

JERSEY / JUDGMENT

Hard Rock Cafe International (STP) Inc and Anor v HRCKY Limited [2022] JRC 055 (01 March 2022)

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judgment

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Introduction

1. This judgment contains my decision in respect of an application by the defendant to strike out the plaintiffs' answer to the defendant's counterclaim ("the strike out summons"). This summons was issued following an earlier summons dated 8 th November 2021 seeking specific discovery of a document called a 2006 Strategic Report (the "specific discovery summons"). 2. The basis for the strike out summons in summary followed the plaintiffs providing to the defendant a PowerPoint presentation which the plaintiffs contended was the 2006 Strategic Report after issue of the specific discovery summons. Provision of this document and the related correspondence prior to its production led the defendant to argue that an unless order dated 5 th May 2020 had been breached requiring the plaintiffs' answer to the defendant's counterclaim to be struck out. In the alternative, the defendants contended that the document the plaintiffs had provided, if I was not willing to strike out the plaintiffs' answer and counterclaim, meant that further discovery should be ordered.

Background

3. This is a very long running dispute which has been ongoing since 2013. It is not necessary to set out the full history of the proceedings in this judgment. Subject to the present application, this case is listed for trial in June of this year. 4. The overall issues in dispute were summarised succinctly by the Court of Appeal in its judgment reported at HRCKY v Hard Rock Limited & Anor

[2019] JCA 123 . At paragraph 21 the Court of Appeal explained the defendant's counterclaim (which is now the only dispute between the parties) as follows: - "21. Stripped of the inessentials, the Appellant's case now really amounts to this: (i) The Respondents fraudulently misrepresented the anticipated profits of the restaurant business. Had the

Appellant been aware of the true likely position, or indeed even of the risks having regard to the worldwide experience of Hard Rock Café franchises, it would never have entered the Franchise agreement in the first place. As a result, the loss which it has sustained extends to the investment made in a business it would never have entered. (ii) The unreasonable way in which the First Respondent responded to the requests made by the Appellant for changes in the standard operating business model which the First Respondent insisted upon was a breach of the implied duty of good faith under the contract itself. This caused or contributed to the losses sustained by the Appellant in the operation of its business. (iii) The termination of the business agreements by the Respondents was unlawful. (iv) There were various overpayments in any event made by the Appellant to the Second Respondent in respect of which damages are due." 5. The position of the plaintiffs was summarised at paragraph 22 as follows: - "22. The Respondents deny these claims. The misrepresentations are denied in fact, and it is also asserted that the Appellant cannot rely upon them, even if they were made, because one of the terms of the contract contains a 'whole contract' provision which excludes any liability for representations made before contract. Similarly, there was an express exclusion of liability in relation to any representations which had been made that a specific level of profit would be achieved. The Respondents rely upon the maxim that la convention fait la loi des parties and assert that these provisions in the Franchise agreement should be given full effect." 6. The relevant procedural history for the purposes of the defendant's strike out summons commences with my judgment dated 16 th December 2019 reported at Hard Rock Ltd and Anor v HRCKY

[2019] JRC 243 . That application sought an order that the plaintiffs comply with certain earlier discovery orders failing which the plaintiffs' answer to the defendant's counterclaim should be struck out. At paragraphs 5 and 6 of that judgment I explained the previous procedural history as follows: - "5. The procedural history to this dispute is complex. I have issued four previous judgments in this matter on Hard Rock Ltd and Hard Rock Café International (STP) Inc v HRCKY Ltd

[2013] JRC 244B (being a strike out and summary judgment application brought by the plaintiff); Hard Rock Ltd and Hard Rock Café International (STP) Inc v HRCKY Ltd

[2015] JRC 117 (dealing with an application to amend by the defendant); Hard Rock Ltd and Another v HRCKY Limited

[2016] JRC 129 (being an application by the defendant to adduce expert evidence in relation to franchise agreements) and Hard Rock Ltd and Another v HRCKY Limited

[2016] JRC 157 (being an application in relation to specific discovery brought by the defendant). 6. It is the latter judgment in relation to the defendant's specific discovery application that is most relevant to the present application before me. That judgment was appealed leading to a decision of Commissioner Birt on 21st November, 2016 for reasons set out in a judgment reported at Hard Rock Limited v HRCKY Limited

[2017] JRC 048 dated 24th March, 2017 where Commissioner Birt allowed an appeal by the defendant to extend the scope of discovery required by the plaintiffs. On 19th June, 2017 Deputy Bailiff Le Cocq (as he then was), further extended the discovery required from the plaintiffs. No judgment was produced in relation to this decision. I refer to the relevant parts of certain acts of court or judgments later in this judgment." 7. I then listed the relevant discovery orders made prior to December 2019 at paragraphs 9 to 11 as follows: - "9. The first relevant discovery order was made by me on 27th July, 2016 where the plaintiffs were ordered at paragraph 1(d) to disclose:- "any documents comprising or containing any profit summary for franchise cafes recording annual profits, whether by restaurant, or by sales of merchandise or both for the financial years 1998 to 2013 inclusive." 10. The act of court of 21st November, 2016 issued by Sir Michael Birt contained the following order at paragraph 1(b):- "The following documents prepared for each of the financial periods from 1998 to 2004 and 2011 to 2013 inclusive (in the form appearing at or materially similar to documents 445, 447, 453, 454 and 457 of the Defendant's List of Documents served on the 24th September, 2015): (i) Hard Rock Café - Active Units- Cafes Restaurant Only Summary (ii) Hard Rock Café - Active Units - Cafes Restaurant EBIT (%) (iii) Hard Rock Café - Active Units - Cafes Restaurant + Merchandise Summary (iv) Hard Rock Café - Active Units - Cafés Industry Benchmark Comparison." 11. The act of court of Deputy Bailiff Le Cocq on 19th June, 2017 at paragraph (i) and (ii) stated as follows:- "(i) the Plaintiffs shall give discovery of documents by way of a supplementary list of documents to contain the same or similar information as contained in the profit summaries previously disclosed in the Plaintiffs' discovery pursuant to the Acts of Court dated the 27th July, 2016, and the 21st November, 2016, for the corporate cafes for the years 1997 to 2004 inclusive, by 4 p.m. on the 4th July, 2017; (ii) the term 'documents' in paragraph (i) above shall not include documents comprising raw data but shall be documents that contain collated information and/or data."" 8. In relation to the order of Deputy Bailiff Le Cocq (as he then was) I stated at paragraph 40 the following: - "40. My construction of the order of the Deputy Bailiff Le Cocq is that what this required was that, if a document exists that contains any profit summary containing the same or similar information to that already disclosed about profitability of corporate cafes, then such a document is disclosable. It does not therefore matter what type of document contains the information. Rather the disclosure obligation is determined by what information about the profitability of corporate cafés is contained in a document. If a document contains information that is the same as or similar to information about such profitability already disclosed, then that document is disclosable." 9. Ultimately, I concluded for the reasons set out in the December judgment that documents existed or were likely to exist in relation to the profitability of the restaurant side of the business which were required to be disclosed by Sir Michael Birt and Deputy Bailiff Le Cocq and which had not been disclosed (see paragraph 55). I also concluded that such documents were clearly relevant to the issues as formulated by the Court of Appeal (see paragraph 56). 10. Finally, I refer to paragraph 62 which contained my decision to make an unless order requiring the plaintiffs to file an affidavit in compliance with the order of the Deputy Bailiff Le Cocq . Paragraph 1 of the Act

of Court of 16 th December 2019 therefore stated as follows: - "unless the Plaintiffs by Friday, 31st January, 2020 file an affidavit in compliance with the order of the Deputy Bailiff Le Cocq (as he then was) dated 19th June, 2017 then judgment on liability in respect of the Defendant's counterclaim will be automatically entered without further order..." 11. I next turn to the judgment of 5 th May 2020 reported at Hard Rock Limited and Anor v HRCKY Limited

[2020] JRC 079 because the strike out summons is based on a breach of paragraphs 9 and 10 of the Act of Court of 5 th May 2020 which followed on from the May 2020 judgment. The relevant provisions of the Act of Court are as follows: - "2. Notwithstanding paragraph 1 of this order, the Plaintiffs shall carry out further searches for any documents in its possession custody or power containing or referring to the probability of the corporate cafes of the Hard Rock Group for all or any part of the period 1997 to 2004 inclusive; 3. the searches to be carried out shall include the following:- a. any back-up tapes held by or for the Plaintiffs for all or any part of the period to be searched; b. any email accounts of Mr Leonard or Mr Beaudrault and Mr Goodwin; c. any email accounts of any individual who acted as an appointed officer of the First Plaintiff at any time during the period to be searched; d. all files containing records of any communications with auditors of the Plaintiffs during the period to be searched; 4. the Plaintiffs will further search email accounts already searched by the Plaintiffs for any documents containing or referring to the profitability of the corporate cafes of the Hard Rock Group for the period 1997 to 2004; 5. the searches shall be managed and supervised by Carey Olsen on behalf of the Plaintiffs 6. the Plaintiffs acting through Carey Olsen shall appoint an expert eDiscovery provider who shall use such artificial intelligence that provider considers is appropriate to enable the searches required by this order to be carried out as efficiently as possible; 7. by Friday, 26th June, 2020 the Plaintiffs shall provide an affidavit of discovery containing all information required by the schedule to Practice Direction 17/08 and shall further set out the nature of all searches carried out, what data has been made available to the eDiscovery provider to search and the methodology used by the eDiscovery provider in carrying out its searches; 8. the affidavit of discovery shall be sworn by an employee of Carey Olsen with responsibility for ensuring that the terms of this discovery order are complied with; 9. if the terms of this Act of Court are not complied with then judgment in default will be entered on the Defendant's counterclaim and the Plaintiff's answer to the counterclaim will be struck out automatically without further order; 10. if there is any dispute about whether or not there has been compliance with this Act of Court and the accompanying judgment and if the Court finds there has been material non-compliance then the Plaintiff's answer and counterclaim will be struck out..." 12. In terms of the reasoning leading to this Act of Court it is appropriate to refer to the following paragraphs of the May 2020 judgment. Firstly, for the reasons set out in paragraph 14, I concluded that the plaintiffs had not complied with the order of 16 th December 2019 for the following reasons: - "14. The starting point for my decision is whether or not my order of 16th December 2019 requiring compliance with Deputy Bailiff Le Cocq's order has been

complied with. In my view it has not for the following reasons:- (i) No enquiries were made of auditors until after the deadline for compliance had passed. (ii) There were no searches of any files held by the plaintiffs relating to communications with their auditors for relevant material. (iii) The letters written to PWC and Deloitte were sparse in explaining why the enquiry was being made. In particular there was no reference to the accounts of the Rank Group for the year 1998. (iv) Just writing to the auditors without searching for any internal files was too narrow a construction of both Deputy Bailiff Le Cocq's order and my order. (v) Enquiries were not made of KPMG who appeared to be the auditors of relevant entities within the Hard Rock Group at the relevant time. (vi) While board minutes were reviewed, no searches were made of any email accounts held in the names of appointed officers. Discovery is an ongoing obligation and so identification of these individuals should have led to searches of any email accounts held for them. Simply writing to them after the event for documents they have retained does not excuse the obligation to search any email accounts held by or for the plaintiffs for such individuals. (vii) Enquiries were made for documents held by officers of the second plaintiff; however, it is not clear why, given that the counterclaim for misrepresentation concerns the agreement with the first plaintiff. This appears to be trying to be seen to make enquiries to demonstrate compliance, but they were after the event and ultimately were irrelevant. (viii) What back up tapes are held has not been clearly explained. (ix) Nor has any description been provided of what further searches whether physical or electronic were carried out to comply with the Deputy Bailiff's order. (x) Nor has there been any statement from Carey Olsen that they are satisfied that the plaintiffs have met their discovery obligations either in relation to the Deputy Bailiff's order or my last order or generally." 13. At paragraph 16 of the said judgment, I reminded the plaintiffs what was required in terms of discovery of any profit summaries and stated the following: - "16. In paragraph 40 of my judgment of 16th December 2019, I made it clear that if any document contained any profit summary that contained the same or similar information to that order disclosed about profitability of corporate companies within such a document, it was disclosable. I also emphasised that it did not matter what type of document contained information. Rather I spelt out the discovery obligation was determined by what information about the profitability of corporate cafes a document contained not the type of document." 14. I also rejected the approach taken by the plaintiffs up to that point in time for the reasons set out in paragraph 17 and 20 as follows: - "17. In light of this clear guidance, the narrow construction and approach taken by the plaintiffs is not justified. Firstly, the affidavits filed for the present application primarily focused on the argument I rejected namely, that profit summaries were not produced prior to 2005. This was contrary to the ruling at paragraph 53 of my previous judgment, which has not been appealed. 20. This email supports the conclusions I had previously reached summarised at paragraph 53 of my earlier judgment. Those conclusions, the evidence of Mr. Leonard, Mr. Beaudrault and Mr. Goodwin further mean that the plaintiffs' approach in adopting a narrow construction of my previous order and that of Deputy Bailiff Le Cocq was not justified. It is simply plain that documents existed within the Hard Rock Group in the late 1990's analysing the

profitability of the corporate cafes only." 15. In respect of the theme of disclosing documents relevant to profitability I returned to this in paragraph 22 and 23 when I stated the following: - "22. I have already observed that the plaintiffs have not explained what searches they have carried out since my order of 16th December 2019. The submission referred to in the paragraph above also ignores paragraph 40 of my last judgment which made it clear that a document was discoverable if it contained information about profitability. What I therefore required was discovery of any document that contained such information. I should add that the order of 19th June, 2017, of Deputy Bailiff Le Cocq also required discovery of any documents that contained (my emphasis) the same or similar information to that contained in profit summaries already discovered. 23. The plaintiffs' error in its approach to whether or not it had complied with these orders was to focus on looking for profit summaries alone not for documents that contained information about profitability about the restaurant side of the business. Such documents could include letters, emails, memos, minutes of meetings, or reports. Yet these have not been looked for since my order of 16th December 2019 because of the narrow construction taken and the repetition of arguments already rejected." 16. My final conclusion on the question of profitability was set out at paragraphs 33 and 34 as follows: - "33. This response means that it is also clear that there have been no searches for documents relating to the profitability side of the restaurant side of the business only. Mr. Doyle expressly raised this in his thirteenth affidavit at paragraph 38 and no evidence was filed in response. Yet I have found both in this judgment and in my previous judgment that analysis of the profitability of the restaurant side of the corporate cafes was taking place in the 1990's within the Hard Rock Group as referred to above. It does not matter whether any analysis was produced using different software/analysis packages no longer used by the Hard Rock group such as Lotus notes, Excel, or the Lawson package. What matters is not that different packages were used but that any such analysis of the profitability of the restaurant side of the business only may have been saved or referred to in backed-up documents including in emails referring to any such analysis. 34. The above failings are clearly serious because, as noted in Powell at paragraph 69, discovery is a fundamental obligation in Jersey's legal system (as in many other legal systems where an adversarial approach is used) because documentation in most cases forms a key part of the evidence before a trial court. In my judgment that is particularly so in the present case in relation to the defendant's allegation that Mr. Doyle was deliberately misled about the profitability of the restaurant side only of the plaintiffs' businesses and that had he known the true position, the defendant would not have entered into any agreement with the plaintiffs." 17. Finally, I concluded that there was no good reason for the breach; in determining what was an appropriate sanction I stated the following at paragraph 38: - "38. There is serious force to these criticisms. However, Advocate Garrood reminded me, correctly in my view, that this is a case where significant damages are sought based on allegations of fraudulent misrepresentation and a lack of good faith. Unless it is absolutely plain that a party will not comply with its obligations of discovery or comply with other procedural orders, I agree with Advocate Garrood a trial is the best place for allegations of fraudulent

misrepresentation and a lack of good faith to be resolved, rather than a judgment in default being entered. I have therefore been persuaded, albeit only just, that the plaintiffs should be granted one final opportunity to ensure that relevant documents are produced. I cannot emphasize strongly enough however that this is the final opportunity for the plaintiffs." 18. I also spelt out what steps the plaintiffs were required to take at paragraphs 39 and 40 as follows:- "39. In relation to what steps the plaintiffs should take, I am going to spell these out because I have been invited to do so by the plaintiffs in Advocate Garrood's skeleton argument. However, this is not the approach that should usually be taken. Normally it is for parties themselves to determine how to approach discovery with the Court only resolving areas of disagreement. They are best placed to know where documents are stored and what would be a proportionate approach. 40. The steps to be taken are as follows:- (i) The discovery process from now on must be managed by Carey Olsen who will take the lead in its searching for relevant documents. (ii) In terms of what is relevant, so that there is no dispute about what is to be provided, the plaintiffs must look for any documents relating to the issue of the profitability of the corporate cafes only in their possession, custody or power for the years 1997 to 2004. (iii) Any searches must cover any appointed officer, files containing communications between the Hard Rock Group and any auditors at any relevant time, and any documents to or from Mr. Leonard, Mr. Beaudrault and Mr. Goodwin and any back up tapes. (iv) Email accounts previously searched will have to be re-reviewed for any documents relating to the issue of the profitability of the corporate cafes only in their possession, custody or power for the years 1997 to 2004. (v) The searches carried out must include electronic searches which will be carried out by independent e-discovery provider appointed by Carey Olsen on behalf of the plaintiffs. (vi) Appropriate artificial intelligence tools should be used to search for documents. (vii) The affidavit of discovery must contain all the information required by Schedule 1 of Practice Direction RC17/08. This information should also be provided to the e-discovery provider." 19. The unless order was maintained at paragraph 42 but subject to the following qualification at paragraph 43 as follows: - "43. If there is any dispute about whether or not there has been compliance and if the court finds there has not been material compliance, then the plaintiffs' answer and counterclaim will be struck out. In other words no further relief from sanction for any material breach will granted." 20. The next relevant judgment is that dated 1 st September 2020 reported at Hard Rock Limited and Anor v HRCKY Limited

[2020] JRC 173 where I granted an application for an extension of time by the plaintiffs to comply with parts of the discovery orders that I had made on 5th May 2020. The material paragraphs are as follows: - "9. The present application was supported by an affidavit from Julie Katherine Keir sworn on 23rd July 2020. Exhibited to her affidavit were two affidavits sworn by Advocate Jeremy Garrood both dated 3rd July 2020. The first affidavit in summary explained what steps had been taken by the plaintiffs to comply with the Act of Court of 5th May 2020 and exhibited a sixth supplemental list of documents. The second affidavit dealt with unidentified categories of documents that used to exist or no longer

existed. The sixth supplemental list of documents contained 49 hard copy documents and an eDisclosure list of 11,446 electronic documents. 15. He (Advocate Holden) emphasised that the order of 5th May was very broad and required the plaintiffs to search for any documents relating to the profitability of the corporate cafés. This order went further than the previous orders made by Deputy Bailiff Le Cocq (as he then was) and Commissioner Birt. 23. Advocate Moran also suggested that the searches had been for too narrow a period because they simply focused on the period 1997 to 2004 whereas the order required discovery of any documents relating to this period and therefore the actual timeframes searched should have been wider in particular to catch documents created after 2004 relating to the profitability of the corporate cafés in 2004. 33. As a starting point I agree with Advocate Holden that it is appropriate to look at the Act of Court of 5th May 2020. The key part of that is paragraph 2 which requires disclosure of any documents containing or referring to the profitability of the corporate cafés of the Hard Rock Group as a whole . [Emphasis Added] 34. I accept that this order was wider than the orders previously made by Deputy Bailiff Le Cocq and Sir Michael Birt but that was as a result of the narrow approach to construction of those orders taken by the plaintiffs which I found was in error and because I was invited to set out what the plaintiffs should look for. 35. What the focus of that order was trying to capture was any analysis or consideration by the directing minds of the plaintiffs of the profitability of corporate cafés being run by the Hard Rock Group and therefore to ascertain what information was known to the first plaintiff when entering into franchise agreements . [Emphasis Added] 21. In paragraph 39 I summarised whether or not there had been material compliance with the Act of Court of 5 th May 2020 and noted the following: - "... (i) Email accounts already searched have been searched again (paragraph 4) (ii) The searches have been managed and supervised by Carey Olsen (paragraph 5). (iii) An eDiscovery provider has been appointed (iv) The eDiscovery provider intends to use artificial intelligence (paragraph 6). (v) The first affidavit of Advocate Garrood also complies with paragraph 7 and 8. (vi) More detailed enquiries of auditors and Rank have been made as have enquiries of former officers." 22. My conclusions were recorded at paragraphs 56 to 59 as follows: - "56. The conclusion I have reached is that although physical searches should have been carried out, unless prevented by COVID, and the failure to do so on the evidence before me is a breach of the order of 5th May, I do not regard this alone as a material breach having regard to the intended focus of the order of 5th May. The aim of that order as set out above was to get the plaintiff to focus on looking for documents relating to the profitability of corporate cafés as a whole. In my judgment the order of 5th May has produced a change in approach since previous applications. What is now described is a focus which did not exist previously. 57. Some of the defendant's criticisms of the plaintiffs are that the plaintiffs have gone too far and, while there is some force to that criticism, it is not a basis to conclude that a material breach has occurred justifying judgment being entered and the answer to the defendant's counterclaim being struck out. 58. Mistakes have also been made in particular in relation to disclosing irrelevant material, but this is again not a basis to strike out an answer to a counterclaim. Rather the just way to proceed is to require the plaintiffs to revisit the sixth

supplemental list of documents to ensure that the correct date for the creation of each document is inserted (not when they were uploaded onto the discovery platform), and to ensure relevant meta data is attached and to review the documents listed so far for relevance. 59. Even taking all these matters together I do not consider they amount to a material breach when set against what has occurred and how far there has been compliance. In particular, the plaintiffs are now looking through significant quantities data when in May I was told that such data did not exist. This is a sea change in approach which means that entering judgment is not justified. The mistakes are also all capable of correction or compensation by appropriate costs orders ." [Emphasis Added] 23. My overall conclusion was found in paragraph 62 as follows: - "62. The plaintiffs are carrying out significant tasks, they have obtained tapes, analysed the most relevant of those tapes and have started the process of using artificial intelligence to identify relevant documents coupled with search terms. A manual review is also proposed. The work to-date and the proposed steps to be taken justify an extension of time being granted. The plaintiffs have not breached the order in respect of searching back-up tapes. The criticisms I have made in respect of not carrying out physical searches are not a justification to refuse an extension of time to continue to search back-up tapes given the approach now being taken. The plaintiffs are now doing what they should have done many years ago. I therefore have concluded that the plaintiffs should be permitted to continue their current approach and it is important that they do so." 24. Subsequent to the September 2020 judgment an affidavit was filed by Advocate Pallot sworn on 30 th September 2020. That affidavit runs to 56 paragraphs, and it contains a detailed explanation of the approach taken by the plaintiffs to discovery following on from the order of 5 th May 2020. The affidavit also exhibited appendices running to some 14 pages containing information about the tapes searched. For the purposes of this judgment, I refer to the following paragraphs of the affidavit: - "7. In view of the wide search parameters, the size of the Hard Rock Group itself and the number of corporate cafés that existed during the period 1997 to 2004 inclusive, this was a substantial undertaking, particularly in view of the time frame within which discovery had to be given. Material had to be extracted and reviewed from a number of different sources including Hard Rock's current database, the back-up tapes, an e-room that was in use by Hard Rock back in 2014/2015 and Carey Olsen's document management system ("DMS"). In addition to this a physical search of Hard Rock's offices in Florida had to be conducted during a period in which the much of the world was in lockdown due to the Coronavirus pandemic.

8. Discovery of documents obtained from Hard Rock's current database following the application of 93 search terms to the documents, together with all relevant documents from Carey Olsen's DMS, were provided on 3 July 2020 pursuant to the Act of Court to the best of Hard Rock's ability at the time and as set out in Advocate Garrood's affidavit of 3 July 2020, the contents of which I shall not repeat. However, in short, due to the technical difficulties arising from the restoration of the back-up tapes containing 1.8 to 2.5 million documents, dating back to 1997, which contained documentation created on software that is no longer in

use, disclosure of the back-up tape documentation was not possible by 3 July 2020. In addition, a physical search of Hard Rock's head offices had not been conducted due to Coronavirus restrictions in place at the time preventing access to the building. Despite requests for it to do so and notwithstanding previous confirmations provided for the Defendant, unfortunately and ultimately the Defendant was not prepared to consent to Hard Rock's request for an extension of time and consequently, Hard Rock issued a Summons for an extension of time.

17. Nevertheless, Hard Rock have made extensive efforts in relation to this discovery exercise. It has been a substantial and complex process that they have undertaken and that has been undertaken on their behalf. The scale of the task is apparent from the fact that the total pool of documents from the back up tapes that had search terms applied to them prior to uploading on to Relativity for review was in the region of 1.8m plus 265,333 from Hard Rock's current system. The Schedule 1 Lists run to 1,140 pages and contain 15,705 documents (including not responsive children of disclosed parent documents but excluding all those listed in List 1.2 (see below)). It contains emails from over 481 different .pst files (481 from the back up tapes) plus 5 ZIP files from the Hard Rock's current systems (a list of which can be found at appendix 2 of MLAP1), As set out in paragraph 14 of Julie Keir's affidavit of 23 July 2020, approximately 1,200 .pst files containing mainly emails were uploaded onto Relativity and search terms applied. Of the c.1,200 .pst files only 481 were deemed to contain potentially relevant documentation for review following the application of search terms.
18. As a guide to the size of the task, and the way in which it has devoured time and resources, since 1 September 2020, Consilio has had a team of 40 reviewers at first level working full time, including weekends and overtime, together with a team of 7 quality control reviewers (with further quality control reviewers being drafted in on or about 17 September) also working weekends and overtime in order to review the volume of documents in the extremely short time frame within which the exercise has had to be completed. This has equated to 3,706 review hours at a cost of £345,221.25 and I note these costs exclude the costs associated with the production of the documents and corresponding lists. In addition to this, Carey Olsen had had a team of 9 reviewers (including myself and my colleague Julie Keir) who have also worked weekends and overtime to complete the discovery exercise. Carey Olsen has incurred more than 510 of fee earner hours during September at a cost of a little in excess of £155,000." Correspondence leading to the present application 25. Finally, it is appropriate to refer to certain correspondence that led to the present application. This correspondence started after issue of the specific discovery summons on 8 th November 2021. 26. On 11 th November 2021 Carey Olsen therefore wrote to Advocate Jones. Paragraph 2 contained the following statement: - "2. For the reasons addressed below, we do not consider that the Strategic Report is relevant to any of the issues in dispute between the parties. Nevertheless, in order to avoid unnecessary costs and delay, we propose below a method by which our client is prepared to give discovery of the Strategic Report." 27. Paragraph 6 of the letter contained the following: - "The Strategic Report, created seven

years after the conclusion of the franchise agreement, is not a contemporaneous document and we do not see how it can be relevant to the state of mind of the negotiating parties at the material time." 28. At paragraph 10 the letter also set out that the strategic report was highly confidential and therefore enclosed a proposed confidentiality agreement for the report to be provided to Advocate Jones on a lawyer only basis. 29. Advocate Jones responded by a letter dated 10 th December 2021 observing firstly that if the plaintiffs conceded that the strategic report was relevant and that would place them in breach of existing discovery obligations. Advocate Jones suggested this breach " would seem to be the sixth time since 2017". 30. He then set out why the strategic report was relevant having referred to the decision of Commissioner Birt reported at Hard Rock Limited and Anor v HRCKY

[2017] JRC 048 (referred to in the December 2019 judgment). Advocate Jones therefore stated in his letter as follows: - "By contrast the Report is but one document and its disclosure could never be described as an onerous exercise. For the same reasons as set out by Commissioner Birt the Report should be disclosed. Indeed, it should have been disclosed many years ago. In light of the analysis performed by Commissioner Birt it is astonishing that your clients have made the positive decision not to disclose the Report." 31. On 15 th December 2021 Carey Olsen replied maintaining that the strategic report was not relevant but enclosing a copy on the basis of the implied undertaking as a matter of pragmatism while reserving the right to make submissions at trial as to the irrelevance of the strategic report. 32. In response to this letter, Advocate Jones issued the strike out summons. In his email to the court seeking a date fix (but not in his summons) as an alternative he also sought the following: - "... in the event that the Court is not prepared to grant that relief my client seeks a further order that the Plaintiffs disclose the source material along with other related documentation (such as correspondence, board minutes etc.) in relation to the Report in so far as such material relates to the profitability (or lack thereof) of the restaurant side of the business for the period 1997-2004 and was relied on in the production and finalisation of the Report." Submissions for the defendant 33. In support of the strike out summons Advocate Jones for the defendant made the following written and oral submissions. 34. Paragraph 2 of the Act of Court of 5 th May 2020 was wide and meant that, if profitability of the corporate cafes for the relevant period was referred to in any document, that document had to be disclosed because it at least gave rise to a train of enquiry and therefore met the relevant test for discovery. 35. Paragraph 2 of the order was clear on its face and was not ambiguous. 36. Paragraph 9 of the order was the sanction for non-compliance with paragraph 2. 37. The decision in May 2020 was giving the plaintiffs a very final chance to remain in the litigation. They were allowed that final chance by the 'skin of their teeth' . A failure to provide discovery in breach of the 5 th May order therefore meant that the strike out would follow as an automatic consequence. 38. Advocate Jones described paragraph 10 of the 5 th May order as a curious provision but accepted that omission of one single document might not lead out to a strike out. In this case however the plaintiffs' decision not to disclose until December 2021 what it described as the strategic report was a deliberate decision not to produce a clearly relevant

document. There was no affidavit explaining why the document produced has not been disclosed in compliance with the 5th May order or indeed much earlier. 39. In relation to what was provided, Advocate Jones complained that he still did not have the complete document or the full story. There was no explanation about how this PowerPoint became to be produced. The information in the PowerPoint must also have drawn on other material or raw data but that had not been disclosed. The plaintiffs had not explained what documentation was used to feed into this document. 40. The raw data was relevant to both what the plaintiffs knew in 1998 in relation to the fraudulent misrepresentation argument and also in relation to the argument based on breach of an implied term of good faith. 41. What was described in Advocate Pallot's affidavit and the affidavits referred to in the September 2020 judgment was no answer to the present application or the failure to explain why what had now been produced had not been produced much earlier. 42. If the court concluded that the strategic report was disclosable, then everything that referred to profitability which flowed into that report was also disclosable. The onus was on the plaintiffs to explain the position, but they had not done so. 43. The argument that no weight should be attached to what had been produced because it was only created or produced in 2006 and therefore was inadmissible was a matter for trial. The document clearly met the test of relevance for discovery purposes. 44. The document disclosed by Carey Olsen was a PowerPoint presentation. Advocate Jones described this document as an incomplete strategic report. He also went through the report in detail highlighting where it referred to the profitability of corporate cafés. There appeared to be about around 18 separate references in one way another to the profitability of corporate cafés between 1997 and 2004. What had been disclosed was therefore obviously relevant irrespective of any discovery orders focusing on particular topics. 45. An earlier draft report contained a slide headed Hard Rock Profit Trends which showed losses from the period 2003; 2004 to 2006 and 2007 as well as figures showing the total trading profit when restaurant trading losses were combined with merchandise trading profit. A later draft slide at page 60 included this statement: - "average unit restaurant sales must be moved beyond the breakeven point and achieve stand-alone profitability" 46. This earlier draft had been found by Mr Doyle who had disclosed the same. However, neither this draft nor the final version of the strategic report or the PowerPoint slides produced by Carey Olsen had been disclosed previously. 47. Advocate Jones then contended that what he described as the strategic report had not been disclosed. He contended that this document was different from the PowerPoint version that had been disclosed. In support of this submission, he relied on the material contained in the 18th affidavit of Mr. Doyle which in summary contended that Mr. Dodds had referred to such a strategic report both in his witness statement for the present proceedings and in an earlier deposition in certain proceedings in the United States. 48. The existence of a strategic report was also supported by reference in a memorandum issued by Merrill Lynch in 2006 to prospective purchasers of the Hard Rock business which contained references to the strategic report which memorandum stated at paragraph 7.1.1 : - "The financial projections have been extracted from Hard Rock's strategic plan. Financial information as of 2006 reflects actual results through to June 30

and projections for the balance of year." 49. Mr Michael Kneidinger who oversaw Hard Rock Cafés and franchise in the early 1990s to 2013 in his deposition in the United States also confirmed that there was a strategic planning document. 50. Advocate Jones therefore argued that the suggestion that the strategic report was the PowerPoint that had been disclosed did not make sense. The disclosure of the PowerPoint presentation had also not been explained on affidavit and therefore there was no confirmation which the court could rely on that the PowerPoint presentation was the strategic plan. 51. In relation to the relevant legal principles where an order had been breached the approach to take had been determined by me in *Newman v De Lima*

[2018] JRC 155 which had been approved by the Royal Court in *Sheyko v Consolidated Minerals Limited*

[2021] JRC 267 at paragraphs 104 to 108. 52. Advocate Jones also emphasized the decision in *Huda v Minister for Health & Social Services*

[2021] JRC 196 where Bailiff Le Cocq struck out on an appeal the defendant's answer because the defendant had been in breach of an unless order. At paragraph 26 of *Huda* the Bailiff cited the words of Commissioner Birt in *Leeds United Football Club v Admatch*

[2011] JRC 016A as follows: - "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." 53. This led to the Bailiff's conclusions at paragraphs 51 to 53 as follows: - "51. It is difficult given that the Master in the Judgment relied on *Admatch*, not to conclude that whereas the Master addressed the question of whether or not the Defendant was failing to engage with the trial process on an equal footing he did not engage with whether there had been a flouting or disregard of the Orders of the Court. Had he asked himself that question, he would in my judgment inevitably have concluded that there had been. 52. On the one hand there is the risk of prejudice to a party who may otherwise have benefitted from a proper compliance with the Order of the Court and on the other hand, the prejudice to another party who if the answer is struck out the Judgment will be entered on a factual basis which remains disputed. The fact that giving a judgment does not amount to either an acceptance by the Defendant of the factual basis of the claim still less than any finding by the Court to that effect, the record would, however, reflect that judgment had been taken. 53. It is always uncomfortable for a judge to strike a case out other than in the plain circumstances where it is without merit. However, orders of the Court are to be followed and in my judgment a breach of an unless order (which is already an extremely serious order and should have placed the Defendant on the highest possible alert to comply with it) which may have prejudiced the party who, in terms of the breach of the order, is the innocent party must it seems to me other than in the most exceptional circumstances be met with the natural

consequences of that breach - namely that the pleading is struck out." 54. As he had in Huda , Advocate Jones therefore posed the question what was the point of an unless order if the court subsequently gave relief from sanction where that unless order had not been complied with. 55. Advocate Jones accepted I had a discretion which included striking out part of a claim rather than the whole claim, but he re-emphasised that this was a deliberate non-disclosure that had occurred for many years which justified the answer to the defendant's counterclaim being struck out on liability. Submissions for the plaintiffs 56. Advocate Holden made the following submissions. 57. His client's position was that they were not in breach of the unless order granted in May 2020 which was the application made by the defendant in their strike out summons. 58. In support of this position, he took me through my decision of 1st September 2020 including the submission by the defendant at paragraph 23 that a wider search period should be applied. Advocate Holden therefore argued that this submission was implicitly rejected in my conclusions at paragraph 62 because I had granted the extension of time. 59. In respect of the order 5 th May 2020 he argued that this only covered documents in respect of the period 1997 to 2004 and emphasised the various reference to periods to be searched in paragraph 3 and 4 of that order. 60. Why this was relevant was that the PowerPoint disclosed was outside this period, and as a consequence the unless order could not apply to a document that did not fall within the terms of the order of the 5 th May 2020. At the very least the order 5 th May 2020 was ambiguous and therefore an unless order should not take effect in respect of an ambiguous order. 61. Advocate Holden accepted that the PowerPoint that had been disclosed was a relevant document but that did not affect his submission that there had been no breach of the unless order granted by the Act of Court of the 5 th May 2020. 62. He also criticised the application because initially the defendant had applied for discovery of the strategic report which had been provided. Despite the report having been disclosed, the defendant still sought to issue its strike out summons. 63. He also observed that the defendant had not brought any other application for specific discovery and had not otherwise challenged the affidavits filed for the September hearing 2020 and the affidavit of Advocate Pallot. This was notwithstanding paragraph 5 of the Act of Court 4 th October 2021 requiring any application for specific discovery by any party to be issued supported by an affidavit within 28 days of that order. The only application issued was the specific discovery summons seeking disclosure of the strategic report. This meant that the plaintiffs' approach to discovery following the May 2020 order had not otherwise been challenged and it was now too late to do so. 64. In relation to the PowerPoint itself, Advocate Holden's position was that the PowerPoint was the strategic report. He accepted that a further supplemental affidavit had not been produced which confirmed the plaintiffs' position. He argued this was because the specific discovery summons had been overtaken by the strike out summons. 65. The defendant's contentions that there was a report over and above the PowerPoint presentation were a matter of inference or submission only. 66. While neither the discovery summons nor the strike out summons sought any other discovery, Advocate Holden accepted that in exercising the discretion under Newman v De Lima , I could order further documents or an affidavit to be provided.

67. In relation to what had been disclosed, Advocate Holden emphasised that this had occurred voluntarily following the issue of the initial summons. The plaintiffs had therefore responded quickly to the specific discovery summons. 68. In relation to the depositions relied on by the defendant Advocate Holden contended that what had been put Mr Dodds and Mr Kneidinger was the PowerPoint that had been disclosed. He accepted however that paragraph 55 of Mr Dodds' witness statement for these proceedings which stated "the ISR is a draft. Once in final form, portions of the ISR became incorporated into hard rock's 2006 strategic plan" was not clear. 69. If I was minded to order more searches, Advocate Holden requested that any such searches were proportionate. The context of ordering any further searches was the very extensive discovery exercise carried out between May and September 2020 as described ultimately in the affidavit of Advocate Pallot. He emphasised the number of documents that had been searched as set out at paragraph 17 and 18 of Advocate Pallot's affidavit. Submissions in reply 70. Advocate Jones in reply contended that the plaintiffs' approach was artificial because what the plaintiffs were contending was that they had complied with the letter of the unless order contained in the Act of Court of 5 th May 2020 but they had clearly not met the spirit of that order because the strategic report as was now accepted was relevant to the issues in dispute. 71. The 5 th May order followed on from a cascade of discovery orders which had not been met. 72. What had occurred here was a positive decision not to disclose the document that had finally been disclosed. That document would have been disclosed if the plaintiffs had followed the terms of the order in particular paragraph 2 which was clear. Profitability was a core issue and until the hearing itself the plaintiffs had maintained that the strategic report was not relevant, albeit they had provided a copy. 73. Any other documents upon which the report was based relating to profitability therefore also had to be disclosed. 74. The acceptance that the document disclosed was relevant meant that the plaintiffs were also in breach of the 5 th May order or earlier orders because of the failure to disclose any underlying relevant material. The court could not be satisfied that the terms of the 5 th May order had been complied with because the non-disclosure of the strategic report, until a summons was issued, was not accidental. In view of this approach, it was open to the court to strike out the plaintiffs' answer to the counterclaim as a sanction. 75. The defendant's primary position was therefore that the plaintiffs' answer should be struck out because of this deliberate non-compliance. As a fall-back the position in respect of the strategic report should be clarified and whether this was the PowerPoint or some other document as well as an order requiring discovery of any underlying documents referring to profitability. It was not for the defendant to identify what those documents might be because the plaintiffs should know what the supporting materials were and it was for the plaintiffs to discharge their discovery obligations. 76. It was wrong to give the plaintiffs the benefit of the doubt when there was no basis to have refused disclosure of the PowerPoint. The plaintiffs were not entitled to any further indulgence because the decision not to produce the report was deliberate and there was no explanation as to why it had not been disclosed earlier. The plaintiffs had not come close to getting discovery right. 77. The failure to provide this report was also a breach of the Deputy Bailiff's order and the

December 2019 order. Decision 78. The starting point for my decision is that the PowerPoint disclosed by the plaintiffs on 15 th December 2021 is clearly a relevant document having regard to the summary of issues as described by the Court of Appeal referred to above. This is because the document refers to the profitability of the corporate cafés between 1997 and 2004 in numerous places as referred to by Advocate Jones. Advocate Holden was therefore entirely correct not to seek to persuade me that the PowerPoint presentation was not a relevant document. As I put to him in argument it was plain as a pikestaff that it was relevant. 79. The argument that the PowerPoint was only created in 2006 was not a reason not to disclose the document. The PowerPoint presentation was always at least a train of enquiry document as to whether what was expressed in 2006 was known to the directing minds of Hard Rock and those granting franchises or dealing with requests to vary franchise terms between 1997 and 2004. The train of enquiry would lead to whether there was any underlying data created prior to 2006 which had led to the conclusions in the PowerPoint. 80. The argument that the PowerPoint presentation in 2006 did not show the knowledge of key individuals who were in Hard Rock Group in 1998 was also a matter for trial but was not determinative of whether or not a document was relevant. 81. The plaintiffs' approach until releasing the PowerPoint in December 2021 was effectively the same argument that I had rejected in my judgment in 16 th December 2019. At paragraph 43 I stated the following: - "43. What neither he nor Miss Roby do not state in any affidavits is that profit summaries in relation to the restaurant only side of the business for corporate cafes were not produced in any format or were not produced at all. The affidavits of Mr Keegan are not therefore an answer to the defendant's criticisms and cannot be accepted as being conclusive evidence that the plaintiffs have met their discovery obligations." 82. The same argument was also rejected at paragraphs 16 and 17 of my 5 th May 2020 judgment. Paragraph 16 is set out above but I then went on at paragraph 17 as follows: - "17. In light of this clear guidance, the narrow construction and approach taken by the plaintiffs is not justified. Firstly, the affidavits filed for the present application primarily focused on the argument I rejected namely, that profit summaries were not produced prior to 2005. This was contrary to the ruling at paragraph 53 of my previous judgment, which has not been appealed." 83. It was therefore clear from my decisions in December 2019 and May 2020 that the PowerPoint and, if that is the strategic plan/report, was a disclosable document. 84. I also do not therefore accept the submission of Advocate Holden that paragraph 2 of the 5 th May 2020 judgment was unclear. Paragraph 40 of the December 2019 judgment repeated at paragraph 16 of the May 2020 judgment made it clear that any document containing any profit summary about profitability of corporate cafés within the period 1997 and 2004 was disclosable. 85. I should add that the plaintiffs were themselves of the same view because in making enquiries of various individuals as to whether they might have relevant documents in May 2020 Carey Olsen's letters contained the following "The Royal Court also ordered our clients to undertake searches of email accounts of all the appointed officers of the Hard Rock Limited for documents in its possession, custody or power containing or referring to the profitability of the corporate cafés of the Hard Rock Group or with any part of the

period of 1997 and 2004 inclusive". The letters also enquired whether individuals had any documents that related to "the profitability of the corporate cafés between 1997 and 2004 inclusive." 86. I accept in relation to paragraph 3 of the Act of Court of 5 th May 2020 that the plaintiffs have interpreted the references to period in that order to mean 1997 to 2004. That approach is entirely understandable in respect of the searches listed in paragraph 3 because defined periods were required. It does not however in my judgment mean that paragraph 2 is ambiguous. 87. In addition, the PowerPoint was disclosable in any event because it was referred to in Mr Dodds ' witness statement exchanged in 2017. The whole thrust of that statement was to contend that no inferences could be drawn from the PowerPoint. However, the fact that it had been referred to in the witness statement meant that it was disclosable for this reason alone, and the plaintiffs must have known this prior to the date Mr Dodd's witness statement was produced i.e. for at least 4 years. Otherwise, what was the point of a witness statement contending that a document was not relevant if that document was not going to be produced? 88. Applying the test in *Newman v De Lima* which both counsel agreed was the appropriate test, I am therefore satisfied that the first question I have to ask, namely whether previous orders for discovery in particular paragraph 2 of the 5 th May 2020 order have been breached, is to be answered in the affirmative for the reasons set out above. 89. The second question is whether those breaches are serious. No evidence has been adduced by the plaintiffs in relation to this part of the test (or indeed at all) and no supplemental affidavit of discovery has been filed disclosing the PowerPoint report or explaining why it was only disclosed at the end of December 2021. The only correspondence produced is that referred to above which asserts that the report was not relevant, which Advocate Holden did not maintain (rightly) and which I have not accepted for the reasons set out above. I also do not see how a report that is referred to in a witness statement to be relied upon at trial has not been disclosed due to some form of accidental mistake or some oversight. The judgments in December 2019 and May 2020 were also clear. The plaintiffs must therefore have known by reading those judgments that the PowerPoint was discoverable. I have therefore concluded that the failure not to produce the PowerPoint that has now been disclosed was not accidental or an oversight but was a conscious or deliberate decision. The failure to disclose is therefore clearly a serious breach. 90. Turning now to the third limb of *Newman v De Lima* I have to consider what sanction should be applied in light of my conclusions on the first two limbs above including whether the unless order should take effect. Returning to Admatch and the quotation at paragraph 26 of Huda , not to disclose a document for four years referred to in a witness statement, for a party not to produce a document until two years after the December 2019 judgment making clear what was relevant and eighteen months after the May 2020 judgment which confirmed the December judgment, is an abuse of process. It is also flouting or ignoring orders of the court. 91. The question I have to ask myself however looking at the full quotation from Admatch is whether this abuse of process and a flouting of court orders renders further proceedings unsatisfactory or prevents the court from doing justice or whether the plaintiffs have conducted themselves in such a way that evidences an unwillingness to engage in the litigation process on an equal footing with

other parties. 92. This requires what has occurred to be put in context. The focus of the order made in May 2020 was to set out how the plaintiffs should discharge their discovery obligations having failed to do so previously (see paragraph 40). As I noted in the September 2020 judgment the plaintiffs had carried out the steps, I required them to carry out. It is clear from the affidavits filed subsequent to May 2020, in particular the affidavit of Advocate Pallot, that a very significant exercise was carried out in respect of the searches that I required. In the September 2020 judgment I described the plaintiffs as having undergone something of a 'sea change' in approach. The approach I described in that judgment, and as set out in Advocate Pallot's affidavit, does show a willingness to engage in the litigation process on an equal footing. The plaintiffs have spent significant sums on reviewing back-up tapes, engaging an e-discovery provider and searching or researching for documents in the manner I had required, which were steps they had not previously carried out. Other than the application for one document, namely the strategic report, the defendant has also not otherwise challenged the approach taken by the plaintiffs. In light of the acceptance of the process followed, I do not need to determine whether the September judgment impliedly accepted the approach taken by the plaintiffs because I did not accede to Advocate Moran's submission to widen the scope of the searches to be carried out. 93. The other relevant matter to evaluate the context of the defendant's application and what has now been produced is that the PowerPoint is a development and expansion of an earlier document that was already in the defendant's possession. What has now been produced has not also advanced matters significantly compared to the earlier draft of the PowerPoint the defendant already had obtained. Battlelines have already been drawn in Mr Dodd's and Mr Kevin Doyle's witness statements about what inferences should be drawn from any strategic report created in 2006 about the knowledge of key executives between 1997 and 2004, and in particular in 1998. I also refer to my previous judgments where I have described other evidence which Mr Doyle relies upon about the knowledge of key executives in 1998. Prior to the present application what conclusions might be reached on this key question and this evidence was an issue that was only ever going to be resolved at trial. Although the PowerPoint disclosed contains more references to the profitability of the corporate cafes, it does not fundamentally alter the question of what inferences can be drawn about knowledge of key executives between 1997 and 2004 based on an analysis carried out in 2006. 94. The final relevant aspect to take into account is that ultimately the plaintiffs did produce the PowerPoint, they did not resist the discovery summons and disclosed the PowerPoint voluntarily without a court hearing. 95. While therefore failure to produce the document until December 2021 in my judgment was an abuse of process and was a flouting of a court order, I have concluded, now that the PowerPoint has been produced and subject to the remaining parts of this judgment, that this breach of the December 2019 and May 2020 orders do not render further proceedings unsatisfactory, in particular the trial listed for June this year, or prevent the court from doing justice at that trial. I am also satisfied that the plaintiffs are now evidencing a willingness to engage in the litigation process because of the other steps that they have taken in respect of discovery which have not been challenged and because ultimately they

produced the PowerPoint without a court hearing. 96. In reaching this conclusion the focus of the May 2020 order was to carry out the searches I directed the plaintiffs to carry out. The plaintiffs complied with what I expected other than in respect of the PowerPoint. 97. This is also not a case like Huda or Sheyko where significant number of documents, for different reasons, had not been disclosed. 98. In relation to the question of what was intended by paragraph 10 of the Act of Court of 5 th May 2020, in my judgment the intention behind paragraph 10 was to recognise the discretion that a court always possesses to whether or not to give effect to an unless order. I regard this as consistent with Admatch which recognises the seriousness of striking out a case and what evaluation was required before doing so. Had that focus not occurred and had the plaintiffs not taken the steps they did to search for documents in the manner I required, then I have no doubt that their answer and counterclaim would have been struck out as the "natural consequence" (taking the Bailiff's words in Huda) of such a breach. The context I however faced in deciding the present application is that the plaintiffs have otherwise complied with the May 2020 order and judgment and have, save in respect of the PowerPoint, changed their approach. In my judgment these are both relevant and sufficient circumstances, as required by Huda , when set against a failure to produce one document, even though deliberate, not to strike out the plaintiffs' answer to the counterclaim. 99. This decision is however subject to the following conditions: - (i) Within 14 days the plaintiffs shall file an affidavit disclosing the PowerPoint and also disclosing any other strategic plan or strategic report or draft of the same created in 2006 which refers to the profitability of the corporate cafes, insofar as not already disclosed. (ii) If there is no other strategic report or plan created in 2006 the affidavit must make this clear. (iii) The plaintiffs also use their best endeavours to file a supplemental witness statement to clarify the ambiguity in Mr Dodds ' witness statement at paragraph 55 and whether Mr Dodds is referring to the PowerPoint or to some other document within 14 days; (iv) The plaintiffs shall further disclose any source material relied upon in relation to producing the PowerPoint or any strategic plans/reports for 2006 which refer to the profitability of the corporate cafés for 1997 to 2004, whenever any document forming part of that source material was created. Although neither summons asked for this discovery, I consider I can require discovery of the same as a condition of not striking out the plaintiffs' answer to the counterclaim. I am satisfied that such discovery should be searched for as part of a train of enquiry as any material relied upon to produce the strategic plan/PowerPoint referring to the profitability of the corporate cafes between 1997 and 2004 would clearly be relevant. As the focus is on what source material was relied upon in 2006, I do not regard making such enquiries as disproportionate; (v) This order does not require the plaintiffs to disclose any raw data held by the plaintiffs but only any source material relied upon to produce the PowerPoint/ strategic plan/report; (vi) The above steps shall be at the plaintiffs' own cost. 100. Finally, given that the failure to produce the PowerPoint was not accidental was an abuse of process and the flouting of a court order, the plaintiffs have brought this application upon themselves and it is fully understandable why the defendant asked for the answer to the counterclaim to be struck out. Although the application to strike out has been refused, the

justice of the case requires the court to express its displeasure about conduct that was a deliberate breach of court orders without any explanation or justification. The plaintiffs will therefore also to pay the costs of this application on an indemnity basis; the defendant should not be out of pocket for raising with the court a serious breach and for asking that I determine that the unless order had taken effect. Any other costs order would not be a fair reflection of what has occurred. Authorities HRCKY v Hard Rock Limited & Anor

[2019] JCA 123 . Hard Rock Ltd and Anor v HRCKY

[2019] JRC 243 . Hard Rock Limited and Anor v HRCKY Limited

[2020] JRC 079 . Hard Rock Limited and Anor v HRCKY Limited

[2020] JRC 173 . Hard Rock Limited and Anor v HRCKY

[2017] JRC 048 . Newman v De Lima

[2018] JRC 155 . Royal Court in Sheyko v Consolidated Minerals Limited

[2021] JRC 267. Huda v Minister for Health & Social Services

[2021] JRC 196 . Leeds United Football Club v Admatch

[2011] JRC 016A . Page Last Updated: 30 Mar 2022 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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