Neutral Citation Number: [2022] EWHC 864 (Ch)

Case No: CR-2020-BRS-000092

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
INSOLVENCY AND COMPANIES LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 12 April 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

JAKE VEASEY	**Petitioner**
- and -	
1. COLIN MACDOUGALL	**Respondents**
2. TAMSIN LANDELLE	
3. T3115 LIMITED	
4. BB ZOO LIMITED	

- -
- -

James Wibberley (instructed by **Foot Anstey LLP**) for the **Petitioners**
Martin Budworth (instructed by **Hill Dickinson LLP**) for the **First and Second Respondents**
The **Third and Fourth Respondents** were not present or represented

Hearing dates: 10 February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ Paul Matthews :

Introduction

1. This is my judgment on two applications for specific disclosure made in this unfair prejudice petition concerning the affairs of two companies (the third and fourth respondents). One application is made by the petitioner against the first and second respondents, and the other is made by the first and second respondents against the petitioner. The petition itself was presented on 18 August 2020, points of defence were filed on 6 November 2020, and a reply was filed on 5 December 2020.

2. The first of the two applications was made by notice issued 7 December 2021 by the petitioner. It is supported by three witness statements of Peter Singfield (the petitioner's solicitor) and opposed by a witness statement of Fiona Parry (one of the first and second respondents' solicitors). The other was made by notice issued 2 February 2022 by the first and second respondents. It is supported by a witness statement of Kate Steele (another of the first and second respondent's solicitors). In the usual way, the companies themselves have taken no part in the litigation. Accordingly, from this point on, when I refer to "the respondents", I mean to refer to the first and second respondents only, unless otherwise specified.

3. The two companies concerned by this petition respectively own and manage a zoo. The petitioner and the respondents are shareholders in both. The petitioner has 42% of the former company and 20% of the latter. The respondents (who appear to be in a relationship) have the remainder of the shares in each case. The petitioner's case in summary (which is denied by the respondents) includes allegations that the purchase and development of the zoo was to be a joint venture between the petitioner and the first respondent, with the petitioner as the operator, or animal director, of the zoo, but the first and second respondents have squeezed the petitioner out, have made inappropriate staff hires, have mismanaged the zoo and misused company funds, and have paid themselves excessive remuneration.

4. The relevant provisions in the statements of case are as follows:

   1. Paragraph 29 of the petition alleges the first respondent refused to pay the petitioner a salary from either of the companies until February 2015. This is denied in paragraph 31 of the points of defence.

   2. Paragraphs 33 to 35 of the petition make allegations concerning the bank borrowing of the companies, which the petitioner says was not necessary. He says that the £600,000 capital provided by the shareholders should have been sufficient to cover both the acquisition costs and the initial working capital needs. The petitioner is concerned that the first respondent's refusal to disclose the company's bank accounts may hide the use by the first respondent of this capital for his own purposes. These allegations are denied in paragraphs 35 and 36 of the points of defence.

   3. Paragraph 43 of the petition alleges a deliberate attempt by the first respondent to force the petitioner to limit or cease his involvement in the zoo. This allegation is denied in paragraph 45 of the points of defence.

4. Paragraphs 61 and 62 of the petition allege that the respondents purported to declare the petitioner's role redundant, but say that this was a sham. This is denied in paragraph 60 of the points of defence.

5. Paragraphs 65 and 66 of the petition allege mismanagement of the zoo by the respondents, giving as examples

(a) "multiple avoidable animal deaths",

(b) the reissue of the zoo's operating licence after the petitioner's departure subject to 21 conditions, and

(c) the confiscation of firearms from the first respondent following an investigation into the first respondent by the police.

These allegations are denied in paragraphs 62 to 66 of the points of defence.

6. Paragraphs 67 to 69 make allegations of misuse of company funds, giving as examples

(a) charging the first respondent's private rental accommodation to the operating company,

(b) charging the cost of commuting between the first respondent's home and the zoo to the operating company,

(c) charging the cost of foreign trips taken by the respondents to the operating company, and

(d) charging excessive "motor and travel expenses" of the respondents to the operating company.

These allegations are denied at paragraph 57 of the defence.

7. Paragraphs 78 to 82 allege that the lack of profitability of the zoo is the result of deliberate suppression of profits by the respondents, by diverting income from or charging expenses to the operating company which are not justified. These allegations are denied in paragraph 70 of the points of defence.

Procedure

5. These proceedings are subject to the disclosure pilot scheme in CPR Practice Direction 51U. On 21 April 2021 I gave directions for the future conduct of the proceedings. By paragraph 7 of my order the parties were ordered to provide disclosure pursuant to the List of Issues (annexed to the order) in model D in respect of each issue, by 2 July 2021. The parties subsequently agreed to extend the date for provision for disclosure to 6 August 2021, and I made a consent order on 29 July 2021 to that effect. The petitioner provided his disclosure on 6 August 2021. The respondents did not. Just before 4 PM on that day they told the petitioner that they had technical problems, meaning that they were unable to give disclosure then, but that they hoped to do so the following week. In fact, by my order of 14 August 2021, time

was agreed to be extended to 20 August 2021 for the respondents to give disclosure. On that day the respondents indeed gave disclosure.

6. However, on 17 September 2021 the petitioner wrote to the respondents seeking disclosure of documents said to have been omitted from that given on 20 August 2021. The respondents replied on 24 September 2021. The respondents at the same time challenged the disclosure given by the petitioner. The petitioner responded to that on 5 October 2021, and the respondents replied in turn on 19 October 2021.

7. Further correspondence passed between the two sides on 28 October 2021, 8 November 2021 and 26 November 2021. In their letter of 26 November 2021 respondents said they hoped to reply substantively by no later than 10 December 2021. In fact, the petitioner issued his application notice on 7 December 2021. On 14 December 2021 the respondents provided a further reply and some further disclosure. On 15 October 2021 further disclosure was provided electronically. To a certain extent, this has narrowed the issues.

The petitioner's application notice

8. The petitioner's application originally sought disclosure in the following terms:

> "1.) The First Defendant provide a witness statement within 14 days confirming:
>
> a. whether he owned any computers between 2014 to date and what has happened to those computers; and
>
> b. listing the hard copy records of the Defendants which (1) exist and (2) which have been searched by the First to Fourth Defendants as part of the disclosure process to date, including details of which records have been provided to Hill Dickinson LLP and whether those records were provided in full or selectively.
>
> 2.) To the extent the First Defendant owned any computers between 2014 to date and has retained them, the Defendants shall search those computers for relevant documents using the agreed key word searches in the Disclosure Review Document (as subsequently amended and agreed by the parties in correspondence) for the time periods set in the Disclosure Review Document for each disclosure issue and any relevant documents shall be disclosed within 14 days.
>
> 3.) The Defendants shall provide disclosure of the following categories of document together with an updated disclosure certificate and list within 14 days:
>
> a. Credit Card Statements for the company credit cards related to the Third and Fourth Defendants used by the First and Second Defendants between 2014 to date
>
> b. Bank Statements for the Third and Fourth Defendants from 2014 to date
>
> c. The underlying documentation supporting the following expenses charged to the company in each financial year from 2014 to date: Motor Expenses, Travel Expenses, Rent / Accommodation;

> d. Records of any payments of legal expenses by the Third or Fourth Defendant in respect of these proceedings (to include any payments to Knights plc or Hill Dickinson LLP);
>
> e. Reports from the I-Zettle system for each financial year from 2014 to date if not yet disclosed;
>
> f. Unredacted payroll records of the Fourth Defendant for each of the financial years from 2014 to date; and
>
> g. Animal Stock lists from each of the financial years from 2014 to date
>
> h. Details of any dividends paid to or loans advanced to the First and Second Defendant by the Third or Fourth Defendant between 2014 to date."

9. On 22 December 2021, the court sent out a notice of hearing of the petitioner's application for 20 January 2022, for a remote hearing via MS Teams, with a time estimate of three hours. The same day, the petitioner wrote to the court explaining that neither side's counsel was available for 20 January 2022, putting forward alternative dates. On 6 January 2022, a revised notice of hearing was sent out, informing the parties that the hearing would now take place on 10 February 2022.

10. On 19 January 2021 the respondents asked whether the petitioner still sought relief on his application "in full". They also referred once again to documents appearing to them to be missing from the petitioner's disclosure. This was followed up by the respondents in a letter of 21 January 2022, setting out detailed complaints, and responded to by a letter from the petitioner dated 27 January 2022. The respondents' application notice was then issued on 2 February 2022, and it was listed to be heard following the petitioner's application, on 10 February 2022.

The respondents' application notice

11. The respondents' application notice sought an order for

> "the Petitioner to provide disclosure under paragraph 17 and/or 18 of CPR PD51U of the following specific categories of document together with an updated disclosure certificate and list within 14 days:
>
> > 1.1. correspondence (including emails and messages) between the Petitioner and his employers or prospective employers concerning the following:
> >
> > > 1.1.1. outcome of job applications with Al Wabra Wildlife Preservation, UFAW, Tusk Trust, Bristol Zoo, Al Ain Zoo Dubai, Chester Zoo, Dubai Safari, Longleat; Durrell and Edinburgh Zoo;
> > >
> > > 1.1.2. the circumstances surrounding the termination of his employment with Vancouver Aquarium;
> >
> > 1.2. correspondence (including emails and messages) between the Petitioner and Mr Hartley concerning alleged animal welfare issues at Peak Wildlife Park (**Zoo**);

1.3. correspondence (including emails and messages) between the Petitioner and ex-employees of the Zoo, including Ms Sandland, Ms Edge, Mr Moore and Ms Dale;

1.4. correspondence (including emails and messages) between the Petitioner and Four Paws regarding the funding of a potential purchase of shares in or around 2018;

1.5. correspondence (emails and messages) between the Petitioner and Ms Anna Ryder Richardson from 2017 onwards;

1.6. native versions of the documents disclosed as JV_4279 and JV_4280."

The procedural rules

12. Disclosure is governed by CPR Part 31, as varied by Practice Direction 51U for Business and Property Court work. CPR rule 31.12 originally dealt with applications for "specific disclosure", but in the Business and Property Courts there is no direct equivalent. Instead, for the purposes of these two applications, the relevant provisions of the procedural rules are contained in paragraphs 6, 17 and 18 of Practice Direction 51U:

"**6. Extended Disclosure**

[…]

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

(1) the nature and complexity of the issues in the proceedings;

(2) the importance of the case, including any non-monetary relief sought;

(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;

(4) the number of documents involved;

(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

[…]

17. Failure adequately to comply with an order for Extended Disclosure

17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—

(1) serve a further, or revised, Disclosure Certificate;

(2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;

(3) provide a further or improved Extended Disclosure List of Documents;

(4) produce documents; or

(5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).

17.3 An application for any order under paragraph 17.1 should normally be supported by a witness statement.

18. Varying an order for Extended Disclosure; making an additional order for disclosure of specific documents

18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.

18.4 The court's powers under this paragraph include, but are not limited to, making an order for disclosure in the form of Models A to E and requiring a party to make a witness statement explaining any matter relating to disclosure."

13. As Marcus Smith J said in *Agents' Mutual Ltd v Gascoigne Halman Ltd* [2019] EWHC 3104 (Ch):

> "11. The difference between these two provisions is easy to see:
>
> i) CPR 51 PD U §17 deals with the case where an Extended Disclosure order has not, or may not have been, adequately complied with. Because of the question of non-compliance, the test that must be met for the granting of an order under CPR 51 PD U §17 is that the order be 'appropriate', which requires the applicant to satisfy the court that making an order is 'reasonable and proportionate'.
>
> ii) By contrast, CPR 51 PD U §18 deals with the case where – even though there has been compliance with an order for Extended Disclosure – the order previously made is sought to be varied. In such a case, the applicant must show not merely that making the order is 'reasonable and proportionate', but also that varying the original order "is necessary for the just disposal of the proceedings". Unsurprisingly, it is harder to obtain an order under CPR 51 PD U §18 than under CPR 51 PD U §17."

(See also *Astra Asset Management UK Ltd v Musst Investments LLB* [2020] EWHC 1871 (Ch), [22].)

14. It is important to bear in mind that the court cannot simply read over from CPR Part 31 to the new provisions in Practice Direction 51U. That practice direction represents a shift to a different culture, at least in relation to work in the Business and Property Courts: see *HMRC v IGE USA Investments Ltd* [2020] EWHC 1716 (Ch), [32].

15. It will also be seen from these provisions that, by comparison with CPR rule 31.12, it is more difficult to obtain an order for specific disclosure or further disclosure under the new regime set out in the Practice Direction 51U. Rule 31.12 confers a discretion on the court: *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] EWCA Civ 1470, [33]-[36]. But, under the Practice Direction, it must first be shown **either** that "there has been or may have been a failure adequately to comply with an order for Extended Disclosure" and that it is "reasonable and proportionate" to make the order (paragraph 17), **or** that "varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate" (paragraph 18). So the bar is higher.

16. Criticisms have been made of these new provisions by some commentators. For example, Charles Hollander, in his book *Documentary Evidence*, 14th edition, 2021, paragraph 8.11, says that these rules are too complicated and granular, and require a disproportionately large amount of work too soon in the process, and so are very costly. Also, he says that they are too definitive of the disclosure process too early on, and that thereafter it is difficult for the court to change course. It is not for me, sitting here, to evaluate these criticisms. Instead, it is my duty to apply the rules as they stand. Nevertheless, I do bear in mind in this case that, following the directions given, evidence in chief has already been exchanged (in December 2021), the PTR is fixed for 29 April 2021, and the trial is listed to begin on 14 June 2021.

The petitioner's application

17. So far as concerns the petitioner's application, in the light of information and explanations provided since this application was issued, a number of heads of relief in

that application are no longer pursued. These relate to the first respondent's computers (paragraph 1a and 2), expenditure on legal expenses (paragraph 3d), and details of dividends paid (part of paragraph 3h). I deal with the remaining categories in turn.

Paragraph 1b: the "Animal Diaries"

18. The first of these is for a list of the hardcopy records of the respondents which have been searched as part of the disclosure process. This has been sought by the petitioner on the basis that the zoo is required to keep "Animal Diaries" under the Zoo Licensing Act 1981, that these diaries would be relevant to issues of mismanagement of the zoo, but that none of them has been disclosed by the respondents. The respondents accept that such diaries are a regulatory requirement, and do exist (see the witness statement of Fiona Parry of 1 February 2022, at [23]). Somewhat surprisingly, the respondent's position in relation to disclosure of them is that

> "there have not been any issues of mismanagement in relation to animal welfare issues and, therefore, the animal diaries are not relevant to disclose."

19. I have to say that I find this an extraordinary statement. It is clearly in issue between the parties as to whether there has been mismanagement of the zoo by reference to "multiple avoidable animal deaths" since the petitioner ceased to be involved in the management of the zoo: see para [3]5(a) above. The petitioner put forward as an issue for disclosure (as part of number 12) "any history of firearms or mismanagement-related incidents at the zoo". The parties agreed that if it were an issue for disclosure then model D should apply to it, that is, disclosure of "documents which are likely to support or adversely affect [a party's] claim or defence or that of another party". But the respondents, for the reason given, say that it is not an issue for disclosure. I reject this reason. The fact that the respondents deny the allegation is not a basis for refusing disclosure.

20. The respondents complain that paragraph 66(a) of the petition is short on particulars and especially of "how it has engendered unfair prejudice". However, in my judgment the petitioner has made a sufficient allegation of mismanagement of the zoo because (he says) animals have died in avoidable circumstances. Whether that allegation can be made good, and, if so, whether it has engendered unfair prejudice, are questions for trial. Alternatively, if the respondents wish to say that, even if this allegation is made good, the petition cannot succeed, then they may be able to apply to strike out this part of the petition. What they cannot do is simply to sidestep disclosure obligations in relation to issues between the parties.

21. The respondents say that "seeking a huge body of diaries from all the keepers in a zoo full of animals across a number of years is a fishing expedition par excellence". I do not agree. In the present case there is material before the court which shows that animals have died. The question is whether their deaths were caused or contributed to by mismanagement on the part of the respondents. The animal diaries are relevant to this.

22. In my judgment, there may have been a failure adequately to comply with my original order for disclosure, and therefore paragraph 17.1 of the Practice Direction 51U is engaged. However, before the court may make an order under paragraph 17, it must

first be satisfied that making the order is reasonable and proportionate (as defined in paragraph 6.4). In the present case, I am so satisfied. The animal diaries may be expected to contain information bearing on any potential mismanagement by which animals die in avoidable circumstances, if there is any such information. Either they will contain such information, in which case they will significantly assist the petitioner's case, or they will not, in which case they will assist the respondents' case. It is entirely reasonable for the court to be able to make use of this available information in resolving this issue. The diaries do not have to be searched for, as it is known they exist and therefore (presumably) where they are.

Paragraph 3b: bank statements

23. The second category of documents in relation to which an order is sought is "Bank Statements for the Third and Fourth [respondents] from 2014 to date". The petitioner says they are relevant to at least three issues. These are (i) how the purchase and redevelopment of the zoo was financed ([3]2 above), (ii) whether the zoo was capable of paying the petitioner a meaningful salary, so that the failure to do so was deliberate conduct to force the petitioner out ([3]3 above), and (iii) whether the respondents have misappropriated funds by charging personal expenses to the zoo ([3]6 above).

24. The only bank statement disclosed (in fact disclosed before the issue of the claim, in response to an application for pre-action disclosure) is a single page statement for the third respondent for the period October 2014 to March 2015, which covers the period when the petitioner's and the first respondent's contributions to the capital of the company were paid. But it does not show how the shareholder funds were applied or how the sums borrowed by the companies were spent. The allegations relied on by the petitioner relate to later periods.

25. The respondents say that the petition does not put in issue any particular bank account entries. Since the petitioner has not seen them, that is hardly surprising. They also say that the disclosure review document referred in issue 13 merely to a "review" of the bank statements by those providing and supervising the disclosure, and not simply their "production". In fact, what the disclosure review document does at this point is to set out the issue relating to misuse and misappropriation of company funds, and then to say: "To include a review of the accounting records for the operation of the Zoo, including bank statements … "

26. It is clear that the reference to a "review" meant that the respondents and their lawyers would have to review the bank statements in order to see whether they were disclosable or not for this issue. Since the bank statements either will show information tending to support the petition on the three issues set out above or they will not, they are likely to fall within Model D disclosure. Yet none of the remaining bank statements has been disclosed. This is not explained. In my judgment, it is not credible that none of them is disclosable.

27. Moreover, the version of events put forward in the points of defence was to deny the allegations of misuse of company monies. Specific statements were made that "private rental costs have not been charged to the business", "personal trips are paid for personally", and "motor expenses have been properly accounted for". Yet, in the evidence given in the witness statements for trial made by Mr Evens and Ms Anderson, examples of the use of funds for personal purchases by the respondents are

set out, including holidays and bedsheets, costs of commuting and rent for the first respondent's accommodation. It is then said in that evidence that such personal expenditure has been properly accounted for and charged back to the respondents as appropriate.

28. But this was not what the points of defence said. On the contrary, they said that the company had not paid the sums at all, rather than that it paid the sums and then been paid back. In any event, even if the respondents are right about this, the bank statements are likely to show the repayments they apparently made, and thus be probative in that sense. I am concerned about the approach taken by the respondents here, which seems to excite rather than to allay suspicion.

29. Accordingly, there may have been a failure adequately to comply with my original order for disclosure, and therefore paragraph 17.1 of the Practice Direction 51U is engaged. Once more the question is whether I am satisfied that making the order is reasonable and proportionate. The respondents say (in particular, in their letter of 19 October 2021) that it is not. In summary, this is because the bank statements go back over seven years, and cover "millions of pounds' worth" of transactions. They say the information given in the statements is too limited to enable a reason to be assigned for each payment and whether it was reasonable for the company concerned to make it. Moreover, they say that an independent third party (the company's accountants) has already reviewed all the relevant documents, including the statements, in order to prepare the companies' accounts. It has done this on the basis of bookkeeping carried out by an independent bookkeeper. Further, the respondents' solicitors have also reviewed the bank statements as part of the disclosure process.

30. But, in my judgment, a conclusion on whether it is reasonable and proportionate to make an order is not answered simply by asserting that a third party has reviewed the documents, nor merely by showing that there will be a lot of work or cost involved in complying with any order. Paragraph 6.4 of the Practice Direction refers to a number of relevant factors, and the number of documents involved and the cost of the exercise are simply two of them. Others are: the issues involved, how important the case is, the likelihood of probative documents existing, the parties' financial positions, and the need to deal with the case expeditiously, fairly and at proportionate cost.

31. In any event, bank statements these days are available in digital form, and usually at the touch of a button. There will be no great difficulty in downloading and making available such statements. The expense will come when they are reviewed. If they were all disclosed, then that expense would in the first instance fall upon the petitioner. If the petitioner raised points on them which were misguided or foolish, the respondents would have to decide whether to deal with them or ignore them. The fact that a non-lawyer third party (the accountancy firm paid by the companies themselves) has reviewed the documents for a quite different purpose than this litigation has no real weight in the balance. It is the more so when (as they themselves have said) the accountants have not carried out a statutory audit of the financial information, but have simply relied on what their clients have told them.

32. In my judgment, the nature and importance of the issues concerned, going to the honesty and propriety of the respondents' management of the companies, the fact that the relevant information to resolve the issues is mostly in the hands of the respondents, the fact that it is not credible that the bank statements contain *no*

probative information one way or the other, and the need to deal with the case fairly as between the parties, even bearing in mind the number of documents that may be involved, means that an order would be both reasonable and proportionate.

Paragraph 3a: credit card statements

33. The next issue relates to credit card statements relating to credit cards issued to the respondents on the accounts of the companies. The petitioner makes the same case as in relation to bank statements and the use of the companies' money for personal expenditure (see [3]6 above). No credit card statement has been disclosed. The respondents make a series of points. The petition does not allege any misuse of credit cards. Disclosure issue 13 specifically identified bank statements, but does not specifically identify credit cards. It is said that all accounting information "framed" by issue 13 has already been disclosed, and indeed that all known adverse documents have already been disclosed. There are "no grounds for supposing that misuse of credit cards has escaped the attention of internal bookkeeper and external accountant".

34. I accept that the petition does not allege any misuse of the companies' credit cards. But it does allege misappropriation of the companies' funds, and credit cards are only one way in which such misappropriation can occur. I also accept that credit card statements were not specifically referred to in disclosure issue 13. But (as I have already said) what that issue did was to set out the nature of the issue and then to continue "to include review of the accounting records for the operation of the zoo, including…". The list of types of accounting records was not an exclusive one. Credit card statements are well within the general meaning of "accounting records".

35. Assertions by the respondents that they have complied with their disclosure obligations are not in themselves of great weight, because they could honestly believe that they have complied with their obligations, and yet be found wanting. As to the point that the bookkeeper and the external accountants must have picked up any misuse of credit cards, part of the answer is the same as with the bank statements. The points of defence deny that there were any instances of use of company funds for personal purposes at all, whereas the trial evidence in the witness statements of Ms Anderson and Mr Evens is that there was such expenditure but it has been recharged. The petitioner is entitled to be concerned about that inconsistency, and the wish to investigate what lies behind it.

36. In my judgment, once more paragraph 17.1 is engaged. I must therefore consider whether the making of the order would be reasonable and proportionate. I think that in the circumstances of this case the credit card statements are likely to contain information probative one way or the other. For similar reasons as those given in relation to the bank statements, I am satisfied that it would be reasonable and proportionate to make the order proposed by the petitioner.

Paragraph 3c: vouchers for travel expenses

37. The next category relates to underlying documentation behind the travel expenses charged to the companies. This forms part of the petitioner's claim that there has been misappropriation of companies' funds by the respondents. The evidence of the petitioner's solicitor Mr Singfield is that the information already provided by the respondents suggests that enough motor fuel was purchased each year to drive the

equivalent of 524 km per day. Although the points of defence deny that any personal trips have been charged to the companies, the witness statement for trial from Mr Evens gives examples of personal travel (including holidays) being charged to the companies in the several thousands of pounds, although it is said that they have subsequently been "properly accounted for", and recharged appropriately. This is the same inconsistency between pleadings and evidence that has been seen elsewhere.

38. In addition, I bear in mind that, where the accountants are in doubt about the proper recharging of expenditure, they rely on what they are told on behalf of the companies. They are not carrying out an audit. In my judgment, paragraph 17.1 is once more engaged. The evidence makes clear that there are underlying vouchers dealing with travel expenditure. In the circumstances, I am satisfied that it would be reasonable and proportionate to make the order proposed by the petitioner.

Paragraph 3e: iZettle system

39. This subparagraph concerns information from an electronic payment system formally known as iZettle, and now simply Zettle. This automatically generates records from every point of sale till in the zoo, for example in the souvenir shop or the café. The information is produced in electronic form, and reported to the bookkeeper, Catherine Anderson. She then manually input this information into the accountancy platform known as Sage. Her evidence is that the respondents have no involvement in this process. The information uploaded to Sage is available to the accountants, who use it to prepare the end of year accounts.

40. This information is relevant to the allegation that the zoo's lack of profitability can only be due to diversion of income streams and/or misappropriation of funds. The petitioner wishes to check the records of this information to see that the income streams shown in the accounts are accurate and properly accounted for. He says there is scope for manipulation of the figures input into Sage, because Ms Anderson does the inputting manually. However, the petitioner cannot point to any evidence that any of these figures may be wrong.

41. In my judgment paragraph 17.1 is not engaged. This is not like the bank statements, the credit card statements or the travel vouchers, where there are inconsistencies which have yet to be explained, and everything depends upon the explanations given by the respondents themselves to their professional advisers. Here there is no evidence to show that the wrong figures may have been input by Ms Anderson. The mere fact that the respondents have refused to provide the information does not, as the petitioner alleges, permit "only one inference", namely that the respondents "have something to hide". I will not make an order under this heading.

Paragraph 3f: payroll records

42. The next category relates to payroll records relating to the companies. This forms part of the petitioner's claim that there has been misappropriation of companies' funds by the respondents. The evidence of the petitioner's solicitor Mr Singfield is that some of these records have been disclosed but there do not appear to be a complete set covering each of the relevant years. Moreover, they have been redacted so as to exclude employees other than the respondents.

43. These records are relevant to the petitioner's claim that there has been misappropriation of companies' funds by the respondents. In essence, what the petitioner is concerned about is that wages and salaries paid to employees of the respondents' other zoo may have been charged to the payroll of this one. He says they are also relevant to the circumstances surrounding the petitioner's purported redundancy, and whether other employees were being paid to undertake the petitioner's role.

44. The respondents say that these records are not specifically listed in disclosure issue 13, which they say has been complied with. In my judgment it does not matter whether they are listed specifically. There are clearly accounting records for the operation of the zoo. The fact that some of them have already been disclosed demonstrates that even the respondents considered that they were relevant and disclosable. In my judgment, that is the correct view. The question is whether there has been or may have been a failure adequately to comply with the disclosure order, so that paragraph 17.1 is once more engaged.

45. In my judgment, the redactions cannot be justified simply on the basis that the names and other details relating to the employees are sensitive. Disclosure obligations can override such confidentiality. Moreover, the payroll records would be relevant in every year, because if they did not tend to show that the petitioner's concerns were well-founded, they would on the other hand tend to show that there was nothing in them. So I am satisfied that there may have been a failure adequately to disclose these documents.

46. I turn then to consider whether it would be reasonable and proportionate to make an order in respect of them. CPR rule 31.22 applies to documents which have been disclosed and so helps to protect the confidentiality of the information contained in them. The petitioner is prepared to give an undertaking that he will not seek to use any information disclosed to contact any current or former employee of the companies concerned that he is not already in contact with. That is as much protection as the respondents are entitled to, in the circumstances of this case. I think it is entirely reasonable and proportionate to make the order on the basis of the petitioner's additional undertaking.

Paragraph 3g: Animal stock lists

47. The next category relates to animal stock lists from each of the financial years from 2014 to date. The petitioner says that these too form part of the accounting records of the companies (disclosure issue 13), because the number of animals held by the zoo at any one time will have an effect on its cost base and therefore profitability. He also says that a significant turnover in the stock of animals may indicate mismanagement (disclosure issue 12).

48. For myself, I do not consider that animal stock lists can properly be considered part of the "accounting records" of the business. The accounting records are those that indicate monies coming in and monies going out, or at least credits and debits being made, whether through banks or other financial institutions, or in other ways. Records of money spent on the acquisition of animals or of money received on the disposal of them, and of money spent on feeding them and looking after them would be accounting records. Simple lists of what animals there are at the zoo are not.

49. As to mismanagement, I do not see how stock lists could by themselves indicate whether there may have been mismanagement. A significant turnover in animals may be caused by a number of factors. Mismanagement, even if it existed, would not be demonstrated merely by showing a turnover of animal stock. Animals may die even if well managed, and mismanaged animals may not die. Stock may change because animals are bought or sold, or lent or returned. In these circumstances, I do not see how I can be satisfied that there may have been a failure so as to engage paragraph 17.1, and I do not consider that it is "necessary" for the purposes of paragraph 18.2 to have these documents. I decline to make an order under this head.

Paragraph 3h: Details of loans advanced to the respondents

50. As originally framed, this category also sought details of dividends paid to the respondents, but this part is no longer pursued. What the petitioner seeks is a running account balance of the respondent directors' loan accounts with the companies concerned. The petitioner says this is relevant to allegations of misuse of company monies. The petitioner relies on a letter from the respondent's solicitors dated 19 October 2021, in which they stated that "any … loans to our clients will be properly recorded". However, in her witness statement on behalf of the respondents Ms Parry states that her firm confirmed to the petitioner's solicitors on 14 December 2021 "that no loans had been advanced". She also refers to the witness statement of Mr Evens of 17 December 2021.

51. However, this latter reference is problematic. This is because Mr Evens in his witness statement asserts (in paragraphs 10-16) the existence and use of shareholder and director loan accounts between the respondents and the companies. I accept that he also gives evidence that at each year end date the balance of these accounts was in favour of the first respondent rather than the zoo. But that is not the same thing as there never having been any loans outstanding between the zoo and the first respondent. And, if documents are properly disclosable by a party, that party cannot sidestep the obligation to give disclosure by providing evidence (credible or otherwise) that it made no difference at the end of the day.

52. In my judgment, whilst a disclosing party cannot generally be required to create new documents, existing documents setting out shareholder and director loan accounts between the respondents and the companies should have been disclosed as part of the "accounting records" under disclosure item 13. I am satisfied that paragraph 17.1 is engaged, because there may have been a failure adequately to give disclosure, and that it is reasonable and proportionate to make the order sought.

The respondents' application

53. By their application, the respondents seek specific disclosure of six categories of document. I deal with each of them in turn.

Paragraph 1.1: Correspondence with employers and prospective employers

54. Under this head, the respondents seek specific disclosure of correspondence between the petitioner and his employers or prospective employers concerning the outcome of certain listed job applications as well as the circumstances surrounding the termination of his employment with Vancouver Aquarium. The respondents say that

these were required to be disclosed pursuant to disclosure issues 1 and 9. Issue 1 reads as follows:

> "P's employment history (including the circumstances of termination of employment)".

Issue 9, so far as material, reads as follows:

> "P's applications for employment between May 2014 and June 2016…"

55. Paragraph 2 (and others) of the Points of Defence, and paragraph 10 (and others) of the Reply put the petitioner's employment history in issue. On the other hand, although paragraph 2 of the Points of Defence and paragraph 11 of the Reply refer to applications by the petitioner for jobs elsewhere, there does not appear to be any relevant *issue* between the parties to which the disclosure in issue 9 could go. For example, the petitioner does not deny the allegation that the petitioner made such applications, but in effect admits it. I accept that in paragraph 34(b) of the Reply the petitioner refers to having turned down roles offered to him, but there is no subsequent pleading from the respondents which puts that in issue. However that may be, it appears that the petitioner has disclosed many job applications, though "little, if any, subsequent correspondence and related documents with his prospective employers on the outcome of those proceedings". As I understand the matter, the petitioner has confirmed that all of those applications were unsuccessful.

56. So far as concerns the application for documents relating to the petitioner's employment history, the evidence is that the petitioner has not disclosed any documents relevant to the termination of his employment with the Vancouver Aquarium in February 2020. In my judgment, that engages rule 17.1 of the Disclosure Pilot. Further, in my judgment it is reasonable and proportionate within rule 17.2 for the court to order that that documentation be provided.

57. Next, I consider the application for documents relating to job applications made by the petitioner. Here, it is not necessary for me to consider whether rule 17.1 or rule 18.1 is engaged. This is because, in circumstances where there does not appear to be any issue that such applications were in fact made, and also an acceptance by the petitioner that all of those applications were unsuccessful, I do not think it would be either reasonable or proportionate to make an order under this head. I add only that, in my judgment, neither is it *necessary* to do so within rule 18.2.

Paragraph 1.2: Correspondence between the petitioner and Matthew Harley concerning animal welfare issues

58. I understand that the petitioner has agreed to disclose this, and so I need not deal with it.

Paragraph 1.3: Correspondence between the petitioner and ex-employees of the Zoo

59. Paragraph 66(b) of the petition and paragraph 63 of the defence raise the question of animal welfare allegations made about the zoo. There is no issue that they were raised. But there *are* issues as to whether the allegations were well founded, and whether it was current and former employees who raised concerns, or whether the

petitioner did so, and coerced current and former employees into supporting him. It is not the case, as the petitioner submits, that the issue is limited to the *fact* of any complaints. Disclosure issue 12 reads as follows:

> "(a) the licensing of the zoo; and
>
> (b) firearms licensing; and
>
> (c) complaints made by P; and
>
> (d) any history of firearms or mismanagement related incidents at the zoo".

60. It appears that there has been some disclosure of documents in this category. But the respondent say it is incomplete. They focus on five classes of case in particular:

> 1. Correspondence between the petitioner and Khalisha Sandland explaining how her letter of resignation or copies of extracts of the zoo's animal diaries came to be in his possession;
>
> 2. Correspondence "surrounding" the statement that Simon Moore made to the licensing authority;
>
> 3. Correspondence between the petitioner and Stephanie Dale;
>
> 4. Documents which explain Kate Edge's involvement in the complaint to the licensing authority;
>
> 5. Correspondence between the petitioner and the ex-employees "evidencing the circumstances surrounding the ex-employee's statements made to the zoo's licensing authority…" (There is an obvious overlap between this category and category 2 in relation to Mr Moore.)

61. The petitioner's answer to this is that any documents identified during the agreed searches have already been disclosed, and that "further searches are disproportionate, given limited scope for further relevant documents to be disclosed". For myself, I do not see how the petitioner's possession of Ms Sandland's letter of resignation or copies of some of the zoo's animal diaries are relevant to the allegations cited above. On the other hand, I can see how the other categories of document might be relevant to the issue of coercion.

62. But, in the circumstances alleged by the respondents, and in light of the petitioner's explanations, I am very far from satisfied that there may have been a failure to comply with disclosure obligations thus engaging paragraph 17.1 of the disclosure pilot, or, if it was, that it was reasonable and proportionate to make an order, and I am certainly not satisfied that such disclosure is *necessary* within paragraph 18 of the disclosure pilot. I therefore decline to make any order under this head.

Paragraph 1.4: Correspondence between the petitioner and Four Paws

63. Four Paws is an animal welfare charity. It appears that the petitioner had discussions with it about a bid to buy out the respondents. The respondent's evidence in support of the application asserts that correspondence between the petitioner and any potential

third party investor would fall under disclosure issue 11 and potentially also 4. These read as follows:

> "4. Discussions or agreement about P's, Mr MacDougall's, Ms Ryder-Richardson's and Ms Landelle's roles, status and shareholdings.
>
> 11. The ending of P's day-to-day involvement with the zoo's operations".

The skeleton argument of counsel for the respondents says that "anything evidencing discussion about respective roles in the zoo's operations and the ending of P's involvement were covered by Issues 4 and 9." I have set out issue 4 immediately above. Issue 9 was set out earlier.

64. The petitioner's response to this head is to assert, first, that correspondence with Four Paws was outside the scope of the disclosure issues, and, second, that it was privileged. In this connection, the petitioner referred me to the decision of the Court of Appeal in *WH Holdings Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652, where the court (Sir Terence Etherton MR, Lewison, Asplin LJJ) said:

> "20. We would accept that a document in which advice or information obtained for the sole or dominant purpose of conducting litigation cannot be disentangled, or a document which would otherwise reveal the nature of such advice or litigation, would itself be covered by litigation privilege. It must also not be forgotten, as Popplewell J pointed out in *Excalibur* at [23], that even if a document is not covered by litigation privilege it may yet be covered by legal advice privilege.
>
> 21. That is not, however, the basis on which privilege for the Disputed Documents is claimed in this case. In relation to some documents, which were in issue below but are not the subject of this appeal, privilege was claimed on the basis that they 'implicitly reflect[ed]' legal advice. The Judge upheld that claim to privilege, and West Ham do not challenge that ruling. But the sole ground upon which privilege is claimed for the Disputed Documents is that (with immaterial variations) they were created:
>
> > "… with the dominant purpose of discussing a commercial settlement of the dispute when litigation with [West Ham] was in contemplation."
>
> 22. We do not consider that a claim in those terms falls within the scope of litigation privilege."

65. It is for a party asserting privilege as a basis for refusing to give disclosure to explain the basis of such privilege: *Rawlinson and Hunter Trustees SA v Akers* [2014] EWCA Civ 136, [13]. I do not see why a document containing correspondence between the petitioner and a potential investor in the zoo should, without more, "implicitly reflect legal advice" (if that is the basis for the privilege relied on). The petitioner simply did not explain to me why it should do so. And the Court of Appeal expressly held that documents created with the dominant purpose of discussion of a commercial settlement of the dispute would not be privileged.

66. So, the question is whether such correspondence would be within or without the scope of the disclosure issues. In my judgment, correspondence with potential investor does not fall within either disclosure issue 4, 9 or 11. It does not fall within number 4, because it is not about the petitioner's shareholding, but instead the potential shareholding of a third party. It does not fall within number 9, because it is not about the petitioner's applications for employment. And it does not fall within number 11, because it is not about the ending of the petitioner's day-to-day involvement with the zoo. Accordingly, I decline to make any order under this head.

Paragraph 1.5: Correspondence between the petitioner and Anna Ryder Richardson

67. Anna Ryder Richardson is the first respondent's wife, from whom he is separated. The petition alleges (at paragraphs 12 and 13) that Ms Ryder Richardson and the first respondent would together take 50% of the zoo, but did not want to be involved in running it. The defence pleads (at paragraph 12) that the reference to Ms Ryder Richardson "is simply not understood". It goes on to say that there was "never any intention of Ms Ryder Richardson of owning or operating this new venture". At paragraph 59, the defence alleges that the petitioner approached Ms Ryder Richardson in 2016 "to offer her the opportunity to spite her ex-husband by committing to content for entitlement to half of [the first respondent]'s shares…" Paragraph 17 of the reply makes a new allegation that the petitioner was only interested in entering a partnership with Ms Ryder Richardson. Paragraph 21 takes issue with paragraph 12 of the defence, saying that the "suggestion that Ms Ryder Richardson was not be involved is incredible…" Paragraphs 63 and 64 of the reply deny paragraph 59 of the defence.

68. The respondents say that "correspondence between the petitioner and Ms Ryder Richardson is relevant to [disclosure issue] 4 and potentially [disclosure issue] 11". I set these two issues out earlier. I agree that such correspondence would be relevant to issue 4. I am not satisfied that it would be relevant to issue 11. The petitioner accepts that his disclosure of correspondence with Ms Ryder Richardson has been limited to 2016, because only this correspondence was considered relevant to what the parties agreed at an earlier stage. In this respect there may have been a failure to comply with the earlier disclosure order, and paragraph 17.1 is accordingly engaged.

69. The petitioner says that it would not be reasonable or proportionate to make an order at this stage. Given that, as matters stand, Ms Ryder Richardson is not a party to this litigation, and neither is she being called as a witness by any party, the resolution of the dispute between the parties about whether or not she was ever intended to be a shareholder in the zoo is in danger of being decided on too little information. I think it is both reasonable and proportionate for the petitioner to give disclosure of subsequent correspondence with Ms Ryder Richardson.

Paragraph 1.6: Native versions of the documents disclosed as JV_4279 and JV_4280

70. Paragraph 13 of PD 51U relevantly provides as follows:

> "**13.1** Save where otherwise agreed or ordered, a party shall produce—

> (1) disclosable electronic documents to the other parties by providing electronic copies in the documents' native format, in a manner which preserves metadata; and
>
> […]
>
> **13.2** Electronic documents should generally be provided in the form which allows the party receiving the documents the same ability to access, search, review and display the documents (including metadata) as the party providing them."

71. Some of the documents disclosed by the petitioner were text messages, that is, documents which were originally in the form of electronic files, though later printed out onto paper. Disclosure of those texts which were considered relevant was given by copying them over into a new document which was uploaded to the e-disclosure platform. In their letter of 6 August 2021, the petitioner's solicitors explained their action in this way:

> "This is an effort to avoid having to redact over 1,000 pages of personal and irrelevant material which is disproportionate in the circumstances. The document uploaded to the platform containing the relevant texts does not have the original meta-data in relation to the messages but this can be provided under separate cover should you require it."

72. This form of production of documents for inspection is not consistent with paragraph 13.1(1) of the Practice Direction. It does not produce them in their native (electronic) format. It is the modern equivalent of producing a copy of an original document instead of the original document. I may say that I understand why the petitioner's solicitors did this, in an effort to reduce costs. And they also made clear that the original meta data could be made available if required. But, as the respondents correctly say, there was no suggestion that any privilege attached to the messages. The fact remains that the petitioner did not comply with the rules.

73. Electronic disclosure is not simply a recent "add-on" to the original disclosure regime. On the contrary, in the modern business world, and under CPR Practice Direction 51U, it is most of it. Producing copies of electronic documents, or simply just printed out versions of them, gives less information (and sometimes different information) compared to the original native versions. Mistakes do occur in copying. It is not unknown for electronic documents, like paper documents, to be tampered with (though there is no suggestion of that here). It is therefore important that the rules specially formulated for electronic disclosure, in particular about disclosing electronic documents in native format, are adhered to. It is especially important to do so in order to avoid the kind of problem which appears subsequently to have occurred in this case.

74. By letter of 21 January 2022, the respondents did ask the petitioner to disclose the native versions of two text messages. The originally disclosed texts of these messages did not give complete details of when the messages were sent (indeed, one of them gave no details at all). The respondents say that the timing of these messages is relevant in the present case. I am in no position conclusively to decide that at this stage, but I can see that it may be so. There was a failure on the part of the petitioner to comply with the disclosure order.

75. The petitioner's solicitors filed further evidence in answer to that on behalf of the respondents. In Mr Singfield's third statement, at [17], he says:

> "Had native versions of these documents been available at the time of the disclosure in August 2021, they would have been disclosed. We have made enquiries with the Petitioner and with the Petitioner's disclosure platform provider and we are unable to locate native copies of these two documents."

As a result, the skeleton argument filed on behalf of the petitioner simply said "This data is not available". During the hearing the petitioner's counsel told me that the petitioner's solicitors never had the electronic documents in native formats. Instead, they only had screenshots.

76. If this were the end of the story, it would disclose an alarming state of affairs. First of all, it is the solicitors' duty to explain to the client from the outset of litigation the importance of preserving documents (including electronic documents) in their original versions: *Douglas v Hello! Ltd* [2003] EWHC 55 (Ch), [2003] 1 All ER 1087, [35]; and see now PD 51U para 3.1(1). It is the client's duty, once this has been explained to him or her, to ensure that these documents are preserved. Given that it is all too easy to delete or overwrite electronic documents without meaning to, and also to damage, break or even lose the electronic device on which they are kept, the client must take appropriate steps to ensure that electronic documents are properly safeguarded.

77. Secondly, absent exceptional circumstances, it is the solicitors' duty to take control of the original versions of the disclosure documents and not to leave them in the hands of their client: *cf Myers v Elman* [1940] AC 282, 325, 338, and PD 51U para 3.2(1), (2). In exceptional circumstances, where the native versions cannot be taken by the solicitors because to do so would do unjustifiable damage to the client's business or other interests, the solicitors may have to take copies in the first instance. However, if that happens, they have to be complete copies (including the preservation of meta data), and the solicitors must satisfy themselves that they are both accurate and complete copies. The fact that the documents in their original version are to be found on the client's smart phone, tablet or laptop is not of itself an answer. Technology may have created these further problems in the modern era, but technology can also solve them.

78. In fact, since the hearing, further enquiries have been made. In a letter from the petitioner's solicitors to the respondents' solicitors dated 4 March 2022, the former stated that the petitioner had taken screenshots to preserve the messages, but had not deleted any of them from their native environment. They further said that there was a coding error by the petitioner's email provider resulting in some electronic documents not being uploaded to the disclosure platform. The incorrectly coded documents, including JV_4280, have since been uploaded and disclosed on 9 March 2022. The letter further states that JV_4279 has now been located and would be uploaded shortly.

79. In the circumstances there has plainly been an original failure to comply with the disclosure order. Given the difficulties and confusion caused, none of which are due to the actions of the respondents, it seems to me entirely reasonable and proportionate that the petitioner should make an appropriate (short) witness statement supported by

a statement of truth, as to what happened in this case, showing either that he had finally complied, or that it is impossible for him fully to comply. That witness statement will obviously deal not only with his own actions but the extent to which he was advised by solicitors of his obligations.

Conclusion

80. Both sides have been successful on some issues and unsuccessful on others. On the petitioner's application, I will make orders under paragraphs 1b, 3a, 3b, 3c, 3f and 3h. On the respondents' application, I will make orders under paragraphs 1.1.2, 1.5 and 1.6. I should be grateful to receive a minute of order to give effect to this judgment.