



Neutral Citation: [2023] EWHC 2072 (TCC)

Case No: HT-2021-000363

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 9 August 2023

Before :

Mrs Justice O'Farrell DBE

Between :

IBM UNITED KINGDOM LIMITED

Claimant

- and -

(1) LZLABS GmbH
(a company incorporated in Switzerland)
(2) WINSOPIA LIMITED
(3) LZLABS LIMITED
(4) MARK JONATHAN CRESSWELL
(5) THILO ROCKMANN

Defendants

Nicholas Saunders KC, Craig Morrison KC, Alex Taylor & Jacob Haddad (instructed by
Quinn Emanuel Urquhart & Sullivan UK LLP) for the Claimant
Roger Stewart KC, Thomas Ogden & Jaani Riordan (instructed by **Clifford Chance LLP**)
for the Defendants

Hearing date: 21st July 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on Wednesday 9th August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice O'Farrell:

1. The court heard submissions from the parties in respect of the following applications:
 - i) revisions to the trial timetable following extensions of time granted by the court on 16 June 2023 for the claimant's service of further particulars and further information in relation to its case;
 - ii) the defendants' application for specific disclosure dated 4 July 2023; and
 - iii) the defendants' application in relation to Mark Anzani dated 7 July 2023.

Background

2. This claim arises out of the development by the first defendant ("LzLabs") of software, known as the 'Software Defined Mainframe' or 'SDM', which is said to enable its customers to take applications developed for IBM mainframe computers and run them on x86-based computer architectures without the need for source code changes or recompilation.
3. On 15 August 2013 the claimant licensed the IBM mainframe software to the second defendant ("Winsopia") pursuant to an IBM customer agreement ("the ICA").
4. The claimant's case is that the defendants breached, or procured breach of, the ICA, using Winsopia's access to the IBM mainframe software to develop the SDM to run IBM software systems without an IBM mainframe or the IBM mainframe software stack by reverse assembling, reverse compiling or reverse engineering the software.
5. In December 2020 the claimant requested an audit of Winsopia under the terms of the ICA and other licence agreements but Winsopia refused on the ground that it exceeded the ambit of the claimant's contractual audit rights.
6. By notice dated 24 February 2021 the claimant terminated the licence agreements for contractual breach.
7. On 21 September 2021, the claimant issued these proceedings, in which it seeks:
 - i) a declaration that Winsopia's licence has been lawfully terminated;
 - ii) an injunction restraining Winsopia from making any further use of the IBM mainframe software, including from offering any services relying on the SDM that contains or uses any part of the IBM mainframe software (and the other defendants from procuring the same); and
 - iii) an account of profits and/or damages.
8. The defendants dispute the claims as speculative, based on inference and bound to fail. SDM is a software platform which enables mainframe users to use their legacy applications in current computing environments, such as x86, ARM and Linux, without the need to rewrite and recompile those applications; it does so by providing a thin compatibility layer, which provides an interface between the users' applications and current computing environments. They claim injunctive declaratory relief and damages.

9. The defendants' case is that the SDM was developed by LzLabs following an extensive research and development process spanning almost 10 years, using strict processes and policies which applied both to LzLabs and the developers whom it engaged, and to Winsopia, to ensure that no IBM material was used other than in compliance with the terms of the ICA. In developing the SDM, LzLabs employed a clean room process and did not use Winsopia's IBM mainframe.
10. At a case management conference on 21 October 2022 before Waksman J, directions were given to a trial on liability, fixed for 9 April 2024 with an estimate of 28 days (7 TCC weeks), including the following:
 - i) full particulars of all breaches of contract and acts of procurement to be relied upon at trial shall be served by the claimant by 23 June 2023;
 - ii) full particulars regarding the claimant's case on deliberate concealment shall be served by 23 June 2023;
 - iii) witness statements shall be served by both parties by 18 August 2023;
 - iv) permission was granted for the parties to adduce written and oral expert evidence at trial from up to two experts in the fields of: (a) computer programming and mainframe analysis, and (b) mainframe software development, debugging and distribution;
 - v) the experts in like fields shall hold discussions in accordance with CPR 35.12 with a view to reaching agreement or clarifying the issues in dispute by 25 August 2023;
 - vi) the claimant shall serve on the defendants any expert evidence on which it intends to rely at trial by 29 September 2023;
 - vii) the defendants shall serve on the claimant any expert evidence on which they intend to rely at trial by 10 November 2023;
 - viii) the claimant shall serve on the defendants any expert evidence in reply by 8 December 2023;
 - ix) the experts shall prepare a joint memorandum setting out those issues which are agreed between them and those which are disputed by 22 December 2023;
 - x) the PTR shall be held on 26 January 2024 (with an estimate of 1 day).
11. At a CMC held on 21 October and at a CMC held on 10 and 11 May 2023, this court ordered the claimant to provide further particulars of its case on deliberate concealment, including particulars concerning the date of knowledge of facts necessary to enable it to commence proceedings, and in respect of its technical case by 23 June 2023.
12. At a hearing on 16 June 2023, this court extended the date by which the claimant should provide particulars and further information in respect of its technical case from 23 June 2023 to 18 August 2023.

13. There is a draft amended pleading by the claimant, including the addition of a sixth defendant, Mr Moores, and the addition of a new allegation of unlawful means conspiracy, but that draft was circulated shortly before the hearing and there is no application before the court in respect of the same.

Trial timetable revisions

14. As anticipated at the hearing on 16 June 2023, following the eight week extension of time granted for the claimant to provide further particulars and further information in respect of its allegations of technical breaches, it is necessary to make consequential revisions to the timetable.
15. The claimant has proposed revisions to the timetable based on extending dates for the defendants' factual evidence and both parties' expert evidence so as to preserve the existing sequence and structure of the same, pushing the dates back by 6-8 weeks but keeping the trial date.
16. Mr. Saunders KC, leading counsel for the claimant, submits that the structure of the existing timetable was ordered following extensive correspondence between the parties and detailed arguments before the Court. There are no compelling reasons necessitating its variation and relatively modest changes to the timetable can ensure that the defendants have sufficient time to consider the case against them, including any additional allegations set out in the forthcoming particulars, before producing their factual and expert evidence.
17. The defendants have proposed a memorial approach to evidence whereby the claimant would serve its factual and expert evidence in August and September, followed by the defendants who would serve their factual and expert evidence together by 26 January 2024. The claimant would have until 23 February 2024 to produce its reply evidence and the experts' joint memorandum would be filed at least seven days in advance of the PTR, again maintaining the trial date.
18. Mr. Stewart KC, leading counsel for the defendants, submits that the claimant has had a significant extension of time within which to finalise its factual and technical allegations. The defendants still have no idea what functionality the claimant intends to attack, or which communications the claimant regards as material to its case. Until the defendants understand the detailed technical allegations, and what factual matters the defendants' experts consider important to their analysis, it is difficult to know from which factual witnesses evidence should be adduced.
19. The timetable already provides for sequential service of expert evidence. It is agreed that the defendants should have appropriate extensions for service of its factual witness evidence after seeing the claimant's evidence but there is no reason why the defendants' factual witness evidence should be pushed back by months to align with the service of its expert evidence. The experts all need to have sufficient time to consider any new pleadings and the witness statements. However, these proceedings were issued on 5 October 2021, directions to trial were given on 21 October 2022, the parties have had the opportunity of briefing their experts over a considerable period of time and disclosure has been continuing over a number of months.
20. Having regard to the above, the procedural timetable will be revised as follows:

- i) further particulars and further information regarding the claimant's case on technical breaches shall be served by 18 August 2023 (as currently ordered);
 - ii) the claimant's factual witness statements shall be served by 18 August 2023 (as currently ordered);
 - iii) the parties shall notify each other of the names of their instructed experts by 1 September 2023;
 - iv) experts of like disciplines in (a) computer programming and mainframe analysis, and (b) mainframe software development, debugging and distribution, shall commence their discussions of the expert issues by 8 September 2023;
 - v) the defendants shall serve their factual witness statements by 13 October 2023 (8 weeks after service of the claimant's particulars, as originally envisaged);
 - vi) the claimant shall serve its expert reports by 27 October 2023 (after service of the defendants' factual evidence);
 - vii) the experts of like disciplines shall produce a first joint statement, setting out any matters agreed or not agreed, and any expert issues of principle then identified, by 20 November 2023 (a new requirement);
 - viii) the defendants shall serve their expert reports by 18 December 2023 (4 months after the particulars and claimant's factual evidence, and 7 weeks after the claimant's expert reports);
 - ix) the claimant shall serve its expert reports in reply by 19 January 2024;
 - x) the experts of like disciplines shall produce a second joint statement, setting out those issues which are agreed between them and those which are disputed by 9 February 2024;
 - xi) the PTR will be fixed for hearing on 13 and 14 March 2024 (plus 1 day's judicial reading).
21. The remaining dates for skeletons by 2 April 2024 and the trial on 9 April 2024 remain unchanged.

Defendants' disclosure application

22. By application dated 4 July 2023 the defendants seek an amended disclosure order in respect of the following matters (listed in order of the priority identified by the defendants in their skeleton):
- i) additional disclosure of Mr Anzani's documents by keyword searches across his entire mailbox and other repositories in respect of DRD issues 4, 17, 19 and 21;
 - ii) additional disclosure of Mr Knight's documents by reconstructing his mailbox for the period 1 April 2013 to 31 March 2020 and conducting keyword searches in respect of DRD issues 2(i), 4 and 21;

- iii) similar reconstructions and searches in respect of other ex-employees of the claimant, Mr Luke Morris, Ms Sarah Sobey, Mr Jonathan Breedon, Mr Peter Chard, Ms Janine Cook, Mr Richard Gamblin, Mr Nick Dudeney and Mr. Laurence Trigwell in respect of DRD issue 21;
 - iv) disclosure of documents from Mr Harvey Reed in respect of DRD issues 2(i) and 4, and Mr. James Curry in respect of DRD issues 17 and 19;
 - v) variation of the date range to be applied to the claimant's disclosure in respect of DRD issue 4;
 - vi) confirmation as to the basis on which the claimant asserts privilege against documents withheld from disclosure;
 - vii) disclosure of documents on the claimant's central server; Repository 1; and shared repositories;
 - viii) disclosure of documents from Mr Tommaseo (IBM Ireland), New custodian 1 (IBM Corp), new custodian 2 (IBM Corp) and Mr. Cook (IBM UK) in respect of DRD issues 2(i), 4 and 21; and Mr Munden (IBM UK) in respect of DRD issues 4, 17, 19 and 21.
23. The application is supported by the first witness statement of Ms Huts, solicitor and partner in Clifford Chance LLP, dated 4 July 2023 and her fourth witness statement dated 18 July 2023.
24. The claimant's response to the application is set out in the ninth witness statement of Mr Pantlin, partner at Quinn Emanuel Urquhart & Sullivan UK LLP, dated 14 July 2023 and his eleventh witness statement dated 20 July 2023.

Mr Anzani

25. The defendants' application in respect of Mr Anzani's documents is for an order that the claimant should carry out keyword searches across his entire mailbox and other repositories in respect of DRD issues 4, 17, 19 and 21.
26. The agreed and approved DRD document set out the issues for disclosure, including the following:
- i) Issue 4: "What was known to C at the times of entering into the ICA and the further Transaction Documents and Attachments, or (if later) in the period before 21 September 2019, concerning: (i) the existence of D1; (ii) the nature of D1's work; (iii) the relationship between D1 and D2; and/or (iv) the activities of the Ds forming the subject matter of the RRAPOC?"
 - ii) Issue 17: "Who made the Audit Request dated 3 December 2020 and for what purpose(s) was such Audit Request made?"
 - iii) Issue 19: "For what reason did C decide to terminate the ICA?"

- iv) Issue 21: “(i) When and to what extent was IBM and IBM UK aware of the SDM? (ii) Did IBM and IBM UK make statements to third parties in the marketplace, whether orally or in writing, in relation to the SDM?”
27. The claimant agreed to provide Model D disclosure in respect of issues 4 and 17, and Model C disclosure in respect of issues 19 and 21.
28. The Model C requests for disclosure in relation to issue 19 were:
- “(1) Written records of communications from 1 January 2020 onwards (including emails or other electronic communications, letters, call logs or notes, and meeting minutes or notes) within IBM UK, and between (i) IBM UK and any IBM group companies (including any representative or member responsible for IBM mainframe z/OS software sales, including Mark Anzani, Paul Knight, Tom Rosamilia and/or Ray Jones (and/or his successor)) and (ii) IBM UK and RSM Partners Limited, which relate to any acts of actual or suspected non-compliance with the ICA by Winsopia or proposals to terminate the ICA.
- (2) Written records of investigations from 1 January 2020 onwards into, or internal updates or reports of, alleged non-compliance by D2 with the ICA.”
29. The Model C requests for disclosure in relation to issue 21 were:
- “(2) Written records of communications (including as above) from 1 March 2016 onwards recording/relating to discussions between C and any third party in the marketplace concerning (i) LzLabs, (ii) the SDM, (iii) Winsopia or (iv) the IBM-Winsopia Agreements.
- (3) Internal C or IBM presentations, briefings and strategy documents (including notes or summaries of the same) concerning (i) LzLabs, (ii) the SDM, (iii) Winsopia or (iv) the IBM-Winsopia Agreements, since 5 November 2014.
- (4) Minutes of any meetings within IBM UK and between IBM UK and other IBM group companies, from March 2016 onwards, in which IBM’s or IBM UK’s commercial strategy in relation to (i) LzLabs, (ii) the SDM or (iii) Winsopia, is recorded as having been discussed.”
30. The defendants’ application is made under PD57AD paragraph 17 on the basis that there has been, or may have been, a failure adequately to comply with an order for extended disclosure:
- “17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to –

- (1) serve a further, or revised, Disclosure Certificate;
- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.”

31. Alternatively, the defendants seek a variation to the order for extended disclosure under paragraph 18 of PD57AD, which provides:

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

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate ...”

32. It is common ground that the test for varying an order for extended disclosure under paragraph 18 is more onerous than the test for ordering further disclosure as a remedy for non-compliance, or apparent non-compliance, with an order for extended disclosure, as explained (in respect of the disclosure pilot which was in materially the same terms) in *Agents' Mutual Ltd v Gascoigne Halman Ltd* [2019] EWHC 3104 (Ch) per Marcus Smith J at [11]:

“The difference between these two provisions is easy to see:

i) CPR 51 PD U §17 deals with the case where an Extended Disclosure order has not, or may not have been, adequately complied with. Because of the question of non-compliance, the test that must be met for the granting of an order under CPR 51 PD U §17 is that the order be "appropriate", which requires the applicant to satisfy the court that making an order is "reasonable and proportionate".

ii) By contrast, CPR 51 PD U §18 deals with the case where – even though there has been compliance with an order for Extended Disclosure – the order previously made is sought to be varied. In such a case, the applicant must show not merely that making the order is "reasonable and proportionate", but also that varying the original order "is necessary for the just disposal of

the proceedings". Unsurprisingly, it is harder to obtain an order under CPR 51 PD U §18 than under CPR 51 PD U §17.”

33. The defendants' position is that Mr Anzani is likely to have documents relevant to the claimant's knowledge of the defendants at the time of the ICA and/or before 21 September 2019 (Issue 4). Documents exhibited to Ms Huts' witness statements show discussions between Mr Anzani and others during this period regarding the business activities of LzLabs and the SDM. It is said that Mr Anzani instigated the audit in December 2020, sending the initial IBM Corp audit request to Winsopia on 3 December 2020 (Issue 17). Following Winsopia's protest, the audit request was re-sent by the claimant but no documents have been disclosed regarding any internal discussions in respect of these decisions. Further, it is said that Mr Anzani played a key role in investigating the SDM (Issue 21), and in the decision to terminate the ICA (Issue 19). Documents exhibited to Ms Huts' witness statements show that Mr Anzani directed that all enquiries in relation to the SDM should be addressed to him.
34. This is the second application made by the defendants in relation to Mr Anzani's documents. At the hearing on 10 and 11 May 2023 I ordered the claimant to carry out further searches in respect of Mr Anzani for the reasons then given. Further searches were carried out but only two further documents have been disclosed.
35. The defendants submit that the reasons for the paucity of documents are first, the claimant has either not carried out searches or withheld documents on the basis that Mr Anzani is said by the claimant to have been an employee of IBM Corp and not the claimant; and second, the claimant has not collected or searched all of the repositories that could have been collected and searched if Mr Anzani was a custodian.
36. The claimant's position is that Mr Anzani is neither a party to these proceedings, nor an employee of the claimant. As such, his documents are not, as a matter of generality, within the claimant's possession, custody, power or control. Notwithstanding that, the claimant made a request to Mr Anzani for his documents and he provided the claimant with his complete mailbox, Sametime messages, Slack messages, and certain Box folders for the purposes of disclosure in these proceedings. Searches were run across all those repositories, using the agreed search terms, the responsive pool was reviewed for relevance and privilege, and documents were disclosed. Following the court's May CMC order, further searches were run across the repositories using the keywords "Anzani" and "Knight" and further documents were disclosed.
37. I am satisfied that the claimant has collected and searched all appropriate repositories likely to hold relevant documents for Mr Anzani. The issue between the parties is that although the claimant has treated Mr Anzani as acting on its behalf in respect of issues 17 and 19, it has claimed that he was not acting for the claimant in respect of issues 4 and 21 and therefore any responsive documents from Mr Anzani's repositories against the search terms for those issues have not been disclosed.
38. In my judgment, the claimant has adopted an approach to disclosure of Mr Anzani's documents that is too narrow. Mr Pantlin confirmed that Mr Anzani's documents are now in the possession, custody, power and control of the claimant with his agreement. Regardless of the capacity in which he was acting, if and to the extent that the documents searched produced responsive hits against the issue 4 search terms, they would be disclosable. Documentary evidence of Mr Anzani's knowledge of the

defendants' activities at the material time is capable of supporting the defendants' case that the wider IBM group, including the claimant, had such knowledge.

39. The Model C request in respect of issue 21 is not limited as understood by the claimant. The confusion stems from the striking out of paragraph (1) of the Model C request without an appropriate amendment to paragraph (2). Paragraph (2) refers to written records of communications "*(including as above)*". That reference must be to the types of communications identified in original paragraph (1), or to the communications defined against issue 19 (set out above), both of which included emails or other electronic communications, letters, call logs or notes, and meeting minutes or notes: "*within IBM UK, and between IBM UK and IBM group companies*". Therefore, regardless of the capacity in which Mr Anzani was acting, if and to the extent that the documents searched fell within that wider group of Model C issue 21 documents, they would be disclosable.
40. Regardless whether the application falls within Paragraph 17 or 18 of PD57AD, I am satisfied that it would be reasonable and proportionate, and necessary for the just disposal of these proceedings, for a further review of Mr Anzani's documents to be undertaken in respect of disclosure issues 4 and 21, without the imposed limitation by reference to the capacity in which he was acting.

Mr Knight and other ex-employees

41. The defendants are concerned that the claimant failed to serve document preservation notices in relation to its ex-employees and, as a result, their documents were destroyed in accordance with company policy.
42. The original order sought by the defendants was that their mailboxes should be reconstructed from the central server and 'cold storage' .nsf files so that keyword searches could be carried out against the DRD issues. However, in Ms Huts' fourth witness statement that has been modified, so that in respect of the identified ex-employees, the order sought is that:
 - i) in respect of accounts on Outlook 365, the eDiscovery Product is utilised to conduct a search across the central server of their names or email addresses in the "to", "from", "cc" or "bcc" fields, to reconstruct the mailbox of each of them for specified periods;
 - ii) in respect of Lotus Notes the .nsf files of other IBM employees in the ex-employees' respective business unit/team, and/or Matt Roseblade, Andrew Bates, Richard Wilson, Rod Little, John Ball, Gareth Greenwood and Michaela Kubenkova are extracted for processing and searching.
43. Mr Pantlin has responded to this in his eleventh witness statement, in which he explains the circumstances in which the documents were destroyed:
 - i) In relation to Mr Knight, litigation was not in contemplation when Mr Knight's documents were routinely deleted 90 days after he left the claimant on 31 March 2020. The claimant was not aware of the connection between the first and second defendants until 25 August 2020.

- ii) In relation to Ms Cook, Mr Gamblin, Mr Dudeney and Mr Trigwell, they were not identified as potential custodians at the outset of the litigation, such that no instruction was given to halt the standard policy concerning the retention of their documents.
 - iii) In relation to Mr Morris, Ms Sobey, Mr Breedon and Mr Chard, the only issue for disclosure in respect of which each of these individuals potentially possessed relevant documents was issue 21. However, the underlying allegations in respect of issue 21 were not raised until the Defence and Counterclaim of the First to Third Defendants dated 31 January 2022, by which time the individuals had left the claimant (between April 2021 and November 2021) and their documents deleted.
44. In section 2 of the DRD, the claimant stated that as a matter of general practice, the claimant does not retain the e-mail accounts of former employees. Specifically, the claimant does not retain employees' emails 90 days after their employment comes to an end, unless some specific instruction to the contrary has been made. The claimant has had this policy in place for at least a decade. Mr Pantlin's further explanation in his witness evidence provides adequate justification for the absence of documents from the above individuals prior to the defendants' application.
45. However, I note that a large measure of agreement has been reached on this issue. The claimant has agreed to carry out the following additional searches:
- i) in respect of Lotus Notes, the .nsf files of Mr Roseblade, Mr Bates, Mr Wilson and Mr Ball will be extracted, processed and searched.
 - ii) The .nsf files of Mr Little and Mr Greenwood have already been extracted and processed, as they were identified as existing custodians.
 - iii) The .nsf file of Ms Kubenkova will not be extracted, processed or searched because she is not an employee of the claimant, as is evident from the emails exhibited.
 - iv) Searches will be conducted across Outlook 365 in the "to", "from", "cc" or "bcc" fields for each of the names or e-mail addresses of Mr Knight, Mr Morris, Ms Sobey, Mr Breedon, Mr Chard, Ms Cook, Mr Gamblin, Mr Dudeney and Mr Trigwell.
46. The above agreed searches are a reasonable and proportionate approach to recover documents from ex-employees whose documents may respond to the relevant DRD issues.
47. Mr Pantlin also confirmed that the document preservation orders in respect of Mr Reed and Mr Curry extended to all of their data that was available to the claimant and therefore no relevant data belonging to those individuals was lost.
48. For the above reasons, the court is satisfied that it would be appropriate to order the agreed additional searches to be undertaken by the claimant.

49. Part of the pleaded defence, in addition to a denial of any breach of the ICA and a defence of statutory limitation, is that all claims said to arise from acts prior to two years before the date of the claim form in these proceedings are time barred by operation of clause 1.11.4 of the ICA. The claim form was issued on 21 September 2021 and, therefore, the defendants' case on contractual limitation is that any claims that arose prior to 21 September 2019 are time-barred. In response, the claimant pleads that the facts relevant to its cause of action against the defendants were deliberately concealed; they were not discovered, and could not reasonably have been discovered, until shortly before the claim form was issued.
50. Issue 4 is concerned with the state of knowledge of the claimant: (i) at the time of the ICA in August 2013; and (ii) in the period up to two years before the issue of the claim form on 21 September 2021. It is set out in the agreed and approved DRD as follows:
- “What was known to C at the times of entering into the ICA and the further Transaction Documents and Attachments, or (if later) in the period before 21 September 2019, concerning: (i) the existence of D1; (ii) the nature of D1's work; (iii) the relationship between D1 and D2; and/or (iv) the activities of the Ds forming the subject matter of the RRAPOC?”
51. Paragraph 10(b) of the order made by Waksman J dated 22 December 2022 provided:
- “The following date ranges shall be applied to the Claimant's disclosure:
- ...
- (b) In respect of Issue 4, the applicable date ranges shall be between: (i) 15 February 2013 and 15 September 2013; and (ii) 5 November 2014 and 21 September 2019.”
52. The defendants seek an order pursuant to PD57AD paragraph 18 which varies the date range of the claimant's searches in respect of Issue 4 by extending the end date from September 2019 to August 2020 as follows:
- “between (i) 15 February 2013 and 15 September 2013; and (ii) 5 November 2014 and 25 August 2020 (plus a week to capture internal discussions about the significance of the date).”
53. The defendants' application has been prompted by the claimant's response to an RFI provided on 23 June 2023, which stated that the claimant's case is that it was unaware of the link between LzLabs and Winsopia until 25 August 2020. Mr Stewart submits that the defendants are entitled to disclosure that permits them to test what the claimant says it discovered on that date because it may be that what the claimant in fact learnt was something it learnt, or with reasonable diligence could have learnt, much sooner.
54. This application is not well-founded. Even if there were documents that indicated knowledge on the part of the claimant prior to 25 August 2020, they would not assist the defendants in their contractual limitation defence unless those documents indicated relevant knowledge prior to 21 September 2019. The formulation of issue 4 and the

applicable date range were agreed by the parties on the basis that the material date of knowledge on the part of the claimant is up to and including 21 September 2019. That basis has not changed. I consider that the variation sought by the defendants is not reasonable or proportionate, or necessary for the just disposal of the proceedings. For that reason, the application is dismissed.

Claim for privilege

55. The defendants seek an order pursuant to paragraph 17 of PD57AD that the claimant should confirm:
- i) what privilege is being asserted against documents withheld from the claimant's disclosure;
 - ii) which entity is asserting that privilege;
 - iii) from what date privilege is being asserted; and
 - iv) under which applicable law.
56. Paragraph 14.1 of PD57AD provides that a party who wishes to claim a right or duty to withhold disclosure or production of a document, part of a document, or class of documents, which would otherwise fall within its disclosure obligations, may exercise that right by describing the document or class of document and explaining the grounds on which it claims that right or duty. Paragraph 14.2 provides that a party who wishes to challenge the exercise of such a right or duty must apply to the court by application notice supported where necessary by a witness statement.
57. Ms Huts sets out the basis for the defendants' application in her first witness statement as follows:

“Given the extremely limited information provided by IBM UK to date, it is unclear why the volume of disclosure is so low. One possibility is that IBM UK has asserted privilege over a wide range of documents, where privilege ought not to have been asserted. By way of example, IBM UK has disclosed only one document in respect of Issue 17 (IBM's audit request). These documents could not be protected by litigation privilege on the basis that they would have been prepared for the [dominant] purpose of undertaking the audit pursuant to the audit right in the ICA, and not for the purposes of litigation.

In its letter of 4 July 2023, IBM UK confirmed for the first time that IBM UK has applied litigation privilege from 25 August 2020 on the basis that documents were created for the dominant purpose of the litigation. However, IBM UK also states that “*To the extent that documents predating 25 August 2020 were withheld from production for privilege, that is because another privilege applied.*” [SKH1/479] IBM UK does not provide any further information, including what privilege is claimed in those documents, by whom, and under what applicable law. This raises

serious concerns as to whether IBM UK has adequately complied with its disclosure obligations under PD57AD in these Proceedings by inappropriately claiming privilege where privilege ought not to apply.”

58. Mr Pantlin responds to this application in his ninth witness statement as follows:

“As the Partner at Quinn Emanuel responsible for overseeing the Claimant’s disclosure of documents, I confirm that, having reviewed the documents in question with support from Ms. Vernon and the Claimant’s external counsel, I am satisfied that documents have only been withheld by the Claimant on the basis of privilege where the claim to privilege is properly justified.

Taking the two specific areas of concern raised by Ms. Huts, and strictly without waiving privilege, I confirm that:

Insofar as documents relating to Issue 17 (the Claimant’s audit request) were withheld from production, that is because each of the documents in question were either (i) created for the dominant purpose of giving and/or receiving legal advice, or were (ii) created for the dominant purpose of litigation which was reasonably in contemplation (namely claims by the Claimant for the Defendants’ alleged breaches of the ICA), or both. I do not accept Ms. Huts’ assertion that documents relating to the audit request could not be protected by litigation privilege.

Insofar as documents pre-dating 25 August 2020 were withheld for privilege, this is because each of the documents in question were (i) created for the dominant purpose of giving and/or receiving legal advice; and/or (ii) created for the dominant purpose of litigation which was reasonably in contemplation (in particular claims by IBM Corporation (“IBM Corp.”)).

In each case the Claimant has assessed questions of privilege as a matter of English law, which (as the *lex fori*) governs questions of privilege in these proceedings.”

59. The disclosure certificates produced by the claimant and the defendants claim privilege on the same basis, namely, by reference to the classes of document that are covered by legal advice privilege or litigation privilege.

60. The defendants have not produced any evidence that indicates there might be any erroneous claim for privilege or otherwise calls for explanation or justification of a claim for privilege. This application is purely speculative and an improper basis on which to challenge the assertion of legal privilege. For that reason, it is dismissed.

Central Server and other repositories

61. The defendants seek an order that pursuant to paragraph 18 of PD57AD the claimant should undertake keyword searches of “lz”, OR “lzl*”, (where * is a wildcard

representing 0 or more alphanumeric characters), OR “winsopia” across (i) the claimant’s central server; and (ii) the ‘zChamps’ repository; for the period between 1 April 2013 and 20 September 2021 and (iii) disclose documents contained in shared repositories.

62. The basis for this application is the defendants’ assertion that it is highly likely that further documents exist which have a probative value in undermining the claimant’s claims and supporting the defendants’ defences, including limitation.
63. Mr Pantlin has explained in his ninth and eleventh witness statements that the central server consists of multiple servers owned by IBM Corp containing the emails of hundreds of thousands of IBM group employees and former employees worldwide. The zChamps repository is not in the claimant’s possession, custody, power or control and there is no archive or back-up repository. Therefore it would not be possible in any event for the claimant to conduct the searches now sought by the defendants. He also explains that the claimant provided all responsive, relevant and non-privileged documents from shared repositories to which custodians had access and stored documents, including those which they did not create.
64. The extension of disclosure to the claimant’s central server would be a very significant departure from the agreed and approved DRD, which already provides for disclosure in respect of identified custodians, over agreed date ranges, using agreed search terms. Against that background, it is incumbent on the defendants to satisfy the test in paragraph 18 of PD57AD that varying the original order for extended disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate as defined in paragraph 6.4.
65. Paragraph 6.4 of PD57AD provides that an order for extended disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors: -
 - i) the nature and complexity of the issues in the proceedings;
 - ii) the importance of the case, including any non-monetary relief sought;
 - iii) the likelihood of documents existing that will have probative value in supporting or undermining a party’s claim or defence;
 - iv) the number of documents involved;
 - v) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
 - vi) the financial position of each party; and
 - vii) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.
66. The starting presumption is that the parties complied with the requirements of PD57AD, including paragraph 6.4, when completing and agreeing the DRD. The DRD went through a number of drafts over many months, including discussion with the court,

before the final version was agreed and approved. Therefore, there was plenty of opportunity for the parties to consider and make submissions on the nature and scope of the searches to be undertaken as part of a reasonable and proportionate approach to extended disclosure. The defendants' perception that, on reflection, it would have been better to include the central server as a custodian is not sufficient to displace that presumption. Furthermore, the defendants have not provided specific evidence of gaps in disclosure, save for the Anzani documents and ex-employee documents, in respect of which further disclosure is ordered as set out above. In those circumstances, the defendants have not shown that the additional wide-ranging searches now identified are necessary for the just disposal of the proceedings.

67. For the above reasons, the general application in respect of the central server and other repositories is dismissed.

Additional custodians

68. The defendants seek an order that additional custodians should be added for the purposes of disclosure, namely, Mr Tommaseo (IBM Ireland), new custodian 1 (IBM Corp), new custodian 2 (IBM Corp), Mr. Cook (IBM UK) and Mr Munden (IBM UK).
69. Mr Tommaseo and the two IBM Corp individuals are not employees of the claimant and therefore, the claimant does not have possession, custody, power or control over their documents.
70. Ms Huts explains that Mr Cook and Mr Munden are considered to be relevant custodians on the basis that they appear to have worked alongside Mr Knight as IBM's main contacts for Winsopia for the period relevant to discovery. Therefore, including them as custodians might assist with the reconstruction exercise in respect of Mr Knight. The reasonable and proportionate approach to the documents of ex-employees, including Mr Knight, has already been addressed as set out above and no further custodians are necessary for this purpose.
71. For those reasons, the defendants' application in relation to the additional custodians is dismissed.

Anzani application

72. By application dated 7 July 2023, the defendants seek an order in the following terms:

“Save as it relates solely to the proper preparation of witness evidence from Mr Anzani in these proceedings, the Claimant is not permitted to share information or documents obtained from or provided by the Defendants in the course of these proceedings with Mr Anzani, without obtaining prior permission from the Defendants or the Court.”

73. The application is supported by Ms Huts' second witness statement dated 7 July 2023. She relies on two instances where it is said that the claimant has not taken a sufficiently serious approach to the protection of the defendants' confidential information. The first instance is the use by IBM Corp of the fifteenth witness statement of Ms Scott (prepared in these proceedings) in the Texas proceedings. The second instance is the exhibition

of a non-redacted version of a report by Keystone Strategy relating to the defendants' source code information to the eighth witness statement of Ms Vernon.

74. Further, Ms Huts relies on a general concern about the involvement of Mr Anzani in the UK and the US proceedings and that sharing information with him in relation to these proceedings may give rise to material prejudice to the defendants.
75. The response to the application is set out in the eleventh witness statement of Katherine Vernon, a partner in Quinn Emanuel Urquhart & Sullivan UK LLP dated 14 July 2023. As to the first instance relied on, Ms Vernon accepts that there was a technical breach of CPR 32.12 in that Ms Scott's witness statement was sent to Mr Wildstein at IBM Corp and to Mr Wilcox and Mr Balcof at Desmarais LLP, and was mistakenly exhibited to a filing in the Texas proceedings before it was made public in these proceedings. However, it did not contain confidential information and was not sent to Mr Anzani. The claimant has apologised for the breach and has taken steps to ensure that it does not occur again by reiterating to IBM Corp's internal and external counsel the importance of the collateral use restriction in respect of any relevant material that is shared with them. As to the second instance relied on, the Keystone report was erroneously labelled as containing source code information but in fact did not do so and, therefore, was not confidential.
76. The parties in these proceedings and their legal advisers are well aware of the restrictions imposed by CPR 32.12 on any collateral use of disclosed documents. There is a confidentiality order in place in these proceedings, protecting the confidential information of all parties. The two specific instances relied on by Ms Huts, although regrettable, do not give rise to any justifiable concern about the role of Mr Anzani. There is no basis for this application and it is dismissed.

Conclusion

77. The parties are invited to draw up an agreed order reflecting the court's rulings set out above. All consequential and other matters, if not agreed, will be dealt with by the court at the further hearing that has been fixed on 16 August 2023.