Neutral Citation Number: [2026] EWCA Civ 117

Case No: CA-2024-002403
CA-2025-000316

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
His Honour Judge Rawlings (sitting as a Judge of the High Court)
Case No. BL-2021-BHM-000065

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2026

Before:

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE COBB

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Between:

(1) MIDLAND PREMIER PROPERTIES LIMITED	**Claimant**
(2) SANMAN PROPERTY MANAGEMENT LIMITED	**Claimant/ Respondent**
- and -	
(1) RAKESH SINGH DOAL	**Defendant**
(2) 2020 LIVING LIMITED **(3) SAMUEL GINDA** **(4) TAYLOR GRANGE 2 LIMITED**	**Defendants/ Appellants**
(5) TAYLOR GRANGE DM LIMITED	**Defendant/ Appellant in CA-2024-002403**
(6) TGDM ONE LIMITED	**Defendant/ Appellant**

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Stephen Robins KC (instructed by **Hill Dickinson LLP**) for the **Appellants**
Max Mallin KC and Daniel Lewis (instructed by **Shakespeare Martineau LLP**) for the **Respondent**

Hearing dates: 27 and 28 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Newey:

1. There are two appeals before us. Both are brought by the second, third, fourth and sixth defendants, respectively 2020 Living Limited ("2020 Living"), Mr Samuel Ginda, Taylor Grange 2 Limited ("Taylor Grange 2") and TGDM One Limited ("TGDM"). The earlier of the appeals was also brought by the fifth defendant, Taylor Grange DM Limited ("Taylor Grange DM").

2. The first appeal is against the decision of His Honour Judge Rawlings ("the Judge"), sitting as a Judge of the High Court, in a judgment dated 13 September 2024 ("the Debarring Judgment"). The Judge concluded in that judgment that the second to sixth defendants had failed to comply with an unless order dated 31 July 2024 and should be refused relief from sanction, with the result that their defences were struck out and they were debarred from defending the claim. The Judge further said that, had he not found the unless order to have been breached, he would anyway have considered it appropriate to strike out the defences of the second to sixth defendants in the light of their failure to comply with Court orders. However, the appellants contend that they did not breach the unless order; that, if they did, they should have been granted relief from sanction; and that it was not appropriate to strike out their defences or to debar them from defending.

3. The second appeal arises from the trial which took place before the Judge, with the appellants debarred from defending. The order made following that trial provided for "[t]he issue of which if any counter-factual scenarios pleaded in paragraphs 20E(1) to (5) of the Re-Re-Amended Particulars of Claim is appropriate for the purposes of assessing quantum" to be adjourned to the "quantification hearing" which was to be listed subsequently. The appellants contend that this direction impermissibly departed from an order which District Judge Phillips had made on 22 February 2023.

Basic facts

4. The second claimant, Sanman Property Management Limited ("Sanman"), is controlled by Mr Pardeep Heer, who is a director of the first claimant, Midland Premier Properties Limited.

5. Mr Ginda is a director and major shareholder of 2020 Living and the sole director of Taylor Grange 2 and TGDM. He is also a director and sole shareholder of Samuel & Co Holdings Limited, which holds the entire issued share capital of Taylor Grange DM, of which Mr Ginda is the sole director. Until 21 April 2021, when half of the shares were transferred elsewhere, Taylor Grange DM owned the entire issued share capital of Taylor Grange 2. Since 1 December 2020, Taylor Grange DM has held all the issued shares of TGDM. The shares had hitherto been held by Mr Ginda.

6. The proceedings were issued in late 2021. By them, Sanman explains that it agreed to lend 2020 Living £1.5 million to enable it to buy a property known as "The Square" in Broad Street, Birmingham, which it was envisaged would be developed to provide both residential accommodation and a hotel. According to Sanman, the contract between it and 2020 Living entitled it to interest at the rate of 36% per annum and also to 50% of the profit which 2020 Living would make from selling on "The Square". Sanman claims that, in order to avoid having to account to Sanman for its share of that profit, 2020 Living disposed of its interest in "The Square" to Taylor

Grange 2 for no consideration. It contends that 2020 Living thereby breached its contract with Sanman; that Mr Ginda, Taylor Grange 2 and TGDM induced 2020 Living to break that contract; and that 2020 Living, Mr Ginda, Taylor Grange 2 and TGDM are also liable for unlawful means conspiracy.

7. There was a costs and case management conference before District Judge Phillips on 22 February 2023. By paragraph 11 of her order, she directed as follows:

> "There is to be a split trial as follows:
>
> 11.1. At the first hearing the Court will try the claim by the First Claimant against the First Defendant and the following issues in the claim by the Second Claimant against the Defendants: (i) whether the Defendants (or any of them) are (subject to any issues relating to proof of damage) liable in respect of the causes of action alleged against them; and if so (ii) what the appropriate counter-factual scenario for the purposes of assessing quantum is by reference to the counter-factual events pleaded at paragraph 20E of the Re-Re-Amended Particulars of Claim and such other scenarios as may be pleaded by way of Defence herein.
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> 11.2. If the Second Claimant succeeds on those issues at the first hearing, the Court will direct a second hearing to assess the quantum of the Second Claimant's damages, and give directions for any further disclosure, evidence (including expert evidence) if and as required."

The estimated length of trial for the first hearing was given as 10 days.

8. In the event, as I have mentioned, the defences of the second to sixth defendants were struck out, and they were debarred from defending, pursuant to the order which the Judge made on 13 September 2024. It was therefore possible to conclude the first of the hearings which District Judge Phillips had directed within two days, on 15 and 16 October 2024.

9. Giving judgment on 24 December 2024 ("the Trial Judgment"), the Judge held that Sanman was entitled to receive 50% of such profits as 2020 Living made from "The Square"; that it was an implied term of the contract between Sanman and 2020 Living that the latter would not seek to structure any on-sale of "The Square" such that its profits were artificially eliminated and/or reduced so as to prejudice Sanman's ability to realise a 50% profit share; that 2020 Living breached that term; that Mr Ginda, Taylor Grange 2 and TGDM induced 2020 Living to break its contract with Sanman; and that 2020 Living, Mr Ginda, Taylor Grange 2 and TGDM were guilty of unlawful means conspiracy as well. The Judge said that he was "satisfied that Sanman has proved that it has suffered loss as a result of [2020 Living's] breach of the Implied Term" (paragraph 230 of the Trial Judgment); that Sanman had suffered loss as a result of the conspiracy "in that it is entitled to 50% of the profit made by [2020 Living] from its interest in the Square" (paragraph 266); and that Sanman is entitled to damages from Mr Ginda, Taylor Grange 2 and TGDM for "the loss it has suffered as

a consequence of their having induced [2020 Living] to breach its contract with Sanman" and from 2020 Living, Mr Ginda, Taylor Grange 2 and TGDM for "the losses it has suffered as a result of the unlawful means conspiracy that they engaged in" (paragraph 267). However, the Judge said in paragraph 280 that he "decline[d] to determine, as part of the first hearing, which counterfactual scenario should be used for valuing Sanman's loss in relation to the Hotel Site". He went on:

> "The choice of the correct counter-factual scenario is an issue, along with expert opinion as to the value at which the Hotel Site would be likely to have been disposed of, in those various counter-factual scenarios, that I will direct should be determined at the quantification hearing with the benefit of expert opinion on at least these issues."

10. The Judge dismissed Sanman's claims against Taylor Grange DM, and Sanman has not appealed against that decision.

The orders of July 2024 and the events leading up to them

11. On 7 July 2020 District Judge Rich ordered the parties to give extended disclosure. In the disclosure review document ("the DRD") prepared in accordance with this order, the second to fifth defendants identified the custodians whose files they proposed to search as Mr Ginda, Mr Steve Skinner, Mr Peter Coen and five individuals from Shoosmiths, Knight Frank, King Street Commercial and Haines Watts. In the disclosure certificate signed by Mr Ginda on behalf of himself and the second and fourth to sixth defendants on 11 January 2023, it was explained that, although Mr Coen had been named as a custodian in the DRD, the review team had "decided to exclude Mr Coen's source documents from the review" as his role was "confined to dealing with technical construction matters related to Taylor Grange developments which included the Square". On 30 January 2023, the second to sixth defendants provided further disclosure consisting primarily of documents from an additional custodian, Mr Simon Murray-Twinn. In a letter to the second to sixth defendants' then solicitors dated 13 February 2023, the claimants' solicitors, Shakespeare Martineau, pointed out that the documents from Mr Murray-Twinn included emails between him and Mr Ginda which had not previously been disclosed. Responding on 10 July 2023, Jury O'Shea, who had taken over as the second to sixth defendants' solicitors, said:

> "there is very little correspondence from Mr Ginda because this is not the way he operates. He conducts business on the telephone, or in video meetings, or in person, rather than by electronic or hard copy correspondence. Further, Mr Ginda's practice was and had been to routinely delete his emails at the end of each day. To the extent that documents were not included in the 'substantive disclosure' (as per you description) but appeared in Mr Murray-Twinn's disclosure, Mr Murray-Twinn can only assume that those emails were deleted (as per Mr Ginda's practice)."

12. On 25 January 2024 Shakespeare Martineau wrote to Jury O'Shea "to address various outstanding matters arising out of correspondence between the parties in particular as within our correspondence dated 13 February 2023 and your clients' response dated

10 July 2023". They expressed concern that the letter of 10 July 2023 "appears to confirm that Mr Ginda may have deleted potentially relevant documents in this matter" and asked for confirmation on certain points. Jury O'Shea did not reply.

13. On 13 June 2024 the claimants made a without notice application to His Honour Judge Worster for an order requiring Mr Ginda to preserve disclosable documents and "Electronic Storage Media" and making provision for "Electronic Storage Media" and "Online Storage Accounts" to be imaged by a computer specialist instructed by the claimants. Paragraph 3 of the draft order attached to the application notice provided:

> "The 3rd Defendant [i.e. Mr Ginda] shall not access the Electronic Storage Media and Online Storage Accounts until these have been returned pursuant to paragraph 4 below, and shall upon service of this order upon him disclose the location of and give the Independent Computer Specialist effective access to the Electronic Storage Media and Online Storage Accounts, and, including:
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> a. make available for collection by or on behalf of, or deliver to the Independent Computer Specialist, the Electronic Storage Media with all the Login Credentials; and
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> b. supply by email to the Independent Computer Specialist all the Login Credentials for the Online Storage Accounts;
>
> so to allow a forensic electronic image to be taken of their contents (including any deleted items which can be restored) by the Independent Computer Specialist."

By paragraph 4 of the draft order, the computer specialist was to "return the Electronic Data Storage Media to the 3rd Defendant or his solicitors" in due course and to "hold the Forensic Images and keep them safely in his custody to the order of the Court or the agreement of the Third Defendant". "Online Storage Accounts" was defined to mean "the Office 365 and G Suite email servers and Microsoft OneDrive (as identified in Section 2 of the Disclosure Review Document filed by the 2nd to 5th Defendants) and any backup or archive system of emails in place from 1 November 2019"; "Forensic Images" to refer to the forensic electronic images taken by the computer specialist; and "Login Credentials" to refer to passwords and the like "in the knowledge possession or control of the Third Defendant".

14. The application was supported by a witness statement made by Mr James Woolstenhulme of Shakespeare Martineau. He explained that the claimants were seeking permission to instruct the computer expert "to forensically image Mr Ginda's devices / online storage accounts" and identified those devices and accounts as "those as set out in the DRD and above". He suggested that what was proposed would cause minimal disruption or prejudice "to Mr Ginda" and that "the business of the 2nd to 6th Defendants can continue while the 3rd Defendant's devices are with BDO [who were to supply the computer specialist] because there are at least two other persons

working with the 3rd Defendant on various projects (as shown in the custodians recorded in the DRD)".

15. In the event, Judge Worster granted an injunction requiring Mr Ginda to preserve disclosable documents and "Electronic Storage Media", but he otherwise adjourned the application to 3 July 2024. On that date, the Judge approved a form of order which had been agreed between the parties subject only to some minor disputes.

16. Given the central importance of the order of 3 July 2024 to the first of the appeals with which we are concerned, I need to set much of it in full. It provided:

> "1. The 2nd to 6th Defendants shall instruct the E-Disclosure Provider as set out in this Order.
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> 2. Save for the purposes of giving instructions to his solicitors in connection with this order, the 3rd Defendant shall not access the Electronic Storage Media and Online Storage Accounts until a forensic electronic image has been taken of their contents (including any deleted items which can be restored), and shall by 4:00 pm on 5 July 2024 give the E-Disclosure Provider effective access to the Electronic Storage Media and Online Storage Accounts, and, including:
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> a. make available for collection by or on behalf of, or deliver to the E-Disclosure Provider, the Electronic Storage Media with all the Login Credentials; and
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> b. supply by email to the E-Disclosure Provider all the Login Credentials for the Online Storage Accounts;
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> so to allow a forensic electronic image to be taken of their contents (including any deleted items which can be restored) by the E-Disclosure Provider.
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> 3. The 2nd to 6th Defendants shall instruct the E-Disclosure Provider to:
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> a. interrogate and restore deleted items from the Forensic Images (which shall also include, for the avoidance of doubt, taking steps to forensically break and repair any PST/OST on any Forensic Image) where this is possible;
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> b. identify any Target Documents restored from the Forensic Images under paragraph 3(a);
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> c. identify any Further Documents from the Forensic Images;

d. confirm whether the SG Devices are the same devices imaged/reviewed by the E-Disclosure Provider for the purposes of the 2nd to 6th Defendants giving disclosure on 11 January 2023 and shall report to the Court (copied to the parties) its findings and, if it is not possible to provide that confirmation it shall confirm the same in that report and the E-Disclosure Provider shall be permitted to liaise with any identified third party under paragraph 4(c) below to give effect to this report;

e. access the Forensic Images to establish whether, following service of the Initial Order, any Document contained on an SG Device was deleted or whether any SG Device was modified since that point, where this is possible;

f. comply with paragraphs 3(a) to (e) by 4:00 pm on 23 July 2024.

4. The 2nd to 6th Defendants

a. shall provide the Claimants with a copy of their draft instructions to the E-Disclosure Provider by 4.00 pm on 4 July 2024 and the Claimants shall provide any comments on these by 4.00 pm on 5 July 2024. The Defendants shall give effect to any such comments in the final instructions to the E-Disclosure Provider where this is reasonably necessary to comply with paragraph 3 above.

b. shall also instruct the E-Disclosure Provider to produce a report setting out the steps the E-Disclosure Provider has taken pursuant to its instructions under paragraph 3 also instruct the E-Disclosure Provider to produce a schedule containing the following details: (i) the file name of any Document deleted or modified following service of the Initial Order; (ii) the file type of any Document identified; (iii) the date and time of such modification or deletion or access of the SG Device; (iv) any identifiable user or profile undertaking such a step; (v) any identifiable steps taken during such access of the SG Device ('the Schedule'). The Schedule incorporating the details under 4(b)(i) shall be provided to the solicitors for the 2nd to 6th Defendants only who shall review the Schedule and be entitled to redact the file name of any document that is not a

Disclosure Document. The 2nd to 6th Defendant's solicitors will then provide a copy of the Schedule to the Claimants' solicitors incorporating the permitted redactions by 4:00 pm on 19 July 2024; and

c. shall produce a witness statement by 4:00 pm on 8 July 2024 setting out the method by which and by whom any documents were harvested from any Electronic Storage Media or Online Storage Account for the purposes of the 2nd to 6th Defendants giving disclosure on 11 January 2023.

5. The 2nd to 6th Defendants shall serve a copy of the report produced under paragraph 4 above on the Claimants by 4pm on 23 July 2024.

DISCLOSURE OBLIGATIONS

6. The 2nd to 6th Defendants shall:

a. carry out searches of the Target Documents to identify any Disclosure Documents in accordance with Section 2 of the Disclosure Review Document;

b. carry out searches of the Further Documents to identify any Disclosure Documents which fall within issues for disclosure 13 in Schedule 1 of the Disclosure Review Document;

c. carry out searches of the 3rd Defendant's email address sam@futurehighstreetliving.com to identify any Disclosure Documents in accordance with Section 2 of the Disclosure Review Document;

d. carry out searches to identify any Disclosure Documents which fall within issues for disclosure 9 and 13 in Schedule 1 of the Disclosure Review Document;

e. the parties shall seek to agree the searches to be undertaken under (b) and (d) above by 4:00 pm on 17 July 2024;

f. shall serve upon the Claimants (i) a Disclosure Certificate; (ii) an Extended Disclosure List of Documents; and (iii) a list identifying which documents disclosed are Target Documents

(which shall include all associated meta data attached to those documents including, without limitation, any associated created, accessed, modified and deletion dates) by 4:00 pm on 16 August 2024;

g. produce to the Claimant any Disclosure Documents identified from the searches under paragraph 6(a) (other than those which they claim to be entitled to withhold) by 4:00 pm on 16 August 2024.

7. The parties shall agree reasonable extensions to the time periods set out above and shall agree reasonable refinements to the searches once the 2nd to 6th Defendants have ascertained the number of Target Documents, Further Documents and other Documents on the Forensic Images and the number of such Documents which are responsive to the searches, so as to limit the requirement for manual review so far as reasonably practicable."

"SG Devices" was defined as "any devices including Electronic Storage Media delivered to the E-Disclosure Provider or Online Storage Accounts that the E-Disclosure Provider is given access to pursuant to paragraph 2 above"; "E-Disclosure Provider" as Consilio Global (UK) Limited ("Consilio"); "Further Documents" as "any Document recovered by the E-Disclosure Provider under paragraph 3 created or modified from 21 October 2022 to the date the 2nd to 6th Defendants comply with paragraph 2 above that is not a Target Document"; "Online Storage Accounts" as "the Office 365 and G Suite email servers and Microsoft OneDrive (as identified in Section 2 of the Disclosure Review Document filed by the 2nd to 5th Defendants) and any backup or archive system of emails in place from 1 November 2019 and the email account identified at paragraph 6(c)"; "Forensic Images" as "the forensic electronic images taken by the E-Disclosure Provider in accordance with paragraph 2 above"; "Login Credentials" to refer to passwords and the like "in the knowledge, possession or control of the Third Defendant"; and "Target Documents" to mean "any Documents either (a) identified as being deleted between 1 November 2019 and the date the 2nd to 6th Defendants comply with paragraph 2 above; or (b) where the date of deletion cannot be identified".

17. On 4 July 2024, Jury O'Shea sent Shakespeare Martineau a draft of the letter of instruction which they were proposing to send to Consilio. Shakespeare Martineau returned the draft on the following day with some minor amendments.

18. The final version of the letter of instruction was sent to Consilio by Jury O'Shea on 8 July 2024. The letter both closely tracked the terms of the order of 3 July 2024 and reflected the amendments which Shakespeare Martineau had made.

19. On 24 July 2024, Jury O'Shea told Shakespeare Martineau in an email that "[t]he images of all devices have been taken" but "[t]here has been a short delay on the part of Consilio".

20. The matter came before the Judge again on 31 July 2024. On that occasion, the Judge made the unless order which he held in the Debarring Judgment to have been breached. The relevant provisions of the order ("the Unless Order") stated:

> "1. Unless the 2nd to 6th Defendants have instructed the E-Disclosure Provider to take the steps set out in paragraph 3(a) to (e) of the order of HHJ Rawlings dated 3 July 2024 ('the Order') by 4.00pm on 2 August 2024, the 2nd to 6th Defendants' Defences will be struck out and the 2nd to 6th Defendants shall be debarred from defending the claim.
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> 2. Unless the 2nd to 6th Defendants have complied with paragraph 4(b) of the Order by 4.00pm on 16 August 2024 the 2nd to 6th Defendants' Defences will be struck out and the 2nd to 6th Defendants shall be debarred from defending the claim.
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> 3. Unless the 2nd to 6th Defendants have complied with paragraph 5 of the Order by 4.00pm on 9 August 2024 the Defences of the 2nd to 6th Defendants will be struck out and the 2nd to 6th Defendants shall be debarred from defending the claim."

Subsequent events

21. On 9 August 2024 Consilio produced a report ("the Report") in which they explained what they had done. They said in the Report that they had been asked to prepare it in compliance with the Judge's orders.

22. For reasons recorded in the Debarring Judgment, the Report was served 22 minutes after the 4 pm deadline given in paragraph 3 of the Unless Order. However, the Judge granted relief from sanction in relation to that breach and Sanman has not appealed against that decision.

23. At 3.45 pm on 16 August 2024 Jury O'Shea emailed to Shakespeare Martineau what they described as "Schedule as required by paragraph 4(b) of the Order dated 3 July 2024". The schedule, which had been prepared by Consilio, comprised columns with, among others, the headings "Filename", "File Type", "Date of Deletion", "Identifiable user or profile information" and "Identifiable steps taken during access".

24. There were, however, two problems with what Consilio had done. In the first place, while Consilio was aware of Mr Ginda's email account sam@taylorgrange.com, it understood the account to contain no data and so proceeded on the basis that any available data would be contained in Mr Ginda's sam@futurehighstreetliving.com mailbox "due to forwarding, syncing or migration". On 21 August 2024, it was provided with data for sam@taylorgrange.com from a "second M365 tenant" which S2 Group, the second to sixth defendants' external IT provider, had by then identified. Secondly, it was apparent from the supplemental report dated 30 August which Consilio prepared, a draft of which had been supplied to Jury O'Shea on 28 August 2024, that it had applied a date range ending on 31 January 2023 to the

sam@futurehighstreetliving.com email address even though the order of 3 July 2024 and the Unless Order had imposed no such limitation. There had been no mention of that in the Report and Ms Gemma Williams of Jury O'Shea, who had the conduct of the matter on behalf of the second to sixth defendants, said in a witness statement dated 1 September 2024 that Consilio "did not mention to [her] that they had only processed the account to 31 January 2023 until [her firm] received a draft of their supplemental report on 28 August 2024".

25. By then, Sanman had already applied, by an application notice dated 19 August 2024, for a declaration that the defences of the second to sixth defendants had been struck out and that they were debarred from defending or, in the alternative, for those defences to be struck out, and the second to sixth defendants debarred from defending, on the basis of their "fundamental non-compliance with paragraph 2 of the Order of HHJ Rawlings dated 3 July 2024 and continued non-compliance with previous Court orders (including those in unless terms)". For their part, the second to sixth defendants had on 29 August 2024 applied for relief from sanction so far as necessary.

Did the appellants fail to comply with the Unless Order?

The Debarring Judgment

26. The Judge concluded in the Debarring Judgment that the appellants had breached paragraph 2 of the Unless Order "by failing to serve a complete and sufficient Schedule": see paragraph 68.

27. The Judge had explained in paragraph 45 of the Debarring Judgment that a schedule "was served in the time allowed by the Unless Order, but it did not include documents from any email account other than sam@futurehighstreetliving.com up to 31 January 2023, because only that email account, for that period, had been imaged by Consilio". "It is common ground," the Judge said in paragraph 46, "that the Schedule ought to have contained, but did not, details of documents deleted or modified after the order of 18 June 2024 was served on the Defendants, in relation to sam@taylorgroup.com and also sam@futurehighstreetliving after 31 January 2023". The Judge added that he had "also found that the documents to be imaged by Consilio should have included the email accounts, steveskinner@taylorgrange.com and petercohen@taylorgrange.com".

28. Having referred to *Realkredit Danmark A/S v York Montague Ltd* [1998] WL 104421 ("*Realkredit*"), *Lakatamia Shipping Co Ltd v Su* [2014] EWHC 275 (Comm) ("*Lakatamia*") and *Gravity Highway v Maritime Maisie* [2020] EWHC 1697 (Comm), [2021] 2 All ER (Comm) 340 ("*Gravity Highway*"), the Judge quoted this passage from paragraph 33 of the judgment of Butcher J in the last of these cases:

> "In assessing whether there has been compliance with an unless order for the provision of further information the Court will consider whether the information is plainly incomplete or insufficient given the terms of the order as to the information to be provided, including the terms of any request which it has been ordered should be answered. The further information will

> be plainly incomplete or insufficient if it could not reasonably be thought to be complete and sufficient."

29. The Judge said in paragraph 56 of the Debarring Judgment that he considered that "the objective test promulgated by Butcher J in *Gravity Highway* is the appropriate test here". He continued in paragraph 56(b):

> "the obligation to serve the Schedule, the content of which was mandated by the 3 July Order has much more in common with an obligation to answer specified questions than the less well defined duty falling on a party to comply with the standard disclosure obligations. The question of whether the Schedule served complies with the requirements of the 3 July Order is equally capable of objective assessment by the court by looking at what the 3 July Order required the Schedule to contain and then at the Schedule served, to see if it contained what the 3 July Order required."

30. In the following paragraph, the Judge said:

> "The Defendants accept the Schedule ought to have contained details of documents, which it did not contain. Even if I had accepted the Defendants' case that only two email accounts of Mr Ginda had to be imaged, the Schedule served was still plainly incomplete and insufficient."

The Judge added in paragraph 58:

> "it seems to me that Ms Williams at least ought to have known, when serving the schedule that she served, that it was incomplete, because Consilio had not imaged all the Online Storage Accounts that they were meant to image. The draft report, which she had seen the day before the schedule was served, made it clear that the only Online Storage Account imaged by Consilio was Sam@futurehighstreetliving.com, up to 31 January 2023."

31. In contrast, the Judge rejected a contention advanced by Sanman that the appellants had failed to comply with paragraph 1 of the Unless Order by breaching paragraph 3(a)-(e) of the order of 3 July 2024. In that connection, he said this in paragraph 35 of the Debarring Judgment:

> "I am not, however, satisfied that the Defendants have breached paragraph 3(a) to (e) of the 3 July Order to which the Unless Order attached the Sanction. I find that for the following reasons:
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> (a) I remind myself that in interpreting the 3 July Order, I should interpret the ordinary meaning of the words in context, and because the Unless Order attached the

> Sanction to paragraphs 3 (a) – (e), I should apply the wording strictly;
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> …
>
> (c) paragraph 3 of the 3 July Order requires the Defendants simply to instruct Consilio to carry out the steps (a) to (e). The Defendants had no responsibility under that order to ensure that Consilio carried out those steps;
>
> (d) the Second Claimant argues that because paragraph 3 requires the Defendants to instruct Consilio to carry out steps (a) to (e) in respect of Forensic Images that they have taken, and because 'Forensic Images' is defined in the 3 July Order as 'the forensic electronic images taken by [Consilio] in accordance with paragraph 2' the Defendants failed to give the instruction required under paragraph 3 of the 3 July Order; and
>
> (e) in my judgment, applying the ordinary meaning of the words in paragraph 3 of the 3 July Order strictly, the Defendants complied with it, if they gave to Consilio the instructions required by that paragraph to be given to Consilio, within the time allowed, and it is common ground that they did both of those things. The fact that Consilio had not imaged all the Online Storage Accounts that they ought to have imaged does not mean that the instructions that the Defendants were required to give to Consilio by 4pm on 2 August 2024 had not been given."

Legal principles

32. The earliest of the cases to which we were referred was *Reiss v Woolf* [1952] 2 QB 557. There, an order had provided for paragraphs in a defence to be struck out unless the defendant delivered "the undermentioned further and better particulars". Further and better particulars were delivered, but these stated that the defendant was unable to give certain details until after discovery, or perhaps at all. The plaintiff contended that, as a result, the relevant paragraphs of the defence had been struck out, but the Court of Appeal disagreed. It agreed with Devlin J, from whom the appeal had been brought, that it would not have sufficed for "any document with writing on it" to be delivered: it must, Devlin J had said, be "a document made in good faith and which can fairly be entitled 'particulars'". "That is the test," Devlin J had said, "and not … whether each demand for particulars has been substantially met".

33. In *Realkredit*, an order had provided for the action to be dismissed unless the plaintiff lenders served by a specified date "a List of Documents setting out in proper form all relevant documents that are or have been in their possession custody or power". A list of documents in the proper form was served by the deadline, but the defendant valuers

argued that there were very large gaps in it. The Court of Appeal, noting that it had not been suggested that the list had been served otherwise than in good faith, held that the lenders had complied with the unless order. Tuckey LJ, with whom Morritt LJ agreed, cited *Reiss v Woolf* and observed that, applying the language of that case, the list "could fairly be described as a list": it was "not illusory" and "would still be a list even if a subsequent application for specific discovery had elicited further documents".

34. In *QPS Consultants Ltd v Kruger Tissue (Manufacturing) Ltd* [1999] BLR 366 ("*QPS*"), in contrast, Simon Brown LJ, with whom Tuckey LJ agreed, said at 371 that *Reiss v Woolf* was "not still applicable, at any rate in the context of further and better particulars". He explained:

> "In short, the position is now very different to that obtaining at the time of *Reiss v Woolf*. If today an Unless Order is breached, the court, so far from being powerless, has a wide general discretion to do whatever is required in the interests of justice. In these circumstances there can be no justification for construing Unless Orders for particulars as narrowly (and, I would add, artificially) as in times past."

That being so, the first instance judge had not needed to find that particulars were "illusory" or that "no genuine attempt had been made" to answer requests to decide that an order for the provision of further and better particulars had been breached. However, Simon Brown LJ added at 371:

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

35. For his part, Waller LJ, the third member of the Court, with whom Tuckey LJ also agreed, decried "elevat[ing] *Reiss v Woolf* into some rule of law as opposed to paying regard to *Reiss v Woolf* in its proper context as an aid to construction of any particular Order". Waller LJ said at 376:

> "what the court is concerned to examine is whether there has been a genuine attempt to answer the request. That is so, because the court will not contemplate enforcing the sanction of strike out either of the particular allegation unparticularised or of the whole pleading, unless there has been a failure, or failures, to make genuine attempts to answer the request or requests."

36. A month later, in *Morgans v Needham* [1999] 10 WLUK 837, Stuart-Smith LJ, with whom Evans LJ agreed, referred to *Reiss v Woolf*, *Realkredit* and *QPS* when deciding that an unless order relating to discovery of "all documents relating to [the defendant's] financial and tax affairs which are necessary to prove the quantum of his

Counterclaim" had not been breached. Stuart-Smith LJ said that, "applying the principles clearly stated by Lord Justice Tuckey in the *Realkredit Danmark* case", the order was "hopelessly unclear and imprecise". Stuart-Smith LJ had said in the previous paragraph:

> "[Counsel for the claimants] has submitted to us that that decision of the Court of Appeal [in *Reiss v Woolf*] is affected or watered down by a subsequent decision of this court in *QPS Consultants Limited v. Kruger Tissue Manufacturing Limited*. It is to be noted that Lord Justice Tuckey was a member of that court. That was a case which was concerned with further and better particulars and the court pointed out, as is the case, that in non-compliance with a request for further and better particulars it is possible for parts of the pleading of the offending party to be struck out, or for there to be an order that no evidence is to be adduced in relation to them. But that is a very different matter from striking out the whole of a claim for alleged non-failure to produce such documents, such non-failure being alleged to constitute a breach of the unless order."

37. The next case to which we were referred was *Lakatamia*. The order at issue there had provided for the defence and counterclaim to be struck out unless standard disclosure was given by a specified date. In the event, disclosure was given 46 minutes late. Hamblen J regarded the non-compliance as "trivial" and granted relief from sanction. In the course of his judgment, he noted in paragraph 22 that the decision in *Realkredit* indicated that an order to provide disclosure "is complied with for the purposes of an unless order as long as a list is provided and that list is not 'illusory'".

38. In *Smailes v McNally* [2014] EWCA Civ 1299, an order had provided for claims to be struck out unless the applicants "conduct[ed] a search for documents falling within CPR 31.6, in compliance with the requirements set out in CPR 31.7" and "provide[d] [the respondents] with a list of documents, identifying the documents located as a result of the search … , in compliance with the requirements set out in CPR 31.10". Lewison LJ, with whom Rimer and Christopher Clarke LJJ agreed, concluded that "no search … let alone a reasonable search" had been made for "scripts", which were "critical documents", and that "the omission to list the scripts is a clear case of failure to comply with the Unless Order": see paragraphs 38 and 40.

39. Commenting on *Realkredit*, Lewison LJ said this in paragraph 43:

> "that was a very different case. It was a case in which the disclosing party had put in evidence on affidavit to the effect that it had no relevant documents other than those that it had discovered by list. That was disputed by the other party which pointed to documents that it would have expected the disclosing party to have had. The disclosing party accepted that the evidence of the other party gave good grounds for an application for specific discovery but did not concede that any further documents in fact existed. It was in that context, and in particular in the context that there might be disputes about relevance and necessity, that the court referred to a list served

> in good faith. They distinguished the case before them from one in which it had been admitted that the list was deficient."

40. With regard to the significance of good faith, Lewison LJ said this:

> "49. … [T]he absence of bad faith does not necessarily mean that the order was complied with. A party may conduct a search in good faith but nevertheless fail to comply with his obligation under Part 31.7. As the judge recognised, what is or is not a reasonable search is something that the court must decide. It is not simply left to the discretion of the party concerned.
>
> 50. Whether the party has acted in good faith may be highly relevant to the question whether he has made the right decision about what ought to be disclosed. He has what in another context might be called a margin of appreciation. … But that is not this case. Mr Gibbs [i.e. a solicitor acting for the applicants] had decided that the scripts ought to be disclosed.
>
> 51. Whether the party has acted in good faith may also be relevant to the question whether relief against sanctions should be granted but the judge never got to that stage."

41. In *Gravity Highway*, an unless order provided for part of the claim to be struck out unless the claimants provided further information. The claimants served a document which was intended to comply with the order, but the defendants contended that what had been supplied did not amount to compliance. After referring to a number of cases, including *QPS*, Butcher J said in paragraph 33:

> "In light of those authorities, I consider that the position is to be as follows:
>
> (1) In assessing whether there has been compliance with an unless order for the provision of further information the Court will consider whether the information is plainly incomplete or insufficient given the terms of the order as to the information to be provided, including the terms of any request which it has been ordered should be answered. The further information will be plainly incomplete or insufficient if it could not reasonably be thought to be complete and sufficient.
>
> (2) In examining completeness and sufficiency, the Court is not concerned with the truth of the answers or with their logical coherence unless any lack of coherence

> goes to the completeness or sufficiency of the response.
>
> (3) If there is non-compliance with an unless order for further information, then the sanction will take effect unless there is relief from it. In considering relief from sanction, amongst the other matters which will be taken into account, are the matters which were, in the pre-CPR context of *QPS Consultants*, regarded as going to the exercise of the discretion as to whether a sanction should be imposed. These will include whether the further information taken as a whole falls significantly short of what is required, and that this will depend in part 'on the number and proportion of the inadequate replies, in part upon the quality of those replies (including whether their inadequacies were due to deliberate obstructiveness, incompetence or whatever), and in part upon their importance to the overall litigation'."

42. On the facts, Butcher J held that the unless order had not been breached. He concluded that the information given was not "plainly incomplete or insufficient" since, among other things, (a) the order had required the claimants to provide "responses" without specifying any degree of detail which the responses had to have and (b) the further information provided did provide a response to all the queries posed: see paragraph 34.

43. Two further authorities are noteworthy: *Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525 ("*Pan Petroleum*") and *Gumbrell v YPG Pembroke Studios Ltd* [2026] EWCA Civ 44 ("*Gumbrell*"). In *Pan Petroleum*, Flaux LJ, with whom Gross and Lewison LJJ agreed, provided this summary of principles in paragraph 41:

> "(1) The sole question for the Court is what the Order means, so that issues as to whether it should have been granted and if so in what terms are not relevant to construction (see [16] of the judgment [of Lord Clarke in *JSC BTA Bank v Ablyazov (No 10)* [2015] UKSC 64, [2015] 1 WLR 4754]).
>
> (2) In considering the meaning of an Order granting an injunction, the terms in which it was made are to be restrictively construed. Such are the penal consequences of breach that the Order must be clear and unequivocal and strictly construed before a party will be found to have broken the terms of the Order and thus to be in contempt of Court (see [19] of the judgment [in *Ablyazov*], approving *inter alia* the statements of principle to that effect in the Court of Appeal by Mummery and Nourse LJJ in *Federal Bank of the Middle East v Hadkinson* [2000] 1 WLR 1695).

> (3) The words of the Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context and with regard to the object of the Order (see [21]-[26] of the judgment [in *Ablazov*], again citing with approval what Mummery LJ said in *Hadkinson*)."

44. In *Gumbrell*, Nugee LJ, with whom Baker and Yip LJJ agreed, said this in paragraph 53:

> "It is well established that unless orders should make it quite clear what the party to whom they are addressed has to do, precisely because the sanction … takes effect automatically. Thus for example in *Abalian v Innous* [1936] 2 All ER 834 at 838 Greene LJ said this:
>
> > 'Speaking for myself, I think that any order dealing with the dismissal of an action unless something is done should be absolutely and perfectly precise in its terms. The dismissal of an action at an interlocutory stage is a very serious matter and may well work serious injustice. If an order is to be made in the form that, unless one party or another party does something, the action will be dismissed, it is imperative that the thing to be done in order to avoid dismissal of the action should be specified in the clearest and most precise language, so that it may be possible for the party on whom the necessity of doing the act lies—which would normally be the plaintiff—to be in no doubt whatsoever as to the steps which he is to take if he is to avoid his action being dismissed.'
>
> Although a decision under the previous rules (the RSC), there is no reason to think that the same is not equally true today under the CPR: see, for example, *Devoy-Williams v Hugh Cartwright & Amin* [2018] EWHC 2815 (Ch) at [8] per Falk J."

45. Drawing some threads together, it seems to me that:

i) Just as the terms of an order granting an injunction are to be "restrictively construed" (to quote Flaux LJ in *Pan Petroleum*), so, given the consequences of failure to comply, must an unless order be;

ii) An unless order must make it quite clear what the party to whom it is addressed has to do;

iii) The mere fact that a party subject to an unless order acted in good faith need not prevent the order from taking effect. While there was reference to "good faith" in *Reiss v Woolf* and that case was cited in *Realkredit* and *Morgans v Needham*, the continuing significance of *Reiss v Woolf* was doubted in *QPS* and, in *Smailes v McNally*, Lewison LJ explained that "the absence of bad faith does not necessarily mean that the order was complied with", albeit that a

party acting in good faith may have a "margin of appreciation". The interpretation of an unless order is a matter for the Court and if, correctly construed, it has not been complied with the existence of good faith will not stop it taking effect;

iv) The Courts have used somewhat varying expressions when considering whether an unless order in respect of further information (or, formerly, further and better particulars) or disclosure (or, formerly, discovery) has been complied with. Plainly, the fact that a document bearing the appropriate heading ("Further information", say) has been served will not of itself suffice. In the context of further information, the Courts have latterly asked whether the response could "reasonably be thought to be complete and sufficient". With disclosure, there has been reference to whether a list was "illusory" or could "fairly be described as such". Whatever the appropriate test, it is evident that, where a party has purported to comply with an order for either further information or disclosure, there can potentially be scope for dispute as to whether an answer (in the case of further information) or list (in the case of disclosure) was good enough to satisfy the requirements of the order;

v) At the end of the day, the terms of an unless order are crucial. If, properly interpreted, such an order stipulated that X would happen unless Y was done, then, in the absence of relief from sanction, the order will have taken effect if it is clear that Y was not done.

Discussion

46. What, then, did the orders of July 2024 require the appellants to do on pain of being debarred from defending in the present case?

47. As I have said, the Judge decided that the appellants had breached paragraph 2 of the Unless Order. That paragraph provided for the appellants to be debarred from defending, and their defences struck out, unless they complied with paragraph 4(b) of the order of 3 July 2024.

48. Mr Stephen Robins KC, who appeared before us for the appellants, denied that they had failed to comply with paragraph 4(b) of the 3 July order. Paragraph 4(b), Mr Robins argued, obliged the appellants to give Consilio certain instructions and to provide Sanman's solicitors with a copy of the schedule which Consilio produced pursuant to those instructions. The appellants gave the requisite instructions and duly supplied Sanman's solicitors with a copy of the schedule prepared by Consilio, Mr Robins said. The Judge was therefore mistaken in thinking that there had been non-compliance. Contrary to the Judge's view, Mr Robins submitted, paragraph 4(b) did not require the appellants to serve "a complete and sufficient Schedule": what they had to do was give appropriate instructions to Consilio and hand on a copy of what they received from Consilio.

49. Mr Max Mallin KC, who appeared for Sanman with Mr Daniel Lewis, disputed that it is open to Mr Robins to argue the appeal in this way. Mr Mallin referred in this respect to the grounds of appeal. Ground 1 asserts that the Judge "should have found that, although the Schedule was incomplete, it had nevertheless been served in accordance with the Unless Order". As, however, Mr Mallin pointed out, this ground

is elaborated on in three paragraphs in which it is maintained that the Judge should have applied the test in *Realkredit* rather than that in *QPS*; that Ms Williams could anyway reasonably have thought that the schedule was sufficient at the time when it was served; and that the Judge's finding that Ms Williams ought to have appreciated that the schedule was deficient was unjustified. Neither in these paragraphs nor in the appellants' skeleton argument, Mr Mallin said, is the contention now advanced by Mr Robins (who neither appeared below nor prepared the grounds of appeal or skeleton argument) to be found. To the contrary, the grounds of appeal and skeleton argument accept that the schedule served was "incomplete".

50. However, Mr Mallin did not object to the way in which Mr Robins was putting the appellants' case at the time but only during his own submissions. More importantly, the correct interpretation of paragraph 4(b) of the 3 July order is a matter of law in respect of which we are as well placed as the Judge. As was explained by Haddon-Cave LJ, with whom McCombe and Moylan LJJ agreed, in *Singh v Dass* [2019] EWCA Civ 360 in paragraphs 15-17, an appellate court "will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court" and "will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial". There is, though, no reason to believe that Sanman would have wished to adduce any different evidence if the appellants had put their case on paragraph 4(b) before the Judge in the way in which Mr Robins did before us. Nor did Mr Mallin suggest that Sanman had been caused any prejudice by any disparity between Mr Robins' contentions, on the one hand, and the grounds of appeal and the appellants' skeleton argument, on the other. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146, Snowden J, with whom Longmore and Peter Jackson LJJ agreed, referred in paragraph 28 to the likelihood of this Court permitting a new point to be taken if it is "a pure point of law which can be run on the basis of the facts as found by the judge in the lower court" provided that "the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime". The present case is of that type, and it seems to me that we should consider Mr Robins' submissions on their merits.

51. Supporting the Judge's decision, Mr Mallin argued that paragraph 4(b) of the 3 July order was inextricably linked to paragraph 2 of that order. The schedule for which paragraph 4(b) provided was to be produced from the image taken pursuant to paragraph 2. If (as in fact was the case) no image satisfying paragraph 2 was generated, it was impossible for appellants to give the instructions for the production of a schedule which paragraph 4(b) required and there could be no "Schedule" within the meaning of that sub-paragraph. To comply with paragraph 4(b), Mr Mallin submitted, the "Schedule" of which a copy was provided to Sanman's solicitors had to contain all the details specified in paragraph 4(b)(i)-(v). Any failing by Consilio as regards those matters, at any rate if more than de minimis, would necessarily result in failure to comply with paragraph 4(b) and so in the Unless Order taking effect, Mr Mallin said.

52. I have not been persuaded. As I see it, paragraph 4(b) of the 3 July order obliged the appellants to "instruct" Consilio to produce a schedule and to supply a copy of what Consilio provided. Paragraph 4(b) did not impose any obligation on the appellants as

regards either the materials from which the schedule was to be prepared or the completeness of what they were given by Consilio.

53. So far as the instructions to Consilio are concerned, paragraph 4(a) of the 3 July order required the appellants to give Sanman the instructions in draft, for Sanman to comment on them, and for the appellants to give effect to such comments where reasonably necessary to comply with paragraph 3 of the order. That process was followed. Not only, therefore, did the instructions accord with the terms of paragraph 4(b) but they took account of the comments which Sanman had made under the scheme set out in the order. That being so, I do not think there can be any complaint about the instructions.

54. The Judge voiced criticisms of the instructions when assessing the reasons for the default which he considered to have occurred. Thus, he said in paragraph 76(c)(v):

> "providing Consilio with a copy of the 3 July Order and repeating some of its terms, in the instruction letter to Consilio, was a totally inadequate means of informing Consilio which Online Storage Accounts it was to image and interrogate. Ms Williams ought to have identified the Online Storage Accounts to be imaged and interrogated by naming them in the letter of instruction, not merely by referring to what the 3 July Order said."

However, paragraph 4(b) of the 3 July order did not say that the instructions should name the relevant "Online Storage Accounts". Nor, despite being invited to comment on the instructions in draft, did Sanman's solicitors suggest that there was any need to do so.

55. Turning to the schedule, the wording of paragraph 4(b) of the 3 July order seems to me to support the view that what the appellants had to give Sanman's solicitors was a copy of the schedule which Consilio produced pursuant to the instructions. As I read it, paragraph 4(b) did not require the appellants to pass on a schedule which contained all the details specified in the paragraph 4(b)(i)-(v). Their obligations were to instruct Consilio to produce a schedule containing those details and to provide Sanman with a copy of the product of those instructions. Paragraph 4(b) did not require the appellants to vouch for the completeness or accuracy of Consilio's work.

56. That the 3 July order should have been limited in that way makes sense. The preparation of the schedule was being entrusted to an outside contractor, albeit one instructed by the appellants. It would not be surprising if the appellants had undertaken responsibility for the instructions rather than the result, and they could be expected to have been reluctant to agree in the Unless Order that any deficiency in the schedule should result in them being debarred from defending subject only to the grant of relief from sanction.

57. It follows that, in my view, the Judge was mistaken in considering that the appellants had failed to comply with paragraph 4(b) of the 3 July order. The Judge held that there had been non-compliance because the schedule of which a copy was provided to Sanman's solicitors was "incomplete and insufficient". As I see it, however, paragraph 4(b) did not require the appellants to ensure that the schedule was complete

or sufficient. What they had to do was give the specified instructions and supply Sanman's solicitors with a copy of the schedule which Consilio produced in response to those instructions. They did both and so (a) paragraph 4(b) was not breached and (b) paragraph 2 of the Unless Order did not take effect.

58. However, Sanman also relies on paragraphs 1 and 3 of the Unless Order. Those paragraphs provided for the appellants to be debarred from defending unless they instructed Consilio to take the steps set out in paragraph 3(a)-(e) of the 3 July order and complied with paragraph 5 of that order. The Judge did not so find, but Sanman takes issue with that in its respondent's notice.

59. By paragraph 3 of the 3 July order, the appellants were directed to instruct Consilio to take various steps in relation to the "Forensic Images", to confirm whether the "SG Devices" were the same devices imaged/reviewed for the purposes of giving disclosure on 11 January 2023 and to report its findings in that connection. Paragraph 4(b) provided for the appellant to instruct Consilio to produce a report setting out the steps it had taken pursuant to its instructions under paragraph 3 and, by paragraph 5, the appellants were to serve a copy of that report.

60. Mr Mallin focused on the role that the "Forensic Images" were to play. As already mentioned, the expression "Forensic Images" was defined to refer to "the forensic electronic images taken by the E-Disclosure Provider in accordance with paragraph 2". It follows, Mr Mallin argued, that the appellants could not comply with paragraph 3 of the 3 July order unless forensic electronic images had been taken in accordance with paragraph 2. There could otherwise, Mr Mallin said, be no "Forensic Images" nor, in consequence, instructions to Consilio complying with paragraph 3. On Sanman's case, the absence of "Forensic Images" would also, as I understand it, mean that the appellants could not serve a copy of a "report produced under paragraph 4" as required by paragraph 5.

61. In my view, however, the Judge was correct that the appellants complied with paragraph 3(a)-(e) of the 3 July order and paragraph 1 of the Unless Order. The former provided for the appellants to "instruct" Consilio to take certain steps and the latter stated that their defences would be struck out, and they would be debarred from defending, unless they had "instructed" to take those steps. What the appellants had to do, therefore, was give the instructions for which paragraph 3(a)-(e) provided, and that they did. As the Judge said in paragraph 35 of the Debarring Judgment, paragraph 3 of the 3 July order required the appellants "simply to instruct Consilio to carry out the steps (a) to (e)" and they "had no responsibility … to ensure that Consilio carried out those steps".

62. It is true that paragraph 3 of the 3 July order refers at a number of points to the "Forensic Images" and that it has transpired that Consilio had not taken images of *all* of the contents of the "Online Storage Accounts" as envisaged by paragraph 2 of that order either by the time it was given its instructions as regards paragraph 3 or even when it delivered the Report. I do not think that matters, however. In the first place, paragraph 1 of the Unless Order and paragraph 3 of the 3 July order spoke merely of the appellants having to "instruct" Consilio. They did not say that the "Forensic Images" referred to in the instructions had to be complete, let alone that the appellants were otherwise to be debarred from defending. Secondly, paragraph 2 of the 3 July order, which provided for Consilio to take a forensic electronic image of the contents

of the "Online Storage Accounts", did not have an unless order attached to it. Thirdly, the definition of "Forensic Images" appears to me to have referred to whatever images Consilio had in fact taken pursuant to paragraph 2 of the 3 July order. As I read the order, "Forensic Images" could exist before Consilio completed its work and even if that work was deficient. Fourthly, even supposing (contrary to my view) that the "Forensic Images" could not exist before all the contents of the "Online Storage Accounts" had been imaged by Consilio, there was nothing in either the 3 July order or the Unless Order to say that the appellants could not give Consilio the instructions required by paragraph 3 of the former order in advance of the imaging being finished. There could have been no question of the Unless Order taking effect if, say, Consilio had been given its instructions on one day and completed the imaging on the next. Yet Mr Mallin's submissions would suggest that there would have been non-compliance.

63. In all the circumstances, it seems to me that the appellants complied with the Unless Order and, hence, that it did not take effect. That being so, the question of relief from sanction does not arise.

Strike out?

64. As I have mentioned, the Judge said that he would have considered it appropriate to strike out the defences of the second to sixth defendants even if, contrary to his view, they had not breached the Unless Order. In arriving at that conclusion, the Judge said that those defendants had failed to comply with paragraph 2 of the order of 3 July 2024, that that breach had "derailed the whole scheme set out in the 3 July Order for Consilio to restore deleted documents, report on documents deleted or modified, provide a schedule of restored documents and identify Further Documents for disclosure" and that there was no good reason for the breach: see paragraphs 118, 121 and 122 of the Debarring Judgment. With regard to proportionality, the Judge said this in paragraph 124:

> "I also have to consider, in the case of the application to strike out the Defendants' defences under CPR 3.4, whether striking out the Defendants' defences is a proportionate response to the Defendants' defaults. I accept that striking out the Defendants' defences is a draconian remedy which would require very strong justification. In summary, for the following reasons, I consider nonetheless that, in all the circumstances it is both appropriate and proportionate to strike out the Defendants' defences
>
> (a) the number of breaches of court orders committed by the Defendants (see paragraph 94);
>
> (b) I have found that the disclosure exercise contemplated by the 3 July Order could not now be completed in time for trial (see paragraph 84);
>
> (c) it is not appropriate to vary the disclosure obligations of the Defendants under the 3 July Order so that they could be completed in time for trial (see paragraph 85); and

> (d) even if I did vary the Defendants' disclosure obligations, or I was wrong and they only extended to Mr Ginda's email accounts, I was not confident that, even then, the disclosure could be completed in time for the remaining directions to be carried out in time for trial (see paragraphs 99 - 102)."

65. In paragraph 94 of the Debarring Judgment, to which the Judge referred in paragraph 124(a), the Judge had said that the defendants had failed to comply with undertakings which TGDM had given on 21 September 2022 to file a witness statement providing details of its assets; that, "even on the Defendants' case, Consilio was not given log in credentials or effective access to the sam@futurehighstreetliving.com account after 31 January 2023, or the sam@taylorgrange.com account" as required by paragraph 2 of the 3 July order; that extensions of time were required in relation to paragraphs 3(a)-(e), 4, 5 and 6(e) of that order; and that the witness statement for which paragraph 9 of that order provided was not served on time. The Judge further said:

> "the extended time periods and directions set out in the Unless Order were also breached, first by the Report being served 22 minutes late, and second, by the redacted Schedule which was served on time, being, on my findings, incomplete and insufficient because it did not contain information concerning documents imaged from the Online Storage Accounts (only the Online Storage Account sam@futurehighstreetliving.com having been imaged, and then, only up to 31 January 2023)."

66. As for when the disclosure exercise could be completed, the Judge had said in paragraph 84 of the Debarring Judgment (to which he referred in paragraph 124(b)):

> "On the basis that I have found that the 3 July Order <u>does</u> require the Defendants to provide further disclosure from the images taken by Consilio of the Steve Skinner and Peter Cohen email accounts, I am not satisfied this could be done in time for the trial, because, the timetable which Mr Atkins produces for directions to trial (which he asks me to approve if the Defendants defences have not been struck out and they are not debarred from defending) is premised upon the Defendants not being required to provide further disclosure in respect of the Steve Skinner and Peter Cohen email accounts. The Defendants have not even suggested a timetable to vary the directions to trial which allows for documents from those email accounts to be disclosed. There is a serious risk therefore that granting the Defendants relief from sanction would ultimately lead to the loss of the trial date, that risk is a very powerful reason to refuse the application for relief."

67. The Judge had further said, in paragraph 101 of the Debarring Judgment, that "[e]ven if … the Defendants were only required to provide additional disclosure in relation to Mr Ginda's email accounts and not those of Mr Skinner and Mr Cohen, I have no confidence that they would do so by 11 September 2024, or that the Schedule would

be provided by 6 September 2024 in each case as the Defendants propose". The Judge had added in paragraph 102:

> "The Defendants propose that witness statements should be exchanged two days after the Defendants provided further disclosure. If I had granted the Defendants relief from the Sanction, this would have allowed the Second Claimant very little time to amend their trial witness statements to reflect anything material contained in that new disclosure (I accept that witness statement should not comment on documents, but the further disclosure could well effect the points that the Second Claimants' witnesses deal with in their witness statements)."

68. It is possible to take issue with a number of aspects of the Judge's assessment.

69. In the first place, the Judge was mistaken in thinking that paragraph 2 of the 3 July order applied to "the Defendants". It was in fact directed at Mr Ginda alone. Mr Mallin suggested that the order did not refer to Mr Ginda only in his personal capacity, but the fact that Mr Ginda handled certain matters on behalf of other defendants as well as himself (the disclosure certificate, for example) does not mean that paragraph 2 imposed any obligation on anyone other than Mr Ginda. Nor is it of any significance that Judge Worster's order of 18 June 2024, in the form which Shakespeare Martineau will have drafted, had attached to it a penal notice referring to all of the second to sixth defendants.

70. That leads to a second point: that, in my view, paragraph 2 of the 3 July order did not extend to the email accounts of Mr Skinner and Mr Coen. Paragraph 2 provided for Mr Ginda to give Consilio "effective access to the … Online Storage Accounts". The expression "Online Storage Accounts" was defined to include "the Office 365 and G Suite email servers and Microsoft OneDrive (as identified in Section 2 of the Disclosure Review Document filed by the 2nd to 5th Defendants" and Mr Skinner and Mr Coen were amongst the custodians identified in the DRD. However, Mr Coen's documents had subsequently been excluded from review; there was no suggestion that paragraph 2 applied to the individuals from Shoosmiths, Knight Frank, King Street Commercial and Haines Watts who were also named as custodians; paragraph 2 required just Mr Ginda to provide "effective access" to the "Online Storage Accounts"; the "Online Storage Accounts to which Consilio was to be given access pursuant to paragraph 2 were termed "SG Devices" (doubtless referring to Mr Ginda's initials); and the 3 July order was made in the context of an application arising from concern that Mr Ginda may have deleted relevant documents so that the claimants sought to have a computer expert "forensically image Mr Ginda's devices / online storage accounts" which, it was said, would cause minimal disruption "to Mr Ginda" and leave other custodians able to pursue the business of the second to sixth defendants "while the 3rd Defendant's devices are with BDO". The Judge said in paragraph 41 of the Debarring Judgment that the 3 July order "was not restricted to reporting on deleted and modified documents and recovering them where possible" but "also covered disclosure of documents which had not been deleted or modified, so that the disclosure obligations in relation to all custodians named in the DRD could be completed". In that respect, however, the Judge was assuming what needed to be

proved, and it seems to me that that interpretation of the 3 July order was not borne out by either its terms or the factual matrix.

71. With regard, thirdly, to the Judge's observation that the proposal that witness statements should be exchanged two days after further disclosure had been provided "would have allowed [Sanman] very little time to amend their trial witness statements", the 3 July order had itself provided for an interval of two business days between further disclosure and witness statements.

72. Fourthly, the Judge proceeded on the basis that refinement of the disclosure exercise would require variation of the 3 July order when that order itself, by paragraph 7, called for the parties "to agree reasonable refinements to the searches … so as to limit the requirement for manual review so far as reasonably practicable".

73. Fifthly, the Judge did not refer to the extent to which the limited time left before trial was attributable to the claimants' failure to act sooner. Shakespeare Martineau had pointed out in February 2023 that documents from Mr Murray-Twinn had included emails between him and Mr Ginda which had not previously been disclosed and they had expressed concern in January 2024 that Mr Ginda "may have deleted potentially relevant documents in this matter". Yet the application to Judge Worster was not made until 13 June 2024.

74. Sixthly, the Judge said in paragraph 58 of the Debarring Judgment:

> "it seems to me that Ms Williams at least ought to have known, when serving the schedule that she served, that it was incomplete, because Consilio had not imaged all the Online Storage Accounts that they were meant to image. The draft report, which she had seen the day before the schedule was served, made it clear that the only Online Storage Account imaged by Consilio was Sam@futurehighstreetliving.com, up to 31 January 2023."

However, the evidence indicated, first, that Ms Williams was not told until after the schedule had been served that there was any data in the sam@taylorgrange.com account; secondly, that it was not apparent from the Report that Consilio had applied a date range ending on 31 January 2023; and, thirdly, that Ms Williams did not learn of that restriction before 28 August 2024.

75. It is also to be noted that:

i) The accounts of Mr Ginda, Mr Skinner and Mr Coen had all been imaged by 22 August 2024;

ii) While 4,444 documents had emerged from the sam@taylorgrange.com account, Ms Williams had said in a witness statement dated 1 September 2024 that the pool of documents could be reduced to about 2,228 if she were permitted to filter out the documents and that she was confident that her team would be in a position to give disclosure by 11 September;

iii) The Judge did not address the possibility of making a further unless order under which the second to sixth defendants would have been debarred from defending if they had failed to provide additional disclosure within a specified time;

iv) The Judge said in paragraph 98 of the Debarring Judgment that he doubted that anything of material relevance to the claims would have been deleted between 5 July and 21/22 August, when the accounts were imaged. Sanman challenged this in its respondent's notice, but in my view the Judge was entitled to make this assessment;

v) The second to sixth defendants had previously, by the end of January 2023, disclosed 6,611 documents;

vi) 2,187 further documents from Mr Ginda's devices and online accounts were disclosed on 28 September 2024;

vii) 1,707 documents from the accounts of Mr Skinner and Mr Coen were disclosed on 2 and 3 October 2024;

viii) With one rather historic exception, the breaches of Court orders which the Judge identified in paragraph 94 of the Debarring Judgment all related to the 3 July order and to a great extent they concerned matters in respect of which extensions of time had been granted;

ix) Paragraph 2 of the 3 July order was not the subject of an unless order. The Judge considered that the claimants would have asked for that if they had not been told by Jury O'Shea on 24 July 2024 that "[t]he images of all devices have been taken", but that email referred only to "devices", not online accounts.

76. Mr Robins argued that in all the circumstances the striking out of the defences of the appellants was wholly disproportionate. Among other things, he submitted that the Judge was plainly wrong to consider that disclosure could not be completed in time for the trial. In any event, he said, the obvious proportionate solution to the problem which the Judge perceived was an unless order, but the Judge did not consider possibilities short of immediately debarring the appellants from defending.

77. For his part, Mr Mallin stressed that the Judge had made an evaluative assessment and that the grounds on which this Court will interfere with such assessments are limited. In *In re Sprintroom* [2019] EWCA Civ 932, [2019] 2 BCLC 617, McCombe, Leggatt and Rose LJJ explained in paragraph 76 that, "on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'".

78. In my view, the key problem with the Judge's decision is that he did not address the possibility of a further unless order. An order debarring a defendant from defending is draconian and must be seen as a remedy of last resort. "In many cases," as Lord

Woolf MR said in *Biguzzi v Rank Leisure Ltd* [1999] EWCA Civ 1972, [1999] 1 WLR 1926, at 1933, " there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out". In the present case, all the relevant accounts had been imaged some time before the matter came before the Judge on 2 September 2024 and the appellants were expressing confidence that further disclosure could be completed without endangering the trial date. The Judge said that he was not satisfied that further disclosure from the images of the email accounts of Mr Skinner and Mr Coen could be done in time for the trial, but I consider him to have been mistaken in thinking that paragraph 2 of the 3 July order extended to those accounts and, even if it had, it would in my view have been right to consider giving the appellants an opportunity, on unless terms, to achieve whatever was required within a time frame consistent with the trial date. The need to address such a possibility is still clearer if, as seems to me to be the case, the disclosure obligations were limited to Mr Ginda's accounts. As to that, the Judge said that he was "not confident that … the disclosure exercise could be completed in time for the remaining directions to be carried out in time for trial". The appropriate response to that lack of confidence was, I think, to allow the appellants to prove that they could do what was required to allow the trial to proceed on a fair basis on the set date.

79. The Judge was plainly entitled to be critical of the appellants and to view timetables suggested by them with some scepticism. On the other hand, the fact that so little time was left before the trial was in part attributable to delay on the part of the claimants; the Judge did not find the appellants to have flouted Court orders deliberately; explanations had been given for what had gone wrong, even if the Judge found them inadequate; the obligations imposed by the 3 July order were more limited than the Judge thought; much had been achieved by the time of the hearing before the Judge; refinement to the searches was expressly envisaged in paragraph 7 of the 3 July order and did not require a variation of the order; the appellants were maintaining that disclosure could be completed with the existing trial date; there was a rational basis for that view; the Judge did not rule out the possibility of the disclosure exercise being completed in time for the remaining directions to be carried out in time for trial; and a Court should not take "the draconian step of striking … out" if a satisfactory lesser alternative exists. In the circumstances, it was, as it seems to me, incumbent on the Judge to consider making a further unless order and, having regard to that possibility, I do not think that the order which he in fact made was one that was open to him. The order striking out the defences of the appellants and debarring them from defending was, in my view, disproportionate.

Other matters

80. The conclusions which I have arrived at above mean that, in my view, the first appeal should be allowed. One of the grounds of appeal advanced in relation to that appeal relates to the costs order which the Judge made in relation to the striking out and relief from sanction applications. On the basis, however, that that appeal is allowed, the orders as to costs will need to be revisited in any event. I do not, therefore, need to address this ground of appeal.

81. Neither do I need to address the second appeal. The appellants' success on the first appeal has the consequence that there will need to be a re-trial. The position as regards paragraph 11 of District Judge Phillips' order of 22 February 2023 will fall to be considered in the context of that. The question whether the Judge was right to

adjourn issues relating to counter-factual scenarios to the "quantification hearing" no longer arises.

Conclusion

82. I would allow the first appeal; set aside the Judge's orders of 13 September 2024, 23 September 2024, 24 December 2024 and 23 January 2025 in so far as they affect the appellants; and remit the matter for re-trial before a different judge. The Judge having conducted a trial, and arrived at conclusions, in circumstances where the appellants were debarred from defending, it could not be satisfactory for either him or the parties to ask him to conduct the re-trial.

83. I would be grateful if the parties would seek to agree (and, if and in so far as they cannot, put in written submissions) on what directions we should give for the purposes of the re-trial.

Lord Justice Cobb:

84. I agree.

Lord Justice Lewison:

85. I also agree.