

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2015/0047

BETWEEN:

KATHRYN MA WAI FONG

Claimant/Applicant

and

[1] **INCREDIBLE POWER LIMITED**
[2] **WONG KIE YIK**
[3] **WONG KIE CHIE**
[4] **RAYLEY COMPANY LIMITED**
[5] **ESBEN FINANCE LIMITED**

Defendants/Respondents

Appearances:

Mr. Hermann Boeddinghaus with him Mr. James Noble and Mr. Phillip Kite for the Claimant
Mr. Stephen Atherton, QC with him Mr. Oliver Clifton for the First and Fifth Defendants
Mr. David Alexander, QC with him Mr. Simon Hall and Mr. Scott Tolliss for the Second and Third Defendants
Mr. Ryan Hocking and Ms. Laure-Astrid Wigglesworth for the Fourth Defendant

2019: October 31;
2020: January 30.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the decision in relation to an application for specific disclosure and inspection pursuant to rules 28.5 and 28.16, Civil Procedure Rules 2000 ('CPR'), and/or the Court's inherent jurisdiction, filed by the Claimant on 14th June 2019.

Background

[2] The relief sought falls into three broad categories:

- (1) disclosure of directly relevant material in the possession or control of the Respondents that the Claimant says should already have been disclosed in discharge of the Respondents' standard disclosure obligations, in accordance with CPR 28.4;
 - (2) provision for inspection, in native electronic format where specified, of documents mentioned in pleadings and witness statements, and thus already disclosed, which the Claimant contends she is entitled to see pursuant to CPR 28.16;
 - (3) affidavit evidence on the methodology of such searches as have been and are to be carried out.
- [3] The Claimant remarks that the Respondents' affidavit evidence in response to the application suffers from widespread deficiencies and non-compliance with CPR 30.3(2)(b) in that it fails to state the source of much of the information and belief expressed therein by the affiants, who are legal practitioners and not persons (says the Claimant) who could possibly have personal knowledge of much of the evidence given therein.
- [4] Trial of the claim has been set down for June 2020.
- [5] For the purposes of this application and without making any findings of fact, I shall assume the following background.
- [6] The Claimant is the widow of the late Mr. Wong Kie Nai ('WKN') and the executrix of his estate. The Second and Third Defendants ('WKY' and 'WKC' respectively) were WKN's brothers. The corporate Respondents are family companies, owned beneficially in equal shares by WKY, WKC and the Claimant as WKN's executrix. These companies are part of what can be called the WTK Group. The Claimant's claim, which she brings derivatively on behalf of the Fourth Respondent ('Rayley') is that in April and July 2013 three substantial misappropriations were made from Rayley, in the sums of AU\$6,617,783, US\$331,565.55 and SG\$917,513.32 respectively, and paid to the First Respondent ('Incredible Power') and the Fifth Respondent ('Esben'), whence the funds have allegedly disappeared without trace. The Claimant's case is that each of these misappropriations was made at the behest of WKY and WKC by a senior employee of each of these companies named Mr Tiang, acting on the instructions of WKY and WKC. Mr. Tiang was the general manager of Incredible Power and Esben and a *de facto*

director or agent of Rayley. Whilst WKY and WKC do not dispute that they caused Rayley to make the three disputed payments, they deny that they were *de facto* or shadow directors of Rayley. The Respondents do not dispute the payments, but they dispute that they amounted to unlawful misappropriations. Rayley explains that it takes a neutral stance.

- [7] The Claimant characterizes the thrust of the defences to be that the three payments were legitimate in that each represented a part settlement by Rayley of one or other of two existing specific inter-company debts: one of these was allegedly owed to Incredible Power ('the Rayley Outstanding Debt') and the other to Esben ('the Esben Outstanding Debt'). These debts allegedly arose because Incredible Power and Esben had on certain occasions in the past discharged invoices that had been issued by other family companies to Rayley, when Rayley allegedly lacked sufficient funds to discharge its own debts. WKY and WKC refer in their Defence to 'an inter-company ledger' recording transfers between Rayley, Incredible Power and other family companies – as the Claimant describes it, essentially a 'running tab'. WKY and WKC also refer to 'a general practice of offsetting the companies' balances against one another.' The Claimant observes that WKY and WKC do not say in their Defence or in their Witness Statements that the two alleged inter-company debts represented the net overall inter-company accounting position as between Rayley and Incredible Power and as between Rayley and Esben. Nor do they do this in their evidence in response to the Claimant's application.
- [8] The Claimant says a key issue in these proceedings is whether the two alleged inter-company debts existed. She contends that the majority of her requests are directed at documents that will enable her to test this issue.
- [9] The Claimant emphasizes that no Respondent has been able to provide any direct documentary evidence of the alleged inter-company indebtedness. They claim the ledger they referred to was deliberately destroyed by Mr. Tiang. Mr. Tiang's responsibility had been to 'maintain and update the financial records' of the corporate Respondents. He claims to have destroyed around 110 to 115 boxes of documents in September 2014, on the instructions of the late WKN. WKN had died a year and a half previously. On the other hand, the Commercial Affairs Department of the Singapore Police Force ('CAD') first questioned Mr. Tiang only about a month before he allegedly destroyed the documents. The Claimant observes that Mr. Tiang makes an attempt at reconstructing the ledger with the aid of some bank statements and some invoices not destroyed by him that had been issued by other family companies and were still in

the possession of those companies. The purpose of doing so was to support the Respondents' case that the payments were legitimate. The Claimant says that in doing so the Respondents were being partial and selective, that is, self-serving. It is simply unreal, says the Claimant, to suggest that the Respondents can cherry-pick a handful of invoices addressed only to Rayley, and corresponding bank statements showing the discharge of those invoices by Incredible Power and Esben, from the pile of invoices issued by the other family companies and say that because these add up to a liability on the part of Rayley, there has been no misappropriation and secondly, that invoices, bank statements and other financial documents cannot be relevant unless they are directly relevant to the composition of the Rayley Outstanding Debt, as conceived of by the Respondents themselves. The Claimant contends that she and the Court must be furnished with material directly relevant to complete the inter-company picture: not only between the same pairs of companies, but also between them and the other family companies known to have made payments to, or received payments from, these companies. The Claimant says it is in issue in these proceedings whether the two alleged inter-company loans represent the complete inter-company picture. Even if it will not be possible to reconstruct the full picture, the documents sought will enable the Claimant and the Court to test the Respondents' case.

- [10] The Claimant says there is a stark inequality in the parties' access to relevant documents. The Respondents, and in particular WKY and WKC, but not the Claimant, have access to the materials that would help build up an overall picture concerning inter-company accounting.
- [11] Mr. Tiang has been described by WKY and WKC as their principal witness. He is a central figure in the events that gave rise to these proceedings. The Claimant calls attention to a recent conviction of Mr. Tiang, which has caused him to be sentenced to eighteen years' imprisonment in Singapore on fifteen criminal charges, including falsification of accounting records, because he embezzled SG\$46.2 million from the very same companies involved in these proceedings (Rayley, Incredible Power and Esben) and another family company incorporated in Liberia. There is some documentary evidence, by way of a press report (for what, if anything, that is worth) that Mr. Tiang did so to feed a gambling habit. Mr. Tiang's fraud comprised some three hundred admitted individual misappropriations between January 2007 and March 2014. He is also said to have attempted to cover up the misappropriations through false accounting. The Claimant submits there is thus a 'high probability' that these misappropriations and/or falsifications affected the apparent inter-company accounting position

as it stood in April and July 2013 when the payments that are the subject of these proceedings took place.

- [12] The Claimant claims that Mr. Tiang is an unreliable narrator, who has been less than forthcoming with the courts. By way of example only, Mr. Tiang has asserted in a witness statement in these proceedings that he strenuously denies any wrongdoing in relation to the corporate respondents. Yet, says the Claimant, in flat contradiction with this, Mr. Tiang's plea in mitigation in the Singapore criminal proceedings recorded that he 'readily confessed to the misappropriation from the moment he was called up by the police for investigation'.
- [13] The Claimant urges that the Respondents must not be permitted to prejudice the pursuit of this derivative action by erecting barriers to materials to which the Claimant is entitled and which are needed for the fair disposal of the claim.
- [14] The Claimant sought fifty two categories of documents in its application, plus seven categories of documents relating specifically to the conviction of Mr. Tiang ('the Tiang Conviction Materials'). Subsequent to the application being filed, the Respondents provided some further disclosure and the Claimant narrowed some of her requests. This has reduced the number of outstanding requests. The Claimant says this shows the application has already had some utility. That submission is doubtlessly made with an eye to determination and/or assessment of costs of the application.
- [15] The outstanding requests can be divided into the following groups. Category numbers are those used in the First and Third Affidavits of Ms. Amelia Tan:
- (1) Documents enabling the parties to determine the financial position of the corporate Respondents ('Financial Position Documents'). The outstanding categories in this segment are categories 2 and 6 to 16. (The Third Affidavit of Ms. Amelia Tan indicates categories 17 to 20 are no longer outstanding provided appropriate affidavit evidence on methodology is supplied the Respondents, and these are therefore not pursued in the Claimant's skeleton argument for the hearing. The Respondents claim to have checked the relevant records and to have found that their records contain no documents responsive to categories 17 to 20.)

- (2) Written communications concerning the alleged destruction of documents by Mr. Tiang ('Tiang Destruction Documents'). The outstanding category in this segment is category 22 (The Third Affidavit of Ms. Amelia Tan indicates category 23 is no longer outstanding provided appropriate affidavit evidence on methodology is supplied the Respondents, and this is therefore not pursued in the Claimant's skeleton argument for the hearing. The Respondents claim to have provided all documents in category 23.)
- (3) Legal advice given to the corporate Respondents ('Legal Advice Documents'). These comprise categories 26 to 30, which remain outstanding.
- (4) Documents mentioned in the Respondents' witness statements ('Documents mentioned in Witness Statements'). The outstanding categories are 31 to 40, 42 and 43.
- (5) Documents in native electronic format. The outstanding categories are 45 to 48 and 50 to 52. (The Third Affidavit of Ms. Amelia Tan indicates category 49 is no longer outstanding provided appropriate affidavit evidence on methodology is supplied the Respondents, and this is therefore not pursued in the Claimant's skeleton argument for the hearing. The Respondents claim to have carried out appropriate searches and not to have been able to find any document responsive to category 49.)
- (6) The Tiang Conviction Materials.

[16] Category 24 comprises documents concerning the bank HSBC's decision to close bank accounts of the corporate Respondents held with it. The Claimant appears not to press this category. The Respondents claim to have provided the documents in this category. As with some other categories, the Claimant is not able to point to any omissions, but says it 'is not good enough' for WKY and WKC to say they have carried out the necessary searches and confirm that no further relevant documents exist in response to this request. The Claimant therefore wants an order requiring WKY or WKC to provide affidavit evidence that discloses the source of the information and belief that this was the case.

[17] The Claimant's primary argument is that the documents she seeks are directly relevant to the matters in question in the proceedings; thus the Respondents were under an obligation to disclose them, pursuant to a party's standard disclosure obligations pursuant to CPR 28.4. These provide that a party must disclose 'all documents which are directly relevant to the matters in question in the proceedings'. CPR 28.1(4) provides that a document is 'directly relevant' if:

'(a) the party with control of the document intends to rely on it; (b) it tends to adversely affect that party's case; or (c) it tends to support another party's case, but the rule of law known as "the rule in *Peruvian Guano*" does not apply.'

A party's duty of standard disclosure continues pursuant to CPR 28.12. The Claimant submits that the specific disclosure process can be used to police the standard disclosure obligation.

[18] The Claimant submits that direct relevance must be assessed by reference to 'the positions [each Respondent] has pleaded or otherwise asserted, insofar as those assertions elucidate what is pleaded; such assertions may be found in witness evidence. The Claimant relies on the case of **Yao Juan v Kwok Kin Kwok**¹ as authority for this proposition.

[19] The Claimant advances a secondary argument that the Court has power to make an order for specific disclosure even where documents do not satisfy the 'directly relevant' test, including those that may lead to a train of enquiry that may advance the applicant's case or damage the disclosing party's case. In short, the Claimant argues that on a correct interpretation of CPR 28.5, the Court has power to order specific disclosure of so-called 'train of enquiry documents', as it is permitted to 'develop a customized approach to fit the case' following *dicta* in **Yao Juan v Kwok Kin Kwok**.²

[20] The Claimant then submits that the Court must consider whether specific disclosure is 'necessary in order to dispose fairly of the claim or to save costs', pursuant to CPR 28.6(1). The Court must have regard to (a) the likely benefits and (b) the likely cost of specific disclosure and (c) whether the financial resources of the Respondents are likely to be sufficient

¹ (Unreported) BVIHCM2013/0162 at [83] (Leon J).

² (Unreported) BVIHCM2013/0162 at [34] (Leon J).

to enable that party to comply with such an order,³ as well as the Overriding Objective of the CPR.⁴

- [21] The Claimant argues that timing is ‘not dispositive’ but is merely a discretionary matter, relying upon **QVT Fund V LP & Ors v China Zenix Auto International Group Ltd & Ors**.⁵
- [22] The Claimant relies upon CPR 28.16(1) to seek inspection of documents mentioned in the Respondents’ statements of case and/or witness statements. The Claimant relies upon the English Court of Appeal authority of **Expandable v Rubin**⁶ for the proposition that the relevant question is whether there has been a direct allusion to or specific mention of a document, on the basis that mention of a document is a form of disclosure, which entitles the other party to its inspection.⁷ The Claimant observes further that she is not required to prove that such a document is directly relevant.⁸ The Claimant recognizes that the Court retains a discretion, but that the general rule is that there is a right to inspect, with the disclosing party having the burden of displacing the general rule.
- [23] The Claimant submits that she is entitled to seek disclosure of documents in native electronic format, in that CPR 28.1(2) defines a document as ‘anything on or in which information of any description is recorded’. This, she says, includes metadata, as such metadata comprises a modification or other marking or feature which is not present in the hard copy format of the original.⁹
- [24] The Claimant submits that the Court can order a party to give evidence about the searches it says it has already carried out. The Claimant’s argument in this regard starts by invoking the requirement for the Court to further the Overriding Objective when exercising its discretion or

³ CPR 28.6(2).

⁴ CPR 1.1.

⁵ (Unreported) BVIHCM2014/0026 at [11] (24th January 2017).

⁶ EWCA Civ 59.

⁷ *Expandable v Rubin* EWCA Civ 59 at [24].

⁸ (Unreported) *Renaissance Ventures Ltd and Joseph Katz v Comodo Holdings Ltd* BVIHCMAP 2018/0005, BVIHCMAP2018/0008 at [27] (Webster JA (Ag.)).

⁹ CPR 28.3(2).

interpreting a rule.¹⁰ Then, the Claimant observes that the Court is required to further the Overriding Objective by actively managing cases.¹¹ In order to achieve this objective, the Court has power to direct that any evidence be given in written form¹² and to give any other direction or make any other order for the purpose of managing the case and furthering the Overriding Objective.¹³ In any event, says the Claimant, the Court has an inherent jurisdiction to order a party to give evidence as to its search methodology in order to police its own disclosure order.

[25] On 28th and 29th October 2019, that is, a very short time before the hearing on 31st October 2019, the Second and Third Respondents disclosed some 1,342 pages of documents. The Second and Third Respondents said these had been seized by the CAD in relation to Mr. Tiang's embezzlement ('the CAD Seized Documents'). The Second and Third Respondents explained the delay in disclosing and producing them on the basis that they had forgotten about them, and that WKY was reminded of their existence only upon being served with an application for disclosure in proceedings in Singapore. The Claimant points to a number of factors which, she says (with considerable force I might add, although I do not need to rule on this point) make this explanation inherently implausible. The Respondents go on to take the position that the CAD Seized Documents are not directly relevant. The Claimant submitted, and demonstrated at the hearing, that this was plainly wrong in that they included some documents that squarely and unequivocally contradicted the Respondents' case. This, submits the Claimant, casts significant doubt on the diligence with which WKY and WKC have understood and discharged their disclosure obligations in this case.

[26] The Claimant observes that the CAD Seized Documents included records relating to the corporate Respondents. Consequently, submits the Claimant, the Respondents had misled the Court when they adduced evidence that Mr. Tiang had destroyed all documents and records (with one exception) in September 2014. The Claimant informs the Court that WKY and WKC have failed to provide a proper explanation and have failed to answer a number of questions posed by the Claimant's legal representatives in relation to the CAD Seized Documents.

¹⁰ CPR 1.2.

¹¹ CPR 25.1.

¹² CPR 26.1(2)(f).

¹³ CPR 26.1(2) (w).

- [27] The Respondents' response to the application was led by WKY and WKC. They object to the relief sought. The substance of their objections is as follows.
- [28] The documents sought by the Claimant are not directly relevant to matters in issue in the proceedings. For instance, the documents sought to enable the parties to determine the financial position of the corporate Respondents would be 'directly relevant' if they tend adversely to affect their case or tend to support another party's case. It is quite impossible to say that providing the disclosure sought would yield a documentary record which tends adversely to affect WKY and/or WKC's case or which tends to support the Claimant's case. Moreover, the work necessary to provide the volume of documentation sought – concerning at least forty companies and many years of transactions – would occupy an inordinate amount of resources and a disproportionate amount of time.
- [29] Similarly, in relation to the documents sought relating to Mr. Tiang's conviction, WKY and WKC say it is hard to see how these can be directly relevant, in the sense of tending to affect WKY and WKC's case adversely or to support the Claimant's case. They also say they have been advised that their communications with the CAD are prohibited from disclosure under the Singapore Official Secrets Act.
- [30] In short, say WKY and WKC, the Claimant is seeking such documents in the hope that 'something useful will turn up', amounting to a clear fishing expedition and/or requests for a collateral purpose, such as use in one of the other ninety or so legal proceedings afoot between the parties.
- [31] WKY and WKC say disclosure of the material sought is not necessary. In this regard, their contention appears to be essentially two-fold: as a matter of substance, they do not go to any of the issues which the parties had agreed as long ago as December 2016 are the principal issues for the trial, and secondly, the Claimant's application is so late that this demonstrates that the disclosure now sought cannot seriously be necessary. Put conversely, had it been necessary, the Claimant can have been expected to have made the application long ago. Rather, the existence and/or composition of the alleged debts is a newly alleged issue, which the parties at no point beforehand considered to be a key issue.

- [32] WKY and WKC highlight the following. The Claimant commenced this claim in February 2015. In December 2016 WKY and WKC gave standard disclosure. They gave supplemental disclosure (not counting the CAD Seized Documents) on five occasions between April 2017 and September 2019. In March 2017, the parties filed witness statements; supplemental witness statements were filed in November 2017. A case management conference was held in January 2018. A year and a half later, on 14th June 2019 the Claimant issued this application.
- [33] Additionally (as alluded to above), WKY and WKC say that many of the requests for documentation do not appear to relate to any of the matters set out in the parties' lists of principal issues to be determined at the trial (which were prepared in advance of the January 2018 case management conference).
- [34] Also, WKY and WKC say the Claimant continues to demand documents in native electronic format when she has been told that they either cannot be located or do not exist. Mr. Tiang is said by the Respondents not to have produced electronic documents but to have used a typewriter.
- [35] In relation to legal advice sought, WKY and WKC's position is that they are not aware of any legal advice obtained by the corporate Respondents from the date of their incorporation until the date of these proceedings.
- [36] In relation to disclosure of documents mentioned in statements of case or evidence, WKY and WKC accept and adopt the same legal principles as the Claimant, stressing that reference to a document by inference is indirect and insufficient. The parties however appear to be apart as to how the principles should be applied.
- [37] WKY and WKC submit that there was in fact no reference to a document at all, and in any event such documents do not exist.
- [38] WKY and WKC answer most of the Claimant's requests in this category by stating that either communications were oral, with no notes available, or all directly relevant documents have been disclosed already, or requests for documents are oppressively wide in scope, or will be disproportionately time-consuming and expensive to produce, or that documents have been destroyed or are irrelevant.

- [39] In respect of inter-company debit and credit notes referred to by a Ms. Janice Ting in her witness statement, WKY and WKC deny that she 'mentioned' such credit notes. They observe that what she said was that she 'was aware that WKN had established a practice of offsetting and netting the balances of companies within the WTK Group against each other through the issuance of debit and credit notes'. WKY and WKC argue that every debit and credit note that was issued throughout the WTK Group and could be found is not directly relevant to the proceedings. Disclosing any debit and credit note that could be found would not tend to affect WKY's and WKC's case adversely or tend to support the Claimant's case. Furthermore, carrying out a search for these would be disproportionately time-consuming and expensive. WKY and WKC submit that these documents appear to be sought for a collateral purpose.
- [40] WKY and WKC submit that the CPR make no provision for the Court to order affidavit evidence to be given as to a party's search methodology, and therefore the Court should not entertain this demand.
- [41] The First and Fifth Respondents support WKY and WKC's opposition to the application. They say it is unnecessary, disproportionate and vexatious.
- [42] They assert as a primary position that they have given disclosure of and have produced for inspection all the documents in their possession, custody or power that are relevant to the matters in issue in these proceedings and which are not otherwise precluded from production. Consequently, they have fully discharged their disclosure obligations.
- [43] The First and Fifth Respondents assert that a number of documents which the Claimant seeks disclosure of either do not exist or if they do exist, they are not within these parties' possession or control. They submit there is no basis upon which the Claimant can go behind their affiant's statements on oath in this regard and such statements have to be regarded as definitive, following **Paddick v Associated Newspapers**¹⁴ and **Henderson v Overall**.¹⁵

¹⁴ [2003] EWHC 2991 (QB) (Tugendhat J).

¹⁵ Unreported, 13 December 2001, 2001 WL 34008538 (Colman J).

- [44] The First and Fifth Respondents submit the following scheme applies to orders for specific disclosure. Such orders should only be granted where documents the disclosure of which is sought are directly relevant to one or more matters in issue in the proceedings (see CPR 28.5(5) and **Barclays Bank Plc v Red Oak Operations Limited**¹⁶). To be directly relevant, the party with control of the document must intend to rely upon it, or it must tend to adversely affect that party's case, or it must tend to support another party's case. Whether or not a document is directly relevant in this sense must be judged by reference to the parties' statements of case, following **Harrods Ltd v Times Newspapers Ltd**¹⁷ and **Paddick v Associated Newspapers**.¹⁸ Then, the documents must also be 'necessary in order to dispose fairly of the claim or to save costs' (see CPR 28.6(1)).¹⁹ Lastly, in considering whether or not to grant specific disclosure the Court must have regard to and apply the Overriding Objective, and consider the likely benefits of specific disclosure, the likely cost to the party being required to make the disclosure and be satisfied that the financial resources of that party are likely to be sufficient to enable that party to comply.
- [45] These Respondents argue that a large number of the documents sought cannot be said to be directly relevant in the requisite sense of that phrase, nor can it seriously be argued that their disclosure is necessary to dispose fairly of the claim or to save costs. Moreover, the breadth of disclosure sought is not compliant with the Overriding Objective or the need to manage litigation costs and maintain proportionality. It is not the law that unlimited resources are to be devoted to a case, notwithstanding that a party may be wealthy.²⁰
- [46] The First and Fifth Respondents furthermore object to the production of certain documents on the grounds that they are subject to legal professional privilege. They take issue with an argument advanced by the Claimant that since she is a one-third beneficial owner of each of the First and Fifth Respondents she is entitled, in the present proceedings, to disclosure of all legal advice obtained by those companies. These Respondents say that is not correct, because in this claim the legal party pursuing the claim is not the Claimant personally but the

¹⁶ Unreported, BVIHCM2014/0126, 16th November 2016 (Davis-White QC J (Ag.)).

¹⁷ [2006] EWCA Civ 294 (Chadwick LJ).

¹⁸ [2003] EWHC 2991 (QB) (Tugendhat J).

¹⁹ (Unreported) Global Skynet International Ltd v Skynet Ltd AXAHCv 2014/0039, 17th November 2017 (Ramdhani J (Ag.)).

²⁰ Fox v Boulter [2013] EWHC 4012 (QB) (Tugendhat J).

Fourth Respondent Rayley. Rayley is an outsider to the internal affairs of the First and Fifth Respondents and thus has no right to inspect material that is legally privileged in their hands. Apart from this, the First Respondent has put the Claimant to proof of her alleged legal title in the single share of that company.

[47] Moreover, these Respondents adopt the position of WKY and WKC that they are not aware of any legal advice obtained by the First and Fifth Respondents.

[48] Lastly, these Respondents say they do not have in their possession and control materials that other companies in the group may have.

[49] The position of the Fourth Respondent, Rayley, is that it is a neutral party in these proceedings and that its role has been strictly limited to providing disclosure. Rayley notes that the Claimant alleges that she is entitled to indemnification from Rayley and Rayley opposes and denies this. Rayley says it has complied with and will continue to comply with its duties of standard disclosure. In relation to certain of the Claimant's requests, such as for documents relating to the corporate Respondents' overdraft limits, Rayley contends these are not directly relevant to matters in issue in these proceedings.

[50] Rayley submits further that documents going solely to credit or credibility of witnesses are not required to be disclosed as part of standard disclosure, following the English Court of Appeal decision in **Favor Easy Management Ltd & Anor v Wu & Anor**.²¹ Rayley submits that although there is an *obiter dictum* in that case suggesting that such material might be disclosable on an application for specific disclosure under the English regime, it is notable that the English Civil Procedure Rules do not contain an equivalent of our CPR 28.5(5) and the scope of specific disclosure is narrower in this jurisdiction than it is in England and Wales. Rayley contends that such an order would go against the spirit of the CPR which has been to encourage the parties to focus on the central issues.

Discussion

[51] It is convenient to take this last point first. CPR 28.5(5) provides:

²¹ [2011] 1 WLR 1803 at paragraph 19 (Neuberger LJ).

“An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.”

[52] I agree with Rayley’s legal submissions in relation to disclosure of documents that go to credit or credibility of witnesses. As a general proposition and in relation to credit generally, this must be correct. Indeed, it is axiomatic in CPR 28.5(5). However, I differ from Rayley as to how these principles are to be applied in this case. There can be situations where one of the matters in dispute is whether a version of events contended for by a party is true or false. In such a case, the court can order disclosure of documents which are directly relevant to that issue, even though it is an issue of credit or credibility. The criteria for disclosure remain two-fold: (a) direct relevance to and (b) a matter in issue in the proceedings.

[53] This is such a case. It is hard to escape the conclusion that the central substantive issue is whether the Defendants’, and in particular the Second and Third Defendants’, explanation for the impugned payments is true. This means that the Court can, if other factors render it appropriate, order specific disclosure of documents that pertain directly to the truth or otherwise of that explanation.

Financial Position Documents

[54] The first limb of the Claimant’s application concerns documents which she alleges should already have been disclosed. The Claimant says these mainly go to the issue whether the two alleged inter-company debts existed and their composition. She contends that the majority of her requests are directed at documents that will enable her to test this issue. Secondly, this category also includes documents seized by the CAD that may not yet have been disclosed by the Respondents.

[55] Taking this starting basis at face value, we first have to consider to what extent this broad category of documents is relevant.

[56] In relation to the financial and accounting records, in practice what the Claimant is asking for is disclosure of a wide range of materials to which WKY and WKC have access to enable a degree of reconstruction of the inter-company balance position. This, she says, is necessitated by reason of the destruction, or alleged destruction, of the inter-company ledger. Even a partial

reconstruction of the inter-company balance position would, or might, depending upon how complete the materials are, enable her to test the Defendants' explanation for the impugned payments.

[57] It is worth observing that the importance of a ledger as a key document stands to reason where a case is being advanced that payments were part of an alleged practice of inter-company settlements.

[58] In the present case, the Defendants, and WKY and WKC in particular, rely upon their own explanation, not documentary evidence, to explain the underlying accounting treatment in relation to the impugned payments. For the reasons set out in the preceding paragraph, this explanation would have been covered, in whole or in part, by the allegedly destroyed ledger.

[59] It is tempting then to accept the Claimant's powerful submission that such primary documents as may still exist which can be used to reconstruct the ledger and stand as independent evidence of the Defendants' explanation are plainly relevant, should have been disclosed as part of standard disclosure, and can and should now be ordered to be disclosed by way of an order for specific disclosure.

[60] A difficulty with this submission is that not all the financial and accounting documents pertaining to inter-company balances will be directly relevant to the existence and eventual composition of the alleged debts.

[61] I accept that to be directly relevant, the party with control of the document must intend to rely upon it, or it must tend to adversely affect that party's case, or it must tend to support another party's case, but the rule of law known as the 'rule in Peruvian Guano' does not apply.²² I will say more about that rule shortly.

[62] CPR 28.5(1)(b) permits the Court to order a party to search for documents. But the Court must also be satisfied that the criteria for making an order for specific disclosure are fulfilled. These go beyond considering whether documents, or a category of documents, are directly relevant and should have been disclosed in compliance with a party's standard disclosure obligations.

²² CPR 28.1(4).

- [63] Before considering these criteria, we are presented with the difficulty that from the Claimant's and the Court's perspective it is impossible to know which of the financial and accounting materials are indeed directly relevant without seeing them first. Ordering disclosure of all such documents, including irrelevant documents, is not appropriate.
- [64] It is abundantly clear to me that the Claimant's legal practitioners are fully aware of this problem. They have, in consequence, raised a fallback argument that this Court has power to order specific disclosure of documents that are not directly relevant, including those that may lead to a train of enquiry that may advance the applicant's case or damage the disclosing party's case. I will go on to explain why this is, in my respectful judgment, wrong.
- [65] The Claimant relies in this regard upon the following *dicta* of Leon J. in **Yao Juan v Kwok Kin Kwok**:²³
- "[34] The court is permitted to develop a customized approach to fit the case. It is not hamstrung by any attempt by rule-drafters to micromanage the process. There is a significant element of "trust the court".
- [66] The preceding paragraphs [27] to [33] in that case set the context for the 'customized approach' suggested at paragraph [34]. Their nub is the learned judge's finding at paragraph [32] that
- "[o]n its face this wording [the use of the word 'may' in CPR 28.5 in contrast to use of the word 'must' in CPR 28.6(1) and (2)] appears to leave it open for specific disclosure to include documents that go beyond documents that are "directly relevant" within the meaning of Rule 28.1(4) so long as they do not include documents the production of which would be only because they are "train of enquiry" documents, which Rule 28.1 precludes when it dis-applies "the rule in Peruvian Guano".
- [67] CPR 28.5(5) provides:
- "An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings."
- [68] The learned judge in **Yao Juan v Kwok Kin Kwok**²⁴ interpreted the word 'may' in this provision as permissive, as opposed to as being restrictive. In other words, that if the court thinks fit, it

²³ (Unreported) BVIHCM2013/0162 at [34] (Leon J).

²⁴ (Unreported) BVIHCM2013/0162 (Leon J).

can (but does not have to) make an order for specific disclosure of documents that are directly relevant. The Claimant adopts and relies upon this approach.

- [69] The Respondents disagree. They rely upon a subsequent decision of this Court, differently constituted, in **Barclays Bank Plc v Red Oak Operations Limited & Anor**.²⁵ At paragraph [15] of this judgment, the learned judge expressed difficulties with this analysis, whilst recognizing that he had not heard full contested argument:

“[15] With great respect, I have three difficulties with this analysis. First, it seems to me that, if specific disclosure can include documents that go beyond documents that are “directly relevant”, then it can include documents relevant under “the rule in Peruvian Guano”. That rule forms part of the definition of documents that are “directly relevant”. If specific disclosure is not limited to documents that are “directly relevant”, then there is no requirement to exclude documents which fall within the rule in Peruvian Guano. Secondly, without determining the point at this stage, I am far from certain that there is some intermediate category of documents which falls between those which are “directly relevant” and those falling within the rule of Peruvian Guano. The so-called Peruvian Guano rule, extracted from the case of that name, relates to documents which are “indirectly” relevant, giving rise to lines of enquiry which might assist or damage a relevant party’s case. Thirdly, I do not consider that the word “may” used in EC CPR 28.5(5) is permissive in the sense that the court “may” or “may not”, at its discretion, limit specific disclosure to documents which are directly relevant. In my assessment, in its context the word “may”, means “shall” in the sense of delineating the scope of the court’s power. This follows from the use of the words “may...only”. Accordingly, in my judgment, documents ordered to be disclosed by way of specific disclosure must be directly relevant. However, if I am wrong about this, it would, in my view, be an exceptional case where documents that were not “directly relevant” should be ordered to be disclosed by way of specific disclosure. I raised this issue with the advocates before me, and understood them to agree that the rule is to be read in the manner that I have set out, that is as limiting specific disclosure to documents that are “directly relevant”. I have not therefore heard contested argument on the point.”

- [70] With deference and respect to the learned judge in **Yao Juan v Kwok Kin Kwok**, I agree with the analysis in **Barclays Bank Plc v Red Oak Operations Limited & Anor** and I will follow that authority. I had the benefit of fuller argument than the Court possibly had in **Barclays Bank Plc v Red Oak Operations Limited & Anor**. but nothing struck me as showing that the Court’s analysis there was wrong. I am persuaded that it is right for the following additional reasons.

²⁵ (Unreported) BVIHCM2014/0126 (Davis-White QC J(Ag.)).

- [71] First, the learned judge in **Yao Juan v Kwok Kin Kwok** did not rely upon any authority other than his own linguistic interpretation to construe the meaning of ‘may’ in CPR 28.5(5).
- [72] Secondly, the intermediate category of documents that the learned judge identifies is amorphous. That, and his suggestion that litigants should ‘trust the court,’²⁶ militates against the spirit of the CPR that litigants should be able to know, as far as reasonably possible, where they stand with regard to their procedural obligations and rights. Ambiguity is the implacable enemy of an orthodox hermeneutic. The drafters of the CPR have gone to great lengths to eliminate guesswork and the debilitating notion that legal proceedings are an ill-lit, endless labyrinth where litigants are at the mercy of judicial officers who are all too often seen (wrongly or rightly) as covered in a double cloak of confusion when it comes to commonsense and day-to-day lay realities. A prime example of this is that it was considered expedient – for the benefit both of litigants and judicial officers, and for the first time in English (and Eastern Caribbean Supreme Court) legal history – to spell out the Overriding Objective, and to do so right at the start of the CPR.
- [73] Thirdly, placing a permissive interpretation on the word ‘may’ reduces that provision to no more than an illustration of what the Court can do. If that is right (and I do not think it is), then it is also an uncharacteristically poorly expressed illustration. The epithet I am tempted to use is ‘feeble’. If it was intended to mean that the Court has power to order specific disclosure of documents that are not ‘directly relevant’ within the sense of that term used in CPR 28.1(4), then CPR 28.5(5) could (and in my view probably would) have said so. But it did not. This is to be contrasted with the explicit matters the Court ‘may’ order as part of its case management powers set out in CPR 26.1(2). These are carefully spelled out, ending with a deliberately expressed ‘catch-all’ power. There is no ‘catch-all’ power expressed in CPR 28.5(5) and on the learned judge’s interpretation in **Yao Juan v Kwok Kin Kwok** such a power would need to be implied. For my part, I am not persuaded that the drafters of CPR 28.5(5) intended to leave such a matter to implication, particularly in the context of an otherwise carefully circumscribed procedural regulatory scheme.

²⁶ (Unreported) BVIHCM2013/0162 at [34] (Leon J).

- [74] Fourthly, in **Compagnie Financière du Pacifique v Peruvian Guano Co.**²⁷ the English Court of Appeal drew a simple distinction between directly relevant and indirectly relevant documents. Directly relevant documents are those which we recognize as documents tending to support or be adverse to a party's case. Indirectly relevant documents were identified as those which contain information which may 'fairly lead [a party] to a train of inquiry' which may have the consequence of the document supporting or being adverse to a party's case. It is such indirectly relevant documents that the English Court of Appeal ruled should be disclosed and which our CPR 28.1(4) expressly excludes from disclosure. Thus the 'rule in Peruvian Guano' itself considers that there are only three types of document the court and the parties need to concern themselves with: those that are directly relevant, those that are indirectly relevant, and those that are irrelevant.
- [75] I note further that CPR 28.1(4) states that its definition of 'directly relevant' is '[f]or the purposes of this Part'. I take this to mean for the entirety of CPR 28, because this definition is given in the introductory sub-part. The definition of 'directly relevant' does not admit of an intermediate category. A document is either 'directly relevant' or it is not. If it is, it is disclosable. If it is not, it is not.
- [76] I accept the Claimant's submission that direct relevance must be assessed by reference to the positions the Respondents have pleaded or otherwise asserted as part of what the law treats as a party's statement of case.
- [77] I apprehend therefore that this Court has power only to order disclosure of documents that are directly relevant as defined by CPR 28.1(4). It has no power to order specific disclosure of documents that are irrelevant or indirectly relevant.
- [78] Lastly, in connection with the Claimant's contention that the Court has power to order specific disclosure even of 'train of enquiry' type documents identified as indirectly relevant in the 'rule in Peruvian Guano', I note that the learned judge in **Yao Juan v Kwok Kin Kwok** considered that CPR 28.1 ruled this out.²⁸ I agree and follow that part of the decision. That submission, with respect, finds no favour with me.

²⁷ (1882) 11 QBD 55 at page 63 (Brett LJ).

²⁸ (Unreported) BVIHCM2013/0162 at [40] (Leon J).

- [79] In my respectful judgment the financial and accounting materials and the further disclosure of CAD Seized Documents that the Claimant seeks which are not 'directly relevant' are 'train of enquiry' type documents. I confess this has been a difficult point for me to decide, in relation to the financial and accounting materials sought. The reasons why this has been difficult are as follows. All those documents sought appear to be directly relevant to the circumstances surrounding the existence of the alleged debts. A close analogy appears to be the delineation of parcels of land under the pre-registration land system, under which one's parcel was defined by reference to where it was not – that is, by the boundaries of the neighbouring lands on all sides. In the same way, the Claimant hopes to reconstruct the financial position of the material companies surrounding the alleged debts so that their existence and composition may become sufficiently clear to enable her to test the Defendants' case. As a matter of principle therefore, all such documents in this category that are not 'directly relevant' will either be completely irrelevant or might beg the question whether they might be 'directly relevant'. In other words (and I chose the words of the preceding sentence carefully), they lead to a train of enquiry as identified in *Peruvian Guano*. I am satisfied the Claimant's learned counsel knows this – it is for that reason that they argued (and had to argue) that 'train of enquiry' documents are disclosable under our specific disclosure regime.
- [80] In relation to the CAD Seized Documents, the alleged fact that Mr. Tiang falsified family company accounting records in order to cover up his embezzlement leads one to ask whether the documents seized by the CAD contain or comprise materials which are 'directly relevant' to the existence and composition of the debts in issue. As a category as a whole, these also are 'train of inquiry' documents.
- [81] I stress this is as a category as a whole. The CAD Seized Documents were shown at the hearing to contain some (albeit a small number of) documents which were directly relevant to another contested issue in the proceedings, whether WKY and WKC were directors of a material company. The Respondents' bald assertion that the CAD Seized Documents are not relevant was to that extent wrong, as learned counsel for WKY and WKC to all intents and purposes conceded (if not in so many words) at the hearing. The Respondents have a continuing obligation to disclose directly relevant documents. Their blanket dismissal that all of the CAD Seized Documents were irrelevant is disconcerting. It suggests at the very least that

someone either has not checked or searched for documents properly or has adopted a cavalier and dismissive attitude towards his disclosure obligations.

- [82] The net result is that I do not have the power to order disclosure of the categories of documents which the Claimant says were relevant and should have been disclosed but were not. If such documents are in fact relevant, they are merely indirectly relevant and thus excluded from disclosure. This however does not prejudice the Claimant's right to seek specific disclosure of undisclosed documents which he can show are directly relevant.

Necessity

- [83] Since some of the documents in these categories may indeed be directly relevant upon their face once they are produced for inspection, I must consider whether to order a search to be conducted pursuant to CPR 28.5(1)(b) and for any such documents as may be found to be disclosed pursuant to CPR 28.5(1)(c).
- [84] The first criterion that I must consider is whether such an order is necessary in order to dispose fairly of the claim or to save costs. This criterion is provided in CPR 28.6(1). I conclude that it is not necessary.
- [85] The Claimant says she wants the accounting and financial documents in order to test the Respondents' case as to the existence and composition of the alleged inter-company debts that were allegedly settled by the impugned payments. This is not sufficient to render such disclosure 'necessary'. The fair disposal of the claim entails a wider enquiry. Where, as here, the Defendants' case is not just constructed out of what the documents show but is dependent upon the explanation of those documents proffered by the Respondents and their witnesses, credibility assumes particular importance. Credibility stands to be assessed in light of all the circumstances of a case.
- [86] As the Claimant points out, certain of the documents (bank statements) the Respondents have chosen to disclose show 'a multitude of unexplained payments' (Claimant's emphasis) made by the corporate Respondents to three other companies that may alter the inter-company picture the Respondents have chosen to 'paint'. The Claimant contends that she should be allowed to have the disclosure needed to be able to analyse this. But this point cuts the other way too. If

the Respondents will not be able to explain adequately at trial the effect or otherwise of those payments, this could seriously affect the credibility of the Respondents' apparently perfect recollection and reconstruction of the alleged debts and impugned payments. In short, documents that explain these other payments are desirable but not necessary for the fair disposal of the claim.

[87] Issues of credibility include how a party has conducted proceedings and the probity of his witnesses.

[88] The Claimant submit the Respondents' main intended witness, Mr. Tiang, has shown himself to be an unreliable narrator, for a number of reasons. He has been convicted and sentenced to a long term of imprisonment for serious offences of dishonesty, in relation to the same accounts which he maintained and which he claims show the alleged debts. There is inconsistency between his or the Respondents' position taken in these proceedings, in that here he denies the impropriety of the transactions which led to his conviction, whereas he has stated to the Singapore courts that he admitted his improper actions at the first opportunity upon being investigated. The admissibility, relevance and weight of these matters, and indeed their accuracy, is a question for trial and I make no findings in relation to them here. There is also the apparently quite extraordinary alleged destruction of the inter-company ledger and mass-destruction of documents by Mr. Tiang, the reasons (or alleged reasons) for which remain unclear.

[89] There is also the explanation of WKY and WKC that they had allegedly forgotten about the existence of the CAD Seized Documents. Again, without making any findings in relation to this now, to have forgotten about such documents appears at first sight to be quite extraordinary. A CAD seizure and investigation is unlikely to be an everyday occurrence in the life of most corporations, and the size and extent of the embezzlement uncovered by the CAD not a matter of little moment. The Respondents have also failed to answer basic questions concerning these documents.

[90] The Claimant indicates that WKY and/or WKC may seek to avoid being cross-examined at trial by invoking ill-health. At this point this remains uncertain and so I attach no weight to this.

- [91] Again, without making any findings in relation to this now, the overall impression given by the Respondents is that they have sought to exert tight control over the documents that should be deployed in these proceedings such that it would be difficult and perhaps impossible for the Claimant to challenge their version of events by reference to documents.
- [92] These matters, to the extent that they may be admissible as evidence, suggests that there may be reasons to doubt Mr. Tiang's and the Respondents' version of the events in issue in these proceedings. Whilst it would of course be desirable for documents to be sought and disclosed that might enable the Claimant and the Court to verify the Respondents' accounting assertions, that is not the test. It is necessity. The disclosure is not necessary for a fair disposal of the claim as a whole.
- [93] The disclosure is also not necessary for costs to be saved. If anything, the wide-ranging search required is likely to increase the Respondents' costs significantly.
- [94] I accept the Respondents' submission that the Claimant's delay in bringing this application indicates that the Claimant herself does not consider the disclosure to be necessary. I agree. I accept there is a long history to disclosure in these proceedings, and if the Claimant thought having disclosure on these matters was so important a far more prompt application would have been the appropriate course.
- [95] This application was made at an advanced stage of the proceedings. A trial has been set down for June 2020. Any wide-ranging disclosure order made at this late stage threatens to postpone the trial or, if not, then to divert the opponent's attention and efforts during the usually intense final trial preparation period.
- [96] I agree with the Claimant's submission that delay is not of itself dispositive but a factor to be considered upon the exercise of the Judge's discretion. That said, in my respectful judgment the risk of disturbing the trial or unfairly inconveniencing the Defendants during trial preparations is greater than the need for disclosure of the materials sought (indeed, there is no need, as they are not 'necessary'). Simply put, had the Claimant not delayed, these matters would not have required consideration. The delay was too long.

[97] In relation to the CAD Seized Documents, as a category as a whole, these are also not necessary. As a category as a whole, they are only indirectly relevant, as 'train of inquiry' documents. Indeed, it is abundantly clear to me that the Claimant is conducting a fishing expedition on the scale of an industrial trawl on little or no more than a supposition that Mr. Tiang's false accounting to cover up his embezzlement affected the material inter-company credit and debt position. Where there is directly relevant documentary and oral evidence (albeit incomplete) available, I do not think specific disclosure in relation to this category as a whole is necessary for the fair disposal of the claim. This is so, even if the Court has the power to order disclosure of indirectly relevant documents which I believe it does not.

Tiang Destruction Documents

[98] The Respondents produced two invoices in this category and say they are not aware of any other documents that relate to this category. The Claimant observes they have not adduced any evidence of a search and seek an order that they carry out such a search and confirm their position by way of an affidavit by WKY or WKC. Subject to what I will say about methodology below, I see no useful purpose in requiring a further search to be carried out. It would be disproportionate in my respectful opinion for the Respondents to trawl speculatively through volumes of records on the chance that they might come across some directly relevant materials that relate to this.

Legal Advice Documents

[99] The Claimant seeks all legal advice given to the corporate Respondents from inception until the commencement of these proceedings. The Respondents say they are not aware of any such advice. They also raise other arguments against specific disclosure in this category. The Claimant says there is no evidence of any search carried out and seeks an order for a search to be carried out. Subject to what I will say about methodology below, I see no useful purpose in requiring a further search to be carried out. The Respondents can be expected to know, or easily to have found out, if the companies concerned had obtained legal advice.

[100] The request under this head also concerns 'train of enquiry' documents. Moreover, there is no evidence suggesting the Respondents did seek legal advice on questions directly relevant to issues in these proceedings. This request is a speculative fishing expedition.

[101] Having made this finding, there is no need for me to address the issue of privilege.

Documents mentioned in witness statements.

[102] The law in relation to inspection and copying of documents identified in witness statements and other analogous statements specified in CPR 28.16 is relatively straightforward, as explained by the English Court of Appeal in **Rubin v Expandable Ltd and others**.²⁹ The English CPR provision is slightly different from our CPR 28.16, in that the types of filed documents in which mention of a document triggers the right to inspect and copy are slightly different, but the scheme is the same.

[103] CPR 28.16 provides:

1. A party may inspect and copy a document mentioned in –
 - a. an affidavit;
 - b. an expert's report;
 - c. a statement of case;
 - d. a witness statement or summary; or
 - e. the claim form.
2. A party who wishes to inspect and copy such a document must give written notice to the party who, or whose witness, mentioned the document.
3. The party to whom the notice is given must comply with the notice not more than 7 days after the date on which the notice is served."

[104] In **Rubin v Expandable Ltd and others** Rix LJ held that where direct allusion is made to a document then it has been 'mentioned'.³⁰ He recognized a distinction between reference to the fact or effect of, say, a guarantee as opposed to the guarantee document itself.³¹ Rix LJ accepted and followed a distinction drawn by Slade LJ in **Dubai Bank Ltd v Galadari (No. 2)**³²

²⁹ [2008] EWCA Civ 59 (Rix LJ).

³⁰ *Rubin v Expandable Ltd and others* [2008] EWCA Civ 59 at [23] (Rix LJ).

³¹ *Rubin v Expandable Ltd and others* [2008] EWCA Civ 59 at [22] (Rix LJ).

³² [1990] 1 WLR 731 (Slade LJ).

between whether a transaction is referred to (which would not amount to mention of a document) and whether a document is specifically mentioned.³³ As Rix LJ observed,³⁴ Slade LJ spoke of ‘the real difference between a reference to the effect of a document and the contents of a document’, with the latter triggering production. Rix LJ left unsaid, but implied, that the former does not trigger production.

[105] Rix LJ illustrated this with the following example. A reference to a conveyance, guarantee, mandate or mortgage would be a reference to a document. Reference to contents of such documents would also be mention of a document. But mere reference to the effect of some transaction or document, such as to say that a property was conveyed or that someone had guaranteed a loan, would not be sufficient.³⁵

[106] Rix LJ then spoke of a second aspect, going to possible objections or exceptions to disclosure when a document has been mentioned. He stated that

“[t]his is not to my mind intended to be a difficult test. The document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned. ... I do not see why there should be need for a strict approach to a request for inspection of a specific document mentioned in one of the qualifying documents. The general ethos of the CPR is for a more cards on the table approach to litigation. If a party thinks it worthwhile to mention a document in his pleadings, witness statements or affidavits, I do not see why, subject as I say to the question of privilege, the court should put difficulties in the way of inspection. I look upon the mention of a document in pleadings etc. as a form of disclosure.”³⁶

[107] Rix LJ considered that disclosure through mention of a document is ‘another important and formal category of disclosure. He continued:

“If so, then the party deploying that document by its mention should in principle be prepared to be required to permit its inspection, and the other party should be entitled to its inspection. What in such circumstances is the virtue of coyness?”³⁷

³³ Rubin v Expandable Ltd and others [2008] EWCA Civ 59 at [19] (Rix LJ).

³⁴ Rubin v Expandable Ltd and others [2008] EWCA Civ 59 at [19] (Rix LJ).

³⁵ Rubin v Expandable Ltd and others [2008] EWCA Civ 59 at [20] (Rix LJ).

³⁶ Rubin v Expandable Ltd and others [2008] at [24] (Rix LJ).

³⁷ Rubin v Expandable Ltd and others [2008] EWCA Civ 59 at [24] (Rix LJ).

- [108] I accept this reasoning is equally applicable in this jurisdiction. Rix LJ does not in terms address whether it is only 'directly relevant' documents that are liable to inspection. When Rix LJ states '[t]he document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned' I understand him to mean that direct relevance is not a pre-condition for inspection.
- [109] The same can, I think, be said of proportionality. In principle, a party who mentions a document must permit its inspection and it does not affect this obligation if to do so is burdensome in some way. If producing such a document or set of documents may be demonstrated upon cogent evidence to be unusually onerous the Court can, I think, place limits upon the effort required in furtherance of the Overriding Objective.
- [110] At risk of stating the obvious, if documents have been destroyed, lost, or are no longer in a party's possession they cannot be inspected and copied. The duty must logically be on the party who would otherwise have to permit inspection to adduce evidence of such destruction, loss or dispossession, because it is his duty to permit the inspection and he must persuade the court that he cannot and explain why not.
- [111] Rix LJ also made specific mention that Slade LJ in **Dubai Bank Ltd v Galadari (No. 2)**³⁸ acknowledged that reference to documents might be 'compendious' rather than to individual documents.³⁹ I understand this to mean that mention might be made of a set or category of documents and that this would then render the set or category as a whole liable to inspection.
- [112] In sum, simply put, if a party mentions a document or set of documents in pleadings etc. then, privilege apart, he has disclosed it and must permit all the documents to be inspected and copied, should they still exist, subject to any limits the Court may impose in order to further the Overriding Objective.
- [113] In the present case the Claimant, through her legal practitioners, has asked to inspect and copy the following 'documents'. In most cases it is not clear that the witnesses were referring to

³⁸ [1990] 1 WLR 731 at 738C (Slade LJ).

³⁹ Rubin v Expandable Ltd and others [2008] EWCA Civ 59 at [19] (Rix LJ).

documents at all, although it was not unreasonable on their part to suppose that there could well be. For ease of reference I will refer to them by the category numbers the Claimant uses.

Categories 31 and 32

[114] Categories 31 and 32 refer to 'instructions' mentioned by WKY in his First Witness Statement. WKY says these had been given orally over the telephone. The Claimant considers this to be an 'unacceptable' response. She says that given that WKY's and WKC's legal practitioners' general admission that WKY and WKC have decided not to carry out searches for the documents requested in the Claimant's Specific Disclosure request letter and given that there is no indication whatsoever that WKY and WKC or their legal representatives have ever carried out searches of hard copy files, personal computers, laptops and other devices, including servers so as to search for documents in these categories, WKY and WKC should now be ordered to do so, to explain in an affidavit the methodology used and to disclose such documents as may be found as a result of such searches as fall within those categories. The Claimant adds that if WKY and WKC persist in advancing this explanation, this should be confirmed in an affidavit sworn by WKY on their behalf.

[115] The Claimant repeats this submission for the other categories of documents too. I shall address this separately, in relation to the Claimant's request for evidence as to the Respondents' search and disclosure methodology.

[116] WKY's reference to instructions merely describes the fact or effect of these communications. There is no reference to anything in writing. Since there was no document in these categories mentioned in the witness statement, the Claimant's right to inspect and copy has not been triggered.

Category 33

[117] The Claimant asks to see all written communications between WKY and WKC and a staff member of auditors to a material company, Richardson & Wrench, regarding a material loan and outstanding sum. The basis for this request is that the auditors' staff member is said by WKC in his First Witness Statement to have 'informed' WKC that there were monies still owing

by Richardson & Wrench to Rayley under a loan deed. WKY and WKC assert that there were no directly relevant written communications in this category.

- [118] The Claimant again treats this response as unacceptable and calls for methodological aspects to be sworn to in an affidavit from both WKY and WKC.
- [119] The use of the word 'informed' only describes the fact or effect of the communication. There is no reference to anything in writing. Since there was no document in this category mentioned in the witness statement, the Claimant's right to inspect and copy has not been triggered.

Category 34

- [120] The Claimant seeks inspection of all written communications from WKY to WKC by which WKY informed WKC that the amount owed by Rayley to Incredible Power was SG\$11,808,495.05, as WKC claimed happened in his First Witness Statement. WKY and WKC assert that the relevant communications were oral, with no existing notes or other records other than a written resolution of Rayley.
- [121] For the same reasons stated in respect of the earlier categories, the Claimant treats this response as unacceptable.
- [122] Again in this case, the operative word used by WKC was 'informed'. This only describes the fact or effect of the communication. There is no reference to anything in writing, even though the detailed figure cited suggests that some note or number had probably been written down. Since there was no document in this category mentioned in the witness statement, the Claimant's right to inspect and copy has not been triggered.

Categories 35, 37, 40 and 43

- [123] In the First Witness Statement of Ms. Janice Ting, she states:

"Thereafter, as instructed by WKN, I reported to WKY on all matters relating to the business of the WTK Group. Notwithstanding WKN's move to Australia, WKN would still contact me from time to time for updates on the status of the WTK Group."

- [124] The Claimant asks to inspect all communications between WKN and Ms. Ting in the period from 1 March 2011 to 11 March 2013. WKY's and WKC's legal representatives claimed that all the communications were oral and in any event this category is too broad and wide-ranging and goes beyond what is necessary or relevant for the resolution of the issues in the proceedings.
- [125] Ms. Ting's narrative asserts what happened in terms of the fact or effect of the communications, with no reference to anything in writing. She does not mention a document in this category. The Claimant's right to inspect and copy a document has not been triggered.
- [126] A similar analysis applies to categories 37, 40 and 43.

Category 36

- [127] At paragraph 14 of Ms. Ting's First Witness Statement she states:

"From my various roles within the WTK Group, I was aware that WKN had established a practice of offsetting or netting the balances within the WTK Group against each other through the issuance of debit and credit notes. In my role, I was instructed by WKN to offset the balances of the Malaysian Companies in the WTK Group against each other (the "WTK Group Malaysian Companies")."

- [128] In paragraph 1 of her First Witness Statement Ms. Ting describes herself as the Chief Financial Officer of WTK Realty Sdn Bhd, which she says is the flagship company of the family group of companies, as well as the CFO of various other companies within the WTK group.
- [129] The Claimant asks to inspect and copy the 'debit and credit notes' mentioned here by Ms. Ting. What Ms. Ting mentions here is a category of documents pertaining the WTK Group as a whole, not just what she refers to as the 'WTK Group Malaysian Companies'. This category of documents comprises the debit and credit notes used for, or evidencing, the offsetting or netting of balances between companies within the WTK Group as a whole. This category of documents does not include debit or credit notes issued to parties outside the WTK Group, or for purposes other than to achieve or evidence the offsetting or netting referred to above.

- [130] WKY and WKC resist this. They do not dispute that these are documents. Rather, they say that these documents are not directly relevant to the matters in question in these proceedings, carrying out a search for these documents would be disproportionately time-consuming and expensive, and they appear to be sought for a collateral purpose.
- [131] Taking this last point first, I reject this as evidentially extremely weak speculation.
- [132] I do not see any cogent evidence why it would be unusually burdensome upon the Respondents to search for and produce for inspection these debit and credit notes. I am not persuaded that a search and production of all debit and credit notes would be disproportionate in terms of time and cost. First, it is quite normal for parties in complex commercial litigation to disclose and produce for inspection large volumes of documents, even if most will not be referred to at trial. Secondly, the very nature of debit and credit notes is to record for subsequent information and eventual use a debit-credit position. So, production for inspection of the debit and credit notes requires no more than what these records were designed for. Thirdly, since Ms. Ting is the Chief Financial Officer of numerous companies within the family group, including of its flagship company, and is clearly familiar with the practice she describes, and, unlike Mr. Tiang, apparently at liberty to access files, I see no reason why all the debit and credit notes cannot be located and produced for inspection reasonably promptly.
- [133] WKY and WKC protest that not all debit and credit notes between all companies within the group, from inception, are directly relevant to the matters in question in these proceedings. That may be so, but Ms. Ting has disclosed these notes generally. Direct relevance is not a condition for production.
- [134] Moreover, even if direct relevance is a consideration (which I do not think it is), the inter-company financial position which tends to support or be adverse to the existence and composition of the alleged debts can be expected to be shown by such debit and credit notes. That inter-company financial position can be expected to have a history – simply put, such credit and debit notes can well be expected to show how the companies concerned reached the point of owing each other the alleged debts. It is not possible to pick a date before which such credit and debit notes would be irrelevant.

- [135] Furthermore, the Respondents themselves do not limit the practice of inter-company netting off simply to the corporate Respondents named in these proceedings. On their version of events, such netting-off practice was a wider exercise, involving other, unnamed, companies within the group. Saying that debit and credit notes between certain companies only should be produced for inspection ignores the open-ended range of companies involved and used by the Respondents themselves.
- [136] All debit and credit notes ever in existence used for, or evidencing, the offsetting or netting of balances between companies within the WTK Group as a whole must be produced.

Category 38

- [137] In Ms. Ting's second Witness Statement she states:
- "Furthermore, the records of Harbour View and Ocarina recorded the payments for the relevant invoices as having been made by Rayley even though the payments were in fact made by Esben Finance on behalf of Rayley."
- [138] The Claimant seeks production and inspection of these financial books and records of Harbour View Realty Sdn Bhd ('Harbour View') and Ocarina Development Sdn Bhd ('Ocarina').
- [139] WKY and WKC resist this, citing the same reasons as for category 36. In relation to the records of Harbour View and Ocarina, Ms. Ting unequivocally discloses these. The Claimant is entitled to their production and inspection. They must be produced for inspection and copying. For the same reasons as for category 36, I reject the Respondents' arguments as to direct relevance, proportionality and alleged collateral purpose. For the purposes of the hearing, the Applicant submitted a draft order which restricted the period for which these records are sought to the period from 1st January 2000 until the date of commencement of these proceedings. If the Applicant wishes to limit her request to that period, or not to require enforcement of an order for inspection that also covers an earlier period, that is a matter for her. But as a matter of principle all the financial records of these two companies are liable to be produced to the Claimant for inspection and copying. By all the financial records, I mean all such records, not just those that record the payments for the invoices relating to the alleged debts in this matter. It is the records as a whole that are mentioned. Within them are said to be recorded the payments in question. The Claimants are now entitled to see exactly where and how they are recorded, **or not**, as the case may be. The legal representatives for WKY and WKC raised a

question in correspondence upon the draft of this judgment being circulated, whether by 'financial books and records' is meant the following types of documents:

- (1) audited financial statements;
- (2) general ledger;
- (3) debtors' ledger;
- (4) creditors' ledger; and
- (5) bank statements.

I do not know what types of documents make up the financial books and records of these companies. I have not seen them. With such a term, I am adopting a broad meaning and an anti-technical approach to ensure that whatever is reasonably recognizable as a financial book or record is indeed produced. These types of documents mentioned above would clearly fall within the term, but there may be others not mentioned here, such as unaudited financial statements, management accounts and directors' accounts, and perhaps others. They too need to be searched for and produced for inspection and copying by the Claimant if they exist.

Category 39

- [140] Mr. Tiang referred to handwritten or typed notes in his First Witness Statement with details of payments to be made by the corporate Respondents. In principle the Claimant is entitled to their production and inspection. WKY and WKC claim however that apart from a separate folder of documents all such documents were destroyed by Mr. Tiang. If that is right, clearly the Respondents cannot produce them for inspection and copying and it would make no sense for the Court to order them to do so. The Claimant seeks verification of WKY's and WKC assertion by way of affidavit evidence. I do not think WKY or WKC need go so far as to attest to this detail.

Category 42

- [141] In paragraph 31 of Mr. Tiang's First Witness Statement he describes in general terms how he was then the subject of an ongoing CAD investigation. As at the date of that statement (10th March 2017) Mr. Tiang stated that no charges had yet been brought against him. The Claimant seeks production by the Respondents and inspection of the charge sheet or other document setting out the allegations mentioned by Mr. Tiang.

[142] The response of WKY and WKC was simply that they do not have a copy of the charge sheet. The Claimant observed that was only a partial reply and asked for a full response.

[143] The passage in the witness statement of Mr. Tiang that the Claimant refers to does not mention any documents. Nor does anything he says there necessarily imply the existence of any document other than probably notes of interviews taken by the police, which are not necessarily in the Respondents' possession or control. In my respectful judgment no right to production and inspection pursuant to CPR 28.16 is triggered here.

Documents in native electronic format

[144] The Respondents do not oppose in principle the request for documents in native format. However, in respect of categories 45 and 46 they say the native format documents cannot be located, although WKY and WKC have carried out the 'necessary searches'. The Claimant is not satisfied with this response. She points out that the Respondents have adduced no evidence detailing what searches have been carried out and no evidence as to why the documents cannot be located. The Claimant seeks an order requiring WKY and WKC to carry out appropriate searches by interrogating personal computers, laptops and other devices and produce for inspection what can be found. Subject to the ruling on methodology below, I do not think the Respondents should be ordered to conduct further searches at this point.

[145] Category 47 concerns 'typed notes' mentioned by Mr. Tiang in his First Witness Statement. He says at paragraph 12, with reference to alleged written instructions provided by WKN to Mr. Tiang: 'These were usually handwritten or typed notes prepared by WKN before our meetings.' The Respondents' response was that these were prepared by Mr. Tiang on a typewriter so that there are no native electronic format versions available. The Claimant points out that this does not seem right, because according to Mr. Tiang it had been WKN who had prepared them. I agree that this is the sensible way to read what Mr. Tiang said. To suggest that Mr. Tiang typed the notes WKN prepared is a strained construction, although not entirely outside the realms of contemplation. Since Mr. Tiang mentioned these notes in his witness statement, the Respondents are liable to produce them for inspection and copying. In relation to any native electronic formats, I agree with the Claimant that the Respondents should conduct a search for them by interrogating the appropriate electronic devices.

- [146] Category 48 comprises letters Mr. Tiang says in his First Witness Statement he prepared for WKY and WKC to send to HSBC. The Respondents' position is that these were prepared on a typewriter by Mr. Tiang and so no native electronic version exists. I think it would serve no useful purpose to order the Respondents to carry out a search nonetheless. The same applies to categories 50, 51 and 52.
- [147] Category 49 (which was not pursued in the Claimant's skeleton argument for the hearing) concerns a loan deed mentioned by Mr. Tiang in his First Witness Statement. The Respondents' answer is that they do not know who prepared it as it was created during WKN's lifetime and upon his instructions; therefore they are not aware of, and have not been able to locate, any electronic format of this document despite 'the appropriate searches'. Moreover, the Respondents say the existence of the loan deed is not an issue in dispute and thus there is no need or justification from the Claimant as to why any other format of this document is required in order fairly to dispose of the Claim. I accept the Claimant's submission that the Respondents must produce and permit copies of this document for inspection and copying, but, subject to what I say below in relation to methodology, I do not think it right to go behind the assertion that appropriate searches have been carried out. If they cannot find it, they cannot produce it for inspection.

Tiang Conviction Materials

- [148] The Claimant seeks wide-ranging disclosure and production of documents relating to Mr. Tiang's conviction. Her objective in doing so is with a view to 'obtaining as much documentary material as reasonably practicable relevant to the approximately three hundred individual transactions whereby Mr. Tiang misappropriated funds from the corporate respondents and to the subsequent instances of false accounting whereby Mr. Tiang sought to cover up his criminal activities'. The Claimant argues that such documentation is directly relevant. She observes that the misappropriations were occurring at the same time as the specific inter-company debts relied upon by the substantive Defendants are alleged to have arisen and certain identified Tiang misappropriations were virtually identical in amount and payor details as the payments relied upon by Mr. Tiang in compiling a list of invoices said to make up the alleged inter-company debts. Moreover, there is documentary evidence that suggests Mr. Tiang stole at least 89% of Rayley's alleged credit balance following its transfer to Esben.

There is also an unresolved question as to how approximately SG\$2.9million recovered from Mr. Tiang should be distributed among the material companies.

[149] WKY and WKC dispute the relevance of the Tiang Conviction Materials. They also assert that they are not allowed to disclose certain documents without authorization of the CAD, but the Claimant says it transpires that no such authorization has been sought, and WKY and WKC refuse to seek such authorization unless ordered to do so. WKY and WKC also say disclosure in respect of this category would be disproportionate.

[150] As a category of documents as a whole, this appears to be a clear example of 'train of enquiry' documents. As such, they are not liable to be disclosed as part of this specific disclosure application. That conclusion is one I have reached as a matter of broad principle. It does not absolve the Respondents from properly exercising their duties of standard disclosure.

Methodology

[151] The Claimants have presented a compelling case that the Respondents, and WKY and WKC in particular, with the help of Mr. Tiang, have sought to limit the documents that are made available to enable the Claimant to test the Respondents' case. In the present case I am far from satisfied that the Respondents have carried out proper searches. The Respondents, by their legal representatives and affiants have taken the position that much of the searches requested by the Claimant are disproportionate in that they would take too long and cost too much. It is not at all clear whether the Respondents have carried out more than the narrowest and most obvious searches. They have been far too ready to say that documents have been destroyed, only for exceptions to come to light. The explanations themselves concerning destruction of documents stretch credibility. In response to this specific disclosure application the Respondents have filed affidavits by attorneys, not by themselves. As the Claimant says, information is given that is likely to be outside their personal knowledge but the source of such information is not identified.

[152] Nor am I satisfied that the Respondents have been properly candid with documents that they have or have had in their possession or control. I am inclined more to accept the Claimant's narrative at this stage, that the Respondents have sought to engineer a situation wherein the documents before the court concerning the impugned transactions are no more than those

which support the Respondents' case. Whilst I am inclined to believe at this stage that this has been the Respondents' and in particular WKY's and WKC's intention, they have not been able to achieve this entirely successfully. The Claimant has obtained some documentation which raises questions concerning the Respondents' version of events. The Claimants have material upon which to base cross-examination, not only as to what could be called the mechanics of the impugned transactions but also, very importantly here, as to the credibility of witnesses.

[153] Sight should also not be lost of the fact that disclosure is not an end in itself, such that specific disclosure should be ordered until a goal of disclosure as close to perfection as possible has been achieved. This application strays closely towards such.

[154] Nor should the specific disclosure regime be used as a vehicle for a wholesale forensic interrogation or audit of potentially relevant documents. Again, this application strays closely towards such.

[155] The scheme of standard disclosure pursuant to CPR 28 envisages self-certification that a party has understood the duty of disclosure and to the best of that party's knowledge it has been carried out – see CPR 28.9. The CPR contain no express provision for an opponent to go behind such self-certification.

[156] I accept the submission of the Claimant that the court has power in furtherance of the Overriding Objective to order a party to file an affidavit to explain how he has conducted his disclosure obligations or to confirm his compliance. The Claimant's learned counsel reads CPR 1.2, 25.1, 26.1(2)(f) and 26.1(2)(w) together to reach this conclusion. I agree.

[157] Such a power would, I think, only be used sparingly, in circumstances where the court has a real doubt that a party has been properly compliant with his disclosure obligations.

[158] In the present case I indeed have a real doubt whether the Respondents, and WKY and WKC in particular, have properly complied with their disclosure obligations.

[159] In this case WKY and WKC have filed and served six lists of documents in total. Each has been signed and certified by WKY and WKC personally, and their legal practitioners in this jurisdiction have also certified that they have explained the duty of disclosure to WKY and

WKC. There is an indication in the materials before me that WKY and WKC have been assisted in the disclosure process by an overseas firm of lawyers, with such lawyers being the channel for communicating WKY and WKC's instructions to their BVI legal representatives. This is common in cases before this Court. Such overseas lawyers are of course unregulated by BVI law and courts and this Court has no visibility over whether such lawyers have properly and indeed honestly complied with BVI disclosure duties. It should be clearly stated that the duty to give proper disclosure is non-delegable with the responsibility resting with the party concerned.

[160] The certification of a list of documents is a mere confirmation; it is not a statement under oath or formal affirmation in lieu of an oath. It would be in the interests of all concerned, including the Respondents (WKY and WKC included), and of justice, for doubts to be dispelled as far and as soon as possible concerning the propriety of the Respondents' disclosure. This can, in my respectful judgment, be achieved to a considerable extent by WKY and WKC each personally swearing or affirming an affidavit in which they each explain what they understand their duties of standard disclosure to be, confirming that to the best of their knowledge they have complied with their duties, identifying who it is that has carried out the disclosure exercise on their behalf and confirming that they have explained, or caused to be explained (and if so how and by whom), to any such person who assisted them what the duties of disclosure are. I do not view such an affidavit as a burdensome or oppressive requirement. It should not be problematic for WKY and WKC to make such an affidavit. To render it even less burdensome, and since the Claimant asks that they produce such an affidavit (although the Claimant wants such an affidavit to go much further) it is in my respectful judgment appropriate that the Claimant should pay WKY's and WKC's reasonable costs of producing such affidavits.

Disposition

[161] The order of the Court will therefore be:

- (1) The Respondents shall search for and produce for inspection and copying by the Claimant the following categories of documents:
 - a. Category 36: all Debit and Credit notes ever in existence pertaining to the alleged practice of offsetting or netting balances within the WTK Group as a whole
 - b. Category 38: all financial books and records of Harbour View and Ocarina;

- c. Category 47: a copy in native electronic format of the 'typed notes' mentioned by Mr. Tiang in his First Witness Statement at paragraph 12;

- (2) Such searches are to include searches of electronic devices and virtual records as well as physical records.
- (3) The Respondents shall each file and serve an affidavit of compliance with the foregoing. The natural person Respondents (i.e. WKY and WKC) shall each make this affidavit personally. This affidavit shall attest to the completeness of the documents produced. Where such production may not be complete, the Respondents shall include a detailed description of the searches carried out, including but not limited to identifying by whom such searches were carried out, the entirety of the instructions given to the person(s) carrying out the search if different from the Respondents, what physical, electronic devices and/or virtual spaces were searched.
- (4) In addition to the affidavit ordered to be made above, WKY and WKC shall each personally file and serve an affidavit
 - a. explaining in detail what they understand their duties of standard disclosure to be;
 - b. confirming that to the best of their knowledge they have complied with their duties;
 - c. identifying who it is that has carried out the disclosure exercise on their behalf if WKY or WKC shall not have carried out their disclosure obligations personally in whole or part,
 - d. confirming that they have explained to any such other person who assisted them what the duties of standard disclosure are;
 - e. stating how and in what terms they have explained the duties of standard disclosure to any such other person who assisted him or them.
- (5) The parties are directed to endeavour to agree deadlines for compliance with the above, failing which the question of a timetable for compliance is reserved following further argument at an oral hearing to be fixed upon the request of one or more of the parties.
- (6) The Claimant shall bear the reasonable costs of WKY and WKC of producing the affidavits for each of WKY and WKC respectively ordered in the preceding paragraph 4, incurred

from today's date until the date of their respective service upon the Claimant, to be assessed if not agreed.

(7) The remainder of the Claimant's application filed on 14th June 2019, that has not been satisfied by the Respondents prior to the hearing, stands dismissed.

(8) Except as otherwise provided above, the costs of the Claimant's application filed on 14th June 2019 is reserved for further hearing as to incidence and quantum.

(9) Liberty to apply generally.

[162] Since a draft of this judgment is to be circulated in draft for learned counsel's review, the time for appeal and any applications relating thereto will run from the date the sealed version of this judgment has been delivered.

[163] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar