



Neutral Citation Number: [2018] EWHC 3163 (Ch)

Case No: BL-2018-001993

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

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

Date: 23/11/2018

Before:

HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

Between:

**WILD BRAIN FAMILY INTERNATIONAL
LIMITED**

Claimant

- and -

**(1) JOHN ROBSON
(2) ALFRED CHUBB**

Defendants

**Robert Anderson QC, Mark Vinall and Daniel Burgess (instructed by Mishcon de Reya
LLP) for the Claimant**
**David Reade QC and James McWilliams (instructed by Simons Muirhead & Burton LLP)
for the Defendants**

Hearing date: 16 November 2018

Approved Judgment

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

.....
HIS HONOUR JUDGE KLEIN

His Honour Judge Klein:

1. By an application notice, dated 4 September 2018, the Claimant applied, without notice, for an “order for delivery up, evidence preservation and computer imaging” against the Defendants (“the Injunction application”). Nugee J made an order (“the without notice order”), at a without notice hearing, on 4 September 2018 (“the 4 September hearing”). That order was varied by Nugee J, on the Defendants’ application, on 12 September 2018.¹ The return date for the Injunction was fixed for 20 September 2018. By that time:

- i) the Injunction had been substantially executed;
- ii) the Defendants had come to the conclusion that, at least in one respect (as I explain below), they had “over-complied” with the Injunction;
- iii) the Defendants had indicated that they intended to apply to discharge the Injunction.

By consent, on the return date, Marcus Smith J (as well as making other orders):

- iv) gave directions for the disposal of the Defendants’ intended discharge application;
- v) made an evidence preservation order and an injunction to restrain the Defendants’ dealing with the Claimant’s documents and the Claimant’s confidential information;²
- vi) ordered that “pending the hearing of the [intended] discharge application, the Claimant shall not inspect any of the documents delivered up as at the date of this order by the Defendants pursuant to paragraph 20”³ of the Injunction.⁴

The Defendants did make a discharge application (“the Discharge application”) on 21 September 2018 and, on 1 November 2018, the Claimant cross-applied for an order providing for a regime to meet the Defendants’ over-compliance with the Injunction (“the Inspection application”). Both the Discharge application and the Inspection application were heard by me on 16 November 2018. At that hearing, Robert Anderson QC, leading Mark Vinall and Daniel Burgess, appeared on the Claimant’s behalf and David Reade QC, leading James McWilliams, appeared on the Defendants’ behalf. I am grateful to them all for all the assistance they gave me at the

¹ In this judgment, I will refer to the varied order as “the Injunction”.

² In fact, as is the case with the other orders to which I refer, Marcus Smith J’s order is more complex (and more detailed) than summarised here. However, this summary is accurate enough for the purpose of this judgment. (Where I do not quote from orders, so as not to overburden this judgment, I try to give an accurate enough summary of the orders. Nevertheless, I have had the precise terms of the orders in mind when determining the applications before me).

³ I think this should actually be a reference to paragraph 19 of the Injunction, but nothing turns on that.

⁴ Once the Defendants’ solicitors had notified the Claimant’s solicitors of the Defendants’ over-compliance with paragraph 19 (or 20) of the Injunction (at least), the Claimant’s solicitors had stopped inspecting the documents delivered up by the Defendants under that paragraph. The purpose of this order was to protect, for the time being, the Defendants’ and third party interests as a result of the Defendants’ over-compliance.

hearing and for their very clear and comprehensive skeleton arguments. This is the judgment on both the Discharge application and the Inspection application.⁵

Background to the applications

2. The Defendants set out the background to the dispute (which has led, ultimately, to the applications) in paragraphs 6-15 of their skeleton argument. In my view, subject to the addition of a small amount of further information which I derive from paragraph 3 of the Claimant's skeleton argument, those paragraphs of the Defendants' skeleton argument (together with the further information) provide an accurate enough explanation about why the parties are in dispute and about why the Injunction application was made.⁶ Those paragraphs of the Defendants' skeleton argument (together with the further information) explain:

“The Claimant is an English company which carries on business in the management of preschool and children's entertainment content on platforms such as YouTube. It is a wholly owned subsidiary of a Canadian company, DHX Media Ltd. (“DHX”).

The Defendants are both former employees of the Claimant. From around November 2015, the First Defendant served as the Claimant's “Managing Director” until he handed in his notice on 22 December 2017. He was on garden leave for 6 months until the end of his notice period on 22 June 2018.

From April 2016, the Second Defendant served as the Claimant's Head of Mergers and Acquisitions until he handed in his notice on 26 February 2018. He was placed on garden leave on 9 March 2018 until the end of his notice period on 26 May 2018.

Neither of the Defendants were ever appointed as statutory directors of the Claimant, which office was occupied by senior managers at DHX. The Defendants further do not accept that they owed any fiduciary duties to the Claimant...

The Defendants are both now employed by Project ABC Holdings Ltd., which trades as Moonbug (“Moonbug”). Moonbug is referred to throughout the pleadings and the evidence as “the New Venture”. The directors of Moonbug are Mr René Rechtman, the former President of Maker Studios Inc. and an investor and prominent figure in the children's media industry, and Mr Jason Schretter, a Partner and Head of

⁵ I have been keen to hand down judgment as quickly as reasonably possible following the hearing. Whilst, therefore, I might not address, in this judgment, all the evidence to which I was taken or all the submissions made in the parties' skeleton arguments or at the hearing, I have carefully considered all that information in determining the applications. On the Inspection application, I have also considered the points made, in correspondence, by Latham & Watkins (London) LLP, who are the solicitors for Moonbug, El Bebe, Raine, Mr Rechtman and Mr Schretter (to whom I make further reference below).

⁶ Mr Anderson agreed that this is so.

Europe, Middle East and Africa at The Raine Group LLC, a merchant bank (“Raine”).

The First Defendant has been employed as Moonbug’s Chief Operating Officer since 22 August 2018. The Second Defendant has been employed as Moonbug’s Head of Mergers, Acquisitions and Strategy since 8 June 2018...

At the heart of these proceedings is a popular children’s YouTube channel known as Little Baby Bum (“LBB”), which was owned by a company called El Bebe Productions Ltd. (“El Bebe”). LBB publishes videos featuring performances of popular children’s nursery rhymes and other content set to animations. It is the twelfth most-viewed YouTube channel in the world, with some 17.8 billion views to date.

It is common ground that during the course of their employment with the Claimant the Defendants were responsible for pursuing the acquisition of LBB. To that end, the Claimant concluded a non-disclosure agreement with El Bebe on 26 September 2017 and the Second Defendant was provided with some financial information pursuant to that agreement and met with the owners of LBB in October 2017.⁷

...The [Claimant’s case is that it] uncovered evidence that the Defendants (and some other former employees of the Claimant) had been involved with [Moonbug] for several months before they handed in their notice, and during their periods of garden leave. In particular, they appeared [the Claimant contends] to have diverted to their new business [the] opportunity [to acquire LBB], which has now been acquired by Moonbug...The Claimant also believed that there was a real risk that the Defendants had its confidential information in their possession and were misusing it, although, at [the 4 September hearing], the Claimant had no direct evidence that this was the case. [Nevertheless, the Injunction application was made].⁸

What is [substantively] in dispute is whether there was ever any realistic prospect of the Claimant acquiring LBB. The Defendants’ case is that by November 2017 there was no prospect whatsoever of such an acquisition taking place in circumstances where [the Defendants contend, at least,] the financial results of the Claimant’s parent company, DHX, had been so poor as to prompt the formation of a special committee on 2 October 2017 and left DHX and the Claimant without the funds necessary to finance such a significant acquisition as

⁷ Mr Anderson explained that the financial information provided included a valuation, by LBB’s vendor, of LBB’s intellectual property, by which the intellectual property was given a mid-range valuation of about £72 million.

⁸ This is the further information I derive from paragraph 3 of the Claimant’s skeleton argument.

LBB. The evidence of the Second Defendant – the individual at the Claimant with responsibility for acquisitions – is that staff of the Claimant had been told by DHX that they could only look at smaller transactions (which LBB on any view was not) but that in practice, given DHX’s lack of funds, all new transactions were put on hold pending the review of the special committee. The Claimant, for its part, maintains that notwithstanding these [alleged] difficulties it would...have found the money to acquire LBB.

Although the Claimant was on any view aware of LBB it did not in the event acquire LBB, nor was it even one of the unsuccessful bidders for LBB.⁹ LBB was ultimately acquired by Moonbug in July 2018, several months after the Defendants had handed in their notice at the Claimant and after the expiry of their respective notice periods.”

3. As I have already indicated, the Claimant made the Injunction application, at least in part because of the alleged misuse, by the Defendants, of its confidential information. As I have also already indicated, the Injunction application came on for a without notice hearing on 4 September 2018 when, having heard from Mr Anderson for over 3½ hours,¹⁰ Nugee J made the without notice order which, as I have said, he varied on 12 September 2018.
4. By the Injunction (broadly, and amongst other matters), the Defendants:
 - i) were to allow, to the best of their ability, an independent computer specialist to copy the data stored on their computer equipment used since 1 January 2017 (save to the extent that their computer equipment had never been used for business purposes) and the copied data was to be retained by a supervising solicitor pending further order;
 - ii) were to allow, to the best of their ability, the independent computer specialist to copy the data on their online communication and data storage sites used since 1 January 2017 and the copied data was to be retained by a supervising solicitor pending further order;
 - iii) by paragraphs 19 and 21, immediately on service of the order (or, in certain cases, within 4 working days of service) and to the best of their ability, were to deliver up to the Claimant’s solicitors, or procure the delivery up of, all copies, in their control, of the Claimant’s confidential information and documents (“the Delivery Up order”);¹¹
 - iv) once these steps had been completed, were to delete all soft copies of the Claimant’s confidential information and documents on the computer equipment and online communication and data storage sites;

⁹ Why the Claimant did not bid for or acquire LBB is a matter of dispute.

¹⁰ Whilst the time taken at the 4 September hearing is not necessarily a good indicator of whether the Claimant complied with its fair presentation obligation, it perhaps does indicate the care taken by Nugee J before making the without notice order.

¹¹ In this judgment, I refer to these three elements of the Injunction together as “the Material Disgorge orders”.

- v) until the Material Disgorge orders were fully executed and they had deleted all soft copies of the Claimant's confidential information and documents on the computer equipment and online communication and data storage sites, were not, other than in complying with the Injunction, to alter or dispose of the Claimant's confidential information or documents ("the Evidence Preservation order");
- vi) until the return date, were not to use or otherwise deal with the Claimant's confidential information and documents (other than in compliance with the Injunction) ("the Confidentiality Preservation order");
- vii) were to provide the following information to the Claimant's solicitors:
 - a) The location of the Claimant's confidential information and documents within their control;
 - b) The particulars of those to whom and the circumstances in which they had revealed the Claimant's confidential information or the contents of any of the Claimant's documents otherwise than in the ordinary course of their employment at the Claimant;
 - c) A summary of their use of the Claimant's confidential information or documents otherwise than in the ordinary course of that employment;("the Information Provision orders").

5. As I have said, the Defendants then made the Discharge Application on 21 September 2018.
6. As I have also said, the Defendants have concluded they have over-complied with the Injunction; in particular, with the Delivery Up order. As I understand their position, in the course of delivering up the soft copy documents they were required to deliver up under the Delivery Up order, they have provided soft copy documents to the Claimant's solicitors which contain privileged material or material which is confidential to them or third parties. I also understand that some of the soft copy documents contain a mixture of material which is confidential to the Claimant and material which is confidential to others.^{12 13} Because of this, Marcus Smith J made the order to which I have already referred, on the return date.
7. By the end of the hearing before me, (broadly) the order which the Claimant was seeking on the Inspection application:
 - i) contained the following undertakings:

¹² In this judgment, I proceed on the basis that what the Defendants say about their over-compliance with the Delivery Up order is correct, although I think that the Claimant does not accept that what the Defendants say is correct, because it has not inspected the documents in question.

¹³ For the way the Delivery Up order has been complied with so far, see, for example, a letter, dated 13 September 2018, from Laytons LLP, the solicitors then acting for the Second Defendant, to the Claimant's solicitor.

- a) an undertaking from the Claimant not, without the court's permission, to use the contents of the documents delivered up by the Defendants "except for the purpose of these proceedings...or commencing civil proceedings in relation to the same or related subject matter to these proceedings provided that this undertaking shall not restrict the use by the Claimant...of its own confidential information or...property" ("the Limited Use undertaking");
 - b) an undertaking to regulate the participation of the Claimant's lay representatives in a confidentiality club;¹⁴
- ii) contained the following orders:
- a) (by paragraph 1) an order that the Defendants be required, within 14 days, to deliver up documents required to be delivered up by the Delivery Up order save that (i) the Defendants are not required to deliver up documents to the extent they contain privileged material and (ii) the documents delivered up may be redacted for confidence (that is, of material which is confidential to the Defendants or third parties);
 - b) (by paragraph 2) an order for members of a confidentiality club to be permitted to inspect the material redacted for confidence (but not that withheld or redacted for privilege). The members of the confidentiality club are five individuals at Mishcon de Reya LLP (the Claimant's solicitors), counsel who appeared before me for the Claimant, and two lay representatives of the Claimant (including one who, I understand, is not resident in this jurisdiction);
 - c) (by paragraph 4) an order that the Claimant can object to a redaction, in which case, subject to paragraph 5, the documents must be delivered up by the Defendants without the redaction;
 - d) (by paragraph 5) an order which provides a mechanism for resolving disputes about redactions;

("the draft Inspection order").

8. It may have been that the Claimant was seeking this form of order on the Inspection application because, during the course of the hearing, I had indicated to Mr Anderson a number of concerns I had about the original form of order which accompanied the Inspection application and because I had suggested that a practical solution to deal with the Defendants' over-compliance ("the Scott Schedule approach") was:

- i) for the Defendants to redact (wholly or partially) documents delivered up under the Delivery Up order on the ground of privilege or confidence and to explain the basis for the redaction in a Scott Schedule;

¹⁴ The draft order also contained an undertaking from the Defendants to hold documents defined as "Original Documents" to the court's order and not to inspect them save as provided for by the order. I do not understand how this is consistent with the Delivery Up order or the obligation, in the Injunction, for the Defendants then to delete soft copies of the documents in question. If this undertaking is being offered to the court by the Defendants, I will need to have explained why it is being offered.

- ii) for the Claimant then only to inspect the documents so delivered up and to respond to the Scott Schedule accepting or objecting to the redaction, explaining why;
- iii) for the parties to try to resolve their differences in relation to the redactions;
- iv) in the absence of a resolution of all those differences, for the matter to come back to court for further consideration.

Discharge application - introduction

9. The Discharge application is made on 3 grounds:
 - i) The Defendants contend that, on the merits, the Injunction (in particular, the Material Disgorge orders and the Information Provision orders) would not have been granted on an on notice application, because the Material Disgorge orders are in the nature of a search order and the test for making a search order has not been satisfied;
 - ii) The grounds for making a without notice application have not been made out;
 - iii) The Claimant failed to comply with its fair presentation obligation at the 4 September hearing.
10. Although the Defendants' application is made on three grounds, it seems to me that the second ground (that a without notice application was not justified) is merely part and parcel of the Defendants' complaint that the Claimant failed to comply with its fair presentation obligation. I will consider the second ground on that basis.
11. If the Defendants' contention is that, at the 4 September hearing, Nugee J was wrong to permit the Injunction application to be made without notice, that would be a matter for an appeal court to consider. A respondent may apply to have an order made without notice discharged, otherwise than for a failure to comply with a fair presentation obligation, under CPR r.23.10 or under a liberty to apply provision. CPR r.23.10 and a liberty to apply provision provide a mechanism for a court to consider, on a respondent's request, at an on notice hearing, all those matters which the respondent wishes to raise in opposition to the order previously obtained on its merits. CPR r.23.10 (on its wording) and a liberty to apply provision (on the standard form of wording) are not intended, in my view, to permit one first instance court to reconsider the merits of a subsidiary decision made by a different first instance court; namely, whether to permit an application to be made without notice. An alternative approach, by which the same result is reached, would be to recognise that, because, under CPR r.23.10 or a liberty to apply provision, a court reconsiders an application substantively on its merits, any merits-based grounds for complaining that the application was initially considered without notice inevitably fall away.

The Disclosure application – the merits-based objection

12. As I have said, the Defendants contend that, by the Injunction (in particular, by the Material Disgorge orders), Nugee J (effectively) made a search order.

13. Formally, CPR r.25.1(1) contemplates that orders for evidence preservation and inspection are different to search orders. Sub-rule (1) specifies that the court can make an order:

“...(c) (i) for the detention, custody or preservation of relevant property;

(ii) for the inspection of relevant property;...

(h) ...(referred to as a “search order”) under section 7 of the Civil Procedure Act 1997 (order requiring a party to admit another party to premises for the purpose of preserving evidence, etc.)...”

14. In fact, section 7 of the Civil Procedure Act 1997 deals with both evidence preservation and inspection orders, on the one hand, and search orders, on the other hand. It provides:

“(1) The court may make an order under this section for the purpose of securing, in the case of any existing or proposed proceedings in the court –

(a) the preservation of evidence which is or may be relevant, or

(b) the preservation of property which is or may be the subject-matter of the proceedings or as to which any question arises or may arise in the proceedings.

(2) A person who is, or appears to the court likely to be, a party to proceedings in the court may make an application for such an order.

(3) Such an order may direct any person to permit any person described in the order, or secure that any person so described is permitted –

(a) to enter premises in England and Wales, and

(b) while on the premises, to take in accordance with the terms of the order any of the following steps.

(4) Those steps are –

(a) to carry out a search for or inspection of anything described in the order, and

(b) to make or obtain a copy, photograph, sample or other record of anything so described.

(5) The order may also direct the person concerned –

(a) to provide any person described in the order, or secure that any person so described is provided, with any information or article described in the order, and

(b) to allow any person described in the order, or secure that any person so described is allowed, to retain for safe keeping anything described in the order, and

(6) An order under this section is to have effect subject to such conditions as are specified in the order.

(7) This section does not affect any right of a person to refuse to do anything on the ground that to do so might tend to expose him or his spouse or civil partner to proceedings for an offence or for the recovery of a penalty.

(8) In this section –

“court” means the High Court, and

“premises” includes any vehicle;

and an order under this section may describe anything generally, whether by reference to a class or otherwise.”

15. I think that the Defendants go too far when they suggest, in their skeleton argument, that it is “neither here nor there” that the Injunction did not permit the Claimant to enter the Defendants’ homes or other properties. The extraordinary feature of a search order is that it compels a respondent to permit the searcher to enter the respondent’s premises (which may include his home). Indeed, this point was particularly well made by Hoffman J in *Lock International plc v. Beswick* [1989] 1 WLR 1268, 1281 (a case relied on by the Defendants), where the Judge said:

“In many cases it will therefore be sufficient to make an order for delivery up of the plaintiff’s documents to his solicitor or, in cases in which the documents belong to the defendant but may provide evidence against him, an order that he preserve the documents pending further order, or allow the plaintiff’s solicitor to make copies. The more intrusive orders allowing searches of premises or vehicles require a careful balancing of, on the one hand, the plaintiff’s right to recover his property or to preserve important evidence against, on the other hand, violation of the privacy of a defendant who has had no opportunity to put his side of the case. It is not merely that the defendant may be innocent. The making of an intrusive order ex parte even against a guilty defendant is contrary to normal principles of justice and can only be done when there is a paramount need to prevent a denial of justice to the plaintiff. The absolute extremity of the court’s powers is to permit a search of a defendant’s dwelling house, with the humiliation and family distress which that frequently involves.”

16. However, as Mr Reade contended, powerfully, in his oral submissions, today, a compelled search of an individual's virtual life (by taking copies of his data, for example) is capable of being (almost, at least) as intrusive as a compelled search of that individual's home; although I add this qualification – the extent and the invasiveness of an intrusion into an individual's virtual life will vary from case to case.
17. Civil Procedure 2018 (“the 2018 White Book”) sets out, in note 25.1.18, the test which the court applies when considering the making of an inspection order, as follows:
- “This remedy includes the power to order the inspection of a database and to order access to a party's computer or to direct the provision of an imaged version of a database, but it will only make such order where this relief can be shown to be both necessary and proportionate (*Patel v. Unite* [2012] EWHC 92 (QB), 26 January 2012, unrep. (Judge Richard Parkes QC); *M3 Property Ltd v. Zedhomes Ltd.* [2012] EWHC 780 (TCC), March 26, 2012, unrep. (Akenhead J)). In *McLennan Architects Ltd. v. Jones* [2014] EWHC 2604 (TCC), 30 July 2014, unrep., at [29], Akenhead J listed non exhaustively, the factors to be considered on an application of this nature as including: (a) the scope of the investigation must be proportionate and limited to what is reasonably necessary in the context of the case; (b) regard should be had to the likely contents (in general) of the device, so that any search authorised should exclude any possible disclosure of privileged documents and also of confidential documents which have nothing to do with a case in question; (c) regard should also be had to the human rights of people whose information is on the device and, in particular, where such information has nothing or little to do with the case in question; (d) only rarely would it be appropriate to authorise a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates; (e) it will usually be desirable for the court to require confidentiality undertakings from any expert or other person who is given access...”
18. The necessity and proportionality requirements referred to are sufficiently flexible to permit the court to require, as it ought in my view, that an applicant meets an increasingly heavy burden, before an inspection order is made, the more intrusive the inspection order sought is and, in an appropriate case, the test which the court is required to apply when considering making a search order may be adopted even though only inspection and no search of premises is being sought. There is support for this conclusion in note 25.1.24 of the 2018 White Book, which explains:
- “...Where the court is making an order for delivery up or preservation of evidence or property, the court has to consider whether to include in the order similar provisions as are specified for injunctions or search orders...”

19. In any event, as it happens, the Claimant proceeded, at the 4 September hearing and before me, on the basis that, effectively at least, to obtain and maintain the Material Disgorgement orders, it was and is required to satisfy the requirements for the making of a search order.
20. I will therefore consider this basis for the Discharge application with those requirements in mind.
21. The Defendants explain, in paragraph 30 of their skeleton argument, that, before the court may make a search order, an applicant must:

“...persuade the Court that, if the Defendants were forewarned, there was a “grave danger that vital evidence will be destroyed, that papers will be burnt or lost or hidden, or taken beyond the jurisdiction, and so the ends of justice be defeated”: see *Anton Pillar KG v. Manufacturing Processes Ltd.* [1976] Ch 55 at p.61 per Lord Denning MR and *Columbia Picture Industries v Robinson & Ors* [1987] Ch 38. Its affidavit evidence in support of the application needed to “disclose very fully the reason the order is sought, including the probability that relevant material would disappear if the order were not made”: see PD52A, para. 7.3(2).”

22. More recently, in *BMW AG v. Premier Alloy Wheels (UK) Ltd.* [2018] EWHC 1713 (Ch), Henry Carr J explained, at [14], that, before the court may make a search order, it must be satisfied (amongst other matters) that there is a “real possibility” of document destruction.
23. There is no dispute that the court can infer that there is a sufficient danger of document destruction from other facts. In *Indicii Salus Ltd. v. Chandrasekaran* [2007] EWHC 406 (Ch),¹⁵ Warren J said:

“In the years following the decision in *Anton Pillar*, it became relatively easy to obtain search orders. In particular, the courts seemed to be willing to infer that a defendant who could be shown to be acting improperly would be likely to hide or destroy evidence. Judges became concerned that it had become all too easy to obtain this sort of relief which could often have serious and permanent adverse consequences for a defendant. But the need for, and meaning of, the requirement that there should be a “real possibility” that the defendants may destroy evidence was underlined and explained in *Booker McConnell plc v. Plascow* [1985] RPC 425 and in *Lock International plc v Beswick*. In the first of those cases, Dillon LJ said this:

“The phrase “a real possibility” is to be contrasted with the extravagant fears which seem to afflict all plaintiffs who have complaints of breach of confidence, breach of copyright or passing off. Where the production and delivery

¹⁵ The Court of Appeal dismissed an appeal against Warren J’s decision.

up of documents is in question, the courts have always proceeded, justifiably, on the basis that the overwhelming majority of people in this country will comply with the court's order, and that defendants will therefore comply with orders to, for example, produce and deliver up documents without it being necessary to empower the plaintiffs' solicitors to search the defendant's premises."

And in *Lock International plc v. Beswick*, Hoffmann J said this:

"Even in cases in which the plaintiff has strong evidence that an employee has taken what is undoubtedly specific confidential information, such as a list of customers, the court must employ a graduated response. To borrow a useful concept from the jurisprudence of the European Community, there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted. The fact that there is overwhelming evidence that the defendant has behaved wrongfully in his commercial relationships does not necessarily justify an Anton Piller order. People whose commercial morality allows them to take a list of customers with whom they were in contact while employed will not necessarily disobey an order of the court requiring them to deliver it up. Not everyone who is misusing confidential information will destroy documents in the face of a court order requiring him to preserve them."

However, Mr Penny says the test this is simply an evidential test which requires evidence of a real possibility that a defendant will disobey a lesser order, for example, for delivery up of computer equipment. It does not, he submits, require a finding of fact that the defendant would or would not have destroyed or hidden evidence. It is clearly correct that all that has to be shown is a "real possibility" of destruction of evidence (and in principle the same applies to hiding rather than destruction). It follows, I consider, that the Court does not have to be satisfied before making a search order that the defendant actually would destroy evidence; and it may be, on the facts of a particular case, that the Court is satisfied that the defendant actually would breach a lesser order such as that which Mr Penny mentions and may, in all the circumstance including that fact, decide that there is a "real possibility" of destruction of evidence. An applicant must, nonetheless, consider whether a lesser form of order would be adequate. If there is no reason to think that a defendant would disobey an order, for instance for delivery up of a claimant's property, then it would not be appropriate to seek to obtain a search order.

Both Mr Macdonald and Mr Penny refer to the decision of the Court of Appeal in *Dunlop Holdings Ltd. v Staravia Ltd.* [1982] Comm LR 3. Mr Macdonald refers to it in the context of search

order becoming easy to obtain in the 1980s where the courts, he said, would infer that a defendant who could be shown to be engaged in wrongful activity was likely to destroy or hide evidence of his wrongdoing if given notice of the claimant's application. But the decision in that case remains good law and the observations of Oliver LJ remain pertinent when he said this (see at page 3):

“It has certainly become customary to infer the probability of disappearance or destruction of evidence where it is clearly established on the evidence before the Court that the defendant is engaged in a nefarious activity which renders it likely that he is an untrustworthy person. It is seldom that one can get cogent or actual evidence of a threat to destroy material or documents, so it is necessary for it to be inferred from the evidence which is before the Court.”

This passage was approved by Hoffmann J in *Lock International plc v. Beswick* at page 1280G and is as applicable today as it was then.”

24. The principal dispute between the parties, on the merits of the Injunction application, is whether there was sufficient evidence at the 4 September hearing for Nugee J to infer that there was a sufficient risk of document destruction by the Defendants for the Injunction to be made.
25. Mr Reade emphasised the passage from *Lock* which Warren J quoted in *Indicii Salus* and he made the point that, as Hoffman J explained, it does not “necessarily” follow that someone who has misused confidential information will destroy that confidential information when faced with an evidence preservation order. I agree with Mr Reade's point as far as it goes. Each case needs to be considered on its facts. There will be some cases where, on the evidence, it is not appropriate for the court to infer that there is a sufficient risk of document destruction. There will be other cases where, on the evidence, it is appropriate for the court to make such an inference. So, at one extreme, may be the case where the respondent may have misused a small amount of the applicant's confidential information without seeking to gain an advantage over the applicant. In such a case, a search order may not be appropriate. At the other extreme may be the case where the evidence shows that there has been substantial misuse, by the respondent, of the applicant's confidential information, in a way which prevents the applicant getting any further access to it, for the purpose of damaging the applicant's business. In such a case, a search order may be appropriate.¹⁶
26. The Defendants contend that the Injunction ought to be discharged, on its merits, because there was insufficient evidence, at the 4 September hearing, to support a conclusion that there was a sufficient risk of document destruction, because:
 - i) they (the Defendants) are respectable;

¹⁶ There is support for this approach (at least, by analogy) in *VTB Capital Ltd. v. Nutritek International Corpn.* [2012] 2 CLC 431, at [176]-[178].

- ii) they openly said that they were entering into competition with the Claimant and that they were being financed by highly respectable institutions;
 - iii) as their conduct following the making of the Injunction (including the without notice order) shows, by their compliance with it, they are not the sort of people who would destroy evidence;
 - iv) there was insufficient evidence, in any event, before Nugee J, at the 4 September hearing, for Nugee J to infer a sufficient risk of document destruction (as he was required to do because there was no direct evidence of such a risk).
27. If there were otherwise sufficient grounds for making the Material Disgorge orders, that the Defendants are or might otherwise be respectable is an insufficient ground for discharging the Injunction. There would, in these circumstances, still be a sufficient risk of document destruction.
28. There is a dispute of fact (which the parties accept I cannot determine) about what was said at the meetings relied on by the Defendants; in particular, whether they (actually, the First Defendant) openly said that they were entering into competition with the Claimant and were being financed by highly respectable institutions. In such circumstances, if there were otherwise sufficient grounds for making the Injunction, the disputed evidence about the meetings would not be a sufficient ground for discharging the Injunction on its merits, in my view.
29. The fact that the Defendants have apparently complied, substantially at least, with the Material Disgorge orders is not a good indication of how they would have conducted themselves had the Material Disgorge orders not been made and, I have concluded, is insufficient for the Injunction to be discharged. The Defendants' conduct only shows, sufficiently clearly, in my view, how the Defendants actually react when subject to the Material Disgorge orders and the risk of committal for non-compliance with them.
30. The Claimant identifies the following matters (amongst others) which it says the evidence establishes and which it says were sufficient for Nugee J to properly infer that there was a sufficient risk of document destruction:
- i) The Second Defendant produced a list of current acquisition targets which did not include LBB, even though he had spoken with LBB's owner three times the previous day;
 - ii) There were secret meetings between the Defendants and others involved in Moonbug;
 - iii) The Second Defendant distributed to the First Defendant and another former employee of the Claimant the valuation of LBB's intellectual property which he had obtained under a non-disclosure agreement entered into by the Claimant;
 - iv) At a meeting on 23 August 2018, the First Defendant said in the Second Defendant's presence, untruthfully, that they had only been in discussion with Raine recently.

31. Before me, the Defendants did not dispute these matters,¹⁷ from which it appears that:
- i) the Defendants' focus was on LBB;
 - ii) the Second Defendant sought to divert the Claimant's attention away from LBB;
 - iii) even after their post-termination restrictive covenants had come to an end, the Defendants misled the Claimant about their involvement in the acquisition, by Moonbug, of LBB. It is reasonable to infer, in my view, that the Defendants did so in order to hide from the Claimant their apparently deep involvement in that acquisition.
32. Because of the Defendants' focus on LBB, which was a possible business acquisition for the Claimant, and because the Defendants continued to hide from the Claimant the extent of their involvement in Moonbug's acquisition of LBB, I have concluded that there was sufficient evidence of a risk of document destruction at the 4 September hearing.
33. Mr Anderson pointed out that, in deciding whether to discharge the Injunction on its merits, I can take into account the product of its execution. In support of this contention, he relied on Gee on Commercial Injunctions (6th ed); paragraph 24-024:

"The court considers an application to discharge a search order taking into account all the evidence available on the hearing of the discharge application, including the results of the execution of order."

The point was made even more clearly by Sir John Donaldson MR in *WEA Records Ltd. v. Visions Channel 4 Ltd.* [1983] 1 WLR 721, 727-8:

"...ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision...

¹⁷ Had they done so, I would not have been in a position to determine the disputes and, on reflection, my decision would have been the same.

In the instant case the Anton Piller order is spent in the sense that it has been executed. However the defendants seek to go back to the beginning of the action saying that regardless of whether the fruits of the order are such as to show that it was abundantly justified, the judge had insufficient material to justify his action at the ex parte stage. They therefore invite us to set the ex parte order aside and to order the return of the affidavits to the two personal defendants and the seized material to the defendants' solicitors.

I regard this as wholly absurd. The courts are concerned with the administration of justice, not with playing a game of snakes and ladders. If it were now clear that the defendants had suffered any injustice by the making of the order, taking account of all relevant evidence including the affidavits of the personal defendants and the fruits of the search, the defendants would have their remedy in the counter undertaking as to damages..."¹⁸

34. As to that additional evidence, there is one matter, in particular, which is troubling.
35. On 7 September 2018, in a meeting which was transcribed, the Second Defendant told one of the Claimant's solicitors that, when he was employed by the Claimant, he had lost a computer, which he used for business purposes, in New York and that he had reported its loss to Graham DeNure (the Claimant's head of technology) (as Mr DeNure has since confirmed). In an affidavit, sworn on 17 September 2018, the Second Defendant said:

"I wish to correct some information I gave the Claimant's solicitor on the morning of 7 September. I told him that I had lost a device referred to as "Alfred's MacBook Air"...in New York. This is not accurate. I did not use it following my trip to New York in September 2017, but retained it until April 2018 when I took steps to destroy it and disposed of it at the Regis Road Recycling Centre in Kentish Town."

The Second Defendant does not explain how come he told Mr DeNure, apparently in September 2017, that he had lost the computer, when that was untrue. Nor does he explain how come he told the same untrue story to the Claimant's solicitor in September 2018, after he had destroyed the computer whilst on garden leave in April 2018. Nor does he explain how, 10 days after telling the Claimant's solicitor something which was not true, he apparently remembered the truth.

36. On this additional evidence, the conclusion that, without the Material Disgorge orders, there is a sufficient risk that the Second Defendant would destroy documents becomes stronger.

¹⁸ In my view, this passage also provides support for the conclusion I have already reached about the second basis on which the Discharge application is made.

37. Bearing in mind that, as I have already said, the Defendants' apparently substantial compliance with the Material Disgorge orders is not a sufficient basis for the discharge of the Injunction on its merits, even taking into account the evidence as it now is, there is no basis, in my view, for the Injunction to be discharged on its merits.

Discharge application – the second basis: the 4 September hearing was without notice

38. I have already explained that, in my view, the Defendants can only challenge Nugee J's decision to hear the Injunction application without notice as part and parcel of its complaint that the Claimant failed to comply with its fair presentation obligation. However, there is a little more I can say about this second basis for the Discharge application.
39. CPR r.23.4(2) provides:

“An application may be made without serving a copy of the application notice if this is permitted by –

- (a) a rule;
- (b) a practice direction; or
- (c) a court order.

The Part 23 Practice Direction; paragraph 3 provides:

“An application may be made without serving an application notice only:

- (1) where there is exceptional urgency,
- (2) where the overriding objective is best furthered by doing so,...
- (4) with the permission of the court,...
- (6) where a court order, rule or practice direction permits.”

CPR r.25.3(1) provides:

“The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.”

These are the bases on which the court can hear an application without notice, in a case such as this one.

40. The grounds for the Defendants' contention that the Injunction should be discharged because the 4 September hearing should have been on notice are set out in paragraphs 35 and 36-39 of their skeleton argument.
41. They say, in paragraph 35 of their skeleton argument:

“In this case, there was no justification for the Claimant to seek relief against the Defendants without notice to them. While ordinarily a search order would justify a claimant applying for relief without notice, in this case for the reasons already given there was no proper basis for the Claimant to seek and obtain search order type relief. None of the other relief sought by the Claimant would have justified the Claimant proceeding without proper notice to the Defendants, still less without any notice at all. The matter was not urgent and the purpose of the other injunctions sought would not have been defeated by the giving of notice.”

42. By this paragraph, the Defendants complain that, because, on their case, the Material Disgorge orders were not merited, the hearing of the Injunction application without notice was not merited. Even if the second point was a corollary of the first, I have concluded that the Material Disgorge orders were merited, so there can be no proper objection, on the merits, to Nugee J’s decision to hear the Injunction application without notice. The Defendants also complain that the matter was not urgent. There is nothing to suggest that Nugee J’s decision to hear the Injunction application without notice was based on any urgency.
43. In paragraphs 36-39 of their skeleton argument, the Defendants explain that the Claimant has dealt with others, who may have been involved in the matters about which the Claimant complains, by way of correspondence and, effectively, on notice. However, as I understand matters, those dealings only took place after the Injunction had been made, when the Claimant had obtained orders which preserve material, in circumstances where it appears that the Defendants were intimately involved in Moonbug’s acquisition of LBB. It is right that there may not be a precise coincidence between material in the control of the Defendants, on the one hand, and others, on the other hand. However, I have so far decided that there is no ground for discharging the Injunction, so, in my view, how the Claimant dealt with others after the Injunction does not alter the merits of the decision to hold the 4 September hearing without notice.

Discharge application – fair presentation obligation

44. I turn, then, to consider the Defendants’ application to discharge the Injunction on the ground that the Claimant breached its obligation to give full and frank disclosure (“the fair presentation obligation”).
45. The parties agree that the nature of an applicant’s obligation and the court’s approach in this context was set out by Ralph Gibson LJ in *Brink’s Mat Ltd. v. Elcombe* [1988] 1 WLR 1350, 1356-7, as follows:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

- (1) The duty of the applicant is to make “a full and fair disclosure of all the material facts:” see *Rex v. Kensington Income Tax Commissioners, Ex parte Princess Edmond de Polignac* [1917] 1 KB 486, 514, per Scrutton LJ.
- (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see *Rex v. Kensington Income Tax Commissioners*, per Lord Cozens-Hardy MR, at p.504, citing *Dalglisch v. Jarvie* (1850) 2 Mac & G 231, 238, and Browne-Wilkinson J in *Thermax Ltd. v. Schott Industrial Glass Ltd.* [1981] FSR 289, 295.
- (3) The applicant must make proper inquiries before making the application: see *Bank Mellat v. Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
- (4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc. v. Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in *Bank Mellat v. Nikpour* [1985] FSR 87, 92-93.
- (5) If material non-disclosure is established the court will be “astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure...is deprived of any advantage he may have derived by that breach of duty:” see per Donaldson LJ in *Bank Mellat v. Nikpour*, at p.91, citing Warrington LJ in the *Kensington Income Tax Commissioners’* case [1917] 1 KB 486, 509.
- (6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(7) Finally, it “is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded:” per Lord Denning MR in *Bank Mellat v. Nikpour* [1985] FSR 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:

“when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant...a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed:” per Glidewell LJ in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings plc*, ante, pp.1343H–1344A.”

46. In *Fundo Soberano de Angola v. Dos Santos* [2018] EWHC 2199 (Comm), Popplewell J explained, at [51]-[53]:

“Three points which are relevant to the current applications deserve emphasis. The importance of the duty has often been emphasised in the authorities. It is necessary to enable the Court to fulfil its own obligations to ensure fair process under Article 6 of the European Convention on Human Rights. It is the necessary corollary of the Court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. **If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make.** It is a duty owed to the court which exists in order to ensure the integrity of the court’s process.

The second is that although the principle is often expressed in terms of a duty of disclosure, the **ultimate touchstone is whether the presentation of the application is fair in all material respects:** see Robert Walker LJ in *Memory Corporation v Sidhu (No 2)* [2000] 1 WLR1443, citing formulations from, amongst others, Slade LJ in *Bank Mellat v Nikpour* [1985] FSR 87, 92, Bingham J in *Siporex Trade v Comdel Commodities* [1986] 2 Lloyd’s Rep 428, 437 and Carnwath J in *Marc Rich & Co. Holding v Krasner* (18 December 1998). This is again the consequence of the exceptional derogation from the principle of hearing both sides.

The evidence and argument must be presented and summarised in a way which, taken as a whole, is not misleading or unfairly one-sided. In a complex case with a large volume of documents, it is not enough if disclosure is made in some part of the material, even if amongst that which the judge is invited to read, if that aspect of the evidence and its significance is obscured by an unfair summary or presentation of the case. The task of the judge on a without notice application in complex cases such as the present is not an easy one. He or she is often under time constraints which render it impossible to read all the documentary evidence on which the application is based, or to absorb all the nuances of what is read in advance, without the signposting which is contained in the main affidavit and skeleton argument. It is essential to the efficient administration of justice that the judge can rely on having been given a full and fair summary of the available evidence and competing considerations which are relevant to the decision.

Thirdly, the duty is not confined to the applicant's legal advisers but is a duty which rests upon the applicant itself. It is the duty of the legal team to ensure that the lay client is aware of the duty of full and frank disclosure and what it means in practice for the purposes of the application in question; and to exercise a degree of supervision in ensuring that the duty is discharged. No doubt in some cases this is a difficult task, particularly with clients from different legal and cultural backgrounds and with varying levels of sophistication. But it is important that the lay client should understand and discharge the duty of full and frank disclosure, because often it will only be the client who is aware of everything which is material. The responsibility of the applicant's lawyers in this respect is a heavy one, commensurate with the importance which is attached to the duty itself. It may be likened to the duties of solicitors in relation to disclosure of documents (see CPR PD31A and *Hedrich v Standard Bank London Ltd.* [2008] EWCA Civ 905)" (emphasis added).

47. The fair presentation obligation is particularly important on a without notice application for a search order (or for similar relief) because of the invasive nature of such an order (per Donaldson LJ in *Bank Mellat*, at page 92).
48. Without seeking to diminish the importance of the fair presentation obligation in any way whatever, it seems to me that there must be some limit to that obligation. To take an example, just because a respondent might have taken the court to a number of cases to reinforce a legal proposition, so long as the applicant has fairly drawn to the court's attention the principle derived from those cases, I do not think that the applicant is required to take the court to those cases in the way the respondent would have done. To repeat what Popplewell J noted in the *Fundo* case, "the ultimate

touchstone is whether the presentation of the application is fair in all material respects” (per Robert Walker LJ in *Sidhu*).

49. There is support for the conclusion that there is some limit on the fair presentation obligation in *Gee*; paragraph 9-001, where it is said:
- “...Incorrect submissions or arguments, including erroneous legal submissions, will not amount to non-disclosure or material misrepresentation provided that such errors do not deprive the court of knowledge of any material circumstance. This is on the basis that the applicant has acted fairly and is entitled to advance his arguments as he wishes provided that the court receives a fair presentation of the case.”
50. In their skeleton argument, the Defendants identify 11 grounds on which they contend the Claimant failed in its fair presentation obligation at the 4 September hearing and Mr Reade apparently identified a further ground during the course of his submissions. The Defendants’ skeleton argument sets out the grounds in some detail. I give a sufficiently accurate summary of each of them below and set out my conclusions on each of them in turn.
51. Ground 1: *Lock*, in particular the passage quoted by Warren J in *Indicii Salus*, should have been dealt with more fully. The passage was set out in paragraph 36 of the Claimant’s skeleton argument for the 4 September hearing (“the Skeleton Argument”) which Nugee J read. Indeed, somewhat more of what Hoffmann J said in that case, which favoured the Defendants, was set out in the Skeleton Argument. Nugee J described what Hoffmann J said in *Lock* as “very interesting”. It is clear to me that Nugee J had well in mind what Hoffmann J said in *Lock* about the limits of justifiable inferences on search order applications and about the requirement that any order be proportionate. This is not a ground to discharge the Injunction.
52. Ground 2: Nugee J should have been taken to authorities about when it is legitimate for the court to draw an inference. In particular, he should have been taken to *Thane Investments Ltd. v. Tomlinson* [2003] EWCA Civ 1272, at [28]. In *Thane*, Peter Gibson LJ “emphasised...that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a freezing injunction” (per Patten J in *Jarvis Field Press v. Chelton* [2003] EWHC 2674 (Ch), at [10]). The Claimant made clear, in the Skeleton Argument, that its case on the risk of document destruction was based on inference and that it had no direct evidence that the Defendants had destroyed documents. Further, its case was not based on “a mere unfocused [allegation] of dishonesty”. Rather, its case was based on allegations of wrongful conduct directly relevant to Moonbug’s acquisition of LBB. I do not believe, therefore, that the Claimant failed in its fair presentation obligation in this respect.
53. Ground 3: The Claimant did not fairly present the Defendants’ case that:
- i) they are respectable;
 - ii) they openly said that they were entering into competition and were being financed by highly respectable institutions;

- iii) as their conduct following the making of the Injunction (including the without notice order) shows, by their compliance with it, they are not the sort of people who would destroy evidence;
- iv) there was insufficient evidence, in any event, for Nugee J to infer a sufficient risk of destruction;
- v) the Claimant has dealt with others since the 4 September hearing by correspondence.

I consider below, in more detail, a letter, dated 2 February 2018, from the Claimant's solicitors to the First Defendant's then solicitors ("the February letter") (although I do have in mind, on this ground, the conclusions I reach below in relation to that letter).

- 54. As I have explained, there is a dispute about what the Defendants revealed about their intentions and I was taken to no evidence which indicated that the Claimant knew the Defendants' case on this point or ought to have known their case (save from what might be derived from the February letter).
- 55. Nor could the Claimant know, at the 4 September hearing, how the Defendants would respond to the Injunction.
- 56. Nor is there any evidence that the Claimant's decision to deal with others in the way it has done was in the Claimant's mind at the 4 September hearing.
- 57. On a without notice application, the court is well aware that a respondent, had he had notice of the application, may well have submitted that the application should be dismissed. The very purpose of the fair presentation obligation is to allow the court to consider, so far as it is able, the without notice application from the respondent's perspective. I do not think that an applicant is required, as part of its fair presentation obligation, to say to the court that the respondent would say that the application should be dismissed (so long as the fair presentation obligation is otherwise complied with).
- 58. Further, I do not see how the fact that the Defendants take the view that they are respectable people is material to the Injunction application.
- 59. In the circumstances, this ground is not made out.
- 60. Ground 4: In paragraph 63 of the Skeleton Argument (in the section on full and frank disclosure), the Claimant mentioned that *Goulding: Employee Competition* (3rd ed) made the point that "orders for the early provision of information or early disclosure of documents are exceptional and should not be granted where they amount to a fishing expedition, or are "tantamount to standard disclosure in an unpleaded case". The Defendants contend that the Claimant should have made more of this point at the 4 September hearing and should have drawn, to Nugee J's attention, authorities which support that legal proposition; in particular, *AON Ltd. v. JCT Reinsurance Brokers Ltd.* [2009] EWHC 3448 (QB), where Mackay J said, at [24]:

"In conclusion, I do not doubt, and nor has it really been strenuously argued by the defendants, that there are no

circumstances and there is no case in which disclosure of this general type can be ordered where it is appropriate to do so in the exercise of the court's discretion. The issue for me is whether the circumstances here are such that it is appropriate to make what is on any view an exceptional and not a routine order, one which should not be made as a matter of course where prohibitory injunctions of the type found elsewhere in this proposed order are to be found."

To my mind, the principle in issue, as articulated in *AON* in particular, was fairly set out in the Skeleton Argument and the Claimant was not required to repeat the point in oral submissions when Nugee J indicated that he had read the Skeleton Argument. Nor do I think, for the reasons I have already explained, that the Claimant was required to take the Judge to authorities which supported the principle. Indeed, it is perhaps instructive to note that, in *AON*, Mackay J said, at [18]:

"To say that applications such as this are fact sensitive is a trite proposition. The assistance therefore to be derived from decisions in other cases is limited except where clear statements of principle can be discerned..."

61. Ground 5: The Claimant did not fairly represent to Nugee J that the Delivery Up order, in particular, was not required to be made without notice. I understand the Defendants' complaint to be that the Claimant should have pointed out to Nugee J that, had the Defendants been at the 4 September hearing, the Defendants might have argued that it was not necessary to make the Delivery Up order (in particular) at that hearing.
62. In paragraph 63 of the Skeleton Argument, the Claimant made the point that "the [Defendants] would be likely to argue that this part of the order is not so urgent as to justify being made without notice".
63. Further, the without notice order contained a wider Delivery Up order, because it covered "Specified Documents". At the on notice hearing on 12 September 2018, Nugee J varied the Delivery Up order to exclude Specified Documents.¹⁹ During the course of the 4 September hearing, Nugee J asked, on more than one occasion, whether, whether or not Specified Documents ought to be delivered up, should be determined on the return date. Nugee J's intervention supports the conclusion that he had well in mind whether it was appropriate to make the Delivery Up order at the 4 September hearing.
64. In these circumstances, I am satisfied that, in this respect, the Claimant complied with its fair representation obligation.
65. Ground 6: The Claimant should have drawn to Nugee J's attention properly that complying with the Injunction would be an onerous task; particularly, I understand the Defendants to contend, for them. It is clear, from the transcript of the 4 September hearing, that Nugee J was taken through the draft Injunction carefully and that he had

¹⁹ So that, in my view, any criticism of the Claimant in this particular respect has already been properly addressed.

in mind that compliance with the Injunction would be onerous; saying, at one point: “He has to do a whole lot of things immediately...[H]e can’t do all of them at the same time...” Further, Mr Reade accepted, properly in my view, that the Claimant could not reasonably know about any matters peculiar to the Defendants which made their compliance with the Injunction unusually onerous. Nugee J having apparently made clear that he had well in mind the terms of the draft Injunction, I do not think that anything more was required of the Claimant, as to the timings in the Injunction, in order for it to comply with its fair presentation obligation.

66. Ground 7: The Claimant did not properly draw to Nugee J’s attention that, to comply with the Delivery Up order, the Defendants might have to deliver up material confidential to third parties. I understand that the Defendants make a particular criticism about the order for the delivery up of Specified Documents in the without notice order. As to that, as I have said, in my view, any criticism of the Claimant was properly addressed at the hearing on 12 September 2018.
67. The reason why the Defendants have delivered up material which is confidential to third parties, in over-compliance with the Delivery Up order, is because they have mixed material confidential to the Claimant with material confidential to others. It must be remembered that, by the Delivery Up order, the Defendants were required to deliver up all copies in their control of the Claimant’s confidential information and documents. I was not taken to any evidence which showed that the Claimant knew or ought to have known that the Defendants had mixed confidential information. The order did not compel the Defendants to deliver up to the Claimant material confidential to third parties. This ground might have been a good ground of complaint if the Claimant knew or ought to have known, by the 4 September hearing, that the Defendants had mixed confidential information but, as I have said, the Claimant did not know this nor ought it to have known this, on the evidence before me. I have concluded, therefore, that this ground for the discharge of the Injunction is not made out.
68. Ground 8: The Claimant failed to fairly make the point to Nugee J that the Injunction was almost as intrusive as a search order. I am clear that this ground ought to be rejected. The Claimant did make the Injunction application at the 4 September hearing on the basis, effectively, that it was seeking an order almost as intrusive as a search order. Pages 3 to 19 of the Skeleton Argument considered the requirements for a search order in detail. The following exchange took place at the 4 September hearing:

“Nugee J: ...I can see it is not as intrusive as an Anton Pillar in enabling you to march in and rummage through someone’s home, but I don’t think it should be described as anything other than quite an intrusive order.

Mr Anderson: My Lord, I entirely accept that...Hence, we have approached it by saying to my Lord: let’s look at this through the lens of the criteria of a search order because I accept this is a quasi-search order.

Nugee J: Yes. Exactly...”

Nugee J was in no doubt about how invasive the without notice order was.

69. Ground 9: The Claimant should have told Nugee J that, had the Defendants been at the 4 September hearing, they are likely to have contended that the Claimant was sufficiently protected, at that stage, by orders which preserved documents. The Defendants contend, in effect, on this ground, that the Claimant should have drawn to Nugee J's attention that the Delivery Up order and the Information Provision orders were not necessary at that stage. On reflection, I do not think that this ground takes matters any further than grounds 4 and 5 above.
70. Ground 10: The Claimant did not properly address, in evidence, the likelihood that it might not have been able to acquire LBB. The Defendants make the point that LBB's vendors had given a mid-range valuation of its intellectual property of £72 million. They also contended that:
- i) even though that that was not necessarily the value of the business (that is, of LBB), the Claimant only had access to a US\$30 million revolving credit facility;
 - ii) various individuals represented to them that the Claimant was not financially able to acquire LBB.

They pointed out that the Claimant did not attempt, in due course, to buy LBB.

71. Nugee J was taken to the intellectual property valuation at the 4 September hearing (although it is right to note that that was not done in the course of submissions about whether the Claimant could have acquired LBB).
72. Whether the Claimant was financially able to acquire LBB (or a controlling interest in it) is disputed. Whether or not the individuals identified by the Defendants as having made representations to them about the Claimant's finances made those representations is also disputed (at least by those individuals who have made witness statements).
73. In support of the Injunction application, Mr Donovan, the Chief Executive Officer of DHX Media Ltd. (of which the Claimant is an indirectly wholly owned subsidiary), made an affidavit in which he said:
- “...I anticipate that it could be said by [the Defendants] that [the Claimant] did not have the funds available to purchase [LBB] and the opportunity was passed over – or could not have been exploited anyway – by [the Claimant] for financial and other reasons...”
74. At the 4 September hearing, Mr Anderson said:
- “...what is not unlikely to be said by the Defendants is well -- when the time comes -- you had no interest in [LBB] or you didn't have the money to acquire it and so you can't complain that we've taken that opportunity elsewhere...”

He continued by explaining, expressly, that he was making the point as part of the fair presentation obligation.

75. The Claimant accepts that it did not try to acquire LBB in due course but the circumstances in which it did not try to do so are disputed. The Claimant contended, before me, that it did not try to do so, because those who were given the job of considering the acquisition were the very people who left its employment and are now employed (in the case of the Defendants) or may be employed by Moonbug.
76. Bearing in mind the continuing issues in dispute which I cannot resolve on the Discharge application (and was not asked to do so), I have concluded that the Claimant did not fail in its fair presentation obligation on this ground. The most difficult aspect of this ground to resolve has been whether or not the Claimant said enough to Nugee J, at the 4 September hearing, about the Claimant's financial ability to acquire LBB. However, on reflection, having considered everything that Mr Anderson said at the point in the 4 September hearing from which the above quote has been taken, as I have said, I have come to the conclusion that the Claimant did not fail in its fair presentation obligation on this ground.
77. Ground 11: The Claimant should have made clear to Nugee J that it is arguable that the Defendants were not fiduciaries. Mr Reade accepted that the Defendants owed the Claimant a duty of fidelity and I understood him not to dispute that it would be a breach of that duty if they misused the Claimant's confidential information. At first sight, it does not seem to matter whether or not the Defendants were fiduciaries (a matter which is apparently disputed in any event). Mr Reade suggested, however, that the remedy for breach of a duty of fidelity is normally limited to damages. He did not take me to anything to support that submission. In my view, if the grounds for making a search-type order are otherwise made out (which, in this context, importantly include a strong prima facie case of a civil cause of action (per Henry Carr J in *BMW* at [14])), I do not believe that it is material whether or not the Defendants were fiduciaries or only owed a duty of fidelity. I therefore do not believe that this ground for the discharge of the Injunction is made out.
78. Ground 12: The Claimant did not fairly present meetings which the First Defendant held with Mr Donovan, Ms Loi and Mr Scherba. In his oral submissions, Mr Reade relied on two meetings; one, on 22 December 2017, with Mr Donovan ("the December meeting") and the other, on 22 November 2017, with Ms Loi and Mr Scherba ("the breakfast meeting").
79. The First Defendant contends that, at the December meeting, he told Mr Donovan that he "was going to try to raise capital to set up [his] own kid's video content company". Mr Donovan disputed that. In his affidavit in support of the Injunction application he said that the First Defendant "did not mention to...at [their] lunch meeting that the reason for his departure was that he was planning to set up the New Venture or that he was looking for third party funding". The parties agree that I cannot resolve this dispute on the Discharge application.
80. However, Mr Reade pointed out that the February letter (written by the Claimant's solicitors) said, with reference to the December meeting:

"When [the First Defendant] indicated that he intended to seek funding for a new venture, Mr Donovan made it abundantly clear to [the First Defendant] that he was prohibited from doing so during the garden leave period..."

This version of events is consistent with what the First Defendant says and inconsistent with what Mr Donovan says.

81. It is not disputed that the February letter was sufficiently material that it had to be fairly drawn to Nugee J's attention as part of the Claimant's fair presentation obligation. In his affidavit, in a footnote, Mr Donovan points out that the February letter is consistent with what the First Defendant says but then adds that the letter is incorrect. Nugee J clearly had the February letter in mind (because of what he had read before the 4 September hearing) and the following exchange took place at the 4 September hearing:

"Nugee J: ...It's difficult to see how the letter could have been written in those terms...if nothing was said about it at all.

Mr. Anderson: ...He's...being candid and telling my Lord on oath the best of his recollection now. I take the point, my Lord...

Nugee J: But this is significant because it suggests that [the First Defendant's] response to the claim will be...: all I was doing was trying to line up possible funding for something to be done once my garden leave had expired."

I understand the Defendants' complaint, in this context, to be that the contents of the February letter were not fairly drawn to Nugee J's attention. I have concluded that the Claimant did fairly draw to the Judge's attention the contents of the February letter. The relevant contents of the February letter were referred to neutrally in Mr Donovan's affidavit, albeit in a footnote. Even though referred to in a footnote, Nugee J clearly had the relevant contents in mind. Once the Judge had so indicated, I do not believe that there was any further obligation on the Claimant to draw those contents to the Judge's attention.

82. The breakfast meeting was not referred to at the 4 September hearing. The First Defendant says that, at that meeting, he "shared with [Ms Loi and Mr Scherba] and outlined [his] plan to leave [the Claimant]. [He] told them details of [his] proposal from Raine and that [he] would be setting up a competing business with Rene Rechtman." Ms Loi and Mr Scherba dispute this version of events. Ms Loi said:

"...[The First Defendant] indicated to Mr Scherba and me that he was considering leaving [the First Defendant]...I recall [the First Defendant] expressing his view that there was plenty of money in the market to set up a new venture...There was no definitive plan presented by [the First Defendant] at all, merely a number of ideas that he was apparently considering...

No specifics about [the First Defendant's] new venture were discussed at the meeting and [he] did not mention anything about proposals that had been made by Raine...to fund a potential new venture. He certainly did not disclose that he planned to misappropriate confidential information belonging

to [the Claimant] or to acquire [LBB] through a new venture in direct competition to [the Claimant].”

83. At the hearing before me, Mr Anderson pointed out that, in paragraph 17.4.1 of the Defence, the Defendants contend:

“...The “New Venture” was and remained nothing more than a highly speculative possibility until the end of December 2017/beginning of January 2018...and even then it remained only a possibility until later in 2018.”

84. Mr Reade did not explain why the breakfast meeting is material. Bearing in mind what the Defendants say in their Defence about the state of affairs in November 2017, I am not satisfied that what was said at the breakfast meeting, to the extent accepted by the Claimant, was material. Bearing in mind too that what actually took place at the breakfast meeting is disputed, I have concluded that, that the Claimant did not mention it in its evidence in support of the Injunction application or at the 4 September hearing, was not a breach of its fair presentation obligation.
85. In the light of all I have said, after careful consideration, I have concluded that the Defendants have not established that the Claimant failed in its fair presentation obligation and that the Discharge application fails on this basis too.

The Inspection application

86. There is no dispute that the court has the jurisdiction to regulate how to deal with the Defendants’ over-compliance with the Delivery Up order. Mr Anderson suggested that that jurisdiction involves the exercise of a discretion and Mr Reade suggested that that jurisdiction requires the court to devise a mechanism which is fair. I do though need to consider the basis of the undisputed jurisdiction in order to see if there is any guide to how the broad discretion which all parties apparently contended for might be applied.
87. The Claimant relied, in support of the Inspection application, principally on section 37 of the Senior Courts Act, which provides:
- “(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
- (2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.”
88. On this basis, what I am effectively being asked to do is to fix the terms and conditions (by varying the Injunction in light of matters which have become apparent since it was made) on which the Claimant is to enjoy the fruits of the Delivery Up order. On this basis, it seems to me that, in imposing “just” terms and conditions ancillary to the Delivery Up order, a court ought to have in mind that, when considering the grant of an interim injunction, it has to take into account the balance of convenience (or, more accurately perhaps, “the balance of the risk of doing an injustice” (per Lord Diplock in *NWL Ltd. v. Woods* [1979] 1 WLR 1294, 1306)).

89. The Claimant makes the Inspection application, alternatively, under CPR r.25.1(1)(c)(ii) to which I have already referred, in respect of which the court should consider what inspection facility for an applicant is reasonably necessary and proportionate, as note 25.1.8 of the 2018 White Book explains. In my view, the requirement to consider necessity and proportionality is, just as is the need to consider “the risk of doing an injustice”, a limiting feature on the broad discretion suggested by the parties.
90. A point well made by Mr Reade (and by Latham & Watkins (London) LLP) is that, not only did the Claimant, on the Injunction application, not seek an order to inspect material in the Defendants’ control which is confidential to the Defendants or third parties, but the court would have been very unlikely, at least, to have permitted such inspection had it been sought. This is a weighty factor militating against any order on the Inspection application which allows the Claimant to review material which is said to be confidential to the Defendants or to third parties. This factor favours the Scott Schedule approach.
91. On the other hand, it is not possible to ignore what has happened in the execution of the Delivery Up order. It has now become clear, apparently, that the Defendants have mixed the Claimant’s confidential information with confidential information belonging to others. The reality is that, had the Defendants, in compliance with the Delivery Up order, delivered up partially redacted documents:
- i) there is every possibility, in this heavily disputed case, that the Claimant would have taken objection to the redactions;
 - ii) those objections may very well have remained unresolved between the parties;
 - iii) there is every possibility that the court would have had to resolve any disputes about the redactions;
 - iv) the Claimant is likely to have taken a more expansive (rather than more focused) approach to its objections because it would have had no opportunity to consider the disputed material but would have seen documents partially redacted;
 - v) the parties would have had difficulties in making focused submissions on any application to court because the Claimant would not have seen the disputed material and the Defendants would not wish to reveal the disputed material.

These factors make the Scott Schedule approach less attractive, in my view, because the Claimant would have completed its part of the Scott Schedule without having been able to consider the disputed material.

92. In the unusual circumstances of this case, where the Defendants have mixed material confidential to different parties, if a mechanism can be devised which protects confidences of the Defendants or third parties, in practice, but allows the parties to address disputes as to redactions in a focused way, I take the view that an order giving effect to that mechanism would be the just result and would be reasonably necessary and proportionate.

93. I am not satisfied that the draft Inspection order, in its current form, is such a mechanism. However, I have concluded that, if the draft order is amended as I now set out, an order (in that amended form) will be such a mechanism and so, subject to those amendments being incorporated in the order, I will make an order in the form contended for by the Claimant.²⁰
94. The draft Inspection order must be amended as follows:
- i) I do not see, at present, why the Limited Use undertaking should permit the Claimant to use documents, save (broadly) to the extent that they are its documents or contain its confidential information, for any purpose at all (except at any hearing where any disputed redaction for confidence is to be determined). By the Delivery Up order, the Defendants' obligation was (broadly) to deliver up or procure the delivery up of copies of the Claimant's confidential information and documents. I do not see why the Claimant should be entitled to make any use, for example, of material, not confidential to it, in documents which belong to unconnected third parties which have been delivered up, where that material has not been redacted. The Limited Use undertaking will need to be amended accordingly;²¹
 - ii) In my view, the time for the Defendants to comply with paragraph 1 of the draft Inspection order is too short. As it has turned out, with hindsight, compliance with the Delivery Up order in a short time frame appears to have been very burdensome and the haste with which the Defendants were required to comply with the Delivery Up order is why, ultimately, the Inspection application has had to be made. Having considered what has been said about the original attempt to comply with the Delivery Up order and about the mixing of confidential information, I take the view that the Defendants should have 28 days, in the first instance, to comply with paragraph 1;²²
 - iii) The proposed number of Mishcon de Reya LLP representatives who are to be members of the confidentiality club seems to me to be high. In practice, in my view, the greater the number of members of a confidentiality club, the greater the risk of an inadvertent dissemination of confidential material otherwise than as permitted. It is necessary to have in mind the limited role played by members of the confidentiality club in this case. That role is to assess whether a redaction, by the Defendants, on the ground of confidence is accepted. I do not think that, in the first instance, it is necessary for five Mishcon de Reya LLP representatives to participate in that exercise. Even though those five

²⁰ Interestingly, perhaps, when discussing how parties might deal with documents redacted for confidence (and not privilege), Hollander: Documentary Evidence (13th ed) comments, at paragraph 10-16: "...It will often be sensible to ask for the lawyers to ask to see the original unredacted document on terms that the contents are not communicated to the client. There can surely be no objection to this in any case where the redaction is not based on privilege. Where the redaction is based on privilege, then it will be inappropriate to have sight of the other side's document referring to privileged legal advice..."

²¹ In reaching my determination on the Inspection application, I have assumed that the Claimant will offer a suitably modified form of Limited Use undertaking. If it does not, I will need to reconsider the outcome of the Inspection application. In any event, I am prepared to hear further submissions from the parties on the form of the Limited Use undertaking.

²² The draft Inspection order contains an express liberty to apply provision which I take to be intended to permit any party to apply back to court for a variation of the order in the event that some feature of it proves unworkable or otherwise impractical.

representatives act (I assume) for the Claimant in these proceedings, because of the undertakings which the confidentiality club members will have to give, I can see no inconvenience to the Claimant or Mishcon de Reya LLP if not all five representatives are members of the confidentiality club. Balancing the competing interests of the parties, the number of Mishcon de Reya LLP representatives in the confidentiality club will need to be reduced to three in the first instance;

- iv) I have come to the clear conclusion that, in the first instance, no lay representative of the Claimant should be a member of the confidentiality club. As I have said, the role of the confidentiality club members will be to consider whether the Defendants' redactions on the ground of confidence are accepted. It is likely, in my view, that, unless the members of the confidentiality club come to the clear conclusion that the redacted material is confidential to the Defendants or third parties (or is sufficiently irrelevant to the proceedings that there is no practical benefit in not accepting the redaction), they will challenge the redaction. I think that it is unreal to suppose that the lay representatives are more likely to accept a redaction than the other members of the confidentiality club. It is difficult to see, therefore, how the lay representatives' membership of the confidentiality club will assist the court in managing the dispute that has arisen as a result of the Defendants' over-compliance with the Injunction. On the other hand, I do think that there is a real risk of a perception of injustice in a lay representative of the Claimant reading material which turns out to be confidential to the Defendants or third parties; particularly where the court's ability to police the undertakings given by members of the confidentiality club would be more difficult in the case of the lay representative who is out of the jurisdiction;
- v) Bearing in mind that, under the draft Inspection order, the confidentiality club can only inspect material redacted for confidence, and in the light of paragraph 4 of the draft Inspection order, I do not understand what purpose paragraph 3 of the draft Inspection order continues to serve (because the only documents which the Defendants can withhold rather than redact, under the draft Inspection order, are those containing privileged material, which is, I understand, the material to which paragraph 3 is directed);
- vi) Paragraph 4 of the draft Inspection order is, I believe, in the form originally proposed by the Claimant and so it has not kept up with the changes, from the original form, to paragraphs 1 and 2 of the draft Inspection order and it does not take into account the other changes to the draft order required by this judgment. Paragraph 4 will need to:
 - a) specify a time, after the 14 day inspection exercise contemplated by paragraph 2 of the draft Inspection order, for the Claimant's solicitors to notify the Defendants' solicitors that objection is taken to particular redactions. 7 days for this seems appropriate in my view;

- b) give the Defendants more than 2 days to deliver up the documents in issue, because the exercise may be burdensome. In my view, 7 days to do so, in the first instance, is appropriate;²³
- vii) Paragraph 5 of the draft Inspection order will need to be amended, in the light of the comments I have made about paragraphs 3 and 4 of the draft Inspection order. I also take the view that the time limit for the Defendants to comply with paragraph 5(i) should be mirror the time given for the Defendants' delivery up obligation in paragraph 4 of the draft Inspection order;²⁴
- viii) The order will need to deal with how the Claimant's solicitors are to destroy the soft copies of the unredacted documents which they have in their control and which, under the order, they are taken to accept the Claimant should not inspect unredacted. If necessary, I will hear further from counsel about how this might be sensibly achieved (although this is a matter which ought to be capable of agreement). One practical way of achieving this would be for one of the Claimant's solicitors in the confidentiality club to be given the responsibility, by the order, for destroying all the soft copies of those unredacted documents in their control within a fixed period after the Claimant's solicitors are to be taken to accept the Defendants' objection to inspection and for that solicitor to confirm, within a specified time thereafter, by letter to the Defendants' solicitors, that that exercise has been completed.

Disposal

95. In the circumstances:

- i) the Discharge application is dismissed;
- ii) the Inspection application succeeds, subject to the modifications to the draft Inspection order I have set out in this judgment.

²³ In its current form, paragraph 4 refers to the "opinion of the Claimant". Some alternative form of wording may be appropriate if no lay representative of the Claimant is a member of the confidentiality club. Nor do I understand the purpose of sub-paragraph (b). I will hear further submissions on this last point but my current view is that that sub-paragraph is unnecessary.

²⁴ Because the confidentiality club will only be challenging redactions for confidence, the reference to "delivery up of [disputed] documents" and the like may be otiose.