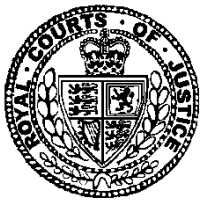

Neutral Citation Number: [2019] EWHC 2058 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No CL-2015-000559

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

Tuesday 30 July 2019

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

VENTRA INVESTMENTS LIMITED
(in creditors' voluntary liquidation)

Claimant

- and -

BANK OF SCOTLAND PLC

Defendant

- -

Mr Stephen Davies QC, Ms Anna Lintner and Mr Michael d'Arcy
(instructed by *Hausfeld & Co LLP*)
appeared for the Claimant

Ms Rosalind Phelps QC, Mr Rupert Allen and Mr Max Kasriel
(instructed by *DLA Piper (UK) LLP*)
appeared for the Defendant

Hearing dates: 3, 4, 12 July 2019

- -

.....

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.

……..

MR SALTER QC:

(A) Introduction

1. The trial of this action is currently listed to begin on 15 January 2020, with a time estimate of 20 days. The primary issue before the court on these applications is whether, in the interests of justice and in accordance with the overriding objective, I should vacate that listing to allow time for the Defendant to give the further disclosure which the Claimant asks me to order, and for the Claimant both to incorporate the results of that further disclosure into its statements of case and into its evidence, both factual and expert, and otherwise to amend its Particulars of Claim to expand the scope of its claims against the Defendant.

2. The Claimant's case is that, for a variety of reasons, a fair trial in January 2020 is no longer possible. The Defendant resists the proposed adjournment of the trial, and argues that the impossibility of accommodating the amendments and further disclosure now sought by the Claimant in the six-month period between now and the trial date is a strong (though not the only) reason why I should refuse the Claimant's applications.

(B) Background

3. The Claimant ("VIL") is a property development company, now in creditors' voluntary liquidation. Its business model was to buy residential properties, to renovate them, and then to let them out. The Defendant ("BOS") was VIL's main banker. Over the period from 2004 to 2008, BOS made various loan facilities available to VIL. The terms of those facilities (on VIL's case) required VIL to buy interest rate hedging products from BOS. In consequence, on 23 June 2005 VIL and BOS entered into a Master Agreement on ISDA terms, and over the period from June 2005 to February 2008 entered into 3 interest rate derivative contracts ("the Original Trades") under which VIL was the fixed-rate payer and BOS the floating-rate payer.

4. In the period between October 2008 and February 2009, VIL and BOS entered into a further 5 interest rate derivative contracts ("the Replacement Trades"), which restructured and replaced the Original Trades. Again, VIL was the fixed-rate payer and BOS the floating-rate payer. Both under the Original Trades and under the Replacement Trades, the floating rate payable by BOS was three-month GBP LIBOR.

5. BOS became part of the Lloyds banking group ("Lloyds") in January 2009. In about May 2010, responsibility for VIL's accounts was transferred within the group to Lloyds' Business Support Unit ("BSU"). On 16 May 2011 BOS appointed Sarah Rayment and Shay Bannon (the "Receivers") of BDO UK LLP ("BDO") as Administrative Receivers of VIL.

6. BOS had entered into an Umbrella Management Agreement (the "UMA") with Grainger RAMP Ltd ("Grainger") on about 3 May 2011. According to Mr Greaves (in his trial witness statement dated 3 May 2019 on behalf of BOS), the purpose of the UMA was:

> **.. to protect and maximise the realised value of [Lloyds'] secured assets, upon the insolvency of a customer, through the appointment of [Grainger as] a well-established residential asset manager to actively manage and sell the customer's assets ..**

To that end, the terms of the UMA obliged Grainger (at BOS's request) to use its best endeavours to agree with BOS a "Portfolio Business Plan" for the management and sale of a specified BOS customer's charged assets, and thereafter to enter into a Portfolio Management Agreement (a "PMA") incorporating that agreed Portfolio Business Plan with any administrator or fixed=charge receiver appointed by BOS in relation to that customer.

7. Accordingly, on 20 May 2011, Grainger entered into a PMA with the Receivers, under which Grainger undertook (inter alia) to provide a variety of services, including letting and sales management, in relation to the portfolio of properties owned by VIL which was charged to BOS. I shall return to the topic of the UMA and the PMA, and to the detailed terms of those agreements, later in this judgment. Under Grainger's management, the portfolio of approximately 89 properties owned by VIL was sold. This produced gross sale proceeds of just under £57m.

8. On 16 March 2015, VIL was placed into creditors' voluntary liquidation. On 24 July 2015, the present action was begun by the joint liquidators of VIL.

9. The claims currently made by VIL in this action fall into three distinct parts: (1) claims which I shall refer to in this judgment as the "Misrepresentation Claims"; (2) claims which I shall call the "Breach of Duty Claims"; and (3) claims which I shall call the "Undervalue Claims". In broad summary, these three sets of claims are as follows:

9.1 The Misrepresentation Claims: VIL alleges that it was induced to enter into the Replacement Trades by 3 types of misrepresentation fraudulently made to it by or on behalf of BOS:

9.1.1 The "Value Representations", to the effect that the Original Trades had a significant positive value to VIL, which it could only release by entering into the Replacement Trades;

9.1.2 The "Proposed Increase Representations", to the effect that VIL would make it more likely that BOS would agree to increase VIL's

term loan facilities by agreeing to enter into the Replacement Trades; and

9.1.3 The "LIBOR Representations" - implied representations about the integrity of the process for setting LIBOR, of the kind recently considered by the Court of Appeal in *Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2018] EWCA Civ 355, [2018] 1 WLR 3529, and by Picken J in *Marme Inversiones 2007 SL v Natwest Markets Plc* [2019] EWHC 366 (Comm).

9.2 The Breach of Duty Claims: VIL alleges that BOS failed to provide sufficient information to VIL to allow it accurately to assess the risks involved in the Replacement Trades and (in particular) failed to explain to VIL the long-term effect of a potential fall in interest rates. VIL's case is that this failure constituted an actionable breach of duty on the part of BOS.

9.3 The Undervalue Claims: VIL alleges that its portfolio of properties was sold at an undervalue by Grainger on behalf of the Receivers. If properly marketed, VIL says that the portfolio should have produced gross proceeds of nearer £74m. VIL also alleges that Grainger and/or the Receivers levied management and selling fees which were excessive and unreasonable. VIL's case is that BOS is vicariously liable for the actions of the Receivers, on the basis that BOS "directed, interfered and/or so intermeddled with the conduct of the Receivers" as to make it liable in equity to VIL.

10. All of these claims are strenuously denied by BOS.

(C) The Procedural History

11. By way of further background, I must set out a little of the procedural history of this action. As I have already mentioned, the Claim Form was issued on 24 July 2015. VIL suggests that the Receivers were contractually precluded and/or were deterred by the economic realities of their relationship with BOS from taking any steps to sue BOS, and that VIL's Joint Liquidators in reality acted with commendable promptness in beginning these proceedings only four months after their appointment in March 2015. That meant, however, that the issue of the Claim Form was not preceded by the usual pre-action correspondence. It was therefore followed by an agreed stay to enable the parties to go through that process. Thereafter, VIL served its Particulars of Claim on 1 July 2016.

12. On 7 October 2016, BOS served its Defence. At the same time, it also served an application by which it sought (a) summary judgment in relation to certain parts of VIL's claims, on the basis that they were statute-barred; and (b) the striking out of

certain other sections of the Particulars of Claim. BOS ultimately withdrew its application for summary judgment, but was successful in its strike-out application at a hearing on 26 January 2017 before Ms Sara Cockerill QC (now Cockerill J, but then sitting as a Deputy Judge of the High Court). VIL served its Amended Particulars of Claim ("the APoC") on 30 August 2017. BOS served its Amended Defence on 29 September 2017, and VIL served its Reply on 3 November 2017.

13. The first Case Management Conference took place before Ms Sonia Tolaney QC (sitting as a Deputy Judge of the High Court) on 24 January 2018. Ms Tolaney gave directions intended to lead to a trial starting on 24 June 2019. These included directions that BOS should give what was defined as "Stage I LIBOR Disclosure" by 29 March 2018, and that both parties should give standard disclosure (except, in the case of BOS, in relation to the "LIBOR Issues") by 8 June 2018. VIL was also required further to amend its Particulars of Claim, after consideration of BOS's LIBOR disclosure, by giving additional particulars of its allegations of fraud.

14. On 8 June 2018, the parties agreed to extend the date for standard disclosure to 27 July 2018, to permit a mediation to take place on 11 July 2018. On 16 July 2018, DLA Piper (UK) LLP ("DLA Piper"), the solicitors acting for BOS, confirmed to Hausfeld & Co LLP ("Hausfeld"), the solicitors acting for VIL, that BOS would be unable to give its non-LIBOR disclosure by 27 July 2018. The parties accordingly agreed that the proposed June/July 2019 trial date should be vacated: and Jacobs J made an order to that effect by consent on 31 July 2018. The parties thereafter agreed a revised timetable, intended to lead to a trial re-listed to begin on 15 January 2020. This revised timetable was embodied in an order made by consent by Phillips J on 4 September 2018. Standard disclosure was thereafter given by the parties on 12 October 2018.

15. On 3 May 2019, the parties exchanged their non-LIBOR factual witness evidence. The parties have not yet completed the ordered sequential exchange of expert evidence as to break costs and property and rental and income valuation. BOS has not yet served its factual evidence in relation to the LIBOR allegations. Nor have the parties completed the ordered sequential exchange of expert evidence as to forensic accountancy. The parties have, however, agreed a revised timetable under which these stages are all due to be completed prior to the PTR, which is presently listed for 10 December 2019.

(D) The Applications now before the Court

16. There are two applications presently before the court: (1) the Disclosure and Amendment Application; and (2) the Adjournment Application. Each was issued on 29 March 2019.

16.1 The Disclosure and Amendment Application: Although it is not expressly framed in precisely these terms, it is convenient to consider the Disclosure and Amendment Application in 3 parts:

16.1.1 First, VIL seeks an order that BOS should disclose "All documents relating to the [Undervalue Claims], including documents relating to the sale of VIL's portfolio in the possession of [Grainger] and Dickinson Dees" (Dickinson Dees were the conveyancing solicitors appointed by Grainger to act on the sale of VIL's portfolio);

16.1.2 Secondly, VIL seeks an order giving it permission to Re-Amend its Particulars of Claim, in order to plead a similar LIBOR Representation claim in relation to the Original Trades to that presently pleaded in relation to the Replacement Trades, and (consequently) to plead a new case in relation to rescission, causation, loss and damage;

16.1.3 Thirdly, VIL seeks a variety of detailed orders for further disclosure and further information in relation to documents said to bear on the Undervalue Claims and the Misrepresentation and Breach of Duty Claims.

16.2 The Adjournment Application: This seeks an order vacating the existing trial date and setting a new timetable, making due allowance for the further disclosure and re-amendments presently sought, and for possible re-re-amendments in the light of that further disclosure.

17. These applications are supported by the third and fourth witness statements of Ms Lianne Craig, made on 29 March 2019 ("Craig 3") and 24 June 2019 ("Craig 4") and by the seventh witness statement of Mr Simon Bishop, made on 29 March 2019 ("Bishop 7"). Ms Craig is a partner and Mr Bishop a senior associate in Hausfeld. They are opposed by the first witness statement of Mr Christopher Harvey, made on 28 May 2019 ("Harvey 1"). Mr Harvey is a partner in DLA Piper. The parties have also referred me to a number of other witness statements and documents contained in the 19-file bundle prepared for this application.

18. BOS has consented to some of the re-amendments sought by VIL, and has provided some further disclosure. However, it disputes each aspect of these present applications. In particular, BOS strongly contends that the date currently fixed for trial should be maintained.

19. It was originally part of VIL's case on both of these applications that it would in any event be necessary to adjourn the present trial date, as even the case as presently

constituted could not be accommodated within the current 20-day time estimate. However, the Commercial Court Listing Office has recently confirmed that a trial of up to 44 Commercial Court sitting days (11 weeks) - which is VIL's current estimate - could be accommodated in Hilary Term 2020, starting on the currently fixed date of 15 January 2020. That argument is therefore no longer pursued by VIL.

20. The hearing of these applications concluded late on Friday 12 July 2019. On 17 July 2019 Hausfeld delivered a letter enclosing a series of documents which it invited me to take into account in connection with certain of VIL's applications for additional disclosure. On 18 July 2019, I received by email a letter from DLA Piper objecting to what they described as VIL's "belated attempt to introduce new evidence". I had by then already briefly read Hausfeld's letter and its enclosures. I have, however, put the contents of Hausfeld's letter and those new materials out of my mind, and have not taken them into account in reaching my decisions. In my judgment, it would be wrong of me to entertain this new material otherwise than by agreement. There was ample opportunity for VIL to put any material it wished before the court prior to the hearing. The late submission of these materials, after the conclusion of the hearing, has meant that there has been no adequate opportunity for BOS to deal with them.

(E) The relevant legal principles

21. Certain principles are common to several of the parts of these applications. It may therefore be helpful for me first to set out some general principles of law relating to statements of case, to disclosure, and to "late" applications, before I turn to apply those principles to the detail of the applications now before me.

(E1) Statements of Case

22. The function of statements of case is to define the issues which the court has to decide and to ensure that each party knows the case which it has to meet. As Dyson LJ noted in *Al-Medenni v. Mars UK Limited* [2005] EWCA Civ 1041 at [21]:

> **.. It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone ..**

23. As the commentary at paragraph 16.0.1 of *Civil Procedure* notes, it does not follow that a court at trial will never entertain and decide an unpleaded issue. The true position was explained by Lord Phillips MR in *Loveridge and Loveridge v Healey* [2004] EWCA Civ 173 at [23]:

> **Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point.**
>
> **Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.**

24. In order to assist in identifying the issues in the action, Particulars of Claim must include a concise statement of the facts on which the claimant relies: see CPR 16.4(1)(a). Subject to that overriding requirement, Particulars of Claim and other statements of case in the Commercial Court should be "as brief and concise as possible". "Particular care should be taken to set out only those factual allegations which are necessary to enable the other party to know what case it has to meet. Evidence should not be included": see paragraphs C1.1(a) and (e) of the Commercial Court Guide. In this context, "evidence is the material by which the facts will be proved (documents, witness statements and the like), while facts are the facts which, once proved by evidence, will be relied upon": *Grove Park Properties Ltd v The Royal Bank of Scotland Plc* [2018] EWHC 3521 (Comm) at [26] per Males J.

25. Clarity is usually better served by brevity than prolixity. As Lord Woolf MR pointed out in *McPhilemy v Times Newspapers Ltd and others* [1999] 3 All ER 775 at 792-3:

> **.. What is important is that the pleadings should make clear the general nature of the case of the pleader ..**
>
> **.. As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification ..**

As Leggatt J also noted in *Tchenguiz v Grant Thornton UK LLP* [2015] EWHC 405 (Comm), [2015] 1 All ER (Comm) 961 at [2]:

> **As commercial transactions have become more complex and more heavily documented (including electronically), adhering to the basic rules of pleading has become both increasingly difficult and all the more important .. It is all the more important because prolixity adds substantial unnecessary costs to litigation at a time when it is harder than ever to keep such costs under control.**

26. The present action embodies three distinct claims, and is therefore perhaps of greater than average complexity. However, the statements of case already exceed to a significant degree the usual 25 page limit prescribed by paragraph C1.2 of the Commercial Court Guide. The APoC (including schedules) is approximately 60 pages long. The Amended Defence runs to some 50 pages.

27. With regard to applications to amend, amendments to statements of case that have been served require the permission of the court in the absence of agreement between all parties: see CPR 17.1. As the notes at paragraph 17.3.5 of *Civil Procedure* make clear, when considering whether to exercise its discretion to permit a party to amend a statement of case the court must have regard to all the matters mentioned in CPR 1.1(2), so as to deal with the case "justly and at proportionate cost" in accordance with the overriding objective. Such applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted. As Rix LJ stated in *Savings & Investment Bank Ltd (in liquidation) v Fincken* [2003] EWCA Civ 1630, [2004] 1 WLR 667 at [79]:

> **.. the older view that amendments should be allowed as of right if they could be compensated in costs without injustice [has] made way for a view which [pays] greater regard to all the circumstances which are now summed up in the overriding objective ..**

28. The timing of an application to amend may sometimes be determinative, particularly if the proposed amendment would result in the adjournment of a fixed date for trial. As Millett LJ observed in *Gale v Superdrug Stores Plc* [1996] 1 WLR 1089 at 1098:

> **.. The rules provide for misjoinder and non-joinder of parties and for amendment of the pleadings so that mistakes in the formulation of the issues can be corrected. If the mistake is corrected early in the course of the litigation, little harm may be done; the later it is corrected, the greater the delay and the amount of costs which will be wasted. If it is corrected very late, the other party may suffer irremediable prejudice ..**

29. Moreover, as the Court of Appeal noted (even prior to the coming into force of the CPR) in *Worldwide Corpn Ltd v GPT Ltd* [1998] CA Transcript No 1835:

> **In the modern era it is more readily recognised that in truth the payment of the costs of an adjournment may well not adequately compensate someone who is desirous of being rid of a piece of litigation which has been hanging over his head for some time, and may not adequately compensate him for being totally (and we are afraid there are no better words for it) 'mucked around' at the last moment. Furthermore the courts are now much more conscious**

> **that in assessing the justice of a particular case the disruption caused to other litigants by last minute adjournments and last minute applications have also to be brought into the scales.**

30. I shall return to the principles specifically applicable to "late" applications below.

(E2) Applications for additional disclosure

31. Although this action was begun in 2015, and an Order for disclosure was first made on 24 January 2018, it is common ground that the disclosure pilot scheme for the Business and Property Courts set out in Practice Direction 51U supplementing CPR Pt 51 (in force from 1 January 2019) now applies to it: see *Sheffield United Ltd v UTB LLC* [2019] EWHC 914 (Ch), [2019] Bus LR 1500.

32. PD51U refers to concepts such as "Extended Disclosure" and "Issues for Disclosure" which did not exist before 1 January 2019. However, as Sir Geoffrey Vos C explained in the *Sheffield United* case (at [24] and [75]):

> **.. The court will interpret the new PD51U in a way that makes it work as effectively in relation to applications for disclosure in proceedings issued after 1 January 2019 as it will in relation to further applications for disclosure made in cases where disclosure was already ordered under CPR Pt 31 before that date.**

33. As Sir Geoffrey Vos C further explained in the *Sheffield United* case (at [75], [76] and [78]):

> **.. the introduction of the Pilot was intended to effect a culture change. The Pilot is not simply a rewrite of CPR Pt 31. It operates along different lines driven by reasonableness and proportionality (see paragraph 2 of PD51U), with disclosure being directed specifically to defined issues arising in the proceedings ..**
>
> **.. In deciding whether to allow Extended Disclosure, the court has to consider whether the application is "reasonable and proportionate having regard to the overriding objective": see paragraph 6.4 of PD51U[1]. Each of the factors in that paragraph is to be given weight ..**

[1] "In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors— (1) the nature and complexity of the issues in the proceedings; (2) the importance of the case, including any non-monetary relief sought; (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence; (4) the number of documents involved; (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates); (6) the financial position of each party; and (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

> **.. The requirements for the parties to co-operate and to act with proportionality are of the greatest importance under PD51U:**
>
> **(1) Paragraph 18.2 of PD51U provides: "The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate."**
>
> **(2) Paragraph 3.2(3) provides that there is an obligation "to liaise and co-operate with the legal representatives of the other parties … so as to promote the reliable, efficient and cost-effective conduct of disclosure".**
>
> **(3) Paragraph 7.3 emphasises that the Issues for Disclosure are "only those key issues in dispute" and "does not extend to every issue which is disputed in the statements of case by denial or non-admission".**
>
> **(4) Paragraph 6.3 makes clear that the court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.**

34. It is that new approach which I must adopt in determining VIL's present applications for disclosure. The parties have sensibly agreed that, for these purposes, I should treat the existing order for disclosure as if it were an order for Extended Disclosure under paragraph 6 of PD51U. However, they disagree about the appropriate analogy for VIL's present applications. VIL submits that I should treat its applications as if they were applications for orders under paragraph 17.1 of PD51U consequent on BOS's failure adequately to comply with the existing order for disclosure[2]. BOS submitted that I should treat VIL's present applications as if they were applications for additional disclosure of specific documents or classes of documents under paragraph 18.1 of PD51U[3].

35. In my judgment, if there is any difference between the approaches required under these two provisions, it is at most a difference in emphasis which can have no practical effect in the particular circumstances of this case. An applicant under paragraph 17.1 of PD51U must "satisfy the court that making an order is reasonable

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2 "Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to— (1) serve a further, or revised, Disclosure Certificate; (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure; (3) provide a further or improved Extended Disclosure List of Documents; (4) produce documents; or (5) make a witness statement explaining any matter relating to disclosure".

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

and proportionate (as defined in paragraph 6.4)": see paragraph 17.2. An applicant under paragraph 18.1 of PD51U must "satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4)": see paragraph 18.2. In the present case, the practical reality is that any order for disclosure that I may make must necessarily take into account in one way or another the presently fixed date for trial. The effect of any order will either be to require that date to be vacated, or to add to the parties' already extensive burden of preparatory work in the limited period left before that date. Against that background, there are in my judgment no circumstances in which it would be reasonable and proportionate for me now to make an order for disclosure – even to rectify a failure adequately to comply with the earlier order for disclosure - unless that order was one that was necessary for the just disposal of the proceedings.

36. In applying the principles required by PD51U I must also be on my guard to ensure that this new approach does not "create a framework for injustice" (to adapt the warning about an earlier rule change intended to limit the scope of disclosure given by Maurice Kay LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328, [2013] 1 CLC 596 at [183]). In deciding under paragraph 18.2 of PD51U what "is necessary for the just disposal of the proceedings and is reasonable and proportionate", I must bear in mind the fact that, in cases such as this, there is inevitably a very significant asymmetry of information between the claimant and the defendant.

37. The process of disclosure is one of the most powerful tools available for achieving justice. That is particularly so in cases such as the present, where allegations of fraud and misconduct within the defendant organisation are in issue. It is wrong in principle to plead matters which do not support or relate to any of the remedies sought or to plead immaterial matters with a view to obtaining more extensive disclosure than might otherwise be ordered: see *Charter UK Ltd v Nationwide Building Society* [2009] EWHC 1002 (TCC) at [16], per Akenhead J; and *Grove Park* (supra) at [24]. However, the law rightly requires a claimant alleging fraud to plead its case with great particularity and precision, and not to make allegations which are not supported by credible evidence: see eg *Three Rivers District Council v Bank of England* [2001] UKHL 16, [2003] 2 AC 1 at [184]-[186] per Lord Millett.

38. In cases such as the present one, the interplay between those two principles can often create a "chicken and egg" dilemma for a claimant. It is inherent in cases such as this that it is likely to be difficult for a claimant to discover the facts and to obtain the necessary evidence, since much of the relevant material will be exclusively within the control of the defendant. Yet, if the scope of disclosure is too tightly confined by the specific facts that the claimant has already been able to plead, the claimant may simply be unable to obtain the material that it needs to plead and to make out its case.

That would bring about a similar situation of injustice to that described by Maurice Kay LJ in the *RBS* case:

> **.. in which one party's perception and appraisal of a case is .. handicapped by his being kept in ignorance of important material on the ground that it is only relevant to issue B but, for the moment, disclosure is only required in relation to issue A ..**

39. PD51U is intended to serve the overriding objective of dealing with cases justly and at proportionate cost, by limiting disclosure to that which in the particular case in question is necessary for the just disposal of the proceedings and which is reasonable and proportionate. It is not intended to hinder the just resolution of substantial cases such as this by making it more difficult for claimants to get at the central documentary evidence that they need.

40. It seems to me that, in such circumstances, what is required from the parties and the Court is a pragmatic, flexible approach to the scope of disclosure, taking into account (as paragraph 9.5 of PD51U requires) "all the circumstances of the case, including the factors set out in paragraph 6.4 .. and the overriding objective". The Court is required to strike a practical balance, in order to decide in each particular case what specific reasonable and proportionate additional disclosure (if any) is necessary for the just disposal of the proceedings. In doing so, the Court is not required to shut its eyes to the practical realities of the litigation.

41. The obligation which a reasonable and proportionate order for Extended Disclosure can impose on a defendant, not merely (under Models A or B) to disclose its already "Known Adverse Documents", but also (under Models C, D or E) actively to search for documents adverse to that defendant's case or which might assist the case of the claimant can often be the only (or only realistic and/or proportionate) means that a claimant may have of obtaining the information and the evidence that it needs to plead and to make out its case. Such an order (for extended or additional disclosure) may therefore be the most practical way of dealing with the case justly.

(E3) "Late" applications

42. It is common ground that, to the extent that any order that I might make giving permission to amend or requiring additional disclosure might have the effect of jeopardising the present trial date, I must take that factor into account.

43. As Chadwick LJ stated in *Boyd & Hutchinson v Foenander* [2003] EWCA Civ 1516, [2004] BPIR 20 at [9]:

> **.. in deciding whether or not to grant an adjournment, the court must have regard to the overriding objective of the Civil Procedure**

> **Rules set out in CPR 1.1, and in particular at sub rule (2) of that rule. Having regard to the overriding objective requires the court to deal with a case, so far as is practicable, in a manner which saves expense, is proportionate to the amount of money involved and allocates to it an appropriate share - - but no more than an appropriate share - - of the court's limited resources.**

See, to similar effect, *Elliott Group Ltd v GECC UK* [2010] EWHC 409 (TCC) at [9], per Coulson J. In *Fitzroy Robinson Ltd v Mentmore Towers Ltd (No 2)* [2009] EWHC 3070 (TCC), 128 Con LR 91 at [9], Coulson J gave the following helpful guidance:

> **.. a court when considering a contested application at the eleventh hour to adjourn the trial, should have specific regard to: (a) the parties' conduct and the reason for the delays; (b) the extent to which the consequences of the delays can be overcome before the trial; (c) the extent to which a fair trial may have been jeopardised by the delays; (d) specific matters affecting the trial, such as illness of a critical witness and the like; (e) the consequences of an adjournment for the claimant, the defendant, and the court.**

44. The principles relevant to "late" applications to amend were recently summarised by Sir Geoffrey Vos C in *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 at [41]:

> **.. In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it.**

As Carr J noted in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]:

> **.. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission .. Parties and the court have a legitimate expectation that trial fixtures will be kept;**

It seems to me that these principles apply equally to "late" applications for disclosure.

45. I put the word "late" in quotation marks because, as Carr J also noted:

> **.. lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done ..**

46. There is one matter that is specific to "late" applications to amend a statement of case. It is, as Lloyd LJ noted in *Swain-Mason v Mills Reeve LLP* [2011] EWCA Civ 14, [2011] 1 WLR 2735 at [73], that:

> **.. if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules ..**

(F) Disclosure in relation to the Undervalue Claims

47. Against that background, and applying those principles, I now turn to the first part of the Disclosure and Amendment Application, VIL's application for additional disclosure in relation to the files of Grainger and Dickinson Dees. Paragraph 5(v) of the draft Order attached to the Disclosure and Amendment Application (set out in paragraph 16.1.1 above) formally seeks an order in very wide terms. However, it is clear from the arguments presented on VIL's behalf by Mr Stephen Davies QC (who has appeared for VIL with Ms Anna Lintner and Mr Michael d'Arcy) that all that VIL is really seeking under this part of its application is an order that BOS should disclose or procure the disclosure of the files of documents relating to VIL and/or VIL's property portfolio that were maintained by Grainger and by Dickinson Dees.

(F1) The arguments of the parties

48. In Mr Davies' submission, it is not possible to have a fair trial of the Undervalue Claims without disclosure of the files of Grainger and Dickinson Dees. That, in Mr Davies' submission, is for two reasons:

48.1 First, because the contents of those files are highly likely to contain documents relevant to the issue of the true nature of the relationship between BOS and Grainger, and to the extent (if any) to which BOS "directed,

interfered and/or intermeddled with the conduct of the Receivers" (Issue 19 in the agreed List of Common Ground and Issues); and/or

48.2 Secondly, because the contents of those files are highly likely to contain documents relevant to the issue of whether the properties in VIL's portfolio were (a) properly marketed and/or (b) sold under arm's length transactions for the best price reasonably obtainable (Issues 19 and 20 in the List of Common Ground and Issues).

49. Mr Davies submits that these issues are both central to the case and that these documents are therefore likely to be of crucial importance to VIL in making out its case in relation to the Undervalue Claims. In Mr Davies' submission, the core contemporaneous documentary base recording the dealings with VIL's portfolio is held not in the files of the Receivers but in the files of Grainger and Dickinson Dees.

50. In particular, in relation to the second reason mentioned in paragraph 48 above, Mr Davies submits that it is only on the receipt of these files that VIL will be able properly to instruct its expert to state a view on the issue of undervalue, since unless VIL can show that (in any particular case) the property concerned was in fact not properly marketed and/or was not sold under an arm's length transaction, the price actually obtained will be treated as *prima facie* evidence of the true market value: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 at 789d-g, per Phillips J; *Michael v Miller* [2004] EWCA Civ 282 at [141], per Parker LJ; and *Bishop v Blake* [2006] EWHC 831 (Ch) at [105]-[106], per Sir Francis Ferris.

51. VIL's case is that the arrangements between BOS and Grainger, embodied in the UMA, mean that these files of documents are in BOS's "control" within the meaning of CPR 31.8. In that connection, Mr Davies has drawn my attention to the observations of Toulson LJ in *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11 at [40] that "the court must have regard to the true nature of the relationship between the third party in the litigant .. even if there [is] on a strict legal view no 'right to possession'".

52. Mr Davies puts VIL's case in relation to BOS's control of these documents both on a wider and a narrower basis.

52.1 The wider basis itself has both a legal and a practical component.

52.1.1 The legal aspect of Mr Davies's argument is that the UMA, taken as a whole, constituted Grainger as BOS's agent in connection with the management and sale of VIL's property portfolio; and it is a legal incident of the relationship of principal and agent that a principal is entitled to require production by the agent of documents relating to

the affairs of the principal: see eg *Fairstar Heavy Transport NV v Adkins* [2013] EWCA Civ 886 at [53], per Mummery LJ (with whom Patten and Black LJJ agreed). This entitlement survives the termination of the agency: see eg *Yasuda Fire & Marine Insurance Co of Europe Ltd v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 at 185H-186B, per Colman J.

52.1.2 The practical basis of the argument is that, as a matter of fact, it is clear from the way in which the relationship between BOS and Grainger played out in practical terms that BOS was well positioned to request documents relating to the marketing and sale of VIL's properties by agents appointed by Grainger.

52.2 The narrower basis is that certain specific provisions of the UMA give (or at least gave) BOS the right to inspect and/or to call for possession of documents in the hands of Grainger.

52.3 With regard to the documents of Dickinson Dees, in Mr Davies' submission the "true master" (to use the words of Hildyard J in *Edenwest v CMS Cameron McKenna* [2012] EWHC 1258 (Ch), [2013] 1 BCLC 525 at [77]) of Dickinson Dees was not VIL but Grainger and/or the Receivers, in either case acting on behalf of BOS as the real principal. BOS therefore has "control", either directly or indirectly, of Dickinson Dees' files.

53. With regard to the alleged lateness of this application, Mr Davies makes four submissions.

53.1 The first is that these were documents which BOS was obliged to disclose by the order for standard disclosure made at the first CMC on 24 January 2018. This application (and any consequent postponement of the date fixed for trial) would not have been necessary had BOS properly complied with its disclosure obligations.

53.2 The second is that such delay as there has been in making this application to compel BOS to comply with its disclosure obligations has itself been caused by BOS.

53.2.1 BOS successfully resisted VIL's application at the first CMC for early disclosure of the UMA. As a result, VIL was compelled to apply to the Receivers, who provided an un-executed version in July 2018.

53.2.2 The picture which has thereafter emerged following disclosure of the UMA is one that could not reasonably have been contemplated by the Liquidators or their advisers. In particular, in Mr Davies' submission, it now appears from the terms of the UMA and from VIL's subsequent investigations that:

53.2.2.1 The appointment by the Receivers of Grainger and the terms of the PMA between the Receivers and Grainger were pre- ordained by BOS;

53.2.2.2 Grainger's task, both under the UMA and under the PMA, was to implement the Portfolio Business Plan which had been agreed between Grainger and BOS before the Receivers were appointed;

53.2.2.3 Grainger's reward for carrying out that task included a right to a share of BOS's "profit" from Grainger's services in the realisation of VIL's properties;

53.2.2.4 It was Grainger alone that contracted with the selling agent: and the agent in fact appointed by Grainger was Westminster Property Services ("WPS"), a one-man company operating from a single site in Kilburn. In Mr Davies' submission, WPS was not local to the properties and would not have been in consideration in any conventional receivership. The Receivers have been unable to disclose the terms on which WPS was engaged. Mr Davies suggests that this may be because they have never seen them;

53.2.2.5 It was Grainger that appointed Dickinson Dees as conveyancing solicitors, and which paid their fees. Dickinson Dees are based in Newcastle, and (again in Mr Davies' submission) would not have been in consideration in any conventional receivership over residential properties in North West London.

53.2.2.6 Investigations by the Joint Liquidators of VIL have been significantly hampered by the lack of access to the files of Grainger or Dickinson Dees: but the limited investigations which have been possible have revealed what Ms Craig (in paragraphs 70 to 77 of Craig 4) says is an

> **.. overall picture .. of Grainger and its chosen selling agents effecting sales of VIL's properties in circumstances which, to put it at its lowest, require an explanation by reference to the documents in the files of Grainger and Dickinson Dees.**

Those circumstances (as set out in Hausfeld's letter dated 12 February 2019 and in the schedules to Craig 4) include several examples of what are said to have been sales to connected parties, and a rather larger number of examples of quick on-sales at a higher price (which Ms Craig characterises as "flipping").

53.2.2.7 Even though these examples (in Mr Davies' submission) plainly give rise to a case to answer against Grainger, BOS's response has simply been to rely upon Grainger's reports to BOS. There is evidence to suggest that these reports may not be reliable. VIL therefore wishes to review the source material from which those reports were derived, which will only be available (if at all) from the files of Grainger and/or Dickinson Dees.

53.2.3 In correspondence, BOS has (in Mr Davies' submission) simply not engaged with the attempts by VIL to gain access to these crucial files.

53.3 The third is that VIL has itself made efforts to obtain these files by other means but has been prevented from doing so by the obstructive attitude of BOS.

53.3.1 The documents which I have seen reveal the following history, on which Mr Davies relies:

53.3.1.1 On 18 July 2018 (two days after DLA Piper had confirmed that BOS would be unable to give its non-LIBOR disclosure by the agreed date of 27 July 2018) Hausfeld wrote to DLA Piper, seeking confirmation that BOS's disclosure would include all relevant documents from Grainger.

53.3.1.2 DLA Piper replied on 2 August 2018, asserting that Grainger's documents were not in BOS's control for the purposes of CPR 31.8, and stating that BOS "does not intend to give disclosure of documents that are in the

possession of Grainger and does not consider itself to be obliged to do so".

53.3.1.3 Accordingly, on 21 August 2018 Hausfeld wrote to Grainger, asking Grainger to provide certain documents and information. This request was mainly directed towards the information and documents passing between Grainger and BOS or which Grainger had made available to BOS.

53.3.1.4 After a further exchange of correspondence on 28 August and 3 October 2018, Grainger provided a substantive reply on 17 October 2018. This stated that:

> **Having reviewed your request, it is apparent that all of the requested documentation would fall within the possession, custody or control of [BOS], with whom we note your clients are in litigation and, as such, would have obligations of disclosure to you. Accordingly, we would respectfully suggest that the requests made to us in your letter dated 21 August 2018 are made to [BOS].**

53.3.1.5 On 21 August 2018 Hausfeld also wrote to Womble Bond Dickinson (UK) LLP ("WBD"), the eventual successor firm to Dickinson Dees, asking them to provide copies of the conveyancing files in relation to each of VIL's properties.

53.3.1.6 WBD acknowledged receipt of that letter on 12 October 2018, but did not provide a substantive reply until 23 November 2018. That reply did not refuse to provide the requested documents. However, it drew attention to Statement of Insolvency Practice 17, and to the fact that "not all of the administrative receiver's papers belong to the company. Some papers belong to the administrative receiver personally and some belong to the charge holder". WBD offered to provide copies of those documents which belonged to VIL, provided that VIL first undertook to meet WBD's reasonable costs of separating the documents belonging to VIL from those belonging to the Receivers personally or to BOS.

53.3.1.7 On 4 June 2019 Addleshaw Goddard LLP on behalf of the Receivers wrote to Hausfeld confirming that "to the extent that confidentiality in any of the documents in question

> belongs to the Receivers, the Receivers have no objection to WBD providing .. such documents, other than documents which are legally privileged to the Receivers".

53.4 The fourth is that responsibility for the adjournment of the original June/July 2019 trial date lies wholly with BOS. Accordingly, from VIL's point of view, this should be considered as if it were a first adjournment application. In Mr Davies' submission, the prejudice to VIL that would be caused by refusing this disclosure in order to avoid an adjournment would greatly outweigh any possible prejudice to BOS. Given the period that has already elapsed since the relevant events, the effect of a further postponement on the reliability of the witnesses' memories would be minimal, particularly compared to the more reliable evidence which the further disclosure now sought would be likely to produce.

54. Almost all of these submissions were hotly contested by Ms Rosalind Phelps QC, who appeared (with Mr Rupert Allen and Mr Max Kasriel) for BOS. In Ms Phelps' submission:

54.1 The additional disclosure of the files of Grainger and/or Dickinson Dees should not be ordered because it is not directed to any pleaded issue, let alone to an issue which is one of the key issues in dispute.

54.1.1 Even before PD51U came into force, the requirement to disclose documents was limited to those which were relevant to those factual issues arising for decision at trial as could be identified from the pleadings: see *Harrods Ltd v Times Newspapers Ltd* [2006] EWCA Civ 294 at [12] per Chadwick LJ. Under PD51U, the principle that disclosure is limited to the issues defined in the pleadings now takes an even narrower form. Under the new regime, the court will only make an order for Extended Disclosure under paragraph 6 and 8 (and *a fortiori* will only make an additional order for disclosure under paragraph 18.1) where (in the words of paragraph 6.3) "it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure": and paragraph 7.3 emphasises that the Issues for Disclosure are "only those key issues in dispute" and "does not extend to every issue which is disputed in the statements of case by denial or non-admission".

54.1.2 The bulk of the allegations set out in Hausfeld's correspondence and in the evidence served on behalf of VIL for this application do not presently form part of VIL's pleaded case:

54.1.2.1 According to Ms Phelps, none of the allegations now made by VIL in its evidence filed in support of these applications of (i) improper (as opposed to inadequate) actions by Grainger; (ii) improper or fraudulent behaviour by WPS; (iii) BOS being liable for the acts of WPS through a "sub-agency"; or (iv) "connected sales" and reversal of the burden of proof, has been pleaded adequately or at all.

54.1.2.2 These allegations "essentially amount to a completely new case". If such a case was to be advanced, it should have been pleaded at the latest at the start of 2019, since BOS's non-LIBOR disclosure was completed in the autumn of 2018.

54.1.2.3 VIL's argument that further detailed disclosure is necessary in order for VIL to formulate its case in relation to these pleaded allegations, so that a new case can be pleaded, is back to front. Allegations must be pleaded before they can give rise to obligations of disclosure.

54.1.3 There would therefore be no basis for the court to order disclosure by BOS of the files kept by Grainger and/or Dickinson Dees, even if (contrary to BOS's primary case) the documents sought were within BOS's control.

54.2 In any event, no order for disclosure of the files kept by Grainger and Dickinson Dees should be made against BOS, because those files are not within BOS's control for the purposes of CPR 31.8.

54.2.1 The UMA did not constitute Grainger an agent for BOS. On the contrary, it expressly excluded any such agency.

54.2.2 To the extent that specific terms of the UMA gave BOS a right to call for or be provided with information and documents from Grainger, those provisions were by their terms limited to documents relevant to the provision of "the UMA Services". The "UMA Services" did not include any of the matters now complained of by VIL, which fell instead under the PMA between Grainger and the Receivers. In any event, those provisions came to an end with the termination of the UMA, and BOS therefore cannot now give inspection (which in practice is what VIL now wants) of these documents. To require BOS now to list them as documents previously within its control would be pointless.

54.3 In any event, the additional disclosure now sought is not necessary for the just disposal of the proceedings or reasonable or proportionate.

54.3.1 VIL could and should have pursued Grainger and WBD directly in the autumn of 2018, promptly after BOS made it clear in August 2018 that it would not disclose their documents. Under the PMA, VIL had a clear right to Grainger's files. In any event, the Joint Liquidators could have sought an order for third-party disclosure in this action, or sought an order against WBD under the Solicitors Act 1974 s 68, or an order against Grainger and/or WBD under the Insolvency Act 1986 s 236.

54.3.2 VIL has already received a great deal of documentation concerning the conduct of the Receivership and the realisation of VIL's property portfolio. BOS has provided all relevant documents in its possession. VIL has also obtained further documents from the Receivers and from the other investigations carried out by its "Forensic Team".

54.4 In any event, even if (contrary to BOS's primary case) it would otherwise be appropriate to order this disclosure, any such order would lead to the loss of the date presently fixed for trial, and so should be refused on that ground alone.

(F2) Analysis - The Statements of Case

55. Ms Phelps' first argument (in summary) is that additional disclosure should not be ordered unless it is directed to a pleaded issue which is also one of the key issues in dispute, and that the bulk of the allegations set out in Hausfeld's correspondence and in the evidence served on behalf of VIL for this application do not form part of VIL's presently pleaded case. It is therefore necessary for me to consider the relevant parts of the current statements of case in some detail.

56. The Undervalue Claims are pleaded in section M "Appointment of the Insolvency Professionals" of the APoC. Paragraph 70 pleads the appointment of the Receivers:

> **.. following which the control of the properties in the VIL Portfolio was transferred to LBG's joint-venture partner [Grainger] .. on terms agreed with BOS, with instructions for their disposal.**

57. Paragraphs 71 to 73 of the APoC then continue as follows:

[71] BOS thereafter directed, interfered and/or so intermeddled with the conduct of the Receivers as to render it vicariously liable to VIL for their conduct. In particular, the Receivers:

71.1 **appointed Grainger to realise VIL's real property assets on pre-negotiated and pre-agreed terms;**

71.2 **were funded by and effectively under the control of BOS;**

71.3 **could not reasonably justify their appointments because they lacked (or, alternatively, there was a reasonable perception that they lacked) the requisite impartiality and independence;**

71.4 **were unable to assess objectively or at all the claims herein due to their inability (or alternatively their practical inability) to sue BOS due to their firm's membership of its insolvency panel; and**

71.5 **continued throughout the administrative receivership seek, take and follow instructions from BSU in relation to all strategic decisions.**

[72] Following the appointment of the Receivers, VIL's property portfolio was liquidated at a discounted, forced sale value of £56,945,814, achieved after inadequate marketing by inappropriate agents.

[73] As to the forced sale value of £56,945,814:

73.1 **Properly marketed by appropriate agents, the open market value of the portfolio would have been a minimum sum of £73,867,500 ..**

73.2 **VIL will call expert evidence at trial to the effect that Grainger and/or the Receivers caused or allowed the property portfolio to be sold at a substantial undervalue and levied management and selling fees which were excessive and unreasonable, for which BOS is vicariously liable to VIL.**

58. The draft Re-Amended Particulars of Claim for which VIL now seeks permission propose minor amendments to the figures in paragraphs 72 and 73 of the APoC, but would otherwise leave these paragraphs unaltered.

59. Paragraph 91 of the Amended Defence admits the appointment of the Receivers and avers the existence of the PMA between the Receivers and Grainger, but otherwise does not admit paragraph 70 of the APoC. Paragraph 92 of the Amended Defence says that the allegations in paragraph 71 of the APoC are inadequately particularised, and otherwise denies them. In paragraph 93 of the Amended Defence, the amount realised from sale of VIL's portfolio is admitted. Paragraph 94 of the Amended Defence avers that, after the appointment of the Receivers "a number of discoveries were made, including that some of the properties had been poorly maintained or refurbished, many had problems with planning consents and there were other serious

health and safety and regulatory compliance issues", and relies on a February 2011 £57.85m valuation by King Sturge. Otherwise, paragraphs 72 and 73 of the APoC are denied.

60. VIL responds to paragraphs 91 to 94 of the Amended Defence in paragraphs 81 to 84 of its Reply. For present purposes, it is only necessary to refer in detail to paragraphs 82 and 84. Paragraph 82 of the Reply disputes the suggestion that VIL has failed to provide proper particulars, and pleads the following further facts and/or arguments:

(a) BOS elected not to use collective insolvency proceedings such as an administration .. but an administrative receivership with the priority of serving the interests of BOS.

(b) VIL relies upon the well-established principle that if a bank mortgagee, after appointing a receiver in exercise of its mortgagee powers, interferes in the receiver's conduct of sale of the mortgaged property by insisting on the employment of an inappropriate and/or inadequately experienced agent who thereafter conducts the sale negligently (so that a sum below the open market is obtained), the bank mortgagee will be liable to the mortgagor in respect of that loss. In this respect, the imposition of Grainger on the Receivers and the Receivers' acquiescence therein was pre-ordained and involved a complete surrender to BOS of the Receivers' discretion to manage and dispose of VIL's property portfolio.

(c) As a consequence, the management and disposal of VIL's portfolio were dictated by the joint venture between BOS/Lloyds and Grainger and not the Receivers.

(d) Thus, it was Grainger, as the private agent and joint venture partner of BOS, and not the Receivers, that had the conduct and de facto control of the receivership insofar as it related to the management and disposal of VIL's property portfolio, and BOS is vicariously liable accordingly.

(e) It was standard practice for banks to insist that as a term or condition of an insolvency practitioner's retention on the panel of preferred insolvency practitioners used by that bank, once appointed the practitioner's partners were not permitted to make any claims against the bank for damages or other financial compensation. In VIL's case, this would have the result that, absent a successive appointment such as that of the Liquidators, the claims herein would be stifled.

(f) The Liquidators also rely on the obstructive and partisan conduct of the Receivers, particulars of which have been provided in uncontested witness statements served and filed in these proceedings on behalf of VIL ..

61. Paragraph 84 of the Reply responds to paragraph 94 of the Amended Defence. It denies the accuracy of the King Sturge valuation for a number of reasons, including:

> **.. the fact that a number of properties whose sale was overseen by Grainger were subsequently re-sold by the buyer for a significantly higher price.**

Details of four specific examples of rapid re-sales at increased prices are then set out

62. In my judgment, these sections of the APoC and the Reply do not adequately plead the Undervalue Claims case articulated in Hausfeld's correspondence and in the evidence relied upon by VIL in support of the applications now before the Court. Not only do they not include a concise statement of many of the specific facts now relied on by VIL, but they do not even make clear the general nature of the case which VIL now seeks to advance.

63. There are two aspects to the Undervalue Claims: (1) the allegedly wrongful characteristics of the sales themselves; and (2) BOS's alleged responsibility for those matters.

64. In relation to the latter, VIL's argument on these applications has relied heavily on the terms of the UMA: but the UMA is not specifically mentioned, either in the APoC or in the proposed Re-Amended Particulars of Claim. Moreover, the use of the word "thereafter" in paragraph 71 of the APoC suggests that the "intermeddling" by BOS of which VIL makes complaint occurred only *after* BOS had appointed Grainger under the UMA to deal with VIL's portfolio: whereas Mr Davies' submissions (consistently with the generalised references to a "joint venture" and the use of the word "pre-ordained" in paragraph 82(b) of the Reply) suggest that that appointment is itself one of the matters on which VIL wishes to rely as making BOS liable in equity for any deficiencies in the subsequent sales.

65. As for the allegedly wrongful characteristics of the sales themselves, paragraph 84 of the Reply lists four examples of rapid on-sales at an increased price. However, these examples are given as indications of the true value of the properties, rather than as particulars of deliberate misconduct by Grainger or WPS. In my judgment, there is force in Ms Phelps' submission that the substantive allegations now made by VIL of improper (as opposed to inadequate) conduct by Grainger and/or WPS are simply not mentioned anywhere in VIL's present statement of case.

66. VIL makes three different types of claim against BOS, one of which has itself three separate aspects. A case of this complexity demands especial clarity in the pleading of statements of case, not merely for the sake of the other side but also for the sake of

the court. In such a case, it is not sufficient for a claimant (as VIL has done) simply to make generalised allegations. At the least, the Particulars of Claim in a case such as this should contain a "bullet point" list of the matters complained of, even if the narrative supporting those "bullet points" may often be better left to be set out in schedules of Further Information or in the trial witness statements.

67. It follows that, in my judgment, much of the material now relied on by VIL in its evidence and arguments is, on a strict application of the rules, not capable of supporting an application for additional disclosure under paragraph 18.1 of PD51U, since it is directed to matters which are not currently among the "key issues in dispute" identified in the existing statements of case.

68. However, that is not of itself wholly fatal to this aspect of VIL's present application for additional disclosure. As Ms Phelps has accepted, VIL's statements of case do presently contain express averments that VIL's portfolio of properties was sold at an undervalue after "inadequate marketing by inappropriate agents", and that BOS has by its conduct (including the "imposition" of Grainger on the Receivers and the fact that the disposal of the properties was dictated by the "joint venture" between BOS and Grainger, rather than by the Receivers themselves) made itself responsible in equity for the loss caused by those sales.

69. In that connection, the practical issue discussed in paragraphs 34 to 41 above is of particular relevance. The Court must take care to ensure that an overly-strict limitation of the scope of disclosure by reference to the presently pleaded details, rather than to the nature of the case set out in the statements of case, does not result in VIL being kept in ignorance of important material.

70. In my judgment, the issues raised by those presently pleaded averments are plainly among the "key issues in dispute" in this action for the purposes of PD51U, even though the details of the additional matters now relied upon by VIL may not be: and it must be inherently probable that the files of Grainger and/or WPS will contain documents that are directly relevant to those presently pleaded issues. If, as VIL now submits, those files are or were within the "control" of BOS, those relevant documents ought therefore to have been disclosed by BOS under the existing order for standard disclosure.

71. It follows that I would not, on this ground alone, have refused to order BOS to search for and disclose relevant documents from the files of Grainger and/or WPS had I concluded that those files were in the "control" of BOS and that it was necessary for the just disposal of these proceedings and reasonable and proportionate to do so.

(F3) Analysis – BOS's control

72. However, Ms Phelps' second argument (in summary) is that the files of Grainger and/or Dickinson Dees are not in the "control" of BOS, because Grainger was (contrary to VIL's submissions) not BOS's agent under the UMA and has no continuing contractual right under the UMA to production of the files either of Grainger or of Dickinson Dees.

73. The security held by BOS over the property portfolio of VIL, which entitled BOS to appoint the Receivers, was not in evidence. It was nevertheless common ground that the terms of that security provided that the Receivers should be agents for VIL. It was also common ground that, as stated by Rigby LJ in *Gaskell v Gosling* [1896] 1 QB 669 at 697:

> **.. [A] receiver and manager appointed by a mortgagee under an agreement that he shall be the agent of the mortgagor is in the same position as if appointed by the mortgagor himself, and as if every direction given to him emanated from the mortgagor himself ..**

74. As explained in *Gaskell*, this agency is a convenient legal device, designed to protect mortgagees from the "almost penal liabilities imposed on a mortgagee in possession". It is, as noted by Hildyard J in *Edenwest v CMS Cameron McKenna* [2012] EWHC 1258 (Ch), [2013] 1 BCLC 525 at [62]-[65]:

> **.. not a fiction, since it has legal substance, but it is in some ways artificial or contrived.**
>
> **One such peculiarity is that the agency is one where the principal, the mortgagor, has no say in the appointment or identity of the receiver(s) and is not entitled to give any instructions to nor dismiss the receivers(s) .. [T]he receiver's primary duty is to realise the assets in the interests of the mortgagee and to try and ensure repayment of the secured debt .. [T]he receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee .. and the receiver's powers of management are really ancillary to that duty ..**
>
> **.. Receivers not only have other (non-agency) powers; but also, the fact that they may contract as agent for the company does not mean that every contract made by a receiver is to be treated as a contract with the company. The question in every case is whether the specific contract was one which the receiver intended or must be taken to have made on behalf of the company or on his own behalf (albeit in the exercise of his receivership functions).**

75. These rules of law, which have the effect of protecting the mortgagee, are well established. Nevertheless, in appropriate cases, the courts are willing to look beyond the contractual provisions to the reality of the situation. As stated by Snowden J in *Davey v Money* [2018] EWHC 766 (Ch), [2018] Bus LR 1903 at [699]:

> **.. The contractual deeming provisions were based upon an assumption that the receiver should be free to exercise his powers as if he were directed to do so by the company, but .. the contractual provisions could be displaced if, contrary to that assumption, the mortgagee in fact sought to exercise control by giving directions to the receiver or by some other personal interference with the conduct of the receivership ..**

76. In particular, "if a bank mortgagee, after appointing a receiver in exercise of its mortgagee powers, interferes in the receiver's conduct of the sale of the mortgaged property by insisting against the receiver's expressed wish on the employment of an inadequately experienced agent who thereafter conducts the sale negligently so that a sum below the open market is obtained, the bank would be liable to the mortgagor in respect of that loss": *Morgan v Lloyds Bank Plc* [1998] Lloyd's Rep Bank 73 at 82, per Sir John Knox (quoted in *American Express International Banking Corporation v Hurley* [1985] 3 ALL ER 564 at 571, per Mann J).

77. In *Davey v Money* (supra at [707]-[708]), Snowden J had to consider how to apply these rules by analogy to the situation where the holder of a qualifying floating charge had appointed administrators (under the Insolvency Act 1986 Schedule B1) rather than receivers:

> **.. The question then arises, what level of involvement by the secured creditor is required in order to justify a finding that an agency relationship has been created between the administrator and the secured creditor or otherwise to justify the imposition of liability on the secured creditor?**
>
> **The formulation in the receivership cases, that the mortgagee might be liable if he "directed or interfered" in the conduct of the receivership, seems to be the appropriate standard. However, this must require something going beyond the legitimate involvement that a secured creditor could expect to have in the administration process by reason of his legal status and rights. The formulation seems to indicate that the administrator should either have been compliant with directions given by the secured creditor, or to have been unable to prevent some interference with his intended conduct of the administration.**
>
> **So, for example, I do not think that an agency relationship would be established merely because the secured creditor gave its consent to a sale of charged property which had been organised by the**

> **administrator. Nor would that be the case simply because an administrator had consulted the secured creditor and taken account of its wishes, even on a regular basis. Nor would such a relationship be established merely because the secured creditor took a commercial decision in the exercise of its own rights which necessarily constrained the administrator's freedom of action.**
>
> **But if, in contrast, the secured creditor gave directions which the administrator unquestioningly followed, or if (to adapt the example in *Morgan v Lloyds Bank plc* [1998] Lloyd's Rep Bank 73) the secured creditor misled the administrators or exerted sufficient pressure on them so as to defeat their free will, then I see no reason why the courts should not be able to hold the secured creditor liable if the property in question was sold negligently for a price that diminished or eliminated the value of the company's equity of redemption ..**

78. The issue of whether BOS did in fact cross the line so as to make itself liable for the actions of the Receivers and their agents (including Grainger and/or WPS) is one of the central issues for trial. It is also one which is acutely fact sensitive: and Mr Davies accepts that, since I cannot try the facts simply on the basis of the witness statements served in support of these interim applications, it is not an issue that I can or should attempt to resolve.

79. Mr Davies, however, submits that the only relevant issue that I have to decide for the purposes of this application for additional disclosure is that of "control": and that, for that purpose, I need only consider the express provisions of the UMA. Those provisions, in his submission, plainly constitute Grainger as the agent of BOS and so put the files of Grainger and/or Dickinson Dees within the control of BOS for the purposes of CPR 38.1. In Mr Davies' submission, the relationship created by the UMA has all the hallmarks of agency discussed in paragraphs 1-001 and 1-020 of *Bowstead & Reynolds on Agency* (21st ed) and by the Court of Appeal in *UBS AG (London Branch) v Kommunale Wasserwerke Leipzig GmbH* [2017] EWCA Civ 1567, [2017] 2 Lloyd's Rep 621 at [79] to [102].

80. In order to consider that submission, it is necessary for me to analyse the structure and terms of the UMA. The UMA is a detailed agreement, whose provisions are set out over 62 pages. Its purpose is explained in its Recitals as follows:

> **(C) [BOS] wishes to appoint [Grainger], on the terms of this Agreement, to consider the suitability of the various properties to be actively managed to increase value prior to an ultimate disposal, make recommendations regarding the management of the residential properties and to maintain a platform to enable the efficient management of the various properties and the provision of necessary**

> **information to [BOS]. These services are aimed at assisting [BOS] to determine what, if any, enforcement action should be taken in respect of the individual properties together with the portfolio as a whole.**
>
> **(D) [BOS] is also desirous of securing, from [Grainger], a commitment to provide further secondary services to any administrator or fixed charge receiver it may appoint in respect of any of these properties. By securing these secondary services [BOS] aims to achieve very high standard service levels, leverage [Grainger's] expertise, seek synergies across the portfolio, streamline the management of the affected properties and ensure any administrator or fixed charge receiver appointed in respect of its portfolio optimise any such realisations with the benefit of [Grainger's] experience and expertise.**
>
> **(E) It is intended these secondary services are made available to and secured by the relevant administrator or fixed charge receiver entering into a Portfolio Management Agreement .. in accordance with this Agreement.**

81. The scheme of the UMA revolves around the concept of the "UMA Services" which Grainger is, by clause 2, appointed to provide.

81.1 The "UMA Services" are defined in Schedule 5 as "collectively the Initial Portfolio Review and the RAMP Services".

81.2 The "Initial Portfolio Review" services are defined by reference to Part 1 of Schedule 1 and (in summary) involve Grainger undertaking on request an initial assessment of a "Target Portfolio" of properties owned by a particular borrower which have been charged in favour of BOS, and thereafter using "reasonable endeavours to agree the Portfolio Business Plan in respect of the Target Portfolio prior to the entering into of a PMA in respect of the Target Portfolio".

81.3 The "RAMP Services" are defined by reference to Part 2 of Schedule 1 and involve maintaining and providing access "to an extranet to hold all property, tenancy and accounting data and other relevant and pertinent information relating to the RAMP Portfolios and the RAMP properties", attending meetings with and submitting monthly reports to BOS, and "identifying opportunities to maximise values across the RAMP Properties and facilitating joint ventures and other combined transactions between RAMP Properties".

82. Clause 6 and Schedule 1 Part 3 provide for the "UMA Fees" of either £150 "for each Target Property in respect of which an Initial Assessment has been provided in the Relevant Period" or £100 for properties in relation to which BOS has not requested an Initial Assessment.

83. Clause 3.2 expressly limits the authority of Grainger "to the provision of the UMA Services and all matters incidental to their provision": and clause 23 provides that the UMA "does not constitute a partnership or joint venture between the parties".

84. In relation to the UMA Services, clause 3 expressly imposes a duty of care on Grainger and requires Grainger to use the level of skill of a "Manager who is qualified and experienced in carrying out residential Property Management services on a large scale, scope and complexity". It also requires Grainger "at all times [to] endeavour to act in what is reasonably considered to be the best interests of the lender" and "in good faith". Clause 3 also requires Grainger to comply with BOS's reasonable requirements, and not to make any profit or commission out of the UMA Services (other than the UMA Service Fees and the PMA Service Fees) without BOS's prior consent. However clause 3 also expressly provides that "the functions and duties which [Grainger] undertakes on behalf of [BOS] shall not be exclusive".

85. Clause 7 and Schedule 2 together require Grainger to "use all reasonable endeavours to agree" with any administrator or receiver that BOS intends to appoint in relation to a borrower ("the Intended Appointee") "the form of PMA to be entered into by the Borrower in respect of the Approved Portfolio (acting by the Intended Appointee), [Grainger] and the Intended Appointee". That PMA must be "in the form of the Agreed Form PMA subject to such variations as agreed between [Grainger] and the Intended Appointee (each acting reasonably)", and must be based on a number of specified principles, including that it must incorporate the Agreed Portfolio Business Plan, and must include provision for the payment of fees in accordance with the PMA Fee Structure laid down in Schedule 2 Part 4 of the UMA. Schedule 2 Part 4 of the UMA contains provisions for payment by the Intended Appointee of a quarterly fee equivalent to 15% of the Gross Rents received, a Sales Fee, and a Profit Share of 20% of the profit calculated by reference to a base value, less a priority return to BOS equivalent to an IRR of 12.5%.

86. Since I have no evidence as to the commercial context of the UMA except that which is obvious from its express provisions, and since its true interpretation and effect are likely to be material issues at trial, I am reluctant to express any concluded view on those matters and I do not do so. I also express no view on the effect of any other communications between BOS and Grainger or of any actions that either of them may in fact have carried out in the context of the UMA.

87. For present purposes, it is sufficient for me to say that I am not presently persuaded by Mr Davies' argument that the UMA in and of itself constitutes Grainger as BOS's agent, so as to put Grainger's files in law under the "control" of BOS.

88. First of all, I am not persuaded that the UMA in and of itself confers on Grainger any sufficient right to act on BOS's behalf so as to affect its relevant relations with third parties. Mr Davies' submissions seemed to me, at times, to treat the employment of a contractor to carry out a task as necessarily involving the creation of an agency relationship in relation to that task between the employer and the contractor. In my judgment, that approach confuses two different (though sometimes overlapping) functions and concepts.

89. The terms of clause 3.2, with its express negation of Grainger's right to affect BOS's relations with third parties, seem to me to be important pointers against the idea that the relationship created by the UMA was intended to be one of agency. The overall structure and terms of the UMA also seem to me to point against agency. The terms of the UMA seem to me to have been carefully drawn with the intention of ensuring that BOS stays within the "artificial or contrived" arrangement described in paragraphs 73 to 77 above, under which the Receivers act as agents for the mortgagor rather than for BOS as mortgagee, and Grainger acts for the Receivers. The intention of the structure, in essence, is that Grainger should be appointed by BOS under the UMA to provide what are essentially advisory services, and should thereafter be appointed by the Receivers under a PMA to assist the Receivers in performing the Receivers' "duty .. to realise the assets in the interests of the mortgagee and to try and ensure repayment of the secured debt .. and to [manage] the security, the property of the mortgagee, for the benefit of the mortgagee" (see paragraph 74 above).

90. Secondly, I am not persuaded by Mr Davies' argument that the UMA in and of itself creates a fiduciary relationship between BOS and Grainger. Fiduciary duties do not commonly arise in commercial settings such as this (outside the settled categories of fiduciary relationships) because it is normally inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party, which is the hallmark of such a relationship: see *Snell's Equity* (33rd edition) at 7-005. It presently seems to me that neither the express obligation of good faith, nor the obligation to act in the best interests of BOS are - whether considered individually or collectively - sufficient in the context of the UMA as a whole to make the relationship between BOS and Grainger created by the UMA a fiduciary one. On the contrary the fact that clause 3.6 of the UMA implicitly permits Grainger to have a conflict between its interests and those of BOS, subject only to a requirement to notify BOS of that conflict, strongly suggests the contrary.

91. The relationship created by the UMA therefore seems to me to lack two of the main characteristics of agency: and, as the Court of Appeal held in paragraph [91] of *UBS*, the absence of any one of those main characteristics must be a significant pointer away from the characterisation of the relationship as one of agency. For all these reasons, I am therefore not persuaded that the relationship created by the UMA is one of agency, so as to put Grainger's documents into BOS's control as a legal incident of that relationship under the principles set out in paragraph 52.1.1 above.

92. Mr Davies, however, has two other limbs to his argument. The first is that certain specific provisions of the UMA put Grainger's documents within BOS's control. The second is that, as a matter of fact (in Mr Davies' submission) it is clear from the way in which the relationship between BOS and Grainger played out in practical terms that BOS was well positioned to request documents relating to the marketing and sale of VIL's properties by agents appointed by Grainger.

93. The specific provisions of the UMA relied on by Mr Davies are these:

93.1 Clause 3.1.9, which required Grainger to "make full disclosure of all material matters in the conduct of its duties to [BOS] including without limitation to immediately notify [BOS] in writing where it becomes aware that it has or that it may have committed a material breach of its obligations under this Agreement";

93.2 Clause 3.4 which required Grainger to "comply with such reasonable instructions and guidelines as may be specified from time to time by [BOS] in connection with the provision of the UMA Services";

93.3 Clause 5.1, which provided that BOS could "appoint a Monitor in relation to the provision of the UMA Services" and that, following a such appointment, Grainger should "provide the Monitor with such access to [Grainger's] personnel, offices, storage facilities and information technology systems as may reasonably be required in order to ensure that the material terms of [the UMA] are being complied with or that they are likely to be complied with";

93.4 Clause 9.4, which required both parties to "return or destroy upon written demand all original and copy documents containing any Confidential Information" following termination of the UMA. Mr Davies particularly drew attention to the wide definition of Confidential Information in Schedule 5;

93.5 Clause 11.5, which required Grainger to "keep and maintain accurate and reasonably detailed books and financial records connection with the UMA Services", and which gave BOS upon request "the right to audit and examine

relevant books and financial records to test compliance with this Clause 11 (Anti-Corruption) and the representations, warranties and undertakings herein";

93.6 Clause 12.5.1, which deals with "Handover following Termination" and which (in summary) required Grainger to hand over to BOS "all books, registers, records, accounts, tax records, reports, finance information, deeds, contracts, policies, licenses, missions, plans, specifications, models, keys and other documents and things in its possession or control relating to any Portfolio, Properties, Property Owner, the Borrower or [BOS]" and also to hand over all electronic data "as may reasonably be required to enable [BOS] to continue the efficient running of the Business or the provision of the UMA Services".

94. Clause 12.5.1 expressly states that the obligations contained therein were to continue "for such period as is reasonably appropriate notwithstanding the termination or expiry of" the UMA. Clause 12.4 states that (inter alia) clauses 9 and 11 are to continue in full force and effect notwithstanding the termination of the UMA.

95. In my judgment clauses 3.1.9, 3.4, 5.1 and 11.5 cannot assist VIL. They did not, by their terms, give BOS "control" of Grainger's documents. Clause 3.1.9 is simply a notification requirement. The power conferred by clause 3.4 would probably not encompass an instruction to hand over Grainger's files, as that is not the purpose for which it was conferred. It is in any event limited to the provision of the UMA Services (rather than anything done under the PMA), and probably does not survive termination. Clause 5.1 can have no application, because it applies only where BOS appoints a Monitor, and BOS has not done so. The power conferred by that clause also probably does not survive termination. As for the examination requirement under clause 11.5, the wording of the clause makes clear that the power given to BOS by that clause to examine Grainger's documents is given for limited and specific purposes which do not include giving disclosure in litigation against third parties.

96. The rights conferred by clause 12.5.1 may well have been wide enough to empower BOS to require Grainger to hand over its relevant files on termination of the UMA. However, they were again conferred for a specific purpose - in this case, to effect a handover - and were expressly stated to cease once a reasonable period had elapsed. Given that the arrangements between BOS and Grainger (as Mr Davies put it) "came to an abrupt end in 2014 in respect of all jobs"[4], such a period would in my judgment inevitably have expired some time ago. Clause 12.5.1 can therefore give BOS no present right to Grainger's files.

[4] T2/245/15-16

97. That leaves only clause 9.4. It seems likely that Grainger's files would have included many documents containing "Confidential Information" within the wide definition given to that expression in the UMA: and the obligations created by clause 9 are expressly stated to continue despite the termination of the UMA. However, in my judgment, clause 9.4 does not on its true interpretation give BOS any present right to Grainger's files. Clause 9.4 has to be interpreted in the context of the UMA as a whole. That context includes clause 12.5.1, providing for handover following termination and seems to me to indicate clause 9.4 is concerned with the narrower purpose of preserving confidentiality following termination. In that context, it seems to me that the natural meaning of the words "return or destroy upon written demand" gives the party receiving the written demand (rather than the party giving it) the choice whether to return or destroy. Nothing more is require in order to ensure the preservation of confidentiality. Clause 9.4 therefore cannot be pressed into service to confer on BOS a blanket right to demand Grainger's files for the purposes of disclosure.

98. It follows, in my judgment, that BOS has no presently enforceable right to compel Grainger to hand over its files in order that BOS may disclose the documents in those files to VIL. BOS may well have had such a right during the currency of the UMA: and, on that basis, probably ought to have disclosed Grainger's documents, in the sense that it should have listed them, at least generically. But, absent present possession or a present right to possession, BOS could not have given inspection of those documents. It would not be sensible or proportionate for me to require BOS simply to list them at this stage in the proceedings.

99. Mr Davies' final argument is that it is sufficient that Grainger would in fact, if asked by BOS, provide its files to BOS. Mr Davies relies upon the cooperative relationship between Grainger and BOS created by the UMA, and upon cases such as *North Shore Ventures Ltd* (referred to in paragraph 51 above) and *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat) at [16] to [21], where Floyd J said:

> **I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of the third party will not on its own be sufficient to make that third party's documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent: but what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that the position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently**

> **establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not turn in any way on the existence of the common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation ..**

100. In my judgment the answer to that submission, as Ms Phelps pointed out, is that there is no evidence of the kind considered by Floyd J before the court in the present case. On the contrary, the fact that the relationship between Grainger and BOS terminated (as is common ground) "abruptly" rather suggests the contrary. At all events, the absence of any such positive evidence brings the present case squarely within the situation described in the first sentence that I have just quoted from Floyd J's judgment. The fact that BOS *might* be able to obtain Grainger's documents is not, on its own, sufficient to make those documents ones that are within the control of BOS for the purposes of CPR 38.1.

101. It follows that I cannot properly make an order against BOS for disclosure of documents currently in the possession of Grainger, because those documents are not within the control of BOS.

102. The position in relation to the documents of Dickinson Dees is similar. Mr Davies has not argued that BOS has any direct right to those documents, but only an indirect right through Grainger or the Receivers. On the evidence presently before the Court, Mr Davies was in my judgment correct to accept that BOS has no direct right to the documents of Dickinson Dees (except, perhaps, to the limited extent (if any) that Dickinson Dees acted as BOS's solicitors for the purposes of releasing BOS's security on the sales). My conclusions in relation to the nature of the relationship between Grainger and BOS created by the express terms of the UMA preclude the existence of any indirect right through Grainger or the Receivers.

(F4) Discretion and delay

103. Those conclusions make it unnecessary for me to consider Mr Davies' further submissions on the issues of discretion and delay. However, in case this matter should go further, I will briefly indicate my views.

104. In relation to the documents of Grainger, Ms Phelps made a powerful point in drawing attention to the Reporting Requirements in Schedule 6 of the PMA, which conferred upon VIL a direct right against Grainger. Paragraph 1(b)(ii) of Schedule 6 to the PMA provides that Grainger shall:

> **If so requested in writing and upon reasonable prior notice by [VIL], provide to [VIL] (via [BNP Paribas Real Estate Advisory & Property Management UK Limited]) and allow [VIL], [BNP] and authorised representatives of them to have access to all information, data, reports, agreements, papers or documents relating to the relevant Property(s) or the Services as they shall reasonably require all such information to be supplied within 5 (five) Working Days of written request.**

105. It is also clear from the correspondence set out in paragraph 53.3 above that VIL could have taken steps of the kind described in paragraph 54.3.1 above to obtain the documents of Grainger and/or Dickinson Dees, but has taken a conscious decision not to do so but instead to pursue the present application against BOS. That is so even though VIL has known since August 2018 that such an application would be firmly resisted.

106. On the other hand, it seems to me that there is force in Mr Davies' submission (see paragraph 49 above) that the core contemporaneous documentary base recording the dealings with VIL's portfolio is held not in the files of the Receivers but in the files of Grainger and of Dickinson Dees. The examples of sales apparently to connected parties and of rapid on-sales at significantly higher prices which are set out in Hausfeld's letter dated 12 February 2019 and in the schedules to Craig 4 (see paragraph 53.2.2.6 above) are (as they presently appear from the limited evidence before me) troubling. As Ms Craig says, they call out for an explanation by reference to the contemporary documents. Those documents are most likely to be found in the files of Grainger and Dickinson Dees.

107. There is also force in Mr Davies' submission that the arrangements between Grainger and BOS recorded in the UMA are unusual: and I am left with a lingering doubt that either VIL or the Court presently has the full picture available to it of how that relationship actually operated in practice. Again, the most complete documentary record is likely to be that in the files of Grainger and Dickinson Dees.

108. It was common ground that, were I to have ordered BOS to disclose the documents in the files of Grainger and Dickinson Dees, there would have been insufficient time between now and January 2020 for that process to be completed and for the parties thereafter to complete their preparations for trial in good order. It would therefore inevitably have been a consequence of such an order that I would have had to adjourn the date presently fixed for trial.

109. I therefore invited the parties to consider whether I might split the trial in some way, so as to keep the present date, but to put off to a later date those issues which could

be illuminated by the Grainger and Dickinson Dees documents. However, neither party expressed any enthusiasm for that suggestion.

(F5) Conclusion in relation to the Grainger and Dickinson Dees documents

110. In the circumstances, I must therefore refuse this part of the Disclosure and Amendment Application.

(G) The Original Trades Amendments

(G1) Introduction

111. In the second part of the Disclosure and Amendment Application, VIL seeks permission to amend the APoC so as to extend its LIBOR Representation claims to the Original Trades. Its proposed amendments ("the Original Trades Amendments") plead:

111.1 In paragraph 35A, that VIL was induced to enter into the Original Trades by implied representations by BOS (which were false and made fraudulently) as to the probity with which LIBOR was set and as to BOS's participation in that process; and

111.2 In paragraph 73A, that VIL is therefore entitled to rescind the Original Trades; alternatively (in paragraph 73B) that VIL has thereby suffered loss and damage.

112. Additional particulars of the making of these alleged representations are given in the first 33 entries in Schedule 4 of VIL's proposed re-amended pleading. Additional particulars of BOS's alleged involvement in LIBOR-related misconduct prior to 2006 are given in Schedule 5 Part A. VIL does not seek permission to make these additions to Schedules 4 and 5 separately from its proposed amendments to the main body of the APoC.

113. The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 33-37, Harvey 1 paras 188-219 and Craig 4 paras 194-202.

(G2) The arguments of the parties

114. In Mr Davies' submission, these proposed further amendments are entirely consistent with the case already put forward by VIL in relation to the Replacement Trades, have a real prospect of success, and ought in justice to be permitted so that VIL's full case,

consistent across all the Swaps which it says it was fraudulently induced to enter into, can be heard and determined. According to Mr Davies, where (as here) the allegations against BOS relate to serious LIBOR misconduct and fraudulent misrepresentations .. there should be overwhelming reasons (which are not present in this case) to shut out those allegations and prevent them from being investigated properly.

115. BOS objects to these proposed amendments. In Ms Phelps' submission, these are entirely new allegations, which could and should have been put forward at the outset, since they do not rely upon any recently discovered material. These proposed amendments would require significant further disclosure, and additional factual and expert evidence. As VIL accepts, these amendments, if permitted, would therefore inevitably require the date presently fixed for trial to be adjourned. The injustice to BOS and other litigants far outweighs the injustice to VIL in refusing its application.

(G3) Analysis

116. Looking at the matter in the round, it seems to me that the factors mentioned in CPR 1.1(2)(a) and (b) count in VIL's favour. VIL does not have the resources of BOS, and (as I have already mentioned) there is a significant asymmetry of information between the parties. This is also an important case, and one of some complexity. The sums which VIL now seeks to claim in paragraph 73B.4 of the draft Re-Amended Particulars of Claim total approximately £91.6m, and the allegations which it makes against BOS (and now seeks by these proposed amendments to extend) are serious ones. BOS, although it strongly disputes them, does not say that they are not properly arguable.

117. On the other hand, VIL's reasons for its delay in putting forward these further allegations are unconvincing. Mr Bishop's evidence (Bishop 7 para 40) is that:

> **.. the totality of the matters giving rise to the Original Trades Amendments were not known to the Liquidators when the proceedings were issued and were only revealed following a review of BOS's disclosure.**

However, both the Standstill Agreement (see paragraph 11 above) and the original Claim Form referred to claims in relation to the Original Trades: and the alleged making of these representations must (in the nature of things) have been known to Mr Palasuntheram on behalf of VIL from the start. It is not clear from Mr Bishop's evidence precisely what additional matters relevant to the Original Trades he contends were only revealed by disclosure. Mr Davies has (in my judgment rightly) accepted in argument that these claims could have been made earlier in the proceedings.

118. Furthermore, BOS's LIBOR disclosure has so far been based upon the investigations which it carried out for the purposes of the various regulatory enquiries. This took as a starting date 1 January 2006. The first of the Original Trades dates from June 2005. In order to give disclosure in relation to that first Original Trade, it would therefore be necessary for BOS to conduct a new investigation covering the year 2005. I accept Mr Harvey's evidence (Harvey 1 paragraphs 217 to 2018) that:

> **The process of recovering this historic data going back nearly 15 years would be complex and time-consuming, involving searches across different legacy archives and systems for multiple custodians. The recovered data would then need to be searched and reviewed before BOS and its solicitors and counsel team could consider the product of this significant investigatory work .. I estimate that the possible scope of this exercise for 2005 only could involve the recovery of in the region of 80,000 to 120,000 documents**

119. That enquiry would, of course, be directed primarily to the question of whether the alleged representations (if proved to have been made and relied on) were false and fraudulent. With regard to the making of the alleged representations and reliance there would, in my judgment, be a considerable overlap between the existing evidence in relation to the Replacement Trades and that required in relation to the Original Trades. However, at least some new evidence would be required even in relation to that aspect of the new case that VIL now seeks to put forward. It also seems to me that considerably more new evidence would be required to deal with the new causation case and other aspects of the claims for damages resulting from the Original Trades Amendments.

120. Although there may perhaps be some element of exaggeration in this part of Mr Harvey's evidence (Harvey 1 paras 200-204), I accept the general thrust of what he says, which is that the Original Trades Amendments would require BOS to undertake a further significant exercise in relation to its factual and expert evidence, and that that exercise has been made more difficult and more expensive by the fact that these allegations were not put forward at the start of the case.

(G4) Conclusion in relation to the Original Trades Amendments

121. In accordance with the principles discussed in paragraphs 43 to 45 above, I have to balance the need for finality in litigation and the injustice to BOS and other litigants in adjourning the date presently fixed for trial in order to require BOS to deal with these new allegations against the injustice to VIL of refusing its application to make these amendments. Given the likely effect of the proposed amendments on the trial date, there is inevitably a heavy burden on VIL to justify the lateness of the application and to show why justice requires that it should be allowed to pursue it. In my judgment, VIL has not discharged that burden, and the balance of fairness and

justice comes down in favour of refusing permission for VIL to make the Original Trades Amendments.

122. In the event that I were to regard the matters discussed in paragraph 118 above in relation to the June 2005 Original Trade as counting strongly in the balance against VIL, Mr Davies invited me as an alternative to consider giving permission to make the Original Trades Amendments solely in relation to the second and third of the Original Trades, which date from February 2007 and February 2008. In my judgment, the balance of fairness and justice comes down in favour of refusing even those more limited aspects of the Original Trades Amendments. Even these more limited amendments would still jeopardise the present date for trial, having regard to the need for additional factual and expert evidence referred to in paragraph 119 above: and VIL's reasons for the lateness of the application to amend remain unconvincing.

(H) The Rescission Amendments

(H1) Introduction

123. VIL also seeks to add a new paragraph 73A and new paragraphs (1) and (2) to the prayer to the APoC ("the Rescission Amendments"), in order to claim the remedy of rescission. Having regard to my decision in relation to the Original Trades Amendments, VIL seeks to make this amendment only in relation to the Replacement Trades.

124. The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 47-51, Harvey 1 paras 228-231 and Craig 4 paras 205-206.

(H2) The arguments of the parties

125. On behalf of VIL, Mr Davies submits that rescission is the usual remedy for misrepresentation, and that VIL's claim for that remedy will not necessitate new areas of factual or expert enquiry beyond those required for VIL's damages claims.

126. BOS objects to the Rescission Amendments, primarily on the ground that they would require significant further factual and/or expert evidence. In particular, BOS says that it would wish to tender expert evidence as to what BOS says is the very limited financial impact on VIL's swaps of the alleged LIBOR misconduct, in order to show that to grant the remedy of rescission would be a disproportionate exercise of the discretion conferred by the Misrepresentation Act 1967 s 2(2): see eg *William Sindall Plc v Cambridgeshire County Council* [1994] 1 WLR 1016. Although Mr Harvey's evidence also objects to the Rescission Amendments on the grounds that "they stand no real prospect of success", Ms Phelps has made clear that BOS no longer relies on

that argument as a reason why I should refuse permission to amend. She does however submit that VIL has given no proper explanation as to why any claim to rescission was not brought sooner.

(H3) Analysis and conclusion in relation to the Rescission Amendments

127. Mr Harvey does not say in his evidence that it would be impossible for BOS to get this further evidence (which in any event seems to me to be largely to be a matter of obvious calculation) in time to maintain the existing trial date. Given the resources available to BOS, it does not seem to me to be unreasonable to require them to produce any such evidence in fairly short order, so that it can be available for the existing trial date: and I am unpersuaded that it would be difficult for BOS to put together any further factual evidence necessitated by the Rescission Amendments, limited to the Replacement Trades. The prejudice to BOS from allowing the Rescission Amendments therefore seems to me to be small and of a kind which ought to be readily manageable in important commercial litigation of this kind.

128. Applying the principles discussed in paragraphs 27 to 29 and 43 to 45 above, the balance between injustice to VIL if the amendment is refused, and injustice to BOS and other litigants in general if the amendment is permitted therefore seems to me, in the case of the Rescission Amendments (limited to the Replacement Trades), to come down in favour of permitting the amendments, and giving consequential directions to ensure that any necessary factual and/or expert evidence is served in sufficient time for the present trial date. To that extent, therefore, that part of the Disclosure and Amendment Application succeeds.

(I) Additional disclosure in relation to the Undervalue Claims

129. In the third part of the Disclosure and Amendment Application, VIL seeks a nuber of specific categories of additional disclosure. First, VIL seeks 7 categories of additional disclosure in relation to the Undervalue Claims.

(I1) Dakin and Wilson (Draft Order paragraph 5(s))

130. VIL seeks an order that BOS should search for and disclose "Documents in the repositories of Richard Dakin and Andrew Wilson between 31 May 2011 and 30 September 2014 using the agreed keywords set out in the [BOS's Disclosure] Statement" ("the Statement"). The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 108-136, Harvey 1 paras 84-134 and Craig 4 paras 150-159.

131. On behalf of VIL, Mr Davies submits that Mr Dakin and Mr Wilson were the two most important decision-makers within BOS whose function it was to address at a high level the difficulties experienced by BOS with Grainger. In Mr Davies' submission, had VIL known of the UMA and of the responsibility of these two individuals for addressing the difficulties experienced with Grainger, these search terms would have been requested from the outset and there could not have been a reasonable objection. The decision not to search these custodians' documents for the whole of the period of the operation of the UMA is indefensible.

132. BOS, by contrast, says that it has already searched its document repositories for Mr Dakin's documents over a 17-month period and Mr Wilson's documents over a five-month period, ending in each case on 31 May 2011. To extend those periods to 30 September 2014, as VIL now seeks, would be disproportionate and unnecessary. Mr Dakin was very senior and was not involved in the day to day management of VIL's portfolio. Any material involvement of Mr Dakin would be apparent from documents already disclosed from the repositories of those custodians who did have day-to-day involvement. Similarly there is nothing to suggest that Mr Wilson had any material involvement.

133. Applying the principles set out in paragraphs 31 to 41 above, it seems to me that these documents are likely to be relevant to Issue 19 in the List of Common Ground and Issues, and that that issue is one of the key issues in dispute. It seems to me that Mr Davies makes a good point when he says that he should be entitled to see the documents of the managers for the whole of the relevant period, and not just to see their thoughts and actions reflected in the documents of what he described as "the foot soldiers" of BOS. In the circumstances, and taking into account the entirety of the evidence to which I have referred in paragraph 130 above, I am persuaded that it is appropriate to make the order sought by VIL under this head in order fairly to resolve that issue.

(I2) Panel relationship (Draft Order paragraph 5(n))

134. VIL seeks an order (as amended by Mr Davies in oral argument) that BOS should search for and disclose "All documents, including any side letter, containing the terms upon which [BDO] was appointed to the relevant panel by BOS and/or [Lloyds]". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 108-136, Harvey 1 paras 102-108 and Craig 4 paras 139-144.

135. On behalf of VIL, Mr Davies submits that the relevance of the panel relationship of the Receivers' firm, BDO, has been pleaded in paragraph 71.4 of the APoC since July 2016, but is responded to in paragraph 92 of the Amended Defence by a bare denial. In Mr Davies' submission, the terms of panel membership are also relevant

to the allegations pleaded in paragraph 71.3 of the APoC and paragraph 82(b) of the Reply.

136. BOS resists this category. Ms Phelps submits that the request is simply fishing, is hopelessly wide and unfocused, and seeks documents which have nothing to do with VIL.

137. I disagree. In my judgment, these documents are likely to be relevant to Issue 19, and are potentially of importance to VIL's case as presently pleaded. It should not be difficult or onerous for BOS to disclose these documents. In the circumstances, and taking into account the entirety of the evidence to which I have referred in paragraph 134 above, I am persuaded that it is appropriate to make the order sought by VIL under this head in order fairly to resolve that issue.

(I3) RAMP Governance Group (Draft Order paragraphs 5(j) and 5(o))

138. VIL seeks an order that BOS should search for and disclose:

138.1 "All minutes and/or reports of every [RAMP] Governance Group meeting that took place at which the appointment of Grainger was discussed or considered: (i) generally; and (ii) specifically in relation to VIL"; and

138.2 "The minutes relating to the [RAMP] Governance Group's selection of BOS's and/or Lloyds' shortlist of asset managers, as referred to in DLA010006290"

The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 108-136, Harvey 1 paras 84-89 and 109-113, and Craig 4 paras 129-130 and 145-146.

139. On behalf of VIL, Mr Davies submits that the RAMP Governance Group was set up to ensure that Grainger had appropriate "governance and control". It follows that the function and workings of the group clearly relates to the control exercised over Grainger by BOS, eventually through the UMA, which is a central issue in this action.

140. On behalf of BOS, Ms Phelps submits that these documents are irrelevant to the pleaded issues, not least because the selection of Grainger as the preferred asset manager took place in December 2010, well before the receivership. The pleaded issue is whether BOS subsequently "directed, interfered and/or intermeddled" with the Receivers to influence them to appoint Grainger, not how Grainger was originally chosen by BOS in preference to other managers. Ms Phelps also submits that any relevant documents are likely already to have been disclosed and that the request is

unbounded in terms of timeframe and includes requests for documents which do not even mention VIL.

141. In my judgment, Ms Phelps' submissions take an altogether too narrow approach to the issue of relevance. The nature of the relationship between BOS and Grainger is a central issue in the case, and the circumstances in which Grainger came to be chosen and the considerations then taken into account are highly likely to be relevant to that issue, even though that appointment had been made before the specific matters now complained of. As for the complaint that the request is "unbounded in time", it seems to me that it is self-limiting, since it relates only to the period during which the appointment of Grainger was being discussed. That having been said, it seems to me that these two requests are duplicative, and that only the first is required fairly to resolve this issue.

142. As to Ms Phelps' point that any relevant documents are likely already to have been disclosed, Mr Davies responds (in my judgment rightly) that that cannot be right, since the relevant minutes have not been disclosed, despite the searches (e.g. in the documents of Ms Firman and Mr Dakin) that have already taken place. That anomaly is not explained in the evidence, and Ms Phelps could not explain it in her submissions.

143. In the circumstances and taking into account the entirety of the evidence to which I have referred in paragraph 138 above, I am persuaded that it is appropriate to make the first order sought by VIL under this head.

(I4) Excom (Draft Order paragraphs 5(k) and 5(l))

144. VIL seeks an order that BOS should search for and disclose:

144.1 "All minutes and/or reports from Excom meetings at which VIL was mentioned and/or discussed; and

144.2 "All 'Solutions: Excom Reports', or equivalent documents by another name, which refer to VIL"

The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 113, Harvey 1 paras 96-98 and Craig 4 paras 131-137.

145. On behalf of VIL, Mr Davies submits that the contemporary documents show that the strategy for disposing of VIL's property through Grainger was discussed at meetings of the CRE BSU Executive Committee ("Excom"). Mr Davies submits that such discussions are plainly relevant to the Undervalue Claims and causation. In his

submission, documents going to the reasons why VIL was placed into BSU and the treatment VIL received within BSU, including the extent to which the Swaps featured in the Bank's decision to place VIL into BSU and then into receivership are relevant to the issues in dispute. In this context, Excom's role as BOS's relevant decision-making body was significant.

146. As for the "Solutions" reports, Mr Davies submits by reference to the statements of the witnesses that BOS intends to call at trial that the Solutions Team was established to work alongside the relationship teams within BSU to assist them in supporting their customers and to help them to maximise realisations. It was the Solutions Team which developed the asset management strategy which became RAMP and which was implemented through Grainger.

147. For BOS, Ms Phelps again submits that these documents do not go to the pleaded issue of whether BOS "intermeddled" with the Receivers. In Ms Phelps' submission, BOS's internal discussions in relation to Grainger are unlikely to be relevant to that pleaded issue. In any event, the documents of Chris Canham (who was a member of Excom up to September 2014) and of Natasha Firman (who was part of the BSU "Solutions" team) have already been searched and any relevant documents disclosed.

148. As with the previous category, it seems to me that Ms Phelps' submissions take an altogether too narrow approach to the issue of relevance, and ignore the central importance to VIL's pleaded case of the relationship between BOS and Grainger. As for Ms Phelps' submission that any relevant documents will already have been disclosed, the fact remains that no minutes or reports have been disclosed: and I accept Mr Davies' submission that it is unlikely that the Excom and/or the Solutions Team at no point referred to VIL in any of the minutes of their meetings or their reports.

149. In the circumstances and taking into account the entirety of the evidence to which I have referred in paragraph 144 above, I am persuaded that it is appropriate to make the orders sought by VIL under this head.

(I5) Guthrie and Cherry (Draft Order paragraph 5(t)(i) and 5(t)(ii))

150. VIL seeks an order that BOS should search for and disclose "Documents in the repositories of Ian Guthrie (1 October 2010 to 30 September 2014) and Mark Cherry (1 October 2010 to 30 June 2014) using the keyword search terms set out in the Statement". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 108-136, Harvey 1 paras 128-134 and Craig 4 paras 160-161.

151. Mr Guthrie was a member of the RAMP Governance Group, and Mr Cherry was Head of Asset Management in the Solutions Team.

152. Mr Davies argues that the fact that Mr Guthrie was a member of the Governance Group is of itself a reason to add him as a custodian whose repository should be searched for relevant documents. I do not agree that that is sufficient, of itself, to justify an application for additional disclosure in relation to his documents at this stage. I accept Mr Harvey's unchallenged evidence (Harvey 1 paragraph 128) that Mr Guthrie had nothing to do with VIL

153. However, it seems to me that Mr Cherry stands in a different position. Ms Phelps submits that there is no pleaded case of Mr Cherry's involvement with VIL. That is correct: but the documents already disclosed by BOS show that Mr Cherry was involved in the decision relating to the re-basing of the value of the VIL portfolio, and that Ms Bouma of Grainger apparently kept Mr Cherry "posted" regarding developments with the disposal of the VIL portfolio. In my judgment, Mr Davies is right to submit that there are likely to be more emails either to or from Mr Cherry which relate directly to the Undervalue Claims - particularly to the pleaded case that the Receivers caused or allowed management and selling fees to be levied which were excessive and unreasonable.

154. In the circumstances and taking into account the entirety of the evidence to which I have referred in paragraph 150 above, I am persuaded that it is appropriate to make the order sought by VIL under this head in relation to Mr Cherry, but not in relation to Mr Guthrie.

(I6) Mr Brouwer (Draft Order paragraph 6))

155. VIL seeks an order that BOS should search the documents of Mr Arjan Brouwer for the period 1 May 2011 to 31 December 2013 using the search terms described in the Statement. The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 153(iv), Harvey 1 paras 164-165 and Craig 4 para 184.

156. Mr Brouwer was an analyst within BSU in the lead up to and during the period that VIL was in administrative receivership.

157. In Mr Davies' submission, it is clear from correspondence between Mr Brouwer and the Receivers that Mr Brouwer directed Grainger, through the Receivers, to carry out BOS's instructions in relation to VIL's portfolio.

158. On behalf of BOS, Mr Harvey accepts that Mr Brouwer "may have assisted in the management of [VIL]'s relationship with BOS following the transfer to BSU, and

liaise from time to time with BDO". However, he "had a very junior role, with no decision-making authority" and it is therefore unlikely that any new disclosable documents will be returned by a search. Ms Phelps also submits that Mr Brouwer's documents are irrelevant to any pleaded issue.

159. In my judgment, Mr Brouwer's documents are likely to be relevant to the Undervalue Claims, and there is a realistic prospect that the search will produce further disclosable documents. Given Mr Brouwer's junior role, I have more hesitation as to whether it is sufficiently necessary for the just disposal of this action for me to order his repository to be searched: but, on balance, taking into account the entirety of the evidence to which I have referred in paragraph 155 above, I am persuaded that it is appropriate to make the order sought by VIL under this head in order fairly to resolve the issues in the Undervalue Claims.

(I7) Deleverage Advisory Forum (Draft Order paragraph 5(r))

160. VIL seeks an order that BOS should search and disclose "All CRE BSU Deleverage Advisory Forum presentations that refer to VIL". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 108-136, Harvey 1 para 119 and Craig 4 para 149.

161. These documents relate to the process of de-leveraging BOS's Corporate Real Estate carried out by BSU. One presentation has been disclosed which mentions VIL. In Mr Davies' submission it is obvious why the way in which VIL's assets might be liquidated quickly as a means of improving BOS's balance sheet is relevant to both the purpose of appointing Grainger and also to the allegation that Grainger, as BOS's appointed manager, managed and effected sales of many portfolio properties for BOS.

162. I do not agree. As Ms Phelps submits, there is no pleaded case that the purpose of RAMP (and the appointment of Grainger) was to improve BOS's balance sheet by liquidating assets quickly at an undervalue. VIL's narrative pleading raising a similar allegation was struck out by Sara Cockerill QC in January 2017.

163. I am not persuaded that it is appropriate to make the order sought by VIL under this head. In my judgment, disclosure of these documents is not necessary in order fairly to resolve the issues in the Undervalue Claims. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J) Additional disclosure in relation to the Misrepresentation and Breach of Duty Claims

164. VIL also seeks 8 categories of additional disclosure in relation to the Misrepresentation and Breach of Duty Claims.

(J1) Corporate Sales Weekly (Draft Order paragraph 5(b))

165. First, VIL seeks an order that BOS should search for and disclose "Copies of all "Corporate Sales Weekly" emails (with attachments) that refer, either directly or indirectly, to VIL between 1 January 2008 and 1 March 2009". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 102-107, Harvey 1 paras 62 to 64 and Craig 4 paras 105-107.

166. In Mr Davies' submission, the Corporate Sales Weekly emails are relevant because they contain candid internal bank commentary regarding significant deals at the time and the revenue generated from them for BOS. They may well shed light on BOS's motivation for seeking to restructure VIL's hedging as it did and for making the Value Representations. At the least, they are likely to contain information regarding the immediate profits generated by the Replacement Trades.

167. It was plain, in oral argument, that Ms Phelps did not accept that documents relevant to the motivation of the team which sold the Replacement Trades to VIL (e.g. documents relating to their bonus and other reward arrangements) would be relevant to the issue of how likely it was that they would (as VIL asserts) deliberately lie or be reckless as to the truth of what they said in order to procure a sale. In my judgment, this was again too narrow a view of relevance.

168. VIL has not, however, made a targeted request for disclosure of such documents. Instead, in this category and the others which follow, it has sought disclosure of documents which "might" or "may well" shed light on those issues. As Ms Phelps submits, that does not satisfy the requirements which would justify an order for additional disclosure.

169. I take into account the entirety of the evidence to which I have referred in paragraph 165 above. However, I am not persuaded that it is appropriate to make the order sought by VIL under this head in order fairly to resolve the issues in the Undervalue Claims. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J2) ID Revenue List (Draft Order paragraphs 5(f))

170. Secondly under this heading, VIL seeks an order that BOS should search for and disclose "All iterations of the ID Revenue List which refer to Ventra or VIL during the period 2008 to 2010". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 102-107, Harvey 1 paras 78-79 and Craig 4 paras 117-120.

171. Mr Davies' submission on this item is that BOS has disclosed a spreadsheet of the customers which have generated the most revenue from interest rate derivative transactions in 2007/2008. VIL therefore seeks disclosure of any similar document which relates to the year 2008/2009 and which therefore contains information as to the revenue generated for BOS from the Replacement Trades.

172. Ms Phelps again submitted that "BOS's alleged motives for making any representations are not relevant to the questions the Court will have to decide". For the reasons explained in paragraph 167 above, that view is in my judgment mistaken.

173. However, in oral argument, Ms Phelps made the much better point that the Bank has already disclosed a document showing the profit which Mr Dolan (who made the Replacement Trades in 2009 on behalf of BOS) thought that he had booked for BOS: and that nothing further is required in order fairly to resolve the case on this issue.

174. I accept that submission. It is Mr Dolan's motives and motivation that are primarily relevant to these issues, not any matters which were unknown to him. I take into account the entirety of the evidence to which I have referred in paragraph 170 above. However, I am not persuaded that it is appropriate to make the order sought by VIL under this head in order fairly to resolve the issues in the Misrepresentation Claims. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J3) Repricing (Draft Order paragraphs 5(g) and 5(i))

175. Thirdly, VIL seeks an order that BOS should search for and disclose:

175.1 "All Pro Formas that were completed in connection with VIL in compliance with the Excess Procedure Document, which have not yet been disclosed"; and

175.2 "All documents which record other instances where a Repricing Opportunity was considered in relation to VIL, in particular between 1 January 2008 and 1 March 2009".

The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 102-107, Harvey 1 paras 80-83 and Craig 4 paras 121-127.

176. Among the documents disclosed by BOS was an "excess compliance" pro forma, containing a request within BOS for an increase in the internal credit limit for VIL to take account of adverse market movements in relation to interest rates (which had increased VIL's potential liabilities under the Swaps, for which BOS had to make internal provision). That pro forma makes a reference to there being no opportunity to "reprice the connection".

177. Ms Craig explains that "a repricing opportunity allows a bank to maximise its income generated from the customer by restructuring the facility or facilities and/or hedging profile of that customer to take advantage of prevailing interest rates". Based on that evidence, Mr Davies submits that these are straightforward and proportionate disclosure requests, relevant to BOS's financial incentive to induce VIL to enter into the Replacement Trades.

178. In my judgment, Ms Phelps is correct to submit that, far from being targeted requests, these applications are in the nature of a "fishing expedition", and do not justify an order for additional disclosure. As I have pointed out in connection with VIL's previous request, it is Mr Dolan's motives and motivation that are primarily relevant to these issues, not any matters which were unknown to him.

179. I take into account the entirety of the evidence to which I have referred in paragraph 175 above. However, I am not persuaded that it is appropriate to make the orders sought by VIL under this head in order fairly to resolve the issues in this action. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J4) Mr Regan and Mr Croudace (Draft Order paragraphs 5(t)(iii)and 6)

180. Fourthly, VIL seeks an order that BOS should search the documents of two further custodians using the search terms described in the Statement:

180.1 Mr Ted Regan for the period from 1 October 2010 to 30 May 2011; and

180.2 Mr Bill Croudace for the period from 1 January 2010 to 1 January 2011.

The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 106-136 and 153(iii), Harvey 1 paras 130 and 162, and Craig 4 paras 161(iii) and 182.

181. Mr Regan and Mr Croudace were both involved (as was Mr Dakin) in the decision-making process which led to the transfer of VIL into BSU. Mr Croudace was a relationship manager of VIL's sister companies within Lloyds for some time prior to the merger between BOS and Lloyds. According to Mr Bishop (Bishop 7 paragraph 153(iii)), Mr Croudace appears to have been opposed to the transfer of VIL to BSU, and to have advocated an alternative approach which was ultimately over-ridden by Mr Regan and Mr Dakin. BOS has served a witness statement from Mr Dakin and from Warren Shave. Mr Croudace was Mr Shave's line manager. However, no witness statements have been served from Mr Regan or Mr Croudace.

182. According to Ms Craig (Craig 4 para 161(iii)):

> **.. The decision to transfer VIL to BSU [is clearly material to the outcome of these proceedings. It] was a critical moment in the demise of VIL which irrevocably changed its trajectory. In particular, it is necessary to understand the extent to which the Replacement Swaps featured in the decision to transfer VIL to BSU and thus whether, "but for" the Replacement Swaps, VIL would have survived with its property portfolio wholly or partly intact ..**

That decision was therefore, according to Ms Craig, directly relevant to the claim for damages pleaded in paragraph 74 and 75 of the APoC and accordingly to issues 21 and 22 in the List of Common Ground and Issues. Ms Craig specifically draws attention to issue 22(c) which is "If VIL had been able to pursue, and if it had pursued, the Termination Strategy, would VIL have (i) defaulted or been placed in BSU; and/or (ii) retained all or part of its property portfolio intact".

183. In Mr Davies' submission, it is BOS's opinion (and not just the actual state of VIL) that will be relevant to this aspect of VIL's counterfactual case as to what would have happened had it not entered into the Replacement Trades. The documents of those, like Mr Regan and Mr Croudace, who were there at the time and were either opinion-formers or decision-makers, are therefore plainly relevant and sufficiently important to justify an order for additional disclosure.

184. Ms Phelps takes issue with these submissions. She argues that BOS's subjective view of VIL at the time it was transferred to BSU is not a significant issue in the case, and that what really matters is the actual financial position of VIL at the time. In Ms Phelps' submission, the arguments now put forward by Mr Davies are an echo of the case struck out by Sara Cockerill QC, which was that the transfer into BSU was itself wrongful, being part of an overall plan to force VIL into default and insolvency in order to assist in de-leveraging the balance sheet of BOS. It is not now alleged that the transfer to BSU was wrongful, or that the transfer itself cause any loss. What caused the loss was the sale of the portfolio by the Receivers.

185. Ms Phelps has another argument, which is that there has already been sufficient disclosure about what happened when VIL was transferred into BSU. This, Ms Phelps argued, is demonstrated to an extent by the various documents relied upon by VIL to demonstrate the conflicting views of Mr Dakin and Mr Croudace. The material that the three men who took the decision had before them at the time has already been disclosed, as have the credit papers that were submitted to the credit committees during the period when VIL's accounts were being managed by BSU.

186. Having regard to the terms of Issue 22(c), it seems to me that there is force in Mr Davies' submission that the issue of what BOS would have been likely to do in the counterfactual situation that VIL had not entered into the Replacement Trades is one of the important issues in this case. Yet again, it seems to me that BOS has taken entirely too narrow a view of what is relevant. VIL's actual objective financial position in that counterfactual situation would plainly be a highly material component in any assessment of what would have been likely to have happened: but the court will also be likely to have to form a view about what BOS subjectively would have done in that counterfactual situation in order to assess VIL's case as to its loss.

187. Even so, I am not persuaded that a trawl through the document repositories of Mr Regan or Mr Croudace would be likely to produce any material of sufficient importance that has not already been disclosed. The documents already disclosed sufficiently show the conflicting views of the people involved on the basis of the material then before them. The relevant issue, though, is what view the decision-takers in BOS would have formed in a different (counterfactual) situation, and therefore inevitably by reference to entirely different material. It seems to me to be quite unlikely that that enquiry would be sufficiently illuminated by this further disclosure to justify my making an order.

188. I take into account the entirety of the evidence to which I have referred in paragraph 180 above. However, I am not persuaded that it is appropriate to make the orders sought by VIL under this head in order fairly to resolve the issues in the Misrepresentation Claims. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J5) Review meetings (Draft Order paragraph 5(m))

189. Fifthly, VIL seeks an order that BOS should search for and disclose "Minutes and/or reports of all "review" meetings that refer to VIL". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 108-136, Harvey 1 paras 101 and 130-131 and Craig 4 para 138.

190. Mr Davies submits that VIL was a "special mention" customer due to its size/complexity, of the kind that would be reviewed at these monthly meetings. The minutes of such meetings would therefore be "focussed summaries of how the bank viewed VIL". These minutes and reports would therefore be relevant for the same reasons as the documents of Mr Regan and Mr Croudace, in that they would shed light on VIL's counterfactual case. One such report has been disclosed but, in Mr Davies' submission, VIL must have been mentioned at more than one of these monthly meetings.

191. Ms Phelps again submits that these documents are not relevant to any pleaded issue. In any event, BOS has searched the documents of 14 BSU custodians for relevant documents as part of its original disclosure exercise. Any relevant documents would already have been disclosed.

192. For the reasons that I gave in considering VIL's application for the documents of Mr Regan and Mr Croudace, it seems to me unlikely that these documents would shed sufficient light on VIL's counterfactual case to justify an order for further disclosure. They could only show what BOS's view was in the situation that actually occurred. Given the material already disclosed, it seems improbable that the further documents now sought would provide significant further material to show what BOS would have done in the different, counterfactual, situation on which VIL's claim for damages depends.

193. I take into account the entirety of the evidence to which I have referred in paragraph 189 above. However, I am not persuaded that it is appropriate to make the orders sought by VIL under this head in order fairly to resolve any of the issues in this action. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J6) Dianne Cornes (Draft Order paragraph 5(c))

194. Sixthly, VIL seeks an order that BOS should search and disclose "the following documents in the repositories of Dianne Cornes between 1 January 2008 and 1 March 2009: (i) Correspondence responsive to the keyword search terms set out in the Statement; and (ii) Documents relating to the S&U Forms disclosed to date or to be disclosed in accordance with paragraph 70 of the First Witness Statement of Christopher Harvey dated 28 May 2019". The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 102-107, Harvey 1 paras 65-71, and Craig 4 paras 108-115.

195. Ms Cornes was Head of Corporate Sales for BOS Treasury, and was the person who sent the "Corporate Weekly Sales" email. As Ms Craig explains (Craig 4 para 110), it was a requirement within BOS that S&U ("Suitability and Understanding") Forms

should be sent to Ms Cornes in relation to any proposed interest rate hedging transaction. These forms contained information about the customer, about the economics of the proposed trade, and about any discussions that had taken place between the salesperson and the customer about the suitability of the proposed trade and the customer's understanding. Ms Cornes' approval was required before the trade could take place: and, according to Ms Craig (Craig 4 para 111):

> **Emails to which Ms Cornes was a party that have been disclosed in these proceedings show that she posed questions to Mr Dolan that related to Mr Palasuntheram's level of sophistication and his understanding regarding hedging products.**

196. In Mr Davies' submission, this shows that documents in Ms Cornes' custody could be relevant to:

- The economics of the Replacement Trades and how the interests of BOS in entering into those trades were viewed and assessed, and hence to VIL's case on fraud;
- The question of Mr Palasuntheram's level of sophistication and experience in relation to such products (Issues 10 and 11 in the List of Common Ground and Issues);
- The scope of the duty in tort which (on VIL's case) BOS owed to VIL to explain fully and accurately the nature and effect of the Replacement Trades (Issue 12);
- Whether BOS intended VIL to understand the Value Representations in the sense alleged by VIL (Issue 9a); and
- Whether VIL did in fact rely on the Value Representations and the information provided to it by BOS in relation to the terms, conditions and risks of the Replacement Trades (Issues 9(b)(i) and 14).

Mr Davies submits that the order sought is a reasonable and proportionate one and that it is necessary in order fairly to resolve these issues.

197. BOS resists VIL's request that it should conduct a detailed trawl of Ms Cornes' documents. Ms Phelps argues that the orders requested by VIL are not justified by any considerations of relevance and in any event are disproportionately wide. Ms Phelps points out that there is no suggestion that Ms Cornes ever communicated directly with VIL, and that any relevant communications between her and Mr Dolan

would have been disclosed as a result of the searches already conducted on Mr Dolan's documents.

198. BOS has agreed (Harvey 1 para 70) to re-review its disclosure documents and to disclose any further S&U Forms relating to VIL which it is able to locate. That seems to me to be entirely proper. Those forms ought to have been disclosed under the existing order for Standard Disclosure.

199. It also seems to me that BOS should conduct a specific search for Mr Dolan's response (if any) to the email from Ms Cornes to Mr Dolan which is quoted in Craig 4 para 111. That response (if any) should already have been disclosed as a result of the searches conducted on Mr Dolan's documents. It seems to me that Ms Craig is correct to say (Craig 4 para 112) that it is probable that Mr Dolan would have responded to Ms Cornes' email: and, if he did, and if that response has not been disclosed (as Ms Craig asserts), that might suggest that something has gone wrong in relation to the disclosure of Mr Dolan's documents. In that event, it would be proper for BOS to review that aspect of its disclosure.

200. However, apart from these specific matters, I am not persuaded by Mr Davies' submissions that a search of Ms Cornes' documents is likely to produce anything of sufficient relevance and importance to justify an order for additional disclosure. Any S&U Forms relating to VIL are to be disclosed. Any relevant correspondence between Ms Cornes and Mr Dolan in the context of those S&U Forms ought already to have been disclosed. Any relevant views of Ms Cornes about VIL's and Mr Palasuntheram's level of sophistication and experience are, in the nature of things, likely to have been recorded in that correspondence.

201. Beyond that, I struggle to see how any of the matters relied on by Mr Davies is sufficiently likely to be illuminated by Ms Cornes' documents to justify an order for additional disclosure.

202. I take into account the entirety of the evidence to which I have referred in paragraph 194 above. However, I am not persuaded that it is appropriate to make the orders sought by VIL under this head in order fairly to resolve any of the issues in this action. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application.

(J7) Odeide, Burke and Cunningham/the MLC system (Draft Order paragraph 6)

203. Seventhly, VIL seeks an order that BOS should search the documents of 3 further custodians for the period from 1 August 2008 to 1 March 2009, using the search terms described in the Statement, plus "PFE" and/or "MTM" in the same document as "Dolan": (1) Mr Alec Odeide; (2) Mr Colin Burke; and (3) Mr David

Cunningham. The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 153(i), Harvey 1 paras 161 and 162, and Craig 4 paras 179 to 181.

204. According to Mr Bishop (Bishop 7 para 153(i)), Mr Odeide, Mr Burke and Mr Cunningham were all employed in BOS Treasury Department and:

> **.. corresponded with and/or advised [Mr Dolan] in relation to the PFE and MTM values of at least some of the Original Trades and the Replacement Trades, during the course of [Mr Dolan] structuring, offering and transacting the Replacement Trades with VIL ..**

205. According to Mr Davies, it is clear from this correspondence that Mr Dolan was influenced in his selection of the Replacement Trades by what he was told by Mr Odeide, Mr Burke and Mr Cunningham regarding the PFE and the MTM of the Original Trades. The documents sought are therefore relevant Mr Dolan's state of mind in proposing the Replacement Trades to VIL (Issues 9(a) and (f) in the List of Common Ground and Issues). The date range sought is only 7 months, and the request is therefore reasonable and proportionate.

206. VIL also seeks an order that BOS should search the MLC ("Murex Limit Controller") System for the period from 1 August 2008 to 1 March 2009, using the search terms described in paragraph 7 of the Statement. The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 153(ii), Harvey 1 paras 160 and 161, and Craig 4 paras 185-186.

207. Again according to Mr Bishop (Bishop 7 para 153(ii)):

> **The details of BOS's existing and prospective trades were entered into and stored in a trade booking system called "Summit" which, according to the Statement, has been searched. However, information about the PFE and the MTM figures of particular trades appears to have been derived from a different system called "MLC" which, according to the Statement, has not been searched.**

208. According to Ms Craig (Craig 4 para 186), Mr Dolan in his witness statement:

> **.. appears to be suggesting that, if he did represent to Mr Palasuntheram that there was positive value in the swaps (that could have been transferred to good effect into the replacement swaps) then he (Mr Dolan) could not have believed that such was true. Mr Dolan's evidence underlines the need to understand what the "true" position was at the time, including the counterparty risk that the bank was exposed to when Mr Dolan was speaking to Mr**

> **Palasuntheram and (on VIL's case) persuading him to enter into replacement trades.**
>
> **It is not suggested that a search of VIL on the MLC system would be onerous and it is likely to have a direct bearing on the understanding of the parties and the court at trial as to the knowledge and belief of Mr Dolan when the crucial conversations took place (including what is most likely to have been in their respective minds when they spoke to each other).**

209. In Mr Davies' submission, the documents held in the MLC system are likely to include documents which evidence Mr Dolan's state of mind and the information that was available to him at the time he sold the Replacement Trades. Like the documents of Mr Odeide, Mr Burke and Mr Cunningham, such documents are directly relevant to Issues 5, 9(a) and 9(f).

210. In response, Ms Phelps submits that BOS's internal views about "MTM" and "PFE" are irrelevant to the issues in the case. It is accepted by BOS that the Original Trades were in fact out of the money, and that Mr Dolan knew that. Anything else is irrelevant. Ms Phelps also asserts that this issue has already been decided by Sara Cockerill QC in paragraphs 77 to 83 of her judgment dated 3 March 2017.

211. I do not accept those submissions. At the time when Ms Cockerill QC handed down her judgment, VIL's claim was based on negligent misrepresentation, and there was no allegation of fraud. That has now changed. Mr Dolan's state of mind, and anything that may (on VIL's case) have motivated him to lie or to be reckless as to the truth of what he was representing (allegations which I must make clear that Mr Dolan strenuously denies) is plainly relevant to the case in fraud that VIL is now putting forward in relation to the Value Representations. Yet again, it seems to me that BOS has taken far too narrow and self-serving a view of relevance.

212. Even so, I am at a loss to understand how anything of substance relevant to Mr Dolan's state of mind is likely to be revealed by a search of the documents of these additional custodians or of the MLC system. Any communications with Mr Dolan should have been disclosed as a result of the searches carried out of Mr Dolan's own documents. The relevant issue is what Mr Dolan himself knew or believed, not what the "true" position (to use Ms Craig's words) was or was believed to be by others within BOS.

213. I take into account the entirety of the evidence to which I have referred in paragraphs 203 and 206 above. However, I am not persuaded that it is appropriate to make the orders sought by VIL under this head in order fairly to resolve any of the issues in

this action. I therefore decline to make the orders sought by VIL under this part of the Disclosure and Amendment Application.

(J8) Hornby (Draft Order paragraphs 5(w), (x) and (y))

214. Eighthly, VIL seeks an order for disclosure of:

214.1 "Any minutes and/or report of the meeting between Andy Hornby, the Prime Minister, the Chancellor, and the other banks' CEOs;

214.2 Any minutes and/or report of the meeting between Andy Hornby and the Chancellor; and

214.3 Any minutes and/or report of any other meeting between Andy Hornby and the Prime Minister and/or Chancellor in 2008 (if any such meetings occurred)".

The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 para 137-150, Harvey 1 paras 145-158 and Craig 4 paras 170 to 178.

215. According to Mr Bishop (Bishop 7 paras 139-140), documents disclosed by BOS show that the Chief Executive of BOS, Andy Hornby, had a meeting with the Prime Minister and the Chancellor on or about 15 April 2008, and thereafter had further meetings with the Chancellor and the CEOs of other banks which continued at least until May 2008. In Mr Bishop's words, these meetings involved:

> **.. Ongoing discussions (and therefore awareness on the part of Mr Hornby) about the unreliability of LIBOR ..**

216. Again according to Mr Bishop (Bishop 7 paras 141-142):

> **.. VIL's case is that in response to these meetings with the government, BOS deliberately and artificially lowered its LIBOR submissions and distorted the market in order to avoid negative perceptions as to its financial strength, and that it did so with the knowledge of senior managers including Andy Hornby (who attended the meetings) and Lindsay Mackay, Cliff Pattenden and Ian Fox (all of whom were recipients of the Andy Hornby Emails) ..**
>
> **It is clear that internal records of the Meetings would have been prepared and it follows that such records should be disclosed.**
>
> **It is also clear that there are likely to be further relevant documents which VIL has not seen. Insofar as they relate to Mr Hornby's**

> **knowledge, they will obviously be particularly relevant to VIL's pleaded case in relation to LIBOR ..**

217. In Mr Davies' submission, the knowledge of BOS's senior management of LIBOR manipulation and, therefore, of the falsity of the LIBOR Representations will be a key issue to be determined at trial.

218. In Ms Phelps' submission, these requests are obviously fishing, since there is no pleaded case in relation to what was said in any of these meetings. Alternatively, Ms Phelps submits that an order in the terms sought by VIL is not necessary for the just disposal of the proceedings and/or is not reasonable and proportionate. As explained by Mr Harvey (Harvey 1 para 151) BOS has already conducted a significant disclosure and review exercise over the documents that are most likely to contain evidence relevant to the LIBOR issues, including (but in no way limited to) a search for the word "LIBOR" over Mr Hornby's available data for the period from 1 January 2006 to 31 December 2012. As a result (in Mr Harvey's words):

> **It is simply not the case that there is a set of documents that has gone unsearched, or that BOS is now unwilling to bring within the scope of its search.**

On that basis, Ms Phelps submits that it would not be reasonable or proportionate to require BOS to carry out further duplicative searches over Mr Hornby's documents from 2008. Such a search would be pointless, and cannot be said to be necessary for the just disposal of these proceedings.

219. I do not accept Ms Phelps' submission that these requests are obviously fishing. I do, however, accept her submission that the extensive disclosure exercise which has already been carried out means that an order in the terms now sought by VIL in relation to Mr Hornby's documents is neither necessary for the just disposal of these proceedings nor reasonable and proportionate.

220. I take into account the entirety of the evidence to which I have referred in paragraph 214 above. However, I am not persuaded that it is appropriate to make the order sought by VIL under this head in order fairly to resolve any of the issues in this action. I therefore decline to make the order sought by VIL under this part of the Disclosure and Amendment Application

(K) Further Information

221. Finally, VIL seeks two categories of Further Information.

(K1) MTM (Draft Order paragraphs 8(f) and (g))

222. First, VIL seeks an order that BOS should provide further information concerning two matters concerning the MTM of the various trades:

222.1 "Whether Mr Dolan, Mr Henderson, Ms Cornes or any other employee of BOS had access to or created a mark to market MTM Graph (or equivalent), or data that would enable the production of an MTM graph (or equivalent), during the period when Mr Dolan was proposing trades to VIL that would restructure the Original Trades (and in particular between 1 August 2008 and 1 March 2009); and (i) if so, BOS shall disclose copies of all relevant MTM Graphs, data or equivalent; or (ii) if not, BOS shall explain how Mr Dolan assessed the MTM of the Original Trades when proposing the Replacement Trades and how any related S&U Forms were properly completed in order to reflect the effect of the MTM of the Original Trades in any proposed (and ultimately transacted) restructured trades"; and

222.2 "What system, program, document, calculation or source enabled Mr Dolan to conclude that £373,000 had been generated for BOS by transacting with VIL on 6 February 2009, immediately after the trade to taken place, and whether the same information would have been available in relation to the other Replacement Trades".

223. Mr Davies submits that this information (and these documents) evidencing the information about the "value" of the Original Trades, including any graphs and/or data informing Mr Dolan of the magnitude of the MTM of the Original Trades is relevant to Mr Dolan's state of mind, and therefore should be disclosed. In Mr Davies' submission, Mr Dolan's awareness of the financial benefits to BOS of transacting the Replacement Trades is relevant to the purpose for which he made the Value Representations and his motivation to act (as VIL alleges, but he denies) fraudulently in making the Value Representations.

224. In answer, Ms Phelps once again submits that levels of MTM and revenue are not "matters in dispute in the proceedings" for the purposes of CPR part 18, and are irrelevant. For the reasons given in paragraph 211 above, I do not accept that submission. Evidence relevant to Mr Dolan's state of mind and to any incentive he may have had to act wrongfully are plainly relevant: and if BOS has conducted its disclosure exercise on the basis that they are not, then it must revisit that exercise and give proper disclosure.

225. However, under paragraph 1.2 of CPR PD18, requests such as this for further information "should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable [the requesting] party to prepare his own case

or to understand the case he has to meet". In my judgment, the request set out in paragraph 222.1 above does not meet those criteria. The relevant issue is what Mr Dolan himself knew or believed, not what the position was known or believed to be by others within BOS. The requested information is far too broad and general, and is directed as much towards matters which are irrelevant as towards the only relevant issue. This information is therefore not reasonably necessary for the fair resolution of the issues in this action, and I therefore decline to make the order sought by VIL in paragraph 8(f) of the Draft Order.

226. By contrast, the request set out in paragraph 222.2 is a targeted one, specific to Mr Dolan and to the information available to him at the relevant time. It is therefore directed to a central issue. The task of answering the request should not be unduly burdensome to BOS.

227. In my judgment, this request does meet the criteria in paragraph 1.2 of PD18. I am therefore prepared to make the order sought by VIL in paragraph 8(g) of the Draft Order.

(K2) Lloyds (Draft Order paragraph 8(o))

228. Secondly under this heading, VIL seeks an order that BOS should provide the following further information in relation to documents emanating from Lloyds:

228.1 "The number of documents that are in the possession and/or control of BOS that emanate from searches conducted by Lloyds Bank plc and Lloyds Banking Group plc (together "Lloyds") on the document repositories after the issue of the Claim Form when Lloyds was still a defendant in these proceedings;

228.2 The names of the Lloyds' custodians and/or systems in respect of which Lloyds' repositories have been searched; and

228.3 The parameters of the searches that were applied to the full set of Lloyds Documents provided to BOS, including date range, keyword search terms and any other automated search functions, resulting in the provision of the 13 documents disclosed".

The evidence relevant to this part of the Disclosure and Amendment Application is principally to be found in Bishop 7 paras 75 to 92, Harvey 1 paras 54 to 61 and Craig 4 paras 98 to 104.

229. In Mr Davies' submission, VIL has reason to believe that relevant documents in the repositories of Lloyds are in the "control" of BOS for the purposes of CPR 31.8 and therefore should have been (but have not been) searched using the keyword search terms in the Statement. VIL's reason so to believe is based on the 13 documents emanating from Lloyds that were included in BOS's disclosure.

230. According to BOS, these documents came into its possession during the period in which two other Lloyds companies were defendants to the present proceedings. According to Ms Craig (Craig 4 para 101):

> **No satisfactory explanation has ever been received from BOS as to: (i) what searches were conducted and, specifically, whose document repositories and/or what systems were searched; (ii) the total number of documents provided to BOS; and (iii) what date ranges and/or keyword searches and/or other automated search functions were used by BOS to produce the final 13 documents disclosed.**

VIL therefore seeks an order requiring BOS first to clarify what, if any, documents of Lloyds are in its control, and how they came to be there, and which are the relevant custodians, and then properly to search those documents using the agreed search terms.

231. In Ms Phelps' submission, this request does not meet the criteria in paragraph 1.2 of CPR PD18. VIL simply does not need a more detailed account of precisely how these Lloyds documents came to be collated and provided to BOS. As Mr Harvey has explained (Harvey 1 para 57) the Lloyds documents which BOS has disclosed:

> **.. came into BOS's possession during the time when Lloyds was a party to these proceedings in the context of both banks' preliminary investigation of the claims and document collation exercise ..**

Those documents were still in the physical possession of BOS's solicitors when the disclosure review was carried out, and were therefore disclosed. That fact does not mean that all of Lloyds' documents are now in BOS's "control" for the purposes of disclosure. BOS and Lloyds are separate legal entities, despite being part of the same corporate group since January 2009. VIL banked only with BOS (though its sister companies banked with Lloyds).

232. In my judgment, the further information sought by this request is not reasonably necessary to enable VIL to prepare his own case or to understand the case it has to meet. Nor is the order sought proportionate. I accept Ms Phelps' submission that VIL does not need this information. I also accept Ms Phelps' submission that the exercise on which VIL is embarked, of which this request for further information is a first stage, is not a reasonable and proportionate one. It would therefore not be in

accordance with the overriding objective, or the requirements of PD18, or the requirements of PD51U for me to make the order sought under this part of the Disclosure and Amendment Application.

(L) The Adjournment Application and the way forward

(L1) The adjournment application

233. For the reasons given in section (F) above, I have refused VIL's application for an order requiring BOS to disclose the documents of Grainger and Dickinson Dees. For the reasons given in Section (G) above, I have refused VIL's application to amend to plead the Original Trades Amendments. It was common ground that, had I granted either of those applications, it would have been necessary for me to adjourn the trial date. Since I have refused those applications, they cannot in themselves provide grounds to support VIL's adjournment application.

234. For the reasons given in section (H) above, I have granted VIL's application to make the Rescission Amendments. In my judgment, it should be possible for the parties to deal with the necessary consequential amendments to their statements of case and any additional evidence required within the period between now and 15 January 2020, when the trial is due to begin.

235. I have also granted, for the reasons given in sections (I) and (J) above, a small number of VIL's more detailed requests for additional disclosure. Again, in my judgment, it should be possible for BOS (which is a large organisation with substantial resources available to it, both internally and externally) to complete this small amount of additional disclosure very promptly, so as to enable the parties to take that evidence into account in their statement of case and evidence well prior to trial.

236. It follows that none of the orders which I have made in favour of VIL on its various applications provides any ground to support VIL's adjournment application.

237. I have considered whether, having regard to the potential importance of documents from the files of Grainger and Dickinson Dees to the case, and to the possibility that VIL will now seek to obtain these documents by other means, I ought as a matter of case management (and as VIL urges) to vacate the present date and to fix a suitable timetable allowing for that to happen.

238. In my judgment, however, that would be premature. If VIL does obtain these files, the evidential value (if any) of what (if anything) any relevant documents from those files may reveal may be a highly material consideration in the exercise of balancing

(in accordance with the principles discussed in paragraphs 43 to 45 above) the need for finality in litigation and the injustice to BOS and other litigants in adjourning the date presently fixed for trial against the injustice to VIL of refusing its application for an adjournment. It would therefore be wrong for me to embark on that balancing exercise now.

239. As I have explained in paragraph 19 above, it is no longer part of VIL's case that the time required for this trial cannot be accommodated by the court starting on 15 January 2020.

240. In my judgment there are no other sufficiently compelling reasons for me to order the adjournment of that trial date. Parties and the Court have a legitimate expectation that trial fixtures will be kept. Taking all these matters into account, I therefore dismiss the Adjournment Application.

(L2) The way forward

241. Paragraph A1.10 of the Commercial Court Guide says that:

> **The Court expects a high level of co-operation and realism from the legal representatives of the parties. This applies to dealings (including correspondence) between legal representatives as well as to dealings with the Court.**

242. The applications which I have dealt with at this hearing, and the associated witness statements and exhibited correspondence that I have read in connection with them, have unfortunately not demonstrated these vital characteristics. As I have explained in a number of places in this judgment, BOS has been inclined to adopt an unreasonably narrow and self-serving approach to relevance in performing its disclosure obligations. On the other side, the large number of VIL's applications which I have refused as unnecessary or misconceived demonstrate a lack of focus on the really important issues and on the most cost-effective and proportionate way of getting what is really necessary. The correspondence between Hausfeld and DLA Piper has seemed on occasions to be a dialogue of the deaf, neither side engaging properly with the logic of the other's position. The result has been a considerable waste of the parties' and the Court's resources. If proper regard had been had on both sides to the overriding objective, the application bundle for these interim applications would not have been 19 files long.

243. If this case is to be got ready for trial by 15 January 2020, both sides will need to demonstrate a much higher level of co-operation and realism. There is sufficient

time between now and then for everything that needs to be done to be done: but there is no time to spare for unnecessary disputes.

244. The first thing which needs to be done is for BOS to give the additional disclosure which I have ordered. That must be done very promptly.

245. Concurrently with that, VIL needs swiftly to put forward its draft Re-Amended Particulars of Claim, setting out in the light of my rulings and of the material now available to it the case which it proposes to make at trial. In that connection, I draw attention to the principles set out in section (E1) above, in particular the requirement for brevity. The second draft of the proposed re-amendment that VIL put before me in the course of the hearing was far too long and diffuse. Statements of case in the Commercial Court must be concise and should include only those factual allegations which are necessary to enable the other party to know what case it has to meet. Evidence should not be included, and it is usually unnecessary and unhelpful to include extensive quotations from documents or detailed particulars. What is required is to make clear the general nature of the case.

246. I mention this, not only to encourage VIL to obey the rules of pleading, but also to encourage BOS not to take technical objections in response to VIL's draft. Statements of case in the Commercial Court exist to serve a purpose: and if that purpose can better be served by other means, then the court has ample power to dispense entirely with statements of case, or to direct that all that is required is an outline: see paragraph L2.1 of the Commercial Court Guide. Many important cases have in the past been tried without pleadings, or on the basis that the affidavits or witness statements filed in connection with interim applications should serve as the statements of case.

247. BOS already has advance notice in correspondence and in the evidence filed in connection with these applications of many of the matters which VIL is likely to introduce by way of re-amendment. The Court is unlikely to be sympathetic to objections to VIL's pleading which are not based on some real and substantial prejudice to BOS which could not realistically be overcome by the cooperation, realism and effort that the Court expects of those appearing before it- for example, by the service of a short supplemental or additional witness statement to deal with a new point.

248. It will be necessary for me to set a timetable for completion of these matters and of all the other stages necessary to get this case ready for trial by 15 January 2020. It will also be necessary for me to set a revised length for the trial. As to that, my present inclination is to allocate 8 Court weeks to the trial: 7 weeks (28 court days), for the hearing, to include 3 days' judicial pre-reading, followed by a week's break for the preparation of written closings, and then a further week for closings (2 days

for VIL to close, 1.5 days for BOS to close and half a day for VIL to reply). When preparations are further advanced, and all evidence has been served, a final indicative trial timetable can then be prepared and approved or amended by the judge who hears the Pre Trial Review.

249. I encourage the parties to attempt to agree these matters in advance of the hand-down of this judgment, If the parties are for any reason not able to agree, I will hear submissions on those and any consequential matters, and give my ruling then.

(M) Postscript

250. After I made my judgment available to the parties in draft, I received from VIL a request that I should revise the draft so as: (1) to make clear that VIL does not accept BOS's contention that paragraph 18.1 of PD51U applies to VIL's disclosure requests; (2) to clarify my reasons for rejecting VIL's argument based on clause 11.5 of the UMA; and (3) to clarify my reasons for rejecting VIL's argument that the UMA constituted Grainger as BOS's agent.

251. I have acceded to the first of these requests in paragraphs 34 and 35 above. As to the second request, it seems to me that the reasons given by me in paragraph 95 above, although briefly expressed, are already sufficiently clear. As to the third of VIL's requests, I had already added one or two sentences of clarification to my judgment, in the normal course of checking it again for typographical errors and infelicities of expression, before receiving VIL's request. In my judgment, no further clarification of that section of my judgment is now required.

(N) Summary

252. For the reasons set out above:

252.1 I give VIL permission to re-amend its Amended Particulars of Claim to plead its claims for rescission of the Replacement Trades.

252.2 I refuse permission to make the Original Trades Amendments and dismiss VIL's other amendment applications.

252.3 I dismiss VIL's application under paragraph 5(v) of the Draft Order for an order that BOS should disclose the documents of Grainger and Dickinson Dees.

252.4 I grant VIL's applications for additional disclosure:

252.4.1 Under paragraph 5(j) of the Draft Order in relation to the RAMP Governance Group;

252.4.2 Under paragraphs 5(k) and 5(l) of the Draft Order in relation to Excom;

252.4.3 Under paragraph 5(n) of the Draft Order in relation to BDO and the panel;

252.4.4 Under paragraph 5(s) of the Draft Order in relation to Mr Dakin and Mr Wilson;

252.4.5 Under paragraph 5(t)(ii) of the Draft Order in relation to Mr Cherry;

252.4.6 Under paragraph 6 of the Draft Order in relation to Mr Brouwer.

252.5 I dismiss all of VIL's other applications for additional disclosure.

252.6 I grant VIL's application for further information under paragraph 8(g) of the Draft Order.

252.7 I dismiss all of VIL's other applications for further information.

252.8 I dismiss VIL's application to vacate the present trial date.

253. I encourage the parties to agree a timetable for completion of all of the stages necessary to get this case ready for trial by 15 January 2020, and to agree a revised length of trial. If these matters cannot be agreed, I will hear the parties' submissions on these matters and on any consequential issues, when I hand this judgment down on Tuesday, 30 July 2019.

254. I am grateful to counsel and their teams for their assistance.