Neutral Citation Number: [2020] EWHC 701 (QB)

Case No: HQ17X02568

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2020

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

(1) BES COMMERCIAL ELECTRICITY LIMITED **Claimant**

(2) BUSINESS ENERGY SOLUTIONS LIMITED

(3) BES WATER LIMITED

(4) COMMERCIAL POWER LIMITED

- and -

CHESHIRE WEST AND CHESTER BOROUGH COUNCIL **Defendant**

- -
- -

Philip Marshall QC and Matthew Morrison
(instructed by **Weightmans LLP**) for the **Claimants**
Fiona Barton QC (instructed by **Clyde & Co Solicitors**) for the **Defendants**

Hearing dates: **16th – 17th October 2019**
Further written submissions: **16th December 2019 – 6th March 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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be at 10:30 of Thursday 26 March 2020

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. A dispute has arisen in this case concerning the proper extent of the defendant's duty of disclosure.

2. The matter was last before me on 17 October 2019 for the purposes of case management at which time I concluded that it would be appropriate for the parties to engage further and more closely in an effort to reach agreement or, at least, narrow the broad range of issues still outstanding between them. In the event that full consensus were not achieved, I indicated that I would seek to resolve any outstanding matters either on paper or, if necessary, following further oral submissions.

3. Although significant progress has been made in the intervening period, there remain areas in respect of which the parties have found it impossible to agree and, following the receipt of further very detailed written submissions, I have decided to proceed to give judgment without calling for a further hearing.

4. It would not normally be either necessary or appropriate in the context of a dispute concerning disclosure to descend into very much detail concerning the history and nature of the substantive dispute between the parties. In this somewhat unusual case, however, it is not possible adequately to understand their respective positions on disclosure without at least some understanding of the dispiritingly labyrinthine path which

has led to the present position. I therefore hope that I might therefore be forgiven for taking what, in other circumstances, might be regarded as a rather "long run up to the wicket".

THE CENTRAL ISSUE

5. The defendant is a local authority which is conducting an investigation, still pending, which arose out of a suspicion that the claimants had been involved in fraudulent trading. It would be an understatement to say that the investigation has not gone entirely according to plan.

6. The claimants contend in these proceedings that the investigation is deeply flawed. They point, in particular, to the alleged conduct of one of the defendant's former employees, David Bourne. In short, it is contended that Mr Bourne, deliberately and in conspiracy with others, traduced the reputation of the claimants to further his own improper ends during the course of the investigation in which he played a part.

7. The claimants allege that Mr Bourne, in respect of whose actions the defendant is vicariously responsible, is guilty of misfeasance in public office and that the defendant is liable to make just satisfaction for breaches of Article 8 and Article 1, Protocol 1 of the European Convention on Human Rights. There are residual claims in trespass and conversion arising from the seizure of the claimants' property during the course of the investigation together with a further claim for declaratory relief.

8. Some idea of the scale and complexity of the dispute which has emerged can be gathered from the fact that the Particulars of Claim, now in its re-re-amended fourth incarnation, stretches over no fewer than 51 pages. The Defence adds a further 30 pages to the tally and, in turn, prompted the service of a Reply which is seven pages long. As is so often the case,

lengthy pleadings have achieved not documentary satiety but a hunger for more. Accordingly, the claimants provided, on request, sixteen pages of further information and the defendant served an eleven page response to a notice to admit facts. This gives a total of 115 pages of pleading. It would be premature for me to pass comment as to whether the volume of these pleadings is proportionate to the scale of the underlying dispute but I must admit, even at this stage, to entertaining a provisional lurking doubt.

9. Setting aside the detail for one moment, it clear that the defendant's broad approach to this litigation is based on the stance that the real purpose of these proceedings is to serve as a distraction manoeuvre which aims to divert the defendant's momentum, resources and focus away from the ongoing investigation into the claimants' trading practices.

10. The claimants, in contrast, present this litigation as a genuine attempt to correct flagrant injustices in respect of which the defendant is answerable but seeking to avoid accountability.

11. Whichever of these two views (if either) is correct, it is hardly surprising that the result had been a strong mutual suspicion which has given rise to a polarisation of the stances taken by the parties and a distinct and persistent frisson between the respective legal teams.

12. It is in this context that the remaining issues concerning disclosure fall to be adjudicated upon with the claimants seeking to persuade me that the approach of the defendant to disclosure has been "improper" and the defendant dismissing the claimant's residual requests as amounting to no more than a "fishing expedition". Before proceeding further, however, it is necessary for me to set out in a little more detail the factual background to this litigation.

THE BACKGROUND

13. The first and second claimants are in the business of supplying energy to commercial customers. For convenience, they are referred to collectively in this judgment as "BES". The third claimant was established with the intention that it should operate as a non-domestic water supplier. It has not, as yet, started to trade. The fourth claimant, Commercial Power Ltd ("CPL") is an energy aggregator. Energy aggregators act as intermediaries through which suppliers, such as the first three claimants, pass details of their products on to a network of brokers.

14. The defendant suspects that BES and CPL have conspired with a number of energy brokers to lie to potential customers in order to deceive them into entering into contracts for the supply of electricity and gas from BES in preference to other energy suppliers. It is concerned that one Andrew Pilley and his sister, Michelle Davidson, have been in effective charge of the activities of the claimant companies and have acted in league with one Lee Qualter acting on behalf of certain of the brokers, and others, to carry out such scams on a large scale.

15. To understand fully the issues arising with respect to the outstanding disputes relating to disclosure it is necessary first to outline the legal parameters of the defendant's role in the enforcement process and to trace the history of the turbulent relationship between the claimants and the defendant and other bodies with regulatory functions to perform.

16. Fortunately for me, I am not the first judge to be required to grapple with the detail of the defendant's investigation and, in particular, the nature of the regulatory framework within which it operates. Mr Qualter, through his broker companies under investigation, has already tried and failed to take on the defendant in judicial review proceedings in which the claimants were named as interested parties. Thus it is that a detailed generic account of the structure of trading standards regulation and

investigations may be found in the relevant judgment of the Divisional Court in ***Lee Qualter Commercial Reduction Services Ltd v Crown Court at Preston and others*** [2019] EWHC 2563 from which I have gratefully plagiarised the abbreviated description which follows.

THE REGULATORY FRAMEWORK

17. In summary, following the abolition of the Office of Fair Trading in 2012 its strategic functions were distributed between a number of new statutory bodies. Responsibility for securing consumer protection at a national or regional level was bequeathed to National Trading Standards ("NTS") which is not a legal entity. Funded by central government, it operates via a board consisting of trading standards officers from different parts of England and Wales. Each year it receives a grant the purpose of which is to support "the delivery of national and cross-local consumer enforcement work". One method of enforcement relates to the work of Regional Investigation Teams. Their object is to take "effective action against rogue traders whose cross-regional activities are beyond the reach of individual local authorities". One of the key performance indicators to be met by NTS is "commissioning local authorities to undertake national prosecutions where appropriate".

18. The most recent NTS Annual Business Plan sets out the core strategic objectives of that body. One such objective is to "ensure effective delivery and co-ordination of national and cross-boundary enforcement projects in relation to serious consumer crime (including eCrime and business to business fraud) and mass marketing scams".

19. NTS does not conduct its own investigations or engage directly in the work of trading standards enforcement. Rather, it commissions and funds the Regional Investigation Teams. There are seven such teams across England and Wales. Each team is based within a particular local authority

and those working as a part of the team will be either employed by or seconded to that local authority. As with NTS, Regional Investigation Teams do not have any independent legal status. Cases will be referred to NTS for funding whether by individual local authorities or by a Regional Investigation Team.

20. In 2012, all 22 of the local authorities carrying out trading standards functions in the North West Region (covering Lancashire, Cheshire, Merseyside and Greater Manchester) signed a document entitled "Protocol for Trading Standards North West Scambuster Investigations". This was intended to put into effect a scheme for utilising funds made available by NTS. The protocol identified the defendant as the lead partner for the Regional Investigation Team. The essence of the protocol was that all of the local authorities in the North West agreed that investigation of region-wide rogue trading would be carried out by the defendant as the host of the Regional Investigation Team. Thus, the other local authorities, including Lancashire County Council ("LCC"), delegated their trading standard functions and powers to the defendant in relation to cases to be funded by NTS. It will be necessary to look in greater detail at the terms of the protocol later in this judgment.

EVENTS LEADING UP TO THE DEFENDANT'S INVESTIGATION OF THE CLAIMANTS

21. In the later part of 2011 and the first months of 2012, the trading standards service of Blackpool Council received complaints about the activities of BES who were based in neighbouring Lancashire. There were meetings between trading standards officers and representatives of BES but the matter was taken no further at that stage.

22. Then, during 2013, trading standards at LCC also began to receive complaints about BES. The predominant issue was alleged mis-selling.

The most frequent allegation was that a small business would be telephoned by someone wrongly purporting to be from their current energy supplier to say that they could no longer continue to supply to that business and that BES was the recommended alternative. Other complaints involved allegations of false rate comparisons and misrepresentations concerning the supposed risk of disconnection.

23. In December 2013, an investigating officer, Sam Harrison of LCC, was appointed to conduct a preliminary investigation. He sent questionnaires to those who had made complaints to obtain more details. He spoke to Blackpool Trading Standards about the meetings with BES that their officers had attended about two years earlier. He also contacted the energy market regulator (OFGEM) and discovered that the regulator was aware of allegations of mis-selling and was investigating BES as the holder of an energy licence. The brokers, however, were not under direct scrutiny because their activities fell outside the statutory remit of OFGEM.

24. After the complainants' completed questionnaires had been returned, it was decided that Mr Harrison's investigation should be taken further. He thus took statements from some of those complainants who had completed questionnaires and made successful applications in March and May 2014 for authorisation to obtain telephone data relating to the companies involved. In those applications it was said that the offences under investigation involved misleading advertising pursuant to the Business Protection from Misleading Marketing Regulations 2008 and fraud by false representation contrary to Section 2 of the Fraud Act 2006.

25. By June 2014, LCC was liaising with the Regional Investigation Team (i.e. officers of the defendant) with a view to obtaining specialised investigative assistance. On 4 September 2014, LCC decided that it was

no longer appropriate for it to continue to lead the investigation and so it was referred, in its entirety, to NTS with a view to being taken over by the Regional Investigation Team.

26. The written application to NTS was submitted in November 2014. It stated that LCC had received 186 complaints between April 2013 and July 2014 with further referrals from regulatory and trade bodies. The geographical spread of complaints was very wide. Small businesses from 80 different local authority areas were involved. A significant number of complainants were based in the North West but these were by no means the majority. LCC was the recipient of the complaints because BES was based in Lancashire and the broker companies were based in the neighbouring authority, Blackpool. The application stated that "the complexity of this case and the required resources go beyond the capability of a local trading standards service".

27. NTS agreed to fund the investigation and required the defendant (in its capacity as the North West Regional Investigation Team) to conduct the investigation which started before the close of 2014.

THE DEFENDANT'S INVESTIGATION

28. One member of the defendant's investigation team from 12 January until 30 June 2015 was David Bourne who was, at the very least, inappropriately enthusiastic in the performance of his duties. This is reflected in the fact that the defence admits that he had invited or encouraged customers to make complaints against the claimants in an unprofessional way. The claimants go further and accuse Mr Bourne of conspiring with two other men, Neil Scrivener and Oliver Mooney, to use the investigation as a vehicle through which they would deliberately damage the claimants' businesses. This, it is alleged, involved Messrs Scrivener and Mooney deliberately provoking and exaggerating customer

complaints against BES which were thereafter referred, via a complicit Mr Bourne, to the defendant's investigating team.

29. The claimants commenced proceedings against Messrs Scrivener and Mooney based on allegations of such misconduct. These proceedings were eventually settled partway through the trial upon undertakings from the two men the broad scope of which involved the wholescale deletion of their blogs and promises not to interfere in BES's business again. If they were to act in breach of their undertakings they agreed, in addition to any other penalty, to pay costs to BES in the sum of £250,000.

30. The instant proceedings, therefore, centre upon the alleged role of Mr Bourne and the economic damage said to have been occasioned to the claimants as a result of his activities

DISCLOSURE

31. Against this background, there arose a significant dispute between the parties concerning the proper scope of the disclosure which the defendant should be required to make. In this context, the claimants had produced a list of "custodians" whose electronic documents they contended should be searched and a list of keywords to be deployed. As I have noted earlier, I was satisfied that, given time, at least some of the outstanding issues could be resolved by agreement between the parties and so ordered in October 2019 that the defendant should thereafter indicate in writing whether it agreed with any or all of the proposed keywords and custodians. Any outstanding issues would be resolved by the Court. I did, however, order:

> "The date range for the purposes of relevance under CPR, rr.31.6 to 31.7 shall be documents originating or sent and/or received between 1 October 2014 to 22 July 2016."

32. There are three broad issues upon which the parties have been unable to reach agreement. They are:

Issue One Whether four named individuals who were employed not by the defendant but by LCC should be treated as custodians;

Issue Two The extent of the list of the electronic repositories to be searched with respect to each custodian;

Issue Three More specifically, the extent of the list of the electronic repositories to be searched with respect to Mr Bourne.

33. Before dealing with each of these issues in turn, it is first necessary for me to take a brief diversion to outline the relevant procedural rules to be applied.

THE LAW

34. The rules relating to the scope and content of disclosure are to be found in CPR Part 31. In particular, the parameters of the obligation to provide standard disclosure and which apply to the defendant in this case, are laid out in rule 31.6 which, in so far as is relevant, provides:

> "**Part 31.6 Standard disclosure—what documents are to be disclosed**
>
> 31.6 Standard disclosure requires a party to disclose only—
>
> (a) the documents on which he relies; and
>
> (b) the documents which—
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case…"

35. CPR rule 31.7 imposes a duty to search for documents falling within the scope of rule 31.6 but limits the scope of such a search to that which is reasonable. It provides:

> "**31.7— Duty of search**
>
> 31.7(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).
>
> (2) The factors relevant in deciding the reasonableness of a search include the following—
>
> (a) the number of documents involved;
>
> (b) the nature and complexity of the proceedings;
>
> (c) the ease and expense of retrieval of any particular document; and
>
> (d) the significance of any document which is likely to be located during the search.
>
> (3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document."

36. CPR rule 31.8 circumscribes the limits of the pool of documents to which the obligation to disclose applies:

> "**31.8— Duty of disclosure limited to documents which are or have been in a party's control**
>
> 31.8(1) A party's duty to disclose documents is limited to documents which are or have been in his control.
>
> (2) For this purpose a party has or has had a document in his control if—
>
> (a) it is or was in his physical possession;
>
> (b) he has or has had a right to possession of it; or
>
> (c) he has or has had a right to inspect or take copies of it."

37. Having thus set out the relevant rules, I must apply them to each of the three disputed issues which I have identified above.

THE FIRST ISSUE

38. The four identified employees of LCC are: Paul Noone, Samuel Harrison, Dawn Robinson and Amanda Maxim ("the four").

39. The four are not and never have been employees of the defendant and so the first question which arises in respect of the documents of which they are the custodians is as to whether they are or have been within the control of the defendant. If not, the obligation to make disclosure does not arise and the claimants' application in respect thereof must fail *in limine*.

40. The claimants contend that the relationship between the defendant and LCC on the particular facts of this case is such as to lead to the conclusion that the four should be treated as custodians of documents falling within the scope of the defendant's disclosure obligations.

41. I have already dealt with the broad basis upon which the relevant activities of LCC related to the subsequent investigation of the defendant. More detailed information concerning the respective involvement of the four individuals is to be found in a witness statement from one of them, Mr Noone, which was relied upon by the defendant in the context of Mr Qualter's unsuccessful judicial review claim. I have already referred to the judgment of the Divisional Court in that case.

42. It had been alleged in that case that in December 2018 the defendant had acted ultra vires in applying to Preston Crown Court for production orders in purported furtherance of its investigation pursuant to Section 345 of the Proceeds of Crime Act 2002. Mr Qualter lost that challenge but the claimants now point to the evidence of Mr Noone, which the defendant relied upon in defending it, as serendipitously supporting their contentions on the issue of disclosure in this case.

43. Mr Noone's witness statement reveals that he was Head of Trading Standards at LCC and represented the North West region on the NTS

Board. Mr Harrison was the Investigating Officer. Ms Robinson was the Team Manager. Ms Maxim was the Trading Standards Manager. All were employees of LCC involved in the investigation of BES which had been named Operation Best. On 4 September 2014, they decided, at a meeting to which I have already made passing reference, that the scale of the investigation was such that the matter would best be progressed by referring it to the Regional Investigations Team with the defendant as the host authority.

44. Mr Noone stated that, following referral, Operation Best "is therefore taking place with my full authority and consent".

45. Mr Harrison liaised with a number of other trading standards officers and the like in the course of his investigation and collated witness statements from complainants who, it is alleged, are likely to have been subject to the baleful influence of Mr Scrivener.

46. Ms Robinson had been involved in meetings with Mr Harrison and is referred to in an email from the allegedly corrupt employee of the defendant, Mr Bourne, to Mr Scrivener as being the person from whom he has taken over the investigation.

47. Ms Maxim confirms in her witness statement that she was involved in meeting with the other three and was the authorising officer in applications for communications data issued in 2014.

48. The question arises as to whether the documents of which any or all of these custodians fall within the scope of CPR, r.31.8 as documents to which the defendant has a right "to possession" or "to inspect or take copies of".

49. The formal documented framework of the relationship between LCC and the defendant is contained in the 2012 protocol to which I have already

referred. Under the protocol, the defendant is referred to as "the Council" and LCC is one of "the Partners". SB refers to the Regional Investigation Team which then operated under the somewhat lurid designation "Scambusters".

50. Clause 2.1 of the protocol provides:

> "**Purpose of Agreement**
>
> 2.1 The purpose of this Agreement is to facilitate the delegation of powers to the Council and officers employed within SB to enforce the provisions of the legislation set out in Schedule 1 within the area of the Partners. The Agreement encourages the exchange of information and a working partnership approach between the Council and the Partners in relation to the listed legislation."

51. Clause 5 provides:

> "**Assistance to SB**
>
> 5. The Council may request assistance from any other council or any other enforcement agency in respect of any SB operation. Authorised officers of the Council may also assist in any SB operation. Any officer of an enforcement agency or council authorised by the Council for the purposes of giving such assistance or any Council authorised officer giving such assistance shall be deemed to be an authorised officer of SB."

52. The defendant, in my view rightly, points out that these terms do not give it any legal right to require the four employees of LCC to give it access to their documents.

53. The claimant counters this point by relying on the fact that the defendant successfully relied upon the terms of the Protocol in ***Qualter*** to establish to the satisfaction of the Divisional Court that it was exercising the functions of LCC to rebut the contention that it was acting *ultra vires*. Furthermore, the defendant was able to call upon each of the four to provide witness statements for deployment in ***Qualter*** and to procure the

disclosure of other documentation from LCC in so far as it suited its purpose in that case.

54. However, this contention only goes so far. The bare fact that A may delegate the performance of one of its functions to B does not automatically entitle B to exercise control over all of the documents in A's possession relating to the A's conduct before such function has been delegated. An implied term may arise in a particular context but this would be in circumstances which are very fact specific. It must be borne in mind that the purpose of the Protocol is to "facilitate the delegation of powers to the Council and officers employed within SB to enforce the provisions of the legislation set out in Schedule 1 within the area of the Partners." The mutual obligations do not, therefore, automatically create a contractual obligation to the provide documents, whether helpful or otherwise, in respect of the defence to a claim framed in misfeasance in public office or the like. Neither does it follow that because LCC provided certain documents and other assistance to the defendant in the context of the ***Qualter*** case that this generates a legal obligation to relinquish all documents falling within the parameters of standard disclosure in this case.

55. Standing back from the detail, I am satisfied that there was no formal legal obligation on LCC to relinquish control of the relevant documents to the defendant but that the likelihood is that it would provide them on request. This raises the issue as to whether this state of affairs is such as to bring the relevant documents within the scope of CPR r. 31.8.

56. In ***Lonrho v Shell*** [1980] 1 WLR 627 an application was made to obtain disclosure from the foreign subsidiaries of the defendants. The case fell to be decided under the old Rules of the Supreme Court but nothing turns on that.

57. Lord Diplock held at 636 F:

> "'For the reasons already indicated Shell Mocambique's documents are not in my opinion within the 'power' of either Shell or BP within the meaning of RSC, Ord. 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association …. or (2) by obtaining the voluntary consent of the board of Shell Mocambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and BP are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made."

58. On the face of it, this approach might seem to be fatal to the claimants' application in this case but they point to the fact that ***Lonrho*** was considered and refined in ***Schlumberger Holdings Limited v Electromagnetic Geoservices AS*** [2008] EWHC 56 (Pat) by Floyd J in which, having quoted the above passage from ***Lonrho***, he held at para 21:

> "I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation, subject only to the caveats contained in paragraph 4 of Mr. Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests."

59. In ***Thunder Air Limited v Hilmarsson*** [2008] EWHC 355 (Ch) the claimant sought an order in respect of company documents against the defendant as director of that company. In support of its application it relied upon ***Schlumberger*** but was unsuccessful. Patten J held:

> "37. …Miss Campbell…pointed to evidence in Ms Webb's witness statement that Mr Hilmarsson obviously had day to day control of the Aviject operation and was ultimately able to procure the delivery up of the documents to TAL. She referred to a recent decision of Floyd J in Schlumberger Holdings Ltd v Electromagnetic Geoservices AS [2008] EWHC 56 (Pat) in which he ordered the claimants to disclose documents belonging to other companies within the Schlumberger group which were not themselves parties to the action on the basis that these documents were under the claimant's control within the meaning of CPR 31.8(1). He did so because the claimant had already included documents in the possession of those companies in its own lists and because the evidence revealed that "the party has already enjoyed and continues to enjoy the co-operation and consent of the third party to inspect his documents and take copies."
>
> 38. It is clear from this passage in his judgment that the facts of that case were special because as Floyd J himself recognized earlier in his judgment, the authorities on disclosure do not treat the documents of a subsidiary as those of the holding company simply on the basis of shareholder control."

60. The court thus went on to refuse the application.

61. Over the years, there have been a number of judicial attempts to define more precisely the parameters of the circumstances in which a party may be held to have control over the documents of a third party notwithstanding the absence of a legal right thereto.

62. The most recent decision in this sequence is that of Andrew Baker J in ***Pipia v BGEO Group Limited*** [2020] EWHC 402 (Comm) in which the Court, having identified the approach in the ***Schlumberger***, went on to observe:

"17. In Ardila Investments v ENRC [2015] EWHC 3761 (Comm) , the claimant, Ardila, sought disclosure of documents held by two subsidiaries, Bamin and Pedra Cinza, of the defendant parent company, ENRC. After setting out the relevant case law, including the Schlumberger case, Males J, as he was then, concluded as follows:

"10. It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access…

13. The position can, therefore, be summarised for present purposes in this way. First, it remains the position that a parent company does not merely by virtue of being a 100% parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request, although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.

14. Fourth, however, a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access."

18. Males J held on the facts that ENRC did not have control in that sense over the documents requested. Ardila had relied primarily on two matters as evidence of the relevant kind of agreement: i) First, certain obligations ENRC had undertaken to Ardila in a share

purchase agreement, which included the obligation to keep Ardila fully informed in respect of its subsidiaries' performance of certain payment conditions. As to that, Males J took the view, at [17] that:

> "…extensive as those obligations are, they fall well short of any understanding or arrangement which would enable ENRC to have free access to all of Bamin's or other subsidiaries' documents. It is one thing to undertake specific obligations of that nature, it is quite another to permit free range through the documents, including those held electronically, of the subsidiary company, extending much more widely."

Second, evidence of the parent company's general counsel that its subsidiary would comply with any request because it would be in the subsidiary's commercial interest to do so. Males J found this to be insufficient too, explaining at [21] that:

> "It is merely the evidence of the normal relationship that one would expect between a parent and subsidiary without the particular features of the Schlumberger or North Shore cases. Such cooperation as there may have been in the past as to compliance with specific requests, for example production of certain of the licences in issue, does not, in my judgment, amount to evidence that ENRC has the necessary control in the sense which the cases show is necessary over Bamin's documents. It does not indicate that ENRC would be entitled to send its solicitors into Bamin's premises and to insist on searching Bamin's computers, applying the kind of word search terms and insisting on production of the computers of various individuals which would be necessary in order to enable that to be done. There is no evidence as far as I can see that that has happened so far, as distinct from specific documents being provided in response to a specific request."

19. It is important, in my judgment, not to read too much into that last quotation from Males J's judgment in Ardila. The particular arrangement found to exist in Schlumberger was an arrangement granting to the litigating party general access to the third party's documents enabling it to go through them looking for material relevant to the litigation. What was alleged to

> exist in Ardila, but found not to exist, was something similar. That does not mean there cannot be 'control' unless there is a grant of that kind of wholesale access to documents.
>
> 20. Take the paradigm case of an enforceable contractual right to be provided with documents of some particular description, upon request, perhaps quarterly management accounts for a business in which the litigating party has invested, or monthly stock reports for a business to which the litigating party has lent money or provided stock on a 'sale or return' basis. That would only ever entitle the litigating party to obtain documents of that description, by making an appropriate request. But there would plainly be control as that is defined for disclosure purposes, that is to say control over documents that fell within the scope of the contractual right. In this context, the need for the litigating party to make a request, to trigger the obligation on the third party to provide the documents, is not a material qualification upon the right to obtain the documents. The need for a request does not stop the entitlement from being "presently enforceable ", in the sense used by Lord Diplock in Lonrho v Shell, supra, at 635G-H.
>
> 21. As illustrated by Ardila, the fact that some particular request or requests to a third party for assistance by way of the provision of documents has or have been met without demur does not mean, without more, that there was or is some standing consent to meet such requests, or that some promise (legally enforceable or not) to meet future requests arises out of that prior assistance. That said, it is not difficult to envisage in principle, although it does not arise on the facts before me, the possibility of repeat behaviour sufficient to imply such a promise, i.e. to involve a standing consent as to the future. But all that is rather by the way for the present case, in which there was an express, written, standing consent, and the only real questions are what it meant and whether it persists today. To the extent that Ms Tolaney QC submitted that only a Schlumberger-type arrangement, granting general access to inspect a third party's documents and take copies to provide by way of disclosure, confers control, I do not agree."

63. I find myself in respectful agreement with the analysis of Baker J.

64. I must now apply the above principles to the particular facts of this case.

65. On the entirety of the evidence before me, I am not satisfied that the defendant has the requisite degree of control over the LCC documents. I note the following:

(i) Although the defendant and LCC have a common interest in the investigation of suspected regulatory misconduct within the context of the framework I have identified, their shared aim remains one that subsists between two quite separate legal entities. The absence of any genealogical corporate relationship between them may not be fatal to the claimants' argument but it is distinctly unhelpful;

(ii) The protocol, as one might expect, encourages the exchange of information and mutual assistance but falls far short of establishing a right or even a presumption that certain categories of documents are, without more, to be provided upon request;

(iii) The fact that LCC cooperated in the ***Qualter*** case in the provision of documentation to the defendant does not, of itself, establish that the defendant has the requisite degree of control of related documents. These were documents deployed for a particular purpose and their provision falls far short of establishing the sort of long standing consent or promise for the future which would bring this case into ***Schlumberger*** territory.

(iv) The defendant has offered to request LCC to search for relevant material but has declined to agree to do so on the basis that the four are custodians of the defendant and by the application of the full panoply of search terms suggested by the claimants. The defendant's proposed requests are sensible and I do not consider that it would be legitimate to draw adverse inferences from its refusal to broaden their scope even further.

THE SECOND ISSUE

66. Having excluded from consideration the four employees of LCC, I must now turn to consider the proper scope of disclosure of documentation of 22 employees and former employees of the defendant.

67. The claimants seek to include within the parameters of the documents to be searched a broad range of potential sources of relevant material with reference to the categories listed in PD31B para. 5(3) in which 'Electronic Document' is defined as:

> "…any document held in electronic form. It includes, for example, email and other electronic communications such as text messages and voicemail, word-processed documents and databases, and documents stored on portable devices such as memory sticks and mobile phones. In addition to documents that are readily accessible from computer systems and other electronic devices and media, it includes documents that are stored on servers and back-up systems and documents that have been deleted. It also includes metadata and other embedded data which is not typically visible on screen or a print out…"

68. In response, the defendant seeks to limit the scope of disclosure to certain distinct sources of potential information.

69. A problem arises from the fact that even at the time that written submissions were first made in December 2019, there remained confusion over what sources of electronic documentation were available in respect of which custodian.

70. The defendant accepts that employees were issued with relevant work related electronic devices which might have included a combination of mobile phones, computers and tablets. To the extent that any employee used such a device to send emails via "Outlook" then these would have been mirrored on the defendant's server.

71. The defendant does not dispute that it is appropriate for it to disclose the fruits of the application of the relevant search terms to the shared

investigation folder relating to Operation Best. It contends, however, that it would be wrong to extend the search to the personal "Y" drive accounts of the individuals who have been identified as custodians or, indeed to any other electronic potential source of information.

72. I share the claimants' concern that the position regarding the defendant's disclosure is unclear and has presented something of a moving target. However, I am reluctant at this stage to make an order for disclosure which runs the risk of being wholly disproportionate before satisfying myself as to the full range of potential material in dispute and the extent of the efforts which would be required to search it. As it stands, the parties' respective positions on whether the extent of disclosure proposed by the defendant is reasonable have, to a significant degree, reached a deadlock the resolution of which depends in part upon speculative inferences from incomplete information.

73. Although recognising the likely detrimental impact on the future procedural progress of this case, I have concluded that greater clarity is required and this should be achieved by an order in the following terms:

> "The defendant is required by 17 April 2020 to file and serve upon the claimants a document containing the following:
>
> (i) In respect of each custodian identified in Appendix A to the draft order of the claimants appended to their written submissions of 16th December 2019 (not including the four LCC employees) the following information:
>
> (a) Over what period each of them were employed by the defendant;
>
> (b) A list of which work related electronic devices and over what period were issued or made available to each of them including, but not limited to: mobile telephones, tablets, memory sticks and computer hard drives and servers;

(c) Whether or not the "Y" drive associated with that custodian is capable of being accessed and, if not, precisely what factor or factors preclude such access.

Where the defendant contends that, in respect of any given custodian any or all of the information referred to above, it is not reasonably practicable to obtain it then an explanation will be provided.

(ii) An estimate of the time required and expense which would be likely to be incurred in applying the search terms set out in the Appendix to the devices listed under (b) above and the accessible "Y" drives under (c) above respectively (taking into account the deployment of such electronic tools as may reasonably be available to minimise the need for individual review) as evidenced in a witness statement from someone with the requisite expertise in IT."

THE THIRD ISSUE

74. Mr Bourne is one of the custodians falling within the scope of the order made in respect of the second issue. With respect to the other custodians, however, I accept that it would be disproportionate for the Court to make any order in respect of sources of electronic information outside that which may be recorded on work issued devices.

75. As the central figure relating to the claimant's case on misfeasance, however, Mr Bourne may arguably attract a broader approach. In this regard, there appears to have been a mutual misunderstanding between the parties as to what is being proposed by the claimants.

76. The claimants rightly point out, with reference to Article 50 of Bowstead & Reynolds on Agency 21st ed., that it is the duty of an agent "to produce to the principal upon request, or to a proper person appointed by the principal, all books, correspondence and documents (including emails and other electronic material) under his control relating to the principal's affairs."

77. In ***North Shore Ventures Limited v Anstead Holdings Inc*** [2012] EWCA Civ 11, Toulson L J observed:

> "The concept of "right to possession" in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant."

78. In the circumstances, I consider that the appropriate order is:

> "The defendant will, by 27th March 2020, formally and in writing, request Mr David Bourne to produce to it all books, correspondence and documents (including emails and other electronic material) under his control relating to the defendant's affairs and will thereafter use its best endeavours to secure Mr Bourne's compliance with such request.
>
> The defendant will, by 17 April 2020, file and serve a witness statement identifying what step have been taken to comply with the above order exhibiting thereto the request together with any response thereto and subsequent correspondence."

79. I am under no illusion that it is likely that Mr Bourne may not be particularly enthusiastic to comply but this, in itself, is not a reason not to try.

CONCLUSION

80. As I have already observed, the orders I have made are bound, regrettably but unavoidably, to put back the timetable of these proceedings. I would ask the parties to seek to agree a realistic revised timetable. The matter should be relisted before me for a further case management conference on the first available date after 17 April 2020 with an estimated length of hearing of half a day. Such a hearing will deal, inter alia, with any outstanding issues of disclosure, expert evidence and the costs of this application if not agreed.