Neutral Citation Number: [2021] EWHC 1360 (Ch)

Case No: BL-2018-002691

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 25/05/2021

Before:

MRS JUSTICE FALK

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Between:

VNESHPROMBANK LLC (a company registered and in liquidation in the Russian Federation)	**Claimant**
- and –	
(1) GEORGY IVANOVICH BEDZHAMOV	**First Defendant**
(2) UNIFLEET TECHNOLOGY LIMITED	**Second Defendant**
(3) PERSONS UNKNOWN (as defined in the Claim Form)	**Third Defendant**
(4) BASEL PROPERTIES LIMITED	**NCA Respondent**
(5) MAXIM GOLODNITSKY and BERKLEY SQARE INVESTMENT PARTNERS LIMITED	**Third Parties**

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Andrew Mold QC and **Jack Watson** (instructed by **Keystone Law**) for the **Claimant**
Justin Fenwick QC and **Mark Cullen** (instructed by **Mishcon de Reya LLP**) for the **First Defendant**
Adam Baradon (instructed by **Signature Litigation LLP**) for the **Third Parties**

Hearing date: 11 May 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE FALK

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Tuesday 25 May 2021.

Mrs Justice Falk:

Introduction and preliminary points

1. This decision relates to issues arising in respect of a search order made by Arnold J on 27 March 2019 and executed two days later. References in this judgment to the "Search Order" are to Arnold J's order as subsequently varied.

2. An order made at a case management conference ("CMC") on 18 March 2021 required the parties to attempt to agree a list of issues relating to the conduct of the Search Order which would be considered at a separate one day hearing. That order also halted material additional work on reviewing material imaged under the Search Order pending a further order of the court. This judgment follows that further hearing.

3. This is not the first occasion on which the operation of the Search Order has been considered in some detail. In addition to amendments made to it in the first few months after it was granted, there was a two day hearing in respect of it before me in July last year. Outstanding issues following that hearing were resolved in a judgment handed down on 5 August 2020 ([2020] EWHC 2114 (Ch)), referred to in this judgment as the "2020 judgment".

4. I should make a preliminary point about confidentiality. The hearing before me was in public and this judgment will be published without any redactions. Prior to the hearing the parties agreed a consent order which provided for material derived from the Search Order to be included in confidential bundles and referred to in confidential annexes to witness evidence and skeleton arguments, circulation of which (or in the case of certain skeletons unredacted copies of which) would be restricted. At the hearing I made an order under CPR 31.22(2) that such material should be treated as not having been read by the court or referred to at a hearing held in public, and that any application pursuant to CPR 5.4C to view the material would need to be made on seven days' notice. This was intended to continue to protect the confidentiality of material derived from the Search Order. A further provision of my order was intended to safeguard the continuing effect of the order made following the 2020 judgment, namely that material determined to be "listed items" (as to which see [9] below) should only be released by the Claimant's solicitors to those instructing them subject to the provision of certain undertakings, with material that is not listed not being released at all. These matters may be revisited at or following trial.

5. I heard oral submissions from Mr Mold for the Claimant, Mr Fenwick for the First Defendant and Mr Baradon for the Third Parties. I am grateful to them for their clear submissions.

Background

6. The background is set out in the 2020 judgment, and I will not repeat it in any detail. In brief, the underlying claim relates to what the Claimant ("VPB") alleges is a massive fraud carried out by the First Defendant, Georgy Bedzhamov ("GB"), together with his sister Larisa Markus, who was President of VPB. VPB was declared bankrupt on 14 March 2016, and a Russian state corporation called the Deposit Insurance Agency ("DIA") was appointed to act as liquidator. GB resists the claim, and denies his participation in any fraud.

7. The claim against GB was issued in December 2018, although the claim form was anonymised and the court file was sealed pending an application for freezing and search orders. The Search Order was initially obtained, together with a worldwide freezing order, without notice. A 40 day trial is listed for January 2022. Disclosure has been made, although there are outstanding issues which it is anticipated will be addressed at a hearing during June. Witness statements and expert reports are due to be served in July and September respectively. There is also a planned process for identifying core documents for the trial, and preparing narratives in respect of them, between July and November.

8. As explained in the 2020 judgment, the Search Order permitted a search of premises which were said in the affidavit evidence to be "GB's London office". In fact, the premises are rented by the Second Third Party, Berkeley Square Investment Partners Limited ("BSIP"), a company wholly owned and managed by the First Third Party, Maxim Golodnitsky ("MG"). MG is a friend of GB and they have conducted business transactions together. GB did visit the property regularly, but he did not have an office there. BSIP also provides advice to a number of clients, of which GB is one. The court was not told that other clients' data could be on the premises. BSIP's clients are individuals who are generally exiles from the Russian Federation, and most are seeking or have been granted political asylum. Information provided by those clients to MG and BSIP includes sensitive personal and business information, including information that is legally privileged.

9. The Search Order permitted searches for hard copy documents and, of particular relevance to this decision, electronic imaging of data stored on any electronic data storage devices "situated on the premises". It provided for images to be held by computer specialists appointed by VPB, originally Consilio, to the order of the supervising solicitor, Fiona Simpson of Kingsley Napley LLP (the "Supervising Solicitor"), who would hold them to the order of the court. The order contemplated a process of searching the material for "listed items", being items listed in Schedule B to the order. The listed items set out in Schedule B are primarily aimed at identifying GB's assets or assets under his control (defined as "Bedzhamov Assets"), but documents relating to claims made by VPB in these proceedings are also covered.

10. Only one of the six data storage devices selected for imaging, a mobile phone, was GB's. The others comprised four computer hard drives and a phone belonging to MG. The total number of documents imaged was 514,069, of which only around 5% were GB's.

11. As explained in the 2020 judgment at [25], a protocol for the review of material was developed, the detail of which has since been modified on several occasions. This involved documents selected for review being checked first for privilege and incrimination by the Third Parties' solicitors Signature Litigation LLP ("Signature") (in respect of the Third Parties' dataset) and by GB's solicitors Mishcon de Reya LLP ("Mishcon") (in respect of items promoted to that stage by Signature and in respect of GB's dataset). Documents not excluded at those stages would be reviewed by VPB's then solicitors PCB Litigation LLP ("PCB"), with those documents regarded by them as listed items being reviewed by Signature and Mishcon, and with disputes being referred to the Supervising Solicitor.

Delays

12. Some, albeit limited and slow, progress was made with a review of the electronic images in the first few months after the Search Order was executed. Work then stopped in early July 2019 when PCB went off the record. PCB was replaced by Keystone Law ("Keystone"), but a combination of the impact of the handover, data breaches and other issues meant that there was no resumption of the search process before the hearing before me in July 2020, at which a revised version of the protocol was agreed (2020 judgment at [26] and [27]). My hope was that this would allow the search process finally to be completed in an orderly fashion, and in particular by the then main deadline for disclosure, 30 October 2020, without materially impacting on preparations for the trial.

13. Unfortunately, my hopes have been disappointed. There were difficulties in accessing the document review platform and, significantly, a number of further security breaches were discovered (in addition to ones that had previously occurred, referenced in the 2020 judgment). These problems ultimately led to VPB recognising that Consilio should be replaced. Epiq were appointed in their place by a consent order dated 2 October 2020. That order included a revised protocol which provided for the review finally to recommence on 12 October 2020 with a revised timetable.

14. In her Twelfth Report, dated 16 March 2021, the Supervising Solicitor identified three main causes for the overall delay. These were (1) the replacement of PCB by Keystone; (2) the data breaches, which the Supervising Solicitor attributed to a failure by Consilio to appreciate the absolute need for confidentiality and data security (despite instructions and warnings from the Supervising Solicitor); and (3) the failure of the Consilio platform to keep an audit trail of items agreed to be listed at meetings in May and June 2019, which resulted in substantial time and resources being expended in attempts to clarify the position, and legitimate concerns about whether non-listed material had been wrongly disseminated by VPB's solicitors (see also the 2020 judgment at [76] to [78]).

15. The Supervising Solicitor's conclusions, which I accept, mean that the view that I expressed in the 2020 judgment at [75], namely that the overall delays were at least in material part the responsibility of VPB, remains accurate. As I said then, it is VPB's Search Order. It holds the firepower, and the computer specialist is instructed by it. It is VPB's responsibility to ensure that the process is properly implemented. The roles of GB and the Third Parties are responsive. I also noted at [74] that the significant delay at that stage contrasted with a principal stated reason for seeking the Search Order, namely to enable GB's assets to be identified and secured.

The 46k Pool and 83k Pool

16. By the time of the hearing in July 2020, VPB were proposing around 27,000 documents for review. These comprised 13,782 documents out of a pool of around 46,000 documents (the "46k Pool") and 13,064 documents out of a pool of around 83,000 documents (the "83k Pool"). The documents identified for review are referred to as the "Reduced 46k Pool" and "Reduced 83k Pool" respectively. They have been identified by applying a list of 66 search terms set out in a schedule to the protocol to the contents of each pool and (in the case of the Reduced 83k Pool) excluding documents that also appear in the Reduced 46k Pool.

17. A key feature of the Reduced 83k Pool is that the documents it contains are exclusively those of the Third Parties. None are GB's custodial documents.

The March CMC and the issues for determination

18. By the date of the CMC in March 2021 the parties were nearing completion of the review of the Reduced 46k Pool, but the review of the Reduced 83k Pool was yet to commence. The order made at the CMC halted the commencement of that review pending the planned Search Order hearing in May. The reasons I gave for that decision related primarily to the uncertain impact on the overall litigation of an application for recognition by GB's Russian trustee in bankruptcy (in fact still not resolved), a concern about the extremely high costs being incurred in connection with the Search Order, and continuing concerns about the impact of the Search Order on the Third Parties. I encouraged the parties to seek to narrow the issues between them and made it clear that the hearing in May could cover the issue of whether the review of the Reduced 83k Pool should go ahead.

19. Following the March CMC the parties agreed a list of five issues for determination at the May hearing. They are as follows:

    i) whether the Search Order should be discharged or whether the review of the documents within the Reduced 83k Pool should commence;

    ii) whether any review of the Reduced 83k Pool (if it were to proceed) could be streamlined and accommodated within the current trial timetable;

    iii) how costs should be addressed if the Search Order is discharged;

    iv) whether documents relating to business opportunities or investments which GB or the Third Parties allege that GB did not ultimately pursue should be treated as listed items; and

    v) whether PCB should be required to confirm by witness statement or affidavit that the only documents that it downloaded or printed, or that it provided to VPB, the DIA or its litigation funder A1, were documents that had been agreed as listed by the parties in May and June 2019, or alternatively whether a representative of one of those organisations should be required to confirm what it received.

20. This judgment primarily addresses the first issue. As to the remainder, see paragraphs [76] to [81] below.

Whether the Search Order should be discharged/whether the review of the Reduced 83k Pool should proceed

21. I have concluded that the right course of action is as follows:

    a) No review of the Reduced 83k Pool should commence. Any further work on other material seized must either be agreed by VPB, GB and the Third Parties or be approved by the court.

b) Imaged documents should be preserved in the safekeeping of Epiq or another appropriate forensic computer expert, to the order of the Supervising Solicitor (and no other person or entity), who must keep them in her custody to the order of the court. Any material seized in hard copy form should also be retained in the custody of the Supervising Solicitor, on a similar basis.

c) The Supervising Solicitor and (in respect of its custodial documents) the Third Parties would have liberty to apply to the court at any time.

d) Any further search or review of preserved documents would require a fresh application to the court and would need to be shown to be justified by reference to both the circumstances existing at that time and an application of the relevant legal principles, with no presumption that the matter should be determined by reference to the actual scope and effect of the Search Order.

e) The question of full discharge will be reconsidered at or following trial.

22. In my view this approach is proportionate and best serves the interests of justice. My reasoning is set out below.

Search and imaging orders: case law

23. Since my last judgment the Court of Appeal has provided guidance on search and imaging orders, in *TBD (Owen Holland) Ltd v Andrew Simons & others* [2021] 1 WLR 992 ("*TBD*"). Arnold LJ considered the case law and legislative history of search orders in some detail. He summarised the position at [175] as follows:

> "175. There are three fundamental points which emerge from this survey of the law with respect to search orders. First, the purpose of a search order is to preserve evidence, whether documentary or real, and/or property in order to prevent the defendant from altering, destroying or hiding such evidence or property if given notice. The purpose of inspecting documents during the course of the search, to the extent permitted by the order, is to identify documents which should be preserved. Secondly, the facts that justify a search order being made may also in appropriate cases justify the making of without notice orders for the disclosure and inspection of documents and/or the provision of information pursuant to either CPR Part 18 or the court's inherent jurisdiction, but nevertheless the two types of orders are distinct, require separate justification, have different effects and must not be conflated. Thirdly, both search orders and without notice orders for the disclosure and inspection of documents and/or the provision of information must contain proper safeguards for the respondent, and those safeguards must be respected during the execution of the order. It follows from the second point that the safeguards required for without notice orders for the disclosure and inspection of documents and/or the provision of information are different to those required for search orders."

24. Arnold LJ then considered the law in relation to imaging orders. He made it clear at [178] that, because imaging cannot discriminate between different types of information, it can only be a preservation step and must be followed by proper consideration of the issues of disclosure and inspection. At [182] to [192] he considered the judgments of Tugendhat J in *CBS Butler Ltd v Brown* [2013] EWHC 3944 (QB) ("*CBS*") and Mann J in *A v B* [2019] 1WLR 583, citing passages from both with implicit or express approval.

25. The passages in question include reference by Tugendhat J in *CBS* at [38] to Hoffmann J's judgment in *Lock International plc v Beswick* [1989] 1 WLR 1268 (see *TBD* at [184]). Tugendhat J pointed out that any order which deprived defendants of the opportunity of considering whether they should make disclosure was, as Hoffmann J described in *Lock v Beswick* (at p.1281G), an intrusive order that was contrary to normal principles of justice, such that it could only be done where there was a paramount need to prevent a denial of justice. There is also reference to the observation by Tugendhat J in *CBS* at [48] that the order that he refused to grant in that case would have given the claimant a significant amount of the defendants' private information and communications, much of which would have been documents and information in respect of which non-parties had rights of confidentiality or privacy (*TBD* at [185]). The passages cited from *A v B* include an emphasis on the fact that the primary purpose of the order is to preserve documents, and that any inspection needs to be justified separately and "analysed in terms of the disclosure jurisdiction" (*A v B* at [25] and [26]; *TBD* at [189]).

26. Arnold LJ's summary at [193] included the following about disclosure and inspection:

> "The presumption should be that it will be for the defendant to give disclosure … in the normal way, but this presumption may be departed from where there is sufficient justification. Even if the presumption is departed from, there should be no unilateral searching of the images by or on behalf of the claimant: the methodology of the search must be either agreed between the parties or approved by the court."

27. In summary, *TBD* emphasises the distinction between (a) imaging as a preservation mechanism, and (b) searching the material preserved, which should be considered in the context of the disclosure jurisdiction. The normal approach to disclosure should only be departed from if there is sufficient justification.

28. More generally, I would emphasise the requirement for proportionality in relation to search orders. This point was made clear in *Lock v Beswick*. It must be borne in mind that a search order is an exceptional remedy, at the extremity of the court's powers: see *Booker McConnell v Plascow* [1985] RPC 425 at p.441, per Dillon LJ. When the search order jurisdiction is exercised it must be confined to its legitimate object. The harm caused by the execution of a search order must not be out of proportion to its legitimate object (see *Indicii Salus Ltd v Chandrasekaran* [2007] EWHC 406 (Ch) at [11d], per Warren J). It must not be allowed to become an instrument of oppression, whether intended or otherwise.

Disclosure: principles

29. Since the Search Order was made a disclosure exercise has been undertaken in this case, governed by the disclosure pilot set out in PD 51U. The key principles of PD 51U include that disclosure is directed at the issues in the proceedings and that its scope is not wider than is reasonable and proportionate in order fairly to resolve those issues (paragraph 2.4). As part of the process there have been a number of disclosure guidance hearings before Master Kaye. A further hearing is listed at which outstanding issues, including issues about the adequacy of disclosure, will be addressed.

30. I would emphasise that the requirements of reasonableness and proportionality are fundamental to the approach in PD 51U.

31. Disclosure is also focused on documents that are in a party's control. It is a stark feature of the Reduced 83k Pool that none of them were in the control of a party to this case. They are all the Third Parties' documents. Paragraph [39] of the 2020 judgment bears repeating:

> "39. In relation to the Third Parties, the first important point to make is that they are just that. They are not defendants in this litigation. They have also not been the subject of any direct action against them, whether for third-party disclosure (in which event they would have searched their own documents to identify relevant material), or as a non-defendant respondent to a search order. It is worth noting that before granting a search order against a non-defendant the court would require it to be shown that there was a real risk of destruction or concealment of evidence (*Abela v Baderaani (No.2)* [2018] 1 WLR 89 at [32]). No such allegation has been made in respect of the Third Parties, and the Search Order was not in fact made against them, even though it seems that the great majority of the electronic material obtained belongs to the Third Parties."

The position of the Third Parties

32. VPB placed significant emphasis on material derived from the 46k Pool which it asserts suggests involvement by the Third Parties in attempts by GB to conceal his assets. However, the fact remains that the Third Parties are not parties to the litigation. No such allegations, which would of course be serious in nature, have been formally made and pleaded, a process which would not only require the requisite clarity and particularity (and an appropriate evidential basis) but would allow the allegations to be properly defended. Specific allegations relating to the involvement of and actions by a BVI company called Clement Glory, MG and his father were the subject of an application to amend the particulars of claim, but that application has not been proceeded with. VPB is not precluded from raising those matters again, but unless and until it does, and it is given leave to pursue them, they are not before the court for determination.

33. Against that background it is important to bear in mind the impact of the Search Order on the Third Parties, and how far removed that is from what might ordinarily be expected. The court was not informed before the Search Order was granted that the office in question was that of a third party: on the contrary it was informed that it was

GB's office. The court was certainly not aware that BSIP provides advice to a number of clients whose data could be on the premises, and that that data was likely to include sensitive personal and business information (see paragraphs [6] and [7] of the 2020 judgment and [8] above). I have little doubt that the court proceeded on the basis that what was going to be imaged was material under the control of GB.

34. It is notable that the Third Parties have previously offered to consent to third-party disclosure against the issues and search terms ordered by the court in the main action. That has not been accepted. There are at least two aspects to this. The first is the scope of disclosure. The Third Parties' understanding (not contradicted by VPB) is that the scope of the searches contemplated by the Search Order process is broader than the disclosure process as determined under the court's guidance. Secondly, there is the question of control of the process. VPB will obviously have its own views about whether the Third Parties should control such a process, but of course that is precisely what disclosure ordinarily involves, and it applies to GB in respect of his own documents, other than the limited number caught by the Search Order.

35. The manner in which the search of the 46k Pool has been implemented well illustrates the extreme intrusion into the Third Parties' affairs, and in particular those of BSIP's own clients ("Fourth Parties"). The generic nature of a number of the search terms employed has inevitably involved a significant amount of information relating to Fourth Parties being identified for review. This is illustrated by the fact that, so far, the Third Parties have had to prepare information in respect of more than 20 different Fourth Parties for the Supervising Solicitor. The work involved has been substantial and more complex than had been anticipated, and has even involved MG delaying necessary medical treatment.

36. The approach taken to the Search Order and the breadth of the material caught has also resulted in the Third Parties effectively being forced into the position of having to justify, with evidence, why particular documents should not be treated as listed items within the terms of the Search Order. As Mr Baradon submitted, this appears to be the wrong way round. The appropriate starting point should generally be that a third party should themselves identify what material is or is not relevant. Even if that starting point is departed from, it seems to me that in principle, and certainly with material that is not clearly caught by the Search Order, the burden ought to be on VPB to demonstrate that a document is a listed item, rather than the Third Parties being required to show that it is not.

37. I concluded in the 2020 judgment that the Search Order process had clearly caused prejudice to BSIP's business (paragraph [74]). The particular context there was the significant delay and uncertainties over the process. In a witness statement provided for this hearing MG stated that revenue streams had pretty much dried up as a result of the Search Order. Mr Mold criticised this as not being backed up by documentary evidence of lost business opportunities, and also submitted that if it was correct it was attributable to the Third Parties' association with GB rather than the Search Order as such. However, even according weight to these points it is still apparent to me that the Search Order itself will have had an impact on the business, bearing in mind the nature of BSIP's clients and the information held on their behalf (see [8] above). I accept MG's evidence that it is currently difficult for him to provide adequate reassurances to clients that sensitive data is safe.

38. The Third Parties are also subject to a costs burden. The Search Order was continued at the return date only on the basis of an undertaking to pay the Third Parties' costs on the indemnity basis. Nothing was paid until the Third Parties obtained a further order in June 2019 in respect of costs already incurred. Although a monthly payment mechanism was then envisaged, payments stopped and the Third Parties had to make a further application in July 2020 which was largely determined by consent (see the 2020 judgment at [26], [30] and [31]). The effect of the current arrangements is that 50% of claimed costs are paid on a monthly basis, with a further 30% into court. The claimed costs are very substantial, so the effect of the existing arrangement is that, at least in cash flow and security terms, the Third Parties have a very material exposure which will continue, and increase, if work on the Search Order continues.

Impact on trial preparation vs. value of material

39. An additional consideration is the impact of the continued operation of the Search Order on trial preparation. A significant amount of work remains to be done to ensure that the planned trial can proceed on a basis that is fair to all parties. The work includes witness statements, expert reports and dealing with outstanding disclosure issues. VPB is evidently relatively well resourced. I do not need in this judgment to explore issues with GB's resources, beyond stating that existing concerns about GB's ability to fund his defence through to trial can only be exacerbated by a requirement to undertake significant additional work on the Search Order.

40. These factors obviously need to be weighed against the potential value of any material that might remain to be derived from the Search Order. In one sense of course this is an unanswerable question: neither party knows exactly what might be unearthed. However, clues can be obtained both from what has been derived from the search of the 46k Pool and from the background to the creation of the two pools.

41. Dealing with the background first, as described in the 2020 judgment at [81], the 83k Pool was created by the application of 471 search terms to around 83,000 documents. The 46k Pool emerged later, following a process that involved additional searches by PCB. One of the real difficulties is that VPB has been unable to explain the detail of how the 46k Pool was arrived at. There were also misunderstandings, now cleared up, about whether it is a simple subset of the 83k Pool, which it is not.

42. Nevertheless, it is a reasonable inference that the 46k Pool was produced by adopting what was thought to be a more targeted approach than that used to produce the 83k Pool. That this inference is fairly drawn is supported by evidence from a partner at Keystone, Anya Bloom, who stated in her fourth witness statement that the further searching PCB had done that resulted in the 46k Pool was "with a view to refining the review population".

43. Keystone, advising VPB, nonetheless subsequently decided that they wished to consider additional documents in the 83k Pool. But the important point for present purposes is that it is reasonable to conclude that whatever targeting was used to arrive at the 46k Pool was intended to ensure that the most relevant material was picked up, and that material not within that pool was therefore considered less likely to be of material assistance. This would include documents in the 83k Pool that are not also in the 46k Pool.

44. The value of the material derived from the search of the 46k Pool is also in dispute. Counsel for GB and the Third Parties emphasised the low number of documents that have emerged as agreed listed items. Counsel for VPB said that this was the wrong approach, and that I should instead focus on quality rather than quantity.

45. Both points have some merit, but on the whole, and taken with the greater targeting of the 46k Pool, I think GB and the Third Parties have the better of the argument. The number of items that have been agreed or determined as listed from the 46k Pool is limited. Taking account of duplications and documents that have already been disclosed, Mishcon de Reya calculate that these comprise 31 of GB's documents and 69 of the Third Parties' (under 1% of the documents in each case). Those low numbers, whilst striking, would not themselves be determinative if they produced convincing evidence. However, no material new asset that VPB may wish to secure, or person or entity that VPB may wish to pursue, appears to have been identified. There also appears to be no material new evidence indicating GB's alleged involvement in a fraud on VPB, beyond transactions or matters that had already been identified. Further, it is critical to bear in mind that the Reduced 83k Pool comprises only the Third Parties' documents, and none of GB's own custodial documents. So, for example, material found on GB's phone about what are alleged to be his assets cannot itself justify continuing with a search of the Third Parties' documents.

46. The high water mark, in terms of evidence of potential value to VPB that might support a continuation of the search, appears to be a document identified among the Third Parties' custodial documents which VPB believes supports its case that GB's arrangements with Clement Glory are a sham. VPB clearly considers this document to be a significant one, albeit that its significance is disputed by MG and GB, but it is worth remembering that the specific allegations in respect of Clement Glory are not currently pleaded and therefore will not be determined at the trial. Further, the search hits indicate that just one document out of the Reduced 83k Pool identified for review refers to Clement Glory, as compared to 1,266 in the Reduced 46k Pool.

47. In the submissions I received from Mr Mold there was much emphasis on allegations that the material that had already emerged from the Third Parties' documents indicates their involvement in GB's affairs, and in particular what is alleged to be their assistance in concealment by GB of his assets. The difficulty with this is that, even if the allegations were made out, they neither appear materially to advance the currently pleaded claim against GB nor to make substantive progress in allowing GB's assets to be secured (the twin purposes of the Search Order). Whilst the material might assist with the allegations contained in the draft amendments to the particulars of claim, as already indicated those matters will not be before the court at the trial.

48. Rather, as Mr Baradon submitted the impression is given of VPB wishing to fish in the Third Parties' pool for material that may justify a claim either against them, or indeed against Fourth Parties. Search orders should not be used for such a purpose: see, for example, the statement in *Gee on Commercial Injunctions, 7th ed.* at 24-030 that the search order procedure "should not be used to enable a claimant to find out whether allegations or charges can be made against the defendant and if so how they might be formulated".

49. VPB's position is that GB and the Third Parties want the Search Order to be discharged because the documents that remain to be obtained will be damaging, rather than because

the process has taken too long, consumes too much resource and (in the case of the Third Parties) causes wider damage to them. Mr Mold pointed to the strong prima facie case established against GB that justified the freezing and search orders in the first place, an initial attempt by GB to deny his identity when the Search Order was executed and what VPB say was an attempt to conceal information at that time. Issues over alleged inadequate asset disclosure by GB are also raised.

50. I do not share VPB's assessment of the reasons for seeking discharge or a halt to work now. VPB's allegation is simply not consistent with the fact that for some months GB and the Third Parties did agree to a review of the Reduced 83k Pool: they just wanted to get it out of the way. Issues over alleged inadequate disclosure should be dealt with in the proper forum for that, alongside any issues that GB wishes to raise about the adequacy of VPB's disclosure.

Likely work involved in reviewing the Reduced 83k Pool

51. There was also a dispute between the parties about the amount of work likely to be involved in reviewing the Reduced 83k Pool. VPB's position is that it should take less work than the Reduced 46k Pool. Not only are there marginally fewer documents, but the legal teams have got used to the process and a number of issues of principle about the approach to listing and redaction have been resolved. Both pools had had common search terms applied. The Third Parties' estimate of six months of further work is challenged with an estimate closer to two months, and it is noted that even if the work took six months it would be completed in advance of the trial.

52. It is obviously difficult to assess the accuracy of the different time estimates, but what is clear is that the work is highly resource intensive. There are also features of the Reduced 83k Pool that suggest that the work involved may be greater than that involved in reviewing the Reduced 46k Pool. These are (a) the fact that the Reduced 46k Pool included around 3,300 photos from GB's phone that the parties were able to agree were not relevant; (b) the fact that technical faults meant that around a further 2,400 documents in the Reduced 46k Pool were not reviewable; and (c) the feature that all of the documents in the Reduced 83k Pool are documents belonging to the Third Parties, so they have to be involved in the review process of all of them, whereas the Third Parties were custodians of only around 5,300 documents in the Reduced 46k Pool. Based on what I have seen VPB's time estimate certainly appears very optimistic.

53. I also accept that significant involvement is required from MG in assessing material, rather than it simply being the case (as VPB suggest) that he should leave his solicitors to get on with it with proper instructions. Given the number of potential Fourth Parties (see [35] above) and the potential need for interaction with them, which I understand has been substantial in relation to documents in the Reduced 46k Pool, I accept that even a first review for privilege and self-incrimination is unlikely to be straightforward. The use of a number of generic search terms in creating both the 83k Pool and the Reduced 83k Pool means that the risk of Fourth Party material being caught is very high, and I would infer even higher than with documents found in the 46k Pool, which was supposed to be more targeted.

54. I note that VPB put forward no proposal to remove generic search terms, but rather pointed out that GB and the Third Parties had not made any such proposal. But it is VPB's Search Order, it was VPB and its advisers who selected such broad search terms,

and it seems to me that as a starting point it should be for VPB to justify the basis on which it wishes to continue with it. It strikes me that at least some of the concerns about the continued operation of the Search Order could have been alleviated by a much more targeted approach to searching.

Effect of prior failure to challenge and consent orders

55. In my view all the considerations set out above weigh against continuing with the Search Order. They would indicate either its full discharge for the future or, at most, indicate an order that "holds the ring", preserving the documents but with no presumption of any entitlement to review them further.

56. Mr Mold's primary submissions against either discharging or halting work on the Search Order related to previous failures to challenge the Search Order, and in particular to the fact that the most recent orders agreeing revised protocols were made by consent. He pointed out that the return date order of Fancourt J on 10 April 2019 gave GB an express right to apply to set aside the order without showing a change of circumstances, an application which GB failed to make despite being granted an extension of time (a request for an additional extension was refused by me on 22 May 2019). No subsequent application has been made either by GB or the Third Parties to discharge the Search Order or limit its scope, other than in respect of confidentiality. The hearing before me was intended to resolve issues of principle but was in fact being used to make an informal application for discharge. Mr Mold also pointed out the significant investment of time and money made by VPB in the Search Order process so far.

57. During the earlier Search Order hearing in July 2020, and following judicial encouragement to co-operate, a revised protocol was agreed to restart the search process, leaving an outstanding issue in respect of confidentiality which was addressed in the 2020 judgment. In fact, the process did not restart promptly and the next material step was a consent order on 2 October 2020 to reflect the replacement of Consilio by Epiq. That order set a revised timetable, reflecting the delay, and appended a revised protocol (see [13] above). The protocol was further revised by a consent order dated 20 November 2020.

58. Mr Mold relied on the fact that the revised agreed protocol contemplated the commencement of the review of the Reduced 83k Pool and contained nothing reserving the position of GB or the Third Parties. They were, he said, now seeking to vary an order to which they had consented, in the absence of any material change of circumstance. It was not suggested, for example, that the work involved, the anticipated costs or the impact on the Third Parties had materially altered since the date of the latest consent order. Whilst the court has jurisdiction to vary an order under CPR 3.1(7), the principles on which it should exercise its power to do so are clearly established. As stated by Rix LJ in *Tibbles v SIG plc* [2012] 1 WLR 2591 at [39(ii)]:

> "…the jurisprudence has laid down firm guidance as to the primary circumstances in which the discretion may, as a matter of principle, be appropriately exercised, namely normally only (a) where there has been a material change of circumstances since the order was made, or (b) where the facts on which the original decision was made were (innocently or otherwise) misstated."

59. Rix LJ also commented at [39(v)] that, although it was a factor going to discretion:

> "…where the facts or arguments are known or ought to have been known as at the time of the original order, it is unlikely that the order can be revisited, and that must be still more strongly the case where the decision not to mention them is conscious or deliberate."

In his summary at [39(vii)] he observed that it ought:

> "…normally to take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances…"

60. I would also point out, however, that earlier in the same paragraph at [39(ii)] Rix LJ noted that the cases all warned against an attempt at an exhaustive definition of the circumstances in which the discretion might be exercised on a principled basis, and at [39(iii)] he commented that it would be "dangerous" to treat the statement of the primary circumstances (namely, material change of circumstances or misstatement) "as though it were a statute". I also emphasise his use of the word "normally".

61. In relation to orders made by consent, Mr Mold relied on *Angel Group v Davey* (unreported, 21 February 2018). In that case HHJ Hodge QC, sitting as a Deputy High Court judge, referred at [27] to [30] to *Chanel Ltd v FW Woolworth & Co. Ltd* [1981] 1 WLR 485 ("*Chanel*") at p.492H-493A, *Di Placito v Slater* [2004] 1 WLR 1605 ("*Di Placito*") at [31] and *Re Kingsley Healthcare Ltd* (unreported, 25 September 2001) ("*Re Kingsley*"). Each of these cases related to undertakings given by consent. In *Di Placito* it was held that special circumstances were required to release or modify such an undertaking, being circumstances not intended to be covered and not ones that ought to have been foreseen when it was given. In *Chanel* Buckley LJ referred to a "significant change of circumstances", or a party becoming aware of facts which she could not reasonably have known or found out at the relevant time.

62. In *Re Kingsley*, Neuberger J referred at p.6 to a consent order being a contract which:

> "…the court will not, save perhaps in exceptional circumstances, vary or interfere with… unless grounds exist which would enable the court, as it were, to interfere with or vary a contract."

63. Neuberger J found that this did not preclude a variation to the undertaking in question, because of the terms of the order, but added at p.9 that the fact that a case has taken longer than expected to come on for hearing (and, as HHJ Hodge observed in *Angel Group* at [30], costs more) did not represent a relevant change of circumstance. Mr Mold did not rely on Neuberger J's analogy with a contract, but did rely on a requirement for what HHJ Hodge referred to as an "unforeseeable new circumstance", and on the delays and additional cost involved in the Search Order process not being sufficient to justify revisiting it.

64. I have concluded that in the particular, and I would say exceptional, circumstances of this case it is appropriate to revisit the Search Order despite the existence of a consent order. The facts are very different to the cases just referred to (*Chanel* involved

undertakings, in a trademark infringement case, not to deal in relevant goods pending trial; *De Placito* related to an agreed time limit within which proceedings to challenge a grant of probate would be brought; and *Re Kingsley* related to an attempt to vary an undertaking in the context of a freezing order). In contrast, this case concerns the protocol for the practical operation of a search order, a "nuclear weapon" in the court's armoury, under the supervision of the court. Further, the context includes a substantial planned trial for which appropriate case management arrangements must be in place to ensure that it can be conducted fairly, with trial preparation not being derailed and with an appropriate focus on the issues in the case.

65. As explained in the 2020 judgment at [69], the guidance in *Tibbles* is not absolute. Its purpose is to ensure finality, by preventing litigants having two bites at the cherry and undermining the normal appeal process. However, it cannot be the case that the court is precluded from intervening where it identifies a real issue of concern that relates to the court's own powers and the need for proper case management. In particular, the court must be able to regulate its own procedures. The Search Order is one such procedure.

66. The consent order made in November 2020 must also be considered in its context. I had encouraged the parties to co-operate at the hearing in July 2020, in the hope that the process of review would be completed relatively promptly thereafter (with an eye on the timing of disclosure, see [12] above). At that stage 16 months had already elapsed since the date of the Search Order. I concluded that the delays that had occurred were at least in material part the responsibility of VPB (paragraph [75] of the 2020 judgment).

67. As explained at [13] to [15] above, following my judgment there were further substantial delays, responsibility for which must largely be attributed to VPB. Concerns about the delays and the risk of derailing the proceedings have been raised by GB for many months, and the significant concerns of the Third Parties have also been manifest. The fact that a pragmatic decision was taken to try to get the process out of the way as speedily as possible by agreeing revised protocols following the replacement of Consilio by Epiq (bearing in mind my encouragement for co-operation) is understandable. In my view it would be quite unjust to treat the existence of consent orders as some form of trump card which should shield the Search Order from proper review by the court.

68. VPB's position is that the delays for which it may bear responsibility are historic and not relevant to the court's assessment of the position. I disagree. They are relevant context. If the process had been implemented properly the Search Order process would have been completed many months ago, without it now causing a distraction from trial preparations and without the need for the ongoing (and resource intensive) involvement of the Third Parties, and a continuing impact on Fourth Parties.

69. It is clear that a claimant who has the benefit of a search order, or other interim relief, is expected to proceed with his claim promptly or will risk the relief being discharged: see *Gee on Commercial Injunctions, 7th ed.* at 24.029. VPB has not failed to prosecute its claim. However, this does not mean that the undoubted significant delays in the Search Order process are irrelevant. Indeed they are of particular relevance given that a principal stated reason for seeking the Search Order was to enable GB's assets to be promptly identified and secured.

70. VPB also claims that progress by GB and the Third Parties has been too slow since the process resumed. A failure by GB and the Third Parties to agree to start the review of the 83k Pool in advance of this hearing (and after the halt ordered in March) was also criticised. However, VPB have not been able to point to any breach of the protocol. Further, GB and the Third Parties cannot be criticised for failing to agree to start reviewing the Reduced 83k Pool when the court had made it clear that the review of the Search Order that the court had ordered could cover the issue of whether the review of the 83k Pool should go ahead (see [18] above).

71. I appreciate that VPB has incurred significant costs in the Search Order process. However, it has been marred by significant delays and other problems for which VPB must bear substantial responsibility. VPB now has the benefit of what it says is valuable material from the more targeted 46k Pool. That benefit will not be lost.

Full discharge?

72. Mr Baradon's primary submission was that the Search Order should be fully discharged, at least as against the Third Parties, albeit with effect prospectively rather than *ab initio*. He relied on the judgment of Kerr LJ in *Booker McConnell v Plascow* at pp.434-435.

73. On balance, I have concluded that the right way forward is not to discharge the order fully at this stage, but instead to "hold the ring" by preserving the material for the time being. This would allow a further review if, but only if, that proves to be justified. In reaching that conclusion I have taken account of all the factors already discussed, but in particular (a) the time and expense that has been incurred on the Search Order to date; (b) the absence of any earlier application to discharge it; and (c) the potential for the allegations reflected in the draft amendments to the particulars of claim (and the related alleged involvement of MG) to be renewed. It also properly reflects the role of an imaging order as a preservation mechanism.

74. However, there is a significant caveat to this. In order to justify any further review there would be no presumption that the matter should be determined by reference to the actual scope and effect of the Search Order as it was granted. It would need to be justified by reference to a fresh determination on normal disclosure principles, taking full account of whose custodial documents are concerned, whether a review of them is justified at the time, and if so on what basis.

75. In the meantime the material must be preserved to the order of the court, in the custody of the Supervising Solicitor. This, together with the approach that would be taken to any application to commence a further review, ought to provide significant comfort to Fourth Parties about the security of their data.

Other issues for determination

76. As explained at [19] above there were five agreed issues for determination. The second issue, relating to streamlining any review of the Reduced 83k Pool, falls away. I note in passing that VPB's suggestion for streamlining was simply an increase in the required rate of review of documents, rather than anything which would actually reduce work or save costs.

77. There was insufficient time to hear submissions on the third issue, costs, so I will not express a final view on it. I will however give a preliminary indication that the outstanding costs of the Third Parties should now be addressed, in accordance with the costs indemnity in their favour. I would also remind VPB that Fancourt J's return date order included not only a costs undertaking but an additional undertaking in damages in respect of any loss found by the court to have been suffered by the Third Parties.

78. In relation to the fourth issue, relating to business opportunities alleged not to have been pursued, I expressed some views at the hearing, at that stage in the form of guidance to the Supervising Solicitor. I reminded the parties that the principal definition of listed items catches documents that relate to or evidence the "existence, location and/or value of any Bedzhamov Asset". I expressed the view that if (a) the document in question evidences a potential or proposed investment opportunity rather than an actual investment; (b) there is no other evidence of an actual investment being made; and (c) there is some evidence that GB did not proceed to make the investment, then it is difficult to see how a conclusion could be reached that the relevant document is a listed item. To be clear, what I have in mind is circumstances where the *only* evidence that is available is of a *potential* investment, rather than an actual investment. VPB's approach of discounting denials by GB or MG that a potential investment was made, at least unless supported by compelling documentary evidence to that effect, appears to be the wrong way round (see also [36] above). Rather, there would need to be some evidence to support a conclusion that a Bedzhamov Asset actually existed.

79. Mr Mold relied on the fact that the Search Order provides that a listed item is one that either falls within the specified description or (in the case of a dispute) is an item "… that in the opinion of the Supervising Solicitor is likely to fall within such description" (emphasis supplied). I accept that, but it requires the Supervising Solicitor to determine that it is at least "likely" that a Bedzhamov Asset existed. Disputes not resolved by her are, under the protocol, referred to the court. So ultimately the court would need to reach such a view. If the only evidence is of a proposed investment, there is some witness or other evidence that the investment did not occur and no evidence to contradict that, then it is very hard to see how the item should be listed. I would add that, in relation to material that indicates that an investment may have been in the course of planning at the date of the Search Order, the practical effect of the worldwide freezing order on GB's ability to proceed also needs to be borne in mind.

80. In setting out these views I expressed particular concern about the impact of VPB's approach to date on the Third Parties. MG was effectively being forced into making very detailed explanations about the Third Parties' own documents in an attempt to persuade VPB that they were not listed items, with VPB refusing to accept MG's evidence. Particularly in circumstances where the Third Parties are neither parties to the litigation nor non-defendant respondents to the Search Order, this seemed to me to be contrary to principle.

81. In respect of the fifth issue, relating to PCB, I made the point that paragraph 17A of the original search order only permitted PCB to "take copies of listed items". The concept of copying seems to me to include the downloading of items by PCB as well as providing copies to those instructing them. Bearing in mind PCB's duties to the court I indicated that it would be appropriate to require that a partner at PCB provide a witness statement confirming, as PCB has already indicated in email correspondence, that the only documents that members of the PCB team downloaded, printed and copied from

the Consilio platform, or provided to those instructing them, were those identified and agreed as listed items – in other words that they did indeed comply with the terms of the order. I have made an order in those terms, which provides in the alternative for an explanation of the position to be provided. This should help address what are obviously continued concerns on the part of GB and the Third Parties about the dissemination and use of seized material.

Conclusions

82. My conclusions as to the way forward are set out at [21] above. In summary, no review of the Reduced 83k Pool should commence. Seized material should be preserved to the order of the Supervising Solicitor, who must keep it in her custody to the order of the court. Either she or the Third Parties would have liberty to apply to the court at any time. Any further search or review would require a fresh application to the court and would need to be shown to be justified at that time, with no presumption that the matter should be determined by reference to the actual scope and effect of the Search Order. The question of full discharge will be reconsidered at or following trial.