In the High Court of Justice of the Isle of Man
Civil Division - Ordinary Procedure

Between:

ORD 21/0001
(1) MIR LIMITED
(2) MIR LIMITED UK LIMITED Claimants
and
JENS BADER Defendant

ORD 21/0002
(1) MIR LIMITED
(2) MIR LIMITED UK LIMITED Claimants
and
(1) VENKATESA PRASANNAA MURALIDHARAN
(2) SHANMUHANATHAN THIAGARAJA Defendants

ORD21/0009
(1) VENKATESA PRASAANNA MURALIDHARAN
(2) SHANMUHANATHAN THIAGARAJA
(3) JENS BADER Claimants
and
(1) ISRAEL ROSENTHAL
(2) MIR LIMITED Defendants

Judgment delivered by
His Honour The Deemster Corlett
on 29 May 2025

Introduction and Background

1. The two applications before the court arise out of three separate claims (which are being case managed and heard together). The three claims fall into two categories:

1.1. First, claim ORD2021/009 by which Venkatesa Prasannaa Muralidharan ("*VPM*"), Shanmuhanathan Thiagaraja ("*ST*") and Jens Bader ("*JB*") seek relief under section 180 of the Companies Act 2006 (minority oppression) against Israel Rosenthal ("*IR*") and MIR Limited ("MIR") (the "Section 180 Claim"). This claim is brought on the basis that their relationship with IR was one of mutual trust and confidence. They claim amongst other matters, that MIR was sold at an undervalue.

1.2. Second, claims by MIR and MIR Limited UK Ltd ("*MIR UK*") against each of JB, VPM and ST for wrongdoing and unlawful conduct.

1.2.1. By claim ORD2021/001 an account/repayment of sums due/gains-based damages are sought against JB for secret profits allegedly made during the term of his engagement with the business.

1.2.2. By claim ORD2021/002 damages are sought against VPM and ST for their unlawful access, downloading and copying of thousands of confidential and/or commercially sensitive documents and information in abuse of their IT privileges, and their concealment of the same, during their employment for their own purposes and/or purposes other than that of the MIR and MIR UK.

I continue to refer in this judgment in the interests of brevity to the parties by their respective initials unless this is considered inappropriate.

2. The Court has before it cross-applications for specific disclosure pursuant to r.7.41 of the Rules of the High Court of Justice 2009, as amended ("*the 2009 Rules*") and ancillary orders:

2.1. JB, VPM and ST's application against IR, MIR and MIR UK for an order for specific disclosure and for an order that unless they comply with the Order made on 31 October 2023, the Amended Defence to the Section 180 Claim be struck out and that claim proceed as an undefended claim.

2.2. IR and MIR's application for specific disclosure and ancillary orders against JB, VPM and ST.

3. Rule 7.41 provides for specific disclosure as follows:

"7.41 Specific disclosure or inspection (31.12)

(1) The court may make an order for specific disclosure or specific inspection.

(2) An order for specific disclosure is an order that a party must do one or more of the following things —

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search to the extent stated in the order;

(c) disclose any documents located as a result of that search."

4. *"Document"* does of course have an extended definition being *"anything in which information of any description is recorded"*. (Rule 7.31(2)).

5. As Deemster Needham stated at paragraph 8 of his recent judgment in VTV Consulting Ltd v Precision Health Corp PCC Ltd (13 March 2025) ORD23/0052, an order for specific disclosure should be necessary, fair and proportionate in the case–specific circumstances. Any order for specific disclosure needs to describe, with precision, the documents or classes of documents sought. "*Fishing expeditions*" will not be countenanced.

6. I pause to observe that, as noted in the text of our rules, Rule 7.41 is in identical terms to the then CPR Rule 31.12. The Isle of Man has yet to introduce an equivalent to Practice Directions PD 51U, 57AD or 31B. However, the ethos governing PD 51U is reflected in best practice in this court and it was not submitted that this court should adopt any different approach to that set out in recent English case law. What can certainly be said at this stage is that the Manx Rules concerning disclosure reflect a desire to restrict the general test for disclosure, by replacing the old "*Peruvian Guano*" test, which was very broad and could lead to disclosure via "*trains of enquiry*". The test for disclosure now is said to boil down to a test of evidential usefulness, the "*standard disclosure*" test being that a document is disclosable if reliance is placed upon it, if it would adversely affect the disclosing party's case or that of another party, or would support another party's case (see Rule 7.35).

7. The Appeal Division in Willers v Gubay 2012 MLR N[8] stated at [11] and [12]:

> *"11. As a matter of general principle, before a court makes an order for specific disclosure it requires to be satisfied, at least prima facie, that the documents are, or have been, in the control of the party against whom the order for disclosure is sought and that the documents are relevant [see Portman Building Society v Royal Insurance plc [1998] PNLR 672]. If such test is satisfied the court has a discretion whether or not to order disclosure and in exercising its discretion the court will take into account all the circumstances of the case and, in particular, the overriding objective specified in Rule 1.2 of the High Court Rules.*
>
> *12. Accordingly on an application for specific disclosure, it is mandatory that the court should firstly identify the factual issues which require to be determined at the trial[since disclosure should be limited to documents relevant to those issues] and it is thus necessary to analyse the pleadings so as to clearly identify the factual issues which are in dispute and as to which evidence can properly be adduced."*

8. Although the disclosure applications were filed in June and August 2024, dates convenient to specially licensed counsel could not be found until 11 and 12 March 2025, when the hearing took place. Some further documents were subsequently filed, the last being a witness statement of Alex Spencer, received on 9 April 2025. Mr Sharpe and Mr Kell appeared for Mr Rosenthal, MIR Ltd and MIR Ltd UK Ltd. Ms Wilson-Barnes appeared for Mr Bader, Mr Muralidharan and Mr Thiagaraja. They were supported by, respectively, Mr Brooks of Simcocks and Ms Samani of Athena Law.

9. A very considerable volume of documentation is before me. As I have said in my judgment of 31 October 2023, neither side appears to be able to produce suitably concise submissions and evidence which actually assist rather than confuse the court. In addition, and as I will comment later, there has been a woeful lack of co-operation between the lawyers, contrary to the obligation of the parties to narrow the issues and, for example, to agree disclosure search terms.

10. The operative parts of the JB, VPM and ST application notice dated 27 June 2024 runs to an overly long 28 pages. The draft order sought is a further 6 pages.

11. The operative parts of the IR and MIR application notice dated 16 August 2024 is much shorter, at 4 pages, with a draft order of 5 pages.

12. The agreed "*list of issues for which evidentiary support is required by way of disclosure*" is 10 pages long and lists 40 such issues plus numerous additional sub-paragraphs.

13. The parties have served numerous witness statements which do not assist in clarifying the issues. IR has now filed five witness statements the second to fifth of which span virtually the whole of 2024, VPM has filed two in October and November 2024, and each of ST and JB have filed one in October 2024.

14. The documents contained in the seven lever arch files which are before me number around 2,500 pages. In addition substantial written submissions and legal authorities were filed by both sides. In determining the merits of the application I have been obliged to focus predominantly upon the skeleton arguments filed by counsel and the oral submissions made

at the hearing on 11 and 12 March 2025 although I have endeavoured to consider all the materials to which I was referred.

15. It has been said that pre-trial disputes between parties about disclosure are not only common and complex but represent a "*chronic operational hazard*" that has to be managed by the court system. It is for this reason that co-operation is so important so that valuable court and judicial time is not unduly wasted.

16. The factual background to this litigation is set out in my judgment of 31 October 2023 and I will not repeat it here, save to refer the reader to paragraphs 4 to 15 thereof. Indeed the two judgments should be read together.

17. In that judgment I also set out at paragraph 18 what I considered to be the key issues on the pleadings. I remind myself that that judgment concerned a specific disclosure application by JB, VPM and ST against IR and MIR. This judgment in contrast concerns an allegation of breach of the order made on 31 October 2023, and applications by both sides for additional specific disclosure.

18. By way of a degree of repetition, it seems to me that the key issues for trial by which the present applications require to be adjudicated are, in relation first to the claims by JB, VPM and ST, what sums were introduced by IR into MIR? How were such payments categorised at the time they were made? What was taken out of MIR by IR, in particular by way of salary? Was the sale of MIR to RHL on 31 October 2021 made at an undervalue?

19. As to the claims against JB, did he take secret profits during his time as an employee of MIR? As to the claims against VPM and ST, did they unlawfully during their employment with MIR and for their own purposes access, download and copy confidential documents and information in abuse of their IT privileges?

What are the duties of lawyers in relation to disclosure in civil litigation?

20. In light of the lack of co-operation evident between the lawyers and also the statement in the skeleton argument of JB,VPM and ST dated 17 December 2024 at paragraph 20.3 to the effect that it is not accepted that there is a duty for advocates to take control of the original versions of disclosure documents, I feel it necessary to go back to basics and remind readers of some underlying principles which it seems to me were not adhered to. The following passages set out the legal framework.

21. I refer firstly to "*Disclosure*" by Matthews and Malek (6th edition) at para 18-09:-

> *"The solicitor has an overall responsibility of careful investigation and supervision in the disclosure process and he cannot simply leave this task to his client. Whilst solicitors may be the lawyers for a party, their duties to assist on disclosure are there to help ensure that the disclosure process has integrity and is not simply performed as a service to a party. The best way for a solicitor to fulfil his own duty and to ensure that his client's duty is fulfilled too is to take possession of all the original documents and create a database of electronic documents or at least collate electronic documents as early as possible. The client should not be allowed to decide relevance – or even potential relevance – for himself, so either the client must send all the files to the solicitor, or the solicitor must visit the client to review the files and take the relevant*

documents into his possession. It is then for the solicitor to decide which documents are relevant and disclosable.

6. It is absolutely fundamental that the client must not make the selection of which documents are relevant."

22. See also my (admittedly obiter) comment in Bell v Solicitor General (No 2) 2024 MLR 256 at para 55 in which I observed that if the Solicitor General had been acting for a government department she would have been under an obligation to take the relevant documents into her custody or control in furtherance of her duties to supervise disclosure. I appreciate that this obligation may to some extent require modification in cases where the volume of electronic documentation is very considerable; see for example IBM UK Ltd v LzLabs Gmbh [2023] EWHC 2142 (TCC) at paras 48 and 49.

23. I also refer to Zuckerman on Civil Procedure (4th edition) at 15.119:-

"The principle of early consultation in PD 31B is reflected in the Sedona Conference Co-operation Proclamation, which encourages early co-operation between lawyers as to e-disclosure. The consequences of a lack of co-operation were illustrated in Digicel (St Lucia) Ltd v Cable & Wireless Plc [2008] EWHC 2522 (Ch). In providing standard disclosure the defendants searched the email accounts of 85 persons by using keywords suggested by their lawyers without consulting the claimants. The operation consumed 6,700 hours of lawyers' time and cost some £2.17 million. Morgan J deprecated the fact that neither side paid attention to PD 31B para.2A.5, which requires that keyword searches should be agreed between the parties. He criticised the defendants' failure to attempt to agree the keywords with the claimants in advance. Their unilateral decisions were subsequently challenged by the claimant. In the event, the court ordered that additional keyword searches be applied by the defendants and that the solicitors of the claimants and the defendants meet to consider a review of documents kept on back-up tapes which the defendants had not searched because they had taken the view that it was unreasonable to do so. This case serves as a reminder of the additional costs and delays that may arise where parties do not co-operate prior to commencing the disclosure process."

24. I refer also to extracts from "*Disclosure in the Business and Property Courts*", being a lecture by Sir Julian Flaux the Chancellor of the High Court on 18 January 2023:-

"10. I hope that we can all agree that the entire process of litigation only works well and efficiently if there is sensible cooperation between the parties. CPR rules 1.3 and 1.4 are central to the CPR and the role of the Court in applying the overriding objective. Where practitioners cooperate professionally, they comply with rather than undermine their duties to their clients.

11. The need for cooperation in giving disclosure is of a different order to other areas of cooperation. Each party is required to undertake a process that will involve disgorging documents, some of which may be unhelpful to the disclosing party's case. They are entitled to disclosure in return. Practitioners have duties to their clients and to the Court to help ensure that if there are adverse documents they are produced. In

Common Law jurisdictions this is an essential part of a fair system of dispute resolution. However, it has to be subject to controls to prevent abuse and excessive cost…

… 28. The importance of having an agreed and workable List of Issues for Disclosure cannot be overstated…

… 34. Judges in the Business and Property Courts have experience of CMCs in which the parties present an agreed list of issues for disclosure running to many scores of issues. Both parties have picked over the statements of case, leaving no issue unturned, and produce a massive list. Lawyers like detail and no doubt anxiety plays its part in making agreement difficult. There will be concern about permitting the other party to evade production of what is probably a mythical 'smoking gun', concern about appearing soft if a collaborative approach is taken and a lack of trust that the other side will comply with their duties. Although this is understandable, it is unhelpful. Issues for disclosure are important but they are only one, proportionate, part in the process of giving disclosure…

… 36. "The List of Issues for Disclosure should be as short and concise as possible."

"Short and concise" says it all, and does not require elaboration…

… 41. Finally on this topic, I suggest practitioners will produce a workable List of Issues for Disclosure if they follow two related guidelines:

(1) First, they apply the mantra "short and concise". If the list is not short and/or the issues are not concise, start again.

(2) Second, have in mind that the list should be a practical working document, related to the likely sets of documents that will have to be reviewed. It is a working tool, which should assist the review team in the process of disclosure, a process that inevitably is not an exact science. You can take comfort from the overriding obligation to produce adverse documents, which is not to be found in CPR Part 31...

… 51. The parties should have in mind when producing issues for disclosure and considering the models that may be used, what the data landscape contains or is likely to contain. Disclosure is inevitably imperfect. The searches may not be perfectly targeted, or they may not hit on every key document, or reviewers may not appreciate the significance of some documents. Rather than spending time on an approach that will likely simply result in volume, careful thought needs to be given to what searches are really necessary to get to the key documents. Searches must be limited and focussed…

… 62. What does the Court expect from the parties? There are four essential requirements:

(1) The parties must be able to demonstrate that there has been genuine engagement.

(2) The parties must show that they have understood the need for a proportionate approach to disclosure.

(3) There must be a clear methodology that underpins the approach to disclosure that has regard to the likely sources of documents.

(4) There should be few differences left for the court to resolve. It is unacceptable to present the Court, for example, with widely differing lists of issues for disclosure and expect the Court to settle issues presented in that way at the CMC. If the parties find intractable difficulty before the CMC they should seek early guidance from the Court.

63. If these steps are not taken, then the parties run the risk that the CMC is adjourned with an adverse order for costs…

… 65. As I have said previously, if the parties have made genuine efforts to resolve disagreements about disclosure and acted in good faith the Court will not resort to sanctions. The position is different where one or both parties are in default and there has been a failure to engage in the way that is required. In those circumstances judges may well consider it is appropriate to adjourn the CMC to a later date. The Court may well in addition either make an adverse costs order, or perhaps more fittingly, if both parties are in default, no order for costs or an order disallowing the costs of preparing a hopeless DRD [disclosure review document] whilst directing parties to do the exercise again. "

Control

25. A party has a duty to disclose only documents which are or have been in his "*control*" (Rule 7.37). Whether documents are under the control of a respondent to a specific disclosure application is particularly relevant to those applications which as in this case seek disclosure of mobile phone data or emails. The law is set out in "*Disclosure*" (Matthews and Malek 6th edition) paragraphs 5-97 and 5-98:-

"In determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents, the following principles have been derived from the authorities:

(1) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

(2) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;

(3) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

(4) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

(5) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

(6) the arrangement or understanding must not be limited to a specific request but should be more general in its nature.

Data held by directors and employees on computers, phones and other devices can raise practical difficulties and whether data is in the control of the company they work or worked for is fact specific and can be complex. Where the devices themselves are the property of the company, then the information on them is within the control of the company, at least in relation to the confidential information of the company. Where an employee (or former employee) has information on his own devices which relate to the business of his employer, then such information ought, in principle, to be within the control of the employer. In practice many people work from home or send work related messages from their personal devices. The employer has a right to have such information to be provided to it both from current and former employees and so should be regarded as being in its control. This does not mean that the employer has a right to have the personal devices be provided to it or to have access to all the emails stored on them, irrespective of whether they are work related to (sic) personal. The employee may argue that his personal messages should not be reviewed or disclosed by the company, and it may be necessary to engage an independent IT expert to carry out searches. Where the devices are not owned by the company, then ordinarily the devices are not in the control of the company, but there may be a contract or data policy binding on the employee giving the company a right of access to such devices. This should bring the device or at least the company information on the device within the control of the company."

The Approach of the Court to Allegations of Non-Disclosure

26. When faced with cross allegations of non-disclosure any court is faced with the difficulty that it is addressing such matters on an interlocutory basis and in the absence of any cross-examination. Foxton J's comments at paragraph 31(v) of his judgment in Terre Neuve Sarl v Yewdale Ltd [2023] EWHC 677 (Comm), made in the context of an application for, inter alia, an "*unless order*" in respect of alleged failures to conduct the disclosure exercise, are in my view particularly relevant:-

"Relevant factors will include… How compelling the case is that the relevant party has failed properly to conduct the disclosure exercise, and how widespread or significant the apparent failure is. In this regard, parties will frequently disbelieve another party's protestations that relevant searches have been done and no relevant documents located. However, at the pre-trial stage of the proceedings, it is not generally possible for the court to reach a concluded view on what has happened, nor proportionate to make the attempt, and it may well be unwise to state that they cannot "go behind" such assertions, leaving it to the complaining party to pursue the issue at trial, when the court can make the appropriate finding and give effect to its consequences (West London Pipeline & Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm), [86])."

27. It is also disappointing that counsel did not remind me of my decision in Gubay v Willers 2011 MLR 10. This addresses in some detail the options available to the court to ensure compliance with the obligation to provide proper disclosure. The headnote helpfully summarises the law:-

> *"Pursuant to the Rules of the High Court of Justice, the following options are available to ensure compliance with the obligation to provide proper disclosure: (1) an application for an affidavit verifying a disclosure statement in a list of documents (see r 8.14 and Sch 8.1.1(6)); (2) an application for an order that a party comply with the rule breached; (3) an application for an order that a statement of case be struck out for failure to comply with a rule or court order (r 7.3); (4) an application for specific disclosure (r 7.41); (5) an application for an order for specific inspection (r 7.41); (6) an application for cross-examination in exceptional circumstances (r 8.7(1)); and (7) an order to provide further information (r 6.44). As to the first method of challenging the adequacy of disclosure, there is no specific power in that part of the civil procedure rules dealing with disclosure to require a party to provide disclosure on affidavit or to verify on affidavit his disclosure. The role of the affidavit is largely covered by the requirement to provide a disclosure statement. The court does however have the jurisdiction to order a party to make and file an affidavit or witness statement as to disclosure (see r 8.14 and Sch 8.1.1(6)). However, in view of the provisions as to disclosure statements, in most cases it will not be necessary to order such an affidavit or witness statement. In addition to the penalties for perjury, a false disclosure statement may be a contempt of court (see r 7.52). In circumstances where the court does consider it necessary or appropriate to reinforce the disclosure obligation and ensure compliance, it may order a party to verify his disclosure statement in the list of documents on affidavit or by witness statement. There will be the usual penalties for contempt and for perjury should a party knowingly file an untrue affidavit or witness statement. The sixth method of challenging adequacy of disclosure, namely by way of cross-examination, is only available in exceptional circumstances. The basic principle remains that cross-examination on affidavits of documents (and for those purposes a witness statement must be regarded as of the same nature as an affidavit) at an interlocutory stage will be regarded as highly exceptional. Cross-examination will not generally be ordered of such documents and cross-examination has to be reserved for extreme cases where there is no alternative relief."*

Contested Issues for Determination

28. Certain matters were resolved during the course of the hearing. The "*draft high level valuation report*" by Deloitte dated 12 January 2021 in respect of Project Uno was disclosed. A payroll document from 2020 concerning IR (see paragraph 49(1) of JB/ST/VPM's application) was produced, as was a document evidencing payment of salary to IR in a lump sum of around £268,000 (see A384). An issue concerning an alleged missing email between IR and a Ms Griffiths (see A196) was resolved in that I am satisfied that no such email exists. According to my note, the following paragraphs of the Application Notice of JB, VPM and ST dated 27 June 2024 were withdrawn or not pursued:- 30(1) and (2), 51 to 62 inclusive. I also have a note that paragraphs 11, 14, 15, 19 and 20 of their draft order were not pursued. However, the matters listed in the next paragraph remained vigorously contested. Some are capable of being addressed briefly, others require a little more elaboration.

29. (1) Has there been a breach by IR/MIR of the specific disclosure order in respect of:

(a) Failure to provide "*primary documents*" (in particular the original ledgers) evidencing the introduction of monies into MIR by IR.

(b) Failure to provide all bank statements of MIR from 15 November 2016 to 24 January 2019 and not just those which show any payment into MIR from IR or from MIR to IR during that period.

(c) Failure to provide any more than one written communication from KPMG in respect of financial transactions concerning IR's investment in MIR.

(d) Failure to provide any drafts of the convertible loan agreement dated 22 January 2019.

(e) Failure to provide documents referred to in the Investcorp letter dated 23 December 2020 for the reason that access to the Investcorp data room (Project Ace) is no longer possible.

(2) Should there be a further specific disclosure order against MIR and IR in respect of:

(a) Failure to provide the disclosure letters referenced in the Schedule to the MIR Asset Purchase Agreement dated 8 March 2021. Are they relevant to the issue of the valuation of MIR?

(b) Failure to disclose any further WhatsApp messages between IR and Mr Kariti.

(c) Is the application for the disclosure of further details of damages in the form of legal costs incurred in the investigation of VPM and ST ill-founded since it seeks documents covered by legal professional privilege?

(d) Should any further disclosure be ordered in respect of payments of backdated salary to IR?

(3) Should there be a specific disclosure order against JB, VPM and ST in the following respects:

(a) To what extent (if at all) should there be disclosure of JB's Funanga email account?

(b) To what extent (if at all) should there be disclosure of "*chats*" between JB,VPM and ST relating to the Funanga bid to treat for MIR?

(c) Should there be disclosure of data appearing on JB's old mobile phone and, if so, to what extent, and should an independent IT expert supervise any process which may be ordered?

(d) Should there be disclosure of emails, texts and other messages which have already been disclosed, but now additionally in "*native*" format?

(e) Should there be disclosure of all documents concerning the sale or attempted sale of MIR's shares held by JB or VPM?

(f) Should JB, VPM and ST be ordered to produce separate lists of documents and not be allowed to rely on the present single consolidated list?

(g) Does the court have the power to order JB, VPM and ST to make witness statements in the manner requested by MIR/IR? If so should that power be exercised?

Breach of the Order of 31 October 2023?

30. IR and MIR make a broadly based challenge to this application, namely that my order only required IR and MIR "*to carry out a reasonable search to locate all the documents listed in the Schedule to this Order*", and disclose documents found as a result of that search. IR and MIR's position is that they have carried out such a reasonable search and have disclosed all documents found as a result. Consequently they submit that they have fully complied with the Order.

31. Reasonableness and proportionality are at the heart of the disclosure regime. Rule 7.36(2) elaborates on what may be considered as a "*reasonable search*":-

> *"(2) The factors relevant in deciding the reasonableness of a search include the following-*
>
> *(a) the number of documents involved;*
>
> *(b) the nature and complexity of the proceedings;*
>
> *(c) the ease and expense of retrieval of any particular document; and*
>
> *(d) the significance of any document which is likely to be located during the search.*
>
> *(3) Where a party has not searched for a category or class of the document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document."*

Ledgers

32. This general point is however no answer to the allegation that there has been a failure to disclose the ledgers of MIR containing and/or recording accounting entries of the introduction (however described), repayment or reclassification of monies by IR into MIR. This reflects the wording of paragraph 1 of the Schedule to the 31 October 2023 Order.

33. That order was made against a background of documentary evidence such as the audited accounts of MIR for the year ended 30 November 2018 which shows (at A542 in the bundle) an amount due to the shareholder (IR) by way of a loan made by him of some £2.429 million, and a document (A568 - Document 36) which records the amount owing as at 17 October 2018 of around £4.759 million, both to be contrasted with (at A585 and A593) documents recording "*equity*" payments by IR of £2 million. It is this change in the

categorisation of IR's contribution to MIR which has motivated this part of the specific disclosure application.

34. The explanation provided by IR is complex and convoluted. It is set out at paragraphs 30 to 35 of IR's fourth statement. He states that he has *"no reason to believe that [the ledgers] are not the primary records"*. He goes on that he is *"not myself aware of the operation of the Quickbooks system"* and goes on to rely on the evidence of Mr Jackson (see below). The skeleton argument on behalf of MIR and IR states at paragraph 33 that *"Following the Order, additional searches were made of the historic Company Quickbooks system and items 210-217* [in fact 218] *were disclosed".* These additional documents are listed at CB344. Ms Wilson-Barnes has satisfied me on balance that what has in fact been disclosed are extracts from the ledgers in the form of snapshots on particular dates. I am satisfied that, in accordance with the principle set out in paragraph 28 of my judgment of 31 October 2023 (which I will not repeat), there needs to be disclosure to all parties of MIR's papers. There remains an absence of the underlying primary records which allow scrutiny of precisely how monies have been treated.

35. Disclosure so far appears to have consisted of a summary, such as that entitled "*Document 36*" which is a summary produced in November 2020, several months after the parties had fallen out. It is not a primary and contemporaneous accounting record.

36. It is IR's position that additional searches were made of MIR's "*Quickbooks*" accounting system and ledgers from "*Quickbooks*" have been disclosed (see paragraph 27 of his fourth statement). However it seems to me that these extracts have been created on "*Quickbooks*" and are not the original ledgers. Stephen Jackson has provided a statement which asserts that the "*Quickbooks*" records are contemporaneous records of the transactions coming in and out of MIR. However, Mr Jackson is an independent contractor providing bookkeeping work etc. and was not engaged to audit the information provided to him. As he states at his paragraph 3 (A1066) the company's financial statements were prepared by him from financial information that MIR's Head of Finance and her team had prepared in "*Quickbooks*". In view of the importance of identifying the amounts paid in to MIR by IR and how MIR classified them upon receipt and, crucially also, of the fact that there is no denial by MIR/IR that the ledgers referred to in the Order do exist, I am satisfied that MIR and IR are in breach of paragraph 1 of the Schedule to the Order and are obliged to make the disclosure now sought.

Bank Statements

37. As to paragraph 2, this raises an interpretation issue. It requires the disclosure of:-

> *"All bank statements of the Company:*
>
> *(1) From the period 15 November 2016 to 24 January 2019;*
>
> *(2) Showing any payments into the Company by Mr Rosenthal (whether described as a loan or otherwise) or from the Company to Mr Rosenthal."*

38. The drafting (agreed by the parties to implement my judgment) is unfortunate. On the one hand it seems unlikely that the intention of the Order was that all bank statements of MIR from 15 November 2016 to 24 January 2019 were to be disclosed. Such would produce many irrelevant documents. On the other hand, reading the two sub-paragraphs together

provides a sensible order since as I understand it the last recorded loan made by IR to MIR was in January 2019, there being a convertible loan agreement dated 24 January 2019. I therefore do not consider there to have been a breach of the Order, since disclosure has been made in compliance with the latter interpretation, namely that only bank statements for the period in question which show payments to or from IR are to be disclosed.

KPMG

39. Moving on to the KPMG issue, this appears to be a repeat run of the argument set out in paragraph 30 of my judgment of 31 October 2023. Further searches having been made, it is repeated by MIR/IR that there is nothing further to disclose. The court must rely on the honesty of the parties and the supervision of the disclosure process by the lawyers and must, at least in advance of the trial, accept what is stated on behalf of MIR/IR. The issue could no doubt be tested further by the making of a third party disclosure order against KPMG.

Convertible Loan Agreement

40. The next alleged breach concerns drafts of the convertible loan agreement dated 22 January 2019. This is an important document in the context of the minority oppression proceedings and its provenance has been put in issue by JB,VPM and ST. They believe it was created after the event to justify the allotment of more shares to IR, thus diluting the percentage held by the minority members. Ido Kariti, the Head of Business Development at RHL, has provided a statement (A1062) to the effect that he prepared the agreement on a Company laptop which he then printed and gave it to IR to sign. IR claims privilege in respect of legal advice provided to him (paragraph 26, A967) but drafts were provided *"to the company"*. As was pointed out by Ms Wilson-Barnes, this suggests that there were earlier drafts of the agreement.

41. While it may seem unlikely that, as averred by MIR/IR, no drafts or accompanying emails are said to exist, it is a matter which again will have to be explored at the eventual trial. Once again, the involvement of the lawyers is vital in ensuring that the disclosure process is properly conducted and retains its integrity.

Share Valuation

42. I move on to disclosure of documents going to the value of the shares in MIR. An indicative bid was made by Investcorp of US$ 40 million. This is set forth in a letter dated 23 December 2020. It is said that the documents referred to in that letter and which formed the basis of the bid cannot be disclosed because the Investcorp Data Room (created in 2020 as part of "*Project Ace*") can no longer be accessed. I have no doubt that this is the case, but that should not prevent the disclosure of the "*materials available*" to which reference is made in the offer letter from Investcorp. These materials must still be available to MIR and IR and it appears to me that they are accordingly in breach of paragraph 11 of the Schedule to the Order, which required the disclosure of all documents relating to the valuation of MIR.

Further Specific Disclosure against MIR and IR?

Disclosure Letters

43. I deal firstly with the application for the provision of the disclosure letters referred to in the Schedule to the asset purchase agreement concerning the sale of MIR to Rtekk Holdings Ltd (RHL). I am satisfied that these are documents which are not concerned with the value of MIR but rather relate to any breach of warranty claim post completion of the sale. The value of MIR was determined prior to the agreement and there was in fact no claim for breach of any warranty.

WhatsApp – IR/Kariti

44. There follows an application for disclosure of WhatsApp messages between IR and Mr Kariti. This is another issue where, although the Court may consider it somewhat unlikely that no further messages have been unearthed between April 2016 and June 2020 (the period during which the parties were in a business relationship), it is a matter which will require examination at the trial. I add that Ms Wilson-Barnes submitted that there is a gap in IR's disclosure of WhatsApp messages (see CB566 being part of an extraordinary 18 page letter, a length regrettably not unusual in this litigation). However, in so far as these consist of messages sent to VPM and which VPM already has, there is obviously nothing to be gained by ordering disclosure to VPM.

Special Damages – Legal Costs

45. The next category concerns the claim of MIR/IR for special damages in the form of legal costs incurred by Allen and Overy and Simcocks. Disclosure has been made (see A289 to A 336) of invoices from both firms together with schedules of time recording.

46. The law in this area is not straightforward. I was referred to paragraph 16-13 of "*Documentary Evidence*" by Hollander (15th edition) which states that in most cases solicitors' bills of costs will not be disclosable because they will not be relevant. In cases where (as here, it must be said) they are relevant, it is submitted that bills are capable of attracting privilege if their contents betray or may betray the nature of the legal advice given. Having said that, the author considers that some flexibility is appropriate and that "*old authority*" which suggests that fee notes etc. are privileged should not necessarily be followed, depending on the facts.

47. MIR and IR maintain that the disclosure of the invoices and time recording schedules of Allen and Overy and of Simcocks suffices and that there should not be any further disclosure of documents referred to in the invoices. They submit that the underlying documents are privileged and that there has been no waiver of privilege. Invoices are not privileged documents in and of themselves.

48. JB, VPM and ST argue that they are entitled to interrogate the substantial claim (now calculated at £363,363.29) in the same way as any other claim for special damages. They also point out that this is a claim brought against VPM and ST, yet there are references in the invoices to JB, there being no basis for investigation costs to be claimed against him.

49. In the absence of any authoritative guidance from the case law it seems to me that the proper order at this time is to order disclosure only of any documents in the schedules produced to date which refer to JB or which predate the commencement of the investigation against VPM and ST (pleaded as being 11 June 2020). This will provide a basis for challenging

this part of the claim. Indeed it would be hoped that on further scrutiny, MIR and IR with the benefit of legal advice would agree to reduce the claim by eliminating any part which relates to JB or which is otherwise not strictly referable to the investigation against VPM and ST.

IR's Salary

50. I turn next to the application for further disclosure of payments of backdated salary to IR. The context of this application is the complaint that IR attempted to dilute the value of the minority shareholdings by seeking substantial backdating of salary. What has now been disclosed consists of all payslips issued to IR between 2016 and 2021, one of which consists of substantial alleged backpay of £268,482, it being IR's case that he did not take his remuneration at the time he was entitled to it but the sum was always properly due to him. I am satisfied that there has been disclosure of the documents relevant to this issue and no doubt the issue can be explored further at trial.

Specific Disclosure against JB/ST/VPM?

Funanga AG ("Funanga")

51. Disclosure is sought of (1) the contents of any email account of JB's connected to Funanga and (2) all messages between JB, VPM, ST and Seth Iorio of Funanga which led to Funanga's bid to treat for MIR in the sum of US$ 55 million on 16 March 2021, which sum was well in excess of the purchase price eventually paid by RHL of US$ 41.9 million in August 2021.

52. The relevance of the Funanga bid is that it is alleged by JB, VPM and ST that the bid was not properly considered by IR and thus amounted to unfair and prejudicial conduct which damaged their interests as minority shareholders of MIR.

53. In determining the application it is relevant that the relationship between the parties and between the parties and Funanga are agreed issues for disclosure (see paragraph 19(g) and (h) of the agreed list of issues – CB300) and so it seems to me prima facie that there ought to be disclosure of communications between them. Having said that, I am bound to agree with Ms Wilson-Barnes that the order as currently sought is excessively wide and ill-defined since it appears to seek disclosure of every email in JB's Funanga email account.

54. The background is that JB resigned from MIR in June 2020. He became the CEO of Funanga on 10 March 2021. His evidence is that he had no involvement in the 16 March 2021 Funanga bid, although he admits that he was asked by Mr Iorio of Funanga "*what would be a good price for MIR?*".

55. IR and MIR deny the allegation of wrongdoing concerning the Funanga offer. They say that Funanga was an actual or potential competitor to MIR and that there were "*trust issues*". In addition, the "*offer*" was a mere invitation to treat. Engagement with Funanga, which would have revealed to a competitor sensitive commercial information, would not have resulted in a better offer than the RHL offer which resulted in the asset purchase agreement dated 8 March 2021. IR's evidence is that this agreement was not to be compromised by virtue of the invitation to treat made by Funanga (paragraph 11 of his third witness statement).

56. JB's position is that he cannot disclose his Funanga email account without the consent of Funanga. This raises the issue of "*control*" to which I have referred earlier.

57. I was referred to Vos J's judgment in Constantin Medien AG v Ecclestone [2013] EWHC 2674 (Ch). The judgment deals at paragraphs 58 et seq. with the issue of whether Mr Ecclestone had physical possession of documents of companies of which he was an officer (the FI Group) such that he ought to be ordered to disclose them. At paragraphs 62 and 63 he stated:-

> *"62. On the evidence I have already cited it does not seem to me that FOG's documents are in the physical possession of Mr Ecclestone. Mr Ecclestone has an office at 6 Princes Gate. No doubt he has a desk there, perhaps also some racing trophies, and perhaps also some documents, but it would be stretching one's imagination to suppose that the entire offices leased by the FOG companies or other entities associated with them are properly to be regarded as in Mr Ecclestone's physical possession just because he, as Chief Executive Officer, has an office in the same building. It might be different in another case concerned with a small one-man company where the documents are kept at the director's home or in his one-man office, but here the FOG companies have a serious and substantial business. The fact that Mr Ecclestone may operate a degree of managerial control does not put all FOG's documents, whether at Princes Gate or in storage in Biggin Hill or elsewhere in his physical possession.*
>
> *63. On the second point, in my judgment, it is clear from the fact that the FOG companies are opposing this application that those companies do not regard it as in their interests to disclose the documents sought in this application. It does not seem to me that I can decide on an application of this kind what is in the third party company's best interests. That must be a matter for the boards of those companies. I could only decide that question if such a decision by the board was challenged in properly constituted proceedings with that company as a party to them."*

58. It seems to me that as things currently stand I am unable to reach an informed decision on this issue. While JB claims that he is unable to disclose his emails in his Funanga account since he does not "*have the right to use them for personal reasons like this litigation*" it does appear that Funanga has allowed JB access to certain documents and that Mr Iorio has exercised a "*sense check*" over any proposed disclosure. Whether this amounts to a *"standing consent*" by the employer in the sense used in Pipia v BGEO Group Ltd [2020] EWHC 402 (Comm), [2020] 1 WLR 2582 is unclear. At the least there should be disclosure of the relevant parts of JB's employment contract with Funanga, together with details of any agreement with Mr Iorio or others within Funanga governing the disclosure which has occurred to date. It may be necessary for Funanga to be given notice of this application in a similar manner to the procedure adopted in Ecclestone, in order that it can indicate its position. As matters presently stand, Funanga has no disclosure obligations and they are not parties to the application. To date JB has disclosed a small number of documents (i.e. from jens.bader@funanga.com) belonging to Funanga with Funanga's permission. Funanga itself has disclosed nothing.

59. In light of the agreement that the parties' relationship with Funanga is an agreed issue for disclosure I also consider that VPM and ST should be required to carry out reasonable searches for documents responding to the search terms "*Funanga*" and "*Seth Iorio*".

JB's Phone

60. Next, I deal with the application for disclosure of documents on JB's mobile phone. It is said by JB that it no longer works, it having "*died*" in April 2024. Having said that, this is a device from which some disclosure has been made and thus it must be considered to be a disclosable device.

61. MIR and IR submit that a third party IT expert will be able to ascertain the extent to which the phone can be made to work and may be able to retrieve documents which are properly disclosable.

62. It is of course a highly intrusive order which is being sought. Nevertheless, I consider that the intervention of a neutral third party IT expert, apparently an exercise achievable at a proportionate cost (said at the hearing to be no more than around £1,000) will provide appropriate safeguards. I bear in mind that the prejudice to JB is reduced by the simple fact that this is not a phone which is in use by him.

Native Format

63. MIR/IR also make an application for the production of documents currently disclosed by way of screenshots or in PDF format to now be in "*native format*".

64. I agree with the response which is that there is no general obligation to disclose or to give inspection of documents in native format (with or without metadata). No direction to this effect was made in this case. The benefits of electronic disclosure in native format are referred to at paragraph 73 of HHJ Paul Matthews' judgment in Veasey v MacDougall [2022] EWHC 864 (Ch) which, despite the current absence in this jurisdiction of an equivalent to CPR Practice Direction 51U, are likely to be acknowledged and followed in this court. There may of course be cases where there is a specific allegation that documents have been created at a date other than suggested on their face. In these instances metadata and native format is likely to assist in accurately dating their creation. This is the case, for example, in respect of the convertible loan agreement of 22 January 2019 where JB/ST/VPM submit that native format and metadata may well be relevant. It was also the case in a Manx authority cited to me, namely Stennett v Ernst & Young [2018] MLR 399.

65. No justification has been advanced by MIR/IR which outweighs the additional time and cost of essentially re-doing the disclosure exercise. It is not alleged that there is a widespread issue with legibility, dates, times or the identity of sender and recipient. The only acknowledgement that "*something has gone wrong*" with disclosure appears in VPM's first witness statement at paragraph 39 on page 349 (an issue with an error in dating a document in the list) and at paragraph 23 on page 388 which clarifies who was the other party to a conversation, the relevant screenshot appearing at B84. These are de minimis issues which do not appear to me to call into question the disclosure exercise conducted by JB/VPM/ST. In the absence of a justification relating to a specific document I do not consider that this application should be granted.

Sales of MIR Shares

66. MIR and IR next seek disclosure of documents concerning sales of MIR shares by JB and VPM. ST did not attempt to sell any of his shares. Substantial sums were sometimes

involved. For example JB sold shares to WES Solutions Pte Ltd for €450,000. I agree with MIR and IR that it is unlikely that there were no written communications between JB and the purchasers. I understand that not a single communication has been disclosed. I also consider that prior offers received are also relevant to the issue of whether the sale to RHL was at an undervalue. Documents relating to this issue are clearly central to the pleaded cases. Having said all that, Ms Wilson-Barnes submits that there is nothing else to disclose. No doubt she and Ms Samani will, as officers of this Court, ensure that all documented communications between JB and VPM and any actual or prospective purchasers are disclosed by their clients following reasonable searches so that the integrity of the disclosure process may be assured. The relevant individuals and entities are set out at paragraph 5 of Schedule 1 to the MIR/IR Application Notice of 16 August 2024.

Disputed Introducer Agreements

67. The next application relates to Disputed Introducer Agreements (DIAs) negotiated by JB which included terms for MIR Group entities to pay commission to the counterparty far in excess of the normal rate.

68. While this is an agreed issue for disclosure, JB resists disclosure on the basis that there is no evidence that he negotiated or received a secret benefit. It is unclear to me why disclosure of any DIAs is resisted. It is no answer to a disclosure application that "*there is nothing to disclose*". As Acting Deemster Moran said in paragraph 44 of his judgment delivered on 10 August 2012 in the KFG Companies case (ORD2011/48):-

> *"44. I do not consider what is required by this application to be a futile exercise, which will produce no worthwhile result. It may produce no additional documents; but if it does not do so, after all that is required by the order has been done, that in itself will be an outcome that is a necessary and worthwhile step in proceeding towards a fair trial and a just outcome."*

69. Certainly a reasonable search must be made for them using the search terms referred to at paragraph 6.6 of IR's third witness statement. (CC Casino Checker, BAM Services Ltd, Payrena Ltd, LSW Life Success K G, Taurus Capital Ltd, Paul Gent).

70. On the other hand the request for disclosure of JB's bank accounts, payslips and tax returns between 2016 and 2020 seems to me to be a classic case of a fishing expedition. It is far too wide in its scope and unduly intrusive.

Separate Disclosure Lists

71. It is next said that JB, VPM and ST have failed to produce their own separate disclosure lists and that they are now obliged to do so. Once again I find this to be an unjustified demand which seems to be designed to magnify the already enormous costs generated by disclosure. The fact is that the parties exchanged lists of documents in 2022. No point was then taken by MIR or IR that the combined lists produced by JB, ST and VPM were made in error. Indeed there is correspondence which evidences the agreement to proceed in this way. The fact that MIR Limited, MIR Limited UK Ltd and Israel Rosenthal also produced one consolidated list also naturally undermines the merits of this part of the specific disclosure application.

Witness Statements

72. Finally, there is an application for the provision of a written witness statement providing details of the searches undertaken and search terms used by each of JB, VPM and ST. Ms Wilson-Barnes submitted that this has every appearance of being in reality an application for further information. The formalities of such an application have not been observed. Adherence to the Rules of Court is important and she submitted that I must therefore dismiss this part of the application. However I consider it necessary to exercise my case management powers to make an order as requested. In addition to the power referred to in my decision in Gubay v Willers 2011 MLR 10 cited above (see lines 13 – 15 of the headnote), the power to do so is derived from the Court's duty to manage proceedings (see Rule 7.2(2)(n) for a specific enabling power). It is also worthy of note that the Order of 31 October 2023 required at paragraph 2 the making of a witness statement explaining any inability to make disclosure on the part of MIR and/or IR. It was not argued that the court lacked the power to make such an order.

Search Terms

73. It is extraordinary that there appears to have been no attempt by any of the parties to agree relevant search terms. This represents a lamentable failure by the lawyers on all sides. Not only is there a lack of consistency between the two sides, but this is also the case within the JB, VPM and ST side.

74. IR points out at 26.3 and 26.4 of his third witness statement that VPM has used two search terms: "*crap*" and "*Ursula*", the relevance of which is unclear and appears to be at variance with the search terms in VPM's own disclosure statement.

75. I also agree (as has already been observed to some degree at paragraph 59 above) with Mr Kell's submission that it is necessary for JB, VPM and ST to use the search terms of each other's name, that of Mr Iorio and of the other companies and individuals referred to in IR's third witness statement at paragraph 6.7. in relation to the Funanga bid.

Sanction for Breach

76. Despite the findings of breach of the order of 31 October 2023, I do not consider that an "*unless*" order is appropriate. There is no pattern of non-compliance and disobedience (see Sochin v Baranov (2018) MLR 90 at paragraph 4) which would justify the imposition of such a sanction as is requested at paragraph 5 of the draft order submitted by JB/VPM/ST (Bundle A30). As is clear from this judgment, there are in any event instances where I do not consider that alleged breaches have occurred.

Summary of Findings

77. IR/MIR are in breach of the specific disclosure order of 31 October 2023 ("*the Order*") by failing to provide the original ledgers showing the transfer of monies by IR into MIR and how such payments were described at the date of introduction and recordal in the original ledgers.

78. IR/MIR are in breach of the Order by failing to produce the documents referred to in the Investcorp letter of 23 December 2020, specifically the "*materials available*" referred to in that letter.

79. Save for these two breaches, the other allegations of breach are dismissed. The outstanding documents must be disclosed and copied to JB, VPM and ST within, say, 28 days.

80. The specific disclosure applications against IR/MIR are dismissed, save that disclosure of documents relating to the claim for special damages in respect of legal costs should be made but limited to the matters set out in paragraph 49 of this judgment.

81. The specific disclosure applications against JB, VPM and ST are granted in the following respects:

(1) There shall be disclosure of JB's contract of employment with Funanga and any separate agreement, both relating only to disclosure of emails in the context of this litigation.

(2) VPM and ST shall carry out a reasonable search for documents responding to the search terms "*Funanga*" and "*Seth Iorio*".

(3) JB's "*dead*" mobile phone shall be surrendered to an agreed IT expert who shall extract any documents relevant to the agreed issues in this litigation. The terms of reference and the costs of the expert shall be agreed by the parties or if not shall be determined by the court.

(4) There shall be further reasonable searches carried out by JB and VPM in respect of sales or potential sales (including offers which did not proceed to completion) of MIR shares.

(5) There shall be a reasonable search made by JB in respect of any Disputed Introducer Agreements negotiated by him.

(6) The methods of conducting the above searches and their results shall be set out in a witness statement which shall also address the issues set forth in Schedule 2 to the draft order submitted by IR/MIR and annexed to their application notice.

82. The remainder of IR and MIR's application (Native Format, Separate Disclosure lists, disclosure of bank statements etc.) is dismissed. The parties' lawyers must agree an appropriate timescale for these various steps to be taken. In default of agreement the court will impose a timetable.

83. This has proven to be a challenging judgment to produce. Should the parties consider that there are essential issues which require further assistance or clarification from the court I am of course prepared to list the matter for a further hearing if that proves really necessary. However, I urge the parties once again to co-operate and to agree matters as swiftly as possible.

84. In all the circumstances I consider that there should be no order as to costs.

85. A final observation is that this dispute cries out for a trial. There needs to be an end to interlocutory disclosure disputes. The parties and their lawyers must now get this case ready for trial. They should agree directions accordingly. In default the court will impose a timetable.

His Honour The Deemster Corlett