Judgment 37/2012

Capita Symonds Limited and Jubilee Scheme 3 Limited Partnership et al & Woolf Limited & PEP Civil & Structures Limited
Royal Court
5th October 2012

Application for search and disclosure.

Approved Text
05.10.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(ORDINARY DIVISION)

Between:	**CAPITA SYMONDS LIMITED**	**Plaintiff**
	-and-	
	(1) JUBILEE SCHEME 3 LIMITED PARTNERSHIP **(2) JUBILEE SCHEME 2 LIMITED PARTNERSHIP**	**Defendants**
	-and-	
	WOOLF LIMITED	**First Third Party**
	-and-	
	PEP CIVIL & STRUCTURES LIMITED	**Second Third Party**

APPLICATION OF DEFENDANTS FOR SEARCH AND DISCLOSURE
Hearing date: 20th July 2012

Judgment handed down: 5th October 2012

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Defendants: **Advocate G S K Dawes**
Counsel for Plaintiff and First Third Party: **Advocate R I C E Harris**
Counsel for Second Third Party: **Advocate M C Newman**

Cases, Texts & legislation referred to:

Goodale v Ministry of Justice [2010] EWHC B40 (QB)

Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited

The Royal Court Civil Rules, 2007

The Civil Procedure Rules 1998, as amended

Disclosure (4th ed.) by Matthews and Malek

Nichia Corporation v Argos Limited [2007] EWCA Civ 741

Documentary Evidence (10th ed.) by Charles Hollander QC

Lonrho Ltd v Shell Petroleum Co. Ltd [1980] 1 WLR 627

Schlumberger Holdings Limited v Electromagnetic Geoservices AS [2008] EWHC 56 (Pat)

North Shore Ventures Limited v Anstead Holdings Inc [2012] EWCA Civ 11

Introduction

1. By an application dated 4 April 2012, the Defendants seek an order that the Plaintiff and the First Third Party be required to undertake a search of the repositories of documents of Paul Pindar, Chief Executive Officer of Capita Group plc, for the purposes of giving standard disclosure in the proceedings. The application also seeks a corresponding order that the Plaintiff and First Third Party disclose to the Defendants, in the course of giving standard disclosure, any documents located as a result of the search undertaken using the key word search terms agreed between the parties to the proceedings. Ten Affidavits, to which I will refer in due course as required, have been lodged on behalf of the parties and helpful Skeleton Arguments have also been filed.

2. After the initial round of submissions, I decided to adjourn the hearing from 29 May 2012 to enable the parties to furnish me with more details of the Custodians who had already been agreed between them. I regarded that information as being important to place Mr Pindar's position and roles over the period in question into better context. Because of some of the issues that had been raised during the parties' submissions, it also seemed prudent to give leave for further, targeted Skeleton Arguments prior to the resumption of the hearing on 20 July 2012, which were duly filed.

3. Although the Second Third Party was represented throughout by Advocate Newman, he took no active part in the hearing, save for aligning the Second Third Party very broadly to the submissions made on behalf of the Defendants, who were represented by Advocate Dawes. Advocate Harris appeared on behalf of the Plaintiff and the First Third Party. I am grateful to them all for their assistance with this matter. For ease of reference, where applicable, I propose hereafter to refer to the Defendants as "the Applicants" and to the Plaintiff and the First Third Party as "the Respondents". At the outset, I should also apologise to the parties for the delay in preparing this judgment, caused in part by the intervention of the vacation period and other commitments arising in the meantime.

Background

4. The dispute between the parties relates to the re-development of the former site of the Royal Hotel in St Peter Port. As set out in the Plaintiff's Re-Amended Cause, the First Defendant was established for the sole purpose of developing a four-storey luxury residential building known as Royal Terrace and the Second Defendant was established for the sole purpose of developing a six-storey office building known as Royal Chambers. The Plaintiff's Re-Amended Cause claims £1,657,821.81 from the First Defendant and £1,534,097.53 from the Second Defendant.

5. Both Defendants have denied that the Plaintiff is entitled to the relief claimed or any relief. Further, the Defendants have issued a Counterclaim and Third Party proceedings. The quantum of the Defendants' claims far exceeds the Plaintiff's original claim. Advocate Dawes indicated that the Defendants are claiming some £65 million. The pleadings on the

Counterclaim and Third Party proceedings are substantial and, as Advocate Dawes also indicated, once disclosure has been completed, there is a high likelihood that the pleadings will be further amended to get them into a proper state for the trial. As such, this action is believed to be the biggest construction case ever to be instituted in Guernsey and Counsel estimated that it would not be ready for a hearing until the second half of 2013 at the earliest.

The disclosure issues

6. The scale of the disclosure exercise in these proceedings was initially raised in correspondence on behalf of the Plaintiff in a letter dated 23 June 2010, in which it was noted that "*There are likely to be in excess of 1,000,000 documents between the parties needing to be reviewed and potentially disclosed in this case. By any standard that is an enormous undertaking and the costs involved on both sides will be extremely substantial.*" The Advocates for the Plaintiff therefore proposed that "*It is appropriate to look for guidance on the practicalities of such [construction] litigation to the English High Court, which has a specialist division (the Technology & Construction Court) set up purposely to deal with complex, high-value building disputes*".

7. The approach proposed was that the parties should have regard to the advances in information technology available to them and dealt with in the Practice Direction Governing Disclosure of Electronically Stored Information (CPR PD 31B). In particular, the parties should utilise the form of ESI Questionnaire set out in the Schedule to the Senior Master's judgment in *Goodale v Ministry of Justice* [2010] EWHC B40 (QB). By an Order dated 7 October 2011, Deputy Bailiff Collas (as he then was) directed that "*The parties exchange completed Electronically Stored Information ("ESI") Questionnaires in the form attached to the Defendants' application dated 5 October 2011 on or before 16 December 2011*" and that "*The parties shall agree the disclosure process including, but not limited, to categories (physical, media and electronically stored information) and formats of documents to be disclosed and document and key word searches to be undertaken by the parties on or before 27 January 2012, failing which any party may apply to the Court for directions in respect thereof*".

8. The parties duly exchanged their ESI Questionnaires in December 2011 in which they proposed *inter alia* (a) timeframes over which the searches envisaged should be conducted, (b) the names of people whose repositories of electronic documents they regarded as appropriate to be searched, and (c) the key words to be used in carrying out those searches. There then followed exchanges in correspondence during which the parties took various points about the differences between their proposals as set out in their ESI Questionnaires, all with a view to seeing whether matters could, as directed, be agreed between them. Although there may still be scope for further refinement of the key words to be used, on the other elements, all but one aspect was agreed between the parties. In particular, they agreed that the relevant timeframe for the searches of the Respondents' Custodians should be from 1 May 2006. Further, all parties will undertake de-duplication and clustering of all documents. However, the one person about whom agreement could not be reached as to whether he should be included as one of the Respondents' Custodians is Mr Paul Pindar.

9. On behalf of the Applicants, Advocate Williams' Fifth Affidavit, sworn on 20 April 2012, draws attention to the download from Companies House Direct showing that Mr Pindar was the Plaintiff's Chief Executive Officer from 29 September 1994 to 31 March 2008. The Applicants' Advocates have also highlighted that Mr Pindar was "*copied into numerous open emails about the project by Charles Billson*" and is "*likely to have been involved in and taking decisions in relation to the project/administration of the project (as we have evidenced), as distinct from the litigation*". The Applicants claim that the material exhibited to Advocate Williams' Affidavit clearly shows that Mr Pindar was more heavily involved in developments than he recalls and that his recollection of matters has already been shown to be suspect. Accordingly, in the conclusion of Advocate Dawes' Skeleton Argument dated 14 May 2012, he submits that "*there is a serious and objective likelihood that Mr Paul Pindar may have or*

will have within his repositories of documents information and/or documents which will bear upon the issues in dispute in these proceedings and accordingly such disclosure is necessary to ensure the just resolution of these proceedings and is consistent with the overriding objective".

10. On behalf of the Second Third Party, in a letter dated 28 March 2012, Advocate Newman summarised the position as follows: "*It is likely that, in circumstances where it is clear that these individuals are known to have had some involvement in the project, that at least some of the correspondence that these individuals are party to does not fall within litigation or other privilege. Therefore, [the Respondents] will need to carry out some search of these individuals' document repositories in order to satisfy itself that it has discharged its disclosure obligations owed to the Court and is able to sign an appropriate disclosure statement*".

11. The reasons advanced for not agreeing to Mr Pindar's inclusion as a Custodian were set out in correspondence from the Respondents' Advocates. In their letter of 6 February 2012, they did not agree to the inclusion of Mr Pindar because he "*is Capita PLC Group Chief Executive and has/had no involvement in the Project. As such he would not have any documents in his control which relate to the Project*". In their letter of 23 February 2012, the Respondents' Advocates explained that "*any documents created by [Mr Pindar] or created by others and received by him are privileged. The fact that he has been copied in on an e-mail (which was sent after the proceedings had commenced), or any other such e-mail(s), does not alter this position and is no justification for his inclusion as a Custodian*". Resistance to including Mr Pindar among the list of Custodians was repeated in the letter of 12 March 2012, but without advancing any further explanation for taking that stance. By their letter of 30 March 2012 (having conceded the other six proposed Custodians "*in the interests of moving forward*"), the Respondents' Advocates summarised their position with regard to Mr Pindar as being that "*Mr Pindar does not work for either of the companies involved in the dispute. He is CEO of Capita Group, a FTSE 100 company, and has had no material involvement in the dispute. Given his position, the likely time and costs that would arise from his inclusion as a custodian and the number of documents likely to be produced, it is our clients' position that it would be disproportionate to expect Paul Pindar to be included as a Custodian*".

12. More particularly, in his First Affidavit, sworn on 26 April 2012, Mr Pindar deposed to the fact that "*As Chief Executive Office [sic] of [Capita Symonds Limited ("CSL")] I had strategic and financial responsibility for CSL. I was not involved in the day to day running of the business. In respect of the development of the two properties known as Royal Chambers and Royal Terrace (the "Project") I had no role other than receiving a high level briefing from my colleagues during [Monthly Operating Board] meetings that there were certain concerns raised by the client and that he was planning on making a financial claim against CSL … I was not materially involved in the Project either before or after the dispute arose, nor am I currently involved in the dispute.*" In his Second Affidavit, sworn on 8 June 2012, aside from correcting some inaccuracies that had crept into his First Affidavit, Mr Pindar pointed out that he had been a director of the First Third Party from 12 February 2004 to 31 March 2008.

13. The evidence from Mr Pindar is supported by the First Affidavit of Jonathan Goring, the Managing Director of the Plaintiff since March 2007, sworn on 30 April 2012, and in Martin McCloskey's Third Affidavit, sworn on 26 April 2012, where he explained that "*Mr Pindar was never involved in making decisions regarding the Project or the administration of the Project.*" Mr McCloskey also clarified that, from 6 May 2005 until Mr Goring's appointment as Managing Director in March 2007, William Dye was the Managing Director of the Plaintiff. Both of those gentlemen are agreed Custodians.

Disclosure regime

14. Although Advocate Dawes invited me to treat the relevant procedural rules in England and Wales as if they applied to this disclosure exercise, relying on *Cherub Investments Limited v The Channel Islands Aero Club (Guernsey) Limited* (unreported, 1982, Guernsey Court of Appeal), and in particular the passage in which Hoffmann JA confirmed that "*the Court remains master of its own procedure and can allow a departure from … rules when justice requires this to be done*", I prefer the approach suggested by Advocate Harris to the effect that the Court is bound to apply the provisions of the Royal Court Civil Rules, 2007, but can look to what happens in England and Wales under the Civil Procedure Rules 1998, as amended (hereafter referred to as "the CPR"), as guidance. In addition to the sources to which I was referred, I have also derived considerable assistance from the analysis contained in Chapter 7 of *Disclosure* (4th ed.) by Matthews and Malek.

15. The use of the ESI Questionnaire process and the Order from October 2011 is, as all Counsel agreed, part and parcel of the means by which the parties are to give standard disclosure. In that context, rule 65(4) of the 2007 Rules provides that:

> "*Standard disclosure requires a party to disclose only –*
> *(a) the documents on which he relies, and*
> *(b) the documents which –*
> *(i) adversely affect his own case,*
> *(ii) adversely affect another party's case, or*
> *(iii) support another party's case, and*
> *(c) the documents which he is required to disclose by a relevant practice direction.*"

There is an equivalent provision in the CPR at rule 31.6.

16. Unlike under the CPR, there is no relevant practice direction underpinning rule 65(4)(c). The commentary on Part 31 of the CPR (at para. 31.6.5) sets out some guidance about Practice Direction 31B, which supplements that Part and which sets out in its Schedule the Electronic Documents Questionnaire which was used by the Senior Master in *Goodale v Ministry of Justice* (supra). Whilst accepting that it is only guidance, para. 6 of PD 31B contains the following general principles, which I regard as helpful:

> "*When considering disclosure of Electronic Documents, the parties and their legal representatives should bear in mind the following general principles –*
> *(1) Electronic Documents should be managed efficiently in order to minimise the cost incurred;*
> *(2) Technology should be used in order to ensure that document management activities are undertaken efficiently and effectively;*
> *(3) Disclosure should be given in a manner which gives effect to the overriding objective;*
> *(4) Electronic Documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure; and*
> *(5) Disclosure of Electronic Documents which are of no relevance to the proceedings may place an excessive burden in time and cost on the party to whom disclosure is given.*"

From the approach taken by the parties, as shown by the correspondence they have exchanged which has been exhibited to the affidavit evidence, I believe that they have had these principles in mind, albeit that their interpretations of how they might apply in the present case differ.

17. The key issue for me to determine on this Application is how rule 66 of the 2007 Rules applies. This rule deals with a party's duty of search and provides:

> "(*1*) *When giving standard disclosure, a party is required to make a reasonable search for documents falling within Rule 65(4)(b) or (c).*
> *(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 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.*"

Again, there is an equivalent provision in the CPR at rule 31.7. The question I need to resolve is whether the Respondents' reasonable search extends to Mr Pindar's document repository and, if so, whether there are any additional time limitations that need to be applied.

18. Further guidance on how to approach the reasonableness of a search is contained in paragraphs 21 to 23 of PD 31B:

> "***21.*** *The factors that may be relevant in deciding the reasonableness of a search for Electronic Documents include (but are not limited to) the following –*
> *(1) the number of documents involved;*
> *(2) the nature and complexity of the proceedings;*
> *(3) the ease and expense of retrieval of any particular document.*
> *This includes:*
> *(a) the accessibility of Electronic Documents including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents;*
> *(b) the location of relevant Electronic Documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents;*
> *(c) the likelihood of locating relevant data;*
> *(d) the cost of recovering any Electronic Documents;*
> *(e) the cost of disclosing and providing inspection of any relevant Electronic Documents; and*
> *(f) the likelihood that Electronic Documents will be materially altered in the course of recovery, disclosure or inspection;*
> *(4) the availability of documents or contents from other sources; and*
> *(5) the significance of any document which is likely to be located during the search.*
> ***22.*** *Depending on the circumstances, it may be reasonable to search all of the parties' electronic storage systems, or to search only some part of those systems. For example, it may be reasonable to decide not to search for documents coming into existence before a particular date, or to limit the search to documents in a particular place or places, or to documents falling into particular categories.*
> ***23.*** *In some cases a staged approach may be appropriate, with disclosure initially being given of limited categories of documents. Those categories may*

> *subsequently be extended or limited depending on the results initially obtained.*"

Once again, by referring to this guidance, I stress that I am not bound to apply it as dictating the practice to be adopted by this Court but I have found the principles useful in determining what the outcome of this application should be.

19. The importance of adopting a proportionate response to the parties' disclosure obligations was stressed on behalf of the Respondents. Although the principle of proportionality is well-settled, Advocate Harris directed my attention to the way this was highlighted at para. [44] in the detailed analysis offered by Jacob LJ in *Nichia Corporation v Argos Limited* [2007] EWCA Civ 741. The applicable principles are also discussed in *Documentary Evidence* (10th ed.) by Charles Hollander QC (see, in particular, paragraphs 8-06 to 8-08). I accept without hesitation that proportionality is now a feature of standard disclosure under the 2007 Rules.

20. As regards proportionality, the evidence is set out in Mr McCloskey's Fifth Affidavit, sworn on 26 June 2012, in which he suggested that Mr Pindar's document repository would be larger than his own. Because Mr McCloskey had been informed by Altlaw, a specialist provider of electronic litigation support, that his repository holds 14GB of data and that, because of the key words being used, some 98% of the documents contain at least one of those key words, a search of the McCloskey document repository is likely to involve in excess of 137,000 documents. Scaling that figure upwards for Mr Pindar's document repository could, therefore, mean that in excess of 150,000 documents would need to be searched. (As an aside, the sheer number of documents involved makes me wonder whether the key words have been adequately narrowed to make the disclosure exercise appropriately focused but, because I am not required to address that question on this Application, I make no further comment on the issue.)

21. The Respondents submit that it would be disproportionate to order that the search to be carried out with Mr Pindar also included as a Custodian because there are already 115 agreed Custodians for the Respondents, some of whom, such as Mr Goring and Mr Dye, will inevitably produce all the documents that might otherwise be found through searching Mr Pindar's repository. Put simply, the Respondents assert that they are fully aware of their disclosure obligations under the 2007 Rules and that the extent of the searches to which they have already agreed will be sufficient to ensure that all relevant documents are identified and disclosed.

22. Ultimately, as with any issue turning on what is or is not proportionate, a balancing exercise has to be conducted. Although the factual situation in one case will inevitably differ from the factual situation in another, I have reviewed the whole judgment of the Senior Master in *Goodale v Ministry of Justice* (supra) to ascertain how similar questions might be approached elsewhere. One of the principal differences, however, is that the parties have already agreed what is in anyone's estimation a very substantial trawl of repositories because of the number of Custodians they have agreed to include.

23. Advocate Dawes submitted that there would be "*no great difficulty*" in the Respondents adding Mr Pindar to their list of Custodians but, with respect to him, that is not the approach I consider I should adopt. I fear he has advanced convenience at the expense of the need to focus on relevance. However, when he sought to attach significance to the position that Mr Pindar held with the Plaintiff prior to his resignation as CEO in 2008 (and also potentially in relation to his position in the parent company), he was really echoing what the Senior Master had indicated at para. [22] of his judgment when he said "*In terms of a search one should always start with the most important people at the top of the pyramid, that is, adopt a staged or incremental approach.*"

24. I was troubled as to whether Mr Pindar was the only director of the Plaintiff and/or the First Third Party who was not being agreed as a Custodian. Therefore, during the lunchtime adjournment at the resumed hearing, I enquired of Advocate Harris whether a list of directors could be produced. Such a list was prepared and submitted for the period 1 May 2006 to 31 March 2008. It confirmed that there were other directors of those companies who had not been included among the proposed list of Custodians, which meant that I still needed to assess the relevance of Mr Pindar's position. Had Mr Pindar been the only director omitted, I would have found it easy to conclude that the approach was to search the repositories of all the directors unless there was some particular justification for excluding Mr Pindar.

25. Although I accept that the arguments for and against including Mr Pindar amongst the Respondents' list of Custodians are finely balanced, I have reached the conclusion that he should be included as a Custodian. Having reviewed what the case is about, including its nature and complexity, and having regard to the wide-ranging approach adopted by the parties to searching repositories, I am satisfied that Mr Pindar's previous position as CEO of the Plaintiff points more towards his inclusion than his exclusion. This is taking a top-down approach, which I regard as consistent with the guidance of the Senior Master to which I have referred. By analogy to the search that would be required of documents in paper, or hard copy, format, I am satisfied that the Respondents would have made some effort to review any such documents held by Mr Pindar from the time that he was on the Boards of those two companies, which reinforces my conclusion that he should be included as a Custodian. Even though Mr Pindar and others have suggested that any documents found will be identified through searches of other persons' repositories, I take the view that the technology involved of de-duplication and clustering, at least as I understand it, will not mean that this additional search is disproportionate to the ends to be achieved through providing standard disclosure under the 2007 Rules.

26. I have deliberately refrained from referring to Mr Pindar's position as CEO of Capita plc because, as a result of the next matter I need to consider, I am not required to indicate whether I would find that Mr Pindar was a Custodian by virtue of that position within the Group of companies of which the Applicants form part. Bearing in mind the desirability of the parties utilising a two-stage approach, where appropriate, and the ongoing duty of disclosure throughout the proceedings found in rule 70 of the 2007 Rules, I would have been minded, if that were the only connection Mr Pindar had to these proceedings, to have concluded that he is not a Custodian for the purposes of the initial electronic search. In those circumstances, if searches of other Custodians put any party on a train of enquiry about whether Mr Pindar had relevant disclosable documents in his repository, then that would be dealt with either by the Respondents carrying out an appropriate search or by further application under rule 71 on behalf of the Applicants for a more extensive search.

Extent of search

27. Limitations are placed on a party's duty of disclosure by rule 67 of the 2007 Rules, which provides:

> "*(1) A party's duty to disclose documents is limited to documents which are or have been in his control.*
> *(2) For this purpose a party has or has had a document in his control if –*
> *(a) it is or was in his physical possession,*
> *(b) he has or has had a right to possession of it, or*
> *(c) he has or has had a right to inspect or take copies of it.*"

There is an equivalent provision in the CPR at rule 31.8.

28. On behalf of the Respondents, Advocate Harris relies on what Lord Diplock said in his speech in *Lonrho Ltd v Shell Petroleum Co. Ltd* [1980] 1 WLR 627, 635:

> "*... in the context of the phrase 'possession, custody or power' the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.*"

In Hollander's *Documentary Evidence*, it is asserted that "*the Lonrho test ... remains good law since the CPR*" (see para. 7-33). By analogy, therefore, it still offers good guidance to the approach to take to the word "control" in rule 67 of the 2007 Rules. Accordingly, documents in the possession of subsidiary companies are not in the "power" of the parent companies (see, also, the commentary to the CPR Part 31 at para. 31.8.3) and, so Advocate Harris submits, the same applies the other way round, i.e., documents in the possession of a parent company are not within the power of a subsidiary company.

29. As regards accessibility of Mr Pindar's document, in Mr McCloskey's Sixth Affidavit, sworn on 11 July 2012, his evidence is that "*Capita Plc does not permit (and never has permitted) the Respondents access to the post-31 March 2008 repository of Paul Pindar.*" Similarly, in Mr Pindar's Second Affidavit, he states that "*In respect of the period from 31 March 2008 to date, during which I have been the Chief Executive Officer of Capita plc but have not been directly involved in the affairs of CSL or Woolf ... I confirm that I do not agree to grant access to my repository of documents or my files for this period to CSL or Woolf for the purpose of them providing disclosure in these proceedings.*"

30. In this context, both sides referred to the analysis undertaken by Floyd J in *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat), culminating in the following passage at para. [21]:

> "*I accept that the mere fact that a party to litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation, subject only to the caveats contained in paragraph 4 of Mr Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests.*"

31. They also both referred to the way in which these cases were subsequently reviewed by the English Court of Appeal in *North Shore Ventures Limited v Anstead Holdings Inc* [2012] EWCA Civ 11 (see para. [40]):

> "*In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant. The concept of 'right to possession' in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency. But even if there were on a*

> *strict legal view no 'right to possession', for example, because the parties to the arrangement caused the documents to be held in a jurisdiction whose laws would preclude the physical possessor from handing them over to the party at whose behest he was truly acting, it would be open to the English court in such circumstances to find that as a matter of fact the documents were nevertheless within the control of that party within the meaning of CPR 31.9(1). CPR 31.8(2) states that for the purpose of CPR 31.8(1) a party has or has had a document in his control if the case falls within paragraph (a) to (c). It does not state that a party has or has had a document in his control if <u>but only if</u> the case falls within one of those paragraphs.*"

32. The relevance of this issue in relation to Mr Pindar is that his current role within the group of Capita plc is different from the role he played up to 31 March 2008 when he was also a director of the Plaintiff and the First Third Party. Although Advocate Dawes was critical of what he suggested was a late change of position, I do not feel able in this case to go behind the clear position enunciated in the evidence of Messrs McCloskey and Pindar. As such, the parent company is a distinct legal entity from the other group entities which are parties to these proceedings and I cannot order that those subsidiary companies search repositories to which they are not entitled as of right to have access.

33. In reaching that conclusion, I am aware that some other Custodians, agreed between the parties, are drawn from outside the direct spheres of the parties themselves. There is, however, in my view, a distinction between a party voluntarily agreeing to conduct a search of a repository of documents and an order of the Court specifying what must be done as part of the reasonable search of documents in its control required by rules 66 and 67 of the 2007 Rules. In the former case, the disclosing party is being afforded access to material and so can agree with the other parties that that material will be searched in the same way as those document repositories under its control. Where such co-operation is not forthcoming, an order requiring a search to be carried out would only become available if, as in the English cases, there is evidence that the documents in question have at some stage, even if not now, been in the possession or control of the party to the proceedings. Because the Respondents have consistently maintained their stance of not volunteering the repository of Mr Pindar for searching, there is no evidence before me in relation to his repository of post-31 March 2008 documents enabling me to decide that that part of his repository can be included in an order directing the Respondents.

34. Consequently, although I have found that Mr Pindar is a person who should have been included as a Custodian, because of the difference between when he was a director of the Respondents and when he was not, the extent of the search that I direct is necessarily narrower than in respect of all the agreed Custodians. Mr Pindar's repository of documents from when he was a director of the Respondents must be searched but the end date for the search will be 31 March 2008 when he ceased being a director of those companies. Further, imposing this time limitation on the search of Mr Pindar's repository of documents reinforces my belief that the order I am making is a proportionate response to the application to include Mr Pindar as a Custodian.

<u>Conclusion</u>

35. For the reasons given, I will, therefore, order that the Plaintiff and First Third Party undertake a search of the repositories of documents of Paul Pindar for the purpose of then giving standard disclosure in the proceedings, but limited to the period 1 May 2006 to 31 March 2008, during which time he was a significant Board member of both of those companies, and not extending, as indicated above, to any distinct repository belonging to the parent company to which those parties do not have access rights. This is a direction given in the context of paragraph 7 of the former Deputy Bailiff's Order of 7 October 2011, enabling directions to be sought if the parties were unable to reach full agreement on the disclosure process.

36. I will reserve the question of costs (see paragraph 3 of the Application). If the parties are unable to agree the costs consequences of my order, I will entertain submissions on costs at a mutually convenient Interlocutory Court.