THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0006

[1] Lau Man Sang, James
[2] Lung Hung Cheuk
[3] Cheung Wing Sum, Albert
[4] Ngai Hin Kwan, Albert
[5] Yeung Yiu Chong
[6] Zhang Guo Wei

Defendants/Appellants

and

[1] King Bun Limited
[2] Kency Ltd
[3] Kar Kwong Development Limited (trading as Kai Kwong Trading Company)
[4] Khi Capital Limited
[5] Kentrue Company Limited
[6] Hui Pak Kong (Suing in the name and on behalf of themselves and all other shareholders in Vanway International Group Limited, except the First and Second Defendants)

Claimants/Respondents

[1] Chau Cheuk Wah, Angus
[2] Vanway International Group Limited

Defendants/Respondents

Heard together with:

BVIHCMAP2022/0028

BETWEEN:

[1] Lau Man Sang, James
[2] Lung Hung Cheuk
[3] Cheung Wing Sum, Albert
[4] Ngai Hin Kwan, Albert
[5] Yeung Yiu Chong

[6] Zhang Guo Wei

Appellants

and

[1] King Bun Limited
[2] Kency Ltd
[3] Kar Kwong Development Limited (Trading as Kai Kwong Trading Company)
[4] Khi Capital Limited
[5] Kentrue Company Limited
[6] Hui Pak Kong
(suing in the name and on behalf of themselves and all other shareholders in Vanway International Group Limited, except the first and second defendants)
[7] Chau Cheuk Wah, Angus
[8] Vanway International Group Limited

Respondents

Before:

The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mde. Vicki Ann Ellis — Justice of Appeal
The Hon. Mr. Gerard St. C. Farara — Justice of Appeal [Ag.]

Appearances:

Mr. Olivier Kalfon with him Mr. Richard Hacker KC, Mr. John Carrington, KC and Ms. Reisa Singh for the Appellants
Mr. Jern-Fei Ng KC with him Mr. Jerry Samuel, Dr. Alecia Johns and Mr. James Bailey for the 1st - 6th Respondents
No appearance for the 7th and 8th Respondents

2023: February 8;
2024: February 15.

Interlocutory appeal – Appellate interference with trial judge's case management orders - Appeal against case management orders made by judge after split trial - Prevention against double-recovery - Election of remedies – Inconsistent and alternative remedies –Whether the trial judge erred by failing to mandate that the respondents elect between an account of profits and damages/compensation - Time of election - Whether the trial judge erred in the exercise of his discretion by making the Consequential Order – Disclosure -Whether the *disclosure ordered by the trial judge in the Directions Order exceeded the information that the respondents were entitled to at that stage*

The underlying dispute in the lower court concerned a derivative action brought by the 1st - 6th respondents as minority shareholders in Vanway International Group Limited (the "Company"). The 1st - 6th respondents were the claimants in the lower court ("the Claimants"), whilst the 1st - 6th appellants and the 7th respondent were the defendants. The defendants at first instance were also the Company's directors (the "Directors"). The Claimants complained that the Directors took a series of steps in 2015 to cause the Company to dispose of certain subsidiary companies (the "Target Group") to the 1st appellant ("Mr. Lau"), by wrongful and/or unlawful means and at a gross undervalue, to the detriment of the Company.

During a case management conference ("CMC") in 2018, the trial judge ordered that the issue of liability was to be determined at a split trial and that the issues of relief and quantum should be stood over for directions by the trial judge. The trial on liability took place over the course of several sittings and eventually, in a written judgment delivered on 20th July 2021, the judge found in favour of the Claimants (the "Liability Judgment"). In October 2021, the court entered an order on judgment (the "Order on Judgment") which, *inter alia*, required the Claimants to file and serve a notice of application with evidence in support, in relation to the consequential orders sought in relation to: (a) relief, (b) costs and (c) further directions for determination of quantum.

The Claimants duly filed the requisite notice of application on 21st October 2021. The following month, the appellants appealed against the Liability Judgment and the Order on Judgment in BVIHCMAP2021/0034 (the "Substantive Appeal"). Shortly thereafter, the appellants sought a stay of the proceedings pending the outcome of the Substantive Appeal (the "Stay Application").

At a hearing on 10th December 2021, the judge dismissed the Stay Application and made two orders. One addressed consequential matters arising from the Liability Judgment (the "Consequential Order"). The Consequential Order is the subject of appeal BVIHCMAP2022/0006 (the "Consequential Appeal") by the appellants. The other order, which is the subject of its own separate appeal, BVIHCMAP2022/0028 (the "Directions Appeal"), gave directions for the trial on quantum (the "Directions Order").

At a hearing on 8th February 2023, the Court of Appeal heard the Substantive, Consequential and Directions Appeals together. By written judgment delivered on 7th July 2023, the Court dismissed the Substantive Appeal and affirmed the trial judge's ruling. Consequently, this judgment addresses and disposes of the Consequential and Directions Appeals.

The appellants' overall submission was that the judge erred in making the Consequential and Directions Orders having misinterpreted the relevant authorities . As to the Consequential Order, the appellants argued that, having prayed for various reliefs including an account of profits and damages/compensation, the respondents were mandated to choose one of these remedies. The appellants asserted that as per the decision of **Personal Representatives of Tang Man Sit v Capacious Investments Ltd**., an account of profits and damages were inconsistent and alternative remedies and therefore, the respondents had to elect between these two remedies before further substantive steps in the relief and quantum trial could take place. The respondents countered that there was no error by the judge since the judge made it clear that the Order was solely concerned with liability. Furthermore, they submitted that paragraphs 1 - 4 of the Order were qualified by paragraphs 5 and 6, which specified that nothing in the Order would entitle the Claimants to double-recovery or to benefit from inconsistent remedies.

As to the Directions order, the appellants argued that the judge erred since the respondents were only entitled to limited disclosure before election. They also contended that the Order was too vague and uncertain. The respondents countered that the judge's approach was appropriate and consistent with the authorities, particularly in light of the appellants' prior disregard for their disclosure obligations.

Held: dismissing the Consequential and Directions Appeals and ordering that the appellants pay the respondents' costs on the appeal and in the court below, to be assessed by a judge of the Commercial Court, if not agreed, within 21 days of the date of this judgment, that:

1. In an appeal against a trial judge's case management decision, an appellate court would only interfere with the judge's exercise of his discretion if it can be shown that he exceeded the generous ambit within which reasonable disagreement was possible. An appellate court is therefore not at liberty to substitute its own exercise of discretion for the discretion already exercised by the judge merely because they would have exercised the original discretion in a different way.

   A.E.I. Rediffusion Music Ltd. v Phonographic Performance Ltd. [1999] 1 WLR 1507 applied; **Roache v News Group Newspapers Ltd** [1998] EMLR 161 applied; **Charles Osenton and Company v Johnson** [1942] AC 130 applied; **Bellenden (formerly Satterthwaite) v Satterthwaite** [1948] 1 All ER 343 applied.

2. The doctrine of election of remedies compels a claimant to choose his/her remedy between two or more inconsistent remedies when two legal theories with contradictory remedies arise out of the same facts. The doctrine prevents double-recovery for a loss from a single wrong. For the doctrine to apply, there must at least be two remedies; these remedies must, in law, be inconsistent; and they must arise from a single wrong. The doctrine would not apply if the remedies are concurrent, cumulative and consistent.

   Clough v London and North Western Rail Co. [1861-73] All ER Rep 646 applied.

3. Built into the doctrine of election, however, is an element of flexibility. It is not rigid and unbending. Like all procedural principles, they are not fixed and unyielding rules. They are a means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties and the wider public interest in the conduct of court proceedings.

Personal Representatives of Tang Man Sit v Capacious Investments Ltd. [1996] A.C. 514 applied.

4. As to the timing of election, this must occur at the time when the judgment is entered. Where litigation is bifurcated and liability is determined as a separate question, election may be deferred. A critical factor in determining the appropriate time at which election should be made is fairness. However, considerations of fairness operate in favour of both parties to the litigation. Accordingly, in the absence of conduct which prejudices the defendant, a claimant should not be called upon to elect until the evidence has established the facts upon which the election can fairly be made. Thus, where a claimant must elect between inconsistent and alternative remedies, he ought not to be mandated to elect unless and until he is able to make an informed choice.

   Minnesota Mining and Manufacturing Co v C Jeffries Pty Ltd [1993] FSR 189 applied; **Island Records Ltd v Tring International plc** [1995] 3 All ER 444 applied; **Immer (No. 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)** (1993) 182 CLR 26 applied; **Peyman v Lanjani** [1985] Ch 457 considered.

5. Although **Personal Representatives of Tang Man Sit v Capacious Investments Ltd.** (and the several cases that follow its reasoning), has generally been referred to as holding that an account of profits and damages/compensation are inconsistent and alternative remedies, this incompatibility has largely been assumed. Ultimately, each case ought to be considered on its own facts. In some circumstances, the question of whether there has been a double-recovery is a pure question of fact, whereas at other times, it is a question of law.

   Peter Birks **Inconsistency between Compensation and Restitution** (1996) 112 LQR 375 considered; Stephen Watterson **Alternative and Cumulative Remedies: What is the Difference?** (2003) 11 RLR 7 considered; Graham Virgo QC **The Principles of the Law of Restitution** 3rd Edition, 2016 considered; **Ramzan v Brookwide Ltd** [2011] EWCA Civ 1033 applied.

6. On the facts, the judge was not prepared to draw any definitive conclusions as to whether the proposed remedies were concurrent, cumulative and consistent, or inconsistent and alternative. This was due to the fact that at the date of the Consequential Order, he was unclear as to the extent to which the remedies pleaded by the respondents were inconsistent or cumulative. His cautious approach, which was reflected at paragraph 6 of the Consequential Order by which the appellants were protected from any attempt by the respondents to benefit from inconsistent remedies, was appropriate in the circumstances as the parties should have the opportunity to address the judge on the relevant facts and the law and authorities regarding election. The judge therefore did not err and it was appropriate that he did not pre-judge these matters before hearing from the parties. Furthermore, the appellants have not demonstrated that they have suffered any actual prejudice as a result of the judge's Order. Taken as a whole, the judge was clearly aware of the relevant legal authorities and principles in making the Consequential Order and

litigation was not at the point where the evidence had established the facts upon which an election could have fairly been made. The Court therefore found that there was no basis upon which to disturb the judge's findings or the terms of the Consequential Order.

Personal Representatives of Tang Man Sit v Capacious Investments Ltd. [1996] A.C. 514 applied.

7. The scope of discovery in relation to an act of election is different from the pre-trial discovery process. In an election, the discovery is more limited as it is merely to assist a claimant in making a choice between remedies. A defendant therefore ought to disclose such documents and information a court considers fair in the circumstances of the particular case, to enable the claimant to make an informed election. This disclosure is not intended to be an onerous and totally accurate exercise since there should not be any undue delay in the process of making an election. Delay may, in fact, prejudice a defendant. The extent of disclosure to be ordered therefore will depend on the facts of each case. A court may thus take into account what information has already been disclosed, whether any information is publicly available or otherwise readily accessible to the claimant, and what information is required for the claimant to identify the most valuable remedy.

   Personal Representatives of Tang Man Sit v Capacious Investments Ltd. [1996] A.C. 514 applied; **Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd and Another** [2008] SGHC 55 considered; **Island Records Ltd v Tring International plc** [1995] 3 All ER 444 considered; **Comic Enterprises Ltd v Twentieth Century Fox Film Corporation (No 3)** [2014] IP & T 1008 applied.

8. On the facts, the judge's finding that the respondents should make an informed decision before election is one that is consistent with established legal principles and procedure. The learned judge did not err when he invited the parties to assist in defining the scope of the disclosure since the determination of relevant remedies would often turn upon facts within the peculiar knowledge of the parties themselves. The lack of practical assistance rendered by the appellants in defining the scope of the disclosure would have placed the judge in a difficult position but he would have been obliged to apply the relevant case law and legal principles to define the scope of disclosure.

9. There was no error on the judge's part in ordering disclosure of documents relevant to the true and fair value of the Target Group. There was no suggestion that this would be a particularly arduous exercise since, as the learned judge found, a business which has kept well-maintained records and has complied with accounting procedures should have no difficulty in producing the evidence. Furthermore, the judge's wording of the Directions Order was clear and unambiguous. The Court found that there was no error in the judge's approach, and he therefore did not err in making the Directions Order.

JUDGMENT

[1] **ELLIS JA**: Before the Court were two related interlocutory appeals in which the appellants challenged two consequential orders made by the judge of the Commercial Division of the High Court after a trial in the commercial court claim BVIHCM2017/0086.

Background

[2] The underlying dispute concerns a derivative action brought by the 1st-6th respondents as minority shareholders in Vanway International Group Limited (the "Company"). The 1st-6th respondents were the claimants in the lower court ("the Claimants"), whilst the 1st-6th appellants and the 7th respondent were the defendants at first instance. The defendants at first instance were also the Company's directors (the "Directors"). The Claimants complained that the Directors took a series of steps in 2015 to cause the Company to dispose of certain subsidiary companies (the "Target Group") to the 1st appellant ("Mr. Lau"), by wrongful and/or unlawful means and at a gross undervalue, to the detriment of the Company. The business of the Target Group was the manufacture and sale in China of a biologically derived painkiller.

[3] During a case management conference in 2018, the judge below ordered that the issue of liability was to be determined at a split trial and that the issues of relief and quantum should be stood over for directions by the trial judge. The trial on liability took place over the course of several sittings and eventually, in a written judgment delivered on 20th July 2021, the judge found in favour of the Claimants (the "Liability Judgment"), determining that the Directors acted in breach of sections 120–122 of the **BVI Business Companies Act**.[1]

[1] Act No. 16 of 2004 of the Laws of the Virgin Islands.

[4] On 6th October 2021, the court entered an order on judgment (the "Order on Judgment") which, *inter alia*, required the Claimants to file and serve, a notice of application with evidence in support, in relation to the consequential orders sought in relation to: (a) relief, (b) costs and (c) further directions for determination of quantum.

[5] The Claimants duly filed the requisite notice of application on 21st October 2021 (the "Consequential Application"). The following month, on 17th November 2021, the appellants appealed against the Liability Judgment and the Order on Judgment in BVIHCMAP2021/0034 (the "Substantive Appeal"). Shortly thereafter, the appellants filed an application for a stay of the proceedings pending the outcome of the Substantive Appeal (the "Stay Application").

[6] At a hearing on 10th December 2021, the judge heard submissions on both the Stay Application and the Consequential Application. The judge dismissed the Stay Application and made two orders. One addressed consequential matters arising from the Liability Judgment, including various orders giving effect to the Liability Judgment (the "Consequential Order"). The Consequential Order (which is the subject of appeal BVIHCMAP2022/0006), provided inter alia:

"**IT IS HEREBY ORDERED AND DECLARED THAT:**

1. The First Defendant is liable forthwith to transfer the Target Group and/or its true and fair value (immediately prior to 20 August 2015) and/or its traceable proceeds, if any, held on constructive trust to Eighth Defendant, (the "Company").
2. The First to Seventh Defendants are liable to account to the Company as constructive trustee for any assets, profits and/or benefits of the Target Group and any dividends or profits received by the First to Seventh Defendants on account of the Sale in breach of their fiduciary duties and/or breach of trust.
3. The First to Seventh Defendants are jointly and severally liable to pay equitable compensation and interest thereon to the Company on account of loss suffered by the Company as a result of their breaches of fiduciary duties and/or breach of trust.
4. The First to Seventh Defendants are jointly and severally liable to pay damages (to be assessed) and interest thereon on account of loss

suffered by the Company as a result of their breaches of their duty to exercise reasonable care, skill and diligence.

5. This Order is subject to the qualifications that:
    (1) Nothing in this Order, nor any election by the Claimants, shall entitle the Claimants to double-recovery, or to pursue, take judgment or otherwise have the benefit of inconsistent remedies.
    (2) Nothing in this Order, nor any election by the Claimants, shall oust or otherwise fetter the discretion of the Court to determine, and to fashion, an appropriate form of relief (the appropriate form of relief always being a matter for the Court).
6. Nothing in this Order, nor any election by the Claimants, shall preclude the Defendants from contending in these proceedings that, by reason of any election, the Claimants are seeking to pursue: inconsistent rights and/or remedies; double-recovery; and/or a legally impermissible combination of rights and/or remedies.
7. The First to Fifth and Seventh Defendants' Stay Application is dismissed."

[7] The other order (which is the subject of its own separate appeal, (BVIHCMAP2022/0028), gave directions for the trial on quantum (the "Directions Order"). The Directions Order provides, *inter alia*, as follows:

"**IT IS DIRECTED AND ORDERED THAT**:

Determination of Quantum and Relief
1. There shall be a further hearing to determine the following issues of quantum and relief (the "Issue of Quantum and Relief"):
    a. Any proprietary relief as against the First Defendant; and/or
    b. The First to Seventh Defendants' liability to account to the Eighth Defendant (the "Company"); and/or
    c. The quantum of equitable compensation payable to the Company by the First to Seventh Defendants; and/or
    d. The quantum of damages payable to the Company by the First to Seventh Defendants.

Disclosure
2. The parties shall give standard disclosure of all documents relevant to the Issues of Quantum and Relief as to the true and fair value of the Target Group, including:
    a. All correspondence, statements, invoices, receipts, books and records relevant to the First to Seventh Defendants' liability to account to the Company as constructive trustee for any assets, profits and/or benefits of the Target Group, and any dividends or profits received by the First to Seventh Defendants on account of

the sale of the Target Group to the First Defendant at an undervalue (the "Sale");

b. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 20 August 2015;

c. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 3 December 2018; and

d. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 20 July 2021.

e. All correspondence, statements, invoices, receipts, books and records relevant to any sale or disposal of the business of the Target Group.

3. The parties shall give standard disclosure on the following terms:

a. Each party shall by 4 p.m. on Friday 18 March 2022 give standard disclosure by list of hard copy documents.

b. Each party shall by 4 p.m. on Friday 18 March 2022 give standard disclosure by list of electronic documents."

[8] The appeals herein are clearly interrelated and in advancing their submissions, the parties have addressed them jointly. In fact, the appeals against both the Consequential Order and the Directions Order have been joined with and heard together with the appellants' appeal in BVIHCMAP2021/0034 on 8th February 2023. However, in a written judgment delivered on 7th July 2023, the Substantive Appeal - BVIHCMAP2021/0034 was dismissed, and the judgment and order of the learned trial judge was affirmed.

[9] This judgment herein therefore addresses and disposes of both the appeal against the Consequential Order (BVIHCMAP2022/0006) and the Directions Order (BVIHCMAP2022/0028) in turn.

The Consequential Order

The appellants' submissions

[10] The overarching submission made by appellants is that the Consequential Order and the Directions Order (together the "Orders") which were made by the judge

were fundamentally misconceived as a matter of principle and involved misinterpretations of the relevant judicial authorities. When reckoned together, these errors lead to the obvious conclusion that the judge's decision in making the Orders exceeded the ambit within which reasonable disagreement is possible and/or was clearly or blatantly wrong.

Election of remedy

[11] The appeal against the Consequential Order engages the principles of avoidance of double-recovery and election between inconsistent remedies. The appellants placed significant reliance on the leading authorities **Personal Representatives of Tang Man Sit v Capacious Investments Ltd.**[2] and **Island Records Ltd v Tring International plc and another**[3] which expound on these principles. They say that having prayed for various reliefs including an account of profits, and damages/compensation, it is incumbent on the respondents to elect and that such election is mandatory. Although they acknowledge that for the limited purpose of enabling the respondents to make an election, the court might order such limited provision of information (whether by disclosure or otherwise) as is strictly necessary to enable an election to be made, the appellants contend that election is necessary before further substantive steps in relation to the relief and quantum trial can properly progress. It follows that the orders sought by the respondents before the judge below were misconceived in principle, and in any event premature and inappropriate at that juncture.

[12] The appellants take issue with several aspects of the learned judge's reasoning. First, the appellants take issue with the following statement by the learned judge:

> "I don't think we know which of these proposed remedies truly are alternative or cumulative in a practical sense even though that distinction could be made at a principal level as a matter of law."[4]

[2] [1996] A.C. 514.
[3] [1995] 3 All ER 444.
[4] Transcript of proceedings on 10th December 2021 pg.134 lines 1-7. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pg. 262.

Counsel for the appellants submitted that this reasoning was wrong and that in refusing to require the respondents to make an election, the judge refused to accept that the relief sought by the respondents was inconsistent and alternative. According to counsel, it is clear that the account of profits on the one hand, and damages or compensation on the other, are inconsistent, and alternative (rather than cumulative) remedies and he submitted that this was expressly confirmed in **Tang Man Sit**.

[13] Counsel submitted that although the judge appeared to have acknowledged that 'as a matter of law' this is so, his reference to it being alternative or cumulative 'in a practical sense' is unclear and in any event, unfounded in principle. He noted that the judge cited no authority for this gloss and pointed out that nothing in **Tang Man Sit** or **Island Records Ltd** makes the need to elect conditional on the remedies being inconsistent or alternative 'in a practical sense'. To the contrary, **Tang Man Sit** makes election mandatory, and explains at page 525B, that accounts of profits and damages/compensation are inconsistent as a matter of principle because they have conceptually distinct and incompatible foundations.

[14] The appellants further take issue with the following statement made by the judge:

> "…should be a Case Management Conference after the disclosure segment of the quantum proceedings so that the Court can be addressed at that point on further remedies that might be required. And, of course, in relation to the need or the ability at that point to elect between alternative remedies."[5]

[15] Counsel for the appellants submitted that the logical corollary of the Directions Order (and the Consequential Order, and the judge's rejection of the appellants' draft order), is that the learned judge did not consider that the election between an account of profits and compensation/damages had to be made before ordering substantive disclosure. Instead, the judge appears to have contemplated that all

[5] Transcript of proceedings on 10th December 2021 pg.136 lines 23-25 and pg. 137 lines 1-2. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pgs. 264-265.

relief, even though inconsistent and alternative (as a matter of law), could be pursued up to the close of the quantum and relief trial.

[16] Counsel argued that this aspect of the judgment dovetails with the submission advanced by the respondents that the court was “not being asked to resolve who is right on these substantive points about double-recovery and whether or not there is a duty to elect, et cetera.” He pointed to the following excerpt from the respondents’ submissions:

> “In my submission, the way of dealing with this pragmatically is to provide for a CMC, Case Management Conference to be scheduled to take place after disclosure has been provided per paragraph 2 of the Claimants' Draft Directions Order where any issues of election, whether or not they arise, and if so how they should be properly resolved, can be properly argued before the Court and any substantive disputed issues in relation to the ostensible duty to elect can be resolved by the Court after the Court has been fully briefed in writing and obviously orally by way of argument by the parties in respect of the issue or against the backdrop of disclosure having already been provided in terms of what's been set out in paragraph 2 of the Claimants' Draft Directions Order.”[6]

[17] Counsel for the appellants submitted that not only is there unequivocally a need to elect, but there is a requirement to consider this issue at an early stage, and without delay.[7] Counsel argued that the approach of the judge in this regard was therefore wrong in principle because the need to elect should have been at the forefront of the judge’s mind at the hearing, and before (not after) orders were made, including providing for substantive disclosure. While the appellants accept that some information would have to be provided before the election was required to be made, they say that none of that detracted from the need for the judge to ensure that the exercise of the right of election was not unreasonably delayed to the prejudice of appellants.

[6] See appellants’ submissions filed on 18th March 2022. BVIHCMAP2021/0034 Hearing Bundle Volume 1B pg. 531.
[7] See Island Records Ltd v Tring International plc and another [1995] 3 All ER 444 at pg. 447.

[18] Counsel for the appellants further submitted that the judge misunderstood the following excerpt from the judgment of Lord Nicholls of Birkenhead in **Tang Man Sit**, at page 522:

> "The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings."

[19] Counsel posited that the judge appeared to treat this passage as creating a general flexibility or discretion which exculpated him from having to engage with the issues that the principle of election presented in the orders sought by respondents. Counsel submitted that in this regard, the learned judge erred because the potential flexibility which is referred to here is not in relation to the need to elect, to do so without unreasonable delay, and to avoid ordering inconsistent remedies. Rather, it refers to the court's analysis of whether an inference can be drawn that an election was made, and the consequences of an election. According to counsel, the court's observations (set out below) make it clear that the reference to flexibility is a reference to the principle that the election is final and finite:

> "In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality."[8]

[20] Counsel concluded that the approach of the judge to the Consequential Order was therefore founded on errors of principle.

[8] Transcript of proceedings on 10th December 2021 pg.133 lines 18-22. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pg. 260.

The respondents' submissions

[21] In response, the respondents submitted that the appellants' appeal against the Consequential Order is premised on a distorted view of the approach taken by the judge in considering the need to elect between inconsistent remedies. Counsel for the respondents submitted that in order to understand the judge's approach to the issue of election it is important to have regard to paragraphs 5 and 6 of the Consequential Order (which qualify paragraphs 1 – 4 of the Order) and he lamented the fact that these paragraphs have been largely ignored by the appellants. The respondents submitted that all of the criticisms levied by the appellants are attributable to their willful disregard to the qualifications contained within paragraphs 5 and 6 of the Consequential Order, which state in unequivocal terms that "[n]othing in this Order, nor any election by the Claimants, shall entitle the Claimants to double-recovery, or to pursue, take judgment or otherwise have the benefit of inconsistent remedies."

[22] To stress the point, counsel for the respondents cited the relevant paragraphs of the Consequential Order which are highlighted below:

> "1. The First Defendant is liable forthwith to transfer the Target Group and/or its true and fair value (immediately prior to 20 August 2015) and/or its traceable proceeds, if any, held on constructive trust to Eighth Defendant, (the "Company").
>
> 2. The First to Seventh Defendants are liable to account to the Company as constructive trustee for any assets, profits and/or benefits of the Target Group and any dividends or profits received by the First to Seventh Defendants on account of the Sale in breach of their fiduciary duties and/or breach of trust.
>
> 3. The First to Seventh Defendants are jointly and severally liable to pay equitable compensation and interest thereon to the Company on account of loss suffered by the Company as a result of their breaches of fiduciary duties and/or breach of trust.
>
> 4. The First to Seventh Defendants are jointly and severally liable to pay damages (to be assessed) and interest thereon on account of loss suffered by the Company as a result of their breaches of their duty to exercise reasonable care, skill and diligence.

5. This Order is subject to the qualifications that:

(1) Nothing in this Order, nor any election by the Claimants, shall entitle the Claimants to double-recovery, or to pursue, take judgment or otherwise have the benefit of inconsistent remedies.
(2) Nothing in this Order, nor any election by the Claimants, shall oust or otherwise fetter the discretion of the Court to determine, and to fashion, an appropriate form of relief (the appropriate form of relief always being a matter for the Court).

6. Nothing in this Order, nor any election by the Claimants, shall preclude the Defendants from contending in these proceedings that, by reason of any election, the Claimants are seeking to pursue: inconsistent rights and/or remedies; double-recovery; and/or a legally impermissible combination of rights and/or remedies." (Emphasis added)

[23] Counsel for the respondents submitted that in his *ex-tempore* judgment, the learned judge left no room for doubt that the Consequential Order was only concerned with the issue of liability. In support, he cited the following excerpt from the judge's reasoning:

> "Turning then to the Declarations Order [i.e. the Consequential Order], I think it needs to be understood that at this point we have all come out of the trial on liability, and that can be summarised as in essence this. That in accordance with the Court's findings, having heard the parties after a plenary trial, the liability has been established by those particular Defendants to the Claimant. And that establishes a marker in the sand. And what flows from it is that from that liability a number of different types of relief naturally follow. Yes, there may need to be an election if they are truly alternative.
> Again, at this point in time I think it is premature to decide which of these remedies are truly alternative and which are truly cumulative. There is nothing wrong with an Order which declares that in principle, which is what it would be, these matters as set out are what the Claimant is entitled to."[9] (Emphasis added)

[24] Counsel submitted that the learned judge would have made clear that the purpose of these Orders would be, "to spell out what the legal consequences are of the Court's findings in the judgment ... [W]hat we're doing now is just specifying the

[9] See respondents' submissions filed on 13th April 2022. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pg. 60.

liability. Any election that needs to be done comes later. (Emphasis added)."[10] The judge would have also explained that his reason for making orders containing findings as to liability was to avoid the "pernicious mischief in hearings ending without orders being settled which only leads to further hearings and inevitably the lawyers for some reason do not agree."

[25] Counsel submitted that paragraphs 1 to 4 of the Consequential Order are therefore clearly aimed at giving effect to the judge's finding that the appellants are liable to the respondents and setting out the range of potential remedies that the respondents are, in principle, entitled to. Reinforcing that the Consequential Order is solely concerned with liability and not ultimate relief are paragraphs 5 and 6 of the Consequential Order. He submitted that these paragraphs confirm that questions of relief will be resolved at a later stage; that the court has the ultimate discretion to fashion the final relief; and crucially, that the respondents are precluded from seeking to obtain or benefit from inconsistent remedies or double-recovery.

[26] According to counsel for the respondents, these factors confirm that the judge was keenly aware of the principles of election and avoidance of inconsistent remedies and fatally undermines the notion that the judge had no regard to the relevant legal principles.

[27] Tuning to the relevant legal principles, counsel for the respondents submitted that there is no basis for the appellants' assertion that the judge failed to properly apply the judgment in the seminal case of **Tang Man Sit**. Counsel pointed out that there are several stark contrasts between **Tang Man Sit** and the instant case. First, the Consequential Order is concerned only with the issue of liability, not ultimate relief. Second, in the instant case, the judge heard detailed submissions with respect to election and the need to avoid double recovery and – critically addressed these

[10] See respondents' submissions filed on 13th April 2022. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pg. 61.

matters both in paragraphs 5 and 6 of the Consequential Order and in his *ex-tempore* judgment. The whole purpose of these paragraphs was to prevent double recovery and facilitate the process of election. This case is therefore far removed from **Tang Man Sit** where the error that Their Lordships identified was that no thought had been given at the point that summary judgment was given as to the inconsistency between those remedies[11] whereas in this appeal, the judge clearly had in mind the need to avoid double recovery and inconsistent remedies.

[28] Counsel for the respondents further submitted that the judge's approach to the issue of election was entirely prudent and proper. He posited that while the respondents readily accept that the account of profits remedy will ordinarily be inconsistent with an award of damages for the same wrong, the judge's cautious approach to this issue is consistent with authoritative legal learning and he cited in support the following passage from Graham Virgo QC's **The Principles of the Law of Restitution**[12] at page 440:

> "It does not follow from the decision of the Privy Council in Tang Man Sit that gain-based and compensatory remedies are necessarily inconsistent, although great care must be taken to ensure that the two remedies are compatible. For example, in Tang Man Sit itself if the claimant had elected to take the profits it is clear that it could not also have claimed compensation for the income it had lost from being unable to lease the properties, since the defendant's profits arose from the same event which caused the claimant's loss, namely that the defendant rather than the claimant had leased the properties. But there would have been nothing to stop the claimant seeking, in addition to the remedy of an account of profits, compensation in respect of the capital loss to the properties arising from the breach of trust, namely that the tenancies had resulted in wear and tear to the properties and that the value of the properties had decreased by reason of their being leased.
>
> The crucial question in determining the compatibility of the remedies is whether the award of a gain-based remedy reduces the claimant's loss. If it does, it follows that compensatory and gain-based remedies are inconsistent and the claimant must elect between them." (Emphasis added)

[11] Supra n. 2 at p. 526C-E.
[12] 3rd Edition, 2016.

[29] Counsel further submitted that a critical feature in the **Tang Man Sit** case was that the compatibility of particular remedies would not have been readily apparent unless the claimant was in an informed position as to his losses and the defendant's gains. Counsel pointed out that in the present case the respondents still have no discernibility as to the extent of the Company's losses or the appellants' gains. Given the appellants' flagrant breaches of disclosure orders of the court, it is not surprising that the judge made express reference to the appellants' "egregious attempt to suppress documents in the procedure leading up to trial" as one of the factors that made it difficult to conclusively determine at this stage which remedies are alternative, and which are cumulative.

[30] A further factor which may have informed the learned judge's cautious approach is the fact that in the instance case there are multiple defendants, only one of whom owns (or is understood to own) the Target Group. It follows that difficult questions may also arise as to the consistency of remedies as between the body of defendants. Considering these factors, counsel argued that the judge rightly adopted a cautious approach, whereby questions of election and inconsistency between remedies would be addressed later. He submitted that in doing so, the learned judge did not in any meaningful sense refuse to decide that particular remedies were inconsistent or refuse to require the respondents to make an election, but rather deferred all such questions until the appropriate time. Counsel submitted that this approach is not inconsistent with the principles articulated in **Tang Man Sit**. In fact, the judge relied on the following excerpt from Lord Nicholls of Birkenhead's judgment which emphasised the flexibility afforded to the court in fashioning appropriate procedural orders relating to election:

> "In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. The principle, however, is not rigid and unbending. <u>Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely, that proceedings</u>

should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings."[13] (Emphasis added)

[31] Counsel submitted that contrary to the appellants' written submissions, the judge did not "treat [this passage] as creating a general flexibility or discretion which exculpated him from having to engage with the issues that the principle of election presented in the orders sought by [the respondents]." Rather, the judge relied upon Lord Nicholls' comments about procedural flexibility only in relation to the question of when any election would take place and the scope/nature of the disclosure exercise. Indeed, at no point did the judge suggest that he could avoid dealing with the issue of election. Rather, the judge indicated that because any need to elect would only arise after the appellants had complied with their disclosure obligations; the safer course was to deal with the issue then, rather than at the hearing.

[32] Counsel for the respondents further submitted that it is equally misguided for the appellants to suggest that the judge "appears to have contemplated that all relief, even though inconsistent and alternative (as a matter of law), could be pursued up to the close of the quantum and relief trial." Counsel pointed out that both in his *ex-tempore* judgment and in the Directions Order, the judge made it clear that a case management conference would be held after the election disclosure had been completed, at which "directions may be given as to the election of relief by the claimants, and the production and exchange of position statements (verified by statements of truth) by the parties." Plainly, the judge accepted that the question of election (if it arises) would be dealt with at or shortly after the case management conference and long before the 'close of the quantum and relief trial.'

[33] Counsel further submitted that it would be illogical for the judge to require the respondents to make an election before the scheduled case management conference as is suggested by the appellants because in his reasons, the judge

[13] Supra n. 2 at pgs. 521-522.

made clear that he wished to hear further submissions as to the issue of election at the case management conference. Counsel submitted that there is therefore no basis for disturbing the Order.

[34] Finally, counsel submitted that the respondents cannot seek or obtain double recovery, nor can they avoid the need to make any election required of them as this is plainly prohibited by the authorities and the express terms of the Consequential Order. Counsel submitted that rather than being prejudiced by the judge's approach, the appellants are fully protected against any attempt by the respondents to seek to benefit from any remedies that are inconsistent. The case law makes clear that the respondents do not need to make any election required of them until after the completion of the disclosure exercise. As election is not yet necessary, it was premature to make such an order and safer to wait until issues of quantum and relief have been brought into the light.

Appellants' submissions in reply

[35] In skeleton arguments advanced in reply to the respondents' case, the appellants took issue with the respondents' characterisation of the Consequential Order. Counsel for the appellants submitted that on any fair reading of the respondents' submissions, the Consequential Order served absolutely no purpose at all, and the hearing at which it was made involved a complete waste of the court's time and the parties' costs because the Order did no more than to identify the types of relief which might be open to the respondents to elect at some future (but unspecified) time, whilst (apparently) making it clear that the court was making no decision at all as to whether or not their election would be valid and/or whether the heads of relief referred to in the Order would actually be available to the respondents.

[36] Counsel for the appellants submitted that this characterisation fails to have regard to the wording of paragraphs 1– 4 of the Consequential Order which involve declarations as to the respondents' rights. Paragraphs 1- 4 are set out above at pages 7-8 of this judgment.

[37] With regard to the declaration in paragraph 1 of the Consequential Order, counsel submitted that this Order is fatally misconceived in law. Counsel posited that not only has no legal basis been argued by respondents for the declared constructive trust, but the declaration confuses the trust subject, and purports to declare a trust over the 'true and fair value,' which is simply wrong in law. Counsel noted that the respondents' contention, that '[t]he precise wording of the various forms of relief referred to in [paragraphs] 1- 4 has no bearing at this stage' must stand as a tacit admission that the formulation of declarations has gone seriously awry, and that the declarations are unsustainable.

[38] Counsel further submitted that contrary to what is represented by the respondents, the hearing did, indeed, have a purpose and that was - in apparent ignorance or complete disregard for the principle of election - to obtain the final relief to which they considered that their victory at trial entitled them. He submitted that the judge, regrettably, fell into error and premised the approach to, and wording of, the Consequential Order on the basis of a wholly impermissible objective.

[39] As to the point at which election must be made, counsel submitted that this has been clarified in the judgment of Lightman J in **Island Records Ltd** where the court had to consider whether a plaintiff must elect at, or before, judgment being entered on liability, or whether it can be delayed pending 'sufficient information to make an informed election.' At page 447, Lightman J stated:

> "[a] right of election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in case of both the two alternative remedies."

[40] Counsel reiterated that such an election must be made, and 'should not be unreasonably delayed to the prejudice of the defendant.' Counsel further submitted

that at page 447 of the judgment in **Island Records Ltd**, the court prescribed a procedure for election with 'reasonable promptitude'[14] in the following terms:

> "In my view, the Court can at the split trial or on any other application for judgment be invited to defer entry of judgment for damages or profits. At this stage the court may either make no order as to the remedy for infringement (as in the Minnesota case) or (as I would prefer) may grant a declaration that the plaintiff is entitled at his election to judgment for either."

[41] In these premises, counsel submitted that the appropriate course which the judge below should have adopted is as follows:

> (1) Require an election at, or before, judgment being entered on liability; or,
> (2) Defer this election for a limited period (for the purpose of enabling limited disclosure to assist with election), and:
>> (a) Make no order relating to relief; or
>> (b) "[G]rant a declaration that the plaintiff is entitled at his election to judgment for either [damages or profits]."

[42] Rather than adopting this course, the judge set out a range of potential remedies that the respondents are in principle entitled to but did not require an election to be made and did not prescribe when such election must be made. The judge also did not actually provide that election would be resolved before the relief and quantum trial.

[43] As it relates to the import of paragraphs 5 and 6 of the Consequential Order, counsel for the appellants submitted that it is not at all clear how the respondents said that these paragraphs answer the appellants' complaints. He argued that the respondents' contention that '[t]he whole purpose of paragraphs 5 and 6 is to prevent double recovery and facilitate the process of election' is plainly wrong because:

(1) Paragraphs [5] and [6] do not provide for an election, nor order one. Nor do they provide that the issue of election will be addressed at the future.

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[14] Lightman J made an order for limited information to be provided to the plaintiff so that an election could be made. Lightman J ordered that the election be made within 7 days of receipt of this information.

(2) They are lifted from the appellants' draft order, but that draft order followed the procedure set out by Lightman J, providing a mechanism for election. It was those parts of the draft order which 'facilitate the process of election' and which the judge (wrongly) excluded from the Consequential (and Directions) Order.

(3) Even at the hearing, the respondents' argument was that the transposition of these provisions from the appellants' draft would prevent double-recovery; not that it would deal with election.

[44] As to the respondents' argument that election should be deferred as it is "presently unclear as to the extent to which the remedies pleaded by the [r]espondents are inconsistent remedies or cumulative remedies," counsel for the appellants submitted that it is beyond clear that, as a matter of law, an account of profits and compensation/damages are inconsistent remedies, and an election must be made between them. Counsel reiterated that it is now well established in law that "[a]n account of profits and equitable compensation are alternative, inconsistent remedies, and a claimant must elect between them."[15] Counsel further explained that election is not just about avoiding double-recovery. It is required because an account of profits has a basis conceptually distinct from (and inconsistent with) that for compensation or damages. The former is about wrongful profit, the latter about wrongful loss.

[45] In these premises, counsel for the appellants submitted that the judge's assertion that one could not know "which of these proposed remedies truly are alternative or cumulative in a practical sense even though that distinction could be made at a principal level as a matter of law" is wrong and unfounded in law. He submitted that the respondents' purported reliance on the academic writings of Graham Virgo QC's **The Principles of the Law of Restitution** does not assist the respondents because

[15] See Recovery Partners GP Ltd and another v Rukhadze and others [2022] EWHC 690 (Comm) at para. 239(a); Snell's Equity 34th Edition, 2022 at 7-052; Personal Representatives of Tang Man Sit v Capacious Investments Ltd [1996] A.C. 514, at 521B, per Lord Nicholls of Birkenhead.

this learning was not before the learned judge when he delivered his immediate *ex-tempore* judgment and so it could not have been in the judge's mind. Counsel further submitted that on the proceeding page, at page 439, Virgo QC explains that an account of profit and compensation/damages are inconsistent remedies for which an election is required.

[46] To the extent it is suggested that an account of profits is not an alternative remedy to compensation/damages, then he is wrong as the position is well set out in the authorities. Moreover, counsel submitted that the respondents have simply ignored the fact that Virgo QC was talking in general, hypothetical terms; "[i]t does not follow from the decision of the Privy Council in **Tang Man Sit** that gain-based and compensatory remedies are necessarily inconsistent, although great care must be taken to ensure that the two remedies are compatible." Virgo QC is simply not saying that an account of profit and compensation/damages are not inconsistent remedies. Rather he is suggesting that it is possible to imagine a situation where a restitutionary and compensatory award might not be inconsistent. In this case, however, the respondents have utterly failed to identify the reason why in this case the remedies sought are not inconsistent and incompatible.

The Directions Order

The appellants' submissions

[47] Regarding the Directions Order, the appellants submitted that the orders made are inconsistent with, and contrary to, the limited entitlement that the respondents have for the provision of information (whether by limited disclosure or otherwise) prior to election. Counsel submitted that the information that the respondents are entitled to is a limited one; it is not full disclosure of the sort that might be ordered after election. Counsel referred the court to the judgment in **Island Records Ltd** which outlined the appropriate consequential orders that a court could make following a split trial where alternative and inconsistent relief was claimed. At page 447, Lightman J explained:

> "At this stage the court may either make no order as to the remedy for infringement (as in the Minnesota case) or) as I would prefer) may grant a declaration that the plaintiff is entitled at his election to judgment for either."

[48] Counsel submitted that if disclosure is ordered at this stage, it should be limited, and for the narrow purpose of providing sufficient information to enable a claimant to make an election. It should not be the full or substantive disclosure that could be ordered as part of the relief trial, which could only take place once the remedy had been elected. He cited, in support, the case of **Tang Man Sit** where, at page 521G-H, the Board referred to the role of this limited disclosure as "to give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy."

[49] Counsel further submitted that the case law has also provided practical guidance about the scope of such disclosure. In **Island Records Ltd** for example, Lightman J, at page 448, explained that:

> "There should be no over-lengthy or unnecessarily sophisticated exercise. The plaintiff is not entitled to know exactly the amount of any damages or profits to which he is entitled, but only to such information as the court considers to be a fair basis in the circumstances of the particular case for an election."

[50] Counsel for the appellants commended the judgment of Jacob J who, in reviewing the authorities in **Brugger v Medicaid**,[16] asked himself "how much information should the defendants have to compile before the plaintiffs have to make their election." The learned judge then continued "[a]n extreme view would be that the defendants should in effect provide all the information necessary for the account. That would involve not only ascertaining the precise numbers of infringing devices sold and the precise prices they were sold at, but would involve what could well be in many cases complicated questions of costing." He rejected this approach, emphasising just how wide and burdensome this would make the disclosure, especially given the nature of modern business. Jacob J then addressed the

[16] [1996] FSR 362.

claimant's request for audited schedules "setting forth the number of nebulizers made and sold and the sums received or receivable." He again rejected this request stating "[t]hat could potentially involve a substantial amount of work and I do not believe that was what was envisaged in the Island Records case." He went on to hold that an affidavit giving estimates of the figures relevant to valuation, and the basis for these estimates would be sufficient.

[51] Applying these dicta, counsel for the appellants submitted that the broad ranging disclosure ordered by the judge significantly exceeds the information that the respondents are, on the basis of established principle, entitled to at this stage. He argued that it is self-evident that no attempt was made to limit the scope of disclosure to that which would "give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy." See **Tang Man Sit**.

[52] Counsel further argued that it is clear from his *ex-tempore* judgment that the judge misunderstood the nature or extent of the disclosure that he was ordering. He apparently contemplated that the way in which the limitation on disclosure would work would be for appellants themselves to decide whether they should, when giving disclosure, limit such disclosure down. Counsel argued that it is the court that makes an order defining and limiting the scope of the information to be provided.

[53] Secondly, and in any event, counsel for the appellants submitted that the judge appears to have been influenced by matters which did not logically support the disclosure orders made. These include the fact that the present limited extent of information about 'the accounts of the company' justified the disclosure ordered and the fact that his previous findings of failings on the part of appellants as to disclosure justified the disclosure ordered.

[54] In responding to the frank criticisms levelled at the appellants' past conduct in litigation and the allegation that they "flagrantly failed to disclose the documents required of them by the [j]udge in the Directions Order," the appellants (in reply) described this as naked mudslinging relating to matters which were irrelevant to the appeal, and which were inadmissible and should be struck out.

[55] Counsel further submitted that the judge acknowledged that the first part of the split trial was concerned with liability and so the disclosure order that had been made at the case management hearing prior to the liability trial only provided for disclosure going to the issue of liability. Further, in his judgment on liability, he accepted that matters post-dating 2015 were not relevant to the issue of liability. Counsel argued that all that the limited financial information showed as at the hearing was that it was appropriate to make an order to provide the respondents with information to enable them to make an informed election (something that was not disputed by the appellants). It did not justify either departing from the principle in cases like **Island Records Ltd**, or the wide terms of the Directions Order.

[56] The appellants also complain that the disclosure provisions in the Directions Order were set out in terms that were too vague and uncertain. Counsel submitted that it is a basic, and self-evident principle, that a party should be able to know from an order the action with which he must comply. See **Morgans (a firm) v Needham**.[17] In citing his concerns, counsel for the appellants noted firstly that the disclosure is defined by reference to the 'Issues of Quantum & Relief,' which are themselves defined in paragraph 1 of the Directions Order as the issues of proprietary relief, account of profits, compensation, and damages, with no greater refinement. Secondly, he submitted that it is not possible to refine the issues relating to these potential forms of relief further by reference to any pleaded case, as the appropriate relief is skeletally pleaded by the respondents, amounting to not much more than a prayer for relief. Thirdly, counsel submitted that while the disclosure is to relate to 'the true and fair value' of the Target Group, the value is itself a matter for

[17] [1999] EWCA Civ J0113-3.

informed judgment in all the circumstances. He noted that 'true and fair value' as expressions, themselves connote an element of judgment on the part of the value and fourthly, he submitted that the order is cast in unqualified terms stating that the appellants must disclose 'all documents,' while on a plain reading the reference to 'including' is non-exhaustive.

[57] Finally, the appellants contend that although the other directions made at paragraphs 5-18 of the Order are only said to be provisional, they are consequential upon the approach the judge took to election and the appropriate disclosure at this stage. It follows that the errors of the judge as identified above infect some of these directions too, such that they should not have been made, or made in the terms they were. The appellants take issue with the following - (1) the fact that the Order provides for a further case management conference on the basis that the respondents should have elected between inconsistent remedies prior to that hearing to give any further case management conference the necessary focus; (2) the fact that it makes provision for directions as to witness statements to be given at the case management conference as such directions cannot sensibly be given until an election is made by the respondents; and (3) the directions in relation to expert evidence, and in particular the dates of valuation on the basis that it is premature to make such orders. Counsel noted that as there has yet been no election or disclosure by the respondents, the judge was effectively determining the dates for valuation in a vacuum.

The respondents' submissions

[58] In response, the respondents pointed out that the appellants' challenge related principally to the scope of the disclosure exercise ordered by the judge in that Order. While the appellants do not contest that the respondents are entitled to "the provision of information (whether by limited disclosure or otherwise) at this stage (i.e. prior to election)," they argue that the disclosure exercise ordered is broadly couched and excessive, primarily because the judge supposedly misunderstood and misapplied the principles regarding election between

inconsistent remedies. This contention was robustly disputed by the respondents who submitted that the disclosure exercise ordered by the judge was both appropriate and consistent with the authorities on election, especially in light of the appellants' prior disregard for their disclosure obligations.

[59] Moreover, counsel submitted that, if the disclosure order is broader than it might be, this is because the respondents and the judge were left to fashion the scope with their eyes closed as to what documentation exists. Counsel argued that although the appellants complained that the draft order was too broad, they have done little to assist in narrowing it. To illustrate, counsel for the respondents noted that the judge was faced with two divergent approaches as it relates to disclosure. In the case of the respondents, they specified the classes of documents which they considered ought properly to be disclosed. In their draft directions order prepared for the hearing, they suggested the following:

> "2. The parties shall give standard disclosure of all documents relevant to the Issue of Quantum as to the true and fair value of the Target Group, including:
>
> > a. All correspondence, statements, invoices, receipts, books and records relevant to the First to Seventh Defendants' liability to account to the Company as constructive trustee for any assets, profits and/or benefits of the Target Group, and any dividends or profits received by the First to Seventh Defendants on account of the sale of the Target Group to the First Defendant at an undervalue (the 'Sale');
> >
> > b. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 20 August 2015;
> >
> > c. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 3 December 2018; and
> >
> > d. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 20 July 2021.
> >
> > e. All correspondence, statements, invoices, receipts, books and records relevant to any sale or disposal of the business of the Target Group."[18]

[18] See respondents' submissions filed 13th April 2022. BVIHCMAP2021/0034 Hearing Bundle Volume 1B pg. 555.

[60] The appellants on the other hand would have submitted that “[i]t is for the Claimants to identify and persuade the court that they are entitled to and that what they seek is to be classed as information that is reasonably required in order for them to make their election and that is why at the moment that is blank” and their proposed draft contained three large open empty square brackets.

[61] Counsel for the respondents submitted that in the face of these contrasting positions, the judge rightly favoured the respondents’ formulation of the disclosure exercise as it was the only concrete, targeted and specific proposal on the table. He further submitted that if there was evidence to suggest that a narrower exercise might have been sufficient to enable an informed election – thereby saving both costs and time – the judge might have made such an order. However, given that the party recommending the narrower approach was unable or unwilling to translate their purported point of principle into anything more specific than three large open empty square brackets, counsel submitted that the judge was perfectly entitled to adopt the wording in the respondents’ draft order.

[62] Counsel further submitted that there was nothing oppressive about the scope of the disclosure order and that it is utterly misconceived for the appellants to contend that, “the Judge misunderstood the nature or extent of the disclosure that he was ordering” on the basis that he apparently contemplated that the way in which the limitation on disclosure would work would be for “[the appellants] themselves to decide whether they should, when giving disclosure, cut that disclosure down.” According to counsel for the respondents, the judge was clearly concerned about the appellants’ history of deliberately suppressing documents in breach of orders of the court and was disinclined to permit the appellants to unilaterally define the scope of the disclosure exercise to be undertaken. Counsel pointed out that this is reflected in the judge’s rhetorical question:

> "[w]ho is going to limit [the disclosure]? The Defendants? That appears to have been what they did in the past. That will not be tolerated, because they cannot be the judge in their own court."[19]

[63] Counsel also pointed to other parts in the transcript where the judge's concerns would have been frankly articulated and he concluded that the learned judge would have rightly identified that if the disclosure exercise were to be drafted in overly precise terms, it would only increase the likelihood that the appellants would seek to identify loopholes and hide behind technical literalistic arguments. Counsel further submitted that the learned judge's concerns about the true motivations underlying the appellants' attempts to limit the disclosure exercise on account of their prior suppression of documents were clearly warranted because after comprehensively failing to obtain a stay of their disclosure obligations pending the outcome of their appeals on three separate occasions, the appellants wrote requesting an extension citing reasons which were contrived, vague and entirely without merit. The respondents accordingly rejected their proposal and on the deadline itself, the appellants filed an extension application relying upon the same contrived reasoning. Counsel submitted that the appellants are once again, in flagrant breach of their disclosure obligations and that as at the date of these submissions they have failed to disclose a single document. He concluded that the appellants' attempts to delay or avoid their disclosure obligations, or to impose "limitations" on the exercise, have been made in order to frustrate the process in the hope that as many damaging documents as possible can be suppressed.

[64] Regarding the other provisional orders in the Directions Order, counsel submitted that these reflect a sensible framework for the future conduct of the proceedings, taking account of the information available at the date of the hearing. In any event, in light of their provisional nature, counsel submitted that it would be inappropriate for this Court to disturb them.

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[19] See respondents' submissions filed on 13th April 2022. BVIHCMAP2021/0034 Hearing Bundle Volume 1B pg. 558.

Discussion and Analysis

[65] This is an appeal against the exercise of the learned judge's case management discretion. It is the law that an appellate court will only interfere with the exercise of a judge's discretion if it can be shown that the judge has 'exceeded the generous ambit within which reasonable disagreement is possible.' The test has alternatively been expressed by Lord Woolf MR in **A.E.I. Rediffusion Music Ltd. v Phonographic Performance Ltd.**[20] citing Stuart-Smith LJ in **Roache v News Group Newspapers Ltd**[21] as follows:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[66] The general test has two limbs. The first condition was explained by Viscount Simon LC in **Charles Osenton and Company v Johnson**[22] where the Lord Chancellor stated:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified."

[67] The second condition was explained by Asquith LJ in **Bellenden (formerly Satterthwaite) v Satterthwaite**:[23]

> "We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable

[20] [1999] 1 WLR 1507 at p. 1523 C-D.
[21] [1998] EMLR 161.
[22] [1942] AC 130 at p. 138.
[23] [1948] 1 All ER 343 at p. 345 B.

> disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

[68] In view of these principles, it therefore follows that in order for the appellants to persuade this Court to interfere with the judge's exercise of discretion they would have to meet the now well-established threshold.

The Consequential Order

The doctrine of election

[69] This doctrine of election of remedies is a fundamental pillar of the English common law which compels a claimant to choose his/her remedy between two or more inconsistent remedies when two legal theories with contradictory remedies arise out of the same facts. The doctrine also provides that if two or more remedies exist that are repugnant and inconsistent with one another, a party will be bound if he or she has chosen one of them - once a claimant elects a remedy, this precludes the pursuit of other inconsistent methods of relief.[24]

[70] The doctrine of the election of remedies is essentially a doctrine of estoppel, the underlying purpose of which is to prevent parallel legal proceedings. The doctrine was developed to prevent a double-recovery for a loss from a single wrong, making the person pursue only one remedy in an action. Of course, the requirements for the operation of the rule are implicit in its definition. These well recognised conditions or 'elements of election' are essential preconditions for the enforcement of the doctrine and are equally well established. First, two remedies in fact must co-exist otherwise a choice would not be possible. Second, the remedies must be, in law, inconsistent. The doctrine does not apply where the available remedies are concurrent, cumulative and consistent. Thus, taking the test of inconsistency of remedies, the courts have taken the view that a remedy is not inconsistent where it merely seeks further relief, or is of such character as to indicate that the adoption of one is not an intentional

[24] See Clough v London and North Western Rail Co. [1861-73] All ER Rep 646.

relinquishment of others. Similarly, the doctrine does not apply in cases where the law expressly allows recourse to additional remedies and is not restricted to the remedy available under any particular enactment. Third, the remedies must exist for the same wrong, otherwise there could be no need to make a choice.

[71] Although these conditions may appear to be unassailable and clear, they only afford a view of the doctrine *ex vacuo*. Difficulties arise when a court is called upon to consider the situation to which these conditions are properly to be applied. One simply has to have regard to the plethora of relevant case law to be convinced that the purported simplicity of the doctrine is underrated. Courts have had to contend with such issues as to when legal alternatives are to be classified as remedies, when and why they are inconsistent, and what constitutes a choice or election between them. Case law has also demonstrated that the timing of election has also been the subject of significant contention. Under the old common law of England, a party had to make an election of remedies at the time that the claim was filed. However, most jurisdictions have since abandoned that requirement. Claimants generally may now file initial pleadings that seek alternative means of relief, and need not make the election of remedies until a judgment is rendered as to the liability of the defendant. The parties in this appeal thankfully are *ad idem* on this issue. It is common ground that election must occur 'at the time when judgment is entered'[25] and the parties have extensively referenced the dicta in **Tang Man Sit** which was effectively a split trial case, in which an account of profits and assessment of damages had been ordered following summary judgment. The appellants however contend that the judge below erred in his consideration of, and application of the **Tang Man Sit** decision. In particular, they submitted that the judge erred in refusing to accept that the relief sought by the respondents was inconsistent and alternative and suggesting instead, that the issue was one of fact and 'practicality'. The appellants say that given the stage of the proceedings, that the judge was wrong not to make an

[25] United Australia Ltd v Barclays Bank Ltd [1941] AC 1 at 30, per Lord Atkin. See also Rice v Reed [1900] 1 QB 54, CA.

order (in either the Consequential Order or the Directions Order) which specifically required the respondents to elect between inconsistent remedies following the provision of such information as was necessary to make an informed election (or at some other specified point in the future).

The timing of election

[72] There can be no doubt that a claimant must elect between alternative and inconsistent remedies. An important consideration for any claimant faced with this decision is, when does that election have to be made? The important decision of the Privy Council in **Tang Man Sit** makes it plain that election should ordinarily be made by the time judgment is entered. At page 197 of the judgment the Board held as follows:

> "Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. <u>The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. A plaintiff is not required to make his choice when he launches his proceedings. He may claim one remedy initially, and then by amendment of his writ and his pleadings abandon that claim in favour of the other. He may claim both remedies, as alternatives. But he must make up his mind when judgment is being entered against the defendant.</u> Court orders are intended to be obeyed. In the nature of things, therefore, the court should not make orders which would afford a plaintiff both of two alternative remedies." (Emphasis added)

[73] Where, as is often the case, litigation has been bifurcated and liability is determined as a separate question, it is now settled law and practice that the election may be deferred until quantum comes to be determined.[26]

[74] A critical factor in determining the appropriate time at which election should be made is that of fairness. In **Immer (No. 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)**,[27] the court cited the following quote from

[26] Minnesota Mining and Manufacturing Co v C Jeffries Pty Ltd [1993] FSR 189 applied in Island Records Ltd v Tring International plc [1995] 3 All ER 444 at p. 447.
[27] (1993) 182 CLR 26 at p. 41.

authors Spencer, Bower and Turner in **The Law Relating to Estoppel by Representation**:[28]

> "It is of the essence of election that the party electing shall be confronted with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice."

[75] However, it is clear that the considerations of fairness operate in favour of both sides of the litigation. Accordingly, in the absence of conduct which prejudices the defendant, a claimant should not be called upon to elect until the evidence has established the facts upon which the election can fairly be made. In **Island Records Ltd**, the issue of timing was at the center of the dispute between the parties in that litigation. That case concerned an action for infringement of copyright in which the plaintiff issued a motion seeking summary judgment and claimed an inquiry as to damages and in the alternative an account of profits. It was common ground that the plaintiff was entitled to judgment, but the question arose as to the date at which the plaintiff had to elect between the two alternative remedies. The plaintiff contended that no election should be required until after the plaintiff had by means of discovery or otherwise sufficient information to make an informed choice. The defendants, however, contended that the election had to be made at the hearing of the motion.

[76] Acknowledging that this issue is of far-reaching importance, Lightman J in the Chancery Division held that there was no authority which required the claimant to elect before judgment. Rather, existing authorities merely required that a claimant could not be entitled to both remedies at judgment. Critically, the learned judge noted that a party should, in general, not be required to elect between remedies unless and until he was able to make an informed choice. At page 447 of the judgment, the learned judge stated:

> "A right of election, if it is to be meaningful and not a mere gamble, must embrace the right to readily available information as to his likely entitlement in case of both the two alternative remedies. It is quite unreasonable to require the plaintiff to speculate totally in the dark as to whether or not the

[28] 3rd Edition, 1977.

> sum recoverable by way of damages will exceed that recoverable under an account of profits. In an analogous situation, it has been held unreasonable to require a plaintiff to speculate whether a payment into court is sufficient to satisfy his claim for damages for infringement of copyright before he has been afforded inspection of the records of sales in the defendant's books (see Mate & Son v Samuel Stephen Ltd [1928–35] Macg CC 257 at 261)."

[77] This dictum reiterates the long held principle that a person cannot be taken to have made an election until he has had the opportunity of ascertaining his rights, and is aware of their nature and extent. A claimant is entitled to make an informed choice before deciding whether election is necessary and, if so, how to elect. In **Peyman v Lanjani**,[29] Slade LJ explained the position in this way:

> "I do not think that a person … can be held to have made the irrevocable choice between rescission and affirmation which election involves unless he had knowledge of his legal right to choose and actually chose with that knowledge."

[78] What is the import of this? Clearly an important consideration will be which remedy maximizes the amount recoverable by the claimant. However before dealing with questions of quantum, the parties and the court must consider whether, in fact, the elements of election obtain. In this context, it is apparent that the learned judge was not prepared to draw any definitive conclusions as to whether the proposed remedies were concurrent, cumulative and consistent or inconsistent and alternative. At pages 136-137[30] of the transcript the learned judge observed:

> "I don't think we know which of these proposed remedies truly are alternative or cumulative in a practical sense even though that distinction could be made at a principal level as a matter of law."

[79] The rationale for this position is set out later in the transcript where the judge explained:

> "That in accordance with the Court's findings, having heard the parties after a plenary trial, the liability has been established by those particular Defendants to the Claimant. And that establishes a marker in the sand. And

[29] [1985] Ch 457 at 500. This prerequisite was endorsed by Lord Goff in Motor Oil Hellas (Corinth) Refineries SA v Shipping Corpn of India, The Kanchenjunga [1990] 1 Lloyd's Rep 391 at 398.
[30] BVIHCMAP2021/0034 Hearing Bundle Volume 1C at pgs. 264-265.

> what flows from it is that from that liability a number of different types of relief naturally follow. Yes, there may need to be an election if they are truly alternative.
> Again, at this point in time I think it is premature to decide which of these remedies are truly alternative and which are truly cumulative. There is nothing wrong with an Order which declares that in principle, which is what it would be, these matters as set out are what the Claimant is entitled to."[31]

[80] The appellants have submitted that this reasoning was wrong as it is clear that the account of profits on the one hand, and damages or compensation on the other, are inconsistent and alternative (rather than cumulative) remedies. I do not agree. There can be no doubt that the authorities all prescribe against a double-recovery by the respondents. To the extent that the remedies sought are inconsistent, the respondents will have to elect. However, whether the remedies are concurrent, cumulative and consistent or inconsistent and alternative is a matter which the parties are entitled to address in written and/or oral submissions to the court. Indeed, basic principles of natural justice demand that this be so.

[81] All parties, including the appellants, should have the opportunity to address the judge on the relevant factual circumstances and the law and authorities regarding election. It seems to me that this is the appropriately cautious approach which is reflected in paragraph 6 of the Consequential Order by which the appellants are fully protected against any attempt by the respondents to benefit from any remedies that are inconsistent. It is further reflected in the Directions Order which makes provision for such a hearing during which the parties are to address the issues of quantum and relief.

[82] It is important that the parties be afforded this opportunity because it is clear that it is not necessary to elect, where the remedies to which a successful party is entitled, are cumulative as opposed to alternative. This position was helpfully reiterated in

[31] BVIHCMAP2021/0034 Hearing Bundle Volume 1C at pg. 270.

the opinion of Lord Nicholls of Birkenhead in **Tang Man Sit**.[32] Under the heading Cumulative Remedies, His Lordship noted:

> "Faced with alternative and inconsistent remedies a plaintiff must choose between them. Faced with cumulative remedies a plaintiff is not required to choose. He may have both remedies. He may pursue one remedy or the other remedy or both remedies, just as he wishes. It is a matter for him. He may obtain judgment for both remedies and enforce both judgments. When the remedies are against two different people, he may sue both persons. He may do so concurrently, and obtain judgment against both. Damages to the full value of goods which have been converted may be awarded against two persons for successive conversions of the same goods. Or the plaintiff may sue the two persons successively. He may obtain judgment against one, and take steps to enforce the judgment. This does not preclude him from then suing the other."

[83] It is not disputed that the authorities make it clear that an account of profits is an example of an alternative remedy known to the law which will give rise to the need for a plaintiff to elect between it and a remedy of damages which is a compensatory remedy. Indeed, the respondents have readily accepted that an award of an account of profits will ordinarily be inconsistent with an award of damages for the same wrong. However, the position is not always definitive. This is somewhat illustrated in **Tang Man Sit** which itself was a case of alternative inconsistent remedies. In that case, Capacious Investments Ltd. ("Capacious") provided Mr. Tang with funds for a joint venture that built 22 properties on land owned by him. Without the knowledge of Capacious, Mr. Tang let the homes, collecting rent while they sustained significant damage. Capacious obtained a declaration that it was the equitable owner of the property, making Mr. Tang liable for a breach of trust. Capacious claimed both damages and an account of the secret rent, but the extent of the damage took time to be assessed, during which Capacious was paid $1,807,774 as an account of the rent. It later attempted to claim $16,937,197 as damages for loss of profit and diminution in value, less the account already paid. Mr. Tang's estate later attempted to argue that accepting the initial account amounted to election of an account, barring any damages claim.

[32] Supra n. 2 at p. 522.

[84] Capacious was awarded, at first instance, both an account of profits and damages for breach of trust. The Hong Kong Court of Appeal held that the remedies were inconsistent; but since the defendant had already paid Capacious some of its secret profits, Capacious was deemed to have elected an account of profits instead of damages. Ultimately, the Privy Council disagreed, holding that there was no real election made, and that Capacious could still recover damages but with credit to the secret profits already paid out. Lord Nicholls focused on the doctrine of election, reasoning that it was a common sense doctrine designed to prevent excess recovery, and the confusion around the initial judgment for account had prevented them from making an informed election between the remedies. With the acceptance of the initial sum not constituting 'election', there was no issue with the damages claim being barred.

[85] Although **Tang Man Sit** (and the several cases which have followed its reasoning) has generally been referred to as holding that accounts and compensation are alternate and inconsistent,[33] legal scholars have complained that the incompatibility of the remedies has been assumed; with the case law in this field providing little help in assessing why accounts and compensatory damages are, in fact, inconsistent. In applying the label 'alternative' and 'inconsistent' without any true discussion as to the conflict between accounts of profits and compensation, they complain that the unsatisfactorily defined use of these terms obscures a complex conflict between remedies which are intended to achieve substantively different goals. Rather than looking at the practical consequences, they say that courts have obscured the individual context of the interaction in cases absent a clear connection between the account and the compensatory award.

[86] Legal writers such as Peter Birks in **Inconsistency between Compensation and Restitution**[34] and Stephen Watterson in **Alternative and Cumulative Remedies:**

[33] See Crittenden v the Estate of Charles Albert Bayliss (Deceased) and another [2005] EWCA Civ 1425 at para. [21].
[34] (1996) 112 LQR 375.

What is the Difference?[35] have been quite critical of the somewhat blind application of these labels without further analysis of any underlying inconsistency between the remedies and more recently, Graham Virgo QC's **The Principles of the Law of Restitution** had this to say:

> "It does not follow from the decision of the Privy Council in Tang Man Sit that gain-based and compensatory remedies are necessarily inconsistent, although great care must be taken to ensure that the two remedies are compatible. For example, in Tang Man Sit itself if the claimant had elected to take the profits it is clear that it could not also have claimed compensation for the income it had lost from being unable to lease the properties, since the defendant's profits arose from the same event which caused the claimant's loss, namely that the defendant rather than the claimant had leased the properties. But there would have been nothing to stop the claimant seeking, in addition to the remedy of an account of profits, compensation in respect of the capital loss to the properties arising from the breach of trust, namely that the tenancies had resulted in wear and tear to the properties and that the value of the properties had decreased by reason of their being leased.
>
> The crucial question in determining the compatibility of the remedies is whether the award of a gain-based remedy reduces the claimant's loss. If it does, it follows that compensatory and gain-based remedies are inconsistent and the claimant must elect between them."

[87] The appellants have taken issue with the respondents' reliance on Graham Virgo QC's statements contending that the learned author was talking in general and hypothetical terms. Moreover, the appellants argue, *inter alia*, that Virgo QC's analysis is not itself supported by authority. In my view, the critique is oversimplified. At the core of this discussion is the question of loss and the rule against double-recovery and ultimately, the proposition is that each case must be considered on its own individual facts. In that regard, I am guided by the dictum in **Ramzan v Brookwide Ltd**[36] which provides a modern application of the **Tang Man Sit** decision. In that case, the conflict was between compensatory damages (through trespass, breach of trust and denial of title) and an account of profits for use of a room beneficially owned by the plaintiff. The English Court of Appeal

[35] (2003) 11 RLR 7.
[36] [2011] EWCA Civ 1033.

reversed the award of an account (related to the breach of trust) but Lady Arden interestingly noted the following at paragraph [29]:

> "The appellant submits, correctly, that double recovery cannot be allowed. Double recovery means that a claimant receives two awards for the same injury, though these may be in different amounts. In some circumstances the question whether there has been double recovery is a pure question of fact. In other circumstances it is a question of law[37] whether the successful claimant is treated as having received more than that to which he is entitled because an award on one basis excludes the possibility of a cumulative remedy for loss on another basis." (Emphasis added)

[88] Bearing in mind the significant legal discourse on this issue, I can see no basis to disagree with the cautious approach adopted by the learned judge in the lower court. It seems to me entirely appropriate that he did not prejudge these matters before hearing from the parties through their counsel. The rationale for the principles of election between alternative remedies is to prevent double recovery since a plaintiff should not be permitted to recover more than he has lost. Ultimately, the crucial question in determining the compatibility of the remedies is whether the award of a gain-based remedy reduces the claimant's loss. If it does, it follows that compensatory and gain-based remedies are inconsistent and the claimant must elect between them. Moreover, counsel for the respondents has submitted that there is an added complexity in the present case in that there are multiple defendants, only one of whom owns (or is understood to own) the Target Group, so difficult questions may also arise as to the consistency of remedies as between the body of defendants. At this stage of the proceedings, I cannot disagree with that submission.

Poor wording of the Consequential Order

[89] The appellants have robustly taken issue with the wording of the Consequential Order. However, I am satisfied that the Order must be read comprehensively, as a single document. When that is done, it is clear that the learned judge was fully

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[37] The question of law here concerned the conflict between the account and compensatory damages measured by loss of profit. The court applied Tang Man Sit and held the remedies were inconsistent, as to award them would give damages "measured both by Brookwide's gain and by his own loss."

seised of the relevant legal principles. As at the date of the Consequential Order, he was unclear as to the extent to which the remedies pleaded by the respondents were inconsistent remedies or cumulative remedies. I do not believe that he can be criticised for considering the practicalities.

[90] Faced with alternative and inconsistent remedies, the respondents must choose, or elect, between them. They cannot have both. The basic principle governing when they must make their choice is simple and clear. They are required to choose when, but not before, judgment is given in their favour and the judge is asked to make orders against the appellants. As election is not yet necessary, it is safer to wait until issues of quantum and relief have been fully brought into the light. I am therefore not satisfied that the judge's reasoning discloses any avoidance or reluctance to treat with the issue of election, and I am further satisfied that the appellants' contention that the learned judge "refused to accept that the relief sought by [the respondents] was inconsistent and alternative" and "refus[ed] to require [the respondents] to make an election" is, in fact, misconceived. The judge was unequivocal that the respondents cannot pursue or benefit from inconsistent remedies and paragraphs 5 and 6 of the Consequential Order put the matter beyond doubt.

Prejudice

[91] There is no doubt that the doctrine of election is based upon considerations of fairness to the defendant. However, it bears repeating that such considerations can also operate in favour of the claimant, so that in the absence of conduct which prejudices the defendant, the claimant should not be called upon to elect until the evidence has established the facts upon which the election can fairly be made. In this appeal, the appellants have relied extensively on the dictum in **Island Records Ltd**, where the court expressed the caution that "the exercise of the right of election should not be unreasonably delayed to the prejudice of the defendant."[38] However, the appellants' submissions go no further than this. They have not alleged or

[38] Supra n. 3 at p. 447.

demonstrated any actual prejudice suffered as a result of the learned judge's Order.

[92] Indeed, the appellants have readily conceded that the respondents do not need to make any election required of them until after the completion of the disclosure exercise. However, it appears that they are concerned that the learned judge's Orders allude to a further delay beyond this point. I suspect that the appellants' real intent is ensuring that the respondents are required to elect prior to the quantum trial. What is clear is that as regards the precise timing of the election, there are no hard and fast rules. As Lord Wilberforce observed in **Johnson v Agnew**:[39]

> "Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity."

[93] Built into the doctrine of election is an element of flexibility. In **Tang Man Sit**, the court put the position this way:

> "In the ordinary course the decision made when judgment is entered is made once and for all. That is the normal rule. The order is a final order, and the interests of the parties and the public interest alike dictate that there should be finality. <u>The principle, however, is not rigid and unbending. Like all procedural principles, the established principles regarding election between alternative remedies are not fixed and unyielding rules. These principles are the means to an end, not the end in themselves. They are no more than practical applications of a general and overriding principle governing the conduct of legal proceedings, namely that proceedings should be conducted in a manner which strikes a fair and reasonable balance between the interests of the parties, having proper regard also to the wider public interest in the conduct of court proceedings</u>."[40] (Emphasis added)

[94] Clearly, a critical consideration for a claim will be which remedy maximizes the amount recoverable and much will depend on the peculiar circumstances of each case. In **Shanton Apparel Ltd v Thornton Hall Manufacturing Ltd**,[41] the New Zealand Court of Appeal held that the claimant in a copyright infringement suit

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[39] [1979] 1 All ER 883 at 894.
[40] Supra n. 13.
[41] [1989] 3 NZLR 304 at 309. See also United Australia Ltd v Barclays Bank Ltd [1941] AC 1 at 19 and 30.

could delay its election between damages and an account of profits until it applied for judgment. At page 309 of that judgment the court held:

> "In the absence of such conduct and provided there is no prejudice to the defendant, the plaintiff should not be called upon to elect until the evidence has established the facts upon which an election can fairly be made. That stage may not be reached until the plaintiff applies for judgment. Although concerned with alternative causes of action, we regard as applicable to alternative forms of relief the following passage from the speech of Viscount Simon LC in United Australia, Ltd v Barclays Bank, Ltd [1940] 4 All ER 20 at p.39,
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> "There is nothing conclusive about the form in which the writ is issued, or about the claims made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend. The substance of the matter is that, on certain facts, he is claiming to redress, either in the form of compensation – that is, damages as for tort – or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress. At some stage of the proceedings, the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment."

[95] Conversely, there are occasions where the claimant has been compelled to elect at an earlier time. In this appeal, it is common ground that litigation is not at the point where the evidence has established the facts upon which an election can fairly be made by the respondents. I agree with the respondents that other than the nebulous reference to the spectre of delay, the appellants have not provided any cogent case which demonstrates any actual prejudice whatsoever arising from the approach taken by the judge.

[96] Applying the principles of appellate restraint, I can see no basis upon which to disturb the learned judge's findings or the terms of the Consequential Order.

The Directions Order

[97] In this appeal, the appellants contend that the broad ranging disclosure ordered by the judge significantly exceeds the information that the respondents are entitled to at this stage. The appellants complain that the Directions Order, which was

ultimately made by the judge, was apparently prepared in ignorance of, or without reference to, the principles and authorities. Moreover, they say that it is self-evident that no attempt was made to limit the scope of disclosure to that which would "give the plaintiff the information he needs, and which in fairness he ought to have, before deciding upon his remedy."[42] Moreover, the appellants say that it is a basic and universal principle that a party should be able to know from an order what he has to comply with.[43] They complain that the disclosure is ordered in terms that are too vague and uncertain.

[98] It is clear that the learned judge would have determined that the respondents should be able to make an informed election rather than simply make a 'stab in the dark' as to the appropriate remedies. This conclusion is clearly consistent with precedent and with established legal practice and procedure.[44] The principles governing the discovery process require that a defendant disclose such documents that would enable a claimant to make an informed election. Of course, the purpose and the scope of discovery in relation to this specific act of election between remedies is different from the usual pre-trial discovery process. In **Main-Line Corporate Holdings Ltd v United Overseas Bank Ltd and Another**,[45] the Singaporean High Court explained the position in the following terms:

> "It should be noted that the purpose and therefore the scope of discovery in relation to this specific act of election between an account of profits and assessment of damages is different from the usual pre-trial discovery process. In pre-trial discovery, the process of determining the relevancy of the documents to the issues is framed by the pleadings. However, the scope of discovery for the purpose of election is more limited – it is merely to assist the plaintiff in making the choice between remedies." (Emphasis added)

[99] The seminal authority on discovery for the purpose of election is the English High Court decision of **Island Records Ltd**. In that case, the plaintiff had successfully obtained judgment against the defendant for infringement of its copyright in sound

[42] Supra n. 2 at pg. 521F-H.
[43] Morgans (a firm) v Needham [1999] EWCA Civ J0113-3.
[44] Supra n. 42.
[45] [2008] SGHC 55.

recordings embodying performances of certain works by Cat Stevens. Lightman J examined the practical rationale behind requiring the plaintiff to make an election between an account of profits or an assessment of damages and opined that the plaintiff in that situation was entitled to such information to make an informed election. He said that it would be quite unreasonable to require the plaintiff to 'speculate totally in the dark' as to whether or not the sum recoverable by way of damages will exceed that recoverable under an account of profits. The judge however cautioned at page 448:

> "There should be no over lengthy or unnecessarily sophisticated exercise. The plaintiff is not entitled to know exactly the amount of any damages or profits to which he is entitled, but only to such information as the court considers to be a fair basis in the circumstances of the particular case for an election."

[100] On this basis, the court ordered that the defendants provide an audited schedule detailing the sums received or receivable by the defendants in respect of their infringements; the sales of infringing copies; the number of infringing copies unsold; and the costs incurred by the defendants in respect of the manufacture, distribution and sale of infringing copies.

[101] Although the decision in **Island Records Ltd** and the line of cases which followed it are useful for the purpose of understanding the general principles and examples of the extent of discovery that would be ordered by the court in similar circumstances, the type of information that should be provided would vary in the amount of detail depending on the nature of the patented item or method in question, and the nature of the business engaged in by the parties.

[102] The English Chancery Division provided further guidance in **Comic Enterprises Ltd v Twentieth Century Fox Film Corporation (No 3)**.[46] In that case, following its ruling that Twentieth Century Fox had infringed the "GLEE" trade mark owned by Comic Enterprises, the court considered the following heads of relief: (i) an

[46] [2014] IP & T 1008.

injunction to restrain trade mark infringement; (ii) delivery up/destruction; (iii) an account of profits; (iv) disclosure in accordance with **Island Records Ltd**; (v) a publicity order; and (vi) interim payment. Fox argued that Comic Enterprises should be confined to damages, believing that an account of profits was inappropriate as Fox was an innocent infringer and Comic Enterprises delayed in bringing proceedings. Fox also argued that it would be too difficult for Fox to establish the necessary causal connection between the profits earned and the infringement, as opposed to other factors contributing to the success of the show.

[103] In order to decide between an inquiry as to damages or an account of profits, Comic Enterprises sought extensive disclosure from Fox. The defendant objected to the scale of the work involved in collecting the information being sought on the basis that the defendant was a multinational company and that the series had been distributed in many territories and profits had been made through a variety of different means of exploitation. These profits and the costs thereof were not necessarily accounted for or collected on a territory by territory basis. The defendant advanced that the cost of this exercise would be in excess of the quantum that would eventually be awarded to the claimant.

[104] The court had sympathy for Fox's argument that the cost of collecting the necessary information might well exceed the quantum that would eventually be awarded. Ultimately, the court did not order disclosure to the extent sought, but accepted that Fox should be able to give a rough assessment of the total profit made by the series and make a rough apportionment of the total profit contributed by the UK market base, for instance, on viewing figures. The court also required Fox to provide an explanation for the basis of such calculations. Importantly, the court applied **Island Records Ltd** and held at page 1022 as follows:

> "**Island Record[s] [Ltd] v Tring** disclosure..…[was] not intended to be an onerous and totally accurate exercise. It [was] intended to give the claimant an order of magnitude [or] idea as to what the claimant might be able to get at the end of the day…[The court] would expect the defendant to be able to give a rough assessment of the total profit made by the series..… some calculation of [that] would be used to decide whether or not to make another

series of the programme before committing to produce it..…that a rough apportionment of the total profit contributed by the UK market could be made based, for instance, on viewing figures…..[that those] figures [would] be commercially sensitive and should be protected by a confidentiality order. There [was] no need for the defendant to produce extensive disclosure to support [that] evidence."[47]

[105] The judge ordered that the defendants provide an audited schedule detailing the sums received or receivable by the defendants in respect of their infringements; the sales of infringing copies; the number of infringing copies unsold; and the costs incurred by the defendants in respect of the manufacture, distribution and sale of infringing copies. His rationale is revealed in the following extract from the judgment:

> "… I am not prepared to make the order in the terms asked for by the claimant. I would expect the defendant to be able to give a rough assessment of the total profit made by the series. I would expect some calculation of this would be used to decide whether or not to make another series of the programme before committing to produce it. I would also expect that a rough apportionment of the total profit contributed by the UK market could be made based, for instance, on viewing figures. These calculations would need to be supported by an explanation of the basis on which they were calculated. I would expect these figures to be commercially sensitive and should be protected by a confidentiality order. There is no need for the defendant to produce extensive disclosure to support this evidence."[48]

[106] In **Brugger v Medicaid**,[49] (a case which concerned an infringement of a patent on medical devices known as nebulizers), the court considered the extreme view which would require the defendant to provide all the information necessary to ascertain the precise number of devices sold and the precise prices they were sold at – a process that would involve complicated matters of costing. The audited schedule setting out such information that was sought by the plaintiff in this case would involve a substantial amount of work on the part of the defendants. The learned judge did not feel that this was what was envisaged or required by the court in **Island Records Ltd** and held that it was sufficient for the defendant to supply an affidavit setting

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[47] Comic Enterprises Ltd v Twentieth Century Fox Film Corporation (No 3) [2014] IP & T 1008 at pgs. 1022-1023.
[48] Comic Enterprises Limited, n.47 at pg. 1023.
[49] [1996] FSR 362.

forth the numbers of infringing devices made and sold, the sums received or receivable and an approximate estimate of the costs incurred and a statement of how the estimate was made.

[107] It is clear from these cases that the discovery exercise is not to be an over lengthy or onerous exercise. The amount of time required for the exercise is critical because there really should not be any undue delay in the process of making the election which may prejudice a defendant. Ordinarily the word of the defendant on sale volume, revenue and profit, in so far as they were audited or attested to, is regarded as sufficiently sound information for the purposes of the election. However, I reiterate that the nature and scope of any orders made by the court will depend on the peculiar factual circumstances of each case and I fully concur with Lightman J who, in **Island Records Ltd** noted[50] that the claimant is entitled to "such information as the court considers to be a fair basis in the circumstances of the particular case for an election".[51] Counsel for the respondents has submitted that there is no 'one size fits all' approach and that this will depend upon factors such as what information has already been disclosed, whether any information is publicly available or otherwise readily accessible to the claimant, and what information is required for the claimant to identify the most valuable remedy. I agree with that submission.

[108] I have considered the specific objections advanced by the appellants. The appellants have criticised the references to 'the true and fair value' of the Target Group on the basis that such expressions 'connote an element of judgment on the part of the value.' I find no merit in that submission. Given the timing and the context, it is clear that the appellants are being required to disclose documents which are relevant to the Target Group's value. I agree that at this point, they are not being asked to make any judgment as to the appropriate value or the appropriate valuation methodology. There has been no suggestion that this would be a particularly arduous task along the lines of **Comic Enterprises Ltd** and I completely agree with

[50] Supra n. 3 at pg. 448.
[51] Ibid.

the judge that, "[a] valuable business such as the business we are dealing with here, keeping well-maintained records and complying with accounting procedures should have no difficulty to produce this evidence."

[109] The appellants further complain that the order is cast in unqualified terms which essentially require that the appellants disclose 'all documents.' They say that on a plain reading, the reference to 'including' is non-exhaustive. Again, I am not persuaded that this submission has any real merit. I have no doubt that the appellants are well aware that what they are required to do is to disclose documents that are relevant to the Target Group's value. There can be no utility in isolating particular words in the Directions Order. The Order must be read as a whole with the natural and ordinary meaning of words being considered in light of the syntax, context and background in which those words were used. What the appellants are required to do is to disclose documents that are relevant to the Target Group's value. If there is any doubt or ambiguity as to the scope of the order, the learned judge would have made clear his reasoning when he stated:

> "Well, the point is, is that your clients are sitting on the documents. You know what's there or you should know what's there. The Claimants don't. And so, therefore, to be overly precise just invites the unattractive technical arguments to be, 'oh, you didn't ask for that one so you're not going to get it'. So that sort of extremely irritating and unconstructive, overly technical approach. It has to be clear that any documents which go to the value of the company are liable to be disclosed as amidst standard disclosure.
>
> …..
>
> Let's be objective about this and realise that what we want you to do is to produce the documents which can be used to assess the value of the company without being overly technical about it. Now, that's not oppressive; it's not anti-legalistic. It's just equitable, okay. So I don't think we really need to specify anything more particular than what's already there. The word 'including' catches other things which have fortuitously not been named. If there might be some kind of file, some kind of computer which might have all the golden nuggets and information on it but it's not defined, it's caught, okay."[52]

[52] Transcript of proceedings on 10th December 2021 pg. 151 lines 7-17 and pg. 152 lines 1-12. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pgs. 279-280.

[110] Moreover, the transcript records the following exchange after counsel for the appellants suggested that aspects of the disclosure exercise were hard to understand and would be difficult to comply with:

> "THE COURT: It's only difficult to comply with if you're intent on being difficult about it and overly technical and trying to find loopholes when there shouldn't be any frankly. And so you should have no difficulty complying at least with the broad package of it. There might be a penumbra, of course, and you might have to come back, but it's only by looking for difficulties that you see that there is a difficulty complying at all. I don't accept that.
>
> MR. KALFON: Certainly, My Lord."[53]

[111] It was clear that the learned judge was concerned that if the disclosure exercise were to be drafted in terms which identified more specific descriptions, it would only increase the likelihood that the appellants would seek to identify loopholes and hide behind technical or legalistic arguments. It is apparent that this concern may have been driven by the appellants' previous conduct in these proceedings. The respondents contend that the judge would have been legitimately concerned about the true motivations underlying the appellants' attempts to limit the disclosure exercise on account of their past conduct during the course of the liability trial and they stressed the following extraordinary response by Mr. Yeung in oral evidence concerning a document:

> "What I would like to point out is that...if it's damaging to our case then I would not have given it to Mr. Cheung."[54]

[112] It is apparent that the learned judge would have formed a considered view as to the appellants' historical conduct of deliberately suppressing documents in breach of orders of the court and would have made adverse findings about the appellants' record of deliberately suppressing important documents in the liability phase of the trial at paragraph 207 of his judgment culminating in the following observation:

> "The irresistible inference is that the Executive Director Defendants "deliberately suppressed disclosure of the accounts of Vanway and Vanworld for the period up to 31st December 2015 for that reason."

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[53] Transcript of proceedings on 10th December 2021 pg. 153 lines 2-13. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pg. 281.

[54] Transcript of proceedings on 10th December 2021 pg. 127 lines 2-4. BVIHCMAP2021/0034 Hearing Bundle Volume 1C pg. 255.

[113] The respondents say that in light of the appellants' past conduct, the court should be alive to the possibility that any effort by the appellants to unduly limit the disclosure exercise could amount to a fresh attempt to withhold relevant documentation. The appellants however contend that whilst the judge's findings in relation to the previous failings on the part of the appellants as to disclosure might have had some relevance as to the manner in which relevant information was to be provided, they had no logical connection with the scope of disclosure that should be ordered at this stage. Indeed, if anything, it made it all the more important to make an order that was more certain and less vague. All that the limited financial information showed was that it was appropriate to make an order to provide the respondents with information to enable them to make an informed election.

[114] In this appeal, I cannot ignore the judge's significant involvement in, and the impressions formed over the course of the significant litigation between these parties. I agree that whilst these findings could properly inform the judge's determination as to the manner in which relevant information was to be provided, they could not justify a departure from the principles which govern the scope of disclosure set out in cases like **Island Records Ltd**. However, it is equally clear that although **Island Records Ltd** and the other judicial authorities referenced by the parties are useful for the purpose of understanding the general principles and provide examples of the extent of discovery that would be ordered by the court, the type of information that should be provided would vary in amount of detail depending on the nature of the business engaged in by the parties and the remit of the inquiry which the court would have to engage.

[115] Although the scope of discovery in the context of election is generally more limited in nature, ultimately, the goal is to ensure that the respondents can make an informed election. What the respondents need is information showing 'which remedy is more advantageous' and 'where his best interests lie.' Otherwise, any election could not be said to be an informed decision.

[116] In this appeal, the disclosure is defined by reference to the issues of quantum and relief as to the true and fair value of the Target Group which are themselves defined in paragraph 1 of the Directions Order in the following terms:

> "a. Any proprietary relief as against the First Defendant; and/or
> b. The First to Seventh Defendants' liability to account to the English Defendant (the "Company"); and/or
> c. The quantum of equitable compensation to the Company by the First to Seventh Defendants; and/or
> d. The quantum of damages payable to the Company by the First to Seventh Defendants."

[117] The Directions Order mandated standard disclosure which included:

> "a. All correspondence, statements, invoices, receipts, books and records relevant to the First to Seventh Defendants' liability to account to the Company as constructive trustee for any assets, profits and/or benefits of the Target Group, and any dividends or profits received by the First to Seventh Defendants on account of the sale of the Target Group to the First Defendant at an undervalue (the 'Sale');
>
> b. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 20 August 2015;
>
> c. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 3 December 2018; and
>
> a. All correspondence, statements, invoices, receipts, books and records relevant to the true and fair value of the Target Group as at 20 July 2021.
>
> b. All correspondence, statements, invoices, receipts, books and records relevant to any sale or disposal of the business of the Target Group."

[118] It is immediately apparent that this scope of the disclosure prescribed is not typical of what would have obtained in intellectual property infringement cases where courts have tended to order disclosure in the form of sworn affidavits or summarised/audited accounts. Counsel for the respondents has suggested that in this case it would not have been appropriate for the necessary information to be provided by an affidavit. Counsel submitted that in light of the judge's findings of

dishonesty against the appellants and their egregious suppression of documents at the trial on liability, that it would be unsuitable to make an order in such terms.

[119] The judge was therefore obliged to determine the scope of the disclosure and in that regard, counsel for the respondents submitted that he was largely unassisted by the appellants. Counsel for the respondents further submitted that if the appellants maintain that the Order was wider than it should be, the onus shifted to them "to spell out in terms what they say should be a narrower form of order for disclosure or some other suitable order." The appellants have scrupulously not done so. Instead, they submitted that it is for the court to make an order defining and limiting the scope of the information to be disclosed.

[120] I am also not satisfied there is anything inappropriate in the judge inviting the parties to assist in defining the scope of disclosure. This is because the determination of relevant remedies will often turn upon facts which are peculiarly in the knowledge of the party who has been unsuccessful in the liability trial. In the circumstances of this particular case, I am not satisfied that the appellants' approach was consistent with their obligations pursuant to the overriding objective. The respondents are at an obvious disadvantage here as they are not in possession of documentation or information as to what has since become of the Target Group following its sale to Mr. Lau. This is information which is clearly within the purview of the appellants.

[121] Indeed, it appears that the appellants may not have been opposed to some discussion and agreement because prior to the hearing, they wrote the respondents inviting their proposals on what information they reasonably required in order to make an informed election. However, in that letter, the appellants did not provide any concrete formulation or proposal of what a limited disclosure order would look like. Counsel for the respondents submitted that if the appellants were concerned about the overly broad disclosure they should have utilised their familiarity with their own documentation to assist the learned judge in formulating

a narrower order. This submission is a compelling one; more so because even up to the hearing of this appeal, the appellants have, despite robustly asserting that a more limited or narrow order would have been appropriate, provided no plausible formulation neither would they have cogently explained (by reference to such particular formulation) why it would be sufficiently appropriate or proportionate in order to enable the respondents to make an informed decision in circumstances where there is to be an election of alternative and inconsistent remedies.

[122] The Directions Order is clearly a case management decision that involved the exercise of the judge's discretion. Ultimately, I am not satisfied that the disclosure orders set out in the Directions Order were prepared in ignorance of, or at any rate without reference to the relevant principles and authorities. The transcript of the proceedings reveals that counsel for the parties would have made copious submissions which would have addressed the appropriate scope of discovery. These submissions would have included an analysis of the relevant legal authorities. I am satisfied that the judge would have been well seised of the relevant legal principles and authorities.

[123] Faced with the respondents' unequivocal indication that the information set out in paragraph 2 of the Directions Order is fairly needed in order to make an informed election and faced with the appellants (who would clearly be in possession of all the relevant information) apparent unwillingness to define scope of the Order despite advocating for a more limited terms, the judge would have been in a difficult position. He would have been obliged to apply the established legal principles and judicial approach commended in the relevant case law.

[124] In doing so, it would have been apparent that the circumstances of this case are not the typical context where remedies for intellectual property/copyright infringement are being pursued. Given that this is a derivative action brought by the minority shareholders (the respondents) (who complain that appellants took steps to cause the Company to dispose of the Target Group by wrongful means

and at a gross undervalue), the remit of the inquiry would quite obviously be different. At issue in this case are proprietary relief as against the 1^{st} appellant; the 1^{st} - 6^{th} appellants' and 7^{th} respondent's liability to account to the Company; equitable compensation to the Company by the 1^{st} - 6^{th} appellants and the 7^{th} respondent and damages payable to the Company by the 1^{st} - 6^{th} appellants and 7^{th} respondent. The relevant context here also includes the judge's unequivocal findings regarding the appellants' conduct as it relates to previous disclosure orders.

[125] Ultimately, there is no cogent case which supports the contention that the learned judge did not deliberately exercise his discretion in making an order defining and limiting the scope of the information to be provided or was plainly wrong. Neither have the appellants demonstrated that the judge erred, in principle, in his approach or that he left out a factor which he should have considered or took into account some factor which he should not have. I am guided by the following dictum in **Scherer and another v Counting Instruments Ltd. and another**:[55]

> "If there is any relevant ground available to the judge and he exercises, or appears to have exercised, his discretion judicially on it, this court cannot review that exercise of his discretion or interfere with his order because this court disagrees with the weight he appears to have attributed to any particular ground or because this court would have exercised the discretion in some other way but if, notwithstanding the availability of that ground, the judge has not, in the judgment of this court, exercised his discretion judicially, that is, if his decision is clearly wrong because the available ground could not in principle support the particular order he has made, it is in our judgment open to this court to correct it."

[126] Having regard to all of the circumstances of this case, I am not satisfied that the Directions Order which reflects the exercise of the judge's discretion meets the test for appealing against case management decisions.

[55] [1986] 2 All ER 529 at 537.

Other grounds/arguments

[127] The appellants also complain about the directions found in paragraphs 4 -13 of the Directions Order. Paragraph 4 provides for a further case management conference, directions 5-7 of the Order make provision for directions as to witness statements to be given at the case management conference and directions 8-13 give directions in relation to expert evidence, and in particular, the dates of valuation. The appellants submit that the errors of the judge, as identified above, have also infected some of these directions, such that they should not have been made, or made in the terms that they were.

[128] Having considered the full text of the Directions Order and the parties' submissions, I am satisfied that the minor objections raised are all without merit. Paragraph 4 of the Directions Order makes clear that:

> "Paragraphs 5 – 18 of this Order make provisional orders for the future conduct of these proceedings, which may be revised or otherwise altered or replaced as if the matters were being considered *de novo*."

[129] It is common ground between the parties that these directions are merely provisional and I can find no utility in disturbing them. It is clear from his *ex-tempore* judgment that the judge contemplates that he will hear further submissions as to the issue of election during that case management conference. For the reasons which have been set out above, I can find no fault with that approach. No doubt following that further hearing, the anticipated framework for the future conduct of the proceedings suggested by these collateral orders would be revisited by the court with the full participation of the parties who will have an opportunity to refine and define the terms.

Disposal of appeal

[130] For the reasons given above, I would dismiss the appellants' appeal against the Consequential Order and the Directions Order. I would also order the appellants to

pay the respondents' costs on the appeal and in the court below, to be assessed by a judge of the Commercial Court, if not agreed, within 21 days of the date of this judgment.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar