

All England Law Reports/2009/Volume 2/Digicel (St Lucia) Ltd and others v Cable & Wireless plc and others  
- [2009] 2 All ER 1094

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## **Digicel (St Lucia) Ltd and others v Cable & Wireless plc and others**

[2008] EWHC 2522 (Ch)

**CHANCERY DIVISION**

**MORGAN J**

**16–18 SEPTEMBER, 23 OCTOBER 2008**

*Disclosure and inspection of documents – Duty of search – Electronic documents – Application for specific disclosure – Nature of court's review – Circumstances in which disclosure would be ordered – Claimants seeking specific disclosure of electronic documents from defendants on basis that defendants failing to carry out 'a reasonable search' – Whether disclosure should be ordered – Meaning of 'a reasonable search' – CPR 31.7, 31.12 – CPR PD 31, paras 2, 2A.*

The claimants were mobile phone companies operating in seven jurisdictions in the Caribbean. The relevant defendant was, in each of those jurisdictions, the incumbent telephone operator, operating telecommunication services, including both fixed line (or land line) and mobile networks, under licences, all with the exception of one part of the group of companies headed by the first defendant. The claimants brought proceedings alleging that in each jurisdiction the relevant defendant had deliberately delayed interconnection with its network by the relevant claimant, in breach of statutory duty pursuant to the relevant telecommunications legislation, that such breaches were pursuant to an overall conspiracy to injure by unlawful means by the first and second defendants in London, and that those defendants were joint tortfeasors with the relevant defendant in each jurisdiction. The claimants applied, pursuant to CPR 31.12, for an order for specific disclosure by the defendants of certain classes of electronic documents. They sought, inter alia, an order that the defendants restore relevant back-up tapes for the purpose of searching for the e-mail accounts of certain former employees, and, in relation to all of the electronic documents already identified by the defendants together with the further electronic documents that might be identified, an order that the defendants carry out a further search across those documents by reference to a set of additional keywords/phrases as identified by the claimants. Issues arose whether, following a comparison of the steps taken by the claimants with the steps taken by the defendants, the defendants had carried out a 'reasonable search' for electronic documents pursuant to CPR 31.7<sup>a</sup> and the legal approach to the scope of the court's review. The defendants submitted that the question of what was 'a reasonable search' had to be decided in the first instance by the solicitor in charge of the disclosure process, on the basis that r 31.12 and CPR PD 31, paras 2 and 2A<sup>b</sup>, referred to someone 'deciding' what was a reasonable search and that therefore when a court was asked to review the decision made by that relevant solicitor, it should reach a conclusion different from the solicitor's conclusion only where that decision was outside the band of permissible reasonable decisions; alternatively, the court should adopt the

- a CPR 31.7, so far as material, is set out at [29], below
- b CPR PD 31, paras 2, 2A, so far as material, are set out at [32], [33], below

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approach of an appellate court reviewing an exercise of discretion. The claimants contended that the court should have regard to all the circumstances, which included the factors identified in r 31.7, and in para 2A.4 of the CPR PD 31, and that the court should make up its own mind as to what was required by way of a reasonable search. CPR PD 31, para 2A.4 provided that the factors that might be relevant in deciding the reasonableness of a search for electronic documents included (but were not limited to) the following: (a) the number of documents involved; (b) the nature and complexity of the proceedings; and (c) the ease and expense of retrieval of any particular document. Paragraph 2A.5 provided that it might be reasonable to search electronic storage systems and in some circumstances to search for electronic documents by means of keyword searches and that those searches were to be agreed as far as possible between the parties.

**Held** – (1) Paragraph 5.4 of the CPR PD 31 made it clear that the procedure of applying to the court for an order for specific disclosure was available where the applicant alleged that the respondent was in breach of its obligation to give standard disclosure, whether by failing to make a sufficient search for documents or otherwise. Where there had been a failure to make a sufficient search, the court would 'usually' make such order as was necessary to ensure that the obligations on the respondent were properly complied with. However, an order for specific disclosure under CPR 31.12 was not confined to such a case. An order could be made even where the respondent had properly complied with its obligations to give standard disclosure but the applicant had satisfied the court that such disclosure was 'inadequate' or that the case was one where something more than standard disclosure was called for. The decision as to what was a reasonable search rested in the first instance with the solicitor in charge of the disclosure exercise. However, the practice direction made clear that some parts at least of the process ought to be discussed with the opposing solicitor with a view to achieving agreement so as to eliminate, or at any rate reduce, the risk of later dispute. If a solicitor, whose decision as to what was a reasonable search was later challenged on a specific disclosure application, the court might well be influenced, in the solicitor's favour, if it saw that the solicitor was very fully informed as to the issues arising in the case, and had made a fully considered decision applying all the factors in r 31.7 and para 2A.4 of the practice direction. However, even if the court could, in a proper case, be favourably influenced by the diligence and conscientiousness of an individual solicitor, the task of deciding what was required by a reasonable search was a task given to the court by the wording of the rules. It could be carried out by the court either in advance of the search being done or with hindsight, where a search had been carried out and its extent was challenged by the other party. There was no warrant in the language of the rules or practice direction for the suggestion that the standard of review should be a judicial review standard of irrationality or the standard adopted by an appellate court reviewing the exercise of a discretion. It would not be helpful for the court to decline to form, and act on, its own view but instead to indulge in a review of the decision-making process on the part of the solicitor. Such a review would deflect the court from determining what was a reasonable search, taking account of all the factors and with the benefit of hindsight, into an examination of the solicitor's mental processes at an earlier time. Further, the duty to give disclosure was a continuing duty. If the court's task was limited to a judicial review of a decision-making process, the court

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might have to consider several decisions taken at different stages, or even a suggested omission on the part of the solicitor to think again, in the light of new material becoming available. The first question for the court was what should have been done in the first place by way of a reasonable search. If the court reached the

conclusion that more should have been done in the first place then it would conclude that a party had failed to carry out a reasonable search. However, that did not necessarily mean that the court would then order the defaulting party to carry out the search which it initially should have carried out. The court's approach was governed by r 31.12 which contemplated the possibility that the court might not make such an order. However, it had to be possible for a court to reach a conclusion in a particular case that the required search which should have been carried out in the first instance would, if carried out at a second stage, be disproportionate as regards cost and the likelihood of revealing anything worthwhile. Moreover, the court had to judge what the defendants had done rather than assess what the claimants had done in relation to e-disclosure, and the mere fact that the claimants had done more than the defendants did not of itself lead to the conclusion that the defendants' efforts had been inadequate (see [26], [51]–[53], below); *Nichia Corp v Argos Ltd* [2007] IP & T 943 considered.

(2) Upon a proper consideration of the factors identified in CPR 31.7 and CPR PD 31, para 2A.4, the defendants had not carried out a reasonable search in all the circumstances of the instant case, in so far as they had omitted to search for, and in, the e-mail accounts of seven specified individuals, to the extent that those e-mail accounts might exist in the back-up tapes which had survived. However, it was inappropriate to make a simple order pursuant to r 31.12(2)(b) that the defendants restore the identified back-up tapes so far as was necessary to identify and search certain e-mail accounts. Such an order did not address the possibility that restoration might not be possible or that it might emerge that restoration was only possible at an utterly prohibitive level of cost; nor did it address the possibility that it might be possible to recover about 90% of an e-mail account with comparative ease, but the remaining 10% would involve difficulty and cost of a different order and magnitude. Accordingly, the court would order that the parties' solicitors meet to discuss how best the restoration of the back-up tapes could be done, following which the defendants should embark so far as reasonably practicable upon restoration of the back-up tapes for the purpose of identifying and enabling a search of relevant e-mail accounts, the defendants' solicitors report to the claimants' solicitors at relatively short intervals on the rate of progress. The parties' solicitors would be expected by the court to co-operate fully with each other, to maintain a dialogue and for there to be questions and answers passing between them as to whether anything further could be done or should be done, with liberty to apply granted to the defendants (see [67]–[70], below).

(3) It would often be appropriate for a party to search electronic documents using positive keywords and in the instant case the claimants had agreed that the defendants should be permitted to do so. It would usually be wrong in principle to adopt the 'leave no stone unturned' approach to disclosure, and it would be wrong to adopt that approach in the instant case. The court had to consider the proportionality of adding an additional keyword to the searches and for that purpose the court had to form a view as to the possible benefit to the claimants and the possible burden to the defendants. In the circumstances, the words 'interim agreement', 'interim rate', 'liberalize', 'liberalization' and 'delay', 'frustra\*', 'impede' and 'obstruct' ought to have been included in a

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reasonable search, and the court would order that, in relation to any e-mail accounts which were recovered as a result of the restoration of back-up tapes, those e-mail accounts were to be searched using those additional words as well as the ten words originally selected by the defendants. The defendants had not carried out an adequate search first time around. They had acted unilaterally and had not followed the advice given in CPR PD 31 as to co-operation with the other party to litigation in advance of the search being done. It was also appropriate for the court to order that the defendants carry out electronic searches of the e-mail accounts of sixteen further identified individuals, using those additional keywords (see [80], [92]–[95], below).

## Notes

For specific disclosure or inspection, see 11 *Halsbury's Laws* (4th edn) (2009 reissue) para 547.

### **Cases referred to in judgment**

*Byers v Illinois State Police* (2002) 53 Fed R Serv 3d 740, ND Ill.

*G v G* [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

*Nichia Corp v Argos Ltd* [2007] EWCA Civ 741, [2007] IP & T 943.

*Sony Music Entertainment (Australia) Ltd v University of Tasmania* [2003] FCA 532, 198 ALR 367.

*Sony Music Entertainment (Australia) Ltd v University of Tasmania* [2003] FCA 724.

*Sony Music Entertainment (Australia) Ltd v University of Tasmania* [2003] FCA 805.

*Sony Music Entertainment (Australia) Ltd v University of Tasmania* [2003] FCA 929.

*Zubulake v UBS Warburg* (2003) LLC, 217 FRD 309, SDNY.

### **Application**

The claimants, (1) Digicel (St Lucia) Ltd (a company registered under the laws of St Lucia); (2) Digicel (SVG) Ltd (a company registered under the laws of St Vincent and the Grenadines); (3) Digicel Grenada Ltd (a company registered under the laws of Grenada); (4) Digicel (Barbados) Ltd (a company registered under the laws of Barbados); (5) Digicel Cayman Ltd (a company registered under the laws of the Cayman Islands); (6) Digicel (Trinidad & Tobago) Ltd (a company registered under the laws of Trinidad and Tobago); (7) Digicel (Turks & Caicos) (a company registered under the laws of Turks and Caicos); (8) Digicel Ltd (a company registered under the laws of Bermuda), applied pursuant to CPR 31.12 for an order that the defendants, (1) Cable & Wireless plc; (2) Cable & Wireless (West Indies) Ltd; (3) Cable & Wireless Grenada Ltd (a company registered under the laws of Grenada); (4) Cable & Wireless (Barbados) Ltd (a company registered under the laws of Barbados); (5) Cable & Wireless (Cayman Islands) Ltd (a company registered under the laws of the Cayman Islands); (6) Telecommunications Service of Trinidad & Tobago Ltd (a company registered under the laws of Trinidad and Tobago), give specific disclosure of certain classes of documents, including electronic documents. The facts are set out in the judgment.

*Huw Davies QC* and *Stephen Houseman* (instructed by *Jones Day*) for the claimants.

*Edmund Nourse and Conall Patton* (instructed by *Slaughter & May*) for the defendants.

*Judgment was reserved.*  
*[2009] 2 All ER 1094 at 1098*

**23 October 2008. The following judgment was delivered.**

**MORGAN J.**

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**Introduction**

**[1]** This judgment concerns an application by the claimants pursuant to CPR 31.12 for an order that the defendants give specific disclosure of certain classes of documents. There are three parts to the claimants' application as originally drafted. The first two parts of the application concern electronic documents. In the first part of their application, the claimants seek an order that the defendants restore relevant back-up tapes for the purpose of searching for the e-mail accounts of certain former employees; this has been described as 'the application for restoration of the back-up tapes'. The second part of the claimants' application relates to all of the electronic documents already identified by the defendants together with the further electronic documents that may be identified in accordance with the first part of the claimants' application. In relation to all such electronic documents, the claimants seek an order that the defendants carry out a further search across those documents by reference to a set of additional keywords/phrases as identified by the claimants. This has been described as 'the application for additional search terms'. The third part of the claimants' application concerns documents containing financial and operational data falling within specified categories.

This application has been referred to as 'the application relating to quantum.'

**[2]** At the hearing of this application, I raised the question with the parties whether it was appropriate to order that there be a split trial in this action with a view to issues as to quantum being tried only after issues as to liability and causation had been tried. When the point was raised, the claimants supported the suggestion of a split trial and the defendants opposed that suggestion. In the event, in the course of the hearing, I announced my decision that I would order a split trial. The parties agreed that in that event, the third part of the application which related to documents dealing with matters of quantum no longer needed to be considered. Accordingly, the issues arising in relation to the third part of the application were not the subject of argument and are not further discussed in this judgment. I will, however, give my reasons for the decision I announced in the course of the hearing that it is appropriate in this case to order a split trial.

*[2009] 2 All ER 1094 at 1099*

### **The claim**

**[3]** It is necessary to attempt a brief summary of the nature of the claim the subject of this action. A brief summary will necessarily not do justice to the many issues of fact and of law which may arise at the trial of this action. The pleadings are voluminous. The amended particulars of claim run to more than 320 pages. The claimants' responses to requests for information run to more than 490 pages. The amended defence extends to more than 830 pages and that is supplemented by more than 50 pages which comprise the defendants' response to a request for further information.

**[4]** The claimants are mobile phone companies operating in seven jurisdictions in the Caribbean, as follows: (1) St Lucia, (2) St Vincent and the Grenadines (SVG), (3) Grenada, (4) Barbados, (5) The Cayman Islands, (6) Trinidad and Tobago (T&T), and (7) The Turks and Caicos Islands (TCI).

**[5]** The relevant defendant was, in each of the above jurisdictions, the incumbent telephone operator, operating telecommunication services, including both fixed line (or land line) and mobile networks, under exclusive licences. Apart from the sixth defendant, Telecommunication Services of Trinidad & Tobago Limited (TSTT), all of the defendants are part of the Cable & Wireless Group headed by the first defendant, Cable & Wireless plc. Cable & Wireless plc did not operate in any of the relevant jurisdictions and is based in London.

**[6]** The relevant period for the purposes of the action is the period from 2001/2002 to 2006. In that period, the telecommunications markets in each of the jurisdictions were liberalised. The relevant defendant companies, by agreement with the relevant governments, surrendered their exclusive licences to operate both fixed and mobile telecommunications networks in order to permit competition for the provision of such services. In each of the jurisdictions, the relevant claimant sought to set up a mobile phone business and applied for a licence from the relevant government and, in due course, the relevant claimant obtained a licence.

**[7]** In order to enable the relevant claimant to provide a mobile phone service, the relevant claimant needed to 'interconnect' with the network of the relevant defendant in each jurisdiction. 'Interconnection' is the process by which one telecommunications network is connected to another, enabling customers of each network to call customers of the other network. Interconnection has two relevant aspects. The first is contractual interconnection and the second is physical interconnection. Contractual interconnection is the process of negotiating the terms and conditions of interconnection, including the terms as to charges. Physical interconnection is the engineering process of joining two networks and is carried out on the basis of the terms agreed in an interconnection agreement. The claimants say that physical interconnection can occur before the formal agreement is entered into.

**[8]** Speaking broadly, the legislation in each of the jurisdictions required the relevant defendant as operator to grant interconnection to the relevant claimant or, at any rate, to grant interconnection once the relevant claimant had obtained a telecommunications licence. For example, in St Lucia, s 46 of the relevant Telecommunications Act (Telecommunications Act 2000) provided that:

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'A telecommunications provider who operates a public telecommunications network shall not refuse, obstruct, or in anyway impede another telecommunications provider from making an interconnection with his or her telecommunications network.'

The phrase 'telecommunications provider' is defined in s 4 of the 2000 Act as referring to a person who is licensed under the Act to operate a telecommunications network or to provide telecommunication services. The legislation varies somewhat in the different jurisdictions although it is almost identical in St Lucia, SVG, Grenada and the Cayman Islands.

**[9]** The basic allegation which the claimants make against the defendants is that in each jurisdiction, the relevant defendant deliberately delayed interconnection with its network by the relevant claimant. The claimants say that such delay was a breach of statutory duty and that the claimants are entitled to claim damages for breach of such statutory duty. The claimants build on this basic allegation by alleging that the various breaches of statutory duty were pursuant to an overall conspiracy directed by Cable & Wireless plc and Cable & Wireless (West Indies) Ltd (CWWI), the second defendant, in London. The claimants allege a conspiracy to injure by unlawful means and the unlawful means are said to be the breaches of statutory duty. Further, the claimants allege that Cable & Wireless plc and CWWI are joint tortfeasors with the relevant defendant in each jurisdiction.

**[10]** The claimants have pleaded that the matters they complain of have caused them considerable loss and damage. The amended particulars of claim refer to lost revenue, lost profits and lost market share in each of the relevant territories as a result of the delayed launch of the relevant claimant's mobile network in that territory. The claimants claim damages under various heads. First, they seek damages by way of compensation for the losses they have identified. Secondly, the claimants seek damages on what they call 'a restitutionary basis' which they explain as a basis which represents the financial gains made and/or the benefits obtained directly or indirectly by the defendants as a result of the defendant's unlawful conduct. This basis of claim is pursued in so far as the relevant gain or benefit on the part of the relevant defendant exceeds the relevant claimant's own loss recoverable under compensatory principles or in so far as the relevant claimant is unable to establish the precise measure of its recoverable loss under compensatory principles. The claim is that the relevant defendant should pay over the entirety of the relevant gain or benefit, rather than simply a proportion of it. In relation to this second claim for damages on a restitutionary basis, the claimants seek an order for accounts and inquiries of all relevant gains and benefits and the amended particulars of claim indicate that the claimants will seek directions for such accounts and inquiries at the trial. In addition to a claim to damages on a compensatory basis, alternatively a restitutionary basis, the claimants also seek exemplary damages on the basis that the defendants deliberately and cynically calculated that they would probably stand to gain from their unlawful activities to a greater extent than the claimants would suffer loss or be able to recover loss under compensatory principles, by reason of such wrongdoing.

**[11]** The defendants have pleaded at considerable length a range of defences to these claims. Liability is denied on the facts and as a matter of law. It is also denied that any wrongdoing on the part of the defendants (which is denied) caused the claimants any loss and it is denied that the claimants are entitled to

recover anything in this action.

*[2009] 2 All ER 1094 at 1101*

**[12]** The defendants applied for an order that there be a trial of identified preliminary issues. Amongst the suggested preliminary issues was a question as to whether the alleged breaches of statutory duty were actionable by way of a private law claim for damages. Another suggested issue was whether the alleged breaches of statutory duty and certain other alleged breaches constituted unlawful means for the purpose of the conspiracy claim. The defendants' application for an order that there be preliminary issues came before Lindsay J who gave judgment on 6 February 2008, dismissing the application. The defendants' application provoked a cross-application from the claimants seeking an order for a split trial. Lindsay J did not make an order for a split trial and later in this judgment, I will return to the circumstances in which the court did not make that order on 6 February 2008.

**[13]** At the hearing of these applications for specific disclosure, the defendants submitted to me that I should approach the application on the basis that the claimants' allegations were without any substantial or proper foundation. The defendants submitted that the amended particulars of claim were 'manifestly inadequate' as a matter of pleading and, in particular, the allegations of conspiracy were 'seriously deficient' as a matter of pleading. The defendants sought to persuade me that, not only were the pleadings inadequate, the claimants' prospects of success were poor. The defendants submitted that this should influence me in disposing of these applications for disclosure. In particular, it was submitted that I should regard the applications for disclosure as 'mere fishing', that is, an attempt by the claimants with no proper basis for their allegations and no ability to particularise their allegations to search for documents in case 'something might turn up.'

**[14]** The claimants responded to these submissions by exhibiting a number of documents which they had so far obtained from the defendants by way of disclosure and pointing to statements and comments in those documents as supporting the claimants' case that there was not only deliberate unlawful delay in the interconnection process but also that such delay was pursuant to a conspiracy between all or at least some of the defendants. The claimants also stressed that where there is a conspiracy, the conspirators generally go to some lengths to conceal their conspiracy and cover their tracks. In an action where a claimant alleges conspiracy, it may very well be, in the early stages of the action, that the claimant is not able to give detailed particulars of all the steps in the conspiracy but this produces the result that the process of disclosure is more important rather than less important in such an action.

**[15]** Although the defendants pressed their submissions as to the alleged weakness of the claim and the alleged lack of particulars, I did not, in the end, find the defendants' approach on these matters to be of much assistance in determining what I should do on these applications. Given the considerable length of the pleadings, there are obvious difficulties in a judge hearing an interlocutory application of the present kind in forming a fair assessment of the degree of particularity of the pleaded case. Further, even if a claim of conspiracy might lack particulars of the individual steps and the individual participants in the conspiracy, the fact of a conspiracy is often proved at a trial by inference from overt acts and, so far as I can tell in this case, the claimants have pleaded overt acts of delay and obstruction and can ask the court to infer that the similarity in the defendants' behaviour across several jurisdictions was not a matter of coincidence, but was a matter of conspiracy. Further, I accept

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the claimants' general submission that because the tendency of conspirators is to conceal rather than to reveal, proper disclosure is all the more important in a conspiracy claim.

**[16]** In so far as the defendants submit that I should form a view that the claimants' claim is weak and, further, that that point of view should influence my attitude to these applications, I have two comments to make. The first is that I would have to become much better acquainted with the voluminous pleadings and



the documents already made available on disclosure to form even a preliminary view as to the strength of the claim. Secondly, even if, on a preliminary view, I thought that the claimants' claim looked, at present, a weak claim I am far from clear that that should influence my attitude to these applications. There has been no application by the defendants to strike out all or part of the claim and, consequently, this claim, weak or strong, will have to go to trial. There will have to be standard disclosure before that trial. For the purposes of these applications for specific disclosure, it seems to me that I should apply the established rules as to disclosure to the specific circumstances of this case.

### The history of the disclosure given

**[17]** On 6 February 2008, Lindsay J ordered each party by 27 June 2008 to give standard disclosure by list. I am told that there was no discussion at the hearing on 6 February 2008 as to any particular points relating to such disclosure.

**[18]** There does not appear to have been any relevant communication between the solicitors for the parties shortly after 6 February 2008 as to what might be involved in this case by way of disclosure of electronic documents. However, on 23 May 2008, the defendants' solicitors wrote to the claimants' solicitors on the subject of disclosure and, in particular, electronic disclosure. The defendants' solicitors stated that they had carried out targeted searches for potentially relevant documents held by relevant individuals in relation to servers which contained e-mail accounts, to the extent that they remained currently in use in each jurisdiction. The defendants' solicitors had not sought to restore back-up tapes. The defendants' solicitors had also carried out targeted searches of electronic documents including e-mails and stand alone documents located on London based servers and computers. On 5 June 2008, the claimants' solicitors replied that they were surprised that the defendants' solicitors were not reviewing all documents in the core periods. They asked for details of the searches that had been carried out. They also noted the decision not to restore back-up tapes and reserved the claimants' position. On 20 June 2008, the defendants' solicitor wrote again but simply noted the claimants' solicitors' observations in stating that the adequacy of their disclosure could be assessed once exchange of lists of documents had taken place.

**[19]** The defendants' solicitor served a draft list of documents on 30 June 2008 and a final and signed list of documents on 17 July 2008. The second list referred to more documents but otherwise the two lists are the same. The defendants' solicitors stated in the lists that, as regards electronic documents, there was no central electronic archive or repository for the defendants' electronic documents and there was no single approach between the defendants as to the management and storage of electronic documents. The defendants had carried out electronic searches in the Caribbean jurisdictions by using ten keywords namely: *Digicel, interconnect, interconnection, licence, liberalise, liberalisation, strategy, competing, competitor, competition*. The electronic

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searches in London included all documents containing one or more keywords which included the keywords used in the Caribbean together with further keywords, namely: *Caribbean, CWWI, Jamaica and West Indies*. The defendants' list stated that no search had been made for documents stored on back-up tapes before the current proceedings began. The list stated that back-up tape restoration would have been disproportionate due to the significant time and costs involved.

**[20]** Following receipt of the defendants' draft list, the claimants' solicitors wrote on 3 July 2008 making a large number of points. They criticised the small number of keywords used to search the electronic documents and also criticised the failure to search back-up tapes. On 11 July 2008 the defendants' solicitors described in detail the disclosure exercise they had carried out. They sought to explain and justify what had been done in relation to keyword searches and, in relation to the restoration of back-up tapes, they contended that such work was disproportionate. The claimants' solicitors replied on 23 July 2008 continuing

to express concern about the keyword searches and the failure to restore back-up tapes and on 31 July 2008, the present application was launched.

**[21]** In the draft order attached to the application, the claimants sought an order that the defendants restore back-up tapes for the e-mail accounts of 17 named individuals, described as former employees. The claimants also sought an order that new electronic searches be carried out across all electronic documents collated by the defendant including those obtained as a result of the restoration of the back-up tapes and those electronic searches should include 34 keywords or phrases in addition to the keywords or phrases already used by the defendants.

**[22]** As a result of the exchange of evidence in this application, the claimants had narrowed somewhat the scope of the orders they sought prior to the hearing of these applications. The scope of the orders sought was narrowed further during the course of the hearing. The number of former employees has now been reduced from 17 to seven. The additional keywords or phrases have been reduced also. I will refer to the detail of what the claimants are now seeking in due course in this judgment.

**[23]** I was given a detailed account of the search carried out by the defendants in relation to electronic documents. In total some 1,140,000 documents were provided to the defendants' solicitors. These documents were on individual DVDs or CDs and hard drives. The figure of 1,140,000 documents included, but was not confined to, documents from three sources in particular. The first source was electronic documents including e-mails (from current servers, PCs and laptops as applicable but not from back-up tapes) of some persons described as relevant individuals for the relevant period which had been subjected to positive keyword searches by the relevant defendant in situ. The resulting documents, after applying the positive keyword searches, were then provided to the defendants' solicitors. The second source comprised electronic documents including e-mails (from current servers, PCs and laptops as applicable, but not from back-up tapes) of some relevant individuals for the relevant period which had been subjected to the same positive keyword searches as described above, together with additional searches for unspecified 'competitors' names' by the relevant defendant in situ. The documents which resulted from these searches were then provided to the defendants' solicitors. The third source comprised the entire e-mail accounts (from current servers, PCs and laptops as applicable, but not from back-up tapes) of some relevant

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individuals. In relation to the third source, the distinction being made is that the entire e-mail accounts were supplied to the solicitors and positive keyword searches were not carried out to reduce what was supplied to the solicitors in relation to this third source. The relevant individuals referred to above were some 85 named individuals as listed in App 1 to the defendants' disclosure statement. These 85 individuals were identified by the defendants as having some, but not necessarily extensive, involvement in the pleaded issues.

**[24]** In relation to the electronic documents provided to the defendants' solicitors, where those documents were not split into sub-folders, they were provided to LDM Global (LDM) and placed on a database. LDM is an information management and litigation support solutions provider specialising in large-scale electronic and paper based disclosure services and data recovery. Where the electronic documents provided to the defendants' solicitors were split into sub-folders, the titles of any electronic sub-folders were manually reviewed in native format (ie the hard drive or disk on which it had been provided) and irrelevant sub-folders were not provided to LDM. Documents not removed by this review of sub-folders were then passed to LDM. These processes reduced the number of potentially relevant electronic documents to about 625,000. All of these 625,000 documents were provided to LDM who placed them on a database. Creating this database involved more than simply transferring individual files to a database. The processes of creating the database were described to me in detail. It is sufficient to state that metadata was extracted to permit electronic de-duplication. The documents were then 'de-duplicated', that is, duplicates were removed. The documents were then converted into an image format so that they could be reviewed and redacted on screen. In parallel, an optical character reading file was created in relation to each document which meant one had an image

that was readable.

**[25]** These 625,000 documents on the database were then subject to the defendants' positive search terms which reduced the number of potentially relevant electronic documents to about 370,000. Documents containing positive keywords were then subjected to an automatic de-duplication process to remove copies of identical documents and this reduced the number of potentially relevant electronic documents to about 197,000. This group of documents was returned to the defendants' solicitors and placed on their database for manual review. Thus, 197,000 electronic documents were manually reviewed for relevance and this produced 5,212 documents which were disclosed. I understand these documents comprise some 28,983 pages and fill some 83 lever arch files. The exercise described above cost the defendants some £2m in fees together with disbursements of some £175,000. The process took some 6,700 man hours of lawyers' time.

**[26]** The focus in the present applications is on the steps taken by the defendants to give disclosure of electronic documents. The focus is therefore not on the steps taken by the claimants. As appears below, the claimants adopted a quite different approach to disclosure of electronic documents or 'e-disclosure'. The claimants asked me to compare what they did with the steps taken by the defendants in order to assess whether the defendants had carried out a reasonable search for electronic documents and whether the court should now require the defendants to take further steps. I will refer briefly in a moment to the steps taken by the claimants but before doing so I should comment that the steps taken by the claimants cannot of themselves identify the relevant yardstick with which to measure the defendants' performance. The commercial activities of the claimants in the relevant areas at the relevant time

*[2009] 2 All ER 1094 at 1105*

were not the same as the commercial activities of the defendants. The documents which the claimants have in relation to the relevant territories at the relevant time will deal with different subject matters from the documents which the defendants have for those territories at the relevant time. Further, I have to judge what the defendants did rather than assess what the claimants did in relation to e-disclosure. The claimants may, or may not, have gone further than was strictly required by way of a reasonable search in order to spread the net as wide as possible to advance their case. If the claimants had done very much less than the defendants had done in relation to e-disclosure, that might cause me to question an application by the claimants that the defendants should do more. However, the mere fact that the claimants have done more than the defendants does not of itself lead to the conclusion that the defendants' efforts were inadequate.

**[27]** Nonetheless, I will briefly refer to the steps taken by the claimants and the results produced. The first step taken by the claimants was to place on an electronic database, for the purpose of searching, all electronic documents (from current servers or existing back-up tapes) of the relevant persons on the claimants' side for the period from 1 April 2001 to 31 July 2006. The electronic documents on the database were subjected to automatic de-duplication to remove copies of identical documents. The remaining electronic documents were subjected to negative keyword searches for irrelevance. Documents not containing any negative keywords were manually reviewed by reference to their contents for relevance. Documents containing any negative keywords were manually reviewed by reference to their title. Any document clearly irrelevant by reference to its title was coded as irrelevant. Where the position on relevance was not clear, the contents of the document were manually reviewed for relevance. All documents coded as irrelevant were nevertheless subject to positive keyword searches. Documents containing any positive keywords were manually reviewed as to their contents for relevance. The above process was applied in relation to identified key periods. Documents outside the key periods were also subject to positive keyword searches. Documents containing any positive keywords were manually reviewed as to their contents for relevance. All relevant and non-privileged documents were again subjected to an automatic de-duplication process to remove copies of identical documents. All remaining documents were then disclosed by the claimants. The claimants' disclosure comprised some 29,000 documents in 860 lever arch files. The defendants' solicitors have analysed the 29,000 documents and submit that if one removes duplicates, documents relating to quantum (as to which the defendants have not given disclosure), documents as to the claimants' retail infrastructure and launch preparations and documents which are wholly irrelevant, one

arrives at a figure of some 18,400 documents which are potentially relevant to the pleaded issues.

### **The relevant rules and practice direction**

**[28]** The CPR provide for disclosure and inspection in Pt 31 and the Pt 31 practice direction. Rule 31.4 defines 'documents' to mean anything in which information of any description is recorded. By r 31.5(1) an order of the court to give disclosure is an order to give standard disclosure, unless the court directs otherwise. The order made in the present case was an order to give standard disclosure. Rule 31.6 identifies what documents are to be disclosed by way of standard disclosure. A party is required to disclose only: (a) the documents on

*[2009] 2 All ER 1094 at 1106*

which he relies; (b) documents which adversely affect his own case or adversely affect another party's case or support another party's case; and (c) documents required to be disclosed by a relevant practice direction.

**[29]** Rule 31.7 identifies the duty of search by a party required to give disclosure. Such a party is required to make 'a reasonable search' for the documents required to be disclosed by way of standard disclosure (apart from the documents on which the party itself relies). Rule 31.7 states:

#### **'Duty of search**

31.7 (1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within r 31.6(b) or (c).

(2) The factors relevant in deciding the reasonableness of a search include the following—(a) the number of documents involved; (b) the nature and complexity of the proceedings; (c) the ease and expense of retrieval of any particular document; and (d) the significance of any document which is likely to be located during the search.

(3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.'

By r 31.7(3), where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.

**[30]** By r 31.8, a party's duty to disclose documents is limited to documents which are or have been in his control. By r 31.10(5) a list of documents must include a disclosure statement and by r 31.10(6) a disclosure statement is defined as a statement setting out the extent of the search that has been made to locate documents required to be disclosed and certifying that the maker of the statement understands the duty to disclose documents and that to the best of his knowledge he has carried out that duty. By r 31.11, a duty of disclosure continues until the proceedings are concluded so that if documents to which that duty extends come to a party's notice at any time during the proceedings, he must immediately notify every other party.

**[31]** Rule 31.12 deals with specific disclosure or inspection. By r 31.12(1) the court is given a power to make an order for specific disclosure or specific inspection. By r 31.12(2) an order for specific disclosure is an

order that a party must do one or more of the following things: (a) disclose documents or classes of documents specified in the order; (b) carry out a search to the extent stated in the order; (c) disclose any documents located as a result of that search.

**[32]** Paragraph 2 of CPR PD 31 deals with the extent of the search which is required. The extent of the search depends on the circumstances. The practice direction adds the comment that the parties should bear in mind the overriding principle of proportionality referred to in CPR 1.1(2)(c).

**[33]** Paragraph 2A of the practice direction deals with electronic disclosure and is in these terms:

'ELECTRONIC DISCLOSURE

2A.1 Rule 31.4 contains a broad definition of a document. This extends to electronic documents, including e-mail and other electronic communications, word processed documents and databases. In addition to documents that are readily accessible from computer systems and other electronic devices and media, the definition covers those documents that

*[2009] 2 All ER 1094 at 1107*

are stored on servers and back-up systems and electronic documents that have been "deleted". It also extends to additional information stored and associated with electronic documents known as metadata.

2A.2 The parties should, prior to the first Case Management Conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents. This may involve the parties providing information about the categories of electronic documents within their control, the computer systems, electronic devices and media on which any relevant documents may be held, the storage systems maintained by the parties and their document retention policies. In the case of difficulty or disagreement, the matter should be referred to a judge for directions at the earliest practical date, if possible at the first Case Management Conference.

2A.3 The parties should co-operate at an early stage as to the format in which electronic copy documents are to be provided on inspection. In the case of difficulty or disagreement, the matter should be referred to a Judge for directions at the earliest practical date, if possible at the first Case Management Conference.

2A.4 The existence of electronic documents impacts upon the extent of the reasonable search required by r 31.7 for the purposes of standard disclosure. The factors that may be relevant in deciding the reasonableness of a search for electronic documents include (but are not limited to) the following:

- (a) The number of documents involved.
- (b) The nature and complexity of the proceedings.
- (c) The ease and expense of retrieval of any particular document. This includes:

- (i) The accessibility of electronic documents or data including e-mail communications on computer systems, servers, back-up systems and other electronic devices or media that may contain such documents taking into account alterations or developments in hardware or software systems used by the disclosing party and/or available to enable access to such documents.
  - (ii) The location of relevant electronic documents, data, computer systems, servers, back-up systems and other electronic devices or media that may contain such documents.
  - (iii) The likelihood of locating relevant data.
  - (iv) The cost of recovering any electronic documents.
  - (v) The cost of disclosing and providing inspection of any relevant electronic documents.
  - (vi) The likelihood that electronic documents will be materially altered in the course of recovery, disclosure or inspection.
- (d) The significance of any document which is likely to be located during the search.

2A.5 It may be reasonable to search some or all of the parties' electronic storage systems. In some circumstances, it may be reasonable to search for electronic documents by means of keyword searches (agreed as far as possible between the parties) even where a full review of each and every document would be unreasonable. There may be other forms of electronic search that may be appropriate in particular circumstances.'

*[2009] 2 All ER 1094 at 1108*

**[34]** It will be noted that para 2A.1 of the practice direction refers to the range of electronic documents including e-mail communications within the definition of 'documents'. The same paragraph also refers to back-up systems. Paragraph 2A.2 states that the parties should at an early stage discuss any issues that might arise regarding searches for electronic documents. Paragraph 2A.3 again refers to the need for the parties to co-operate as to the format in which electronic copy documents are to be provided for inspection. Paragraph 2A.4 supplements the factors listed in CPR 31.7(2) by identifying six specific matters in para 2A.4(c). Paragraph 2A.5 of the practice direction refers to the possibility of searching electronic documents by means of keyword searches and adds that these searches are to be agreed as far as possible between the parties.

**[35]** Paragraph 5.1 of the practice direction deals with specific disclosure. Paragraph 5.4 states:

'5.4 In deciding whether or not to make an order for specific disclosure the court will take into account all the circumstances of the case and, in particular, the overriding objective described in Pt 1. But if the court concludes that the party from whom specific disclosure is sought has failed adequately to comply with the obligations imposed by an order for disclosure (whether by failing to make a sufficient search for documents or otherwise) the court will usually make such order as is necessary to ensure that those obligations are properly complied with.'

**[36]** Paragraph 5.4 of the practice direction makes it clear that the procedure of applying to the court for an

order for specific disclosure is available where the applicant alleges that the respondent is in breach of its obligation to give standard disclosure, whether by failing to make a sufficient search for documents or otherwise. Where there is a failure to make a sufficient search, the court will 'usually' make such order as is necessary to ensure that the obligations on the respondent are properly complied with. However, an order for specific disclosure under CPR 31.12 is not confined to a case where the respondent is in breach of an obligation to give standard disclosure. The court can make an order for specific disclosure even where the respondent has properly complied with its obligations to give standard disclosure but the applicant satisfies the court that such disclosure is 'inadequate' or that the case is one where something more than standard disclosure is called for, for example, disclosure of documents which may lead to a train of inquiry with the consequence of producing documents which advance the applicant's case or damage the respondent's case: see para 5.5 of the practice direction.

### **The Cresswell Report**

[37] Paragraph 2A of CPR PD 31 was introduced following the recommendations of a working party chaired by Cresswell J on the subject of electronic disclosure. The report was not cited to me but nonetheless it provides very useful background reading when considering an application of the kind which is before me.

[38] The *Cresswell Report (Electronic Disclosure: A Report of a Working Party Chaired by the Honourable Mr Justice Cresswell, 6 October 2004*, [http://www.hmcourts-service.gov.uk/docs/electronic\\_disclosure1004.doc](http://www.hmcourts-service.gov.uk/docs/electronic_disclosure1004.doc)) makes a number of points which it is useful to record. At para 3.3, the report explains why the issues which arise in relation to disclosure of electronic documents are different from the issues which arise in relation to disclosure of paper documents. These reasons include the huge volume of documents which

[2009] 2 All ER 1094 at 1109

are created and stored electronically, the ease of duplication of electronic documents, the lack of order in the storage of electronic documents, the differing retention policies of the parties, the existence of metadata and the fact that electronic documents are more difficult to dispose of than paper documents.

[39] At para 2.15, the *Cresswell Report* discusses the duty to search for documents. It states that CPR Pt 31 gives a party 'a certain degree of latitude' as to the extent of the search because what may be reasonable in one case may be inadequate in another. The test of 'a reasonable search' in r 31.7 has the virtue of flexibility and takes account of the overriding objective: see para 2.18. At para 2.18(4), the report refers to back-up data and describes this as commonly having the disadvantage that the data is compressed and it can be difficult and costly to retrieve. At para 2.20 the report refers to the possibility of a search being carried out electronically using specified words or strings of words, rather than manually.

[40] The *Cresswell Report* refers to the experience and approach in the United States of America. It concludes that the case law in the United States illustrated some of the difficulties in practice but did not build up a coherent pattern of decisions. Later in the report (para 2.29) there is a discussion of the Sedona Principles first laid down at the Sedona Conference in 2004 (*The Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production—A Project of the Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production* (January 2004)). The report considered that these principles were not suitable for wholesale adoption in England and Wales. Nonetheless, it can be seen by comparing the Sedona Principles with the recommendations of the working party that the working party picked those parts of the Sedona Principles which were appropriate for adoption in this jurisdiction.

[41] It is worth quoting from two decisions of the United States courts. In *Byers v Illinois State Police* (2002)

53 Fed R Serv 3d 740 the court stated:

'Computer files, including e-mails, are discoverable ... However, the Court is not persuaded by the plaintiffs' attempt to equate traditional paper-based discovery with the discovery of e-mail files ... Chief among these differences is the sheer volume of electronic information. E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent by e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents. All of these e-mails must be scanned for both relevance and privilege. Also, unlike most paper-based discovery, archived e-mails typically lack a coherent filing system. Moreover, data archival systems commonly store information on magnetic tapes which have become obsolete. Thus, parties incur additional costs in translating the data from the tapes into useable form.'

**[42]** The question of the cost of e-disclosure and in particular the cost of restoring back-up disks was discussed in *Zubulake v UBS Warburg LLC* (2003) 217 FRD 309. The court said:

'The application of these various discovery rules is particularly complicated where electronic data is sought because otherwise discoverable evidence is often only available from expensive-to-restore

*[2009] 2 All ER 1094 at 1110*

back-up media. That being so, courts have devised creative solutions for balancing the broad scope of discovery prescribed in [the rules] with the cost-consciousness of [the relevant rule]. By and large, the solution has been to consider cost-shifting: forcing the requesting party, rather than the answering party, to bear the cost of discovery.'

**[43]** The *Cresswell Report* refers to the potential for dispute in relation to back-up data (see paras 3.13–3.14). At para 3.20, the report refers to the use of keyword searches and suggests that an early exchange of information between the parties would assist in reducing the scope for dispute. At para 3.24, the report refers to the question whether there should be cost shifting, as described above in the United States decision.

## Discussion

**[44]** It may worth emphasising the character of the application made by the claimants and what that application does *not* involve. The application is for specific disclosure not specific inspection. The claimants do not say that those back-up tapes which still exist and which are in the control of the defendants are themselves documents which should be available for inspection by the claimants. Instead, the claimants say that the back-up tapes are a source of possible documents, namely, the e-mail accounts of certain individuals so that the back-up tapes should be the subject of a reasonable search to produce the documents, namely, the relevant parts of the e-mail accounts.

**[45]** Further, it is to be noted that the application is for an order that the defendants restore back-up tapes to a specified extent and that the defendants search all electronic documents in their control by the use of positive keyword searches. As will be seen, the defendants say, amongst other things, that it will be extremely difficult to restore back-up tapes and that the cost of the various steps required by the claimants is disproportionate having regard to the high cost of the steps required and the likelihood that very few relevant documents will be found. In the course of the claimants' submissions, I inquired whether the claimants



wished to put any alternative case, for example, that instead of the court making an order that the defendants restore back-up tapes the court might make an order that the back-up tapes be delivered to the claimants to enable the claimants to carry out the necessary work. I suggested a further alternative which was that the tapes be delivered to an independent expert who would carry out or oversee the necessary work of restoration. I pointed out that either of these possibilities, if ordered, would have to be carefully controlled by undertakings as to confidentiality and perhaps other matters. Mr Davies QC, who appeared for the claimants, did not adopt these alternatives. He referred to the possibility that the defendants would object to those methods of proceeding. Mr Nourse who appeared for the defendant did not address these alternatives in his submissions. Accordingly, I proceed on the basis that the only application before me is an application by the claimants that the defendants restore the back-up tapes and carry out further keyword searches to electronic documents generally. Nonetheless, as the material discussed in the *Cresswell Report* shows, the possibility of the court giving the task to the applying party rather than the producing party is a possibility, together with associated cost shifting. Furthermore, in Australia, the courts appear to be creative in these respects: see the judgments given in *Sony Music Entertainment (Australia) Ltd v University of Tasmania* [2003] FCA 532, [2003] FCA 724, [2003] FCA 805 and [2003] FCA 929 (there are four judgments

[2009] 2 All ER 1094 at 1111

reported at these pages). Consequently, although I will not explore these questions further in this judgment, they may be worthy of attention in another case.

**[46]** It is also right to recall that the claimants' allegations in the present case include allegations of conspiracy. It is no doubt true that where there is a conspiracy the conspirators are careful not to leave written records of their conspiracy behind them. However, it is also well known that people say things in e-mails which they would not dream of putting into a letter or a minute or a formal note. Further, in litigation involving allegations of conspiracy or similar allegations, it may only take one revealing statement in a document, perhaps in an e-mail, to show clearly what people really thought or what people really were intending to achieve, a matter that might not have been revealed in many tens of thousands of other documents in the trial bundles. As against that, it must be remembered that what is generally required by an order for standard disclosure is 'a reasonable search' for relevant documents. Thus, the rules do not require that no stone should be left unturned. This may mean that a relevant document, even 'a smoking gun' is not found. This attitude is justified by considerations of proportionality. This point is well made by Jacob LJ in *Nichia Corp v Argos Ltd* [2007] EWCA Civ 741 at [50]–[52], [2007] IP & T 943 at [50]–[52].

**[47]** This case provides an opportunity for the court to emphasise something mentioned in CPR PD 31 which the parties in the present case disregarded. Paragraph 2A.2 of the practice direction states that the parties should at an early stage in the litigation discuss issues that may arise regarding searches for electronic documents. Paragraph 2A.5 of the practice direction states that where keyword searches are used they should be agreed as far as possible between the parties. Neither side paid attention to this advice. In this application the focus is upon the steps taken by the defendants. They did not discuss the issues that might arise regarding searches for electronic documents and they used keyword searches which they had not agreed in advance or attempted to agree in advance with the claimants. The result is that the unilateral decisions made by the defendants' solicitors are now under challenge and need to be scrutinised by the court. If the court takes the view that the defendants' solicitors' keyword searches were inadequate when they were first carried out and that a wider search should have been carried out, the defendants' solicitors' unilateral action has exposed the defendants to the risk that the court may require the exercise of searching to be done a second time, with the overall cost of two searches being significantly higher than the cost of a wider search carried out on the first occasion.

**[48]** There emerged at the hearing a difference in the legal approach which was urged upon me as to the scope of the court's review in this case. Mr Nourse on behalf of the defendants said that the question of what was 'a reasonable search' had to be decided in the first instance by the solicitor in charge of the disclosure process. Rule 31.7 and paras 2 and 2A of the practice direction refer to someone 'deciding' what is a reasonable search. That decision inevitably had to be made in the first instance by the solicitor. Mr Nourse

referred to para 6.33 in Matthews and Malek on *Disclosure* (3rd edn, 2007) where the authors state: 'What constitutes a reasonable search may be regarded as being to a certain extent subjective and thus the disclosing party is given a degree of latitude in making standard disclosure.' Mr Nourse also referred to *Nichia Corp v Argos Ltd* [2007] IP & T 943 at [77] where Rix LJ said:

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'Once attention is focused on the rationale of standard disclosure in the context of any relevant issue, it is possible to appreciate that it is those parties and their advisors who are in the best position to adopt the procedures which are both commensurate and proportionate.'

**[49]** Mr Nourse then submitted that when a court is asked to review the decision made by the relevant solicitor, it should adopt a standard of review which reflects the degree of latitude given to the solicitor and the subjective character of the decision and this should lead the court to reach a conclusion different from the solicitor's conclusion only in a case where the solicitor's decision was outside the band of permissible reasonable decisions, alternatively, the court should adopt the approach of an appellate court reviewing an exercise of discretion. Mr Nourse referred to the classic statement of the approach in such a case in *G v G* [1985] 2 All ER 225 at 229, [1985] 1 WLR 647 at 652 per Lord Fraser of Tullybelton, where he said:

'... the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible.'

**[50]** Mr Davies QC on behalf of the claimant submitted that there was no warrant for Mr Nourse's approach in the wording of the rules or the practice direction. He submitted that the court should have regard to all the circumstances which included the factors identified in r 31.7 and in para 2A.4 of the practice direction and the court should make up its own mind as to what was required by way of a reasonable search.

**[51]** It is right that the decision as to what is a reasonable search rests in the first instance with the solicitor in charge of the disclosure exercise. However, the practice direction makes clear that some parts at least of the process ought to be discussed with the opposing solicitor with a view to achieving agreement so as to eliminate, or at any rate reduce, the risk of later dispute. If a solicitor, whose decision as to what is a reasonable search is later challenged on a specific disclosure application, the court may well be influenced, in the solicitor's favour, if it sees that the solicitor was very fully informed as to the issues arising in the case, and had made a fully considered decision applying all the factors in r 31.7 and para 2A.4 of the practice direction. However, even if the court can, in a proper case, be favourably influenced by the diligence and conscientiousness of an individual solicitor, in my judgment, the task of deciding what is required by a reasonable search is a task given to the court by the wording of the rules. This task can be carried out by the court either in advance of the search being done or with hindsight, where a search has been carried out and its extent is challenged by the other party. I do not find any warrant in the language of the rules or practice direction for Mr Nourse's suggestion that the standard of review should be a judicial review standard of irrationality or the standard adopted by an appellate court reviewing the exercise of a discretion. The passage in *Disclosure* is an echo of para 2.15 of the *Cresswell Report*. It is clear that these comments only amount to a statement that what is reasonable depends upon a number of circumstances and factors which differ from case to case. Similarly, the comment of Rix LJ in *Nichia Corp v Argos Ltd* reflects the fact that the solicitor in the first instance has the job of

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deciding what the extent of the search should be. That comment does not limit the scope of review by the court in a case where the decision is challenged.

**[52]** Further, I do not think that it would be helpful for the court to decline to form, and act on, its own view but instead to indulge in a review of the decision-making process on the part of the solicitor. Such a review would deflect the court from determining what is a reasonable search, taking account of all the factors and with the benefit of hindsight, into an examination of the solicitor's mental processes at an earlier time. It should also be remembered that the duty to give disclosure is a continuing duty. A solicitor might reasonably think at an early stage in the process that a certain search will suffice. However, later events may require the solicitor to think the matter through again and form a different view and conduct a wider search. Accordingly, if the court's task was limited to a judicial review of a decision-making process, the court may have to consider several decisions taken at different stages, or even a suggested omission on the part of the solicitor to think again, in the light of new material becoming available.

**[53]** There is one other general matter to which I should refer at this stage. In making his application for an order that the defendant should carry out further keywords searches, Mr Davies QC on behalf of the claimants emphasised that the question was whether it was reasonable to carry out such an extended search in the first place rather than the question being whether it was reasonable for the court to order the defendants to carry out a second search, the defendants having already searched with fewer keywords. In my judgment, Mr Davies is correct that the first question for the court is what should have been done in the first place by way of a reasonable search. If the court reaches the conclusion that more should have been done in the first place then the court will conclude that a party has failed to carry out a reasonable search. That does not necessarily mean that the court will then order the defaulting party to carry out the search which it initially should have carried out. The court's approach is governed by r 31.12 which provides that the court 'may' make an order for specific disclosure in such a case. Thus, the rule contemplates the possibility that the court may not make such an order. The position is described in para 5.4 of CPR PD 31 which says that the court will 'usually' make an order for specific disclosure to ensure that the obligation to give disclosure is properly complied with. However, it must be possible for a court to reach a conclusion in a particular case that the required search which should have been carried out in the first instance would, if carried out at a second stage, be disproportionate as regards cost and the likelihood of revealing anything worthwhile.

### **Back-up tapes**

**[54]** The order sought in relation to back-up tapes is to the effect that the defendants should restore their back-up tapes located in St Lucia, SVG and Jamaica, so far as necessary in order to identify and conduct an appropriate electronic search (to which I refer later) of the e-mail accounts of seven individuals for a period which is specified in the case of each individual. The seven individuals are former employees of a defendant company. The e-mail accounts of those former employees were deleted from the relevant server following the ending of their employment. However, it may be the case that some or all of the individual's e-mail accounts exist on the back-up tapes. The seven individuals are Clive Batchelor, Pinkley Francis, Rudy Gurley, John Thompson, Fred Walcott, Errald Miller and Winston Butler. In these cases

*[2009] 2 All ER 1094 at 1114*

(with the exception of Rudy Gurley), the period of time begins in June 2002 and continues in each case until the date the employee ceased to be employed or, in the case of Mr Walcott, to March 2003. In the case of Rudy Gurley, the period begins in April 2001, seemingly on the basis that Mr Gurley was involved in the OECS (Organisation of Eastern Caribbean States) liberalisation agreement of April 2001.

**[55]** As a result of the evidence disclosed in these proceedings, it has emerged that back-up tapes exist in relation to St Lucia and SVG and there are also back-up tapes in relation to Jamaica which may contain the e-mail accounts of Mr Miller and Mr Butler. I am told that there are some 700 back-up tapes in relation to St Lucia and some 100 back-up tapes in relation to Jamaica, but I have not been told the figure for SVG.

**[56]** In the disclosure statement of the defendants, the defendants stated that back-up tape restoration would have been disproportionate due to the significant time and costs involved. The claimants originally understood that back-up tapes generally were available and the back-up tapes which had survived were not restricted to the numbers I have referred to above. The defendants only made it clear that the number of back-up tapes which have survived are as described above in the course of these proceedings. In a witness statement prepared for this hearing, Mr Cotton stated that at the outset of the disclosure exercise it was decided that back-up tapes would not be restored, to the extent that they existed. This statement does not suggest that the defendants' solicitors knew how many tapes did exist. Mr Cotton goes on to explain that at the outset it was expected that the voluminous data which did exist would catch large numbers of former employees' e-mails. He suggests that this has turned out to be the case and that the matter would have been reconsidered if the initial searches of the data which did exist yielded only limited amounts of disclosable documents.

**[57]** The claimants submit that an appropriate electronic search should be made of e-mails of employees whether current or former at a relevant time providing the employees are identified as sufficiently relevant individuals. The claimants submit that back-up tapes can be restored and therefore should be restored. The claimants also explain the role of the seven named individuals in the matters relevant to this action and say that they are potentially sufficiently relevant to justify a search of their e-mail accounts in restored back-up tapes.

**[58]** The defendants say that they should not be ordered to do anything in relation to these back-up tapes. They stress that the defendants have already spent a considerable amount of time at great cost in giving the disclosure that they have given. They say that the work of restoring the back-up tapes which exist would be very elaborate, beset with difficulty and with no certainty as to what could be recovered. They say the cost of that exercise would be prohibitive. They say that it is unlikely that anything very much would be found in addition to that which has already been found. They say that the practice which was prevalent at all times and in all territories was for e-mails to be sent to several recipients and not a single recipient. Accordingly, that e-mail communication can be found by searching the e-mail account of one recipient and it is not necessary to search for the same e-mail again and again and so it is not necessary to restore the e-mail account of a former employee to find an e-mail that has already been found. The defendants also discuss the significance or lack of significance of some of the individuals and have analysed the detailed allegations made in the pleadings for the purpose of submitting that further searches are unlikely to yield much if anything of any real relevance.

*[2009] 2 All ER 1094 at 1115*

**[59]** It is obviously important to know, to the extent that it can be known at this stage, how difficult and how costly it will be to restore the back-up tapes. The evidence which I have on that question is very far from being conclusive. On the one side I have the witness statement of Mr Cotter from the claimants' solicitors which gives hearsay evidence as to what he was told by a Mr Riordan who is described as Digicel's head of IT and who was involved in the restoration of back-up tapes on behalf of Digicel. Mr Riordan is reported as saying what he expects the position to be in relation to the defendant's back-up tapes and the overall tenor of the evidence is that Mr Riordan does not regard the restoration of back-up tapes and the location of an individual's e-mail account as being unduly difficult.

**[60]** Mr Riordan's reported remarks are the subject of comment by Mr Cotton of the defendants' solicitors. He suggests that Mr Riordan's speculation as to what the situation might be is not well founded as a matter of fact. Mr Cotton points out that this is not a case of a single party, as there were separate entities operating in the territories the subject of this dispute. Mr Cotton says there was no unified system of electronic storage within the defendant companies. He cross-refers to a witness statement of Mr Carte (to which I will later refer) to support the conclusion that any extraction of data from the back-up tapes would be a complex, time-consuming and costly process which might not even result in relevant e-mails being restored. He refers to back-up tapes in SVG where the IT personnel in SVG tried and failed to restore some back-up tapes in 2003.

**[61]** The defendants rely on a witness statement of Mr Carte of LDM who has been engaged by the defendants' solicitors in relation to these proceedings. Mr Carte describes some of the difficulties which might exist in relation to restoration of the back-up tape and the identification of partial or complete e-mail accounts for individuals. There is much in Mr Carte's witness statement that one would have wished to explore further before one could form a fully informed prediction of what might be involved. Mr Carte gives some general evidence about what is typically found with back-up tapes. He refers to back-up tapes normally comprising a set of tapes so that restoration requires one to have the complete set rather than a broken set. Mr Carte says that LDM was provided with a sample of 96 back-up tapes from the 700 back-up tapes for St Lucia. Based on this sample, he found that the back-up tapes were not organised or catalogued and would need to be further investigated. It is not even clear that complete sets exist. The defendants' IT personnel in St Lucia are unable to restore the back-up tapes themselves. He points out that the purpose of back-up tapes is to assist with disaster recovery so that restoration of a set of back-up tapes restores the system to the state it was in at the time when the back-up was made. He identifies a two-stage process which is involved in restoration. The first stage is grouping and cataloguing tapes and the second stage is their restoration. To group and catalogue 700 tapes would cost £100 per tape and would take six to eight days per 100 tapes or six to eight weeks for 700 tapes. The stage two restoration process will cost approximately £225 for each tape that is selected for restoration. The overall time and expense will depend on how many tapes are so selected.

**[62]** From LDM's review of the sample of 96 tapes, the tapes cover periods and not people. If a tape includes an e-mail account it will include the e-mail account up to a certain period but not the entire e-mail account from its inception, but only from some earlier date. Although Mr Carte has not catalogued the back-up tapes, he was told by the defendants' IT personnel

*[2009] 2 All ER 1094 at 1116*

in St Lucia that there are e-mail back-up tapes which relate to a single e-mail server. Mr Carte does not regard this as a guarantee but equally offers no evidence to undermine what he was told. If there is only one e-mail server, selection of the e-mails of a specific individual will be possible. It may be the case that a tape is corrupted.

**[63]** Mr Carte then demonstrates or seeks to demonstrate that the volume of documents on the back-up tapes is extremely large. However, he does not explain the relevance of this if one were to use electronic search terms to isolate the e-mail account of a specific individual. He also points to the fact that there will be significant duplication but does not explain why that is likely to cause any particular difficulty or expense.

**[64]** My own reaction to this somewhat inconclusive technical evidence about the difficulty and cost of restoring back-up tapes is that the evidence does not persuade me that one should give up any attempt to recover e-mail accounts from those tapes. Mr Carte's evidence amounts in some ways to the accumulation of a whole series of worst case scenarios. As to the fact that there are hundreds of back-up tapes and to restore every one of them would be a substantial exercise, it must be remembered that the order sought is that the defendants restore back-up tapes to the extent that they need to restore them to get e-mail accounts of seven individuals for defined periods. I will return to the question of what steps should be taken with a view to restoration of the back-up tapes after I have considered the other matters raised by the parties.

**[65]** The defendants have a valid point that if an e-mail is sent to, say, five people and one searches the e-mail account of one of those five, that search will turn up the relevant e-mail and it is not necessary to search for the same e-mail in the other four e-mail accounts. For this reason, if an e-mail account of one of the seven named individuals is restored, one will find in it e-mails which went to several persons some of which may already have been obtained earlier in the disclosure exercise. The converse is that if one restores a back-up tape and searches the e-mail account of a specified individual, one may find relevant e-mails which went to persons other than those whose e-mail accounts have survived and been searched. One will

also find e-mails from the specified individual to third parties outside the defendant companies. The defendants submit that there will be very few additional documents which turn up as a result of restoring the back-up tapes to search the e-mail accounts of the seven individuals. The defendants accept, as they must, that they cannot rule out the possibility that there will be additional material. In that case, they cannot rule out the possibility that the additional material might be of great significance. In my judgment, it is very difficult to predict the scale of the additional material which will be found on a search of seven further e-mail accounts. However, I am not able to rule out the need for a further search just because some part, perhaps even a large part, of what will emerge has already been disclosed.

**[66]** Apart from their submissions based on the chain of e-mails point, the defendants also submit that some of the seven individuals were remote from the matters complained of and I was specifically taken to the pleadings as regards the involvement, limited or otherwise, of certain individuals. The defendants appear to accept that they cannot make this point in relation to every one of the seven individuals so that if what I have discussed so far would lead to an order that back-up tapes should be restored to search for the e-mail accounts of some of the seven individuals, it is not clear what if any further work would be needed to extend the search from, say, three or four of the seven individuals to all of the seven individuals. In any case, having carefully

*[2009] 2 All ER 1094 at 1117*

considered the witness statements and the parties' submissions and the pleadings in relation to the seven individuals, I conclude that the claimants have done enough to justify a search of the back-up tapes and in particular of the e-mail accounts of the seven individuals.

**[67]** Having considered the points made by the defendant, I return to the question of reasonable search and the factors which are identified in r 31.7 and expanded in para 2A.4 of the practice direction. In my judgment, the defendants have not carried out a reasonable search in all the circumstances of this case in so far as they omitted to search for, and in, the e-mail accounts of the seven specified individuals, to the extent that those e-mail accounts may exist in the back-up tapes which have survived.

**[68]** I therefore now turn to consider whether it is appropriate to make an order under r 31.12(2)(b) requiring the defendants to carry out a search to the extent stated in the order. I conclude that more remains to be done. I will now attempt to identify the regime which should be followed in this respect.

**[69]** It seems to me to be inappropriate to make a simple order that the defendants restore the identified back-up tapes so far as necessary to identify and search certain e-mail accounts. An order in those terms does not address the possibility that restoration might not be possible or that it might emerge that restoration is only possible at an utterly prohibitive level of cost. The order does not address the possibility that it might be possible to recover, say, 90% of an e-mail account with comparative ease but the remaining 10% would involve difficulty and cost of a different order and magnitude. I remind myself that the practice direction stresses that the parties should discuss perceived problems and co-operate in resolving them. That seems to me to provide a key to the proper way forward.

### **Order in relation to back-up tapes**

**[70]** Accordingly, in relation to the restoration of back-up tapes for the purpose of identifying and enabling a search of the e-mail accounts of the seven individuals, I will direct, first, that the parties' solicitors meet more or less straight away to discuss how this can best be done. This meeting can be attended by LDM on behalf of the defendants and any expert available to the claimants. The discussions at that meeting should be minuted. Following such a meeting, the defendants should embark so far as reasonably practicable upon restoration of the back-up tapes for the purpose of identifying and enabling a search of relevant e-mail

accounts. I will not, at this stage, order that the defendants should permit the claimants to have an observer present at the attempts which are made but I will require that the defendants' solicitors report to the claimants' solicitors at relatively short intervals, say every ten days or two weeks, on the rate of progress. The parties' solicitors will be expected by the court to co-operate fully with each other, to maintain a dialogue and for there to be questions and answers passing between them as to whether anything further can be done or should be done. I will give the defendants express liberty to apply so that if the claimants continue to require that further steps are taken which the defendants say ought not to be taken then the defendants can seek appropriate direction from the court.

[71] As a matter of detail, I will change the commencement date of the relevant period for Rudy Gurley from April 2001 to June 2002 so that it is in line with all the other commencements of the period of search.

[2009] 2 All ER 1094 at 1118

### Keyword searches

[72] As described earlier in this judgment, the defendants used positive keyword searches at various stages in the process to reduce the numbers of electronic documents which were ultimately the subject of a manual review as to their contents. When describing the three sources which contributed to the total of 1,140,000 documents, I referred to one of the sources as being the entire e-mail accounts of some relevant individuals. In the course of the hearing, the claimants provided a list of 16 employees of the defendant and enquired which of those 16 fell into the category where the entire e-mail accounts were provided to the defendants' solicitors. It transpired that the entire e-mail accounts of three of those 16 individuals were provided to the defendants' solicitors. In the case of a fourth individual the entirety of the TCI and Cayman Island sub-folders of that individual's e-mail account were provided to the defendants' solicitors.

[73] The use of positive keyword searches by the defendant is likely to have led to the elimination of very many electronic documents. Before the compilation of the 1,140,000 documents, positive keyword searches were used and no figure has been given as to the number of electronic documents eliminated by those searches. At the later stage when positive keyword searches were used some 370,000 documents were selected from the earlier bulk of 625,000 documents. I have set out earlier in this judgment the keywords used by the defendants in the Caribbean territories and in the case of the London documents. For convenience, I will re-list the ten keywords used in relation to the Caribbean territories. They were: *Digicel, interconnect, interconnection, licence, liberalise, liberalisation, strategy, competing, competitor and competition*. The claimants point out that some of these ten words shared a common stem; this applies to *interconnect* and *interconnection*, to *liberalise* and *liberalisation* and to *competing, competitor and competition*. Thus the ten words comprise some six stem words.

[74] Although the steps taken on the claimants' side are not necessarily a pointer to what was a reasonable search on the part of the defendants, the claimants stress that their forms of electronic searching did not rely to the same extent on a small number of positive keywords and that the manual review of the contents of documents was much more extensive on their part.

[75] In the draft order attached to the claimants' application, the claimants identified an additional 34 keywords. The draft order sought an order that the defendants carry out keyword searches across all electronic documents in the control of the defendants, including any restored back-up tapes for identified employees. In the course of the hearing, the claimants' application in relation to keyword searches was refined. At the end of the hearing, the claimants supplied a draft order which identified 19 keywords (in addition to the defendants' original ten). Those 19 keywords are subject to qualification in that if a particular keyword is ordered by the court then other keywords need not be ordered and, further, the use of a keyword is sometimes limited to certain jurisdictions, rather than all jurisdictions. Further, the draft order for keyword searches does not now extend to all electronic documents in the control of the defendants. The keyword

searches which are sought relate to the e-mail accounts of 16 individuals identified in a schedule to the draft order together with the further e-mail accounts, if any, of the seven former employees which might become available following restoration of back-up tapes. Although the claimants were critical of the excessive reliance by the defendants on positive keyword searches, the claimants are now content that the defendants follow

[2009] 2 All ER 1094 at 1119

the same process as before, using positive keyword searches, provided that the number of keywords is increased in the way in which I have described.

**[76]** There is no doubt that it will often be appropriate for a party to search electronic documents using positive keywords. In any event, the claimants agree, on this present application, that the defendants should be permitted to search their electronic documents using positive keywords. The principal issue between the parties relates therefore to the selection of those keywords.

**[77]** The defendants stress that two or three words, without more, will go a very long way towards finding documents which then need to be examined manually for relevance. The two or three keywords are *Digicel*, *interconnect* and *interconnection*. I agree that those keywords are vital and will identify a very large part of the totality of the documents which need to be identified. However, the defendants do not say that those two or three keywords between them will suffice. The defendants say that in the documents they have disclosed the word *Digicel* appears in 75% of the cases. They also say that only 9.435% of the documents disclosed by the defendants do not contain *Digicel*, *interconnection* or *interconnect*. It will be remembered that these statistics are produced by positive keyword searches using only some six stem words. Further, the statistics themselves prove that one cannot confine oneself to *Digicel* and *interconnect* and *interconnection* although those words are the obvious, all-important starting point. Furthermore, as regards the use of *Digicel* to identify the claimants, the claimants point out that other means of identifying the claimant were probably used in e-mails. The claimants were, or might have been, called 'Digi'. The claimants were or might have been called 'our Irish friends'. Further, references to the claimants might have involved the use of the name of the individual employee of the claimants and no search has been carried out in respect of the names of individual employees.

**[78]** Nonetheless, it remains a fact that the use of any keyword in addition to *Digicel*, *interconnect* or *interconnection* is liable to reveal only a comparatively limited number of relevant documents.

**[79]** There is also a problem if one uses an ordinary English word as a keyword. Such a word will throw up many documents which have got nothing to do with the issues in this case. An example is the word *delay* which I discuss in more detail below. Another difficulty arises with the use of *Nortel* as a keyword. Nortel were involved in the interconnection process of the claimants to the defendants. But Nortel were also in communication with the defendants in relation to many installations which did not concern Digicel and are not relevant to the issues in this action. I discuss this word further below.

**[80]** If one were to adopt the 'leave no stone unturned' approach to disclosure then one would be more ready to add keywords to those originally used by the defendants. However, it will usually be wrong in principle to adopt that approach and, in my judgment, it would be wrong to adopt that approach in the circumstances of this case. One therefore has to consider the proportionality of adding an additional keyword. For that purpose one has to form some sort of view as to the possible benefit to the claimants of adding the keyword and the possible burden to the defendants of doing so. The burden to the defendants will principally consist of the burden of manually reviewing a large number of irrelevant documents.

**[81]** It is unfortunate that this dispute about the extent of the keyword search comes to court after the



defendants acted unilaterally in choosing keywords and conducting a search. In acting unilaterally, and in disregarding the clear advice in CPR PD 31, the defendants have exposed themselves to the risk that

[2009] 2 All ER 1094 at 1120

the court will conclude that their search was inadequate and that the court should order the defendants to carry out a further search. The defendants submit that because they have already carried out a search, taking a considerable time and involving a very large cost, the court should be most reluctant to order them to carry out a further search. It seems to me that I should approach the issues in relation to keywords in two stages. At the first stage, I will attempt to identify where to draw the line between inclusion and exclusion of the suggested additional keywords. If as a result of that process I conclude that the defendants should have, first time round, used additional keywords I will then have to consider whether to make an order for a further search under CPR 31.12. It is also possible for me to distinguish between the e-mail accounts of the 16 individuals who have already been the subject of keyword searches and any further e-mail accounts found following the restoration of back-up tapes, where there have not previously been any keyword searches.

**[82]** I will now deal with the individual keywords put forward by the claimants. The debate in relation to individual keywords varies from word to word. Further, the parties made thorough and detailed submissions as to the possible benefit and the possible disadvantage of including an additional keyword together with detailed references to the witness statements served for the purposes of this application and to the lengthy pleadings. I do not intend in this judgment to rehearse the detail of those arguments. I will apply the approach which I have attempted to identify earlier in this judgment and will weigh the rival arguments and express my conclusions which involve an assessment of the proportionality of including an additional keyword. On a subject such as proportionality, there is no precise and correct answer. Arguments as to proportionality involve choosing a cut-off point in a range of possibilities and there is no single right answer as to where the cut-off point should be.

**[83]** I start with the word *Nortel*. If one searches using this word, one will find many, many documents which have already been revealed by using the words *Digicel* and *interconnect* or *interconnection* and, perhaps, some further documents relevant to the action which have not already been revealed. However, the use of the word *Nortel* will bring to light, requiring manual review, a large number of documents that have got nothing to do with the issues in this action. My conclusion is that, on grounds of proportionality, the burden of a manual review of documents which include the word *Nortel* is far in excess of the possible benefit of finding in those documents a relevant document which has not already come to light. I hold that the word *Nortel* was not required to be included in a reasonable search by the defendants.

**[84]** I next deal with the words: *legacy*, *NGN*, *ODF* and *optical distribution frame*. The claimants say that any search for these words can be confined to documents relating to Trinidad and Tobago which were created between June 2005 and April 2006. My assessment is that the specific allegations in relation to these matters together with the keywords which have already been used by the defendants and the likelihood that there will be many documents using one or some of these words which have nothing to do with the issues in this action make it disproportionate for this words to be included in a keyword search. I hold that these words were not required to be included in a reasonable search by the defendants.

**[85]** I next turn to the words: *MUX*, *multiplexor*, *equipment*, *W/1 lists*. The claimants ask that these words be used in searches relating to all territories.

[2009] 2 All ER 1094 at 1121

They say that these words will not be necessary if the court orders the use of the words *delay*, *obstruct*, *impede* and *stall*. However, before dealing with *delay* etc, I find it convenient to deal with the words now being considered. In my judgment, on the basis of proportionality, and substantially for the reasons given above in relation to *legacy* and *NGN* etc, these words were not required to be included in a reasonable search by the defendants.

[86] I next consider the terms: *interim agreement* and *interim rate*. The defendants say that the use of the phrase 'interim interconnection agreement' would have been more normal than *interim agreement*. In my judgment, there is a real chance that the defendants would have used the shorter phrase *interim agreement* and this phrase would not be picked up by the use of the keyword *interconnection*. The defendants also say that the probability is that references to *interim agreements* and *interim rates* would only be relevant in a document which had either the word *Digicel* or *interconnect* or *interconnection* to provide the relevant context. In my judgment, on balance, the proportionate thing to do would have been to include the phrases *interim agreement* and *interim rate* in the kind of positive keyword search carried out by the defendants.

[87] I next turn to the word: *concession*. In the relevant territories apart from T&T, the relevant document was referred to as a *licence*. The defendants used the word *licence* in their keyword searches. In T&T, the equivalent document was referred to as a *concession*. The claimants accordingly say that a reasonable search would have used the word *concession* in relation to documents concerned with T&T which documents were created between June 2005 and April 2006. Prima facie, this is a strong argument. In response, the defendants say that they used the word *licence* as a keyword out of an abundance of caution and its use was probably unnecessary given the context provided by the keywords *Digicel* and *interconnection*. I would have been inclined to give this argument limited weight but the argument is considerably strengthened by the fact that of the 5,212 documents disclosed by the defendants, only 17 of the documents use the word *licence* without any other search term. The defendants also say that a search using the word *concession* would bring to light every document in which the term was used with its ordinary English meaning and such documents are unlikely to be relevant. So far as any e-mail accounts of the seven former employees which have come available as a result of restoration of back-up tapes, in view of the territories in which those employees were involved, I will not require the word *concession* to be added as a keyword. In the case of the e-mail accounts of the 16 employees where the claimants are asking for a further search to be carried out using further keywords, I have reached the conclusion that to carry out a search using the word *concession* is not required as it involves the possibility of only marginal benefit to the claimants. Accordingly, I do not make an order for this to be done under CPR 31.12.

[88] The claimants also asked for the words *liberalize* and *liberalization* to be used in further searches. Both these words have a 'z' rather than an 's'. The defendants did search their documents using the words *liberalise* and *liberalisation*. They now say that was out of an abundance of caution. In my judgment, in view of the fact that the relevant territories used the American spelling (at least some of the time) with a 'z' rather than a 's', a reasonable search in the first instance should have included these two words spelt with a 'z' as well as these two words spelt with a 's'.

[2009] 2 All ER 1094 at 1122

[89] I will next deal with the group of words which comprise: *delay*, *frustra*<sup>C</sup>, *impede*, *obstruct*, *stall*. It seems entirely possible that the word *delay* appears in e-mails relating to interconnection between Digicel and the defendants. Of course, if the word *Digicel* or *interconnect* is used in the same e-mail then that e-mail will have already been revealed by the earlier search. The problem comes when the use of *delay* as a keyword reveals a large number of documents which have nothing to do with the issues in this case. The position is made worse if one starts to add synonyms for the word *delay*. The claimants asked for the words *frustra*<sup>\*</sup>, *impede*, *obstruct* and *stall* to be used as keywords. As before, it is very likely that these somewhat general words will reveal some documents which are relevant, and which have not already been found, but the use of these words is likely to bring to light, requiring manual review, many documents that have nothing to do with the issues in this case. On the question of synonyms there are, no doubt, many more words which might be added to *delay* which have a somewhat similar meaning.

[90] The points made in the last paragraph would, in the absence of countervailing arguments, lead to the conclusion that the words *delay* etc should not be used as keywords. However, the claimants' allegation that the defendants deliberately delayed interconnection with Digicel is at the very heart of this claim. The

argument based on context is not a complete answer to the claimants' requirement that the word *delay* is used as a keyword. I am, of course, most concerned that if *delay* is used as a keyword, the search will throw up many documents which will have to be manually reviewed and which will turn out to be dealing with irrelevant matters. The position will be made worse if I add to the word *delay* synonyms such as *frustra\**, *impede*, *obstruct* or *stall*. In my judgment, on balance, a reasonable search in the first instance would have included the word *delay*. It is right that there are many synonyms for *delay* which might have been used in place of that word. After considerable hesitation, I conclude that a reasonable search in the first instance would have included the words: *delay*, *frustra\**, *impede*, *obstruct*. I would omit the word *stall*. I am not sufficiently satisfied that this word is all that likely a synonym for *delay*.

**[91]** The last word I need to refer to is *launch*. The claimants only seek to include the word *launch* if the court declined to order *delay*, *frustra\**, *obstruct*, *impede* and *stall*. As I conclude that the first four but not the fifth of these words would have been included in a reasonable search I also conclude that it would not be necessary in addition to include the word *launch*.

### Order in relation to keyword searches

**[92]** Having concluded that the words: *interim agreement*, *interim rate*, *liberalize*, *liberalization*, and *delay*, *frustra\**, *impede* and *obstruct* ought to have been included in a reasonable search, it follows that I will order, in relation to any e-mail accounts which are recovered as a result of the restoration of back-up tapes, those e-mail accounts are to be searched adopting the procedures already adopted by the defendant but using these additional words as well as the ten words originally selected by the defendants.

**[93]** I need separately to consider whether to make the further order sought by the claimants in relation to the e-mail accounts of the 16 individuals in Sch 1 to the draft order. My earlier conclusions mean that I have determined that the

<sup>c</sup> Editor's note: This asterisk is a wildcard symbol that represents any sequence of characters in a search.

[2009] 2 All ER 1094 at 1123

defendants did not carry out an adequate search first time round. Further, the defendants acted unilaterally in this respect and did not follow the advice given in CPR PD 31 as to co-operation with the other party to the litigation, in advance of the search being done.

**[94]** The defendants say it would be wholly disproportionate for the court now to require them to carry out a further search. They refer to the fact that the defendants, unlike the claimants, did not bring all the electronic documents together on one database. The result will be that if a further search is required the search will have to be done in situ in the various territories. It is also said that further searches are likely to throw up many further documents which (the defendants submit) will be largely irrelevant and it will be a burdensome task to review manually so many documents. I have attempted, so far as I think appropriate, to balance the prospect of benefit from the exercise against the burden of the exercise so that where the burden on my assessment outweighs the benefit I have not included the keywords asked for by the claimants.

**[95]** My overall conclusion is that is appropriate to order the defendants to carry out electronic searches of

the e-mail accounts of the 16 identified individuals, using the additional keywords which I have identified. As I understand it, it ought to be possible for the defendants to run a negative keyword search using as negative keywords the ten words they previously used so as to eliminate documents which have already been processed in the earlier round of searches.

[96] When judgment is handed down, I will hear counsel as to the time which should be allowed for the defendants to give the further disclosure which may be appropriate following further searches. I will also hear counsel as to any consequential adjustments which may be appropriate to the directions previously given. At the hearing, the defendants submitted that I should not order further disclosure because such an order would jeopardise the trial date. I will hear counsel as to whether the trial will need to be re-fixed. It is not obvious to me at present that that will be necessary. If it is necessary to re-fix the trial date as a result of my further order for disclosure, then the claimants do not complain because, of course, they seek an order for disclosure. As to the defendants, unfortunately it was their failure to carry out a reasonable search in the first instance which has led to the making of this further order.

### **Split trial**

[97] Earlier in this judgment I referred to the nature of the claims made by the claimants against the defendants. The claimants claim damages in three separate ways. They first claim compensatory damages as a result of delays inflicted upon the claimants by the defendants. They secondly claim what they call restitutionary damages as a result of the gains or benefits obtained or retained by the defendants as a result of the defendants delaying the claimants. Finally, the claimants claim exemplary damages. To date, there has not been an order splitting the trial of quantum issues from other issues. However, the parties have proceeded to date on the basis that the quantification of any compensatory damages will be investigated and if necessary determined at the trial but, as regards the claim to restitutionary damages, the trial will be limited to determining whether this could be or should be a case in which restitutionary damages are in principle recoverable. If the court were to hold that restitutionary damages ought in principle to be recoverable, there would then be a second stage at which there would be an account taken of the gains and benefits to the defendants.

*[2009] 2 All ER 1094 at 1124*

[98] I understand that the claimants have given disclosure in relation to their claim to compensatory damages. The defendants have not given any disclosure in relation to damages. In the present application, the claimants seek an order that the defendants give disclosure in relation to the claim to compensatory damages but the claimants accept that the defendants need not give disclosure in relation to the claim to restitutionary damages. If in due course a court were to hold that the claimants were in principle entitled to restitutionary damages then there would have to be an order for disclosure against the defendants at that point followed by an account of the gains and benefits on the part of the defendants. Accordingly, even without an order for a split trial of the kind I discuss below, the parties appear to have produced a situation whereby there is a split of some kind between the issues decided at the first trial and the issues which might be decided at a possible second trial.

[99] The claimants' claim to compensatory damages is far from straightforward. It will be the subject of extensive argument and, one imagines, considerable evidence. Even if the claimants were to win on liability, there is bound to be a major dispute on causation as to what delay was inflicted upon the claimants by the defendants, for which the defendants are liable to compensate the claimants. It is entirely possible that the claimants' claim to damages will be based on certain periods of delay but the judge after a trial might conclude that the claimants have established an entitlement to damages for some delay, but a different or shorter period of delay from that advanced by the claimants. The judge may end up concluding that there has to be a further investigation into quantum based upon his findings as to the extent of the delay for which the defendants are liable. Further, the fact that the first trial is to deal with the quantum of any compensatory damages has led to this present dispute as to what disclosure is due from the defendants on such points.

**[100]** On pre-reading the papers, it seemed to me that it was in the interests of the parties and of the court to split the trial so that the quantification of damages, both compensatory and restitutionary damages, should take place at stage two rather than at stage one. I decided that it was important to raise this point with the parties at the outset, as an order for a split trial would remove the need to decide the dispute about disclosure of documents relating to quantum. I identified the line of demarcation between the first trial and the second trial as one producing the result that the first trial would decide issues of liability, issues of causation, issues of principle as regards the claimants' entitlement to recover compensatory damages and/or restitutionary damages and/or exemplary damages but any quantification of compensatory damages and/or any restitutionary damages would follow at a second trial. At the second trial, both compensatory damages and any restitutionary damages would be dealt with and disclosure relating to both those questions (if both remained alive) would follow the first trial, in readiness for the second trial. If at the first trial the judge held that an award of exemplary damages was appropriate it would be a matter for the judge to decide whether any quantification of exemplary damages could be dealt with in a broad brush way at the first trial or whether it should take place at the second trial.

**[101]** Having identified at the beginning of the hearing my preliminary view as to the desirability of splitting the trial, the claimants indicated they supported such a split and the defendants opposed such a split. Mr Nourse on behalf of the defendants made detailed submissions as to why a split trial was not appropriate.

*[2009] 2 All ER 1094 at 1125*

**[102]** Mr Nourse's first point was that the existence of this litigation, even though the defendants say that the claim has no prospects of success, was having an adverse effect on the defendants' reputation and share price. The defendants therefore wished the trial to take place as soon as possible. Splitting the trial would not, of course, delay the trial on liability and if the defendants succeeded on liability, that would be the end of the matter. Of course if the defendants failed on liability, it would seem that any adverse effect from this litigation on the defendants' reputation would be justified. However, Mr Nourse identified the possibility of some possible halfway position whereby the claimants succeeded on liability to a modest extent in relation to one territory only and the delay in having modest compensatory damages assessed in respect of that liability would prolong the period when the defendants' reputation was adversely affected.

**[103]** I am not persuaded that Mr Nourse has identified a problem of any great seriousness or, at any rate, a problem which should persuade the court not to achieve the many benefits which would be achieved from splitting the trial.

**[104]** Mr Nourse's second point was that if the court split the trial of liability from the quantification of compensatory damages, one could end up with three trials. The suggested three trials were, first, a trial of liability, second a trial as to compensatory damages and third a trial as to restitutionary damages. In my judgment, the split I envisage will not produce that result. As part of this second point, discussing the mechanics of a split trial, Mr Nourse suggested there would be difficulties in separating the trial on causation from the quantification of compensatory damages. In my judgment, that ought not to be a serious difficulty and, at any rate, not one which persuades me to order a single trial of liability and quantum.

**[105]** Mr Nourse's third point was that it was now unfair for the court to order a split trial. He referred to the fact that earlier in this litigation, the defendants had applied for the trial of preliminary issues and the claimants had cross applied for an order for a split trial. Lindsay J having heard detailed argument refused to order preliminary issues and gave a judgment setting out his reasons for his conclusion. In the course of the hearing before Lindsay J, the claimants did not press their application for a split trial and the defendants did not seek an order for a split trial in the alternative to the trial of preliminary issues. Lindsay J was therefore faced with both parties apparently concurring in the view that, in the absence of preliminary issues, there should be no split trial. Lindsay J referred briefly in his judgment to the application for a split trial. He did not

order a split trial. He felt that 'at this stage of these pleadings' a trial that was not split was likely to represent the cheapest and earliest resolution of all the issues which fall to be decided at first instance. Mr Nourse did not go so far as to say that I was only free to order a split trial at this stage if I was satisfied that the present was a proper case in which to revoke an earlier interlocutory order under CPR 3.1(7). He submitted that I should hesitate long before ordering a split trial at this stage when the claimants have not pressed their application for a split trial at an earlier stage and neither party had come to court on this hearing positively seeking a split trial. I agree that I should hesitate before ordering a split trial in view of the previous view of the parties and in view of the fact that Lindsay J did not see the necessity for a split trial when he reviewed the matter at an earlier stage.

**[106]** Notwithstanding the hesitation to which I have referred, the matter has now been thoroughly argued before me and I am wholly persuaded that an

*[2009] 2 All ER 1094 at 1126*

order for a split trial is the right order to make. In so far as Mr Nourse says that an order for a split trial would be unfair to his clients because the claimants succeeded in seeing off the defendants' application for preliminary issues by not pressing the earlier application for a split trial, I find it difficult to judge how much, if any, influence the claimants' earlier behaviour had on the defendants' failure to persuade Lindsay J to order preliminary issues. In any event, it seems to me that an order for a split trial is clearly the right thing to do in the interests of the parties as well as the court. I will therefore make what seems to me to be the right order at the present time.

#### **Disclosure in relation to quantum**

**[107]** Having decided that there should be a split trial of the kind discussed above, the parties are agreed that the claimants' application for disclosure of documents in relation to quantum ought not to be pursued at this stage.

*Order accordingly.*

Neneh Munu    Barrister.