-inflicted wound which requires them to seek the assistance of the court.

86. However, I remind myself that the overriding objective is also about managing cases justly. Compliance with rules and orders is a significant part of the overriding objective but not to the exclusion of all other considerations.

The Request

87. Although the application is for permission to issue an application to set aside the 27 April Order rather than the substantive application itself, it is necessary when considering all the circumstances pursuant to CPR3.9 and the third stage of the Denton test to have regard to the underlying merits of such an application if made.

88. The Claimants say that there had been no substantive consideration of the Request by the court. To require them to respond to a Request that they argue does not meet the requirements of CPR18 would not be reasonable and proportionate and that should be taken into account by the court when considering the application to extend time.

89. The Claimants say that the Request is an early request for evidence and disclosure and in some cases goes even further, seeking evidence or disclosure that is simply not relevant to the issues they say the court has to determine. In so far as the Request is a request for early evidence or disclosure Mr Mill says that it will be provided in due course in accordance with the directions given at the CCMC.

90. He argued that PD18.1.1 and 1.2 were of universal application and it was plain in this case that the Request was not a request for clarification or information strictly confined to matters which it was reasonably necessary and proportionate to enable the Defendants to either prepare their case or to understand the Claimants' case. A detailed defence and counterclaim were served as long ago as July 2018 without any obvious difficulty. The Defendants filed a reply to the defence to counterclaim in March 2019. The requests raised on 1 April 2020 were not sought in the Defendants earlier CPR 18 request in November 2019.

91. Mr Mill took me through the Request in some detail. In summary, he submits that 14 of the requests seek early evidence relating to the issue of joint composition which would require a detailed analysis of which of the songwriters composed, recorded and performed certain elements of "Shape of You" and in each case with any variations. He argues that this is not only onerous but in relation to the requests relating to performance and recording, not relevant to any of the issues in dispute.

92. He says that the requests are requests for evidence concerning how "Shape of You" was composed. This, he argues, self-evidently cannot be necessary to enable the Defendants to prepare their own evidence. In so far as the requests about "Shape of You" are relevant to the issues to be determined at trial they will be addressed in the Claimants' evidence.

93. He described the Claimants' statements of case on joint authorship as "a standard pleading" as demonstrated he said by the fact that the Defendants relied on joint composition and joint authorship. He pointed to the fact that the Defendants had not themselves provided the type of particulars on joint composition and authorship now sought from the Claimants. Thus, he argued that it was difficult for the Defendants to argue that the Claimants should provide more detail at this stage given the Defendants' own approach.

94. Finally he noted that the date for expert evidence (June 2021 onwards) was three months after the witness evidence was due to be exchanged (April 2021) so that to the extent that the Defendants had sought to argue that they needed the answers to the Request early because it might assist with the preparation of expert evidence, it would be available, on the current timetable, in sufficient time.

95. He argued that the Request was a request for early fragmentary witness evidence of the type that Roth J had said was not appropriate in *National Grid Electricity Transmission Plc v ABB Ltd* [2012] EWHC 869 Ch.

96. Thus, Mr Mill argued that the answers to those 14 requests were therefore not strictly necessary, reasonable, or proportionate for the Defendants to understand the case they have to meet. They are not in his view proper requests which meet the requirements of CPR 18.

97. In relation to the other 4 requests he said that those would require the Claimants to engage in an analysis of documents that were provided to the Defendants (at their request) by way of voluntary early disclosure in February 2020. The documents were uploaded to an electronic platform but to date the Defendants have not sought access to the platform or the documents. Mr Mill says had the Defendants done so they would have been able to address those 4 requests themselves.

98. Further, and importantly, he says, the electronic files came from third parties and are not the Claimants' electronic files. The Claimants would not be in a much better position to find what the Defendants are looking for than the Defendants. He submitted that the Defendants' intention was to have the Claimants do the work for the Defendants at the Claimants' expense.

99. He therefore maintained that the response "not entitled" was the correct and justifiable response as the Requests did not relate to matters which it was necessary or proportionate for the Defendants to have in order to understand the case. It was a request for advance evidence or in the case of the electronic documents analysis and advance disclosure. In relation to the requests relating to recording and performance he argued that the Requests were not relevant at all.

100. Mr Cuddigan submits that the Request is justified and proportionate on the basis that the claim is of significant reputational and financial value and the court should have regard to the repute of "Shape of You".

101. I do not accept that the significance or value of the claim changes the requirement in PD18.1 for any request to be strictly necessary, reasonable, and proportionate to enable the Defendants to understand the case they have to meet. Proportionality is not just about the significance and value of any claim; it is a much broader concept.

102. Mr Cuddigan says the most important issue in the case is whether the Claimants copied parts of "Oh Why" when composing "Shape of You". Thus, he says that the genesis of the composition is of crucial importance. He argues that the Request is focussed on the issue of copying not joint authorship.

103. He says the Claimants' pleading of joint composition is not good enough where the Claimants seek negative declaratory relief and that it is necessary for the Claimants to plead the material facts upon which they rely.

104. Mr Cuddigan argues that the Claimants should provide an independent and comprehensive account of who composed what parts of the composition particularly as that is their claim. He says the Request goes to that issue.

105. He also seeks identification of which electronic files/recordings (which the Claimants say will be in the voluntary disclosure requested by the Defendants) are said to record the relevant event sought in the other 14 requests. He asks how the Defendants can be expected to go through 12,000 documents if they do not even know the name they are searching for.

106. The Defendants' explanation for not having accessed the voluntary disclosure was that they did not have the protection of PD51U and had no safeguards. Given that the Defendants had not accessed the electronic platform I did not understand how they could know if there was any issue with the documents on the electronic platform and/or the ease or difficulty in locating any document.

107. It seems to me if the Defendants were concerned to ensure that the only documents produced were those responsive to an agreed list of issues for disclosure they should wait for disclosure.

108. In the face of that approach the suggestion by Mr Mill that parts of the Request were intended to cause the Claimants to have to analyse the audio and audio-visual files in the voluntary disclosure for the Defendants cannot be ignored when considering whether to give the Claimants an opportunity to apply to set aside the 27 April Order.

109. The court would have to look critically at the appropriateness of a request for further information that appeared to require the responding party to carry out analysis of third-party material in this way.

110. Mr Cuddigan argues that responses to the Request now would help with disclosure and would help inform the expert evidence and factual evidence. However, despite his protestations and the Defendants' subsequent written submissions I was not able to

identify any clear prejudice to the Defendants in having to wait for disclosure based on an agreed list of issues for disclosure and witness evidence.

111. Mr Cuddigan was concerned that the Claimants' resistance to answering the Request now suggested that they would not respond in evidence and disclosure in due course. There is a difference between having to answer the Request and providing witness statements and disclosure in accordance with a procedural timetable. It does not follow that a resistance to responding to the Request means that the evidence would not be provided in the fullness of time. In any event if Mr Cuddigan having reviewed the evidence and disclosure considered it wanting that would appear to me to be the appropriate time to make any applications for more.

112. I therefore balance against the Claimants' non-compliance with the 27 April Order what seems to me to be the considerable force in Mr Mill submissions that the Request appears to include requests for early evidence and disclosure. There is now an agreed timetable for the future conduct of the case including disclosure and witness evidence.

113. It seems to me that in so far as the Request were to seek disclosure that would fall outside the scope of the DRD it would be wrong in principle to permit that wider disclosure without a properly formulated disclosure application setting out why such further disclosure was reasonable, proportionate and likely to be of probative value.

114. When considering the overriding objective and in particular what is reasonable and proportionate having regard to efficient case management and costs requiring one party to provide early and out of sequence partial disclosure and fragmentary witness evidence should be viewed with particular caution by the court.

115. "Not entitled" was plainly an inadequate response to the Request. The authorities are to my mind clear. The appropriate course was for the Claimants to apply to set aside the order. However, a failure to comply with a validly obtained order is only part of the broader consideration of all the circumstances both pursuant to CPR 3.9 and the third stage of the Denton test. It does not to my mind trump all other considerations in this case.

116. I do not accept that Covid-19 was a good reason for the failure to apply. It is clear from the evidence and submissions that the Claimants simply thought that they could say "not entitled" and that would be an end of it and/or they could argue the substantive question of the appropriateness of the Request on this application.

117. Against that despite Mr Cuddigan's submissions I am not persuaded that the absence of the responses to the Request to date have caused the Defendants any prejudice. Disclosure will take place by 27 November against an agreed list of issues. If Mr Cuddigan's concerns about the voluntary disclosure were justified, then disclosure pursuant to the agreed list of issues will resolve any residual concerns that he may have. He will have disclosure with what he calls proper safeguards. If that disclosure is considered deficient by the Defendants, they can make an application pursuant to either paragraph 17 or 18 of PD51U.

118. Whilst the Defendants say they will be prejudiced by not having this information in advance of disclosure and witness evidence it was not clear what that prejudice would

be. Certainly, I can see that the Defendants might be advantaged by getting the information they seek earlier and at the Claimants' expense.

119. When considering all the circumstances and whether to give the Claimants permission to apply out of time to set aside the 27 April Order I take into account that it appears to me that the Request seeks what is primarily fragmented, early and out of sequence, and worse potentially overlapping, witness evidence and disclosure. It does not appear to me to be reasonably necessary or proportionate to enable the Defendants to understand the case they have to meet. I am concerned about its utility given the stage the proceedings have reached and the additional costs that the Request is likely to cause both parties to incur.

120. Mr Cuddigan did not oppose the granting of an extension of time to answer the Request. He did not ultimately press for an unless order. What he wanted was an order requiring the Claimants to respond.

121. Whilst I accept the Defendants have a validly obtained order, they have not identified any prejudice if the Claimants are permitted to apply to set aside the 27 April Order.

122. The application was listed at the CCMC and does not appear to have caused any difficulty or delay in agreeing all aspects of the CCMC including the timetable. There was no suggestion that the Request and/or the absence of a complete and sufficient response interfered with the ability of the parties to agree the DRD.

123. Ultimately, I need to take into account the need to act fairly as between the parties and balance their respective positions whilst also having regard to the overriding objective more broadly and the need to conduct cases efficiently and at proportionate cost.

124. Taking all of the matters into consideration including the detailed submissions by both counsel and having regard to all the circumstances it seems to me that it is not reasonable or proportionate or in keeping with the overriding objective or efficient case management to refuse the Claimants' application for permission to issue an application to set aside the Request out of time.

125. At this stage notwithstanding my provisional view of the nature and utility of the Request I need to proceed on the basis that the 27 April Order remains in full force and effect and the Claimants are in breach. I therefore need to consider the appropriate extension of time for compliance with that order in the meantime.

126. I am not persuaded that this is a case in which it is appropriate to make an unless order despite the obvious breach of the order for which there is no real excuse. However, neither does it seem to me reasonable, proportionate or in keeping with the overriding objective to direct the service of a response to the Request at a time that would result in overlapping and out of sequence disclosure causing unnecessary additional costs to both parties. The Defendants have been unable to identify any prejudice to them if they have wait for the response. It seems to me therefore that to minimise the adverse impact of such out of sequence working, I will extend time to respond to the Request to the date of disclosure. I consider this to balance the interests of both parties and to be reasonable, proportionate and in keeping with the overriding objective and the need to manage cases efficiently.

127. I find therefore that

i) The Claimants' response to the Request was not a sufficient or complete response and the Claimants were in breach of the 27 April Order.

ii) The failure to apply to set aside or vary the terms of the 27 April Order and the failure to seek to extend time to do so until this hearing was a serious and significant breach for which there was no good reason.

iii) However, having regard to all the circumstances and for the reasons set out in this judgment including the contents of the Request itself I will extend time for the Claimants to make an application to set aside the 27 April Order to 7 days after the handing down of the judgment.

iv) I will extend time for compliance with the Request to the date for disclosure and not on an unless basis in any event.

128. I invite counsel to seek to agree an order to reflect the terms of this judgment.