Companies.

[2021]JRC267

ROYAL COURT
(Samedi)

29 October 2021

Before : J. A. Clyde-Smith OBE., Esq., Commissioner, and Jurats Ronge and Averty

Between	**Mr Oleg Sheyko**	**Plaintiff-Respondent**
And	**Consolidated Minerals Limited**	**Defendant-Appellant**

Advocate J. C. Turnbull for the Appellant.

Advocate W. A. F. Redgrave for the Respondent.

JUDGMENT

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THE COMMISSIONER:

1. This is an appeal against a decision of the Master of 13th January 2021 to strike out the Answer and Counterclaim of Consolidated Minerals Limited ("CML"), the defendant in proceedings brought by Mr Oleg Sheyko ("Mr Sheyko") in which he claims damages for alleged repudiatory breaches by CML of his service agreement.

2. By way of background, Mr Sheyko had provided services to CML, a Jersey incorporated company, and its subsidiaries, known as the "Consmin group" for a number of years. The business of the Cosmin group was the exploration, mining, processing and sale of manganese products with mining assets in Australia and Ghana.

3. In May 2017, the Consmin Group was acquired by the TMI Group, which is headed by Ningxia Tianyuan Manganese Industry Group Co Ltd ("TMI"), a company incorporated in China. TMI is owned as to 99.62% by Mr Jia Tianjiang of China, referred to by the parties as "Mr Jia". CML became a wholly owned subsidiary of TMI held through a Cayman incorporated company China Tian Yuan Manganese Limited ("CTYML").

4. Mr Sheyko became Chief Executive Officer of CML with effect from 25th July 2017, when he moved to Jersey. The business of the TMI Group is substantial with a turnover of US$8.5 billion to which CML and the companies beneath it contributed some US$ 790 million. The TMI Group currently has 13,892 employees in China, 933 in Ghana, 384 in Australia, 9 in Jersey and 6 in Hong Kong. In addition to being one of the world's largest processors of electrolytic manganese metal, it has expanded into related industries including amongst others the production of chrome, ferro-chrome, nickel, cement, copper, nickel-plate and aluminium.

5. Mr Sheyko resigned on 4th June 2018. He brought proceedings against CML by way of Order of Justice on 27thJuly 2018, seeking damages for alleged repudiatory conduct on the part of CML. In its answer, CML denies any such repudiatory conduct, and counterclaims for damages for alleged breaches by Mr Sheyko of his service agreement.

6. Mr Sheyko's claim is essentially this. In 2017, CML was bought by TMI. Mr Sheyko was its CEO in Jersey, but in reality all the big decisions were taken by the new owners in China. Major decisions imposed on him were inexplicable and damaging to the company. His authority was undermined. In the end, enough was enough and he resigned in the summer of 2018. He says that CML is in repudiatory breach. The decisions he complains of are set out in paragraph 19 of the Order of Justice and include:

   (a) the decision to sell manganese ore at fixed prices to a Chinese counter party on favourable payment terms, and not to renegotiate the price when it was possible to get higher prices;

   (b) breaching transfer pricing regulations in Ghana, risking legal consequences;

   (c) the imposition of production targets that were unrealistic and would lead to stockpiles and lower prices; and

   (d) CML guaranteeing a $450m loan entered into by CTYML its parent with CITIC, a Chinese state bank.

   What these decisions have in common, says Mr Sheyko, is that they are decisions of the Chinese, particularly CML's chairman and ultimate owner, Mr Jia, not decisions of Mr Sheyko.

7. CML denies that it was run in a way that risked placing it into financial or legal difficulties. It says Mr Sheyko was incompetent and difficult, and resigned because he had not got rich from an anticipated IPO.

8. This appeal is concerned with discovery made by CML out of China, and it is helpful therefore to set out those members of the board of CML who were based in China during the material period:

   (i) Mr Jia, Chairman. He was also chairman of TMI and its 99.62% owner.

   (ii) Mr Huang He, director (from 5th June 2019) and alternate chairman to Mr Jia (from 29th May 2019) he was also vice-chairman of TMI.

(iii) Mr Jun Liu, director and special adviser to Mr Jia. He was also a director of TMI.

There were three directors of CML based in Hong Kong, namely Mr Ming "Jacky" Cheung, who was Deputy Chairman, Mr Roy Zhang and Mr Ching-Wo Ng. There was one director in Cyprus, Mr Andreas Marangos, and two in Jersey, namely Mr Sheyko and Mr David Slater, who was the chief financial officer and company secretary. Mr Jia was also a director of a large number of the companies underlying CML.

Relevant procedural history

9. Paragraph 3 of Practice Direction RC 17/07 provides that, as soon as a party is aware that litigation is contemplated, that party must immediately take all reasonable steps to ensure that potentially discoverable documents are preserved. In respect of the discovery of documents held in electronic form, RC 17/08 provides:

> ***"Preservation of documents***
>
> ***6. As soon as a party is aware that litigation is contemplated, that party must immediately take all reasonable steps to ensure that potentially discoverable Electronic Documents are preserved.***
>
> ***7. As soon as a party retains a legal representative that legal representative must inform its client of the need to preserve all potentially discoverable documents including Electronic Documents.***
>
> ***8. The party and its legal advisers in either case shall take all reasonable steps to ensure that no potentially discoverable document is destroyed pursuant to any document retention policy or otherwise in the ordinary course of business.***
>
> ***9. The party and its legal advisers may be required to provide information to the Court and the other parties to demonstrate it has fulfilled its obligation to preserve documents by reference to the questions set out in schedule 1 to this practice direction."***

10. Shortly after the commencement of proceedings, both Walkers, for CML and Baker & Partners, for Mr Sheyko, expressed concern about the preservation of documents. By its letter of 5th

September 2018, Baker & Partners asked that the past and present directors, members of the group executive committee, non-executive directors of CML and all members of staff, whether in the Jersey office or elsewhere and all outside contractors wherever situated with whom CML had dealt with in relation to the matters in issue should, as soon as reasonably practicable and in any event by 19th September 2018, submit any computers, laptops, tablets and mobile phones to be digitally imaged by an agreed independent third party, for those images to be preserved and reviewed for discovery purposes.

11. By its letter of 15th October 2018, Walkers rejected the suggestion that CML should image mobile devices used by its officers, staff and contractors. They said CML was aware of its disclosure obligations and would provide disclosure in accordance with the Court's procedure at the proper time.

12. The pleadings were closed on 7th December 2018, with the service of Mr Sheyko's rejoinder.

13. A directions hearing was listed for 6th February 2019 and, in advance of that, the Master wrote to the parties' legal advisers saying that from his review of the pleadings it appeared that there may well be significant amounts of electronic discovery in this case and reminding them of their obligations contained in Practice Direction RC 17/08.

14. On 5th June 2019 and largely by consent the Master ordered the parties to make discovery by the provision of a list of documents verified by affidavit on or before 4th October 2019. The relevant search terms and data custodians were listed in schedules to the order and a date range from 1st February 2017 to 27th July 2018 established. Provision was made, in particular, for the translation of documents into and from Chinese. 21 custodians were listed, with the Master resolving that Ms Elaine Hui (based in Hong Kong) should be added, as she acted as executive assistant to Mr Cheung, a significant figure in the dispute and she had an email address for CML. In his note the Master said he was likely to require expert evidence from experts retained on both sides to rule on any challenge by Mr Sheyko as to the adequacy of the discovery process carried out by CML. Of the custodians listed, five were based in China, namely Mr Jia, Mr He, Mr Liu, Ms Jenny Tsai (CML's representative in China) and Mr Zhensheng Zhang (an operations director based in China and Ghana).

15. Following a brief stay for mediation in August/September 2019, the parties' discovery deadline was extended to 28th October 2019.

16. On 14th October 2019, Walkers requested a three-month extension to CML's discovery deadline, with operatives at Consilio, CML's e-Discovery provider, explaining that in their view, the collection of data in this case is one of the most difficult they had encountered for a number of reasons, including the need to obtain documents and data from China.

17. CML applied formally for an extension, which was heard by the Master on 6th November 2019. In his affidavit of 1st November 2019, Advocate Niall MacDonald for CML raised, we understand for the first time, difficulties in transferring data out of China. He explained that documents could not leave China before:

    (i) it had been determined by CML's Chinese law firm, Ningren, the purpose for which they are to be transferred was legitimate;

    (ii) the documents had been reviewed by Ningren to determine whether transferring any of them out of the jurisdiction would breach any Chinese laws;

    (iii) Ningren had confirmed that they are satisfied that the risk of any breach was low; and

    (iv) the certification had been submitted to the relevant authorities in China to confirm that the documents may be transferred out of China, a process that could take one to two months or longer.

18. It was submitted by Advocate Turnbull on behalf of CML, in the skeleton argument for the hearing on the 6th November 2019, that:

> *"18. Clearly, without the evidence currently being reviewed by the Defendant's lawyers, and/or with only a partial view of the parties' dealings, the Court cannot justly resolve this claim. It would, by definition, be drawing unsafe conclusions, and that would not be fair to the Plaintiff or Defendant nor, indeed, to the Court tasked with doing so."*

19. The Master was not told that CML had not, in fact, collected any data in China at that time, in that it had only engaged Ningren to assist in the discovery process on 24th October 2019, just four days before the then deadline for the completion of its discovery and CML and TMI had only begun discussions with Consilio about discovery in China on 8th October 2019, just 20 days before the deadline. As we understand it, Consilio's contract with CML to assist with the

discovery process in China was not finalised until 27th November 2019, and data collection in China did not begin until 6th December 2019.

20. On 6th November 2019, the Master extended the deadline for CML to provide discovery in respect of all documents held in China to 28th January 2020, such order to be a final order, subject to a further hearing taking place on 15th January 2020 for half a day, to consider whether any further extension of time for the provision of documents located in China was required. The Master also ordered that CML may provide discovery in tranches provided any tranche is of a reasonable size, is in chronological order and is appropriately numbered with a final list identifying any alteration to any reference number for any document provided in tranches.

21. In setting out his reasons for ordering CML to pay Mr Sheyko's costs of the application on the standard basis, the Master said this at paragraphs 6 – 9:

> *"6 I also formed the view that the defendant had not proceeded with its discovery obligations at the pace required. While data was obtained for documents outside China in May 2019, the process of analysing this data to produce potentially relevant documents through the use of technology did not start until September 2019. Yet this was in respect of a dispute where proceedings were issued in July 2018. The defendant was also on notice of the importance of its discovery obligations from September 2018 by reference to correspondence from Baker & Partners dated 5 September 2018. Yet it was only a year later that the defendant really started to get to grips with what was required.*
>
> *7 The defendant also delayed unnecessarily in agreeing translators as directed on 4 June 2019. It should not have taken 3 weeks to respond to approve the proposed translator.*
>
> *8 The defendant further chose, when mediation was proposed to in July 2019, not to progress providing discovery, even though no stay had been agreed at that stage. While I did not read the defendant's skeleton argument as suggesting this was due to any agreement with the plaintiff, it was a decision taken by the defendant at its own risk because it knew of the deadline for discovery.*
>
> *9 Insofar as delay occurred due to the defendant becoming comfortable with what was required for a technology assisted review, the practices*

expected by this court have been set out in a Practice Direction in force since June 2017. Furthermore, my observations above about the defendant being on notice of its discovery obligations since September 2018 are pertinent. The defendant had plenty of time to understand and take the approach it is now taking to discovery. Had the defendant taken this approach earlier then there was a better chance of compliance with the orders I made."

22. At the hearing on 15th January 2020, CML applied for a further extension of time for the provision of documents located in China. As explained in the Master's subsequent judgment of 16th April 2020 (Sheyko v Consolidated Minerals Limited [2020] JRC 061) at paragraph 30, over 10,000 potentially relevant documents had been reviewed within China, with the result that CML was in a position to upload on to the e-Discovery platform 1,595 documents for review by Walkers, and to list any of those that were relevant. CML had also identified 8,777 potentially relevant documents, which were potentially disclosable, but which were not going to be listed or disclosed because they were subject to certain state secrecy laws of China referred to in an opinion from Ningren. Walkers were not able to state what those documents were because they had not seen them because of the effect of the relevant laws of China. The question of discovery of documents within China was further complicated by the need to protect the personal data of third parties within China.

23. The Master made the following orders:

"1.a. by 5:00 p.m. Friday, 24th January, 2020 the Defendant shall provide in English to the Plaintiff a list of all of the 1,595 documents that the Defendant considers to be disclosable referred to at paragraph 28 of the second affidavit of Niall Hugh MacDonald sworn on 6th January, 2020; the form of the list shall comply with Practice Direction RC17/08;

b. …

c. by 5:00 p.m. Friday, 7th February, 2020, the Defendant shall provide in English a list of each of the 8,777 documents which are potentially discoverable, but which the Defendant does not wish to disclose as far as they are relevant or make available for inspection, describing as far as possible each document individually and why inspection is being withheld by reference to Article 9 of the Law of the Peoples Republic of China ("PRC") on Guarding State Secrets or Article 219 of

the Criminal Law of the PRC or any other statute relied upon with as much specification as can be provided.

d. *thereafter the Defendant shall produce on a fortnightly basis starting with Friday, 21st February, 2020 further lists of documents setting out any further documents being disclosed which list shall be in the form required for a list provided pursuant to Practice Direction RC17/08 and where inspection shall be provided by downloading the documents from the 'Relativity' programme and transferring them to the Plaintiff's legal advisors by SFTP or hard drive at the same time as a list is provided;*

e. *on the same dates, the Defendant shall also provide lists of any further documents which are potentially relevant where inspection is withheld and why inspection is being withheld in the same format as required by paragraph 1.c. of this order;*

2. *discovery of all documents held within the PRC shall be completed by 5:00 p.m. Friday, 20th March, 2020;*

3. *by 5:00 p.m. Friday, 3rd April, 2020 the Defendant shall further provide an affidavit from a suitable qualified lawyer from Ningren law firm identified by name and setting out with as much detail as possible all of the legal explanations relied upon as to why any potentially relevant documents have not been disclosed and why they have been withheld for inspection;*

4. *any breaches of paragraphs 1 to 3 and 7 of this order will entitle the Plaintiff to apply for the Defendant's answer and counterclaim to be struck out immediately or for such other sanction as the Plaintiff sees fit;*

5. *the Defendant shall pay the costs of and occasioned by this hearing on an indemnity basis;*

6 *…*

7 *…*

8 *any material disclosed by any party in these proceedings may only be used for these proceedings;*

9 *subject to any other order the trial judge may make, any email addresses or any personal data referred to in any document disclosed in these proceedings shall not become public as a result of any such email address or other personal data being referred to in any witness statement or at trial."*

We will refer to these as "the Discovery Orders".

24. The Master explained the reasons for making the Discovery Orders at paragraphs 42 – 49 of his judgment of the 16th April 2020 as follows:

"Decision

42 I firstly ordered the defendant to provide a list of all discoverable documents from a review of the 1,595 documents that the defendant accepted could be released from the PRC by 24th January 2020. There was no reason not to provide discovery of any relevant documents that the defendant released for review by Walkers.

43 I further ordered that the defendant by Friday 7th February 2020 was to provide a list in English of the 8,777 documents which were potentially discoverable but which the defendant did not wish to disclose. The defendant as part of this order was required to describe as far as possible each document individually and why inspection was being withheld by reference to any applicable secrecy laws in PRC. This was so that the plaintiff could understand why documents were being withheld and take advice on the defendant's approach. At present, the opinion from Ningren was simply a statement of the relevant statutes without an analysis as to why and how those statutes applied to the present case or applied to categories of documents that would otherwise be disclosable. The plaintiff was entitled to know why documents were being withheld so that ultimately, if advised to do so, the court could be invited to rule on whether the defendant had made out any grounds relied upon to withhold documents.

44 *In reaching this conclusion, I wish to emphasise that no discourtesy is intended to the PRC or its laws. However, this is a case before the Royal Court of Jersey where both parties have accepted the Royal Court has jurisdiction. The Royal Court is therefore entitled to determine, having regard to appropriate opinions from Chinese lawyers about whether or not grounds exist which might override the normal discovery rules, which grounds the Royal Court should recognise. It is therefore important that what the defendant intends to produce or withhold and the reasons why are made clear.*

45 *I further ordered disclosure to take place on a fortnightly basis with further lists of documents being produced of the documents that were being disclosed and of lists of documents being produced which were potentially relevant but which were being withheld.*

46 *I further required the defendant by Friday, 3rd April, 2020 to provide a further affidavit from a suitably qualified lawyer within Ningren to set out with as much detail as possible all of the legal explanations relied upon as to why any potentially relevant documents have not been disclosed and why they had been withheld for inspection.*

47 *I required the opinion to come from a named lawyer because the opinion as a matter of Jersey procedural law is expert evidence which must come from an individual and must be in compliance with Practice Direction RC17/09 on expert evidence in particular the obligations of an expert contained in Schedule A.*

48 *I further ruled that discovery should be completed by Friday, 20th March 2020. This was because of how long the defendant had already taken to comply with discovery obligations. The defendant itself had stated it was aware of its discovery obligations in October 2018. Directions for discovery had also first been issued in June 2019. Nine months to produce relevant documents was therefore more than ample time for the present dispute. While the dispute is reasonably complicated, ultimately it is about whether the position of the plaintiff as CEO was undermined or not and therefore whether his resignation on the*

basis of various alleged repudiated breaches of contract was justified.

49 ***I further made it clear that, if the orders I issued were not complied with, then the defendant was at risk of having sanctions imposed including its answer struck out. While a strike out of an answer with judgment being entered is a serious step, if that is the only means by which the Royal Court can enforce compliance with its orders, then such a sanction may be an appropriate step for the Court to take. Whether such a sanction is ordered in this case is of course a matter for another day, but I made it clear to the defendant's advocates that they should be under no illusion that any non-compliance with orders I issued would be a very serious matter and could well attract significant sanction."***

25. The Master gave these reasons for ordering CML to pay Mr Sheyko's costs on the indemnity basis at paragraph 50:

"50 ***I also ordered the defendant to pay the costs of the hearing on the indemnity basis and ordered a payment on account of costs of £15,000 within 14 days. This was for the following reasons which justified indemnity costs:-***

(i) At the previous hearing, the defendant had agreed to use its best endeavours to make disclosure. I was not satisfied that this obligation had been met because of the length of time it took to retain Consilio and because of delays in information being provided by the defendant or its parent company to Consilio for review. At times the defendant or its parent company has not responded with the urgency required by a best endeavours obligation.

(ii) the opinions provided from Ningren did not explain in sufficient detail why potentially discoverable documents were being withheld. Nor was there any explanation of what processes were being followed to determine whether any state secrecy provisions applied to particular documents. This did not help in formulating a timetable.

(iii) The defendant had also not explained why any law of the PRC concerning protecting commercial secrets applied to the present case, which was primarily about the internal decision making processes of the defendant, and whether the position of the plaintiff had been undermined. The position of third parties who might have commercial secrets which required protection was not clear at present.

(iv) At the last hearing I had expected discovery documents outside the PRC to take place in tranches, which was the impression created by paragraph 78 of the first affidavit of Advocate MacDonald. This had not occurred.

(v) I was also not satisfied by the explanation that discovery in tranches was permissive in nature only; this was not the impression I was left with after the last hearing at all.

(vi) I was also not persuaded by the explanation that no further discovery in tranches was possible because of a review of privilege for over 100,000 documents. The process of using an experienced eDiscovery provider such as Consilio involves identifying which documents are or may be privileged. While I accept that questions of privilege can and will arise during a review process, this does not mean that every document that is disclosable will have to be re-reviewed. There is technology available for a party to identify which documents may be privileged without having to hold up the entire disclosure process.

(vii) The defendant's unsatisfactory approach had led to further delay."

26. Finally, the Master explained at paragraph 51 why he had included orders in respect of confidentiality:

"51 Finally, because of possible concerns about confidentiality I made express orders that any documents disclosed could only be used for these proceedings and that any material used in any witness statements or referred to at trial would not become public simply by being referred to at any trial or as a result of

> ***being referred to in any witness statement. This is subject to any different order the trial judge may make once the trial court had the benefit of hearing all the evidence. I also made it clear that any breaches of these orders could be referred to the Royal Court as a contempt of court."***

This was clearly addressed at concerns within China over the issue of privacy.

27. These deadlines were subsequently extended following the Covid-19 outbreak, but the substance of the Discovery Orders remained identical.

Numbers of documents disclosed

28. Data had been sourced by Consilio from email servers and desktops in China in three tranches. Only one iPhone had been sourced, namely that of Ms Tsai.

29. Out of the first tranche made on 24th January 2020 from email servers, 8,777 had been withheld, reduced to 1,427 because the remainder had been outside the date range. Of those, 665 had been disclosed.

30. Out of the second tranche made on 21st February 2020 from desktops, 5,767 documents had been collected with the bulk found to be irrelevant. 40 were withheld and 49 disclosed.

31. Out of the third tranche made on 1st May 2020, out of emails and Ms Tsai's iPhone, 1,998 had been collected, 1,105 had been withheld and 76 disclosed.

The Master's judgment of 13thJanuary 2021

32. On 13th January 2021, the Master struck out CML's answer (save as it related to quantum) and its counterclaim. CML was debarred from defending Mr Sheyko's claim on the issue of liability and from prosecuting its counterclaim. Judgment on liability was awarded to Mr Sheyko, with the issue of quantum proceeding to trial. The Master's reasons for these orders are set out in his judgment of 13th January 2021 (Sheyko v Consolidated Minerals Limited [2021] JRC 006) ("the Master's judgment"). In it, he sets out in detail the submissions of the parties and we would summarise his decision in this way:

(i) He identified two issues for consideration, firstly whether breaches of the discovery orders he had made had occurred and if so, whether such breaches prevented a fair trial or whether other orders or sanctions were appropriate to address the breaches that had occurred.

(ii) Having heard the criticisms made by Mr Sheyko as to the discovery of documents held outside China, he focused on the discovery of documents held by individuals within China.

(iii) Given the evidence as to the use of WeChat in China, (to which we will refer later), and the WeChat threads (totalling 37,525) which had come from sources outside China, and given that the most senior people in particular, the chairman and alternate chairman of CML, Mr Jia and Mr He were based in China, this allowed him to conclude that there were WeChat threads being used in China, given the way the business world operates, the extensive use of technology and the power of mobile phones and other portable devices. He said he would be astonished if such devices were not being used to communicate amongst the upper echelons of CML and its parent company in China, and if WeChat was not one of the methods of communication used.

(iv) According to the report of Consilio at paragraph 61, it was left to individuals within China to decide whether to hand over mobile phones or not. This meant that no personal devices held by individuals within China relevant to the issues had been searched, apart from that of Ms Tsai. Yet communications between other board members about Mr Sheyko or Mr Sheyko's conduct of CML's business were obviously pertinent to Mr Sheyko's claims. The bulk of the data sourced from Ms Tsai's phone was withheld as a state secret.

(v) In addition to not knowing what personal devices were used, no evidence was put forward as to whether such devices were owned personally or whether they were paid for by CML or some other entity within the TMI Group. Whilst an employer should not be entitled to obtain copies of any personal communications where a device had been used for a mixture of work related and personal matters, CML just accepted the refusal of directors and employees to hand over what were said to be personal devices without any challenge.

(vi) As a consequence, only work emails had been sourced. Furthermore, no personal email accounts were searched on grounds of privacy. The Master gave examples of two email addresses that had not been searched. The Master was therefore not satisfied that discovery of emails or WeChat communications on personal phones or held in personal email accounts of individuals within China had occurred. The devices of key individuals had

not been handed over for any review. The obligation to provide discovery had therefore been breached.

(vii) TMI and CTYML had not given permission for CML to access, disclose or inspect potentially relevant documents said to belong to them, justified on the basis that there was a strict demarcation line operating between CML and its immediate and ultimate parent. This led CML's approach to discovery to depend on which hat a particular individual was wearing when an email was sent, even if that email was in the possession of CML. If that individual was discharging a function for an entity other than CML or wore multiple hats, whether a document was produced depended on CML's conclusion as to which function the individual was considered to be performing. The Master had these concerns with this approach:

(a) Documents in the possession of CML should ordinarily be disclosed whatever the hat being worn.

(b) The approach taken is not equivalent to the case of documents found on an employer's systems received by employees whilst on secondment to a stranger. CML's approach is about documents in its own possession.

(c) CML's approach is inconsistent with Mr Jia's position as the ultimate owner of CML as well as being its chair and director, as illustrated by an email sent from him on the 2nd March 2018 (to which we refer later). In other words, the strict approach now being applied to refuse disclosure of emails did not apply while the relationship of the parties was subsisting. No strict separation of corporate personalities was being applied. CML's approach did not sit comfortably with its case as pleaded in its answer that Mr Sheyko could be subject to oversight from shareholders, and the email from Mr Jia indicating the extent of that oversight. Having taken that position, CML's current approach now appeared to want to have it both ways.

(viii) CML argued that board members outside Jersey were obliged to act in the best interests of CML and did so, yet those same board members in China will not provide access to emails they have sent about CML and/or Mr Sheyko and they object to emails held by CML being produced because they allege that a board member was wearing a different hat or performing a different role. In addition, if they were acting in the best interests of CML as they assert, then there should be no difficulty with making discovery of any relevant communication.

(ix) The claim to withhold documents on the basis that they belonged to TMI or to CTYML was not therefore made out, and so paragraphs 1(d) and 2 of the Discovery Orders had been breached.

(x) Documents belonging to third parties had also been withheld on the basis of a claim to privilege, but it was not clear whether the claim for privilege covered communications between CML, CTYML or TMI. The Master referred to this extract from Chief Master Marsh's judgment in the case of Smith v SWM [2017] JRC 026:

> ***"15 During the course of the hearing of Astex's application the form in which the claim for privilege was made by AZ was described as 'conventional'. I accept that the claim for legal advice privilege is described adequately. However, it may have been conventional at one time to state that other documents are 'by their nature privileged', such a statement has no place in modern litigation, let alone litigation of very real complexity. It is clearly unhelpful, without describing the documents said to be privileged, to say that 'their nature' explains why they are privileged because the recipient of the list of documents has no way of knowing which documents, or classes of documents, are being referred to."***

(xi) Whilst a claim for privilege in an affidavit of discovery can be conclusive, the affidavit firstly had to state the claim to privilege properly and CML's description did not permit the Master to identify what documents exist between CML and its parent or ultimate parent, which may be the subject of a claim for privilege. For such categories of documents to be regarded as privileged would require a much clearer explanation than that given, and this was a breach of paragraph 2 of the Discovery Orders.

(xii) Ningren had conducted an initial legal review of email messages and had tagged or removed emails that fell within the categories of state secrets, trade secrets and personal data involving persons that were not related to the proceedings. It was for this reason that paragraph 3 of the Discovery Orders had required as much detail as possible of the legal explanations relied upon as to why potentially relevant documents had not been disclosed and why they had been withheld from inspection.

(xiii) The ultimate difficulty both the Master and Mr Sheyko faced is that there is no explanation given as to what was a state secret beyond quoting the statute that allowed documents to

be characterized as state secrets, and then applying the label potential state secrets, a label that was itself problematic. This was not providing as much detail as possible.

(xiv) Even if the potential state secret column were ignored, it was not possible to understand why breaches of the stated articles of the Cybersecurity Law had been breached, or why breaches of any of these articles was a state secret. There was no explanation as to the general policies for data protection operated by CML or its parents, what consents may have been obtained or might be contained in practice and procedures operated by CML or within the TMI Group.

(xv) There was no explanation as to why WeChat messages between members of the TMI Group above CML represented personal information, nor was it explained why it might be said that illegal methods had been used. There was simply no analysis in the Ningren affidavits drilling down into the detail of the relevant provisions or the practices of CML. Yet the order required as much detail as possible. Nor does the schedule attached to Ningren's affidavits identify the documents with as much detail as possible or explain why the normal process for describing a document cannot be followed, even if that document is being withheld. What would appear to be relevant to whether a document can be withheld is the content of the document, not its description. Again, this was in breach of what was required by the Discovery Orders.

(xvi) The affidavits filed did not address or explain the impact of conversations Ningren had had with the various Chinese government departments. In a note dated 31st March 2020, the Ningxia Department of State Security said it did not regard Manganese technology as a state secret. The note deposed a series of questions, but there was no conclusion as to the *"careful consideration"* that the questions posed would require. Lack of any analysis in the affidavits was also troubling to the Master, because of the statement that the Ningxia Department for Industry and Technology *"needs to help the company win the case and this be done in accordance with the law."* That statement was not explained and was troubling in the light of the other lack of analysis to which the Master had referred.

(xvii) There had also been an inconsistency in the approach of Ningren because on the one hand Ningren were advising that the Chinese authorities needed to agree before documents could be released and yet it had chosen to release documents itself. That inconsistency was not addressed in the affidavits.

(xviii) In terms of risk of prosecution, the starting point was paragraph 3 of the Discovery Orders, which required Ningren to set out with as much detail as possible *"all the legal explanations*

relied upon" as to why the relevant documents had not been disclosed. Both parties accepted that the Court retained jurisdiction as the Court dealing with procedural matters, which includes discovery, whether to make such an order requiring disclosure in the particular circumstances, following the principles set out in the English Court of Appeal decision in Bank Mellat v Her Majesty's Treasurer [2019] EWCA Civ 449 which we refer to later.

(xix) The evidence of Ningren did not address the actual risk of prosecution. It simply set out the maximum penalties while recognising that sanctions may be administrative, civil or criminal in nature. Just as there was no analysis of why particular documents were being withheld, there was no analysis of why the withholding of documents or categories of documents would give rise to an actual risk of prosecution. The use of Manganese technology did not appear to be a state secret. What the ultimate policy of the Chinese authorities might be was an unknown factor. To the extent that the concerns of the authorities in China were issues of confidentiality the Master had made express orders to address such concerns. Where disclosure is sought of material that would enable a review of what key individuals were saying to each other, again safeguards could have been built in to protect purely personal information, such as ID numbers, personal phone numbers or addresses, and therefore a risk of prosecution. However, no such safeguards had been considered by Ningren or proposed by CML.

(xx) The Master pointed out that as per paragraph 63(vi) of the Bank Mellat v Her Majesty's Treasurer decision, comity cuts both ways. As it was put in that case, ***"considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this court."*** Again, there was no such analysis by Ningren in their affidavits addressing this issue.

(xxi) Mr Sheyko contended that documents in China were likely to be extremely significant in relation to this dispute, which has at its heart the relationship between him, as Chief Executive Officer, and the board of CML and above all, the relationship between him and Mr Jia, the chairman of CML and its ultimate beneficial owner.

(xxii) The Master agreed with Mr Sheyko that there would be unfairness in the discovery process if documents were not provided on the basis of a risk of prosecution, because there had only been discovery by Mr Sheyko, and there had not been discovery of relevant documents from key individuals based in China. This is not a case where one set of

lawyers had seen documents, but others had not; rather, the complaint is about what had not been produced at all.

(xxiii) The lack of reasoning had led the Master to conclude that CML had not persuaded him that a risk of prosecution was a basis for withholding the inspection of documents or, in this case, discovery of them.

33. For all these reasons, the Master found CML to be in breach of the Discovery Orders in the following respects, quoting from the Master's judgment at paragraph 225:

> ***"(i) The defendant has not searched all possible data sources in China. It has not therefore given discovery as required by paragraph 2.***
>
> ***(ii) Searches for WeChat and/or other communications held by individuals within China have either not been carried out or the material has been withheld without justification. Again, this leads to a breach of paragraph 2.***
>
> ***(iii) The claim to withhold documents as belonging to third parties when those third parties are the immediate and ultimate parent of the defendant is not made out.***
>
> ***(iv) The claim to withhold documents on the basis of privilege in relation to any communications between the defendant, its parent and/or its ultimate parent is also insufficient. This again is a breach of paragraph 2.***
>
> ***(v) The schedule attached to the affidavit of Ningren fails to comply with the requirements of paragraph 1c.***
>
> ***(vi) The affidavit provided by Ningren does not comply with paragraph 3 in relation to why relevant documents had not been disclosed, why they had been withheld from inspection, and why a risk of prosecution arises.***

34. Turning to the sanction to be imposed, we summarise the judgment of the Master in this way:

(i) He was satisfied that the documents held by senior individuals within China were very relevant to the allegations in paragraph 19 of the Order of Justice. They were also pertinent to CML's arguments that Mr Sheyko was in repudiatory breach and whether or not he was justified in wanting to be involved in major projects said to be outside his remit and authority.

(ii) Discovery from key individuals in China was therefore central to the complaints of Mr Sheyko and aspects of the defences which in the Master's judgment went to the heart of the issues on liability between the parties. He did not think a fair trial on liability could take place without these documents and the breaches were therefore as serious as they can be.

(iii) The Master was not satisfied that the position would change, for a number of reasons:

(a) The lack of detail in the Ningren's affidavits followed a pattern. The Master had not been told prior to the November 2019 hearing that Consilio had not been retained in China. He was not told either at the November 2019 hearing or the January 2020 hearing the full story in relation to Ningren's communications with the relevant authorities in China.

(b) The affidavits of Ningren continued that pattern of a lack of detail despite the express orders made. The documents withheld are not described in anything like as much detail as possible, nor is the reasoning why documents have been withheld at all clear; nor is the risk of prosecution explained.

(iv) It was relevant to note how long the discovery process had taken. CML was put on notice of its discovery obligations in September 2018, but there was no process of safeguarding devices entered into at that time. In respect of documents in China the process of looking for relevant data sources did not start until 14 months later, and another year has since elapsed. He posed the question - who knows what has happened to the devices or data previously stored on devices in the meantime?

(v) The Master referred to the efforts made to obtain data from Mr Cheung's iPhone detailed in Consilio's letter of 20th August 2020. Whilst Mr Cheung was not in China, and therefore there was no Chinese law obstacle to data being sourced, he was vice chairman of CML. The Master said his conduct was as uncooperative as it could be, short of destroying the relevant device. There was no explanation as to why Mr Cheung chose to take that

approach and there is still no disclosure from the documents ultimately sourced from Mr Cheung's device.

(vi) The Master found the attempt to involve the Chinese state in the discovery process of concern. The impression of the Chinese authorities looking to assist CML and its parent was troubling and when taken with the approach of CML and the TMI Group on balance suggested a wish to support CML's approach.

(vii) Ningren had been given a further six months since January 2020 to make matters clear and had not done so. When set against the context of how long had already passed since CML was put on notice of its discovery obligations, the Court not being given the full picture and only being given information just before relevant hearings, the Master did not consider that any further time allowed or further orders would lead to a change of approach. Even if it did, he asked who knows what has happened to devices, material held on such devices or to emails held on personal accounts in the meantime.

(viii) It did not help CML that Mr Sheyko had to battle to obtain notes of the latter's conversation with the authorities in China, which were clearly relevant and should have been produced and explained in affidavit evidence.

(ix) It was a combination of all of these factors taken together that led to the Master's conclusion that the Court's expectations had not been met, and in his judgment, would not be met. The discovery process had now taken over 18 months. This was simply not acceptable, even allowing for Covid-19. Mr Sheyko already had 5 court orders in his favour which had not been a deterrent to CML.

(x) The Master made reference to the judgment of the Bailiff in Sheyko v Consolidated Minerals & Another [2019] JRC 008, connected proceedings in which Mr Sheyko had obtained a freezing order against CML and in which CML had made an application for its discharge. When making a costs order against CML, the Bailiff stated:

> ***"In these circumstances, however, I consider it to be more appropriate to reflect the fact that the Defendant's application and the evidence it deployed and the evidence that it failed to deploy, was wasteful of time and costs in a manner that should be reflected by an order for costs in favour of the Plaintiff."***

(xi) The Master stated that, in so far as the Bailiff was criticising a tactical approach, that tactical approach had continued for the reasons he had set out. Further orders requiring compliance would not, in his judgment, make any difference to that approach.

35. The Master was therefore satisfied that a fair trial could not take place on issues of liability. That also applied in respect of CML's counterclaim.

CML's submissions

36. In short CML's position was that, properly analysed, there were no breaches of the Discovery Orders and even if there were any such breaches, there was no proper basis on which CML's answer and counterclaim fell to be struck out without being afforded the opportunity, through further specific discovery orders, clarification or even an unless order, to deal with any criticisms that were reasonably and fairly made. Instead, the Master proceeded to strike out CML's answer and counterclaim without any proper consideration as to whether this draconian course was appropriate or proportionate.

37. The Master had lost sight of the scope and effect of the Discovery Orders and his conclusions were fundamentally flawed, not least because he had failed completely to recognise, or to apply, the basic principle that CML could only make discovery of documents within its possession, custody or power.

38. Whilst the parties had not agreed a list of issues, this is a constructive dismissal claim in which Mr Sheyko asserts conduct on the part of CML which he necessarily knows about. He does not rely upon matters which he did not know about. CML's defence is that it did not act in repudiatory breach, and it follows that in resigning, Mr Sheyko was himself in repudiatory breach. If CML did effectively dismiss Mr Sheyko, then it was entitled to do so, by reason of his failings as CEO. The issues are therefore relatively narrow.

39. CML has always acknowledged and accepted its obligations to carry out a reasonable and proportionate search for the purpose of discovery and had done so. It had undertaken the collection and the processing of data from custodians in Jersey, England, Hong Kong, China, Ghana and Australia. More than 15 million documents have been processed by Consilio, a leading eDiscovery provider, which was engaged by CML to assist with the furtherance of the discovery exercise. After applying the date ranges, key-word searches, de-duplication etc, that resulted in more than 200,000 documents for review, including 27,597 from London, 8,548 from Hong Kong and 10,204 from Australia. These documents were then manually reviewed by a

team of nine document reviewers in Jersey, with each reviewer going through an in-depth tailored training process and a Chinese speaking team of reviewers reviewed the documents that were in Chinese. CML has spent in the region of £3 million on its discovery exercise, including legal costs, translation fees and the services of its eDiscovery provider, Consilio. It might be thought that the discovery process was already manifestly excessive and disproportionate, but the Court had apparently required perfection rather than reasonableness and imposed the most draconian sanction in response to a perception that CML had fallen short.

40. In Federal Republic of Nigeria v J P Morgan Chase NA [2021] EWHC 1192, Calver J described expenditure of £2.9m on disclosure as ***"staggering"*** notwithstanding that it concerned a complex commercial case whose value was US$875 million, but CML has already spent more on discovery in this case where, if successful, Mr Sheyko might recover a sum closer to US$15m.

41. Further, the obligation on discovery is to make reasonable search for documents; it is not to identify every document that is, or might be, relevant. As noted by Jacob LJ in Nichia Corporation v Argos Limited [2007] EWCA Civ 741 at paragraphs 50-52:

> ***"50 There is more to be said about the change to standard disclosure and indeed to the express introduction of proportionality into the rules of procedure. 'Perfect justice' in one sense involves a tribunal examining every conceivable aspect of a dispute. All relevant witness and all relevant documents need to be considered. And each party must be given a full opportunity of considering everything and challenging anything it wishes. No stone, however small, should remain unturned. Even the adversarial system at its most expensive in this country has not gone that far. For instance we do not include the evidence of a potentially material witness if neither side calls him or her. Nor do we allow pre-trial witness if neither side calls him or her. Nor do we allow pre-trial oral disclosure from all potential witnesses as is (or at least was) commonly the practice in the US.***
>
> ***51 But a system which sought such 'perfect justice' in every case would actually defeat justice. The cost and time involved would make it impossible to decide all but the most vastly funded cases. The cost of nearly every case would be greater than what it is about. Life is too short to investigate everything in that way. So a compromise is made: one makes do with a lesser procedure even though it may result in the justice being rougher.***

Putting it another way, better justice is achieved by risking a little bit of injustice,

52 The 'standard disclosure' and associated 'reasonable search' rules provide examples of this. It is possible for a highly material document to exist which would be outside 'standard disclosure' but within the Peruvian Guano test. Or such a document might be one which would not be found by a reasonable search. No doubt such cases are rare. But the rules now sacrifice the 'perfect justice' solution for the more pragmatic 'standard disclosure' and 'reasonable search' rules, even though in the rare instance the 'right' result may not be achieved. In the vast majority of instances it will be, and more cheaply so."

42. It is trite law, as set out in Royal Court Rules 6/17(1) that a party only has discovery obligations in respect of documents over which it has possession, custody or power. The meaning of each of these elements has been considered in detail by the English courts:

    (a) A party has a document in ***'its possession'*** if it has the right to the possession of it: B v B [1978] Fam 181 at 186; Matthews & Malek*, Disclosure (5th ed) (2016)*, paragraphs 5-61.

    (b) A party has a document in its ***'custody'*** if it has it in its actual physical possession: B v B [1978] Fam 181 at 186; Matthews & Malek, Disclosure (5th ed.) (2016), paragraphs 5-63.

    (c) A party has a document in its ***'power'*** if it has an enforceable right to inspect the document or to obtain possession or control of the document from the person who ordinarily has it in fact: B v B [1978] Fam 181 at 186; Matthews & Malek*, Disclosure, 5th ed*. (2016) paragraphs 5-64. In Lonrho Ltd v Shell Petroleum Co Ltd (No 1) [1980] 1 WLR 627 (HL) ("Lonrho") at page 635, Lord Diplock described ***'power'*** as a ***"presently enforceable legal right to obtain inspection of the document from whoever actually held it without the need to obtain the consent of anyone else."***

43. The English CPR now refers to documents within a party's *"control",* but this is in reality a matter of terminology rather than a substantive difference, given the definition of *"control"* in CPR r.31.8(2) which incorporates the same three elements.

44. There had been no breach of the Discovery Orders. There were five custodians based in China, namely Mr Jia, Mr Liu, Mr He, Ms Tsai, and Mr Zhensheng Zhang, who had left the TMI Group. Fundamental questions of principle and of fact arose as to whether, and if so, the extent to which CML had control of any documents held by those individuals. The Master made no attempt to engage with the question of whether the matters complained of, namely that (a) CML failed to collect personal devices of some custodians in China and (b) CML failed to collect data from personal email accounts and/or WeChat threads stored on personal devices could be, or were in fact, breaches of the Discovery Orders.

45. A substantial number of the custodians were not employees or officers or were ex-employees/officers of CML. A substantial number of them had multiple roles, and on any view, documents which they held in relation to their other roles were not within CML's control, as it had no right to documents belonging to third parties. Furthermore, numerous individuals held, or may have held, documents on personal electronic devices or in personal email accounts. Unless CML had a right to access such documents, regardless of their relevance to the case, it cannot be under an obligation to obtain discovery of the same. At most, CML can make voluntary requests that those custodians hand over documents or their personal devices or conduct searches. If those requests are rejected or the searches which the Court cannot compel a third party to perform are inadequate in some way, there is no breach of a discovery order. As authority for this proposition, CML relied on Phones 4U Limited (in Administration) v EE Limited & ors [2021] EWCA Civ 116.

46. The finding of the Master at paragraph 173 that *"devices of key individuals have not been handed over for a review"* was wrong and contrary to the evidence, which demonstrated that the devices of *"key"* individuals which had been identified as containing discoverable documents had been reviewed. Of the five custodians in China, as identified in the evidence, three stated that they did not use their mobile telephone devices for work purposes; two did, but of those, one had left CML and the other, Ms Tsai, produced her device which was searched accordingly.

47. The Master's finding that there were relevant WeChat threads that CML had failed to disclose was untenable in the light of the factual evidence proffered by CML to the contrary, and the fact that the Master's conclusion was based on unsubstantiated supposition and speculation.

48. In so far as the individuals had personal devices, or used personal email addresses or documents which were stored on non-CML servers, even if CML had an enforceable right to possession (i.e. a *"power"*) to work related documents on such devices, in line with English authority given the privacy issues and the Article 8 rights of the custodians raised, the Court had no power to order a party to the proceedings to deliver up third party custodians' personal email accounts or devices,

or indeed give discovery from servers that it does not control. Rather, on the authority of Phones 4U, the Court can only require the parties to the proceedings to make requests of third parties to search for relevant documents. That is precisely what CML did, and if those requests were rejected or the searches are inadequate in some way, there is no breach of a discovery order.

49. Accordingly, criticisms of CML to the effect that certain custodians did not cooperate with CML's requests or of the custodians more generally, are misconceived, and the Master's conclusions to the contrary, which did not engage with the relevant legal principles, were plainly wrong.

50. The Master erred in relation to the CTYML and TMI documents. These are the parent companies to CML and separate legal persons. The Master did not analyse or identify what would be necessary in order to reach the conclusion that documents held by these third parties were in CML's possession or power.

51. Advocate Turnbull submitted that the following well-established principles arose from the English authorities:

(i) The Court has no power to require a party to bring documents into its possession, custody or power: Hollander*, Documentary Evidence, 13th ed.* (2018) paragraphs 8-07.

(ii) The Court has no power to require a party to do all that can be reasonably done to obtain material from third parties; Matthews & Malek, *Disclosure (5th ed.)* (2016) paragraphs 5-59 citing Dubai Bank v Galadari (No 6) CA, unreported (October 1992). In that case, the Court of Appeal overturned an order of Morritt J requiring that the defendants ***"should by all lawful means available to them obtain possession, custody or power of the relevant documents."***

(iii) As was noted in Phones 4U having quoted dicta of earlier cases:

> ***"The defendants rely first on Lord Diplock's dicta in Lonrho … at pages 635-6: (a) that 'in the absence of a presently enforceable right [to obtain the document from whoever actually holds it] there is … nothing in [RSC] Order 24 to compel a party … to take steps … to acquire one in the future' , and (b) that, even if consent were likely to obtained from the third party, the defendants were not 'required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that***

other person'. Secondly, they rely on Glidewell LJ's dictum in Galadari that there is 'no general provision in the rules for the discovery of documents which are not in the possession, custody or power of a party, but are held by a Third Party.' "

(iv) Accordingly, no discovery obligation lies to compel or require a party to bring documents into its possession, custody or power and there is no general provision in the rules for the discovery of documents which are held by a third party and not in the possession, custody or power of a party.

52. As to possession, custody or power in the context of group companies Advocate Turnbull submitted that:

(i) In relation to a company's subsidiaries, the starting point is that a parent company does not exercise control over the documents of, or held by, its subsidiaries, merely by virtue of its shareholding in those companies; Pipia v BGEO Group [2020] EWHC 402 (Comm) at [10], citing Lonrho. In Lonrho itself, since the parent companies had no presently enforceable legal right (failing alteration of the subsidiaries' Articles of Association) to obtain the subsidiaries' documents without their consent, it was held that they had no ***'power'*** to obtain documents from those subsidiaries for the purposes of the RSC.

(ii) As Males J (as he then was) pointed out in Ardila Investments NV v ENRC NV [2015] EWHC 3761 at [13]: first, it remains the position that a parent company, even one with a 100% shareholding, does not merely by virtue of its ownership, have control over the documents of its subsidiaries; second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control, and third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request. Rather, what is required to have control over documents held by a subsidiary is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice given free access to third party documents.

(iii) Similarly, in relation to a subsidiary company's right to obtain documents from its parent company, the English courts have held that the subsidiary company has no right to call for documents or information from the parent company, and accordingly no ***'power'*** for the purposes of any discovery exercise, and that is so even if the parent company exercises effective control over the litigation on behalf of the subsidiary: see Matthews & Malek, *Disclosure, 5th ed.* (2016) paragraphs 5-68, citing Procter & Gamble Ltd v Peaudouce (UK) Ltd (Unrep., 23 November 1984) per Falconer J. Indeed, there appear to have been no

cases (in England at least) in which a subsidiary has ever been held to have control of documents in the custody of a parent company. See, similarly, Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd [2021] EWHC 849 (Ch) at paragraph 40.

(iv) Situations may arise where an agent (B) of a principal (A) also holds documents for a different principal (C), or for himself in his own right. In such a situation, principal (A) has no right to possession of (C's) documents held by (B): Grupo Torras SA v Al-Sabah (unreported 5 June 1997, Mance J). That case was one where a solicitor was acting for two clients: one client had no right to the documents of the other: see further Matthews & Malek, *Disclosure (5th ed.)* (2016) paragraphs 5-61.

53. As to the Court's jurisdiction to make orders in relation to disclosure where officers/employees and/or ex-officers/ex-employees of a company have or may have used their personal electronic devices to send and receive work-related messages and emails relating to that company, Advocate Turnbull submitted:

(a) The starting point is the need to determine whether documents in the physical possession of a third party are in a litigant's possession, power or custody. That can be a complex question, and it remains an open question whether a device held by a third party itself is within a litigant's possession or power: Phones 4U at paragraph 22.

(b) The Court has no jurisdiction to order a defendant to disclose or allow inspection of documents that are not within its control: Phones 4U at paragraph 23.

(c) In principle, employees, officers and agents (both present and former) are under a duty (subject to any contractual provision to the contrary) to allow their respective principal/employer to inspect emails sent to or received by them and relating to their employer's/principal's business: see Fairstar Heavy Transport NV v Adkins [2013] 2 CLC 272 at paragraph 56. So those documents, but not devices or personal email addresses themselves, are in principle within the control of the relevant principal/employer.

(d) However, the Court cannot order a party to the proceedings to deliver up third party custodians' personal devices or email accounts: Phones 4U at paragraph 46. Ordering custodians to hand over personal devices (or ordering a party to the proceedings to demand that custodians do so, which amounts to the same thing), is therefore not permissible. Further and in any event, it raises privacy issues; personal

devices and email accounts are highly likely to contain personal and/or other material over which a party to the proceedings has no right.

(e) Accordingly, as a matter of English law, third parties can only be compelled to do anything by an order under CPR 31.17 (which permits orders for third party disclosure against persons within the jurisdiction) or by another procedure to which they are made a party: Phones 4U at paragraph 28.

(f) Jersey (unlike England) has not given its Courts a power to order third party disclosure at all. A party to the proceedings cannot, by the back door, be made subject to a similar order which the Court would not (or could not) order against a third party.

(g) That regime applies equally to Jersey under the Lonrho principle, save that the question is whether the documents are within the '***possession, custody or power'*** of a party.

(h) Rather, the Court can require (and only require) that the parties to the proceedings make requests of employees/officers and third parties to search for relevant documents held on personal devices or email accounts: Phones 4U at paragraphs 28, 30 and 55 and also BES Commercial Electricity Ltd v Cheshire West and Chester Borough Council [2020] EWHC 701. Of course, the parties can do so of their own volition even absent an order, as CML has done in this case, for example, by making requests from third parties (employees, officers, other non-employees etc.) to provide mobile devices for inspection.

(i) If those requests are refused, or the searches (which the Court cannot compel a third party to perform) are inadequate in some way there is no breach of a discovery order: Phones 4U at paragraph 47.

54. Having made these general submissions, CML advanced 8 grounds of appeal which we take in turn.

Ground 1 – The Master erred in relation to the nature of the jurisdiction or power exercised by him

55. Mr Sheyko's summons had been brought under Rule 6/13 of the Royal Court Rules 2004, which provides as follows:

> ***"6/13 Striking out***
>
> ***(1) The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that –***
>
> ***(a) It discloses no reasonable cause of action or defence, as the case may be;***
>
> ***(b) It is scandalous, frivolous or vexatious;***
>
> ***(c) It may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) It is otherwise an abuse of the process of the Court,***
>
> ***and may make such consequential order as the justice of the case may require.***
>
> ***(2) No evidence shall be admissible on an application under paragraph (1)(a).***

56. It is clear that an application to strike out under Royal Court Rule 6/13 must be made on the basis of party's pleaded case, but Mr Sheyko advanced no argument at all that CML's defence disclosed no reasonable defence or was scandalous or abusive. The question arose as to whether the Court should have entertained at all an application to strike out the answer and counterclaim on the basis of a failure to comply with orders for discovery in circumstances where no summons for such an order had been made. CML argued that it should not have done so. Furthermore, the Master made no finding that CML had abused the Court's process.

Ground 2 – Failure to hear from CML

57. Mr Sheyko had made various criticisms of CML's discovery of documents outside China which were either capable of resolution or not a breach of the Discovery Orders at all. None of them either taken individually or together justified a strike out. Despite having reached this conclusion, however, the Master appeared to suggest at paragraph 149 of the Master's judgment that they were nonetheless in some way relevant to his overall determination and he did so, notwithstanding the fact that at the hearing, he refused to hear submissions from CML in relation to these alleged criticisms. This was a clear breach of natural justice.

Grounds 3 and 4 –Errors in relation to discovery of data from China, WeChat documents held on personal computers and CTYML and TMI documents

58. At the heart of Mr Sheyko's allegations were that the Chinese custodians did not hand over their personal devices or allow access to what was said to be their personal email accounts in order to permit CML to take data from them, and those personal devices were said to contain WeChat threads that were said to have relevant and disclosable material. These criticisms were misconceived, both on the facts and also because they fundamentally failed to recognise that the devices and personal or third-party email accounts were not in CML's possession, custody or power. In failing to apply the principles summarised above, the Master made fundamental errors in relation to whether CML had possession, custody or power over documents purportedly held by certain custodians. If the relevant principles had been applied correctly, the Master would have found that there had been no breach of the Discovery Orders.

59. The work email accounts of the Chinese custodians have been searched and material collated from them – even though they are not in fact CML accounts. That reflects the fact that CML requested that the relevant individuals search their non-CML work email accounts and those individuals cooperated in doing so. The issue is therefore in relation to personal email accounts and devices.

60. CML requested each of the Chinese custodians to provide disclosure or access to personal devices and/or personal email accounts which they had used for work purposes. Consilio collected data from Mr Jia, Mr He and Ms Tsai's personal email accounts which they used for work purposes. Mr Lui had stated that he did not use a personal email account for work purposes and Mr Zhensheng Zhang had left the TMI Group and did not cooperate. Of the five custodians in China, as identified in the evidence, three stated that they did not use their mobile telephone devices for work purposes; two did, but of those, one had left the TMI Group and the other (Ms Tsai) produced her device which was searched accordingly.

61. That was all CML could do, and all the Court would have been entitled to order it to do, in respect of personal email accounts or personal devices (or indeed, material not stored on servers not owned by CML).

62. Accordingly, there was no breach of the Discovery Orders. It was not sufficient for the Master to have assumed that a personal device or email account might contain material relevant to the proceedings.

63. As to the alleged WeChat communications, the factual premise of the Master's conclusion was entirely speculative, the Master appearing to have concluded that because there was general evidence that WeChat was used in China, it followed that the Chinese custodians were using WeChat for work purposes. That, however, was directly contrary to the affidavit evidence of the relevant custodians, who each stated that they did not use WeChat for work communications. There was no basis to doubt those statements.

64. The Master held wrongly that there had been a breach of the Discovery Orders, because documents from third parties had been withheld, those third parties being the immediate parent CTYML, sister companies of CTYML and/or the ultimate parent, TMI. The issue arose because during the discovery process, it became apparent to Walkers in Jersey that Consilio had inadvertently collected a relatively small numbers of documents and other data from custodians which did not belong to CML. They had been provided inadvertently by third party custodians, but Advocate Seddon, for CML, had confirmed by affidavit that the documents in question belonged exclusively to CTYML, sister companies of CTYML and/or TMI. It was vital to differentiate between which hat was being worn by that custodian in determining whether a document is in the party's control. If a document is held by a third-party custodian which is not under the control of CML, it has no right to that document and that document is not disclosable. The party does not have control over documents held by a third party unless it has a legal right to those documents. All the documents at issue here were obtained inadvertently from third party custodians. Even if there is a close relationship between the parties in question, that is irrelevant to the question of whether a party has control.

65. The Master had wrongly sought to distinguish the case of Saltri III v MD Mezzanine SA SICA [2012] EWHC 1270 (Comm) on the basis that it concerned seconded employees. However, the analysis in Saltri is not predicated on an employee being a secondee. Rather, its propositions are of general application to any party who is an officer or employee of two companies. Quoting from paragraphs 40-46 of the judgment.

“40 <u>EL point out that it is important to bear in mind that the question is whether EL have the relevant control, not whether a particular employee could in some capacity have had access to the documents. They provide the example of a person, A, who is an officer of two companies, X and Y (it matters not for this example whether X and Y are related companies). They submit that the fact that A may as director of X have access to its documents cannot mean that if Y is sued, Y has control of X’s documents</u>.

41 They further point out that the Mezzanine defendants’ argument has wide-ranging consequences. It would mean that wherever a person is employed by company A, including where he is seconded to another company or companies, B, C and D, everything he produces, in whatever capacity, is immediately within the control of A. As EL point out, where an employee is seconded to another employer, he owes duties of confidence to the second employer and he cannot disclose to the first company documents concerning the second, absent its express consent.

42 They also point out that the consequence of the Mezzanine defendants’ argument would be that where there is a group of companies with, as is very common, one acting as employer but the employees acting for different group companies and there is a shared email destination, all of the emails of each company in the group for whom any of the employees have worked, indeed arguably of all the companies who have used that email destination, will be within the ‘control’ of any one of them for the purposes of CPR 31.

43 In my judgment, there is considerable force in the points made by EL and I accept the general proposition that if an employee of X is seconded to another company, Y, documents produced by him during the course of his secondment are prima facie Y’s documents confidential to Y and X has no right to inspect them. Any other conclusion would be far-reaching and indeed unworkable, as shown by the examples given by EL.

44 The Mezzanine defendants submit however that that is no answer to their point in relation to access to servers. EL could have access to all their employee’s documents on the servers, if

they so chose. But I agree with EL that one comes back to the same point: if EL have no right to inspect documents produced by employees who are seconded to another company that applies to all such documents, whether they are stored on a server or on a laptop or wherever.

45 The Mezzanine defendants had a further point that there is here no satisfactory evidence that the relevant custodians were seconded in such a way which would mean that they were no longer acting in the course of EL's employment. The Mezzanine defendants point out that there was no physical relocation of the employees and that they continued to perform some roles for EL.

46 I accept that JP Morgan could have organised the division of roles more clearly and distinctly, but I am not satisfied on the evidence presently before the court that it has been shown that any of the relevant custodians were seconded in such a way as to mean that they should continue to be regarded as acting in the course of the employment of EL." (Advocate Turnbull's emphasis)

66. The key point was that documents are not in a party's possession, custody or power if they are held by third party custodians who hold them in a separate capacity. Saltri itself concerns seconded employees, but the point is not limited to seconded employees.

67. The Master placed improper reliance on the fact that Mr Jia was the majority shareholder of TMI, as well as being Chairman of both TMI and CML, as a basis for finding that the claim to withhold documents belonging to third parties was not made out. He was relying on one email, on the apparent basis that it showed no strict separation of corporate personalities and it is plain that the email did no such thing.

68. Following the principles summarised in Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd there was no evidence to conclude that that there *"was an arrangement or understanding that the holder of documents will search for relevant documents or make documents available to be searched"*. The Master's finding that this one email was evidence that *"no strict separation of corporate personalities was being applied"* could not therefore stand.

69. A shareholder's document held in that capacity is not within the possession, custody or power of a company (see Matthews & Malek, *Disclosure, 5th ed*. (2016) at paragraph 5.68 citing Procter and Gamble Limited v Peaudouce (UK) Ltd (unrep. 23 November 1984) per Falconer J and Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd at paragraph 40). CML therefore had no control over Mr Jia's documents, where they were held in his capacity as shareholder of a different company.

Ground 5 – Errors in relation to privilege

70. The Master had erred in relation to his finding that there was a breach of the discovery orders in relation to privilege by seeking to go beyond CML's affidavit claiming privilege pursuant to Royal Court Rule 6/17(3), when there was no basis for doing so. The issue arose because Advocate Seddon had said at paragraphs 96 and 97 of his first affidavit:

> *"[96] During the latter stages of the CML Discovery Process, it became apparent to the Walkers team in Jersey that Consilio had collected a relatively small number of documents and other data from certain custodians which … (iv) in some cases, were privileged in favour of a third party company (i.e. not CML) …*
>
> *[97] For the avoidance of doubt, any documents falling within (iv) above are not disclosable in these proceedings and will not be disclosed."*

71. The Master said it was not clear as to whether the privilege claim covered communications between CML and its parent CTYML and ultimate parent TMI and the claim to privilege did not permit the Court to identify which documents exist between the defendant and its parent, or ultimate parent, which may be the subject of a claim for privilege.

72. As to the level of detail required, it is trite that privilege is a fundamental substantive right and there is no discretion on the part of the Court to order the production of a privileged document. CML had identified claims for privilege in its disclosure lists and affidavits. It had done so in the conventional way, in a manner compliant with paragraph 16 of Practice Direction 17/07 by setting out the basis of the claim for privilege. Jersey applies the same rules as the English court applied under the RSC, under which it is well established authority that no detailed description of the documents for which privilege is claimed was necessary, lest it might be capable of undermining the privilege by revealing information - see Ventouris v Mountain [1990] 1 WLR 1370 at 1373. There was therefore no requirement for privilege to be claimed by reference to individual documents.

73. As to whether the basis for privilege had been made out, Advocate Seddon, as a practising advocate, carefully considered the claims for privilege and was satisfied that they were properly made. There was no reason for his evidence not to be accepted. As to the claim to privilege in respect of documents privileged in favour of a third party company, Advocate Seddon did not identify the third party and he was not required to do so. There is no evidence for the apparent assumption by the Master that if the documents were privileged in favour of CML's parent companies, such a claim to privilege should somehow be harder to make.

74. An example given by the Master of communications between board members of CML about the plaintiff and the plaintiff's performance was a hypothetical example, not applicable to the claim for privilege actually made, and in any event, an example of a document which would never have been privileged.

Ground 6 – Error in relation to compliance with paragraphs 1.c and 3 of the Discovery Orders

75. The Master found that CML was in breach of the Discovery Orders for two reasons, namely that the schedule attached to the second affidavit of Mr Liu Jianguo, a partner in Ningren, failed to comply with the requirements of paragraph 1.c and with paragraph 3 in relation to why relevant documents had not been disclosed, why they had been withheld from inspection and why a risk of prosecution arises. These conclusions were plainly wrong and irrational. The documents were withheld from production on the bases set out in the column headed *"Reviewer Comments".* The column to the left of that described these as *"Potential State secrets"* but a simple glance at the *"Reviewer Comments"* column would have made it clear that this was simply how they had been coded in the eDiscovery system, rather than reflecting the basis upon which production was being withheld, which was properly set out in the *"Reviewer Comments"* column. As the Master did not ignore the description *"Potential State secrets"* and focus on the "Reviewer Comments" as argued he should do so by Advocate Turnbull, this was a highly irregular approach that resulted in obvious injustice.

76. In his approach, the Master sought to determine matters of Chinese law in respect of WeChat communications, despite there being no evidence upon which to make such determinations. There was a fundamental failure in the approach on the Master's part in assuming that matters of Chinese law could be approached as if they were equivalent to some notional Jersey comparable legislation, when they are in fact quite different, reflecting the different traditions in China.

77. The disclosure exercise performed by CML was substantial. The two affidavits filed by Mr Jianguo addressed the Chinese law concerning the transmission of documents, the process of

review of documents, the process of submission of a report to the Chinese authorities and the process, where necessary, of approval for transmission following the submission of the report.

78. In his first affidavit of 3rd April 2020, Mr Jianguo said this at paragraph 16 in relation to the involvement of the Chinese authorities:

> *"Upon instructions from CML on 24 October 2019, I immediately contacted the Ningxia Cyberspace Authority ("NCA") several times with regard to whether a review is necessary and the response we received is that such regulations remain somewhat underdeveloped thus it would not be necessary. On 27 December 2019, my team and I once again contacted NCA and their response was the same but they added that CML must do the self-assessment diligently.*
>
> *Towards the end of the first round of self-assessment on around 2nd January 2020, my firm once again contacted NCA to confirm whether a review by NCA would be necessary in the circumstances. The response from the NCA was that they will have to seek instructions from the State Cyberspace Authority ("SCA") and the NCA also stated that transmission is forbidden without such approval from the NCA as appropriate."*

Thereafter, the Chinese authorities became engaged in the process.

79. Whilst an oral indication had been provided at the meeting with the Ningxia Cyberspace Authority ("NCA") to the effect that it would be unnecessary for it to review the documents and that a self-assessment by Ningren would be sufficient, Mr Jianguo considered it necessary to obtain written confirmation of this, which was prudent, in relation to legislative provisions with significant coercive sanctions. Mr Jianguo confirmed the following:

(i) Contrary to Mr Sheyko's suggestion, Ningren was never given permission to 'remove the documents from China on 24th October 2019'. The oral indication given to it at this October meeting was that no review was required by the NCA but authorisation for transmission was not given.

(ii) Ningren has repeatedly communicated with the NCA in order to establish the nature of the obligations that applied in relation to the removal of documents. That was an obvious and sensible approach to adopt when a potential criminal sanction is engaged. Moreover, as Mr Jianguo received different information from the authorities, that is entirely understandable

and has been explained on repeated occasions. Ningren was not prepared to receive preliminary indications from the NCA orally, as formal confirmation was reasonably required. The Court was told that this was the approach that Ningren had decided to adopt.

(iii) In January 2020, Ningren was told that the NCA were still reviewing the position. It is obvious therefore that the indication given in the October 2019 meeting could not be relied upon formally as it was not consistent with what Ningren was told later.

(iv) In January 2020, Ningren were seeking approval in relation to transmission of documents outside China. That is obviously different from the review process.

CML summary

80. It follows that the evidence of Mr Jianguo was plainly sufficient for the purposes of the Discovery Orders. The Court was told the full story in relation to Ningren's communications with the relevant authorities in China and there was no lack of detail.

81. CML gave this summary on the issue of whether there had been a breach of the Discovery Orders, as found by the Master:

(i) CML was not required to *'search all possible data sources in China*'. Rather, the Discovery Orders specified various custodians, and in respect of each of these, CML was required to search and disclose relevant documents within its control. CML was not obliged to retrieve and/or search a custodian's personal device(s) or personal email accounts, and could only request that the relevant custodians provide discoverable documents. That is what it did.

(ii) Similarly, there was no breach of the Discovery Orders because CML failed to conduct searches for WeChat and/or other communications held by custodians in China on their personal devices. These communications were not within CML's control, and CML could not be in breach of the Discovery Orders for failing to give discovery of documents not within its control.

(iii) The claims to withhold documents as belonging to third parties was made out: CML did not have control of these documents, and the Master's reasoning for why it did at paragraphs 175 and 182 was plainly wrong and contrary to established authority.

(iv) There was no breach of the Discovery Orders on the basis that CML improperly sought to assert that certain documents were privileged in favour of third parties (and/or some documents were subject to legal advice and/or litigation privilege). Those claims to privilege were properly made, and sufficiently articulated, and the Master's finding to the contrary was premised on an irrelevant hypothetical example of a document in respect of which privilege was not being asserted.

(v) CML was not in breach of the Discovery Orders in relation to the affidavits of Mr Jianguo by failing to comply with the requirements of paragraphs 1(c) and 3 of the Discovery Orders. Rather, the detailed reasoning in the schedules to Mr Jianguo's affidavits which the Master chose to deliberately ignore, was precisely the explanation that he had directed. That reasoning and the affidavits of Mr Jianguo explained in as much detail as possible why documents had been withheld from inspection and why a risk of prosecution arose.

Ground 7- error in relation to risk of prosecution

82. The question as to whether or not there was a risk of prosecution was not before the Master. Even if it were, the Master said at paragraph 210 that the relevance would be that the Court would order inspection. The Court wrongly treated this matter as constituting non-compliance with the Discovery Orders, rather than a claim to withhold documents which the Master held in the circumstances had not been made out.

83. Further, the Master's analysis was factually wrong as Mr Jianguo's evidence did comply with the order regarding the risk of prosecution.

Grounds 8 – error in relation to sanction

84. It is trite that striking out a pleading is a very serious matter as it has the consequence of deciding a disputed claim against a party not on the merits, but for procedural reasons, and without there being a trial to resolve the disputed issues.

85. It follows that a Court considering such a sanction must be guided at all times by the overriding objective and the fundamental duty of a court to do justice. It must also have regard to the right to a fair trial under Article 6 of the European Convention on Human Rights, specially where, as here, the effect is a final determination of the case in favour of one party. In considering Article 6, any restriction upon the right of access to the court should ***be "proportionate"***, that is to say serving a legitimate aim and being suitable and necessary for regulating the litigation process, and not

destroying the very essence of the Article 6 right: CIBC Mellon Trust Co v Stolzenberg [2004] EWCA Civ 827: Stubbings v UK [1996] 23 EHRR 213.

86. It is an intrinsic feature of the discretion exercised by the Court that it must take into account all available possibilities as a response to default. These include, in particular, the availability of a more proportionate response without the draconian consequences of strike out.

87. The concept of proportionality is therefore an integral feature of the right of access to the courts. It requires the court to consider the consequences of its action to ensure that its order is proportionate to the aim it seeks to achieve: JSC BTA Bank v Ablyazov [2012] EWCA Civ 1411. Where there is a range of sanctions, the Court should select that which is most appropriate to meet its aim: Biguzzi v Rank Leisure Plc [1999] 1 WLR 1926, CA. As it was put by Lord Woolf MR in Biguzzi: ***"in many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out."*** For example, in Douglas v Hello! Ltd [2003] 1 All ER 1087 the defendants made false statements, destroyed documents and failed to disclose relevant documents – but even there, the defence was not struck out as there was nothing to suggest that a fair trial was impossible.

88. Advocate Turnbull referred to this passage from the judgment of Sir Michael Birt, then Bailiff, in Leeds United Football Club Limited v Admatch [2011] JRC 016A at paragraph 35:

> ***"35 I draw from the above authorities the conclusion that it is a strong thing to strike out a defence and there must be an abuse of process such as to render further proceedings unsatisfactory or prevent the court from doing justice, or, to quote Page Commissioner, a party must have flouted or ignored the Court's orders or persistently conducted himself in a way that evinces an unwillingness to engage in the litigation process on an equal footing with the other parties.***
>
> ***36 I should add that this is not a case where the defendant is, at present, in breach of an 'unless' order. The plaintiffs have not sought an unless order in respect of the two failures by the defendant to comply with the order of 17th December 2009. Where there is a breach of an unless order, different considerations are likely to apply, see the observations of Ward LJ in Hytec Information Systems Limited v Coventry City Council [1997] 1 WLR 1666 at 1674-1675, quoted with approval by the Court of Appeal in Alhamrani at paras 84 and 85."***

89. Advocate Turnbull also referred to a judgment of Beloff J in Alhamrani v Alhamrani (C.A.), 2009 JLR 301 at paragraph 55:

> ***"It is a common feature of hotly-contested litigation that there is late or inadequate disclosure, sometimes as a result of a deliberate desire to suppress unhelpful evidence. It is equally not unusual that witnesses can be exposed as having given advice inconsistent with the contemporary record. Such features, when identified, are grist to the mill of the opposing advocate, provide fertile ground for cross-examination and submission, and entitle a court to draw adverse inferences against the party in default. … But the existence of such features can only rarely result in a court being unable fairly to conduct a trial: rather, it can actually assist the court in reaching the right conclusion. In my view, a court should not lightly be persuaded that it is unable to perform its primary adjudicative role."***

90. The approach of the Jersey courts, as that of the English courts, is that a strike out is preserved primarily for plain and obvious cases, and if a defect or abuse can be dealt with another way, it should be; judges should not rush to make findings of fact on contested evidence at a summary stage. The power should be used sparingly and even if an unless order has been made, the Court still has a discretion over whether to give effect to the unless order exercising its power to strike out sparingly.

91. The Master made no attempt, as he should have done, to analyse the extent of any alleged missing disclosure, but simply concluded without any analysis that ***"documents held by senior individuals in China are very relevant to the allegations at sub-paragraphs (a), (b), (c), (d) (e) (f) (h) (j) (k) and (l) of paragraph 19 of the Order of Justice",*** and that the breaches were so serious that a fair trial was no longer possible, both on the answer and the counterclaim. This was plainly wrong and not in accordance with the principles set out in the authorities. Notwithstanding that there had plainly been very substantial discovery to Mr Sheyko, pursuant to an enormous discovery exercise, there was no proper consideration by the Master of why the specific additional documents that the Master considered were not disclosed and matters such as allegedly inadequate explanations as to Chinese law would prevent a fair trial of the constructive dismissal claim. They would not. Indeed, the more obvious conclusion is that in so far as there was any prejudice at all, it would be CML and not Mr Sheyko that might be prejudiced by the absence of the documents in question.

92. In any event, there were obviously more proportionate sanctions available. The most obvious proportionate sanction would be orders for specific disclosure, if necessary, with an unless order,

and/or better particularity as to what was in fact required to satisfy the terms of *"the far-reaching and in part ambiguous court order"*.

Decision

93. It is well established that in an appeal from a decision of the Master, the Court has to consider the matter afresh and reach its own conclusions, whilst, of course, taking due account of the decision of the Master and the reasons for his decision (see Irish Nationwide Building Society v Volaw Corporate Trustee Limited [2013] 2 JLR 107 at paragraph 16). We have considered all of the material before the Court afresh and have reached the same conclusions as those of the Master, substantially for the reasons put forward in the Master's judgment and on behalf of Mr Sheyko, upon whose submissions we have in large part drawn in this judgment. We will address each ground of appeal put forward by CML cognizant that this appeal is concerned with discovery within China, and the key questions for the Court are:

    (i) Has CML breached the Discovery Orders? And if so,

    (ii) Do these breaches mean that a fair trial cannot take place?

94. Mr Sheyko's application is based on two principal alleged breaches on CML's part expressed in this way:

    (i) The refusal of the central figures in the events complained of, including CML's Chairman and ultimate beneficial owner, Mr Jia, and others in his immediate circle, to provide access for discovery purposes to electronic devices they used, thus removing any possibility of material held on these devices being disclosed – leading to the disclosure of nothing of significance from these key figures; (Key Issue A) and

    (ii) The decision to withhold a substantial proportion of the small amount of material that was collected in China on the spurious and unevidenced basis that CML faced a real risk of prosecution under Chinese law, if that material was disclosed. (Key Issue B)

95. For the avoidance of doubt, Mr Sheyko's strike out application and the Master's judgment are founded on the conduct of CML and the people who control it. They are not founded on the actions of CML's Jersey lawyers.

96. Before turning to the grounds of appeal, we would make the following preliminary points; firstly, the importance of the role played by Mr Jia. His dominance is demonstrated from the following correspondence:

(i) Correspondence dated 18th January 2018 from Mr Cheung in relation to the provision of financial information from CML:

> *"Pls understand this is an instruction to CosMin [sic] by the owner Mr Jia, so we need to work it out for him. As Jenelle advise if there is licensing problem, then solve it with the software company, increasing users number, if we need to sign a new agreement, then sign it. Even if we need to change the software company, change it because we need to fulfil [sic] the owner request. We need to complete his request end of Jan."*

(ii) Correspondence dated 2nd May 2018 from Mr Roy Zhang, director of CML, which frames the central duties of its directors as follows:

> *"You refer to a fiduciary duty to act in the best interests of the company. As you may be aware, this means acting in the best interests of the shareholder. I also note that all directors and employees serve at the pleasure of the shareholder. [Mr Jia.]"*

(iii) Correspondence dated 8th May 2018 from Mr Roy Zhang, director of CML, admonishing CML's lawyers (Ogier) for advising that they could only hold a discussion with Mr Jia's lawyer (Mr Ike Kutlaca of KWM) on a limited basis because Ogier acted for CML, and not Mr Jia. Mr Zhang claimed that Mr Kutlaca acted for both Mr Jia and CML and, as a result, all information should be provided to him.

(iv) Correspondence dated 4th May 2018 from Mr Roy Zhang saying that CML should not seek legal advice from its own lawyers in Jersey but should, instead, seek legal advice from Mr Kutlaca (Mr Jia's lawyer).

(v) Correspondence dated 2nd March 2018 from Mr Jia stating, in critical terms, that the price at which CML sold manganese ore was a matter solely for him, and no business of Mr Sheyko:

> *"Dear Oleg,*

I read last year's Capex plan. I don't think it's up to the standard. Firstly, in order to make decision, you need provide comparison among outsource, lease and purchase. Then we can decide which option best fits our needs. In your plan, there is nothing mentioned at all. Secondly, if we decided for purchase, I also did not see the detailed list, offering by suppliers and comparison among different suppliers. Lastly for such large purchase, payment terms or financial leasing options were not discussed at all. I will never approve such uncompleted plan. This is totally not acceptable. …

Regarding your concern over higher profitability from Ukrainian sales, I have made it very clear to minimize your sale to Ukraine. I don't think you got my point. It is my decision on who to sell to. Your focus should be on production expansion and cost reduction. I never put profit as your KPI [Key Performance Indicator]. So far, I hear very little discussion or proposal from you on how to reduce cost or increase production. I think this is where you should keep your focus on…."

(vi) Correspondence dated 7th February 2018 in which Mr Jia overruled the decision of Mr Sheyko to part company with a member of staff and declared that every employment decision must be subject to his final approval:

"Dear Oleg,

Recently, during Chinese and western staff integration, staff changes and company expansion stage, any management team member adjustment should get my approval.

Oleg, please withdraw Australian's decision of dismissal Simon, I will consider the rearrangement of Australian team seriously.

Meanwhile, please start recruit bi-lingual managers in Australia, requirement is understand mine management and related mining professional. Every employment should get my final approval."

(vii) Correspondence dated 24th December 2017 in which Mr Zhensheng Zhang said this in connection with a shipping dispute:

"Chairman Jia is very angry. He orders you to solve the problem immediately, to perform the port operation and reduce the loss. At the same

time, punish the responsible person severely and undertake the company's total loss".

97. Secondly, we agree with the assessment of the Master and the assertion of Mr Sheyko as to the importance of discovery from the China based custodians. In his role of Chief Executive Officer, Mr Sheyko would be accountable to the directors of CLM, but particularly to Mr Jia as Chairman of CML, from whom the correspondence showed he received direct instructions, some of which Mr Sheyko alleges conflicted with the best interests of CLM and with good governance. The particulars, set out in paragraph 19 of the Order of Justice (quoted extensively in the Master's judgment at paragraph 23) in the main relate to decisions/actions of CML directors or employees who had been appointed by TMI.

Ground 1 – The Master erred in relation to the nature of the jurisdiction or power exercised by him

98. There is no dispute between the parties as to the test to be applied on a strike out, namely whether the conduct of CML had put the fairness of the trial in jeopardy, both relying (as did the Master) on Leeds United Football Club Limited v Admatch in the passage cited above.

99. However, CML said that the application brought by Mr Sheyko fell outside Royal Court Rule 6/13 because it pertained to conduct of CML's discovery rather than its pleaded case. That proposition is incorrect. The question was considered by the Master in Viera v Kordas and Motor Insurance Bureau [2013] JRC 251, where he held:

> ***"I consider however there is a distinction between Rule 6/13(1)(c) & (d). The commentary in the White Book at paragraph 18/19/17 on the equivalent to rule (c) as with rules (a) & (b) focuses on how a party has pleaded its case and gives the Court power to strike out the pleaded case if any of grounds in Rule 6/13/(1) are made out. By contrast, the abuse of process ground is the one that focuses much more on the conduct of the litigation as the above passages in Culbert illustrate."***

100. The Master referred to, and based his interpretation of Rule 6/13(1)(d) upon, Culbert v Stephen G Westwell & Anor [1993] P.I.Q.R., P54 (CA) in particular the following passages (cited by the Master at paragraphs 18 and 19):

> ***"An action may also be struck out for contumelious conduct or abuse of process of the Court or because a fair trial of the action is no longer***

> ***possible. Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the Court. In my view, however a series of separate inordinate and inexcusable delays in complete disregard of the rules of court and the full awareness of the consequences an also properly be regarded as contumelious conduct or, if not that, to an abuse of process of the Court."***
>
> ***"The Court is concerned to see that its process is not abused and that justice is done. If it is abused by the plaintiff's action, or if justice cannot be done if the trial goes forward, it matters not whether it is the plaintiff himself or his advisers who are to blame. The action cannot be allowed to proceed. To the extent that the blame is that of his advisers, he will no doubt have his remedy against them."***

101. CML also contends that the Royal Court Rules contain no analogy with the power under the English CPR (CPR r. 3.4(2)(c)) which is a power to strike out where there has been a "***failure to comply with a rule, practice direction or court order".*** This too is incorrect.

102. RCR 6/26(8) and (12) read as follows:

> ***"(8) Without prejudice to the generality of paragraph (12), if the Court on any hearing of the summons for directions requires a party to the action or that party's advocate or solicitor to give any information or produce any document and that information or document is not given or produced, the Court may -***
>
> ***(a) record the facts in its act with a view to such order, if any, as to costs as may be just being made at the trial; or***
>
> ***(b) if it appears to the Court to be just to do so, order that the whole or any part of the pleadings of the party concerned be struck out, or order that the action or counterclaim be dismissed on such terms as may be just.***
>
> ***(12) If any party fails to comply with an order made under the provisions of this Rule, the Court may, of its own motion or on the application of any other party to the action, make such order***

> ***as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, that the answer or other pleading be struck out and judgment entered accordingly."***

103. The purpose of RCR 6/26 is to give effect to the standard directions set out at Schedule 3 to the RCR. Schedule 3 has now been deleted by Royal Court (Amendment No. 20) Rules 2017. The relevant guidance and standard directions are now contained in RC Practice Direction 17/05. This Practice Direction makes it clear that discovery falls within its purview (see para 12, and para 6 of the template order).

104. In Newman v de Lima and Anor [2018] JRC 155, the defendants failed to comply with an order to serve evidence. At paragraph 41 the Master held as follows:

> ***"Where an order has been breached, I agreed with both counsel that the power to make orders in relation to any non-compliance is found in Rule 6/26(12). In interpreting Rule 6/26(12), Rule 1/6, which contains the overriding objective and was introduced in June 2017 by Royal Court (Amendment No 20) Rules 2017 … requires me to both give effect to and to interpret rules in light of the overriding objective."***

105. The Master further held that, as Jersey now had in RCR 1/6 an overriding objective identical to that found in the CPR, it was appropriate to apply the first two limbs of the test set out by the English Court of Appeal in Denton v TH White Limited [2014] 1 W.L.R. 3926 when considering what sanction to impose (see paragraph 42) namely:

(i) Was the breach serious or significant? and

(ii) Was there good reason for the breach?

106. In addressing these questions, the Master stated at paragraph 43:

> ***"what needs to be considered are the orders that have not been complied with and the effect of such non-compliance on the progress of the litigation either to a trial or to a settlement."***

107. The Master did not follow the third limb of Denton (which refers specifically to CPR 3.9) and instead held that the discretion in Jersey was more general (at para 47 *et seq.*):

> ***"47. In my judgment in this jurisdiction, the discretion is a more general one. This discretion still requires me to consider whether the case can be dealt with justly and at proportionate cost and any relevant factors listed in Rule 1/6. However, I consider that I am also required to look at the case as a whole and the nature of the proceedings in particular, what is in issue where some form of strike out of a claim is contemplated. In cases involving a failure to issue a summons for direction (albeit pre-dating the overriding objective), the Royal Court has noted that the most severe sanction of striking out a plaintiff's claim should not be applied if there are other sanctions which could be applied which would enable justice to be done between the parties – see for example Viera v Kordas [2014] JRC 042 at paragraph 19 and Mayhew v Bois Bois [2016] JRC 024 at paragraphs 8 and 9. Whether the failure is to issue a summons for directions required by the Rules or a failure to comply with a particular order, I consider that the same approach should be taken to imposition of sanction which has the effect of striking out a claim or counterclaim or an answer, thus depriving a party of their day in Court.***
>
> ***48. I also consider it may be possible to make orders which fall short of striking out the entire claim. Depending on the breach it may be possible to limit the sanction to striking out part of a case or that if a particular step is not complied with part of the case will be struck out or evidence may not be adduced on a particular issue. There is also the sanction of costs.***
>
> ***49. I have referred to these different possibilities available to the Court because they are all illustrative of the more general discretion available to the Court where a party has not complied with a Court order. In reaching this view, it should not be forgotten that procedure is a means to an end namely a trial or settlement and breaches should be kept in that context. The key issue is therefore the effect of any non-compliance and whether or not a fair trial can take place after a breach. I accept I have to also take into account, if it is right to impose a sanction for non-compliance, whether that non-compliance was either deliberate or there is no justification for it. In every case there will always come a point where the conduct of a party in ignoring Court orders will lead to the ultimate sanction of a case being dismissed even if a trial could still take place. This judgment should not therefore be taken as any indication that non-compliance of any Rules and Practice Directions is acceptable, will be***

tolerated or will not, in appropriate cases lead to the ultimate penalty of a claim or answer being struck out." (emphasis added)

108. The Master, whose approach we endorse, applied the same test in Powell v Chambers [2018] JRC 169, which was about relief from sanction after a party had been automatically struck out for failure to comply with an unless order in respect of discovery.

109. The correct legal position is that CML could have been struck out under RCR 6/13(1)(d) and/or RCR 6/26(12). If the application at first instance had been brought under RCR 6/26, the result would have been the same. The approach to striking out a claim remains the same. The key issue is the effect of any non-compliance and whether or not a fair trial can take place after a breach. That is the basis upon which the Master approached his judgment.

Ground 2 – Failure to hear from CML

110. These are criticisms of CML's non-China discovery process, and were expressly found by the Master at paragraphs 153-158 of the Master's judgment to be irrelevant to his decision to strike the case out. Even if upheld, which in the case of the complaint about not identifying the source of a document (paragraphs 155-157 of the Master's judgment), they were not, they plainly had no impact on the possibility of a fair trial and were capable of remedy. They played no part in the decision to strike out CML's case and can be ignored.

Grounds 3 and 4 – Errors in relation to discovery of data from China, WeChat documents held on personal computers and CTYML and TMI documents

111. These grounds cover the collection of data from the key custodians based in China, WeChat and the material belonging to CML's parent companies.

Collection of data from the key custodians based in China

112. The agreement for Consilio to collect and preserve data in China was entered into as late as 27th November 2019. CML has maintained legal privilege over the communications between Consilio and the China based custodians. The information provided to the Court is contained in the affidavit of Advocate Seddon and the reports of Consilio, the latter stating that each of the custodians were sent a questionnaire, the contents of which we have not seen. Consilio state that if mobile phones were not collected from any custodian, it was on the basis of a response indicating that they did not have mobile phones which were available and which contained data relating to this matter (report of 21st August 2020).

113. On 6th December 2019 data was collected by Consilio at its office in Shanghai in relation to the email accounts of Mr Jia, Mr He, Mr Liu, Ms Tsai and Mr Zhensheng Zhang which they used for work purposes. In January 2020 data was collected from four desk-top computers in Beijing relating to Mr Jia, Mr Liu, Mr JinQiu Shi (Mr Jia's assistant) and Mr Fei Zhang, (another assistant to Mr Jia). Consilio were unable to collect data from Mr Shi's mobile because he refused to give them his access details. Consilio also collected data from two desk tops used by Mr He in Yinchuan and from Ms Tsai's laptop in Shenzhen. In April 2020 further material from Ms Tsai was collected in Shanghai including emails and the content of her iPhone.

114. Ms Tsai was the only custodian in China from whom data was collected from a mobile phone. As Advocate Redgrave says, nothing is said about any efforts to persuade the more senior and central China based custodians to provide access to devices which must have existed and the position is, therefore, that whilst Consilio was able to extract emails from various computers in China, they were provided with no phones, tablets or laptops for the five China based custodians, save for Ms Tsai. Mr Shi handed over a phone but would not give the credentials to get into it.

115. Whilst the China based custodians are not parties to these proceedings, although Mr Jia effectively owns CML, we note in this respect that Mr Sheyko had asserted that he had surrendered all of his devices to Baker & Partners (his affidavit of 2nd September 2020) so that they could be accessed for the purposes of his discovery, although this is disputed by CML. CML maintains that it could do nothing more than, through Consilio, request the China based custodians for access to their mobile devices, relying on the authority of Phones 4U.

116. In Fairstar Heavy Transport N.V. v Philip Jeffrey Adkins, Claranet Limited, the issue was whether the appellant's company was entitled to an order requiring its former CEO, after the termination of his appointment, to give it access to the content of emails relating to its business affairs. The relevant emails, which were stored on his personal computer in England, were sent or received by him on behalf of the company. Quoting from paragraph 17 – 20 of the judgment of Mummery LJ:

> ***"17 In brief, Fairstar claims an enforceable right, described by it as 'proprietary', to the content of business emails sent and received by Mr Adkins while Fairstar's CEO and stored by him on his personal computer. That right entitled it to inspect and make copies of the content of the emails, either directly or through an independent person instructed for that purpose.***

> ***18 The nature of the prior legal relationship between Fairstar and Mr Adkins as one of agency is not disputed. Emails to and from third parties came into existence and into the possession of Mr Adkins in the course of that relationship. Although stored on his personal computer, the relevant emails relate to Fairstar's business, not to private affairs of Mr Adkins. By means of electronic operation the emails can be retrieved from storage on the computer. Retrieval may either take the form of display on a screen or of a print-out in document form. Fairstar wishes to exercise its right as principal to inspect the electronic documents, either by reading them on screen or by the printing out of hard copies of them. That, it is contended, is the same right that it would undoubtedly have in respect of books and paper documents created by or coming into the possession of the agent in similar circumstances. Even if the emails are not printed out on paper, the same legal principles apply to access to the content of electronic documents as would apply to access to the content of printed paper versions of them.***
>
> ***19 Bowstead & Reynolds on Agency (19th E) Article 50(3) and paragraphs 6-093 were cited in support of the general proposition a principal is entitled, at the termination of the agency, to require his agent to produce or deliver up to him books and documents concerning his affairs prepared or held by the agent for him for the purpose of the agency relationship. It is submitted that the differences of form in which business correspondence is recorded, transmitted, sent, received, held or stored is, in principle, irrelevant to the substance of Fairstar's legal right to inspect and copy their content during or after termination of the relationship. The rationale for that right as an incident of agency is the same.***
>
> ***20 Mr Susman QC observed that, as the contemporary world is in near-universal electronic communication, it would be chaotic if a principal (or an employer) were denied the kind of relief sought in this case for inspection of documents relating to their affairs held by the other party to that relationship, simply because the materials were in a paperless form rather than on paper that could be physically delivered up under a court order."***

117. It was held at paragraph 55:

> ***"55 Fourthly, materials held and stored on a computer, which may be displayed in readable form on a screen or printed out on paper, are in principle covered by the same incidents of agency as apply to paper documents. The form of recording or storage does not detract from the substantive right of the principal as against the agent to have access to their content."***

118. CML did not demur from these basic principles of the law of agency and to the proposition that if the China based custodians had received or sent emails or other communications on their personal devices in their capacity as directors (agents) of CML, then CML was entitled to access to that information. No information was in fact provided by the China based custodians as to the existence or ownership of devices, who paid for them and whether they were primarily used for work or personal purposes. No devices were withheld because they were said to be personal property. Advocate MacDonald says in his sixth affidavit at paragraph 36 that *"CML never provided Mr Jia with a phone"* which begs the question what is meant by "provided" and whether any other group company did so.

119. In Phones 4U, the issue arose as to whether the Court at first instance had jurisdiction to order a party (an employer) to request a third-party custodian (employees and ex-employees) to voluntarily produce personal devices to an independent IT consultant to be searched for documents relevant to the business and emails stored on them (subject to relevant undertakings by the IT consultant). It was argued that to make such a request was to violate Lord Diplock's *dictum* in Lonrho to the effect that, if the defendants could not be compelled to hand over the custodian's personal devices, because the devices themselves were not in the defendants' control, they could not be obliged to ask the custodians to do so voluntarily.

120. Phones 4U was ultimately seeking to obtain disclosure of work-related emails and messages that were sent to or received by the custodians on their personal devices, not the devices themselves, and it was common ground that such emails and messages, if they existed, were to be regarded under English law as being in the relevant defendant's control for the purpose of CPR Part 31.8.

121. Sir Geoffrey Vos, Master of the Rolls, delivering the judgment of the Court of Appeal explained at paragraph 42:

> ***"42 It is true that the judge could initially have made an order requiring disclosure by the defendants of specific categories of documents held on the Custodians' devices, but under the control of the defendants, under CPR Part 31.12. That would, in effect, have left***

it to the defendants to try to recover those documents from the Custodians. We think it likely that the effect of this course would have been further applications to the court, whether in these proceedings or in separate proceedings brought against the Custodians by the defendants. In effect, the judge was trying to short-circuit the need for satellite litigation whether in these proceedings under CPR Part 31.17 or elsewhere."

122. He said at paragraphs 24 and 25:

> ***"24 We accept that the court has no jurisdiction under CPR 31 to order a defendant to disclose or allow inspection of documents that are not within its control. Save that the House of Lords was concerned with documents in the 'possession, custody or power' of the defendant under RSC Order 24, that was what <u>Lonrho v Shell</u> decided. That, however, in our judgment, is the limit of the jurisdictional point.***
>
> ***25 Disclosure is an essentially pragmatic process aimed at ensuring that, so far as possible, the relevant documents are placed before the court at trial to enable it to make just and fair decisions on the issues between the parties. CPR Part 31 is expressly written in broad terms so as to allow the court maximum latitude to achieve this objective. It is not a straitjacket intended to create an obstacle course for parties seeking reasonable disclosure of relevant documents within the control of the other party. Some of the defendants' submissions seemed to us to have an air of that unreality. It was submitted, in effect, that, ultimately, after many (no doubt costly) applications, hearings and orders, it would indeed be possible for Phones 4U to get hold of the documents that they now know are held by the Custodians to one of the defendants' order. It was only possible, they submitted, by making applications under CPR Part 31.12, or for third party disclosure under CPR 31.17, or ultimately, if those were not complied with, for orders based on alleged contempt. We do not agree."***

123. It was obvious, said the Court of Appeal, that third parties could only be compelled to do anything by a third party disclosure order under CPR Part 31.17 (for which there is no equivalent in Jersey) or by being made a party, but that did not mean that the Court could not, as a matter of principle, require the parties to the proceedings to make requests of third parties by way of making a search for relevant documents. The order made was a step towards the practical exercise of an established jurisdiction ***"by seeking to identify documents that fall under the Defendants' control."*** That is not to say that making such a request of a custodian in an attempt to short-

circuit the process is the only thing that a defendant need do or that making such a request discharges a defendant's obligation to make discovery of documents in its power.

124. The true position is that under English law, which is persuasive in this jurisdiction, a corporate litigant has control (in the sense of power) of any documents on the personal devices of its employees or agents that were sent or received in relation to the business of the company- Fairstar Heavy Transport NV v Adkins and BES Commercial Electricity Ltd v Cheshire West and Chester BC [2020] EWHC 701. Notably, in Phones 4U, the parties were agreed that work-related documents on the defendants' employees' and ex-employees' personal devices were within the control (power) of the defendants, as opposed to the devices themselves. The same is true in relation to documents held on personal email accounts. CML accepted this proposition in paragraph 48.3 of its contentions.

125. Such documents are in no special position as regards the orders that can be made against a litigant for disclosure. The litigant can simply be ordered to disclose the documents, notwithstanding that they are not in its immediate physical possession or custody, just as he can be ordered to do in relation to any other document in his power but not his immediate custody. Mr Jia, Mr He, Mr Liu and Mr Cheung are directors of CML (or were at the relevant time). They owe fiduciary duties to CML (See Viscount v Woodman [1972] JJ 2085) and are (or were) its agents. They control CML. If they held potentially relevant material, whether on their phone, on their laptop, or in their house, they were obliged to provide CML with access to it so that it can be searched and, if relevant and not subject to any applicable legal restriction (such as privilege), disclosed. The fact that CML did not own (or may not have owned) the device upon which that material was held is neither here nor there. They were obliged to provide CML access to it.

126. Fairstar Heavy Transport NV v Adkins was concerned with documents held by a former CEO and Phones 4U with employees and ex-employees, but the unusual feature of the present case is that we are concerned in substantial part with access to work related documents held by directors of CML itself. How can CML, which it is acknowledged has a right of access to work related documents held on the devices of its own directors, claim in these proceedings that all it is required to do is a make a request to those directors for access to those documents and to meekly accept a refusal, when it is those very same directors (including Mr Jia who is also the ultimate beneficial owner) who manage and exercise all of CML's powers?

127. Ultimately, it is irrelevant whether or not the devices were personal. CML had a right to access documents held on devices used by current or former employees or directors that relate to their work for CML and it has a duty, acting through its directors, to obtain them for discovery.

128. The Master ordered CML to disclose ***'all documents held by the custodians listed in Schedule 1."*** That plainly included relevant work-related documents held on personal devices. Having failed to do so, CML is in breach of the Discovery Orders.

WeChat

129. The evidence supporting the use of WeChat not only in China, but within CML was set out in paragraph 50 of the Master's judgment. No evidence was filed in response to the evidence referred to in this paragraph.

130. Further articles were appended to the eighth affidavit of Mr Phillip Brown, solicitor, filed on behalf of Mr Sheyko after the Master's judgment, explaining how WeChat had become the most popular communication tool in China (where media platforms such as Facebook, Twitter, Linkedin and Instagram are either banned or inaccessible), in comparison to many Western countries where the use of email was still predominant.

131. As the Master noted in paragraph 56 of the Master's judgment, Consilio processed 37,525 WeChat threads disclosed from non-China discovery confirming how much it was used within CML. Yet apart from those of Ms Tsai, not a single WeChat message was obtained from any electronic device in China.

132. Only a small number of emails had been disclosed from Mr Jia's work email address. Quoting from the eighth affidavit of Mr Brown, he makes this observation about the emails discovered in relation to Mr Jia at paragraph 13:

> *"a. The total number of documents disclosed by CML comprising emails sent by Mr Jia (or his assistants) from account [ ] is 30.*
>
> *b. Eight of those emails were collected not in China (from Mr Jia or his assistants) but from other custodians in other jurisdictions.*
>
> *c. There is duplication among the emails (perhaps because some of the documents collected were hard copies, or because the same email was collected from more than one custodian. Of the 30 emails identified, 23 are unique communications. That is to say, CML identified as relevant (and therefore disclosed) a total of 23 unique*

emails sent by Mr Jia in the 18-month period between 1 February 2017 and 27 July 2018.

d. *Of those 23 unique communications, 19 involve Mr Jia forwarding emails to other email addressees without comment. Of these communications, Mr Jia forwards one email to Mr Cheung (received from Mr Sheyko and entitled 'Strategic Options') and four further addresses (pages 1-20) who do not appear to be CML directors or employees. Those five emails are sent on the same day.*

e. *…*

f. *A total of three emails sent by Mr Jia were withheld from potential disclosure on grounds of Chinese law. The negligible volume (and quality) of the disclosure from Mr Jia therefore cannot be explained on the basis that documents were withheld on grounds of Chinese law."*

133. As for personal email addresses, CML had provided no confirmation by affidavit that the email accounts that had been searched were the only addresses used for work purposes. Use of personal addresses for work purposes appears to be very common in CML, as evidenced by the discovery. The paucity of emails disclosed lead to the conclusion that either other email accounts were being used, which had not been searched, or that other forms of communication such as WeChat were used for work communications. Either way, such communications have not been obtained or reviewed.

134. Mr Cheung is a director and deputy chairman of CML and was a conduit for messages from Mr Jia to others involved in the management of CML and its subsidiaries, because unlike Mr Jia, he spoke English. Also, unlike Mr Jia and the others, he was based in Hong Kong, which meant that no Chinese law obstacle could be invoked to prevent his material being reviewed for discovery purposes. Nothing was found on his WeChat desktop application and in relation to his iPhone he failed or was unable to give passwords and initially refused to have it repaired or updated. Eventually, Consilio was able to collect data from the iPhone in the summer of 2020. In Advocate MacDonald's affidavit of 11th June 2021 filed for this appeal, he states that the data retrieved ultimately contained nothing of relevance. This, submitted Advocate Redgrave, was not surprising, given how long Mr Cheung had denied access to his iPhone. Mr Cheung claimed, as reported by Advocate MacDonald, that he was in the habit of deleting messages so that memory storage on his iPhone is available for saving photos and other multi-media.

135. The Master declined to consider four affidavits submitted by CML because they were outside the timetable he had set, and there was no opportunity for Mr Sheyko to respond to them. Mr Sheyko has now had the opportunity of responding through the eighth affidavit of Mr Brown, and we therefore took these further affidavits into account. All four affidavits were strictly limited to responding to the allegation of Mr Sheyko that CML had failed to collect and/or disclose WeChat communications during the relevant period of 5th February 2017 – 27th July 2018. Mr Jia's affidavit was limited to these two short responses:

> *"6 I confirm that I did not use the instant messaging service known as WeChat for work-related matters during the Relevant Period.*
>
> *7. My secretaries Zhang Fei and Shi JinQui have access to and share the same email account as me [ ]. If they correspond on my behalf, they do so using this account."*

136. We note that Mr Jia does not deny using WeChat at all or having a WeChat account. He does not say whether he received work related WeChat messages (as opposed to sending them) or indeed, how he communicated for work purposes, bearing in mind the paucity of emails disclosed, or the devices he used. Taking into account the evidence in relation to the use of WeChat within CML, we agree with Advocate Redgrave that the claim that Mr Jia did not use WeChat for work communications is implausible.

137. In Mr He's affidavit, he set out particular parts of Mr Sheyko's written submissions of 24th July 2020, alleging the use by him of WeChat for work matters, and responded as follows at paragraphs 7 – 10:

> *"7 While I have an account with WeChat, I did not use it or any similar instant messaging service for work-related matters during the Relevant Period save for some occasional informal business discussions. Other than that business matters would have been confirmed in writing via email or hard copies. As such, WeChat communications with our foreign staff was limited to Isabella Dai only, the rest were communicated via emails, and all business decisions were confirmed via email.*
>
> *8 Paragraph 195d as quoted above refers to an email which Isabella Dai sent to Mr Sheyko stating:*

'Dear Oleg

Below is the response from Mr Huang via WeChat.

Agree Oleg's proposal regarding to the procedure to close Metals Solutions Limited. Please handle relevant issues in accordance with UK law.

Best regards'

9 In relation to the message described above, the reality was that Isabella Dai was the only foreign staff with whom I would discuss work-related matters on WeChat.

As explained above, all work-related matters or instructions from TMI would have been communicated via email or on paper.

10 It has not been possible to recover any WeChat messages which I sent during the Relevant Period because the Apple iPhone which was in use during the Relevant Period was misplaced and could not be found when I moved office in or about May 2019. Further, as there was limited storage space on my phone, and WeChat was mostly used for casual communications, it is my practice to clear my WeChat records once a month to free up storage space on my phone since these messages were not important to make sure my phone runs normally."

138. Accordingly, Mr He admits the use of a WeChat account and that some of his WeChat messages were work related, although there is no clarity as to what is meant by *"occasional informal business discussions."* He states that his Apple iPhone was misplaced but does not say when and in what circumstances and, bearing in mind his apparent practice of deleting WeChat messages monthly, what steps have been taken to recover data from the cloud.

139. Ms Hui Yee ("Elaine") Ling, an Executive Assistant to Mr Cheung responds to the same issue at paragraph 5 of her affidavit:

"5 While I have an account with WeChat, I confirm that I did not use it or any similar instant messaging service for work-related matters during the Relevant Period. Mr Sheyko refers to emails from me in relation

to WeChat. Whilst there were occasions when I sent emails requesting WeChat details, this was just a suggestion and the communications did no go any further on WeChat."

140. Whilst she admits having a WeChat account, we agree with Advocate Redgrave that her evidence as to its use for work related matters is implausible. The evidence shows that there are emails in which she requested the WeChat account details of Ms Tsai (a fellow custodian) for *"easy communication".* As Mr Brown says in his eighth affidavit, there are 28 other emails with a total of 46 attachments within CML's disclosure which contain reference to a "WeChat" history between Ms Ling and others, including Mr Cheung, Mr Roy Zhang and Ms Kitty Yeung. These emails emanate from WeChat accounts, and it appears that the attachments represent files received by Mrs Ling on WeChat which she then sent to herself by email. There is clear evidence of Ms Ling's use of the WeChat platform for relevant work related matters, and it reinforces the evidence of WeChat usage by senior personnel such as Mr Cheung and Mr Roy Zhang.

141. Finally, the affidavit of Mr Xing Xinmin, who acted as a translator for Mr Liu, contains this brief response:

> *"5 I confirm that Mr Jun Liu only used his email account – [ ] – to communicate for business purposes and did not use WeChat or any similar instant messaging service for work-related matters during the Relevant Period.*
>
> *6 Further, I did not use WeChat or any similar instant messaging service to communicate on his behalf either."*

142. Mr Liu is a China based director of CML and a special adviser to Mr Jia. The only evidence as to data disclosed by him as a custodian is that of his translator, Mr Xinmin. The evidence of the use of WeChat within CML as summarised by the Master undermines the suggestion that Mr Liu did not use WeChat for work related matters. As Mr Brown says in his eighth affidavit at paragraph 17, it is surprising that the material disclosed identifies no emails sent from Mr Liu's account to Mr Jia, as the main recipient, and only one where the latter is copied (to which Mr Sheyko is also copied). There are two emails sent from the account of Mr Jia to Mr Liu, which are emails sent by Mr Sheyko and forwarded without comment.

143. In Mr Brown's eighth affidavit, which contains a careful analysis of the four affidavits filed and of the data collected by Consilio in China, he contrasts in paragraph 9 the volume of data collected from custodians outside China as summarised by Advocate MacDonald in his sixth affidavit to the

comparatively very small volume of documents collected and made available for review in China where five of the custodians, including CML's chairman were based. According to Ningren, a total of 18,137 documents were made available for review, although more than a third of these fell outside the agreed date range. Only 7,789 of these were ever made available for review by Walkers, and of these, 1,336 were unreadable. Only 956 documents from China have been disclosed. In total, CML has disclosed 125,077 documents in these proceedings, of which 956 (or 0.76%) were collected in China.

144. All of this supports the conclusion that CML has not searched these data sources in China or material has been withheld and has not therefore given discovery as required by paragraph 2 of the Discovery Orders.

Material belonging to CML's parent companies

145. The issue here is that Consilio had inadvertently collected from some custodians a small number of emails sent and received in the custodian's capacity as a director or employee of CTYML and/or TMI or a sister company of CML. On review by Walkers, only those documents sent and received by the custodian as a director or agent of CML were said to be disclosable.

146. As Advocate Turnbull says, the mere existence of the relationship of parent to subsidiary does not give one the right to obtain documents from the other. The position is well summarised in the judgment of Vos J in Berkeley Square Holdings & Others v Lancer Property Asset Management Limited at paragraph 46:

> ***"46 Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:***
>
> ***i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship.***
>
> ***ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched.***

> ***iii)*** ***The arrangement may be general in that it applies to all documents held by the third party, or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;***
>
> ***iv)*** ***The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;***
>
> ***v)*** ***It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;***
>
> ***vi)*** ***The arrangement or understanding must not be limited to a specific request but should be more general in its nature."***

147. There is no legally enforceable right on the part of CML to have the documents of CTYML or TMI or any sister company, made available to CML to be searched, but as for the existence of an arrangement or understanding, the Master relied substantially on the email sent by Mr Jia to Mr Sheyko on 2nd March 2018 (set out in paragraph 96(v) above), which demonstrates that a strict approach to the parties' relationship was not at that time being applied.

148. Advocate Turnbull makes the point that this email falls to be interpreted in the substantive hearing and we agree that the principles set out in Saltri above are of general application and that where a custodian holds documents in different capacities, it is necessary to differentiate between which hat is being worn by that custodian in determining whether a document is in a party's control or not. Quoting from Matthews & Malek on *Disclosure* at paragraph 5.61:

> ***"Thus, under the revised RSC "possession" mean[t] 'the right to the possession of a document'. It did not require actual physical possession. The CPR distinguish between 'physical possession' (equivalent to the former 'custody') and the 'right to possession' (equivalent to the former 'possession'). So it appears that the old law on possession continues to apply, albeit under a new name. If A's own***

documents are in the hands of his agent or servant B, A has 'the right to possession' within the Rules, just as A had 'possession' under the pre-1996 Rules. Of course where the agent B holds the documents concerned for a different principal, or for himself in his own right, A had no right to possession. If B is a professional man and A his client, then a distinction may be drawn between B's own working papers, which belong to him and documents (e.g. correspondence with third parties) in B's hands, which belong to A.

149. The authority cited by Matthews & Malek in support of this proposition is Grupo Torras SA v Al Sabah, where, as previously stated, it was held (per Mance J) that in a situation of a solicitor acting for two clients, one client had no right in relation to the documents of the other. However, CML is not holding these documents as agent for CTYML or TMI or anyone else as principals and so the illustrations given in Matthews & Malek and Grupo Torras SA v Al Sabah have no application. The documents concerned were given by custodians to Consilio who in turn passed them to Walkers, who act for CML, for review. They are therefore in the custody or physical possession of CML through its own agents Walkers and are disclosable, irrespective of the hats worn by the custodians who supplied them, the primary point made by the Master. Quoting again from Matthews & Malek on *Disclosure* at paragraph 5.63:

" 'Custody' and 'physical possession'

In B v B, Dunn J said:

> ***'… 'custody' means 'the actual physical or corporeal holding of a document regardless of the right to possession, for example a holding of a document by a party as servant or agent of the true owner'.***

Thus, a company director who had the company's documents in his physical custody was obliged to give discovery of them if relevant, although such custody was only in his capacity as an officer of the company. The CPR now refer to 'physical possession', which appear to be the same concept. However, there is nothing in the Rules to limit disclosure to cases where the physical possession is lawful. Accordingly, it is submitted that even a thief would have to give disclosure of stolen documents if appropriate to litigation to which he was a party."

Ground 5 – Errors in relation to privilege

150. The Master held that CML's claim to privilege was inadequate because it was not clear whether it covered communications between CML and its parents, so the Court was unable to determine whether the claim was properly made out. This ground again does not go to the heart of the strike out application as it would be capable of rectification.

151. We agree with the conclusion of the Master, in that, in essence, the claim to privilege is too brief, does not identify the names of third parties on whose behalf privilege is claimed nor the nature of the documents or the privilege claimed.

Grounds 6 and 7 – Error in relation to compliance with paragraphs 1.c and 3 of the Discovery Orders and error in relation to risk of prosecution

152. These grounds cover the withholding of documents on the basis of Chinese secrecy laws and the risk of prosecution and we take them together.

153. In November 2019, CML first raised in Jersey the prospect of documents being prevented from leaving China because of Chinese secrecy laws and in consequence, on 15th January 2020, the Master made the orders contained in paragraphs 1.c and 3 of the Discovery Orders.

154. Both parties agreed that Jersey law should follow the law as set out in the case of Bank Mellat v Her Majesty's Treasury, where Gross LJ said at paragraphs 2 and 3:

> ***"2. For all litigants, the procedure in this Court is governed by the lex fori – English law. That is the norm internationally, as a matter of the conflict of laws. Disclosure and the inspection of documents form part of the law of procedure governed by the lex fori. On occasions, a tension can arise between the English law requirement for the inspection of documents and the provisions of foreign law in the home country of the litigant.***
>
> ***3. Where such a tension arises, it is for the Court to balance the conflicting considerations: the constraints of foreign law on the one hand, and the need for the documents in question to ensure a fair disposal of the action in this jurisdiction, on the other. The balance is struck by a Judge sitting at first instance, making discretionary, case management decisions. As is well-***

established, this Court will only interfere if the Judge has erred in law or principle or has (in effect) reached a wholly untenable factual conclusion."

155. The position was summarised at paragraph 63:

> ***"63 Pulling the threads together for present purposes:***
>
> ***i) In respect of litigation in this jurisdiction, this Court (i.e. the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the 'home' country of the party the subject of the order.***
>
> ***ii) Orders for production and inspection are matters of procedural law, governed by the lex fori, here English law. Local rules apply; foreign law cannot be permitted to override this Court's ability to conduct proceedings here in accordance with English procedures and law.***
>
> ***iii) Whether or not to make such an order is a matter for the discretion of this Court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e. foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins, op cit. at paras 1-008 and following). This Court is not, however, in any sense precluded from doing so.***
>
> ***iv) When exercising its discretion, this Court will take account of the real – in the sense of the actual – risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state is not determinative of the balancing exercise but is a factor of which this Court would be very mindful.***
>
> ***v) Should inspection be ordered, this Court can fashion the order to reduce or minimise the concerns under the foreign law, for***

example, by imposing confidentiality restrictions in respect of the documents inspected.

vi) Where an order for inspection is made by this Court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this Court. Comity cuts both ways.

156. This was the test applied by Fancourt J in the recent case of Byers v Samba Financial Group [2020] EWHC 853 (Ch) in which the defendant's claim to a risk of prosecution under foreign law failed and, as a result, its defence was struck out and it was debarred from defending the claims, save for some discrete points which the court held were not adversely affected by its lack of disclosure. The Court held (at paragraph 129):

> ***"An important consideration is whether allowing certain issues to proceed to trial notwithstanding the serious and culpable breach of the Bank would undermine the authority of the court. The Bank might be seen as having flouted the Court's authority and yet secured the chance to defend the claim in a more limited way. Doing justice between litigants according to the law depends on the court's orders being obeyed and its coercive powers being used where appropriate, otherwise its orders would regularly be flouted and injustice would result. As observed by Gross LJ in the Bank Mellat case, the Business and Property Courts of England and Wales welcome litigants from all parts of the world and treat them all equally; the court's reputation for fairness and incorruptibility means that they have many cases involving overseas claimants and defendants. If these courts allowed a defendant inexcusably to act in breach of court rules or orders on the basis of alleged foreign law restrictions and as a result obtain a trial of certain favourable issues only, there would be a real risk of encouraging others to do the same."***

157. In the Master's judgment of 16th April 2020, explaining the reasons for the Discovery Orders, he said at paragraph 47 that he required an affidavit from a suitable qualified lawyer from Ningren because: *"….. the opinion as a matter of Jersey procedural law is expert evidence which must come from an individual and must be in compliance with Practice Direction RC17/09 on expert evidence in particular the obligations of an expert contained in Schedule A".* It is fair to say that no reference to compliance with Practice Direction RC17/09 on expert evidence was referred to in paragraph 3 of the Discovery Orders, and the first affidavit of Mr Jianguo was filed prior to that

judgment being issued. His second affidavit, however, of 12th June 2020 does not comply with Practice Direction RC17/09 on expert evidence.

158. In his affidavits, Mr Jianguo exhibits schedules of the 18,137 documents collected by Consilio in three tranches in China and setting out those that have been withheld. Only two documents were withheld as constituting state secrets. The note of the meeting held on 31st March 2020 between Ningren and the Ningxia Department of State Security makes it clear that the latter did not regard Manganese technology as a state secret, nor in their view did it constitute a high-tech industry in that region.

159. The schedules contain a translation of the definition of "State Secrets":

> ***"State Secret Protection Regulations***
>
> ***Law of the People's Republic of China on Guarding State Secrets***
>
> ***Article 8: In accordance with the provisions of Article 2 of this Law, state secrets shall include the following:***
>
> ***(i) Secrets concerning major policy decisions on state affairs;***
>
> ***(ii) Secrets in the building of national defence and in the activities of the armed forces;***
>
> ***(iii) Secrets in diplomatic activities and in activities related to foreign countries as well as secrets to be maintained as commitments to foreign countries;***
>
> ***(iv) Secrets in national economic and social development;***
>
> ***(v) Secrets concerning science and technology***
>
> ***(vi) Secrets concerning activities for safeguarding state security and the investigation of criminal offences; and***
>
> ***(vii) Other matters that are classified as state secrets by the state secret guarding department."***

160. Whilst we accept that the interpretation of this Law is a matter of expert opinion as to Chinese law and despite the lack of any detail about the content of these two documents, it seems clear that bar these two documents, we are not concerned in the main with State Secrets, as confirmed in the meeting with the Chinese authorities.

161. Other documents are listed as being withheld because they are protected under the Cybersecurity Law and the Anti-Unfair Competition Law. An example of the former is Document 119 in the list exhibited to Mr Jianguo's second affidavit:

> ***"Document Number***
>
> ***119***
>
> ***Document ID***
>
> ***H51706-0040-0000298***
>
> ***Family date***
>
> ***16/03/2018***
>
> ***Ningren review***
>
> ***Potential State Secret***
>
> ***Reviewers Comments***
>
> ***The document is WeChat record of work communications involving other individuals' WeChat accounts. It is protected by Articles 41,42 and 44 of the Cybersecurity Law of the People's Republic of China"***

162. The schedules set out a translation of the law on the protection of personal information or Cybersecurity Law:

> ***"Protection of Personal Information Regulation***

'Cybersecurity Law'

Article 41

Network operators collecting and using personal information shall abide by principles of legality, propriety and necessity, disclosing their rules for its collection and use, explicitly explaining the purposes means and scope for collecting or using information, and obtaining the consent of the person whose data is gathered.

Specific provisions

Article 42

Network operators must not disclose, distort or damage personal information they collect without the agreement of the person whose information is collected, personal information may not be provided to others.

Article 44

An individual or organisation must not steal or use other illegal methods to acquire personal information and must not sell or unlawfully provide others with citizens' personal information."

163. There is no indication from Mr Jianguo as to the nature of the documents withheld on this ground or an explanation as to why their disclosure infringes the Cybersecurity Law. Nothing is said about CML's rules for collection and use of steps taken to gather relevant consents or why their disclosure would contravene principles of legality or propriety.

164. The schedules also set out a translation of the law on commercial secrets or Anti-Unfair Competition Law:

"Laws and Regulations involved in the assessment of data moving out of the Republic of China

Protection of Commercial Secrets Regulation

"Anti-Unfair Competition Law"

Article 9: A business shall not commit the following acts of infringing upon state secrets:

(i) ***Acquire a trade secret from the right holder by theft, bribery, fraud, coercion, electronic intrusion, or any other illicit means.***

(ii) ***Disclosing, using or allowing another person to use a trade secret acquired from the right holder by any means as specified in the preceding paragraph.***

(iii) ***Disclosing, using or allowing another person to use a trade secret in its possession in violation of its confidentiality obligation or the requirements of the right holder for keeping the trade secret confidential.***

(iv) ***Abetting a person, or tempting or aiding a person into, or in acquiring, disclosing or allowing another person to use the trade secret of the right holder in violation of his or her non-disclosure obligation or the requirements of the right holder for keeping the trade secret confidential.***

An illegal act as set forth in the preceding paragraph committed by a natural person, legal person or unincorporated organisation other than a business shall be treated as an infringement of the trade secret.

Where a party knows or should have known that an employee or former employee of the right holder of a trade secret or any other entity or individual has committed an illegal act as specified in paragraph 1 of this Article but still acquires, discloses, uses or allows another person to use the trade secret the third party shall be deemed to have infringed upon the trade secret.

For the purpose of this Law, 'trade secret' means technical, operational or commercial information unknown to the public and is of commercial

value for which the right holder has taken corresponding confidentiality measures.

Several Provisions on Prohibiting infringement upon Trade Secrets

Article 2

The term 'trade secret' as mentioned in these provisions refers to the practical information about technologies and business operations which is unknown to the public and is able to bring economic benefits to the owner and for which the owner has taken confidentiality measures.

The phrase 'unknown to the public' as mentioned in these provisions refers to the fact that the information is not directly available through public channels.

The phrase 'practical information that can bring economic benefits to the owner' as mentioned in these provisions refers to the information with definite practicability which can bring actual and potential economic benefits or competitive advantages to the owners.

The 'confidentiality measures taken by the owner' as mentioned in these provisions include signing a confidentiality agreement, setting up a confidentiality system and adopting other reasonable confidentiality measures.

The 'information about technologies and business operations' as mentioned in these provisions includes designs, procedures, formula of products, manufacturing techniques and methods, management secrets, name list of customers, information about resources production and sales strategies, bottom price of a bid, contents of a bidding document, etc.

The term 'owner' as mentioned in these provisions refers to citizens, corporate bodies or other organisations who own trade secrets."

165. In terms of unfair competition, there would appear to be no question of CML, in complying with its obligation to make discovery, either acquiring another person's trade secrets by illegal means or

using another person's trade secrets. It is simply providing its own data in relation to an employment dispute with an ex-employee. To the extent the documents do constitute commercial secrets (and there is no explanation as to why that might be so), there is no explanation given by Mr Jianguo as to why documents so defined should not be disclosed.

166. Mr Sheyko has obtained an affidavit from an expert in Chinese law, namely Mr Taili Wang, a partner in the firm of East & Concorde Partners in Beijing. He had reviewed the two affidavits of Mr Jianguo, and whilst he had been able in small part to assess the conclusions reached, overall, he had not been given enough information to do so. As to whether NingRen were correct to refuse disclosure, he said this at paragraphs 14-16:

> *"14 As a PRC [People's Republic of China] legal expert, since those specified documents are not provided to me and are, on the whole, not described in enough detail for me to understand their content, I am not sure of the basis upon which they are being withheld i.e. whether they are state secrets, trade secrets or personal information. Therefore I cannot make a judgment on whether Ningren's decision on refusing to disclose the specified material is correct or not.*
>
> *15 According to NingRen's reasoning, the withheld documents cannot leave the PRC because they are protected as state secrets, trade secrets or personal information by the law of the PRC on Guarding State Secrets (hereinafter 'Guarding State Secrets Law'. Anti-Unfair Competition Law of the PRC (hereinafter 'Anti-Unfair Competition Law') and Cybersecurity Law. In fact the relevant in force PRC laws and regulations have clear definitions of state secrets, trade secrets, personal information. Before applying certain laws and regulations, it is necessary to clarify the definition and scope of relevant terms. Only then is it possible to reach a conclusion as to whether or not, and if so, how, the law applies. Ningren has not done this.*
>
> *16 According to the list of documents provided by Ningren, of the total 18,137 documents, Ningren advised that 2,572 of them should not be transferred outside the PRC. In view of the fact that we have not been able to see the specific content of these document, and therefore do not know their legal nature, it is impossible to comment upon whether they are state secrets, trade secrets, or personal information, the transfer of which is prohibited under the PRC law. As Ningren claims that this material cannot leave the PRC, it has the burden to prove it. In my view this burden has not been discharged. I also note that the Master specifically directed Ningren to*

explain the implications of its reliance on commercial secrets, which it has not done."

167. We note that Mr Wang also said this in connection with Ningren's interaction with the Chinese authorities:

> *"7 The NCA informed Ningren on 24 October 2019, and again on 27 December 2019, that no review shall be conducted by the NCA. The NCA further requested CML to conduct the self-assessment properly and diligently. Ningren then requested a confirmation letter. After that Ningren continued to seek to involve the NCA and other government departments. To date there are no effective laws and regulations specifically providing the procedure for data cross-border transfer security assessment. Therefore, there is no benchmark as a matter of PRC law against which I can assess the decisions taken by Ningren. What I can say is that CML having been given permission by the NCA to conduct the document review itself, it is difficult to see why Ningren repeatedly went back to the NCA. The explanation provided by Ningren that it did not want to proceed because of the uncertainty around the applicable procedure and process is not explained in sufficient detail for me to reach a clear view as to whether it justified going back to the NCA, and appears inconsistent with the fact that the NCA had given Ningren permission to proceed.*
>
> *8. The information Security Technology – Guidelines for Data Cross-Border Transfer Security Assessment (2017-8-25 Draft for Comments) (hereinafter as the 'Guidelines for Assessment') and Measures for the Security Agreement of Personal Information and Important Data to be Transmitted Abroad (2017-5-11 Draft for Comments) (hereinafter as the 'Measures for Assessment') are both just drafts for comments, rather than effective legal documents. Ningren clearly knows the Guidelines for Assessment is not an effective legal document in the PRC. Therefore, Ningren's practice of conducting data cross-border transfer security assessment is based on draft rules that are not legally effective. Therefore Ningren's opinion is not based on the law. While the law remains in a stage of development, Ningren could certainly have proceeded through the self-assessment in accordance with the initial decision of the NCA."*

168. It is wrong, as CML contends, to suggest that the Master focused purely on the entry *"Potential State Secret"* in the 1,105 documents withheld under the second affidavit of Mr Jianguo without

looking at the next column, under the heading *"Reviewer Comments"* (as illustrated in Document 119) which he manifestly did, finding that all the information on the lists was inadequate for the reasons set out in his judgment and we agree that he was right to do so. The disclosure list does not identify the nature or content of the document, so it is impossible to tell why it has been withheld, and the reasons given by Ningren for withholding are often vague and repetitious, do not refer to specific sub-provisions of the statute where applicable and do not offer any detail as to why a particular statute provision is invoked. It follows that Mr Sheyko and the Court are unable to assess the basis upon which material has been withheld. We agree with Advocate Redgrave that the clear purpose of the Master's order has been defeated.

169. As to the risk of prosecution and following Bank Mellat v Her Majesty's Treasury, the Court must examine the evidence filed in terms of the actual risk of prosecution in China and balance that against the importance of the documents to the fair disposal of the proceedings.

170. In Mr Jianguo's affidavits, he referred to legal sanctions available in China for transmitting documents in breach of certain secrecy laws. His first affidavit included the following:

(i) *"12. Before transmitting any data out of the PRC, due consideration must be given to prevent transmission of data which contains (i) state secrets, (ii) trade secrets, or (iii) personal data which cannot be disclosed illegally. Otherwise an individual(s) responsible for transmitting such data out of the PRC will be exposed to criminal liabilities, administrative penalties and/or civil liabilities pursuant to the following laws and regulations .." [there follows a list of statutes which might potentially be engaged].*

(ii) *"37.a If data concerns State secrets then data transmission out of the PRC without approval from the relevant authorities shall be subject to administrative penalties and criminal liability in accordance with: …" [there follows a list of statutes which might potentially be engaged].*

(iii) *"37.b Part of the withheld documents involve commercial secrets between Tianyuan Manganese and other companies and if data concerns such commercial secrets then illegal transmission of such data may give rise to civil liability, administrative penalties and criminal liability in accordance with …." [there follows a list of statutes which might potentially be engaged].*

(iv) *"37.c If data concerns personal information then transmission without the consent of the persons involved, or without going through the necessary procedures, may give rise to criminal liability or administrative penalties in*

accordance with: …" [there follows a list of statutes which might potentially be engaged.]

171. Mr Jianguo's second affidavit included the following:

(i) *"22.(a) In recent years, the Chinese government has paid more attention to the management of network information security and transmitting data out of the PRC and has been increasingly strict about it. There have also been cases of administrative penalties for illegal transmission of data, for example Huada Technology and Huashan hospital have been punished for transmitting human genetic information out of the PRC without prior approval. Therefore it may be illegal to transmit important data out of the PRC without prior approval."*

(ii) *"22.(b) The current data transmission involves important data of the manganese industry, and there are thousands of documents, which my team had to carefully review and provide our opinion on. This included consideration of whether such data transmission out of the PRC would affect the development of the PRC's manganese industry, and whether it would be detrimental to the interest of the country, in which case transmitting such data could lead to administrative punishments by the Chinese government and could even be a criminal offence in serious cases."*

(iii) *"22.(d) Ningren understands that the current data transmission application is the first in the PRC under the current legal regime in the PRC. It is also therefore the first time that the NCA has handled this type of data transmission application. Through their communication with us, the NCA appears to have been constantly looking for the best way forward, striking a balance between the national interests of the PRC and assisting the Defendant in complying with its obligations to the Jersey court."*

172. These statements represent the highest that CML's case on the risk of prosecution can be put. They provide no basis to conclude that there was a real risk of prosecution if the documents were transmitted outside China:

(i) *Mr Jianguo makes no meaningful statement as to the likelihood that any particular disclosure could contravene a criminal law. Even if the evidence did indicate that some sort of proceedings were likely, Mr Jianguo provides no information on what the nature of them would be, e.g. regulatory, administrative,*

civil or criminal. He simply makes vague assertions that such proceedings are theoretically possible.

(ii) For example, as the Master noted at paragraphs 196-198, no explanation is given as to why transmitting WeChats would carry a risk of prosecution. The Cybersecurity Law applies to personal information and on its face only criminalises transmission if illegal methods have been used. It is not possible from CML's evidence to identify any withheld document to which that applies.

(iii) Mr Jianguo makes no meaningful assessment of the risk of prosecution if the material were transmitted pursuant to a Jersey court order.

(iv) There is no indication from any court or prosecutorial body as to the likelihood of a prosecution being pursued.

(v) Two cases are very briefly referred to but appear to pertain to an entirely different subject matter - the transfer of human genetic information. No judgment or other supporting material is provided, and no explanation is given as to how these cases affect the probability of prosecution.

(vi) It is of particular note that Mr Jianguo makes no reference to the type of sentence that individuals or entities based in China might receive if a prosecution were to be brought. Having provided no information on the nature of any prosecution, it would not be possible to comment on potential sentences.

173. Mr Wang, in response to the question of the likelihood of any party based in China being subject to a criminal prosecution said this at paragraph 20, having reviewed the relevant laws in China:

> *"20 I am unable to express a certain view on the likelihood of prosecution because, as set out above, Ningren has not been clear as to the legal basis for withholding documents. For example, if a document or class of documents was shown to fall within state secrecy legislation, then the consequences for disclosure without state consent could, potentially, be serious. However, in the absence of sufficient detail about the content of any given document, and the specific law or laws of the PRC under which it is said that a prosecution would proceed, I am unable to offer a considered view on the chances of a prosecution being brought. As I have explained, the assessment process undertaken by Ningren has no legal foundation, as it is able to develop it as it considers appropriate."*

174. When asked as to the likelihood of any party based in China facing a serious penalty such as imprisonment or the death penalty if Ningren allowed all of the documents to leave China, he advised as follows:

> *"21 As mentioned above, if the data provider violates the provisions of the PRC Criminal Law on the protection of personal information, the maximum penalty is a fixed-term of imprisonment of not more than seven years. If the data provider violates the provisions of the PRC Criminal Law on the protection of trade secrets, the maximum penalty is a fixed-term of imprisonment of not more than seven years imprisonment; if the relevant regulations on state secrets are violated, the maximum penalty is life imprisonment.*
>
> *22 Unfortunately, as I have not seen any evidence upon which an accurate prediction of a potential sentence could be based, I am unable to comment on the likelihood of any such sentence being passed."*

175. There is no evidence that the Chinese authorities have threatened to prosecute if the material were disclosed, and as the Master noted at paragraph 203, there was no sign of any thought having been given to redacting personal information which would be irrelevant, bearing in mind that Ningren said this in its explanatory note of 4th January 2020:

> *"If the safety self-assessment forbids the email to be transmitted out of China, CML may choose to simplify the contents of that email, using technology to amend the email such as reducing its sensitivity, and re-assess the amended email data."*

176. This Court endorses what the Master said at paragraph 223 of the Master's judgment:

> ***"223 Whether the authorities in China would in fact prosecute is more difficult to determine. The use of manganese technology does not appear to be a state secret (see paragraph 76) above. What the ultimate policy might be however is an unknown factor. To the extent that the concerns of the authorities in China are issues of confidentiality, I have already made express orders to address such concerns. Where disclosure is sought of material that would enable a review of what key individuals were saying to each other, again safeguards could have been built in to protect purely personal information such as ID numbers, personal phone numbers or addresses and therefore a***

risk of prosecution. However, no such safeguards had been considered by Ningren or proposed by the defendant. Finally, as noted at paragraph 63(vi) of the <u>Bank Mellat</u> decision, comity cuts both ways. As it was put in that case 'considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this court.' Again, there is no such analysis by Ningren in their affidavits addressing this issue."

177. The evidence as to the risk of prosecution, such as it is, leads the Court to conclude that the balancing exercise comes down firmly on the importance of the documents being required for a fair trial. CML has not persuaded the Court that the risk of prosecution is a basis for withholding the inspection of documents or, in this case, discovery of them.

178. Accordingly, we agree with the conclusions of the Master reached at paragraph 225 that the affidavits of Mr Jianguo fail to comply with the requirements of paragraphs 1.c and 3 of the Discovery Orders.

Summary in respect of Grounds 1 – 7

179. For the reasons set out above and consistent with the findings of the Master set out in paragraph 225 of the Master's judgment, we find as follows:

   (i) CML has not searched for all of the data held by the China based custodians and has not, therefore, given discovery of all documents held in China as required by paragraph 2 of the Discovery Orders.

   (ii) In particular, searches for WeChat and/or other communications held by individuals within China have either not been carried out, or the material has been withheld without justification, which again is a breach of paragraph 2 of the Discovery Orders.

   (iii) The affidavits of Mr Jianguo do not comply with the requirements of paragraphs 1.c and 3 of the Discovery Orders

180. It is these findings which are central to the strike out application, and which address key Issues A and B. We also agree with the Master's further two findings, which are not central to the strike out applications, namely:

(i) The claim to withhold documents as belonging to third parties when those third parties are the immediate and ultimate parent of CML is not made out.

(ii) The claim to withhold documents on the basis of privilege in relation to any communications between CML, its parent and/or its ultimate parent is also insufficient.

Ground 8—Error in relation to sanction

181. We accept CML's submissions that striking out is a very serious matter, as it has the consequence of deciding a disputed claim against a party not on the merits but for procedural reasons, without there being a trial to resolve the disputed issues. We agree that a Court considering such a sanction must be guided at all times by the overriding objective and the fundamental duty of a Court to do justice. It must also have regard to the right to a fair trial under Article 6 of the European Convention on Human Rights, especially where, as here, the effect is a final determination of the case on liability in favour of one party. In considering Article 6, any restriction on the right of access to the Court should be proportionate, that is to say, serving a legitimate aim and being suitable and necessary for regulating the litigation process, and not destroying the very essence of the Article 6 right.

182. However, we agree with Mr Sheyko that here, there is no other appropriate remedy. This is not a case where giving CML more time to fix things could possibly make any difference. The devices have not been searched and the material has not been preserved (and it is accepted that the custodians have deleted material). We agree that the defects are incurable.

183. We find that the Master correctly considered the right test and applied it. He found:

(i) That documents held by senior individuals within China are very relevant to the issues for trial (para 228).

(ii) That discovery from these individuals was therefore at the heart of the case and a fair trial could not be had without them (para 229).

(iii) That the position would not change if CML were given more time to remedy the position (paras 230-241) because of a number of factors:

(a) The pattern in the litigation of CML not providing the full picture on discovery (para 231) and taking a tactical approach to compliance with orders (paragraphs 240-241).

(b) The failure of Ningren, despite the Master's clear orders, to justify withholding documents and the failure to remedy this subsequently (paragraphs 232 and 236).

(c) CML's failure to safeguard devices in 2018 and to commence accessing China documents until December 2019, meaning that even if they were accessed now it would be too late; the contents would have gone (paragraphs 233-4, 237).

184. The Master was justified in taking CML's default as seriously as he did. There have been multiple serious breaches of the Discovery Orders which have deprived Mr Sheyko of relevant documents that go to the core issues. It is manifestly unfair to him to be subject to a trial in those circumstances.

185. This is not a case of the Court seeking perfect justice by requiring every relevant document to be considered nor is it a case of inadequate disclosure where the Court would be able fairly to conduct the trial. Discovery from the China based custodians is, as the Master said, at the heart of this case and a fair trial cannot be held without it. The paucity of documents disclosed from China is glaring and CML's failures in this respect amounts to an abuse of process preventing the Court from doing justice.

186. We acknowledge that substantial discovery has been made from sources outside China, but there is no issue before us as to the proportionality of the Discovery Orders themselves made in this case largely by consent. Whatever the volume of documents sourced from outside China, it cannot detract from the importance of discovery of documents from within China where some of the key persons involved in this matter were based. CML itself acknowledged in November 2019 that the court could not justly resolve Mr Sheyko's claim without the evidence then being reviewed in China (paragraph 18 above).

187. CML suggests that if breaches are found they can be addressed more proportionately by the making of orders for specific disclosure combined, if necessary, with an "unless order", and/or better particularity as to what was in fact required to satisfy the terms of what it describes as the *"far reaching and in part ambiguous court order",* but we can see no utility in that, bearing in mind:

(i) The history of this matter. The proceedings were instituted over three years ago. It is now too late to access the devices.

(ii) It is over a year since Mr Jianguo filed his second affidavit and despite the decision of the Master and CML's own appeal, the opportunity has not been taken of seeking to address the serious inadequacies identified by the Master. Its position remains as stated. There would be no point attaching an 'unless order' to a pointless order.

(iii) In any event, a very clear warning was given to CML in the Discovery Orders, which we have set out above, which was confirmed in paragraph 49 of the Master's judgment of 16th April 2020 as set out above.

(iv) As for better particularity, we agree with Advocate Redgrave that this is a contrived argument and, in any event, pointless. There is no ambiguity and CML has made its position clear.

Conclusion

188. A fair trial is not now possible. The damage has been done and it cannot now be repaired, nor can it be mitigated nor managed by any lesser sanction than a strike out. Having re-heard the matter, we have reached the same conclusions as the Master. The appeal is therefore dismissed.

Sheyko v Consolidated Minerals Limited [2020] JRC 061.

Sheyko v Consolidated Minerals Limited [2021] JRC 006.

Royal Court Rules.

Practice Direction RC 17/07.

Practice Direction RC 17/08.

Smith v SWM [2017] JRC 026.

Bank Mellat v Her Majesty's Treasurer [2019] EWCA Civ 449.

Sheyko v Consolidated Minerals & Another [2019] JRC 008.

Federal Republic of Nigeria v J P Morgan Chase NA [2021] EWHC 1192.

Jacob LJ in Nichia Corporation v Argos Limited [2007] EWCA Civ 741.

B v B [1978] Fam 181.

Matthews & Malek, *Disclosure (5th ed)* (2016).

Lonrho Ltd v Shell Petroleum Co Ltd (No 1) [1980] 1 WLR 627 (HL).

Phones 4U Limited (in Administration) v EE Limited & Ors [2021] EWCA Civ 116.

Hollander, *Documentary Evidence, 13th ed.* (2018).

Dubai Bank v Galadari (No 6) CA, unreported (October 1992).

Pipia v BGEO Group [2020] EWHC 402 (Comm).

Ardila Investments NV v ENRC NV [2015] EWHC 3761.

Procter & Gamble Ltd v Peaudouce (UK) Ltd (Unrep., 23 November 1984).

Berkeley Square Holdings Ltd v Lancer Property Asset Management Ltd [2021] EWHC 849 (Ch).

Grupo Torras SA v Al-Sabah (unreported 5 June 1997).

Fairstar Heavy Transport NV v Adkins [2013] 2 CLC 272.

BES Commercial Electricity Ltd v Cheshire West and Chester Borough Council [2020] EWHC 701.

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Practice Direction RC 17/09.

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