Neutral Citation Number: [2021] EWHC 1054 (Comm)

Case No: CL-2019-000515

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: 27/04/2021

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

BUGSBY PROPERTY LLC
(a company incorporated under the laws of Delaware)

Claimant

- and -

(1) LGIM COMMERCIAL LENDING LIMITED
(2) LEGAL AND GENERAL ASSURANCE SOCIETY LIMITED

Defendants

- and -

(1) YOO CAPITAL LIMITED
(2) DEUTSCHE FINANCE INTERNATIONAL LLP
(3) OLYMPUS MANAGEMENT LIMITED
(4) RDM CAPITAL LIMITED
(5) CAPITAL AND COUNTIES PROPERTIES PLC

Respondents

- -
- -

Thomas Munby and Duncan McCombe (instructed by **Stewarts Law LLP**) for the **Claimant**
Mehdi Baiou (instructed by **Clyde & Co LLP**) for the **Defendants**
Peter de Verneuil Smith QC (instructed by **Fladgate LLP**) for the **First and Third Respondents**
Zoe O'Sullivan QC (instructed by **Norton Rose Fulbright LLP**) for the **Second Respondent**

Robert Howe QC and Celia Rooney (instructed by **Mishcon de Reya LLP**) for the **Fifth Respondent**

The Fourth Respondent did not appear and was not represented.

Hearing date: 22 March 2021
Draft judgment circulated to the parties: 19 April 2021

Approved Judgment

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

Mr Justice Henshaw:

(A) INTRODUCTION

1. There are before the court the following applications for non-party disclosure pursuant to CPR rule 31.17 and section 34 of the Senior Courts Act 1981:

   i) applications, which substantially though not wholly overlap, by the Claimant ("***Bugsby***") and the Defendants ("***L&G***") against the First Respondent ("***Yoo***"), the Second Respondent ("***Deutsche***") and the Third Respondent ("***OML***") (collectively, the "***Yoo Respondents***");

   ii) further applications made by Bugsby alone against the Yoo Respondents;

   iii) applications, which substantially though not wholly overlap, by Bugsby and L&G against the Fifth Respondent ("***Capco***"); and

   iv) further applications made by Bugsby alone against Capco.

2. The applications arise in litigation between Bugsby and L&G arising from Bugsby's unsuccessful bid in 2016/17 for a business known as "*Olympia*", based around the well-known events and exhibition space based in Kensington, London. The business's owner, Capco, put it up for sale. The bidders included Bugsby and the Yoo Consortium, of which Yoo and Deutsche were members along with German institutional investors. OML is the entity which currently operates the Olympia business. The Yoo Consortium was the successful bidder, and the business was sold to it. Bugsby's case is that the Yoo Consortium was enabled to mount the winning bid by reason of financing provided by L&G, in breach of a confidentiality and exclusivity agreement that had been entered into between Bugsby and L&G.

3. Bugsby's application was also made against the Fourth Respondent ("***RDM***"), which is said to have been the Yoo Consortium's debt broker responsible for sourcing debt finance for the Consortium's acquisition of Olympia, including the financing from L&G. The application as against RDM was resolved by agreement and therefore does not need to be addressed here.

4. For the reasons set out below, I have concluded that the applications succeed in part. Further, the disclosed documents should be subject to a confidentiality ring reflecting the matters set out in section (H) below.

(B) BACKGROUND AND CONTEXT

5. The background in outline, taken from the Case Memorandum, is as follows.

6. Bugsby is a Delaware company which engages in the business of property investment sponsorship and investment management. The First Defendant ("***LGIM***") is an English company which, among other activities, arranges loans for commercial property ventures. LGIM is part of the Legal & General Group.

7. In or around 8 November 2015, Capco put up for sale the Olympia exhibition centre and the exhibition, event and conference business run from that site (collectively "***Olympia***"). Bugsby wished to purchase Olympia and approached LGIM in January 2016 to seek financing for this acquisition.

8. Bugsby and LGIM signed a confidentiality and exclusivity agreement dated 25 January 2016 ("***the Agreement***"). The Agreement provided, amongst other things, that LGIM would (1) keep confidential the confidential information supplied to it regarding Bugsby's plans for the purchase of Olympia and (2) afford exclusivity to Bugsby in relation to the Olympia transaction.

9. Subsequently, in admitted breach of the exclusivity provisions of the Agreement, LGIM was involved in arranging the provision of finance to another bidder for Olympia, referred to in these proceedings as the "***Yoo Consortium***", which was chosen by Capco as purchaser of Olympia ahead of a joint bid by Bugsby and a Chinese conglomerate known as "*HNA*". Bugsby alleges that LGIM also committed breaches of confidence, which are denied.

10. Bugsby claims damages on a loss of a chance basis (alternatively on the ordinary basis) for breach of the exclusivity and confidentiality provisions of the Agreement, and/or damages and/or equitable compensation and/or an account of profits for breach of confidence. As at August 2018, Bugsby estimated its losses to be in the region of £214 million. In the alternative, Bugsby claims negotiating damages consisting of the amount that it would have received by way of release fee to release LGIM from its obligations of exclusivity.

11. I interpolate that the claim is thus a substantial one, and that is part of the relevant context to the present applications. Further, Bugsby sues on the basis of the loss of a chance and, as L&G points out, the size of the claim means that every percentage change in the chance held to exist has a large impact in financial terms. The quality of the evidence available to the court on causation is thus particularly important.

12. L&G contends that various heads of loss claimed by Bugsby are irrecoverable in law. As to the facts, it is said that LGIM's breaches of the Agreement caused Bugsby no loss, because had LGIM not breached the exclusivity provisions of the Agreement, Capco would still have sold Olympia to the Yoo Consortium and not to Bugsby. LGIM's involvement in arranging finance for the Yoo Consortium made no difference to Bugsby's chance of acquiring Olympia. Thus, L&G say that:

i) the Yoo Consortium had other sources of debt finance available to it;

ii) the Yoo Consortium could have completed the acquisition of Olympia without debt finance because its equity backers were willing and able to fund the entire purchase in equity; and

iii) Capco had a longstanding relationship with Yoo, a bid had been made and a limited exclusivity agreement entered into between the parties before L&G had been approached for financing and "*The Yoo Consortium was, compared to Bugsby/HNA, by far the more reputable, reliable and desirable counterparty from CapCo's perspective and its bid would have appeared to CapCo to be more likely to complete and do so quickly*."

13. The issues between Bugsby and L&G include the following of particular relevance to the present applications:

i) **Issue 10**:

> To what extent, if any, was LGIM's participation in the Yoo Consortium's bid necessary to that bid's viability and success? In particular, to what extent, if any, was LGIM's participation necessary to the Yoo Consortium's bid:
>
> (1) proceeding, either at all or within a competitive timescale? As to this, to what extent did the Yoo Consortium have ready access to alternative debt finance, or require debt finance at all, to proceed with the acquisition?
>
> (2) proceeding as quickly and certainly as it in fact did? and
>
> (3) ultimately being more attractive to CapCo than Bugsby's bid?

ii) **Issue 11**:

> To what extent was Bugsby's bid a viable and/or attractive alternative to the Yoo Consortium's bid and to what extent did CapCo consider it to be such?

iii) **Issue 17**:

> Had Bugsby/HNA completed the acquisition of Olympia: (i) How would Bugsby/HNA have developed the Olympia site; and (ii) What profits would Bugsby have generated from its stake in Olympia?

14. The parties agreed and, following a CMC on 15 June 2020 the court directed, that the above issues (among others) required disclosure under the Practice Direction 51U Disclosure Pilot. L&G point out that it thus follows, from PD 51U § 7.3, that the court has ruled that those issues are "*key issues in dispute*" that "*will need to be determined by the Court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings*."

(C) PRINCIPLES

15. Section 34(2) of the Senior Courts Act 1981 provides:

> "On the application, in accordance with rules of court, of a party to any proceedings, the High Court shall, in such circumstances as may be specified in the rules, have power to order a person who is not a party to the proceedings and who appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of the said claim — (a) to disclose whether those documents are in his possession, custody or power; and (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order —
>
> (i) to the applicant's legal advisers; or
>
> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; …"

16. Pursuant to that provision, CPR 31.17 provides:

> "**Orders for disclosure against a person not a party**
>
> (1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where –
>
> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.
>
> (4) An order under this rule must –
>
> (a) specify the documents or the classes of documents which the respondent must disclose; and
>
> (b) require the respondent, when making disclosure, to specify any of those documents –
>
> (i) which are no longer in his control; or
>
> (ii) in respect of which he claims a right or duty to withhold inspection.

> (5) Such an order may –
>
> (a) require the respondent to indicate what has happened to any documents which are no longer in his control; and
>
> (b) specify the time and place for disclosure and inspection."

17. The requirements flowing from CPR 31.17 were conveniently summarised by Vos J in *Constantin Medien AG v Ecclestone* [2013] EWHC 2674 (Ch) as comprising:

    i) the threshold test of whether it has been shown that each of the documents in the category or the class of documents sought may well help the claimant's case or damage the defendant's case;

    ii) whether disclosure of the documents is necessary to dispose fairly of the claim or to save costs;

    iii) whether the definition of the documents is sufficiently clear and specific, so that no judgments about the issues in the case are required by the respondents; and

    iv) whether, as a matter of overall discretion, disclosure of that class of documents should be ordered.

18. The first requirement, that the documents must be "*likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings"* (CPR 31.17(3)(a)), does not require the applicant to satisfy the test on a balance of probabilities. It is sufficient that the documents "*may well*" support the applicant's case or adversely affect another party's case: see *Three Rivers DC v Bank of England (No.4)* [2003] 1 WLR 210 (CA) §§ 29, 32 and 33.

19. Where the applicant seeks classes of documents, every document which falls within the class must satisfy the test: *Three Rivers* at §§ 36 and 38. Some documents in the class can be considered to satisfy the test if they provide context for other more obviously relevant documents, even if the former documents might not satisfy the test if viewed in isolation: *American Home Products Corp v Novartis Pharmaceuticals UK Ltd (No.2)* [2001] FSR 41 (CA) § 34; *Three Rivers* §§ 37-38).

20. As to the second requirement, that "*disclosure is necessary in order to dispose fairly of the claim or to save costs*" (CPR 31.17(3)(b)), Vos J said in *Andrew v News Group Newspapers Ltd* [2011] EWHC 734 (Ch):

> "This requirement seems to me to be largely, but not wholly, to follow relevance. I need to have regard here to the availability to the claimant of similar documentation or information from other sources." (§ 71)

However, I agree with the Respondents that Vos J should not be taken to have intended to state, as a general proposition, that the necessity test has little or no independent role once documents are regarded as relevant. For example, the documents already in the possession of the parties to an action may be sufficiently complete in relation to an issue for there to be no necessity to trouble a third party to provide documents on the same

issue. Indeed, Vos J's second sentence quoted above alludes to that as an example of a case where the necessity test may not be passed.

21. I do not accept the submission made on behalf of the Yoo Respondents that an application of this kind needs, in order to be viable, to be supported by specific expert evidence stating the materials sought to be necessary. The applications here are supported by full witness evidence, and to a large degree the statements of case speak for themselves.

22. As to the third requirement, the court must be satisfied that the documents actually exist and that it will be clear from the face of the order whether documents do or do not fall within its scope (*Re Howglen* [2001] 1 All ER 376, 382-383; *Three Rivers* § 36). A non-party should not be required to familiarise itself with the issues in the litigation, in order to decide which documents are covered by the order. However, there is not necessarily a problem with the disclosing party having to exercise some judgment in complying with an order – see *Constantin Medien AG v Ecclestone* [2013] EWHC 2674 (Ch) per Vos J:

> "66. … A party receiving an order against him will always have to exercise some judgment in carrying it out. For example, a person ordered to disclose bank statements relating to all accounts in his name and in his possession would have to decide whether the terms of that order included trust accounts held by him as trustee and perhaps trust accounts held by him as a joint trustee. Even more difficult questions may arise in respect of which he may have to exercise judgment. If such a person is in doubt as to what was intended to be covered, he can obviously apply to the court for further and better directions.
>
> 67. When a non-party is required to make disclosure, it must be told by the order what documents he has to disclose. That instruction must be made without any reference to the issues in the case. A non-party should not be expected or required to understand the case that is in issue between other parties. A non-party should not be required to familiarise himself with the issues in litigation to which he is not a party.
>
> 68. … Chadwick LJ was … obviously right at paragraph 36 in *Three Rivers* to say that the threshold condition cannot be circumvented by an order putting on the non-party the burden of identifying which documents in a composite class met the condition itself. Also, of course, the court must be satisfied that the threshold test is satisfied: namely that each document in the relevant class of documents may well advance the applicant's case or damage the case of another party to the litigation.
>
> 69. … It must be clear from the order what the non-party must produce. The order must be framed without regard to the issues in the case, or to the relevance of the documents in the non-party's possession to those issues."

23. As to the fourth question, the language of CPR 31.17(3) ("*the court may make an order*") indicates that even if the requirements in CPR 31.17(3)(a) and (b) are met, the court maintains a discretion. As Capco submits:

    i) The limits on non-party disclosure set out above are appropriate, given the "*intrusive*" nature of the jurisdiction (*Flood v Times Newspapers Ltd* [2009] EWHC 411 (QB) § 29), and it has been said that disclosure remains the "*exception rather than the rule*": see White Book note 31.17.2.1 citing *Frankson v Home Office* [2003] 1 WLR 1952 § 10 and *Ang v Reliantco Investments Ltd* [2020] EWHC 2529 (Comm) §§ 6-7. In the latter case, Peter Macdonald Eggers QC (sitting as a Judge of the High Court) said:

    > "Once these jurisdictional requirements are satisfied, the Court has a discretion whether or not to order disclosure. In *Frankson v Home Office* [2003] EWCA Civ 655; [2003] 1 WLR 1952 , para. 10, the Court of Appeal said that *"The word "only" in rule 31.17(3) emphasises that disclosure from third parties is the exception rather than the rule. Disclosure will not be routinely ordered but only where the conditions there specified are met".* Nevertheless, the Court of Appeal recognised that *"wider considerations"* come into play in the exercise of the Court's discretion (para. 13)." (§ 7)
    >
    > Paragraph 13 of *Frankson* stated:
    >
    > "The third and final stage under Rule 31.17(3) is for the court to exercise its discretion whether or not to make an order. Here, wider considerations may come into play, but the court only reaches this stage if the two conditions in (a) and (b) are met. It is at this point, in my judgment, that public interest considerations fall to be taken into account and, if necessary, to be balanced. Two competing public interests have been identified in the present case, on the one hand the public interest of maintaining the confidentiality of those who make statements to the police in the course of a criminal investigation, and on the other the public interest of ensuring that as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result."

    ii) Accordingly, the courts have been encouraged to exercise the powers under 31.17 with caution (*Re Howglen* at p.382h). The court should not make an order unless it is furnished with sufficient information from which it can evaluate the necessity of disclosure for the fair disposal of the claim (*Commissioner of Police of the Metropolis v The Times Newspapers Ltd* [2011] EWHC 1566 (QB) § 29).

24. As illustrated by *Frankson*, one factor of potential relevance to the discretion is any alleged confidentiality in the documents. If the documents sought are considered necessary for the fair resolution of the litigation, such confidentiality concerns will not necessarily stand in the way of disclosure, though they may lead to the imposition by the court of mitigating steps to seek to preserve the third party's confidentiality in so far as this is compatible with the fair resolution of the proceedings: see *Science*

Research Council v Nassé [1980] AC 1028, 1065-1066, 1071-1072 and 1085, as applied following the introduction of the CPR in *Three Rivers DC v Bank of England* [2002] EWHC 2309 (Comm) per Tomlinson J § 4. Hence, Scott Baker LJ (with whom Wilson J agreed) said in *Frankson*:

> "38. Tomlinson J said in the *Three Rivers* case that if disclosure of the documents in question is shown to be necessary in the interests of the litigation, then that need overrides confidentiality. However, in such a case, the court will be concerned to see whether the needs of the litigation can otherwise be satisfied, e.g. by considering redactions, disclosure from other sources or other appropriate means. There is to my mind no absolute rule. The public interest in ensuring a fair trial in the light of all relevant evidence is nevertheless in my judgment of the utmost importance and one that inevitably weighs heavily in any balancing exercise. However, as has been pointed out, there are circumstances in which it is overridden. Legal professional privilege, without prejudice communications and the need to protect the identity of an informer are cited as examples. Mr Havers observes that in the case of informers the underpinning factor is the desirability of maintaining a free flow of information to the police. If non-disclosure affects the integrity of a criminal trial the Crown is left with the stark choice of either disclosing the information or abandoning the prosecution. The position is different in civil cases. The trial proceeds and the judge must do his best on the information before him. The appellants' argument is that there are already some circumstances in which the public interest of obtaining a fair trial on full evidence is overridden and that maintaining the confidentiality of interviews under caution is of such importance that it must be another. I cannot agree. In my judgment a judge should not be required to try actions by prisoners against the Home Office alleging assault by prison officers and misfeasance in public office in blinkers as to potentially critical evidence of what the prison officers said to the police when interviewed under caution. The evidence may help to establish liability or to negative it. Either way, in the present instances, it should be disclosed.
>
> 39. The court has in cases such as the present a difficult balancing exercise to perform between the two conflicting public interests. For my part, I would not put interviews under caution of suspects into any special category. It seems to me that all who make statements to, or answer questions by, the police do so in the expectation that confidence will be maintained unless (i) they agree to waive it or (ii) it is overridden by some greater public interest. The weight to be attached to the confidence will vary according to the particular circumstances with which the court is dealing. In the present case the countervailing public interest is one which, in my judgment, is of very great weight and one

> which outweighs the desirability of maintaining confidentiality. In conducting the balancing exercise the judge had clearly in mind the need to maintain the confidences as far as it was possible to do so. To that end he imposed stringent conditions on the extent and manner of disclosure. This, in my view, is a course which should always be followed in similar cases where the court decides that disclosure is required."

25. Further, there is authority to the effect that the confidential nature of information sought from a third party can be a relevant factor against ordering disclosure in the first place. In *Secretary of State for Transport v Pell Frischman* [2006] EWHC 2756 (TCC), Jackson J noted that an application for non-party disclosure under CPR 31.17 is very different from an application for early disclosure under CPR 31.16, and said:

> "The parties to an application under rule 31.16 are already locked in a legal dispute. They both have an interest in the documents for that reason. By contrast, the parties to an application under rule 31.17 do not usually have a pre-existing dispute. The respondent to an application under rule 31.17 usually has an interest in the documents which is quite different from the applicant's interest. In most applications under rule 31.17 the respondent has no involvement in the applicant's litigation. The respondent's concern may simply be to protect the confidentiality of his own documents. This is a general consideration which militates against ordering disclosure under rule 31.17." (§ 41(2))

26. Jackson J went on to approve a statement by Professor Adrian Zuckerman in the 2006 edition of his book "*Civil Procedure*" in the following terms:

> "The second jurisdictional condition, that disclosure is necessary to dispose fairly of the claim or to save costs, should give rise to fewer problems. In most cases it is likely to involve considerations such as whether the documents add significantly to what is already known or whether the likely benefits of disclosure justify the expense. But in some cases the court may need to strike a balance between the applicant's need for access to documents and some other competing interest, such as public interest immunity. On occasion the court may have to balance the applicant's need for particular documents against the respondent's legitimate interest in keeping them private. Privacy does not provide immunity from disclosure, but the court is entitled to consider whether it is necessary to infringe a person's privacy in order to enable a party to legal proceedings to prosecute his case. There may well be circumstances where the incursion into the non-party's privacy would be so great and the benefits of disclosure so small that the court would decline to order disclosure….
>
> The jurisdictional conditions of CPR 31.17(3) are necessary conditions, not sufficient conditions. An applicant that

> establishes the conditions will not necessarily succeed because the final decision will depend on the court's assessment of the competing interests of the party and the non-party. The court has to have regard not only to the interests of the party seeking disclosure but also the non-party's interest in protecting his privacy, confidentiality or other interests." (my emphasis)

(D) BUGSBY/L&G APPLICATIONS AGAINST YOO RESPONDENTS

27. The first group of documents that both Bugsby and L&G seek from the Yoo Respondents relate to alternative sources of debt or equity finance that were or would have been available to the Yoo Consortium for the Olympia acquisition had L&G not lent to it.

28. The first category in this group concerns documents within a defined date range passing between, records of presentations given and/or minutes of meetings taking place between members of the Yoo Consortium and potential lenders concerning the financing or acquisition of Olympia. It is now common ground that this category should not be confined to the seven potential lenders named in certain contemporary documentation. The category is said to be necessary because the parties' own disclosure has produced no direct evidence of the sources and terms of alternative funding that the Yoo Consortium could have used.

29. The Respondents do not contest in principle that documents within this category passes the CPR 31.17 tests, subject to the points of dispute considered below.

30. The first disputed point is whether the lead-in wording to this category should begin "*All documents*" (as Bugsby suggest) or "*Matrices and the most recent versions of term sheets*" (as L&G have suggested should suffice). Bugsby say that in order to address the issues in the case, it will be necessary to see not only what term sheets and matrices exist but the correspondence and other documents showing how likely it was in reality that another lender would have lent, on what terms, and in what timescale. Only that will give the court a clear picture of why the Yoo Consortium in fact borrowed from L&G and not that other lender. I was shown an example of a matrix, summarising in high level form the state of play and key terms under discussion with various lenders at a particular date. This illustrated, however, that important matters remained unsettled at that stage, such as the amount of borrowing. Correspondence would, Bugsby submitted, be likely to show what in reality was likely to be available from particular alternative lenders and in what timeframe. Further, such documents should be a readily identifiable body of documents within the proposed date range, which would be extractable using filters and search terms. Moreover, any confidentiality concerns are unlikely to be acute now, four years after the event.

31. Yoo responds that the Consortium obtained term sheets from each of the alternative lenders, and the key terms that the Consortium considered most important to its assessment of the debt finance options were extracted and summarised in a matrix. The stage reached with each of the alternative lenders, and the Yoo Consortium's assessment of the terms which were considered most material, is set out in the matrices.

32. In my view Bugsby is correct on this point. Whilst the matrices are of some value, they give a somewhat limited view of what was taking place between the Yoo Consortium

and the lenders. I anticipate it would be difficult for the court to form an accurate view of the real dynamics of the situation, the advantages the L&G financing in practice had over the potential alternatives, and whether any of the alternatives would have met the Yoo Consortium's needs and enabled it to win the bid, without a fuller range of documents. The broader formulation of this category is necessary in order fairly to dispose of the claim, and I am satisfied that other CPR 31.17 requirements are met.

33. Another partly disputed category of documents regarding alternative funding available to the Yoo Consortium concerns minutes of meetings of, and reports submitted to, any investment committees "*or similar bodies*". The italicised words represent the point of disagreement.

34. Bugsby explains that it does not know the internal organisation of, or terminology used by, the Yoo Consortium (which includes, for example, German institutional investor members), hence the need for the expanded wording. Yoo objects that the words *"or similar bodies"* are too vague. In my view, this wording is sufficiently clear and specific, and the documents are necessary for the reasons Bugsby indicates. The Respondents will need to identify bodies whose function in substance is (or includes) that of an investment committee, but that is an exercise of judgment only in the ordinary sense referred to in *Constantin* § 66 and does not require the Respondents to understand the issues in the substantive dispute.

35. Bugsby and L&G also seek from the Yoo Respondents:

> "Business plans, projections, project timetables or overviews for the operation and redevelopment of the Olympia site post-acquisition, in particular showing the effect of the Covid-19 pandemic on such redevelopment plans, created in the period 1 January 2017 to [insert date of Order]."

36. These documents are said to be important for the quantification of Bugsby's loss, which involves considering a counterfactual scenario in which Bugsby acquired Olympia in 2017 instead of the Yoo Consortium. The actual performance and redevelopment of Olympia under the Yoo Consortium's ownership is said to be relevant for assessing what would have become of it under Bugsby's stewardship. Hence Bugsby alleges in its Particulars of Loss ("***POL***") that the way in which the Yoo Consortium developed Olympia is "*the best available proxy for the scheme which Bugsby/HNA would have adopted*" (§ 10(b)). As L&G pointed out, this is a unique development, far from a typical shopping centre development where experts might reasonably be expected to make reliable estimates based on generic data and considerations.

37. The Yoo Respondents point out that the parties already have access to (i) a Consortium presentation from December 2016 regarding redevelopment, (ii) updated redevelopment plans from January 2018 to October 2018, (iii) a development briefing given by the Consortium to D2 in July 2019 and (iv) the Consortium's planning application for the redevelopment (46,000 pages), which includes a business case for it, publicly available since January 2019. However, Bugsby and L&G say those documents will not take into account subsequent events, particularly Brexit and the Covid-19 pandemic, and their impact on Olympia. Such likely impacts are expressly referenced in the POL (§ 10(f)) and in L&G's Defence to those Particulars. Paragraph § 3(2) of the latter document states:

> "The Defendants admit and aver that in any calculation of the alleged Investment Return, the hypothetical performance of the operating business must take full account of the negative impact of the Covid-19 pandemic on revenues, from 2020 onwards (paragraphs 10(e)-(f)). The same applies to any part of the Investment Return that depends on the evolution of the value of the Olympia site from 2020 onwards, which must take into account the negative impact of the Covid-19 pandemic on commercial property values. Calculation of the Investment Return must also take into account the negative impact of the UK's exit from the European Union on both London commercial property values and the revenue of businesses such as Olympia."

The evidence served on behalf of Yoo/OML itself states that the Yoo Consortium's business plans "*will have evolved significantly since the acquisition, in particular to deal with the significant changes in the business environment during that time, running from shortly after the British Government invoked Article 50, through two General Elections and most recently the global Covid-19 pandemic.*"

38. As part of its claim, Bugsby puts forward a case that having succeeded in acquiring Olympia, it would have improved its initial redevelopment plans and adopted a scheme that would have been "*at least as ambitious as that which was in fact adopted by the Yoo Consortium for the development of Olympia*." Bugsby and L&G accordingly agree that the documents in this category are needed so that the parties' experts can test the redevelopment assumptions put forward by Bugsby and thus allow the court to decide the issue fairly. Pre 2020 documents do not provide the critical information in this regard.

39. The Yoo Respondents raise a number of objections to this category. They suggest that the issues in the case concern Bugsby's hypothetical behaviour had it won the bid, and the Respondents' documents are not needed for that purpose. In my view, however, it is equally important for the resolution of the case to know what in practice Bugsby could and would actually have achieved, had it acquired Olympia, and the actual development and results of the business since January 2017 would be a key piece of evidence in that regard. The earlier documents already available to the parties obviously will not show the effect of events since (in particular) the beginning of 2020 including Brexit and the pandemic.

40. The Yoo Respondents also suggest that the parties seek these documents in order to make their experts' jobs easier. In fact, however, the case for disclosure of the documents is that it will make it much easier for the court to produce a fair result, by allowing the experts and the court to base their opinions and conclusions on much more complete information, about the actual impact of events on the Olympia development, than could be arrived at by experts attempting to form views on the likely impact of such events.

41. It is true that the parties will shortly receive OML's audited accounts for the year ended December 2020 (see below). However, a brief review of the 2019 accounts suggests (as one would expect) that such accounts will set out bottom line figures for revenues and expenses but provide only limited real insight into how the business has been

redeveloped, and how it has been adapted in light of events such as Brexit and the pandemic, and (in each case) at what cost and with what results.

42. The Yoo Respondents express concern about proportionality, saying they did not have any single type of document calling itself a 'business plan', and that extensive searches may be required. Bugsby and L&G have not so far proposed the search terms which they suggest the Respondents should use. (For their part, Bugsby and L&G complain that the Respondents have declined to engage in any such discussion.) L&G have suggested, as a possible mitigation of the burden, that it would be open to the Yoo Respondents to identify stages at which the Consortium's plans were significantly revised and disclose the latest version of the plans at each stage. L&G do not seek an order that the Yoo Respondents be required to take that approach, and I agree it would be unduly burdensome to make such an order. As to the wider point about proportionality, I would accept that having to search for this category of document is likely to be somewhat burdensome. On the other hand, particularly given that L&G admits breach, questions of causation and loss are at the heart of the dispute between the parties; and the actual performance of the Olympia business is (as the parties to the substantive litigation agree) by far the best available evidence as to the likely and/or feasible performance of the business had it been in the Bugsby's ownership. That factor pushes significantly in favour of disclosure of this category. Further, Bugsby and L&G will of course be *prima facie* responsible for the Respondents' reasonable costs of the disclosure exercise.

43. A further objection is that the documents in this category will go to the heart of the Yoo Consortium's proprietary information, and their disclosure would risk undermining relationships with tenants, commercial partners, construction contractors and planning authorities. Though it has not been made clear in specific terms how this might arise, as a general proposition I would accept that some of the information in these documents is likely to be commercially sensitive. It is therefore necessary to take account of that factor in deciding whether or not it is appropriate, even with suitable confidentiality protections in place, to require disclosure. In my view it is, bearing in mind the considerations I refer to in the preceding paragraph. Overall, the necessity test is passed, and the balance in my view falls in favour of requiring disclosure, subject to confidentiality protections of the kind which I consider later in this judgment.

44. It is common ground between Bugsby, L&G and OML that OML will disclose to Bugsby and L&G its annual audited accounts for the year ended 2020 by a date in April 2021, failing which it will immediately disclose its management accounts for December 2020. A small point arises about whether the date in April should be 16 or 30 April. In my view the latter date is sufficient in terms of the litigation timetable as a whole (which leads up to a 12-16 day trial in October 2021). L&G point out that the date of 16 April was proposed as experts' initial reports are due by 11 May. I shall hear any argument from the parties as to any timetable adjustments required in the light of this point or, more generally, the need to disclose documents pursuant to the order following this judgment.

(E) BUGSBY FURTHER APPLICATIONS AGAINST YOO RESPONDENTS

45. Bugsby seeks disclosure by the Yoo Consortium of additional documents relating to the Yoo Consortium's investment strategy and timetables for the Olympia project, applications etc to credit committees and certain communications with Capco, all

during the period 1 July 2016 to 10 April 2017. These are not opposed by the Yoo Consortium, subject to one point of dispute. Exception is taken to the italicised words in the quotation below from the draft order:

> (a) "Investment policy documents, memoranda, mandates, presentations, reports [*or similar documents*] which set out Yoo's, DFI's, VKB's, BVK's and/or the Yoo Consortium's investment criteria, strategies and policies in the period 1 July 2016 to 10 April 2017.
>
> (b) Documents passing between Yoo, DFI, RDM Capital, VKB and BVK during the period from 1 July 2016 and 10 April 2017, meeting the following descriptions:
>
> (i) Proposed or agreed timetables [*or similar documents*] setting out the times within which the acquisition of Olympia and/or Project O (or relevant stages of the transaction) were to be completed.
>
> (ii) Proposed or agreed financial models or projections for the acquisition of Olympia and/or Project O, showing the proposed basis of funding of such acquisition and/or the impact of such funding upon anticipated profitability of the venture.
>
> (iii) Applications, funding requests, memoranda, reports [*or similar documents*] submitted to credit committees, investment committees [*or similar bodies*] of VKB or BVK relating to the acquisition of Olympia and/or "Project O" (including, without limitation, the Investment Committee Memorandum of April 2017 of which p.10 appears at Annex 2).
>
> (iv) Approvals, rejections and other responses of credit committees, investment committees [*or similar bodies*] of VKB or BVK to applications, memoranda, reports [*or similar documents*] falling within paragraph 2(b)(iii) above.
>
> (v) Correspondence or analysis [*or other documents*] discussing, assessing or otherwise relating to the effect or potential effect on the acquisition of Olympia by the Yoo Consortium on the governance or regulatory obligations of VKB or BVK, in particular (but not limited to) EU Directive 2009/138/EC (the "Solvency II Directive") and/or any national legislation passed pursuant to it; asset allocation restrictions or regulations; and German regulatory restrictions in relation to real estate assets and income.

Including, in each case, the e-mails or other messages by which the document was passed between those parties.

(c) Documents passing between Yoo, DFI and/or CapCo during the period from 1 July 2016 and 10 April 2017, meeting the following descriptions:

(i) Any offer letters [*or similar documents*] in relation to the acquisition of Olympia and/or Project O (including, without limitation, the letter dated 15 December 2016), responses to such letters and variations or notices served thereunder;

(ii) The exclusivity agreement entered into between the Yoo Consortium and Capco in December 2016, together with all extensions, variations, notices, terminations or communications under that agreement;

(iii) Proposed or agreed timetables [*or similar documents*] setting out the times within which the acquisition of Olympia and/or Project O or relevant stages of the transaction were to be completed;

(iv) Demands by CapCo for the provision of documents or confirmation by way of formal "check-ins", "mile-stones", "tests" [*or similar*] to demonstrate progress towards the transaction; submissions to CapCo by way of such "check-ins", "mile-stones" [*or*] "tests" [*or similar*];

(v) Any documents which mention "Bugsby" or "HNA".

Including, in each case, the e-mails or other messages by which the document was passed between those parties.

(d) Communications with, or calendar entries regarding or minutes of meetings with, any entities within the Legal & General Group or their agents concerning the acquisition of Olympia and/or Project O up to and including 18 January 2017."

46. Save in relation to quoted § (b)(v) above, similar considerations arise as indicated in § 33 above. A document that is functionally essentially the same as (for example) a report or timetable, or a body that is functionally essentially the same as a credit committee, may be known by a different name. Bugsby does not know which names are in fact used, and it is in those circumstances unreasonable to criticise it for not having itself put forward specific search terms for the Respondents to use. The inclusion of the italicised words entails no more than a simple exercise of common sense judgment in the permitted sense, does not require the Respondents to understand the issues in the substantive case, and is sufficiently clear and specific.

47. The addition of the words "*or other documents*" to quoted § (b)(v) above is slightly different because it operates as a positive expansion. However, the subparagraph

relates to a narrow category of documents, discussing particular types of legal restrictions in relation to the project, and the explanation does not in my view render the subparagraph unclear, non-specific or disproportionately wide.

48. I therefore consider that these additions are necessary in order for the fair disposal of the claim and satisfy the other requirements of CPR 31.17.

49. Probably rather more contentious is the request for:

> "(e) Documents concerning the refinancing by Goldman Sachs of L&G's loan secured on Olympia on or around 7 February 2020, meeting the following descriptions:
>
> (i) The Facility Agreement (or similar contractual document) and any related contractual documents or side letters.
>
> (ii) Valuations, surveyors' reports and other due diligence reports."

50. Bugsby says these documents are relevant to movements in Olympia's value since 2017, being the value that Bugsby says it has lost by reason of L&G's breach. Bugsby's solicitor, Mr Zietman, explains in his witness statement that:

> "L&G's lending secured on Olympia was refinanced via a loan from Goldman Sachs on or around 7 February 2020 …. I understand from DFI's website that this refinancing was in the region of £875 million ….This suggests a very significant increase in value between April 2017 when Olympia was purchased and February 2020 when this refinancing took place. The extent of such an increase in value (and why it took place) is extremely important evidence which goes to the scale of Bugsby's loss. For example, whether the loan to value ratio of this lending was (say) 50% or 75% would affect the value placed on Olympia by Goldman Sachs by in excess of £500 million. Documents evidencing this valuation placed on Olympia by Goldman Sachs, and the reasons for it, will therefore be necessary to enable the court to fairly determine the quantum of Bugsby's claim and are likely to support Bugby's case as to the value of the opportunity."

51. To the extent that the Yoo Respondents' objections to this category correspond to those discussed in §§ 39-41 above, in my view the same answers apply.

52. The Yoo Respondents also say this class of documents is profoundly sensitive, and their disclosure would risk damaging its relationship with a major finance party (Goldman Sachs), and commercial prejudice arising from disclosure to a competitor (Bugsby).

53. It is evident from the correspondence and submissions that Savills produced a valuation of the Olympia site/business for Goldman Sachs, and consideration was given to

disclosing that item alone from this category of requested documents, albeit Bugsby maintained its application in full.

54. In my view, it is necessary for the fair disposal of the claim for the Savills valuation (and any supplements or other documents produced by Savills necessary to complete the picture presented by the valuation) to be disclosed, but not any of the other documents in subparagraph (e) quoted above. The value of the Olympia business is central to this litigation. The Savills valuation, assuming it to date from around the time of the refinancing, pre-dates the effects of the pandemic but post-dates both the Brexit referendum and the December 2019 election (with its implications for the Brexit process). It seems highly likely to be an invaluable piece of evidence when assessing the value of the Olympia business, including the value it would have had in Bugsby's hands. The Yoo Respondents ask why the parties' own valuers cannot perform their own valuations of the business, taking account of recent events, and suggest that Bugsby is seeking to free-ride on Savills' work. However, it seems likely that Savills will have had more information than will be available to a valuer attempting to value the business from the outside, and their valuation is likely to be of particular assistance to the court when considering the Olympia business's value today.

55. Conversely, the detailed terms of the refinancing are in my view at one remove from the issues in this case, and may relate to a greater degree to factors specific to the Yoo Respondents and their characteristics (e.g. credit-worthiness) as distinct from the inherent value of the Olympia business. Bugsby submitted that, over and above the valuation itself, it was necessary to know how robust Goldman Sachs felt it and the business to be, as reflected in (for example) the loan to value ratio, interest rate and covenants; and how concerned Goldman Sachs were about the looming Covid pandemic. I am not, however, persuaded that this further information over and above the valuation itself is necessary for the fair disposal of the present case. I also bear in mind the likely greater commercial sensitivity relating to the Consortium's dealings with its finance partner. In my view, the CPR 31.17 criteria are satisfied in relation to the Savills valuation (and any associated documents as indicated above) but not the remainder of this category of documents. I reach that conclusion on the basis that there will be appropriate confidentiality protections in place for such documents as are disclosed, as discussed later in this judgment.

56. Finally, it appears there is a dispute about the definition of "*Yoo*" for the purposes of the draft order. The Yoo Respondents are content for this to cover Yoo Capital Limited, Yoo Capital Advisers Management Limited and Yoo Capital Advisors LLP, but object to the proposed addition *"and all of their controlling and controlled entities, subsidiaries and affiliates (whether companies, partnerships, limited partnerships, limited liability partnerships or otherwise)"*. The Yoo Respondents say they have already used the non-expanded version for the purpose of identifying custodians and uploading data. However, Bugsby points out that the definition does not concern the parties who are required to give disclosure (or, hence, the custodians or datasets) but only the subject-matter of what they must disclose. The change therefore appears unexceptionable.

(F) BUGSBY/L&G APPLICATIONS AGAINST CAPCO

57. Bugsby and L&G seek disclosure by Capco of:

> "Board minutes, notes of Board discussions and associated papers presented to the board evidencing CapCo's assessment of actual or potential offers for the property located at Olympia, Kensington, Hammersmith Road, London W14, including the Olympia exhibition centre and the exhibition, event and conference business conducted from that property"

created or received from 1 February 2016 to 30 April 2017.

58. These documents are said to be relevant to why Capco preferred the Yoo Consortium's bid to Bugsby's and, hence, whether that was caused by L&G's breach. The parties' own disclosure has, unsurprisingly, produced little material about Capco's internal assessment of the rival offers and why it preferred the Yoo Consortium bid.

59. Capco queries the need for the words "*actual or potential*" offers. However, I agree with Bugsby and L&G that those words are necessary in order to cover, for example, (1) initial discussions at Board level as to how CapCo intended to assess, and choose between, bids that might in due course be received for Olympia; (2) Board discussions of anticipated future bids from parties, such as Bugsby, who over the relevant period made several offers for Olympia; and (3) Board discussions of offers that were made but in a non-binding, preliminary or indicative form or "*subject to contract*". Capco's solicitors in a letter of 16 March 2021 have indicated that the board minutes and papers during the relevant date range indicate that the board did not in fact have any discussions of types (1) and (2), and Capco's proposed disclosures in any event include discussion of type (3); but in principle it seems to me appropriate for the order to include the proposed additional wording in any event.

60. Bugsby's version of the wording further extends to board documents concerning the reasons for and timelines of schedules associated with Capco's "*potential refinancing*" of Olympia. Bugsby explains that L&G's disclosure indicates that there were talks between L&G and Capco in September 2016 about the possible refinancing of the Olympia business, at about the same time that the Yoo Consortium approached Capco. The reasons for and progress of Capco's proposed refinancing are relevant to the degree of speed and certainty Capco required for the Olympia sale. That in turn is relevant to causation, if the Yoo Consortium was able to provide such speed and certainty only by reason of the financing provided to it by L&G in breach of L&G's contract with Bugsby. As Bugsby puts it in its skeleton argument:

> "Bugsby avers at para 47(a) of the RAPOC that: "*CapCo repeatedly emphasised to the Claimant that speed and certainty was an important element in their decision-making process as to which offer to accept…*". The importance of that averment is that (as pleaded at para 47(d) of the RAPOC): "*If the Yoo Consortium had not been able to proceed as quickly as they did with the certainty afforded by the Defendants' debt financing, CapCo would have accepted the offer from the Claimant and HNA which was financially more favourable and would (in that scenario) have been significantly further advanced and more certain*". The progress of and motivations behind CapCo's potential refinancing of Olympia are likely to show that CapCo was in such a position that, even the shortest delay resulting from

> L&G not lending to the Yoo Consortium, would have led to CapCo choosing the Bugsby/HNA bid, thereby aiding Bugsby's case on causation."

61. In principle that reasoning is in my view correct, and these documents are necessary for the reasons Bugsby gives.

62. Bugsby adds that the potential refinancing documents are also relevant to the question of when the Yoo Consortium and L&G first made contact about Olympia: which L&G says was only in January 2017, but Bugsby believes was in September 2016. The potential connection is that the L&G/Capco refinancing discussions may well have been what led to contact between L&G and the Yoo Consortium about Olympia. On the other hand, as Capco points out, L&G's own disclosure should indicate when contact was first made with the Yoo Consortium about Olympia. As a result, I am unpersuaded that the documents are necessary for this particular reason. That does not, however, detract from the point made in the preceding paragraphs.

63. Secondly, Bugsby and L&G seek copies of emails sent or received by Gary Yardley, Capco's managing director and chief investment officer, evidencing his and/or Capco's assessment of the same matters as covered by the first request. Mr Yardley's documents are said to be relevant given his position and his heavy involvement in the sale of Olympia and Capco's dealings with Bugsby.

64. Capco says Mr Yardley's assessment of matters would have been superseded by the board minutes and reports to the board. It says the documents already disclosed show that the minutes contain a considerable amount of information about Capco's assessment of the rival bids, and I was shown redacted examples of board papers that have already been disclosed. However, given his role, it seems highly likely that Mr Yardley's emails will provide more detail, and hence insight, into the reasons why the Yoo Consortium's bid was preferred, and when: the 'when' being important as the case advanced by Bugsby refers to certain key turning points in the sale process, such as the times at which the Yoo Consortium was given exclusivity, and when L&G offered to finance the Yoo Consortium bid at start of 2017. The witness statement of Mr Steven Marcus of Bugsby refers to Mr Yardley seventeen times, and attributes to him statements and views said to reflect Capco's assessment of Bugsby and other bidders. For example, it is said that Mr Yardley at a meeting on 13 January 2017 said the Yoo Consortium bid was "*off the pace*" and was preparing to cut their exclusivity short, before L&G provided financing to the Consortium. His emails are, it is said, likely to contain important detail on such matters which does not appear in board papers. On this basis, both Bugsby and L&G consider that Mr Yardley's emails are likely to advance one or other of their cases in the dispute, and are needed to resolve the dispute fairly: and in principle I agree.

65. Capco raises a further concern based on specificity, suggesting that production of Mr Yardley's emails would involve a complicated exercise of judgment about whether or not emails show Mr Yardley's assessment of actual or potential offers. However, that is in my view merely another example of the type of common sense judgment needed in any (party or non-party) disclosure exercise, about whether or not documents fall in a particular category, and it does not require an understanding of the issues in the case.

66. As to proportionality, Capco states that (whilst it is one of the largest listed property companies in Central London) it has only one IT officer. Mr Yardley no longer works for Capco, and his PAs may also have left. Capco fears there might have to be a search of Mr Yardley's whole mailbox. Moreover, Capco says it has no company-wide document management system, and hence no easy way of determining whether electronic documents were produced or stored. Physical documents have been archived over time with no central index. It has no formal requirement to retain hard copy documents or emails for any period of time.

67. Considerations of this kind have a potentially serious impact on the question of whether or not disclosure should be ordered. However, it should in principle be possible for Capco to employ additional resources if needed, bearing in mind that Bugsby/L&G will ultimately have to pay the reasonable costs of the disclosure exercise. Moreover, only a reasonable search will be required. The requests are date limited, and limited to a single transaction i.e. the Olympia deal. Provision can be made that documents which are no longer available need not be disclosed (in the formal sense) at all. It may be possible, as L&G suggest, for Capco (or paid IT resource) to upload all Mr Yardley's emails onto a document review platform. Further, Capco has said that Mr Yardley did have some semblance of a filing system, and so it may be feasible to begin by reviewing folders most obviously likely to contain relevant documents, and then review the position in the light of what is found and what, if anything, appears likely to be missing. In the circumstances, I do not regard these potential problems as a reason for declining to make an order in respect of what appears likely to be a highly relevant category of documents; but they may condition what in practice a reasonable search will entail. The parties will no doubt take a reasonable approach, and the order will contain liberty to apply generally in case any disputes as to approach cannot be resolved without further court intervention.

(G) BUGSBY FURTHER APPLICATIONS AGAINST CAPCO

68. Bugsby seeks to extend the request discussed above not only to Mr Yardley but also Mr Terry O'Beirne, Capco's Group Finance Director, on the basis he ran the Olympia sale on a day to day basis. Bugsby points out that L&G's disclosure includes eight emails involving Mr O'Beirne, to none of which Mr Yardley was a copyee. There are also references to him in the statements of case and witness statements. However, it seems very likely that important strategic decisions of the kind likely to be relevant to this dispute would have involved Mr Yardley as well. Bearing in mind also the practical problems discussed under heading (F) above, I do not consider it proportionate to extend the order to Mr O'Beirne's emails.

69. Bugsby's formulation of the documents sought in relation to Mr Yardley (and Mr O'Beirne) is somewhat broader than L&G's formulation, and in total covers these categories:

> "i. the reasons for and timelines or schedules associated with CapCo's potential refinancing or sale of Olympia;
>
> ii. their or CapCo's assessment of actual or potential offers for the purchase of Olympia;

> iii. their or CapCo's ongoing assessment of the progress and prospects of completion of the Yoo Consortium's bid to acquire Olympia;
>
> iv. actual or potential lending by the Legal & General Group (i) to refinance CapCo's debt secured on Olympia and/or Earl's Court or (ii) support the acquisition of Olympia and/or Earl's Court by the Yoo Consortium or any members thereof; and
>
> v. The Yoo Consortium's exclusivity agreement with CapCo entered into in December 2016 and considerations whether to enter into, terminate or extend that agreement."

70. Subparagraphs (i) and (ii) correspond to the subject-matters in respect of which I have concluded that board papers should be disclosed, and are in my view necessary. Subparagraphs (iii) to (v), to the extent that they do not duplicate (i) and (ii), in my view go beyond what is necessary for the fair resolution of the dispute. In reaching that conclusion, I should make clear though that I regard subparagraph (iii) as being subsumed within subparagraph (ii), on the basis that subparagraph (ii) is not confined to the final view taken of bids but includes the view taken from time to time. It would hence include such matters as Capco viewing the Yoo Consortium bid as being 'off the pace' at particular times. Such communications may be important in a case where the gist of Bugsby's case includes the point that the intervention of financing from L&G enabled the Yoo Consortium to improve its bid from being relatively unattractive to being the winning bid.

71. I also note that Bugsby's formulation is also broader than L&G's in that it covers other (non-email) electronic and physical communications involving Mr Yardley in the relevant categories. Capco explains that the practical difficulties here could be even greater than in relation to emails. Capco does not have a document management system or any naming conventions. Accordingly, documents could be located anywhere on Capco's system and under any name. The entire server would therefore have to be searched. There are possible options that Capco (working with its solicitors or a third party e-discovery provider such as Inventus) could adopt, but each is anticipated to be extremely costly. I am not currently persuaded that it would be proportionate to require an exercise involving the need to search the entire server. However, it is in my view proportionate and necessary at least for a more limited search to be conducted, by identifying (if they exist) paper or electronic folders that Mr Yardley kept relating to the Olympia business, refinancing and sale and conducting a reasonable search of those folders for documents in this category.

72. Bugsby also seeks from Capco *"Presentations, memoranda, notes, minutes or other documents associated with meetings attended by Mr Yardley, or Mr O'Beirne in the period 1 February 2016 to 30 April 2017"* concerning the same matters as those in respect of which it seeks their emails. For the reasons already given, I do not think it necessary to order materials in relation to Mr O'Beirne. As to Mr Yardley, Capco expresses concern that it would, were this request to be granted, have to identify all meetings he attended during the period (more than a year), may have to restore all his diaries, and may have to search the whole Capco email system, containing some 20,000 document folders. As with the previous category considered above, I am not currently persuaded that it would be proportionate to require an exercise of that kind. However,

it is in my view proportionate and necessary at least for a more limited search to be conducted, by identifying (if they exist) paper or electronic folders that Mr Yardley kept relating to the Olympia business, refinancing and sale and conducting a reasonable search of those folders for documents in this category.

73. Finally, Bugsby seeks from Capco communications between the Yoo Consortium and Capco during the period 1 July 2016 to 10 April 2017 on five specified topics:

> "i. Any offer letters or similar documents in relation to the acquisition of Olympia and/or Project O (including, without limitation, the letter dated 15 December 2016), responses to such letters and variations or notices served thereunder;
>
> ii. The exclusivity agreement entered into between the Yoo Consortium and Capco in December 2016, together with all extensions, variations, notices, terminations or communications under that agreement;
>
> iii. Proposed or agreed timetables or similar documents setting out the times within which the acquisition of Olympia and/or Project O or relevant stages of the transaction were to be completed;
>
> iv. Demands by CapCo for the provision of documents or confirmation by way of formal "check-ins", "mile-stones", "tests" or similar to demonstrate progress towards the transaction; submissions to CapCo by way of such "check-ins", "mile-stones", "tests" or similar;
>
> v. Any documents which mention "Bugsby" or "HNA".
>
> Including, in each case, the e-mails or other messages by which the document was passed between those parties."

74. These documents are said to be relevant to the key issue of required timetable for the Yoo Consortium bid, and (hence) whether it was L&G's financing for the Yoo Consortium that enabled the Consortium to fulfil that timetable.

75. As regards subcategories (i) to (iv), I agree and consider it necessary and proportionate to require these documents. They are likely in the main to consist of formal or semi-formal documents that should be relatively easy to identify.

76. I do not consider subcategory (v) to be necessary or proportionate. Bugsby seeks them on the basis that L&G alleges that Capco regarded the Yoo Consortium as more reputable, reliable and desirable than Bugsby as a counterparty, and that Capco showed interest in Bugsby's bid only to create some competitive tension. However, the documents I have already concluded should be disclosed, regarding Capco's board's and Mr Yardley's assessment of the bids, should be sufficient for these purposes. I am not persuaded that his subcategory is necessary or that it meets the test of documents likely to advance or damage a party's case.

(H) CONFIDENTIALITY

77. The starting point is the general protection provided by CPR 31.22(1):

> "A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where—
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree."

78. It is not possible to legislate in advance that parts of the trial will be in private, as was proposed in Yoo's evidence: that will be a matter for the court to determine under CPR 39.2, weighting up confidentiality concerns and open justice. However, it is necessary to provide appropriate protection in the meantime.

79. One possibility is a confidentiality ring or 'club'. The burden is on the party applying for such an arrangement to establish a real risk, deliberate or inadvertent, of a party using its right of inspection for a collateral purpose (*Church of Scientology of California v Department of Health* [1979] 1WLR 723, 743G). Where a risk is demonstrated the restriction must go no further than is necessary to protect the right in question. The Supreme Court has recognised that a party's commercial interest can be such a right (*Al Rawi* § 64), and in *IPCOM v HTC* [2013] EWHC 52 (Pat) Floyd J stated: "*the court should not facilitate the granting of a competitive advantage to [the Claimant] and accordingly inflict a competitive disadvantage on [the Defendant and the third parties] unless justice requires it to take such a course"* (§ 31). In *Libyan Investment Authority v Société Générale* [2015] EWHC 550 Hamblen J noted that "*Confidentiality clubs are most typically employed in antitrust or intellectual property litigation in order to protect commercial confidences*", and set out factors to be considered:

> "(1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club — see, for example, *InterDigital Technology Corporation v Nokia* [2008] EWHC 969 at [18] and [19].
>
> (2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club — see, for example, *Warner-Lambert v Glaxo Laboratories* [1975] RPC 354 at 359 to 361.
>
> (3) The importance of the confidential information to the issues in the case — see *Roussel UCLAF v ICI* at [54] and *IPCom GmbH v HTC Europe* [2013] EWHC 52 (Pat) at [20].

> (4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge — see *IPCom GmbH v HTC Europe* at [18].
>
> (5) Practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information — see *Roussel UCLAF v ICI* at [54] and *InterDigital Technology Corporation v Nokia* at [7]." (§ 34)

80. In the present case, a confidentiality ring is in my view appropriate given the obvious sensitivity of some of the categories of documents involved, such as business plans and valuations.

81. The parties disagree about whether the documents should all be viewable by client representatives, particularly Mr Marcus of Bugsby Advisory Limited, Bugsby's advisor in relation to this litigation . Bugsby says it would be wrong in principle to restrict access to lawyers and experts: Bugsby (through Mr Marcus) is entitled to know the case and evidence against it (see, e.g., *Al Rawi v Security Service* [2012] 1 AC 531 § 12, *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 1158 (Ch) § 50 and, in the specific context of non-party disclosure, *JSC Aeroflot – Russian Airlines v Berezovskaya* [2014] EWHC 70 (Ch)).

82. However, the fact that Bugsby is entitled to know the case against it, as it eventually unfolds, does not mean that its lay representatives must be entitled to see at the disclosure stage the entirety of a body of documents including highly sensitive commercial materials many of which may well, however, form no part of the case actually advanced against Bugsby. As Yoo says, a confidentiality ring manages disclosure of documents in a staged approach. It is a common feature of litigation that much of the disclosed documents is not deployed at trial. It is an appropriate time to review the working of the confidentiality rings after the parties have identified what evidence will be deployed at trial. There is no authority suggesting that a party may be denied access to evidence used at trial, and Yoo does not suggest otherwise. I agree, and consider there to be merit in the idea of a tiered confidentiality ring in this case.

83. The Technology and Construction Court Guide provides a convenient summary of how such a ring can operate:

> "38. Parties, and in particular the claimant, may also wish to include certain of their own employees in the ring, who may be in house lawyers or other personnel. This will usually be for the purpose of understanding material disclosed into the ring and/or for giving instructions to external lawyers.
>
> 39. Where a party proposes to admit an employee representative, and the ring contains material which is confidential to a commercial competitor of that party, relevant factors are likely to include that party's right to pursue its claim, the principle of open justice, the confidential nature of the document and the need to avoid distortions of competition and/or the creation of

> unfair advantages in the market (including any retender) as a result of disclosure"
>
> ...
>
> 41. In order to manage these risks employee representatives may be admitted to a confidentiality ring on different terms from external representatives. Employee representatives may also have access to some but not all of the material disclosed into the ring (for example, technical material but not pricing information). This is sometimes referred to as a "two tier" ring.
>
> 42. Under an alternative form of two tier ring, the external representatives of a party in the first tier may apply for an employee representative in the second tier to have access to a particular document or documents, whether in open form or partly redacted. One way of dealing with this is for notice to be given to any person affected by the proposed disclosure, identifying the document, the form in which its disclosure to members of the second tier is sought, and the reasons why disclosure to the second tier is sought, and for the person affected to consent or object within a fixed time. The person or persons affected may be the contracting authority and/or the owner of the confidential information. In cases subject to expedition the period for response may be short and, in appropriate cases, less than a working day. Two tier rings necessarily introduce additional cost and complexity and will need to be justified in the circumstances."

84. Here, Yoo submits that Mr Marcus stands to obtain a competitive advantage from disclosure of the Yoo Consortium's extremely sensitive/sensitive information:

i) Bugsby's directing mind for the bid was Mr Marcus, who founded Bugsby and is a witness of fact. Mr Marcus thus has a background as a real estate sponsor with the skill/expertise to have run Bugsby's bid for Olympia: a very large London development unrelated to life sciences (his claimed main field of operation). There is no evidence from Bugsby that Mr Marcus has terminated his work as investment manager and real estate sponsor and will never re-enter that market. On the contrary, until January 2021 he was "*the Manager*" of Bugsby, and he has provided extensive advice to Alexandria Real Estate Equities Inc., a real estate investment trust. Mr Marcus has said in evidence:

> "This work allowed Bugsby to gain significant experience in the London real estate investment market and to establish key relationships with investors, operators, planning, and development specialists and individuals in the entertainment, real estate, hospitality and financial industries. Bugsby became well acquainted with the London Plan and planning policy, including specifically in Hammersmith and Fulham. Bugsby also gained a familiarity with the London-based listed property company universe, including Capital &. Counties Properties pic

> ("CapCo"), and built strong relationships with key investment bankers in the sector including at UBS, BAML and Goldman Sachs."

ii) It is common ground that Mr Marcus also operates a life sciences business with some focus on laboratories/offices. Whilst Mr Marcus's main focus may be Paris, Yoo says it is not his exclusive focus and there is nothing stopping his life sciences business from, for instance, taking laboratory or office space in London. It is obvious given Mr Marcus's extensive experience in real estate investment that he would gain a competitive advantage from the disclosure.

85. I accept this evidence at least to the extent of agreeing that there is a high degree of potential commercial sensitivity in relation to some of the document categories sought, including some of those relating to the Yoo Consortium's redevelopment of Olympia since April 2017, and a risk that (even if inadvertently) its disclosure might confer on Mr Marcus and/or Bugsby a competitive advantage whether now or in the future. A finding of such a risk does not depend on any assumption that Mr Marcus or Bugsby would or might breach their duties (cf *IPCOM* §§ 21 and 32(iii)).

86. I accept that in the authorities cited, tiered confidentiality rings excluding the lay client have arisen in cases involving secret patent processes or other acutely sensitive information (e.g. *IPCOM*, *Mitsubishi v Archos* [2020] EWHC 2641 (Pat), *Libyan Investment Authority*). On the other hand there is no reason why the approach should be limited in that way. Further, in *IPCOM* itself Floyd J regarded the information in question as lower down the scale of secrecy than secret process cases (§ 31(i)) and also had in mind the problem of a small company whose directing mind may be excluded, at least initially, from being able to see documents (§§ 13 and 33). However, he pointed out that (like the present case) the action was still at the interim stage, and it was not clear what, if any, part the documents in question would play in the case even if it went to trial (§ 32). It was not necessary in order to do justice, at least at the interim stage, for the relevant individuals to be able to review the materials in question (*ibid*.)

87. Bugsby also suggests that it would be unfair for Mr Marcus to be unable to see the documents but for L&G's in-house lawyers to do so (L&G does not seek to include commercial personnel in the inner ring of any confidentiality club). Bugsby does not have in-house lawyers. However, I do not think the two are comparable, and as already noted, the question that arises now relates only to access at this interim stage, and (even then) will be subject to applications that may be made under the confidentiality mechanism for Mr Marcus to be able to see particular documents.

88. In all the circumstances of the present case, it is appropriate for there to be a tiered confidentiality ring that will involve Bugsby's client personnel, including Mr Marcus, not seeing in the first instance some categories of document, but instead a process for disclosure decisions to be taken on case by case basis. Mr Marcus should not be included in the inner ring, but should be in the (or an) outer ring, and thus prospectively able to review documents if and to the extent that a decision to that effect is made pursuant to the confidentiality club mechanism or by the court. Yoo put forward a suggested methodology for a confidentiality club in § 27 of its skeleton argument, as did Deutsche in §§ 32ff of its skeleton argument, and draft orders were produced. Since these proposals were put forward at a relatively late stage in the process, the parties were not in a position to make detailed submissions about the formulation of the

confidentiality order, but I anticipate the parties will be able to work out an agreed form of order in the light of this judgment. Any remaining disputes should be capable of resolution at the hearing of matters consequential on this judgment.

(I) CONCLUSIONS

89. Bugsby's and L&G's applications succeed to the extent indicated above. I shall hear further submissions as to the appropriate form of order, including details of the confidentiality arrangements.

90. A respondent's reasonable costs of the application, and its costs of complying with any order, will usually be met by the applicant provided the respondent has acted reasonably (CPR 46.1). The court may make a different order, as is clear from CPR 46.1(3) and *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269. I shall hear any submissions the parties may wish to advance as to any reason for departing from the usual orders; as well as submissions regarding security for costs.