Neutral Citation Number: [2020] EWHC 2431 (Comm)

Case No: CL-2013-000683

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

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

Date: 10/09/2020

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- - - - - - - - - - - - - - - - - - - -

Between:

(1) KAZAKHSTAN KAGAZY PLC
(2) KAZAKHSTAN KAGAZY JSC
(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP
(4) PEAK AKZHAL LLP
~~(5) PEAK AKSENGER LLP~~
(6) ASTANA-CONTRACT JSC
(7) PARAGON DEVELOPMENT LLP

Claimants

- and -

(1) BAGLAN ABDULLAYEVICH ZHUNUS (formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)
(2) MAKSAT ASKARULY ARIP
(3) SHYNAR DIKHANBAYEVA
(4) SHOLPAN ARIP
(5) LARISSA ASILBEKOVA

Defendants

- and -

HARBOUR FUND III LP

Additional Party

- and -

(1) COOPERTON MANAGEMENT LIMITED
(2) FABLINK LIMITED
(3) WAYCHEM LIMITED
(4) STANDCORP LIMITED
(5) PERMAFAST LIMITED

(6) DENCORA LIMITED
(7) UNISTAREL CORPORATION
(8) XYAN HOLDINGS LIMITED

Respondents to the Applications for Charging Orders

- -
- -

Daniel Saoul QC (instructed by **Hogan Lovells International LLP**) for the **Claimants**
William Mc Cormick QC, Rebecca Drake and Joe-Han Ho (instructed by **Preiskel & Co LLP**) for the **Sixth and Seventh Defendants to the Applications for Charging Orders**

Hearing date: 13 August 2020
Draft judgment circulated to the parties on 8 September 2020

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.

Covid-19 Protocol: This judgment was handed down at a hearing attended by the judge remotely via Skype, and by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10 September 2020 at 10:30 am.

Mr Justice Henshaw:

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(A) INTRODUCTION

1. This judgment deals with three applications:

   i) An application by the Claimants dated 31 July 2020 for declarations that the Sixth and Seventh Respondents, Dencora Limited and Unistarel Corporation

("***the Respondents***"), have failed to comply with provisions made on an 'unless' basis in an order made by Andrew Baker J on 10 July 2020 ("***the Baker J Order***"), and for judgment against the Respondents accordingly. The Baker J Order in turn referred to certain parts of an order made by Butcher J on 10 June 2020 (***"the Butcher J Order"***). Paragraph 4(ii) of the Butcher J Order required the Respondents' director, Mr Georghiou, and Mr Mavros (of ISS Information Security Services Limited ("***ISS***"), the Respondents' IT expert for a disclosure exercise carried out in 2019) to file witness statements addressing the circumstances in which a forensic image taken by ISS of certain data ("***the ISS Image***") was not preserved. Paragraph 5 of the Butcher J Order required the Respondents to serve a witness statement addressing the procedures used in the exercise that produced the ISS Image, and related matters.

ii) The Respondents' application dated 7 August 2020 for relief from sanctions regarding the breaches alleged by the Claimants in their application of 31 July 2020.

iii) The Respondents' application dated 22 July 2020 to delete paragraph 5 of the Baker J Order. That paragraph relates to 2,660 documents which the Respondents' legal representatives were ordered to review, but which they now say cannot be reviewed within the timeframe ordered.

2. For the reasons set out below, I have come to the conclusion that the Respondents did not fail to comply with the relevant 'unless' orders, so relief from sanctions is not required. In case I am wrong in that conclusion, I have considered whether relief from sanctions should be granted in relation to certain limited respects in which the Respondents' evidence might on one view be regarded as non-complaint, and have concluded that it should. Accordingly, the Claimants' application (i) above must be dismissed. Separately, I have concluded that the Respondents have put forward no cogent grounds for application (iii) above, which must therefore also be dismissed.

(B) BACKGROUND

(1) General

3. The Claimants are part of a corporate group (the "***KK Group***") in the business of recycling, paper and packaging in Kazakhstan. The Second and Third Defendants, Mr Maksat Arip and Ms Shynar Dikhanbayeva, were in substance the Chief Executive Officer and Chief Financial Officer of the KK Group. Mr Arip was also a substantial shareholder of the KK Group until 2009, when he sold his remaining interest in the business and left Kazakhstan, renouncing his Kazakh citizenship and acquiring dual nationality in St Kitts and Cyprus.

4. By a judgment dated 22 December 2017 ([2017] EWHC 3374 (Comm)), following a 13 week trial, Picken J found that Mr Arip and Ms Dikhanbayeva had planned and executed three highly sophisticated and very substantial schemes to defraud the KK Group. Picken J found these fraudulent schemes to have been perpetrated by the use of an extensive network of nominee companies and individuals. He found Mr Arip to be a "*thoroughly dishonest*" witness, and that he had called a series of other dishonest witnesses to support a false defence, including a dishonest expert witness.

5. On 28 February 2018, after Picken J had handed down a judgment on consequential matters (including resolving various quantum issues), the Claimants obtained final judgment against Mr Arip and Ms Dikhanbayeva for a total of US$298,834,593.00 (the "***Judgment Sum***"); together with an order for £8 million as an interim payment on account of costs. A worldwide freezing order which had previously been granted against Mr Arip pending trial was increased in value to reflect these orders.

6. Mr Arip and Ms Dikhanbayeva have not paid any of the Judgment Sum nor the interim payment. Mr Arip now claims that, despite his bankers estimating the value of the family assets he controls as being up to US$500 million, he is now worth no more than a few hundred thousand dollars (as set out in the post-judgment asset disclosure he was required to give). Following Picken J's judgments, Mr Arip petitioned for his own bankruptcy in Cyprus, but then in September 2019 withdrew his petition (in order, the Claimants say, to avoid being cross-examined in relation to it).

7. The Claimants allege that Mr Arip continues to attempt to frustrate and delay enforcement and to make himself judgment proof, including through (1) the use of offshore companies and trusts to hold and conceal the proceeds of his fraud and current wealth, and (2) the involvement of his wife Mrs Sholpan Arip, the Fourth Defendant. At an earlier stage in the litigation, Mrs Arip was involved in attempts to frustrate enforcement by obtaining anti-suit injunctions in Cyprus which have since been set aside.

(2) Claims against the Respondents

8. The Claimants seek to enforce the Judgment against a number of assets which they claim to have identified as being held by entities or persons closely connected to Mr Arip, and as representing (a) the traceable proceeds of the frauds on the Claimants, (b) assets of which Mr Arip is the beneficial owner, and/or (c) assets which Mr Arip has sought to transfer away for the purpose of putting them beyond his creditors' reach.

9. The Respondents are BVI companies connected to Mr Arip, each of which is the registered legal owner of a valuable property in London. Unistarel owns Flat 9, 10 Montrose Place, Belgravia (the "***Montrose Property***"). Unistarel is owned by another BVI company, Drez Investments Corp, the shares of which are owned by Pilatus Trustees Limited, a Cypriot company of which Mr Georghiou is sole director ("***Pilatus***"). The Montrose Property is said by Mr Georghiou to be worth around £23.5million. Pilatus claims to hold these assets on trust for the RatalKha settlement, of which Mr Arip's mother-in-law was the settlor and of which she and Mr Arip's children are the beneficiaries.

10. Dencora owns 19 Wycombe Square, Kensington (the "***Wycombe Property***"). Dencora is owned by another BVI company, Carabello Holdings Inc, which is again owned by Pilatus. Pilatus claims to hold these assets on trust for the Wycombe Settlement, of which Mr Arip was the settlor and which Mr Arip, his wife, their parents and children are the beneficiaries. The Wycombe Property has been valued by Mr Arip, in his asset disclosure, at between £12.5million and £14million.

(3) Disclosure in the Burlington charging order application

11. In July 2018 the Claimants issued a charging order application against other properties, owned by other offshore entities they had identified as being connected to Mr Arip (the "***Burlington Properties***"). Disclosure was given in that application in September 2018. Very shortly afterwards, on 27 September 2018, the Respondents' solicitors Quinn Emanuel came off the record and were replaced by Signature Litigation. The Claimants contended that the change in solicitors was connected to disclosure failures on the part of the Respondents to the Burlington application. Mr Georghiou stated in a witness statement dated 1 April 2019:

> "57. Ms Vaswani asserts that Quinn Emanuel came off the record because they had concerns about the Respondents' disclosure, and demands that the Respondents "waive privilege and explain why Quinn Emanuel suddenly came off the record" (Vaswani 32/22(d)(iv)). This is an astonishing position for the Claimants to take. The Claimants are not entitled to know the reasons why the Respondents changed their lawyers, and are not entitled to demand that the Respondents waive privilege in order to respond to the Claimants' allegations.
>
> 58. I am not willing to waive privilege, but what I can say is that the change in lawyers had nothing whatsoever to do with disclosure or Quinn Emanuel's professional obligations."

12. The Claimants subsequently issued an application for disclosure of documents showing why Quinn Emanuel had ceased to act, on the ground that privilege had in fact been waived. On the evening before that application was due to be heard, Candey LLP (newly appointed as further replacement solicitors for the Respondents) served an affidavit from Mr Georghiou dated 23 May 2019 to "*correct an error*" in his previous statement. Mr Georghiou stated that paragraph 58 of his 1 April 2019 witness statement had been "*wrong*" and that *"[Quinn Emanuel] did cease acting at their election because of concerns over their professional obligations including disclosure"*.

13. The Respondents conceded that there had been a waiver of privilege, and, following further disclosure orders on 'unless' terms, in June 2019 disclosed *inter alia* an email from Mr Khaled Khatoun, a partner at Quinn Emanuel, to Mr Georghiou dated 24 September 2019 in which Mr Khatoun said:

> "During the past few weeks, we have tried our utmost to advise Cooperton on how best to comply with its disclosure obligations. In particular, we have repeatedly expressed the view that the failure to search for electronic emails (whether before or after your appointment) is likely to adversely impact on the Judge's perception of the Respondents and their Defence. Despite our best endeavours, we have not been able to agree on the proper approach. Notwithstanding our serious concerns as to whether Cooperton is complying with its disclosure obligations, and our notices that we may need to go off the record, we stayed on the record in order to ensure that

> Cooperton was in a position to provide disclosure on 21 September, and gave disclosure on that date in accordance with your strict instructions.
>
> …On any view, there has unfortunately been a breakdown of trust and confidence between Quinn Emanuel and Cooperton. We therefore regrettably consider that it would be in the interests of both parties for Quinn Emanuel to come off the record as soon as possible."

14. In a subsequent judgment dated 30 January 2020 Andrew Baker J described Mr Georghiou's evidence in relation to these matters as "*unsatisfactory*", although at that stage (and at a time when Mr Georghiou's subsequent evidence, addressed further below, had not yet been given) the judge was not prepared, absent cross-examination, to make a positive finding that it was not honestly given.

15. The charging order application relating to the Burlington Properties was due to go to trial in late October 2018. That trial had to be adjourned because Mrs Arip, with the support of the trustees, had obtained anti-suit injunctions from the Cyprus court, without notice to the Claimants, in order block the Claimants' English enforcement proceedings. Those Cyprus injunctions were set aside in Cyprus later in 2018, with the Cyprus court being extremely critical of those who had sought them.

(4) Charging order applications relating to the Wycombe and Montrose Properties

16. The Claimants thereafter sought charging orders in respect of the Wycombe Property and the Montrose Property, and obtained interim charging orders pending trial.

17. In January 2019, the Court ordered that the various charging order applications should be case managed together, and directions were given for a trial to take place which was then listed for July 2019. The Respondents contest the applications on the basis that the properties are beneficially owned by various Cyprus trusts in which Mr Arip has no interest.

18. On 4 April 2019, at the first CMC in these proceedings, Andrew Baker J ordered the Respondents to give extended disclosure by 17 May 2019 using Model D.

19. However, the day before that deadline the Respondents' solicitors, Signature Litigation (who had replaced Quinn Emanuel), came off the record and were replaced by Candey LLP. The Respondents sought a 14-day extension of time to give disclosure. On 20 May 2019 the Claimants sought an 'unless' order to compel disclosure. Cockerill J on 24 May 2019 declined to make an 'unless' order, and granted an extension until 7 June 2019, but gave "*the strongest possible indication that if that date is not met, for disclosure, the Respondents have been made extraordinarily well aware that an unless order, in those terms, is almost inevitably going to follow*".

20. In the first week of June 2019, a five-person team from Candey LLP and an IT service provider, RVM, spent five days at Mr Georghiou's law firm in Cyprus, imaging his secretary's computer (through which all of Mr Georghiou's emails were said to pass), applying electronic keyword searches and manually reviewing the results for purposes

of disclosure. The Respondents then gave disclosure on 7 June 2019, but the Claimants contended that it was deficient in a number of significant ways, including because a number of relevant electronic devices had not been searched.

(5) Orders made by Jacob J on 28 June 2019

21. On 28 June 2019, following a hearing, Jacobs J made orders adjourning the trial and concerning disclosure. The trial was adjourned for reasons relating at least in part to the behaviour of the Respondents. As Andrew Baker J subsequently said in his judgment of 30 January 2020:

> "There were two causes, each sufficient, of the adjournment of the July 2019 trial. One was the degree to which the case was not ready for trial because of the respondents' failures to complete disclosure properly. That increases the seriousness of the Unless Order defaults as regards disclosure, although those defaults came after the adjournment of the trial, as it means the Unless Order was imposed in respect of prior failures to comply with disclosure obligations that had rendered the trial liable to be lost: see *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153, [2016] 1WLR 4350. The other sufficient cause to adjourn the July trial was the claimants' desire at the last hour (relative to the trial listing) to take concrete steps to pursue their stance, which had been consistent throughout the enforcement process, that their case in the charging order applications, to the effect that the properties belonged in equity to Mr Arip and so could be charged by way of enforcement of his judgment debts, was strictly in the alternative to a primary argument that the properties belonged in equity to the claimants. In a case in which there seems always to be another layer to every point, what I have just said is not a criticism of the claimants. They were for a long time seriously hampered in what they could pursue here by injunctions improperly obtained by or at the behest of Mrs Arip – it may be at the ultimate behest of Mr Arip – from courts in Cyprus. …" (§ 56)

22. Jacobs J ordered Mr Arip, by way of injunction endorsed with a penal notice, to deliver up his valuable wristwatch collection in part satisfaction of the Judgment Sum. He failed to do so, and on 29 August 2019 Phillips J sentenced Mr Arip to two years' imprisonment for contempt of court ([2019] EWHC 2319 (Comm)).

23. As to disclosure, Jacobs J on 28 June 2019 made a series of 'unless' orders against the Respondents, as well as other orders not on 'unless' terms ("***the Jacobs J Order***"). The Respondents were required to carry out a range of further electronic searches by 18 September 2019, including searches of Mr Georghiou's electronic devices as well as those of his firm and employees. These orders were not on 'unless' terms. The search terms to be used were specified in Jacobs J's order, being the search terms agreed in the previously finalised disclosure review documents (as had been applied by RVM), less three terms which were expressly excluded as they had been deemed too generic.

(6) Events in the second half of 2019

24. On 6 August 2019 the Claimants commenced fresh proceedings to enforce the Judgment against a number of different parties, including the Respondents, in action number CL-2019-000494 (the "***Tracing Claim***"). The Claimants' primary claim in the Tracing Claim is that they themselves have a beneficial interest in the relevant properties and are entitled to trace into them. There are various alternative claims.

25. The Respondents then took steps in purported compliance with the Jacobs J orders in relation to disclosure. They explain their methodology in this regard as follows:

    i) On 5-6 September 2019, ISS created a forensic Image, i.e. the ISS Image, from all the electronic sources at Mr Georghiou's Cypriot legal firm (A.A. Georghiou LLC) prescribed in the Jacobs J Order (the "***Sources***"). This amounted to a cache of around 3.2 million documents.

    ii) ISS applied the court-ordered search terms to the entire population of 3.2 million documents. After excluding certain files as permitted by paragraph 4(b) of the Jacobs J Order, 4,709 files containing court-ordered search terms were identified.

    iii) At the same time, on the instructions of Mr Georghiou's (as the Respondents' director), ISS also applied a number of 'exclusionary' search terms, which the parties have referred to as the Unrelated Search Terms or "***USTs***", to the entire population of 3.2 million documents. 117,213 files containing USTs were identified.

    iv) ISS then compared the search results above: 3,649 files containing both court-ordered search terms and USTs were identified. These were excluded from manual review.

    v) The remaining 1,060 files, containing court-ordered search terms but not USTs, were sent to Candey for manual review. Candey produced from these files the documents produced on disclosure on 25 September 2019.

    vi) Of the 3,649 files containing court-ordered search terms and USTs (sub-paragraph (iv) above), a total of 2,660 files contained in the 'To' or 'From' fields one of the four USTs identified in the Claimants' solicitors' letter of 6 January 2020, namely "@candey.com", "@quinnemanuel.com", "@Russell-cooke.co.uk", and "@signaturelitigation.com". These search terms referred to the Respondents' former solicitors, and, the Respondents maintain, would very likely be privileged.

    vii) That left a total of 989 files (i.e. 3,649 – 2,660 = 989). These files were sent to London in early January 2020 and were manually reviewed under the supervision of the Respondents' then leading Counsel (Dominic Chambers QC, acting on a Direct Access basis) and by junior Counsel (Joe-Han Ho). As a result of this review, it was determined that none of the 989 files fell to be disclosed.

26. As noted in subparagraph (v) above, the Respondents on 25 September 2019 gave disclosure on the basis of the methodology outlined above.

27. By a judgment dated 8 October 2019 ([2019] EWHC 2630 (Comm)) Jacobs J found Mrs Arip and her mother liable to pay the Claimants' costs of the underlying claim against Mr Arip, and ordered a payment on account of £8 million pursuant to section 51 of the Senior Courts Act 1981. Jacobs J found that Mrs Arip and her mother had been involved in "*an asset dissipation and concealment exercise*" in respect of Mr Arip's assets (§ 105). Jacobs J made a post-judgment worldwide freezing order against Mrs Arip's mother (a worldwide freezing order already having been made against Mrs Arip at the outset of the section 51 application), but she failed to comply with the asset disclosure orders made against her. Neither Mrs Arip nor her mother has made any payment towards the judgments against them.

28. On 21 October 2019, Candey LLP formally ceased to act for the Respondents and were replaced by Dominic Chambers QC (instructed on a direct access basis).

(7) January 2020 application for relief from sanctions

29. The Respondents failed to comply with various procedural orders which Jacobs J had made on 28 June 2019 on an 'unless' basis. This led to an application for relief from sanctions, which was heard and granted in part by Andrew Baker J in January 2020 ([2020] EWHC 128 (Comm)). In that judgment Andrew Baker J found that a number of the breaches of the 'unless' orders were "*serious and deliberate*" (§ 73), that there was no good reason for the breaches (§ 64) and that a number of the matters relied upon by Mr Georghiou to explain the defaults "*were rather unworthy of a serious, experienced professional of many years' standing*" (§ 63).

30. Nevertheless relief was granted in part, on the basis that to strike out the Respondents' Defences in full would be an excessive sanction in the circumstances, the court concluding that the defaults had by then either been made good or could be appropriately sanctioned in other ways (in particular by striking out limited parts of the Respondents' statements of case, in respect of which the Respondents had failed in good time to provide proper responses to requests for further information). In their evidence and in the course of argument, the Respondents insisted that they were now familiar with the procedures of this court and would not misconduct themselves again.

31. On 6-7 April 2020, a joint CMC was held for the present proceedings and the Tracing Claim. The court directed that the claims "*be tried and case-managed together…The parties shall endeavour to ensure that no separate steps are taken, and no separate costs incurred, in relation to the Charging Order Applications*." (paragraph 1). The court further directed that the parties had permission to use documents disclosed and witness evidence given in the present proceedings in the Tracing Claim, and *vice versa* (paragraph 2). The trial is now fixed for June 2021 with a time estimate of 16 days (plus two days' pre-reading).

(8) Events leading to the Butcher J Order

32. The Claimants considered that a number of features of the disclosure provided by the Respondents in September 2019 were highly unsatisfactory, including in particular the use of the USTs without the approval of the court or the Claimants, thereby

cutting across the search terms that Jacobs J had directed should be used. The Claimants also considered the numbers of documents reported by Mr Mavros to have been hit by the search terms to be suspiciously low. The Claimants were further concerned to find that Mr Mavros had previously been found by a Cypriot court to have failed to comply with his duties as an expert.

33. The Claimants accordingly issued an application on 4 March 2020 for an order for part of the exercise to be carried out afresh, by an independent IT expert, in accordance with the court-ordered procedure. The Claimants wished the data that had been collected by Mr Mavros to be provided to an independent IT expert, so that the latter could then search that material for relevant documentation in accordance with the court-approved process without using the USTs.

34. The Respondents resisted the application, and it was heard by Butcher J over the course of a day on 10 June 2020. Having heard detailed submissions from counsel on both sides, during which the Respondents' counsel conceded that his clients had not complied with the Jacobs J Order (albeit maintaining that the USTS were a good faith attempt to effect a reasonable and proportionate search), Butcher J granted the Claimants' application. Butcher J noted *inter alia* that a number of the explanations that had been given by the Respondents had been "*inaccurate and inconsistent*" (§ 8), that their evidence as to the disclosure exercise they had carried out and its results raised "*a number of serious questions*" (§ 9); and that there had been "*a failure adequately to comply*" with the Jacobs J Order (§ 12).

35. After Butcher J had delivered his *ex tempore* judgment, the Respondents' counsel informed the court that the Respondents no longer had the ISS Image, and so the data would have to be gathered again. As a result of this development – subsequently described by Andrew Baker J as a "*bombshell*" – the orders made by Butcher J on 10 June 2020 included orders that:

    i) by 4pm on 24 June 2020, Mr Georghiou and Mr Mavros should provide witness statements explaining the circumstances in which the ISS Image was destroyed, when it was destroyed, upon whose instruction that took place, and why this was allowed to happen given the Respondents' obligations to preserve documents (§ 4(ii) of the Order);

    ii) by 4pm on 1 July 2020, the Respondents should provide a witness statement setting out how that data had originally been collected, the chain of custody of that data, and related information (§ 5 of the Order); and

    iii) by 4pm on 15 July 2020 the Respondents should allow the independent IT expert access to Mr Georghiou's offices to collect the data afresh (§ 4(iii) of the Order).

36. The Respondents' current legal team was also ordered to review and give disclosure by 24 June 2020 of a batch of 2,660 documents collected by Mr Mavros, which had been excluded from the Respondents' previous disclosure review on the basis that the Respondents considered them very likely to be privileged (§ 10 of the Order).

37. On 22 June 2020, the Respondents' current solicitors, Preiskel & Co, learnt that Mr Georghiou had been hospitalised suffering from chest pains. That was in the context

of Mr Georghiou having a serious history of heart problems, including a number of previous heart attacks, and having undergone coronary arterial bypass grafts in 2012 as well as a total of four angioplasties (the latest being September 2018).

(9) Events leading to the Baker J Order

38. Based on medical advice that Mr Georghiou should have no role in the litigation for two months, the Respondents on 24 June 2020 applied for a stay for two months of the deadlines in the Butcher J Order. The Claimants cross-applied on 1 July 2020 for an 'unless' order in respect of compliance with paragraphs 4(ii), 5, and 10 of that order.

39. These applications were heard by Andrew Baker J on 3 and 10 July 2020, leading to his order of 10 July 2020 ("***the Baker J Order***"), which placed some of the obligations of the Butcher J Order on 'unless' terms. The Claimants made the points *inter alia* that the medical evidence was late and inadequate, and that there was no good reason why Mr Mavros and the independent IT expert, Deloitte, could not continue their work. The Claimants also commissioned surveillance evidence to the effect that Mr Georghiou had, while claiming to be incapacitated, been observed receiving a work colleague at his house and walking and driving himself, unaided, around town on several occasions prior to the hearing on 10 July 2020, including on one occasion driving himself to his firm's office building where he remained for several hours.

40. At the hearing on 3 July 2020, Andrew Baker J described the Respondents as "*a serious serial defaulter on disclosure obligations*" and said that "*By the skin of their teeth, they are still in this game at all, under the Judgments that I made earlier this year*". On 10 July 2020, the Andrew Baker J concluded that the Respondents "*are once again in default of their disclosure obligations*" (§ 5); and that the surveillance evidence demonstrated that the Respondents' solicitors "*have been given, and therefore have been caused to put before the court, a false and seriously misleading picture of the impact of Mr. Georghiou's recent health issue. That is both as to its impact on Mr. Georghiou and also as to its impact on the respondents' ability to comply with Butcher J's order, even if Mr. Georghiou had been as incapacitated as was asserted*" (§ 13). He added:

> "The evidence of Mr. Georghiou's actual condition and activity in recent days causes me to conclude that the respondents have set out to mislead the court, in an effort to avoid complying with Butcher J's order, and that their non-compliance, with that one exception concerning Mr. Georghiou's own statement, both was initially and most certainly is now entirely deliberate and calculated" (§ 15)

> "The respondents are conducting themselves in the manner of parties with material they know needs to be disclosed to the claimants but they wish to hide. Whether that is the truth of it or not may ultimately be a matter to consider at trial, depending on how matters develop. For present purposes I am clear that the court must act on the basis that there is a significant chance that that is the position, and do all it can to ensure that proper

> disclosure is given, or the respondent must be debarred from defending the merits because of their failure to ensure that any trial would be fair. They are also, by their conduct, treating the court and its orders with a degree of contempt that in the public interest cannot be seen not to have consequences." (§ 22)

41. Accordingly, Andrew Baker J dismissed the Respondents' application for a stay, and granted the 'unless' orders sought by the Claimants, which required the Respondents to do (in summary) the following, failing which their Points of Defence would stand struck out and Judgment would be entered for the Claimants on the relevant Charging Order Applications:

    i) by 4pm on 17 July 2020, provide the witness statement from the Respondents' IT expert Mr Mavros addressing the destruction of the ISS Image, as well as the witness statement explaining the procedures he followed when taking the ISS Image and the chain of custody of the ISS Image;

    ii) by 4pm on 24 July 2020, provide the witness statement from Mr Georghiou addressing the destruction of the ISS Image; and

    iii) by 4pm on 11 September 2020, review the 2,660 documents which had been omitted from the Respondents' previous disclosure review.

42. In addition, the existing order requiring the Respondents to allow Deloitte access to the relevant electronic devices at Mr Georghiou's firm, in order to collect the data afresh, was varied to make it clear that such access need not be provided by Mr Georghiou himself (but could, for example, be provided by a colleague of his). The deadline for providing such access remained 4pm on 15 July 2020 (and that deadline having not yet passed, that element of the Order remained on standard, rather than unless, terms).

(10) Subsequent events

43. Pursuant to the Baker J Order, the Respondents filed and served on 17 July 2020 the first witness statement of Mr Mavros of ISS ("***Mavros 1***") and on 24 July 2020 the eighth witness statement of Mr Georghiou ("***Georghiou 8***"). Correspondence ensued in which the parties debated whether or not those witness statements complied with the Baker J Order.

44. The Claimants on 31 July 2020 made their present application for judgment. The Respondents on 7 August 2020 applied for relief from sanctions, supported by the fifth witness statement of their solicitor Mr Dougans of Preiskel & Co, and also served a second witness statement from Mr Mavros ("***Mavros 2***") and a ninth witness statement from Mr Georghiou ("***Georghiou 9***"). Mr Dougans conceded that the Respondents had not complied with the Baker J Order, though he did not accept that there was any serious or significant breach. Mr Dougans stated:

> "4. The reasons why those statements did not comply is due to a misunderstanding by both Mr Mavros and by Mr Georghiou as to the extent of the obligations on them. As the Court is aware, Mr Georghiou is a practising Cypriot lawyer and was

> heavily influenced by his view of what a Cypriot court would have expected from him. In circumstances where he believes that under Cypriot law the failure by Mr Mavros to preserve the image when carrying out the forensic exercise would have been the standard method in carrying out the forensic exercise, and in circumstances where he was content to entrust the process to Mr Mavros as an IT specialist without seeing a need to discuss the detail of Mr Mavros's task with him, Mr Georghiou did not consider he had acted improperly. Whilst the requirements under the 10th June 2020 Order and 10th July 2020 were therefore explained to Mr Georghiou, the importance of precise compliance was not fully understood by Mr Georghiou. Mr Georghiou has also been very worried about the effect of any work upon his continued recovery from a heart attack, and considers a Cypriot court would have been more lenient in requiring compliance with Court orders during this time.
>
> 5. As to Mr Mavros, he did not consider he had acted in any way improperly in accordance with his understanding of Cypriot law, and therefore did not fully understand the severity of the Unless order being sought.
>
> 6. Given the relatively tight deadlines between the date of the 10th July 2020 Order and the dates by which the witness statements were to be served, coupled in Mr Georghiou's case with continued recovery from a heart attack, this witness statement was received from the witnesses at a stage too late for any further amendments and had to be served only partially compliant. Indeed, Mr Georghiou's witness statement was received back from him after the deadline of 4pm on 24th July 2020 and therefore after the deadline for compliance had already passed.
>
> 7. The position has been attempted to be rectified by way of serving supplemental witness statements by both Mr Mavros and Mr Georghiou which do comply fully with the requirements in the 10 June 2020 order. These supplemental witness statements have been served on 7 August 2020.
>
> 8. Whilst therefore we accept and apologise for the lateness of the statements, we request the Court grant relief from sanctions"

45. Whether there was a breach of the Baker J Order, or any serious or significant breach, is a matter I have to consider for myself. I do so below after first summarising the principles applicable to applicants for relief from sanctions.

(C) RELIEF FROM SANCTIONS: PRINCIPLES

46. CPR rule 3.9 provides that:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

47. In *Denton v TH White Ltd* [2014] EWCA Civ 906 at § 24 the Court of Appeal stated:

> "… A judge should address an application for relief from sanctions in three stages.
>
> The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages.
>
> The second stage is to consider why the default occurred.
>
> The third stage is to evaluate "*all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"*…."
>
> (paragraph breaks interpolated)

"Factors (a) and (b)" are those referred to at (a) and (b) of CPR 3.9(1), i.e.:

> "the need— (a) for litigation to be conducted efficiently and at proportionate cost; and (b) to enforce compliance with rules, practice directions and orders".

48. At §§ 26-28 the Court of Appeal said:

> "26. Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In *Mitchell* itself, the court also used the words "minor" (para 59) and "insignificant" (para 40). It seems that the word "trivial" has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at

> proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.
>
> 27. The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage … rather than as part of the assessment of seriousness or significance of the breach.
>
> 28. If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance."

49. As to 'unless' orders, Popplewell J in *Sinclair v Dorsey & Whitney (Europe) LLP* [2016] 1 Costs LR 19 said: "*The starting point is that breach of an unless order will almost always be treated as serious. It is a failure to comply with a Court order in the*

knowledge that the Court has already attached sufficient importance to the need to comply with it so as to impose the sanction of strike out as the proportionate consequence of non compliance" (§ 26).

50. Jackson LJ in *British Gas Trading v Oak Cash & Carry* [2016] EWCA Civ 153 stated:

> "41. The very fact that X has failed to comply with an unless order (as opposed to an 'ordinary' order) is undoubtedly a pointer towards seriousness and significance. This is for two reasons. First, X is in breach of two successive obligations to do the same thing. Secondly, the court has underlined the importance of doing that thing by specifying an automatic sanction in default (in this case the Draconian sanction of strike out).
>
> 42. On the other hand, as Mr Weston rightly says, not every breach of an unless order is serious or significant. In Utilise the claimant was just 45 minutes late in complying with an unless order. He filed his budget by 4.45 p.m., rather than 4 p.m. when it was due. The Court of Appeal held that a delay of only 45 minutes in compliance was "trivial". The court also noted that, contrary to the district judge's view, there was no underlying breach of the rules onto which the unless order was attached."

51. As to whether there is a good reason for the breach, the Court of Appeal in *Mitchell v News Group Newspapers Ltd (Practice Note)* [2014] 1 WLR 795 § 41 gave examples of good reasons, including "*For example, if the reason why a document was not filed with the court was that the party or his solicitors suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason*". At § 43 the Court of Appeal stated that good reasons are likely to arise from circumstances outside the control of the party in default.

52. At this stage, the court has to evaluate all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) to enforce compliance with rules, practice directions and orders. In this context:

    i) whilst all the circumstances of the case should be considered, two factors, namely the need for litigation to be conducted efficiently and at proportionate cost, and the need to enforce compliance with rules, practice directions, and orders, are to be given particular weight: *Denton* § 38 and see *Clearway Drainage Systems Ltd v Miles Smith Ltd* [2016] EWCA Civ 1258;

    ii) "*When a Court is considering an application for relief from sanction where there has been a failure to comply with an unless order which has specified that a strike out is the sanction for failure to comply, the Court must proceed on the basis that the sanction of strike out contained in the unless order was properly imposed as a proportionate sanction for failure to comply.*": *Sinclair* § 25; and

iii) there is "*a very powerful public interest in ensuring that parties recognise the importance of complying with unless orders*": ibid. § 42.

(D) COMPLIANCE WITH THE RELEVANT ORDERS

53. I now consider to what extent the Respondents' evidence complied with the relevant parts of the Butcher J Order, placed on 'unless' terms by the Baker J Order.

54. Paragraphs 2 and 3 of the Baker J Order provided:

> "(2) Unless, by 4pm on Friday 17 July 2020, Dencora and Unistarel comply with the obligations in respect of Mr Mavros in paragraph 4(ii) of the 10 June Order, and the obligation not being in respect of a specific witness in respect of paragraph 5 of the 10 June Order, their Points of Defence shall be immediately struck out and judgment shall be entered for the Claimants in the Wycombe Application and the Montrose Application, and the Charging Orders in the Claimants' favour over the Wycombe Property and the Montrose Property shall be made final.
>
> (3) Unless, by 4pm on Friday 24 July 2020, Dencora and Unistarel comply with the obligations in respect of Mr Georghiou in paragraph 4(ii) of the 10 June Order, their Points of Defence shall be immediately struck out and judgment shall be entered for the Claimants in the Wycombe Application and the Montrose Application, and the Charging Orders in the Claimants' favour over the Wycombe Property and the Montrose Property shall be made final."

55. Paragraphs 2 and 3 of the Butcher J Order required the Respondents to provide to the Independent IT Expert all forensic images or other copies taken by ISS of the relevant devices (i.e., in effect, the ISS Image). Paragraph 4(ii) of the Butcher J Order then required that:

> "(4) In the event that Dencora and Unistarel contend that compliance with paragraphs (2) and (3) above is not possible because ISS has destroyed or otherwise not preserved the images and copies of documents referred to in those paragraphs (the "**Destroyed Data**"), then:
>
> …
>
> (ii) By 4pm on 24 June 2020 Dencora and Unistarel shall file and serve witness statements from each of Mr Georghiou and Mr Mavros stating:
>
> a. the circumstances resulting in the destruction or non-preservation of the Destroyed Data;

> b. when the Destroyed Data was destroyed or otherwise failed to be preserved;
>
> c. upon whose instruction this took place; and
>
> d. why they allowed this to happen, given the obligation on Dencora and Unistarel as parties to these proceedings to preserve potentially disclosable documents."

56. Paragraph 5 of Butcher J Order provided:

> "(5) By 4pm on 1 July 2020, Dencora and Unistarel are to serve on the Claimants' solicitors, a witness statement:
>
> (i) setting out the procedures followed by ISS to take each image or copy of the devices referred to in paragraphs (2)(i) and (2)(ii) above (exhibiting to the said witness statement all records or other documents evidencing the procedures used);
>
> (ii) setting out the chain of custody from:
>
> (a) the taking of the original image or other copy; to
>
> (b) provision of the image or other copy of the document to the Independent IT Expert, or to its destruction or non-preservation, as the case may be
>
> (exhibiting to the said witness statement all records or other documents evidencing the chain of custody); and
>
> (iii) exhibiting a record of the 4,709 documents that Mr Mavros of ISS concluded were hit by the Court-Ordered Search Terms."

(1) Circumstances resulting in destruction/why allowed to happen

57. Paragraphs 4(ii)(a) and (d) of the Butcher J Order required evidence of the circumstances resulting in the destruction or non-preservation of the ISS Images, and why they allowed it to happen, given the Respondents' obligations to preserve potentially disclosable documents. There is some overlap in these requirements and it is convenient to consider them together.

58. The first, and primary, evidence on these matters came from Mr Mavros in Mavros 1. The Claimants accept that it was not necessary for evidence to be repeated in the witness statements of Mr Mavros and Mr Georghiou, so long as one of them provided the requisite evidence.

59. Mr Mavros made this preliminary point in Mavros 1:

> "6. I would like to begin by saying that I am not party to this litigation. As I explain below, I was hired to carry out certain tasks by Mr. Georghiou (acting on behalf of Dencora and

> Unistarel). I did not and do not have a wider role. I do not work for Mr. Georghiou or his firm."

60. Mavros 1 included the following evidence relevant to the matters falling within paragraph 4(ii)(a) and (d) of the Butcher J Order:

> "9. I was not informed that the Jacobs Order required ISS to store any of the items described and/or to create or keep the forensic images reviewed, and most importantly ISS was not instructed to do so. Having reviewed the Jacobs Order (a copy of which is attached to the Brief report [10-19] I can say from my own knowledge and experience that this is NOT a mandatory procedure in the computer forensic science since in many cases a live index search with special software and hardware applied at the investigation scene to bypass exactly the legal issues on seizing evidence which includes personal communication data. Moreover, when I worked for the police, the legitimate procedure would be that forensic images could be seized and retained by the police ONLY after special relevant court orders both for seizing and retaining and if such an order was not made then such material could not be retained. I know that the same situation applies and that it would be a breach of Cyprus law and EU law (in the form of the GDPR) to retain such material myself. I have worked with lawyers and police officers all of my career and this is what I have always been doing.
>
> 10. I repeat that the Jacobs Order did not require ISS to store any of the items and/or to create or keep forensic images and did not specify any procedure which ISS should follow.
>
> …
>
> 13. As explained above I was not instructed to store and/or create or keep forensic images and the Jacob's Order did not require me to do so thus I considered that what needed to be preserved was the original material in Mr. Georghiou's office, and of course the product of the searches which I uploaded to Candey and to its platform and also delivered it to Mr Georghiou in a USB drive.
>
> 14. As I set out above, this is NOT a mandatory procedure in the computer forensic science. Active relevant court orders, with clear instructions for seizing and retaining digital evidence for each case should be issued by an authorized regional Court of Law. I was especially conscious of the fact that the images referred to at para. 10 above were taken from an established law firm. Signing before I proceed a relevant legal NDA agreement obviously understood that any electronic documents taken from a law firm would be likely to contain private and legally privileged information.

> 15. I cannot now recall the date when this took place. It must have happened some time after 13 January 2020.
>
> …
>
> 17. … I took the image from Mr Georghiou's firm (as I explain in the Brief Report) and took it to ISS for examination. I then kept it until all questions were answered. …"

61. Mr Georghiou also dealt with these matters to a degree in Georghiou 8. Georghiou 8 is regrettably diffuse, and in places argumentative. It includes several inappropriate suggestions that this court's previous orders are in some way invalid or wrong. However, it also includes the following passages relevant to the circumstances of and reasons for the deletion/non-preservation of the ISS Image:

> "19. The Jacobs Order did not provide anything about the procedure and the method to be followed for the IT forensic exercise, did not provide about images and any retaining of images and of what images of what data. The Jacobs Order was providing only for the performance of an IT forensic exercise in relation to Dencora and Unistarel and the delivery of a brief report with the results of the IT Forensic Expert.
>
> …
>
> 21. I am not computer literate and I do not understand much about technology, while I do not understand anything about forensic process. At that time I did not know anything about images, what images are and how the things are working. My concern was to comply with the Jacobs Order and concurrently to protect the data of the third parties and to have a USB with the responsive documents. There has been no issue in relation to the preservation of the data. The data was either on the electronic systems of AAG or on USBs kept by AAG. Specifically the responsive documents of Dencora and Unistarel, including all disclosure documents, apart from the electronic systems and/or the USBs, are also preserved on the USB delivered to me by Mr Mavros.
>
> ….
>
> 23. It has been very clear to me, and the Claimants and their lawyers made a big noise and criticised me that I have not stated previously how I preserve the data, that I am the one who is responsible to preserve the data and I hereby state and confirm that all electronic and hard copy data in AAG's system and my possession are securely preserved and that all these documents were reviewed and disclosed by the lawyers of the Respondents.

> 24. Specifically, I hereby state and confirm that all the population of the electronic data of AAG, including the data related to Dencora and Unistarel, as well as to the other Respondents for the period from 01 January 2014 until 31 January 2020 are stored and preserved on a Network Attached Storage ("NAS") in the server room of AAG, of which (room) I am the only one who has the key, on two USBs which I am the only one who keeps them and knows where they are. Furthermore, all the electronic documents which are responsive in relation to Dencora and Unistarel, according to the Jacobs Order, are kept on one USB which is also in my exclusive possession.
>
> 25. To my knowledge and understanding, the images are not data which should be preserved and ISS has not have the legal right to preserve any images or even data. There has been no valid legal basis to retain them. The duty to preserve the data is mine and I have stated and explained how the data are preserved in paragraphs 47 to 52 of my Sixth Witness Statement. Therefore, no data and in no case have been destroyed or not preserved as the lawyers of the Claimants submitted and managed to convince the court that this is the case.
>
> ….
>
> > 37.1 There are not destroyed data or non preserved data and I do not accept the term "Destroyed Data". None of the data was destroyed and all the data are preserved, as stated hereinabove.
> >
> > 37.2 As I understand, the imaging is a forensic exercise method and not data to be preserved. The preservation of images and data by an IT Forensic Expert is governed by the law and the GDPR unless there is a specific court order
> >
> > ….
> >
> > 37.5 The Jacobs Order did not provide for the taking or retaining any images, especially of those not related to Dencora and Unistarel. The Jacobs Order was only ordering De[n]cora and Unistarel to file a Brief Report of the IT Forensic Expert which they did."

62. In summary, therefore, the evidence in Mavros 1 and Georghiou 8 on these matters is that neither of them understood themselves to be under an obligation to retain the ISS Image, as opposed to (a) retaining the original underlying data on Mr Georghiou's systems and devices and (b) using the ISS Image as a tool to facilitate the identification of the documents responsive to the disclosure requirement; that Mr Mavros understood himself to be under legal duties *not* to retain the data on the ISS

Image longer than necessary; and that Mr Mavros therefore retained the ISS Image only until he considered it to have served its purpose.

63. The Claimants make the point that this evidence was unsatisfactory, since the Respondents *were* under an obligation to retain the ISS Image, by reason of the obligation on parties to preserve documents in their control, now enshrined in CPR 51U PD para 3.1(2), and the obligation to take reasonable steps to ensure that agents or third parties holding documents on a party's behalf do not delete or destroy them (CPR 51U PD para 4.1(3)). Accordingly Mr Mavros should have been instructed to preserve the ISS Image. In addition, the Claimants point out that the statement in Mavros 1 § 13 that he was "*not instructed to store and/or create or keep forensic images…*" appears to be inaccurate (at least in part), since Mr Mavros did create the ISS Image in the first place pursuant to Mr Georghiou's instruction "*to search all of the firm's computers and electronic devices, irrespective of whether they were being or had been used for the trusts or not*" (Georghiou sixth witness statement § 39). The Claimants also challenge Mr Mavros's statements about Cyprus law, and point out that an obvious solution in any event would have been for Mr Mavros simply to hand the ISS Image over to Mr Georghiou for safekeeping.

64. I agree that those aspects of the evidence are unsatisfactory. However, the question is whether the evidence sets out the matters necessary in order to comply with §§ 4(ii)(a) and (d) of the Butcher J Order. In my view, notwithstanding the objections that can be made to the Respondents' approach to the ISS Image and its non-preservation, the evidence in Mavros 1 and Georghiou 8 did contain an explanation of the circumstances resulting in the destruction/non-preservation of the ISS Image and why it was allowed to happen.

65. Mr Mavros's evidence could be criticised for not stating clearly *how* the ISS Image was destroyed/not preserved, and this was one of the topics on which the Claimants subsequently pressed the Respondents in correspondence. The Butcher J Order did not explicitly require an explanation of the manner in which the ISS Image was destroyed/not preserved, and it is questionable whether that was a necessary part of the *"circumstances resulting in"* the destruction or non-preservation of the data. Read in context, the *"this"* in Mavros 1 § 15 ("*I cannot now recall the date which this took place. It must have happened some time after 13 January 2020*") can only sensibly be read as indicating that he deleted the ISS Image, since he makes clear in § 17 of Mavros 1 that he at no stage gave the ISS Image to anyone else.

66. Mavros 2 and Georghiou 9, both dated 7 August 2020, were served *after* the time for compliance stipulated in the Baker J Order. Each took the form of a short statement confirming the accuracy of an exhibited set of answers to questions posed by the Respondents' solicitors on "*Matters which need to be Clarified*" in relation to the existing witness statements.

67. The answers exhibited to Mavros 2 included the following preamble:

> "While I am not party of these proceedings, as a matter of good will and to be fully cooperative with the Court without accepting any of the unsubstantiated allegations made by Hogan Lovells reference my expertise and manner I have contacted and implement my forensic examinations I have

> decided to provide this supplementary witness statement for the avoidance of any doubt or challenge in a final effort to clarify the issue at hand."

68. Mr Mavros's answers included the following passages with a bearing on the matters referred to in § 4(ii)(a) and (d) of the Butcher J Order:

> "In addition it is obvious that the Jacobs Order did not require forensic images and made no reference to any specific IT forensic procedure which should have been followed. The images were taken according to the procedure I have decided to implement that would allow to secure the integrity of the data. As explained I had no instructions to retain them and obviously I couldn't predict and/imagine that forensic copies that already were provided to the parties would become of such significance and importance taking also into consideration that any other expert can proceed to the examination of all original data at any time.
>
> Images are not retained unless there is a specific provision/order in the relative court order. Otherwise and in accordance with GDPR laws/regulations anything related to any data, including images must be retained only until the scope of the relative order, and in general the scope of the forensic exercise is fulfilled. Immediately thereafter, the images/data must be deleted. Several laws/regulations deal with the subject matter some of which are: The Retaining of the Telecommunication Data for the Purpose of Serious Criminal Offences of 2007 (Law 183 (I)/2007 in combination with the laws on the Protection of the Confidentiality of Private Communication (Surveillance of Communication and Access to Recorded Content of Private Communication) (Law 92 (I) 1996, the Protection of Natural Persons with Regard to the Processing of Personal Data (Law 125 (I)/2018) and the Regulation of Electronic Communication and Mail Services (Law 112 (I)/2004 the data/images in no case can be retained for a period of more than 6 months without the specific provision of any law or any court order.
>
> It is for me absolutely clear the Jacobs Order did not provide for the retaining of any images. On the contrary, the Jacobs Order was providing only for the IT Forensic Exercise to be conducted by applying the relevant search terms, to upload the responsive documents to a designated platform for review and disclosure and to prepare and deliver a brief report on the electronic data and forensic analysis (Brief Report). I have done everything and I consider that I have acted in full compliance with the Jacobs Order and with all due respect there has been no expert evidence before Mr Justice Butcher to the contrary.
>
> …

I must clarify that no data has been destroyed. I only created forensic copies of the original data when I needed them to preserve the integrity of the actual original data and when I needed them for the forensic exercise and I deleted them when I did not need them.

The actual original data has been at all times on the electronic systems of the law firm A.A.Georghiou LLC (AAG) and in the possession and/or control of Mr Georghiou. The Jacobs Order did not contain such instructions and none of the parties instructed and/or suggested and/or asked and/or demanded and/or even mentioned to create and/or retain and/or return any forensic copies to Mr Georghiou or to anyone else. It has always been my understanding that the taking of the images was part of my forensic exercise procedure which, according to the applicable legislation, the practise and the way I have understood the NDA Statement should be deleted at the end of the exercise and on the fulfilment of the scope of the exercise.

…

As I said, I have uploaded all the responsive documents to the OpenText platform. OpenText said that 350 emails could not be opened in the native format and it took a long time to solve this issue and from what I know some emails were required to be sent by AAG in their original form. Furthermore, Hogan Lovells raised issues about the USTs and finally it was agreed between the parties to exclude the 2660 documents/emails containing the USTs in the "To" or "From": @candey.com, @quinnemanuel.com, @russel-cooke.co.uk, @signaturelitigation.com and to send the remaining responsive documents to Mr Dominic Chambers.

Consequently, I excluded the 2660 email which were responsive to the aforesaid email addresses, and the remaining 989 responsive documents to the USTs were sent to Mr Dominic Chambers for review and disclosure.

Nobody gave me instructions to retain the images pending any possible issues/questions/requests of Hogan Lovells. Nobody told me that issues/questions were pending and that the images were of relevance and/or importance.

…

I repeat, that no data has been destroyed. The forensic images are only copies of the original data, and the original data are existing, preserved and never destroyed. The forensic images were deleted by myself for the reasons I explained above.

…

> ... I emphasize that at no point Mr Georghiou or anybody else pointed out to me that the forensic copies could have been considered as potentially disclosable documents, and I myself didn't know that the forensic copies were required to be preserved as potentially disclosable documents. Nobody and nothing directed my mind to this possibility. I only acted according to the Jacobs Order, to the Cyprus laws, the GDPR and the practice."

69. Mr Georghiou in Georghiou 9 stressed that he did not have personal knowledge of what happened in relation to the ISS Image, as Mr Mavros dealt with it, and that *"It has been always my understanding that the preservation of the data relates only to the original data, I have not had any idea about images, ... and in any case all the data of the case, and generally all the data A.A.GEORGHIOU LLC, are preserved on two USBs and on a Network Attach Storage (NAS)".*

70. These passages from Mavros 2 and Georghiou 9 are essentially in line with the statements made in Mavros 1 and Georghiou 8 on these topics, and do not materially add to them, save perhaps for the fact that Mavros 2 makes express what was implicit in Mavros 1 namely that he deleted the ISS Image when he considered it no longer to be required.

71. Accordingly, although one might take issue – and the Claimants have taken issue – with some of the contents of Mavros 1 and Georghiou 8 in relation to this topic, in my view they complied with § 4(ii)(a) and (d) of the Butcher J Order.

(2) When the ISS Image was destroyed or not preserved

72. Paragraph 4(ii)(b) of the Butcher J Order required the Respondents' evidence to state when the ISS Image was destroyed or otherwise failed to be preserved.

73. Mavros 1 stated:

> "15. I cannot now recall the date when this took place. It must have happened some time after 13 January 2020".

74. In Mavros 2, Mr Mavros responded to requests from the Respondents' solicitors for clarification as to (a) whether in § 15 of Mavros 1 the word "*this*" referred to the destruction of the data, (b) why he was unable to work out when it happened, and what digital and/or forensic records he kept in this regard, (c) whether he could work out the date of destruction from any discussions with Mr Georghiou, and (d) the significance of the date 13 January 2020. Mr Mavros replied:

> "(a) I must repeat that no data has been destroyed. Speaking about the forensic copies of the original data which have not been preserved, this should have taken place after 13th January 2020. I say this because on the 13th January 2020 was the date during which I sent the 989 documents to Mr Dominic Chambers and thereafter there was nothing else, to my understanding, I should do, in relation to this case.

> (b) I do not remember when exactly the deletion of the forensic copies was made. As regards the keeping of records, I keep records only in cases where I will be called to testify as a witness before a Competent Court. I repeat that in this case, apart from the fact that it is a civil case, the requirement from the forensic expert was only to deliver a Brief Report which I did.
>
> (c) I have not and never discussed such issue with Mr Georghiou. With all due respect, I did not consider and/or could have imagined that the non-preserving of the forensic copies (the original data can be retrieved at any time) was going to be of such a big issue in order to preserve them or to record it.
>
> (d) please see above."

75. It would have been obviously preferable for Mr Mavros to have responded in more detail in Mavros 1, particularly on the question as to whether the date on which he deleted the ISS Image could be ascertained from digital and/or forensic records (and if not then why not: that being a question which would naturally present itself).

76. In addition, Mr Mavros stated that by 13 January 2020 he considered the ISS Image no longer to be required, and that he kept it "*until all questions were answered*", whereas in fact the Claimants' solicitors Hogan Lovells were continuing to raise questions after 13 January 2020 (when Mr Mavros passed the remaining 989 documents to Mr Chambers QC for review). Mavros 2 addresses this point by stating that *"Nobody gave me instructions to retain the images pending any possible issues/questions/requests of Hogan Lovells. Nobody told me that issues/questions were pending and that the images were of relevance and/or of importance."* Clearly Mr Mavros should have been told that questions remained and, in any event, to retain the ISS Image.

77. However, the question for present purposes is whether Mr Mavros has, particularly in Mavros 1, failed to comply with the requirement in § 4(ii)(b) of the Butcher J Order for evidence stating when the ISS Image were destroyed. Mavros 1 stated that he could not recall but that it must have after 13 January 2020. In substance that remains his evidence in Mavros 2.

78. The Butcher J order did not in terms require the Respondents to explain the reason for any uncertainty or imprecision about the date of deletion. Further, there is no evidence before me to the effect that there is bound to be a digital or 'forensic' record of the date on which the ISS Image was deleted; and that cannot be regarded as a matter of common knowledge of which I could take judicial notice. I suspect it may depend on the type of device on which the ISS Image was stored.

79. Similarly, the fact that Mavros 1 did not explain the relevance of the date 13 January 2020, such explanation coming only in Mavros 2, does not, strictly speaking, mean there was a failure to state in Mavros 1 when the ISS Image was deleted: the information was there, albeit without the explanation.

80. In these circumstances, I am unable to conclude that the Respondents have in this respect breached the order, or in any event that a serious or significant breach occurred.

(3) On whose instruction the ISS Image was destroyed

81. Paragraph 4(ii)(c) of the Butcher J Order requires evidence as to upon whose instructions the ISS Image was deleted.

82. Mavros 1 § 16 stated:

> "16. I understand from Mr. Dougans that Dencora and Unistarel and Mr. Georghiou have been criticised for not preserving this material. I am not party to this case and not able to speak on their behalf. All I can say is that, without clear written and specific instructions to do so in a Relevant Court Order applicable in our jurisdiction, I would NOT have retained such material in any case, as such action on behalf of ISS would lead to violation of GDPR laws."

83. Georghiou 8 stated:

> "22. According to the Jacobs Order, ISS was not to keep and was not allowed legally to keep any images or data. I, myself, didn't know about any images and therefore I could not give any instructions to Mr Mavros about them. My ignorance led me to be mistaken, something which was considered by HL as contradiction between me and Mr Mavros.
>
> …
>
> "37.4 I have not had any idea about the forensic search procedure and about images and I have not participated in the search or given any instructions to Mr Mavros apart from the conducting of the search according to the Jacobs Order."

84. In my view, a fair reading of this evidence is that Mr Mavros deleted the ISS Image of his own accord, and not under instructions from anyone else, including Mr Georghiou.

85. Mavros 2 and Georghiou 9 confirm this:

> <u>Mavros 2:</u>
>
> "I do not accept the terms "destroyed data" or "destruction of data". I only accept the terms "deletion of images" or non-preserving of images" and this was made only by me without the discussion with anybody or the participation of anybody, or the instructions of anybody, and I did it because I considered that the scope of the forensic exercise had been fulfilled and my job was done.

> …
>
> I have not and never discussed such issue with Mr Georghiou. With all due respect, I did not consider and/or could have imagined that the non-preserving of the forensic copies (the original data can be retrieved at any time) was going to be of such a big issue in order to preserve them or to record it.
>
> …
>
> No, I did not consult with Mr Georghiou or anyone else. ...
>
> …
>
> Georghiou 9:
>
> "I have not given any instructions about this and I do not know that anyone has given such instructions."

86. The Claimants make the point that Mavros 1 did not explain what, if any, discussions Mr Mavros had with Mr Georghiou prior to deleting the ISS Image, nor when (if only afterwards) he first informed Mr Georghiou of this. The passages from Mavros 1 and Georghiou 8 quoted above indicate, in my view, that there was no prior discussion about the deletion of the ISS Image. Mavros 2 confirms that *"there has been no reason or ground for me to discuss this matter with Mr Georghiou. Moreover, Mr Georghiou was not involved in the exercise forensic procedure at all"*. The evidence does not deal with any subsequent discussions, but the Butcher J Order did not require any such discussions to be covered.

87. I agree with the Claimants that it is surprising and very unsatisfactory that Mr Georghiou, who says he learned of the deletion a few days before the hearing before Butcher J on 10 June 2020, did not inform the court but instead allowed the court to proceed on the false basis that the ISS Image remained available for searching. That factor does not, however, have the result that the evidence subsequently served failed to comply with the Butcher J Order.

88. I therefore do not consider that the Respondents can fairly be held to have breached this part of the Butcher J Order. If that is wrong, then I would in any case conclude that any breach was neither serious nor significant. The position was at least implicit in Mavros 1, and any doubt was removed shortly afterwards by Mavros 2 and Georghiou 9.

(4) Procedures used to take image

89. Paragraph 5(i) of the Butcher J Order required a witness statement setting out the procedures ISS followed to take the ISS Image, exhibiting all records or other documents evidencing the procedures used.

90. Mavros 1 stated:

> "11. At pages 2-3 of the Brief Report [2-3] I set out the process used by which I took images from Mr. Georghiou's firm to

> conduct further searches. As I say in the Brief Report, this procedure took place on 5 and 6 September 2019.
>
> 12. Following that, as I set out at pages 3-4 of the Brief Report [3-4] I set out the analysis procedure and what took place next. I confirm that this material is true. Specifically, after the application of the Search Terms and the Unrelated Terms to the images responsive electronic files and their metadata were sent to Candey (the solicitors then representing Dencora and Unistarel) and uploaded to their review Platform "*Open Test*". This analysis took place in the lab of ISS."

91. The "Brief Report" cross-referenced was ISS's *"Brief Report of Electronic Data Forensic Analysis"* signed by Mr Mavros and dated 17 September 2019. It included the following:

> "**Actions**
>
> In order to execute the assigned instructions, on the 5th of September 2019 and the 6th of September 2019, the ISS team headed by me visited the premises of the legal company A.A. Georghiou LLC to create forensic images of electronic data of the existing computing devices. Specifically, we found and created forensic images of the electronic data stored on the following computing/mobile devices, by using Access Data FTK Imager, XRY, UFED Cellebrite and Magnet AXIOM:
>
> A. Desktops (8) which are used by the following employees:
>
> a. Adamos Aristidis
>
> b. Kyriaki Siantani
>
> c. Alexandrina Buceatch
>
> d. Angelina Schukina
>
> e. Chloe Pharmkalidi
>
> f. Lola Champidi
>
> g. Alexandra Oikonomou
>
> h. Charoula Artemiou
>
> According to Mr. Andreas Georghiou, the above Desktops cover the period of 1st of January to the dates of the imaging.
>
> B. Servers (3) Virtual Servers
>
> a. Active Directory

b. File Server

c. Application Server

C. An external USB drive containing archived emails and attachments, which according to Mr. Andreas Georghiou cover the period 1st of January 2014 to 31st December of 2017.

D. Mobile Devices including their SIM cards (2)

a. Nokia Asha RM-840 IMEI 355520053666200 with CYTA SIM 99434443

b. Samsung SM-A300FU IMEI 359665065108712 with CYTA 9940333

Forensic Analysis Procedure

Between the dates 7th of September 2019 and 14th September 2019, we conducted an automated analysis of all the obtained images in our facilities. For the analysis we used the forensic software/tool "Access Data FTK" that I am a qualified examiner for, and our company has a valid usage license (License 2-1 312310).

Specifically, we performed recognition and categorization of all electronic data that were stored on the electronic devices under investigation, including Optical Character Recognition (OCR) and indexing of file content.

Thereafter we applied all Search Terms of the List provided by Mr. Leo Nabbaro (APPENDIX C) according to the court order (APPENDIX B) and we found all the responsive documents that contained any of the related key words for the period 1st January 2014 to the dates of the imaging.

Then according to paragraph 4(b) of the court order (APPENDIX B), we excluded the results found on the C and D Drives of Mrs. Lola Champidi computer for the period 1st January 2018 to 3rd June 2019.

Then, to these search results we applied the Unrelated Terms (APPENDIX D) and we removed all search results according to this list. The list (APPENDIX D) was not applied to the mobiles of Mr. Andreas Georghiou because no responsive hits were found when we applied the Search Terms contained in APPENDIX C."

92. The Claimants criticise this evidence, making that point that the 'Brief Report' did not clearly explain the procedures used to take the ISS Image, hence the court's order for further explanation. However, the first paragraph quoted above from the Brief Report did state the methodology for the taking of the ISS Image, including the software

used, and it is not clear what further elaboration would be required in order to comply with the Butcher J Order.

93. After *inter partes* correspondence following Mavros 1, the Respondents' solicitors asked Mr Mavros to provide further details including the software used (including version number), software configuration and whether 'full' or 'logical' images were taken of the devices. Mr Mavros responded in Mavros 2:

> "I obtained image copies of the electronic data stored on the computer devices under search using the latest release at the time of Access Data FTK Imager.
>
> The software was configured to create a bit by bit forensic images/copies of the physical storage (Full) of all the data including all the documents and of all folders on each device. Thereafter, I conducted an automated analysis of all the obtained images and specifically I performed recognition and categorization of all electronic data that were stored on the electronic devices under investigation, including Optical Character Recognition (OCR).
>
> I say all these and generally, I describe all the procedures followed in my Brief Report which I repeat and adopt."

94. Notwithstanding Mr Mavros's assertion in the last paragraph quoted above, the explanation in Mavros 2 does to a degree go beyond that in Mavros 1 (read with the Brief Report). Nonetheless, in circumstances where the relevant part of the Butcher J Order was worded in general terms, I do not consider that the absence from Mavros 1 of the limited further elaboration found in Mavros 2 meant that Mavros 1 failed to comply with the order.

(5) Chain of custody of image

95. Paragraph 5(ii) of the Butcher J Order required a witness statement setting out the chain of custody from the taking of the ISS Image to its provision to the Independent IT Expert or its destruction, exhibiting all records or other documents evidencing the chain.

96. Mavros 1 stated:

> "17. Insofar as the Court and the Claimants are interested in the chain of custody of the image and the material extracted from the image according to my analysis, the matter is simple. I took the image from Mr. Georghiou's firm (as I explain in the Brief Report) and took it to ISS lab for examination. I then kept it until all questions were answered. Nobody else had any access.
>
> 18. I do not believe there are any documents exhibiting this chain of custody, as simply, I did not pass it to other people. I did not (for example) sign any agreement with a third party to handle the material because I did not give it to them to handle."

97. The Brief Report then dealt with what was done with Mr Mavros's findings (as opposed to the ISS Image itself):

> "All the above findings (responsive electronic files and their metadata) were sent electronically to Candey Limited in their original state and to their Review Platform "OpenText".
>
> The Findings were also saved in read-only mode and stored on a USB Storage which will be delivered to Mr. Andreas Georghiou."

98. Georghiou 8 included the statement that *"Mr Mavros kept the images until it was needed to respond to [Hogan Lovells] questions through Dominic Chambers".*

99. The Claimants make the point that it is troubling that Mr Mavros asserted that he had no documents exhibiting the chain of custody of the ISS Image, and submit that this was in breach of the 'unless' orders. I would accept that if Mr Mavros's explanation were obviously false, or could by other evidence be shown to be false, then it would probably not comply with the Butcher J Order. However, I have seen no evidence to that effect, and the fact that (at least arguably) there *ought* to have been records of the chain of custody does not render the evidence served non-compliant with the Order. Considerations of that nature, and other aspects in which (as I have outlined above) the evidence of Mr Mavros and Mr Georghiou appears unsatisfactory, may well give rise to inferences at a later stage in these proceedings. Addressing the present issue, though, Mavros 1 states on its face the chain of custody and the absence of contemporary records of that chain. It cannot in my view be regarded as non-compliant with the Butcher J Order.

(6) Record of the 4,709 'hits'

100. Paragraph 5(iii) of the Butcher J Order required a witness statement to exhibit a record of the 4,709 documents that Mr Mavros concluded were hit by the court-ordered search terms.

101. Mavros 1 explained:

> "19. Noted that, after applying the court Order search terms I found 4709 unique bundles.
>
> 20. After applying the USTs to the 4709 unique bundles the responsive documents reduced to 1060.
>
> 21. There was a difference of 3649 (4709 – 1060) from which I excluded 2660 which was related to the 4 law firms (@candey.com @quinnemanuel.com @Russsell-cooke.co.uk and @signaturelitigation.com) after (as I understand it) all parties agreed to do so.
>
> 22. The final number was 989, which I send them to Mr Dominic Chambers, on the January 2020. The 2660 were

> excluded completely according to an agreement between the lawyers of parties and were never retained by me/ISS"

102. Mavros 2 elaborates as follows:

> "Out of the 4709 responsive documents, the 1060 were uploaded on the OpenText platform, the 989 were sent to Mr Dominic Chambers and the 2660 were excluded according to the agreement between the parties and after the deletion of the images, for the reasons I explained, the 2660 documents are not existing separately anywhere, but there are existing in their original form and they are, from what I know, in the control of Mr Georghiou.
>
> …
>
> "The 2660 documents are included in the 4709 documents. Obviously, a record of the 4709 documents cannot be presented because it was not provided by the Jacobs Order and the forensic copies which I created were not preserved for the reasons I explained.
>
> In this respect, I feel the need to repeat and state the following:
>
> - 1060 file bundles that are part of the 4709 documents were uploaded to OpenText.
>
> - 989 file bundles that are also part of the 4709 documents were sent/uploaded to Mr Chambers.
>
> - The remaining 2660 file bundles were excluded and are existing only in the systems of AAG.
>
> Please put the above in a witness statement format bearing in mind that I do not accept any changes."

103. Mr Mavros's evidence is thus that there is no record of the 4,709 documents, as such, that can be exhibited (or, hence, which could have been exhibited to Mavros 1). That was confirmed by the Respondents' solicitors Preiskel & Co in their covering letter of 17 July 2020 enclosing Mavros 1. In the absence of an evidential basis on which to conclude that those statements are false, I am bound to proceed for present purposes on the basis that it was not possible to comply with the terms of § 5(iii) of the Butcher J Order, and for that reason that either there was no breach of the 'unless' order or that any breach was not serious or significant. Clearly, to the extent that any of the 4,709 documents have been lost (for example, by reason of data held on the computer used by a former employee of Mr Georghiou's firm having apparently been lost since the ISS Image was taken) that may well be a serious matter. It does not follow, however, that the Respondents' inability to exhibit such a record of the 4,709 documents, because no such document exists, should in itself be regarded as a serious or significant breach of the Butcher J Order, attracting the consequences of the 'unless' order. The two matters are in my view different.

(7) Conclusion on compliance with Orders

104. For the reasons detailed above, I conclude that, despite their unsatisfactory aspects, Mavros 1 and Georghiou 8 substantially complied with the relevant provisions of the Butcher J Order and, hence, of the Baker J 'unless' order. At worst, there were certain arguable areas of non-compliance which were, however, neither serious nor significant: namely, that Mavros 1 did not explain *why* the ISS Image must have been deleted after 13 January 2020 (such explanation coming only in Mavros 2); that Mavros 1 did not state in explicit terms that Mr Mavros had deleted the Image of his own accord (that being made explicit in Mavros 2 and Georghiou 9); and that no record of the 4,709 documents was exhibited (because no such record had been retained).

(E) APPLICATION OF THE DENTON CRITERIA

105. In the light of the conclusions I reach above, the answer to the first stage of the *Denton* enquiry in this case is that relief from sanctions is not required because there was no non-compliance. In principle, the discussion ends there.

106. In case I am wrong in that conclusion, I would find (again for the reasons set out above) that any non-compliance was limited to the points mentioned in § 104 above. None of those matters imperilled or imperils future hearing dates nor has otherwise disrupted the conduct of the litigation; and nor in my judgment was any of them serious or significant in the broader sense considered in *Denton* § 26. That paragraph of *Denton* is not specifically focussed on breaches of 'unless' orders, where the particular considerations indicated in §§ 49 and 50 apply. However, as the Court of Appeal pointed out in *British Gas Trading*, not every breach of an 'unless' order is serious or significant. Such non-compliance as, on one view, occurred was limited to a lack of clarity on two points which was fairly promptly remedied, and failure to exhibit a record that was in fact not available to exhibit. None of those matters in itself has any ongoing significance for the litigation. It is important to distinguish between the significance of the breaches themselves, on the one hand, and other aspects of the Respondents' conduct which may be inadequate more serious ways. The focus at this stage is on the seriousness of the breaches themselves (see *Denton* § 27). These breaches – if (contrary to my primary conclusion) they were breaches at all – were not serious or significant.

107. In these circumstances, it is unnecessary to consider the second and third *Denton* stages in any detail, if at all. As to the reasons for any breach, the Respondents make a number of submissions to the broad effect that:

   i) Mr Georghiou is the director and sole natural person with control of the Respondents. He has a distinguished and unblemished record as a very senior Cypriot lawyer (and former Member of Parliament).

   ii) Mr Georghiou does not speak English as his mother tongue, and is not an English lawyer familiar with English litigation. He is also substantially IT illiterate, having stated on the Respondents' disclosure certificate that he does not personally use any computer or other such device, relying on others in this regard. He had no meaningful involvement in the obtaining of the ISS Image

or the processes conducted upon it, effectively leaving everything to Mr Mavros.

iii) In this hard-fought litigation, there is very bad blood between the Claimants and Mr Georghiou, and the Claimants are said to have made a number of belligerent personal attacks on Mr Georghiou.

iv) These factors have contributed to imperfect decision-making and to unnecessarily straining relations.

v) There is a different cultural approach in Cyprus, which manifests itself most strikingly in the law and practice towards the preservation of the ISS Image. Mr Georghiou has admitted that he was mistaken as to his duty to preserve the ISS Image. However, it was an innocent mistake, and one which viewed from outside the UK can be seen as reasonable. Put simply – the ISS Image was seen as being "only" a copy of the data upon which the disclosure exercise was focused, with no inherent value.

vi) ISS is completely independent from the Respondents. Mr Mavros cannot be taken to be as available to the Respondents as Mr Georgiou.

vii) Mr Georghiou is clear that the Sources are pristine and untouched: if the disclosure exercise were repeated, exactly the same results should ensue.

viii) Once the potential for a finding of breaches was fully apprehended, the Respondents swiftly sought to remedy that risk. This is all in the context of Mr Georghiou's serious heart-related illness.

ix) Each of Mr Georghiou and Mr Mavros was unduly (if understandably) upset by the definition "*Destroyed Data*" in the Order (which implied the destruction of the underlying data with all that that means for professional men in their positions). Similarly, each of Mr Georghiou and Mr Mavros considers that he has acted in accordance with Cypriot law and procedure and so has not fully appreciated the need for any more detailed explanation as to why the ISS Image as not retained (and the disclosure obligations under English law strictly complied with).

x) Mr Georghiou has been understandably concerned about the effect of any stress on his recovery from a heart attack.

xi) Any non-compliance has been contributed to by the lack of "*bright lines*" marking out what was required.

108. The Claimants point out, on the other hand, that the Respondents' evidence that Mr Mavros and Mr Georghiou did not fully understand what was required of them is inadequate as an explanation, and at odds with the evidence given by Mr Georghiou and his then legal representative, Mr Dominic Chambers QC, when the Respondents sought relief from sanctions for their previous breaches of 'unless' orders, similar excuses having then been given to the effect that Mr Georghiou was previously unfamiliar with English practice and procedure:

i) Mr Georghiou, in his sixth witness statement of 6 November 2019, said that: "*now being more familiar with how the litigation process works in England, I will do everything I can to ensure that there are no repeats of the mistakes of the past*"; and

ii) in evidence of the same date, Mr Chambers QC said: "*I have ensured that the Respondents are fully aware of their obligations to the Claimants and to the Court so as to ensure that this litigation is conducted with maximum efficiency and cooperation in accordance with the overriding objective. I am now confident that, going forward, there will be no repeat of the type of events which led to the making of the 'unless' provisions of the 28 June order.*"

109. The Claimants also point out that Mr Georghiou's evidence about the impact of his heart condition has already been found by Andrew Baker J to be at best unreliable. The reality, they say, is that despite at all material times being fully advised on the implications of the English court's orders, and despite the clear warnings given by Andrew Baker J in his Judgment of 10 July 2020, Mr Georghiou considered that he knew better.

110. The question of 'good reason' clearly has to be assessed in the context of the nature of any breach. If there were any breach, in the respects listed in § 104 above, it was in two instances a lack of precision or detail and in the third instance an inability to exhibit a record that had not in fact been retained. Dealing with the third point first, on the basis (on which I consider I must proceed for present purposes) that the record was indeed not retained, that must be a good reason for not exhibiting it. As to the first two points, the factors identified in § 107(iii)-(vi) and (ix) might be regarded as having contributed to any such breach, though none of them could in my view be regarded as a good reason.

111. More important, to my mind, is that any such breaches were neither serious nor significant in the first place. In those circumstances, it seems to me that it would be wrong then to proceed, at *Denton* stage 3, to refuse relief from sanctions for any such breaches on the basis that the Respondents' overall conduct of this litigation to date, including the disclosure process, has been highly unsatisfactory to say the least.

112. On the contrary, that approach would involve imposing (in this case) the most draconian sanction – final judgment against the Respondents in respect of properties said to be worth of the order of £38 million – by reason of breaches which were neither serious nor significant in themselves, and which cannot realistically be regarded as having imperilled the fairness of these proceedings.

113. The Claimants in their skeleton argument make the overarching points that:

> "100. … the Respondents' conduct is now imperilling the fairness of these proceedings. They have destroyed, or allowed to be destroyed, important data in circumstances which remain opaque and which they refuse properly to explain. They are also refusing to allow a reputable independent IT expert to re-conduct their disclosure exercise, with the effect of (1) preventing the integrity and accuracy of their previous disclosure exercise being tested (as the Court has deemed

> necessary) and (2) preventing proper disclosure being given at all. And they continue to accuse the Claimants of serious wrongdoing without any basis and continue to contest the validity of this Court's Orders.
>
> 101. The Respondents have shown no remorse and, regrettably, have shown that the Court can have no confidence that matters will ever improve. It is not fair for the Claimants to be required to continue to litigate these Charging Order Applications at considerable expense in circumstances where (1) the fairness of the proceedings has now been jeopardised and (2) it is overwhelmingly likely that granting the Respondents a yet further indulgence will merely result in further non-compliance, further cost and the use of further Court time in dealing with those."

114. Though I have considerable sympathy with the Claimants in a general sense, the above submissions in my view relate largely to matters other than the breaches (if any) of the 'unless' orders. The court is not currently being asked to impose a sanction in respect of any destruction of data by the Respondents, their conduct in relation to the Deloittes exercise, the adequacy of their disclosure, their accusations against the Claimants, or their approach to this court's orders in general. Had there been serious and significant breaches of the 'unless' order, then those considerations would been relevant at *Denton* stage 3. However, in my judgment that is not the position.

115. As a result, if and to the extent that relief from sanctions were required, it should in my view be granted.

116. It follows that the Claimants' application for judgment must be dismissed.

(F) APPLICATION TO DELETE OR VARY PARAGRAPH 5 OF THE BAKER J ORDER

(1) The order

117. Paragraph 5 of the Baker J Order provides:

> "(5) Unless by 4pm on 11September 2020, the remaining 2,660 documents out of the 4,709 said on behalf of Dencora and Unistarel already to have been hit by the Court-Ordered Search Terms are manually reviewed by qualified solicitors employed by Preiskel familiar with the issues in dispute in these proceedings, alternatively by Counsel for Dencora and Unistarel, Mr Jo-Han Ho, for the purposes of Extended Disclosure, and any disclosable documents are produced to the Claimants, their Points of Defence shall be immediately struck out and judgment shall be entered for the Claimants in the Wycombe Application and the Montrose Application, and the Charging Orders in the Claimants' favour over the Wycombe Property and the Montrose Property shall be made final.

> Liberty to apply so long as the application is made and notified to the Claimants by 4pm on 22 July 2020".

118. The remaining 2,660 documents are the documents from Mr Georghiou's systems which were identified using the court-ordered search terms but excluded because they contained in their 'to' or 'from' fields one of four UST search terms reflecting email addresses of the Respondents' former solicitors.

119. It appears that liberty to apply was included because the Respondents' solicitor indicated at the hearing before Baker J:

> "I understand that those particular documents are here and are on my system, so I believe but I would wish to reserve our right to say that for some reason they are not."

(2) The Respondents' application

120. The Respondents have applied by notice issued on 22 July 2020 for an order deleting the above paragraph. The Respondents' solicitors' witness statement in support of this application states:

> "6. Paragraph 5 of the Order provides for a review of the remaining 2,660 documents out of the 4,709 located by Mr. Mavros' review of a much wider tranche of material to be carried out on or before 4pm on 11 September 2020. These were the product of a number of electronic searches carried out by Mr. Mavros. As Mr. Mavros makes clear in his evidence, the work produced from these searches has not been preserved. It is therefore not possible to comply with this provision of the Order – we cannot review what has not been preserved.
>
> 7. I should add that a further IT forensic exercise is taking place in that Deloitte have been instructed to repeat the imaging carried out by Mr. Mavros, and to carry out further searches of these images. The documents located by these searches will then be reviewed by my firm. I would, therefore, expect that the remaining 2,660 documents would be located by these searches and will fall to be reviewed by my firm".

121. The position therefore is that § 5 of the Baker J Order cannot be complied with in the manner originally intended, namely by identifying the documents from the ISS Image and then reviewing them. However, it can be complied with by locating the same documents (presumably using search terms) from the forensic image that Deloittes have taken. As the Respondent's state in their skeleton argument, "*R6-R7 is clear that these very same documents should be flushed out once Deloitte has completed its exercise, and R6-R7 fully intended promptly to carry out the review once these documents are available*". The same documents could alternatively be identified by means of fresh searches (with or without taking a further forensic image) of the original files of Mr Georghiou and his firm.

122. In the hearing before me the Respondents sought, as an alternative to the deletion of § 5 of the Baker J Order, an extension of time until either after the Deloitte image has been processed in the same way, or sufficient time had been given to the Respondents to perform the exercise themselves on their own database.

(3) Mr Georghiou's further proceedings in Cyprus

123. There is an apparent impediment to identifying the documents using the Deloittes forensic image, because Mr Georghiou has chosen to apply for, and has obtained, an order of the Cyprus court preventing this from occurring. The background to this development is as follows.

124. The Butcher J Order, as varied by the Baker J Order, required the Respondents to allow Deloitte, the independent IT expert, to access the premises of Mr Georghiou's law firm "*for the purposes of imaging and taking copies of all documents*" contained on the devices previously imaged by Mr Mavros, i.e. to collect the electronic data afresh. The deadline for this was 15 July 2020.

125. Despite Deloitte being ready and willing to commence work, the Claimants encountered delays in obtaining access. Accordingly, on 16 July 2020, the day after the deadline had passed, the Claimants issued an application for 'unless' orders in this regard.

126. On 20 July 2020 Ms Siantani, a lawyer within Mr Georghiou's firm and the Respondents' company secretary, wrote directly to the Claimants' solicitors making a number of allegations against the Claimants and their legal team but stating that "*our Law Firm and Mr Georghiou were and are ready and willing to give access to Deloitte to carry out their work according to the Order*".

127. Deloitte were then allowed access on 21 July 2020 and completed the exercise of taking fresh forensic images on 28 July 2020. The Respondents had asked for the images to be password protected, but on 29 July 2020 Deloitte were provided with the passwords.

128. During this period Ms Siantani wrote again to the Claimants' solicitors, stating *inter alia*:

> "Mr Georghiou has given full access to all the electronic systems of AAG [Mr Georghiou's firm] to Mr Ioannides [of Deloitte] and his associates and gave instructions to all the employees to cooperate fully with them and render to them every assistance and this is what is happening. The whole process has been agreed between the Deloitte's IT Experts team and the IT Experts of AAG Dinos Pastos and Spiros Konstantinou without any involvement or interference by me or on behalf of AAG".

129. In light of these developments, Deloitte commenced the next step of the exercise ordered by Butcher J, namely processing the collected documents to render them searchable, and applying the search terms mandated by Jacobs J's Order of 28 June 2019, with a view to providing the results of that search to the Respondents' solicitors

to review for disclosure. On 3 August 2020 the Claimants informed the court that they did not intend to pursue their application of 16 July 2020, given that the work of the independent IT expert was now progressing (although they reserved their rights as to costs).

130. However, on 5 August 2020 Deloitte informed the Claimants' solicitors that Ms Siantani had emailed them an interim injunction, obtained by Mr Georghiou's law firm on an *ex parte* basis and without notice, from the Larnaca District Court in Cyprus (the "***New Cyprus Injunction***").

131. The operative part of the New Cyprus Injunction prohibits Deloitte, and the Claimants in the present action, from processing, using or copying documents, data, correspondence or information received by Deloitte from the offices, electronic systems or electronic records of Mr Georghiou's law firm or related entities, which pertain to Mr Georghiou's firm or related entities or to any third parties that are not parties to these English proceedings. The injunction also prohibits Deloitte from disclosing any such documents to the Claimants "*and/or any other persons*", which on its face includes the Respondents' own English legal team. It does not apply to documents and/or details and/or data of the Respondents themselves and/or related thereto.

132. The New Cyprus Injunction has been obtained in support of legal proceedings issued in Cyprus by Mr Georghiou's firm, asserting a variety of substantive claims against Deloitte and the Claimants, including seeking final orders prohibiting the execution of the Butcher J Order and the Baker J Order in Cyprus in relation to data other than that of the Respondents, as well as declarations that Deloitte's receipt of data belonging to parties other than the Respondents is illegal. Mr Georghiou's firm also advances claims for general, special and punitive damages against Deloitte and the Claimants in respect of Deloitte's work already undertaken.

133. The New Cyprus Injunction, and the final orders sought, currently prevent Deloitte from continuing with their work and complying with the Butcher J Order and the Baker J Order. The documents collected in the first instance, by means of word searches using the court-ordered search terms, from the relevant electronic sources – i.e. from the devices identified in the Jacobs J Order dated 28 June 2020 (save for one such device, which it appears Mr Georghiou's firm have allowed to be erased after the employee using it left the firm) – will almost inevitably not all pertain to the Respondents or to the issues in dispute. It is only following the review by the Respondents' own lawyers for relevance and privilege that all third party documents will be filtered out.

134. Moreover, even the initial process of Deloitte conducting a keyword search is on its face prohibited by the New Cyprus Injunction: despite the fact that it would be no different from keyword search exercises carried out in the vast majority of electronic disclosure exercises carried out in Commercial Court litigation, which involve electronic search terms being applied to data that may include irrelevant data and data pertaining to third parties.

135. Further, the search which the New Cyprus Injunction obstructs is no different in principle from (i) the searches which the Respondents have already themselves instructed two successive IT service providers to carry out (RVM in June 2019 and

ISS in September 2019), and (ii) searches which the Respondents have apparently also committed to carrying out for the purposes of disclosure in the tracing claim, due to be given in October this year. As the Claimants point out, Mr Mavros' application of the exclusionary search terms provides no material ground of distinction in this regard, since (1) there is no indication that RWM in June 2019 applied such exclusionary search terms, and (2) the application of those exclusionary search terms by Mr Mavros (a) is not said by the Respondents to have eliminated all third party data from the review, and in any event (b) must itself have amounted to processing third parties' data: i.e. the act which Mr Georghiou and his firm now allege to be illegal.

136. The application for the New Cyprus Injunction was supported by a 53 page affidavit from Ms Siantani of Mr Georghiou's firm. The affidavit, and the injunction application and the proceedings which it supports, must have been in preparation for some time, and indeed it is very likely that they were being planned and/or drafted at the same time as (i) Mr Georghiou was professing, in his witness statement of 24 July 2020, to be complying with the Butcher J Order voluntarily, and (ii) Ms Siantani wrote to Hogan Lovells stating that the Respondents and her firm were willing to allow Deloitte to carry out their work pursuant to the Order and were cooperating to that end.

137. Further aspects of the obtaining of the Cyprus injunction give cause for concern:

i) There appears to have been no proper basis for proceeding without notice or *ex parte*. Deloitte and the Claimant could and should have been given notice of the applicants' intention to apply for an injunction, even if there were some perceived urgency.

ii) The applicants failed to mention that the relevant provisions of the Butcher J Order of 10 June 2020 were made because of the destruction of the ISS Image.

iii) No disclosure was made of the fact that at the hearing on 10 June before Butcher J, the Respondents conceded that they had breached the 28 June 2019 order of Jacobs J.

iv) There was no disclosure of Andrew Baker J's findings, in his Judgment of 10 July 2020, that Mr Georghiou and the Respondents were serial defaulters on their disclosure obligations and had deliberately sought to mislead the Court in order to avoid compliance.

v) The applicants failed to disclose that in his eighth witness statement dated 24 July 2020, in purported compliance with the 'unless' orders, Mr Georghiou stated that he was voluntarily complying with the Butcher J Order.

vi) There was no disclosure of the fact that the legal principles relied upon as prohibiting Deloitte's work were never raised by the Respondents at the hearings in this jurisdiction on 10 June 2020, 3 July 2020 or 10 July 2020.

138. The only logical conclusion that can be drawn from all these matters is that the Respondents, through Mr Georghiou, are in this respect proceeding in bad faith, claiming to be complying with the orders of this court, whilst covertly taking steps to

obtain orders from an overseas court designed to subvert the processes of this court and without making any remotely adequately disclosure to the overseas court of the true position.

(4) Merits of the Respondents' application

139. In the circumstances set out in section (3) above, any inhibition arising from the Cyprus injunction upon the compliance by the Respondents with § 5 of the Baker J Order is a self-inflicted one. It presumably remains open to Mr Georghiou, the Respondents' director, to withdraw the Cyprus proceedings and bring about the discharge of the injunction. If Mr Georghiou declines to do so, the Respondents must accept the consequences in terms of the present proceedings.

140. In any event, as noted earlier, it is open to the Respondents to comply with § 5 of the Baker J Order by means of a further search exercise not relying on the Deloittes work. No evidence was provided to me that there is any difficulty about doing so, nor that it could not be done before the relevant deadline in the 'unless' order (11 September 2020). Mr Mavros's 'Brief Report' indicates that ISS were able to take their Image in a period of only seven days, between 7 and 14 September 2019. There is no reason to believe the ensuing word search and review process would take substantial periods of time.

141. Moreover, the Respondents accept that Mr Georghiou knew that the ISS Image had been destroyed by 9 July 2020, i.e. *before* the hearing on 10 July at which the Baker J Order was made. In those circumstances, any complaint that the destruction of the ISS Image makes compliance with the Baker J Order impossible is not fairly open to the Respondents.

142. In summary, the Respondents have failed to advance any cogent basis for deleting § 5 of the Baker J Order, or for extending the time for compliance.

143. In those circumstances, I indicated during the hearing before me that I did not need to hear from counsel for the Claimants in reply on this application; and on 26 August I caused an email to be sent to the parties confirming that this application would be dismissed.

(G) OVERALL CONCLUSIONS

144. The Claimants' application for judgment must be dismissed. I have concluded that the Respondents did not breach the relevant 'unless' orders. In case I am wrong in that conclusion, I have considered whether relief from sanctions should be granted in relation to the limited respects in which (in my view) there was any possible non-compliance, and concluded that it should.

145. The Respondents' application for the deletion of, or an extension of time to comply with, § 5 of the Baker J order must also be dismissed.