



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Neutral Citation Number: [2025] CIGC (FSD) 32

CAUSE NO: FSD 79 OF 2022 (DDJ)

**IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)
AND IN THE MATTER OF POSITION MOBILE LTD SEZC**

Before: The Hon. Justice David Doyle

Appearances: Michael Wingrave and Jack Stringer of Dentons for Technology
Investment Consortium LLC

Liam Faulkner and Lisa Yun of Campbells LLP for Genimous Investment
(Hong Kong) Co., Ltd and Genimous Holding (HK) Limited

Heard: 8 April 2025

Draft Judgment circulated: 14 April 2025

Judgment delivered: 17 April 2025

Discovery in winding-up proceedings – whether documents are in the “power” of the Respondents one of whom is the holding company of a subsidiary whose documents the Petitioner seeks disclosure of – relevant law and procedure – need to formulate specific discovery applications with precision and to provide the court with the evidence and relevant law in support

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Introduction

1. These proceedings have had a protracted and unsatisfactory history. I was surprised to see in the undated outline submissions of Technology Investment Consortium LLC (the “Petitioner”) filed on 3 April 2025 (the “Petitioner’s Outline Submissions”) that the Petitioner has “sought to reach trial as soon as reasonably possible” (paragraph 9).
2. The petition was dated as long ago as 1 April 2022, over 3 years ago now. It sought an order that Position Mobile Ltd SEZC (the “Company”) be wound up or in the alternative an order be made for the purchase of the Petitioner’s shares by other members or by the Company itself at a price to be agreed between the parties or in default of agreement to be determined by the Court. The respondents to the Petition are Genimous Investment (Hong Kong) Co., Ltd (“Genimous Investment HK”) and Genimous Holding (HK) Limited (the “Respondents”).
3. By consent order made as long ago as 11 October 2022 it was ordered that the parties agree categories of documents for disclosure by no later than 4pm on 18 November 2022 (paragraph 5) and exchange list of documents on Friday 2 December 2022 (paragraph 6) with requests for inspection of copies being made within 7 days after service of the list and responded to (through disclosure of the relevant documents) by 16 December 2022 (paragraph 7). By order made on 12 January 2023, those time periods were extended to 8 February, 15 March and 22 March 2023, respectively.
4. By judgment delivered on 31 October 2023, I dismissed a second application made by the Petitioner by way of summons filed on 3 August 2023 for the appointment of joint provisional liquidators in respect of the Company. The first attempt was made *ex parte*, and I declined to deal with it on an *ex parte* basis (see my judgment delivered on 7 April 2022). I dismissed the application at an *inter partes* hearing held on 14 April 2022. In my judgment, delivered on 31 October 2023 at paragraph 150, I expressed concern “over the Petitioner’s failure to promptly progress its winding up petition.” At paragraph 226, I stated that the Petitioner “would be well advised to focus its efforts and resources on progressing towards the hearing of the winding up petition rather than engaging on these or any more pre-hearing skirmishes.”

5. In my judgment delivered on 12 December 2023 refusing the Petitioner leave to appeal at paragraph 15, I reiterated what I had said at paragraph 226 of the judgment delivered on 31 October 2023.
6. It was not until 22 July 2024 that the Petitioner filed its summons for directions to trial.
7. By order made on 31 October 2024 (the “October 2024 Order”), certain previous orders were discharged, and insofar as discovery and inspection were concerned, the following orders were made:

“3. The parties are to provide discovery pursuant to O.24, r.3(1) of the Grand Court Rules by Friday, 24 January 2025. Discovery is to be undertaken as follows:

- (a) The parties will conduct a reasonable search for documents relating to any matter in question in the proceeding. The parties will use the Discovery Guide annexed as Schedule One in conducting their reasonable search for documents. However, the Discovery Guide does not narrow the parties’ discovery obligations or the test for relevancy applying at law.
- (b) The parties will conduct their search and list and exchange discovery documents in accordance with the Listing and Exchange Protocol (“Protocol”).
- (c) The parties’ list of documents will be verified by affidavit from a representative of the party in accordance with the Protocol. The verifying affidavit will be filed and served by Friday, 24 January 2025.
- (d) Inspection is to be completed by Friday, 21 February 2025.”

8. Schedule One to the October 2024 Order contained the agreed discovery categories. Footnote 1 stated, “This document is intended as a reference tool for the parties to assist with their discovery review. This document does not limit, expand or otherwise vary the parties’ discovery obligations, including the test for relevancy in *Compagnie Financiere du Pacifique v Peruvian Guano Co* 11 QBD 55”. At paragraph 7, the heading “Class of Documents” is specified as “Documents relating to the Company’s intellectual property” and at h) under the heading “Description” the following

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appears: “The Company’s source code repository as provided to Nick Ferrara”. There is no reference to the code repositories of East End Technologies Limited (“EET”) or indeed any other third party entities.

9. Schedule Two to the October 2024 Order contained the agreed “Discovery Listing and Exchange Protocol” (the “Protocol”). Paragraph B1 provided:

“The Parties agree that the Discovery Guide [which in the October 2024 Order is at paragraph 3(a) referred to as annexed as Schedule One and it is also made clear that “the Discovery Guide does not narrow the parties’ discovery obligations or the test for relevancy applying at law”] does not vary, limit or narrow the scope of their discovery obligations but is intended to guide the Parties in their search for discoverable documents.”

10. Paragraph B3 of the Protocol reads:

“The Parties agree that the search for discoverable documents will include a search of Electronic Devices and Electronic Accounts which: (i) are in the possession, custody or power of those persons identified in the Custodians List; and (ii) are also within the possession, custody or power of the Parties (as applicable). However, the Custodians List does not vary, limit or narrow the scope of the Parties’ discovery obligations. The Parties must disclose all documents that are discoverable in this proceeding, even if they are in the possession, custody or power of a person or persons not identified in the Custodian List, save that no party is required to give discovery of documents not within its own possession, custody or power.”

11. Section J of the Protocol is headed “Privilege” and provides at paragraph 33 that nothing in the Protocol prevents a party from withholding documents from inspection by other parties on the basis of any applicable Cayman Islands law. Paragraph 34 provides that if a claim of Cayman Islands law privilege is asserted over a portion of a document only, that portion shall be redacted and the documents produced.

12. Section N of the Protocol is headed “PRC Redaction Regime”. At paragraph 55, it is stated:

“Within five Business Days of production of the PRC Redacted Documents, a partner in the PRC Law Firm will confirm on affidavit or affirmation (to be filed and served by the Genimous Parties) that the PRC Law Firm has made reasonable efforts to ensure that all redactions applied by the PRC Law Firm have been applied in accordance with this PRC Redaction Regime in compliance with the relevant PRC laws and regulations in force at the relevant time.”

13. The October 2024 Order also provided:

“6. The final date for the parties to file any interlocutory applications in relation to any matters arising in relation to discovery or the pleadings will be Friday, 9 May 2025”.

14. Under paragraph 7, the parties were granted leave to adduce expert evidence on issues concerning:

- (1) the fair market value of the shares of the Company on certain dates;
- (2) whether the Company’s intellectual property has been used, copied or misappropriated; and
- (3) if it has, any loss or damage occasioned to the Company.

15. Under paragraph 9, the Petitioner is to file and serve its witness statements and expert reports by 6 June 2025, the Respondents by 18 July 2025 and the Petitioner’s reply evidence by 1 August 2025. Under paragraph 10, meetings of the experts are to occur by 15 August 2025, and under paragraph 11, joint expert memoranda are to be filed by 29 August 2025.

16. A pre-trial review was set down for 10am on 7 October 2025, and a 12-day trial was set down to commence on 20 October 2025, with sitting days being Monday – Thursday, with the trial concluding on 6 November 2025.

17. On 20 March 2025, the Petitioner amended its petition (the “Amended Petition”). Section C of the Amended Petition contains a summary of the Petitioner’s reasons as to why the Company should be wound up. The contents of paragraph 7 under that heading can be seen on 3 pages from (a) to (p).

The Summons

18. By summons (the “Summons”) dated 26 February 2025 (with a time estimate of 3 hours), the Petitioner applied for the following relief:
- “(a) An order that the Respondents provide a further and better list of documents verified by affidavit in accordance with the requirements of Order 23 (sic), Rule 3 of the Grand Court Rules (GCR) and the Directions Order dated 31 October 2024.
 - (b) An order requiring the Respondents to make an affidavit stating whether the documents specified in Schedule One are, or have at any time been, in the Respondent’s possession, custody or power, together with the additional matters set out in Order 24, Rule 7(1) of the GCR and to produce those documents for inspection if they remain in their possession, custody or power.”
19. I think the reference in (a) to “Order 23” was an obvious error. It should have read “Order 24”. Order 23 relates to security for costs. Order 24 relates to discovery.
20. Under Order 24 rule 3(1) of the Grand Court Rules (“GCR”), subject to rules 4 and 8, the court may order a party to make and serve on any other party a list of documents and may also order the party to make and file an affidavit verifying such a list.
21. Under Order 24 rule 7(1) of the GCR, subject to rule 8, the court may on the application of any party order any other party to make an affidavit stating whether any document specified or described is, or has at any time been in that other party’s possession, custody or power and if not then in that other party’s possession, custody or power when that other party parted with it and what has become of it.
22. Order 24 rule 7 (3) of the GCR provides that an application for an order under rule 7 must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under rule 7 has, or at some point had, in the deponent’s possession custody or power the

document, or class of documents specified or described in the application and that it relates to one or more of the matters in question in the cause or matter.

23. Order 24 rule 8 of the GCR is headed “Discovery to be ordered only if necessary” and provides:

“Discovery to be ordered only if necessary (O.24, r.8)

8. On the hearing of an application for an order under rule 3 or 7 of the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs.”

24. Schedule One to the Summons reads as follows:

“SCHEDULE ONE

1. Code repositories for the mobile applications in issue in these proceedings, relating to apps published by Position Mobile Ltd SEZC, East End Technologies Limited, Advanced Commerce Solutions, Inc and other Genimous related entities maintained by Sigot, Inc (now Eightpoint Interactive, Inc).
2. Drafts and final versions of the document referred to in the email between Benjamin Newall and Dirk Van Dyke sent on 24 November 2024, referred to in the Respondent’s (sic) discovery document [GHK00019006].
3. Such further categories of documents outlined by the Petitioner in submissions.”

25. I would discourage drafting in terms of paragraph 3 of Schedule One. It is not in accordance with the rules or procedure and is unsatisfactory. The documents or class of documents should be specified clearly and not left to “submissions” filed a few days before the hearing or made orally at the hearing.

26. Having been pressed for some particularity, on 7 March 2025, Mr Wingrave for the Petitioner sent to Mr Faulkner for the Respondents a “Schedule of Missing Documents” (the “March 2025 Schedule”). Paragraph 1 of the March 2025 Schedule simply repeated paragraph 1 of Schedule One of the Summons, and paragraph 2 of the March 2025 Schedule simply repeated paragraph 2 of Schedule One of the Summons. Paragraphs 3-5 of the March 2025 Schedule read as follows:

- “3. Relevant text messages, WhatsApp messages, WeChat messages and other electronic messages sent or received by Peter Wong, Benjamin Newall, Xingang (Scott) Yu, Jing Sun, Dening He, Ryan Dinyer, Charles Bullock, John Lash, Zhifeng (Tony) Chen, Hongdan Lu, Cody Miller, Ryan Marshall, Karetha Strand, Ryan Horvath, Thomas Redford and Huang (Jackie) Ying (together, the Respondents’ Custodians).
4. Relevant emails or messages sent or received by the Respondents’ Custodians through their personal accounts used for business communications. For instance, relevant business communications sent or received by Peter Wong’s personal email account [email address specified].
5. Relevant partially privileged documents.”

27. The Summons was heard on 8 April 2025. During that hearing, Mr Faulkner, on behalf of the Respondents, provided an undertaking that:

- “(i) the discoverable documents identified as a result of the supplemental discovery exercise described in Chen 5 and Chen 6 shall be produced to the Petitioner’s attorneys in accordance with the Discovery Protocol appearing at Schedule Two of the Order dated 31 October 2024 (Discovery Protocol) by 3 pm on Thursday 24 April 2025; and
- (ii) the Respondents’ supplemental list of documents shall be verified by affidavit or affirmation from a representative of the Respondents in accordance with the provisions of the Discovery Protocol and that such verifying affidavit or affirmation shall be filed and served on the Petitioner by 3 pm on Thursday 24 April 2025.”

28. These undertakings were in response to my question as to whether the Respondents were willing to give an undertaking that (i) insofar as such documents were within the Respondents' possession, custody or power the preliminary draft valuation referred to in the email from Dirk Van Dyke to Benjamin Newall dated 24 November 2021 7:50pm (erroneously referred to as 2024 in the Petitioner's paragraph 2 of Schedule One to the Summons) together with any other draft and final valuations shall be provided to the Petitioner within a certain timescale; (ii) the 29 documents referred to at paragraph 60 of Chen 5 (as defined below), the 189 documents referred to at paragraph 63 of Chen 5 (as defined below), the further documents to be provided in the supplemental list referred to at paragraph 15 of Chen 6 (as defined below) and the four additional documents referred to at paragraph 86 of Chen 5 (as defined below) and paragraph 58 of the Respondents' skeleton argument be provided to the Petitioner within a certain timescale; (iii) the Respondents' supplemental list to be provided with a verifying affidavit or affirmation within a certain timescale; and (iv) the Respondents shall file and serve by a certain timescale the affidavit or affirmation referred to at paragraph N55 of the Discovery Protocol.
29. Mr Faulkner referred to the ongoing review and in effect indicated that insofar as the documents were discoverable his undertaking would cover undertakings (i), (ii) and (iii) of the Court's request but he was not in a position to provide an undertaking in respect of (iv) as such was outside his control.
30. The affidavit or affirmation referred to at N55 of the agreed Discovery Protocol had not been provided, and Mr Faulkner did not address me on any reasons as to why it should not be provided and N55 of the agreed Discovery Protocol complied with. Noting that we were hard up against the Easter vacation and that the affidavit or affirmation was required from an individual overseas in the People's Republic of China, I gave some extra time for compliance. The order I made and signed on 9 April 2025 was that:
- “The Respondents file and serve on the Petitioner the verifying affidavit or affirmation referred to at section N, paragraph 55 of the Discovery Protocol by 3 pm on Friday 9 May 2025.”
31. That left 3 main issues for determination:

EET source code repositories

- (1) the source code repositories for the mobile applications in issue in these proceedings relating to apps published by EET as specified at paragraph 1 of Schedule One to the Summons, the Petitioner having acknowledged receipt of the code repositories relating to apps published by the Company;

Electronic messages on personal email accounts and personal devices

- (2) relevant electronic messages sent or received by various individuals as specified at paragraphs 3 and 4 of the March 2025 Schedule; and

Relevant partially privileged documents

- (3) “Relevant partially privileged documents” as specified without any particularity at paragraph 5 of the March 2025 Schedule.

The law and procedure

32. Before I turn to my determinations on these 3 issues, I set out the relevant law and procedure and refer to some of the evidence.

Discovery in winding-up proceedings

33. This case involves winding up proceedings. Order 1 rule 4 of the Companies Winding Up Rules (2023 Consolidation) (“CWR”) is entitled “Application of Grand Court Rules etc”. It makes no reference to Order 24 of the Grand Court Rules (“GCR”).
34. Under Order 1 rule 2 (4) (c) of the GCR except for Orders 3, 4, 5, 38, 39, 62, 67, 45-51 and 52 the GCR shall not apply to any proceedings which are governed by the CWR.

35. Order 3 rule 12 (1) (i) of the CWR refers to the court, upon hearing a summons for directions, giving such directions as it thinks appropriate in respect of the discovery and inspection of documents.
36. In the Consent Order dated 11 October 2022, the parties introduced the requirement of discovery and inspection by way of the exchange of lists of documents and subsequent inspection “through disclosure of the relevant document(s)”. By order made on 31 October 2024 and filed by Dentons, the reference to Order 24 rule 3 (1) of the GCR crept in, and a Discovery Guide and Protocol was agreed upon. Mr Wingrave in his Outline Submissions (at paragraph 12) says “that part of the Order was not contentious and had been agreed between the parties”.
37. The Petitioner in its Summons referred to Order 24 and by mistake also to Order 23 of the GCR. Mr Wingrave, however, appears to have backtracked and distanced himself from the applicability of Order 24 of the GCR to winding up proceedings in his Outline Submissions. Examples are:
- (1) at paragraph 13, “Were it not for the mandatory provisions of O.1, r.2 of the [CWR], the [GCR] would arguably have direct effect on this matter. The provisions of the CWR, however, are to apply to every winding up petition and the instant action is a winding up petition” (the Petitioner’s underlining);
 - (2) at paragraph 19, “The Summons relies upon GCR O.24, rr 3 and 7, as the exercise of the Court’s discretion in this proceeding, it is submitted, should be guided by the approach taken under these rules and the parties agreed those rules to govern discovery. Should it be formally required, however, the Petitioner will seek permission to amend the summons to rely upon CWR O.3, r.12(1)(i).” No application for leave to amend was made; and
 - (3) at paragraph 30, “the Respondents’ discovery obligation arises in these proceedings and under the CWR”.
38. Kawaley J set out the position in respect of discovery and winding-up proceedings in his helpful judgment in *In the matter of Global Cord Blood Corporation 2023 (2) CILR 298*. In that case, there was an application for the production of certain documents, including an unredacted copy of a bank statement exhibited to an affidavit and certain emails and attachments. At [5] Kawaley J stated:

“There is no doubt that this court must be jurisdictionally competent in some circumstances to order the production sought in the context of just and equitable winding-up proceedings...”

39. There was a dispute as to the application of Order 24 rule 12 of the GCR. At paragraph 7, Kawaley J stated that “GCR Order 24, rule 12 does not apply to winding-up proceedings” and made reference to Order 3 rule 12 (1) (i) of the CWR. Kawaley J at [8] stated:

“That express power to give such directions as the Court considers appropriate for discovery can only sensibly be understood as conferring jurisdiction to order general or specific discovery, or none at all. While the Court is required to consider matters such as discovery at the summons for directions stage, I am satisfied that by necessary implication, discovery orders can validly be made at any stage of a winding-up proceeding under this rule.”

40. At [12] Kawaley J rejected a submission that the GCR Order 24 rule 10 approach (inspection of documents referred to in pleadings and affidavits) should be followed.

41. At [13] Kawaley J added:

“The specific jurisdiction which is conferred by the CWR is a broad jurisdiction to make discovery related orders to the extent the Court considers it appropriate ...”

42. Kawaley J stated:

“14. Having found that CWR Order 3, rule 12 (1) (i) confers a power to order general or specific discovery, there is clearly potential correspondence between the jurisdiction this Court would exercise in proceedings governed by the CWR. Whether that potential is realised will depend on the facts of each case. And where the procedural context which arises in a winding-up proceeding is indistinguishable from that in civil proceedings to which the GCR applies, it will almost invariably be because a general or specific discovery order is sought under CWR Order 3, rule 12 (1) (i). What this Court would do under GCR Order 24, rule 10 (as read with GCR Order 24, rule 14(1)) cannot serve as a useful or valid

guide to the approach under the CWR, because there is no corresponding jurisdiction. It would be wrong to apply the practice under Order 24, rule 10 in the CWR context “as if” it applied because (a) it does not apply, and (b) no corresponding jurisdiction exists under the CWR.

15. This Court clearly has jurisdiction to compel the production of the documents sought but there is no starting assumption that production should be ordered because they are referred to in affidavits, unless (in effect) the respondent raises an issue as to the appropriateness of the request. In seeking to decide how to exercise the CWR discovery jurisdiction in relation to contributories’ petitions and to determine when it is appropriate to make a general or specific discovery order:

(a) the corresponding jurisdiction under the GCR requires regard to (1) the fair disposal of the proceeding and (2) saving costs. This is clearly a more particularised way of expressing when it will be “appropriate” to make a discovery order;

(b) where a discovery application is made under the CWR in circumstances which are procedurally similar to circumstances which would arise under the GCR, the practice under the GCR Order 24, rule 14(1) will be analogous and highly persuasive as to the approach which should be adopted in the winding-up context;

(c) the practice under the GCR will not be dispositive because the CWR discovery jurisdiction is expressed in more open-ended terms. However, where there is no material distinction between the winding-up jurisdiction and the general civil jurisdiction, it will generally be desirable for legal clarity and consistency that the same procedural approach is adopted in each jurisdictional context.

16. In the present case where the production order is sought in relation to an application to set aside a judgment on the grounds that it was obtained by fraud, this is quintessentially a generic civil issue not coloured in any material way by the fact that it arises in the context of winding-up proceedings. This Court should

obviously approach the application in essentially the same way it would when dealing with a comparable application for specific discovery under the GCR.”

43. As Kawaley J wisely stated at paragraph 11 “Context, of course, is everything.”

44. At [28] Kawaley J concluded:

“28. The Court has jurisdiction to compel the production of the specific documents sought under CWR Order 3, rule 12(1)(i) where the Court is of the view that this is appropriate. An applicant must generally show that the production sought is necessary for fair disposal of the relevant application or to save costs, the corresponding test under GCR Order 24, rule 14 (1).”

45. I am content, in the present context and bearing in mind the agreed specific reference to Order 24 of the GCR in the October 2024 Order, to consider and determine the arguments in respect of discovery taking into account the relevant provisions of the GCR and the CWR and the surrounding caselaw and in particular the caselaw on the definition of the word “power” in this context.

The tests to be applied as to whether documents are or have been in a party’s “possession, custody or power”

46. The October 2024 Order requires the parties to provide discovery pursuant to Order 24 rule 3 (1) of the GCR, which makes reference to documents “which are or have been in the party’s possession, custody or power relating to any matter in question in the cause or matter ...”.

47. Mr Faulkner in his skeleton argument dated 3 April 2025 helpfully refers to the House of Lords’ decision in *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 where it was held, at high level, that a party had a document in his “power” only if he had 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; and that, since the documents in the possession of the subsidiaries could not be obtained without their consent (failing alteration of their articles of association) and in the case of the subsidiaries in Rhodesia and South Africa, ministerial consent, they were not in the power of the defendants.

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48. In that famous case, Lord Diplock at pages 635-636 stated:

“... in the context of the phrase “possession, custody or power” the expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future ...

For the reasons already indicated Shell Moçambique’s documents are not in my opinion within the “power” of either of Shell or B.P. within the meaning of R.S.C., Ord. 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association of Consolidated and procuring Consolidated through its own board of directors to take steps to alter the articles of association of Shell Moçambique, which Order 24 does not require them to do; or (b) by obtaining the voluntary consent of the board of Shell Moçambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and B.P. are 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, however likely he might be to comply voluntarily with the request if it were made.” (my underlining)

49. Lord Diplock dismissed the appeal “on its own special facts” and indicated that he would say nothing “about one-man companies in which a natural person and/or his nominees are the sole shareholders and directors. It may be that, depending on their own particular facts, different considerations may apply to these.” (pages 636-637)

50. In *WAFR Holdings Ltd* (CICA unreported judgment delivered 13 October 2021), there were various subsidiaries that were not parties to the proceedings. Discovery was sought of documents of subsidiary companies such as financial statements. The “essential issue” was whether the Respondent had a presently enforceable right to obtain access to such documents (see [5]). Moses

JA at [8] stated that the “essential principle” was identified by Lord Diplock in *Lonrho Ltd v Shell* [1980] 1 WLR 672 where he stated that:

“The expression “power” must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else.”

51. At [9] Moses JA added:

“Two English cases at first instance [*Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat) and *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm)] have applied the principle explained in *Lonrho*, where a subsidiary’s documents were sought from a 100% parent. In neither case was the existence of a common corporate structure sufficient to oblige the parent to give discovery.”

52. Moses JA at [10] referred to *Schlumberger Holdings*, which involved a holding company of a large multinational group of companies providing oilfield services, which included a number of subsidiaries. Moses JA stated, “The Defendant made a discovery application in which it required the claimant holding company to search for the records of other companies within the Schlumberger group. No disclosure was or could have been sought directly against those third parties because they were not within the jurisdiction.”

53. At [11] Moses JA commented that the judge in *Schlumberger Holdings* concluded on the facts of that case that the documents were in the control of the holding company because general consent had already been given by the relevant third parties before the application was made, for the holding company to search for, inspect their documents and take copies.

54. At [12] Moses JA quotes from Floyd J in *Schlumberger Holdings* at [21] as follows:

“I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party’s documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third-party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed,

and continues to enjoy, the co-operation and consent of the third party to inspect his documents and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that my decision does not in any way depend on the existence of a common corporate structure. My decision depends on the fact that it appears from the evidence that a general consent has in fact been given to the claimant to search for documents properly disclosable in the litigation, subject only to the caveats contained in paragraph 4 of Mr Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests."

55. At [13] Moses JA felt it instructive to consider the nature of the evidence which persuaded the judge that such general consent had been given.

56. Moses JA continued:

"14. The claimant's, Schlumberger's, disclosure statement had stated that it had carried out searches for documents at its facilities and in the files of its employees. In response to a further letter from the Defendants it had also disclosed that it had searched the personal files of the attorneys of two of its subsidiaries and a technical officer of one of its subsidiaries [11] and [12]. It stated in the letter that it had compiled the list "having taken into account all documents that may exist in the Schlumberger group and with the cooperation of other group companies" but it denied any obligation to extend disclosure to documents not within its own custody, power or control and denied that the obligation extended to group documents as a whole [13].

15. The judge concluded that the searches which had been carried out, even after the original disclosure was performed, were with the consent of the companies concerned ([14] and [15]).

16. It was this evidence which drove the judge to the conclusion I have cited at [21], that general consent had in fact been given.

17. That *Schlumberger* did not erode the principles to be directed from *Lonrho* was made plain in *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm). It is not sufficient that consent could be obtained if it were asked from the subsidiary [5]. If there is no evidence of an existing right or understanding or arrangement giving a parent access to subsidiary's documents then the parent does not have the necessary control over its subsidiary's documents.

18. Males J explained this principle:

“[13] First, it remains the position that a parent company does not merely by virtue of being 100% parent 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. Third, in such circumstances, as Lord Diplock said in *Lonrho*, there is no obligation even to make the request although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.

[14] Fourth, however, a party may have sufficient practical control in the sense which the *Schlumberger* and *North Shore* cases indicate, if there is evidence of the parent already having unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access.”

19. The essential question, therefore is to determine whether there is evidence that WAFR already had unfettered access to the subsidiary companies' documents.

20. In the instant case, all that the Administrator can rely upon is the fact that WAFR produced consolidated accounts; there is nothing else.

21. There is no evidence or material as to the circumstances in which the consolidated accounts were prepared or how WAFR, as holding company, obtained what was

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needed to prepare those accounts. Certainly, there is no evidence of unfettered access to the documents the Administrator seeks or some prior arrangement or consent for WAFR to search for them.”

57. In *WAFR*, it appears that the discovery point had not been properly taken before the judge at first instance. Counsel for the Respondent Administrator during the appeal hearing suggested that the matter ought to go back to the judge to give him the opportunity to establish the evidence or material that would entitle him to the discovery he seeks (see [38]). At [39] Moses JA was conscious of the need for finality and the objection to “the Administrator having a second bit of a cherry at which, to put it at its highest, he had previously only nibbled.” At [41] Moses JA reluctantly came to the conclusion that the Administrator should be given the opportunity to see whether he can adduce before the judge the evidence or material he needs in order to justify his right to the documents which the judge has already ruled to be necessary to the proper administration of the Cayman estate. The discovery issue was remitted to the judge.

58. In *In the matter of Investar General Partner Limited* (unreported, 27 July 2022, FSD Cause Nos. 146, 147, 148 and 196 of 2018 (IKJ)), Kawaley J dealt with the remitted issue. Kawaley J at [14] stated:

“What is not entirely clear from the Court of Appeal’s summary of the legal principles is whether the arrangement or understanding has to be legally enforceable, as opposed to practically enforceable. The Court was not fully determining the discovery issue and was merely explaining why the evidence supporting the application was legally insufficient at this stage. The passage cited from *Lonrho Ltd v Shell* [1980] 1 WLR 672 suggests that the right to inspect must be legally enforceable. The references Moses JA made to *Schlumberger Holdings Ltd v Electromagnetic Geoservices AS* [2008] EWHC 56 (Pat) and *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm) at least imply that documents which a parent company has a practical right of access to may be considered to be within its “power”.”

59. At [19] Kawaley J found that an arrangement or understanding pursuant to which the parent company “has in practice free access to the documents of” its subsidiaries will potentially support a finding that the documents are within the “power” of the parent company and accordingly discoverable.”

60. Kawaley J determined that the burden of proof lay on the applicant for the discovery order to prove that the documents were within the “power” of the other party or parties.

The evidence

61. I have considered the evidence put before the court in respect of the Summons, including Chen 4, 5 and 6 and Stephens 6, 7 and 8, all as defined below.

Chen 4

62. Mr Chen Zhifeng, also known as Zhifeng (Tony) Chen (“Mr Chen”), in his fourth affidavit sworn on 24 January 2025 (“Chen 4”) at paragraph 13 certifies that the Respondents “have carried out their discovery duties to the best of my knowledge and belief”. The Respondents engaged Deloitte & Touche LLP in the Cayman Islands to provide e-discovery services in relation to these proceedings. Documents were categorised as the “US Data Pool” and the “PRC Data Pool”. It is further stated that extensive quality control checks were undertaken at senior level by Campbells, the Cayman attorneys acting for the Respondent. Zhung Lun, a PRC law firm, undertook a review of what were described as the PRC Unique Documents, which were also reviewed by Campbells. At paragraph 41, Mr Chen states: “... I consider that the Respondents have discharged their discovery obligations. I am aware that the Respondents are under a continuing obligation to give discovery until the conclusion of these proceedings.”

Stephens 6

63. Mr Ryan Stephens (“Mr Stephens”), Manager of the Petitioner, in his sixth affidavit sworn on 24 January 2025 (“Stephens 6”) verifies the Petitioner’s List of Documents.

Stephens 7

64. Mr Stephens in his seventh affidavit sworn on 26 February 2025 (“Stephens 7”) states he files it in support of the Petitioner’s application for further and better discovery against Genimous Investment (Hong Kong) Co Ltd and Genimous Holding (Hong Kong) Limited (the Respondents) pursuant to Order 24 rules 3 and 7 of the GCR “on the basis that the Respondents have failed to comply with

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their discovery obligations.” At paragraph 15, Mr Stephens says that the “Respondents failed to produce the code repositories for key applications central to these proceedings. These repositories were expressly identified as discoverable in the Discovery Guide and the Respondents’ expert had relied upon them”.

65. At paragraph 16, Mr Stephens says that in correspondence, “Campbells indicated that access would be provided to the repositories to which Mr Ferrara had been granted access.” In his oral submissions, after I had asked him to refer to the correspondence supporting that statement, Mr Wingrave described that statement as “a mistake”. I deal with this further below.
66. At paragraph 17, Mr Stephens refers to access to certain Position Mobile code repositories being given. He does not, however, exhibit the affidavit or report of Mr Ferrara upon which the Petitioner so strongly relies upon in support of its application for specific discovery. At paragraph 18, Mr Stephens says that “the Petitioner was not granted access to the EET code repositories, despite the fact that the Respondents’ own expert, Mr Ferrara, had access to these repositories.” Mr Stephens says that the failure to provide access to these repositories prevents the Petitioner and its experts from conducting a proper analysis of potential misappropriation or unauthorised code duplication. The code repositories are referred to at paragraph 1 of Schedule One of the Summons.
67. At paragraph 23(a), Mr Stephens says that “The Respondents appear to have failed to collect and produce any communications from personal or corporate devices via messaging platforms”. Such are not referred to in the Summons or Schedule One.
68. At paragraph 32(b), Mr Stephens refers to “Missing Attachments” and says “on 24 November 2021, Dirk Van Dkye provided Benjamin Newall a “preliminary draft valuation” for Position Mobile as seen in the email appearing at [RS.7.33]. However, the Respondents have not produced this document or any other draft or final valuation reports.”
69. At paragraph 2 of Schedule One to the Summons there is reference to “the email between Benjamin Newall and Dirk Van Dyke sent on 24 November 2024 ...”. 2024 appears to be an error. I think it should have read 2021. At HB.1.055 is an email dated 24 November 2021 sent at 7:50pm from Dirk Van Dyke to Benjamin Newall at Spigot: “Here is our preliminary draft valuation, that has not gone through the final QC review step.”

Chen 5

70. Mr Chen in his fifth affidavit sworn on 11 March 2025 (“Chen 5”) referred to the offer of the Respondents on 24 May 2024 to the effect that the Company would be placed in voluntary liquidation with the Petitioner’s nominee liquidators and then the voluntary liquidators would be placed under the supervision of the court so the liquidator could investigate the matters of which the Petitioner complains. He says that on 5 June 2024, the Petitioner declined the “no-fault divorce” option and confirmed its intention to proceed to trial on the basis that it seeks a buy-out order as its primary forum of relief in an unspecified amount. Mr Chen says that the Company is now solvent, and the Respondents are content for the Company to continue operating if the Petition is dismissed.
71. Mr Chen says that Genimous Investment HK holds 100% of Genimous Interactive Investments Co Ltd, which in turn holds 100% of the issued shares of Spigot. Genimous Investment HK also holds 100% of the issued shares of Eightpoint. Eightpoint holds 100% of the issued shares of Equate Marketing Ltd, which in turn holds 100% of the issued shares of EET.
72. From paragraph 26 onwards, Mr Chen refers to the National Security Agreement dated 30 September 2021 entered into with, *inter alios*, the United States Government (“US Government”). Mr Chen makes reference to the Committee on Foreign Investment in the United States (“CFIUS”) which is stated to be a United States inter-agency committee authorised to review certain transactions involving foreign investment in the United States by foreign persons for the purposes of determining whether such transactions impact on the national security interests of the United States. At paragraph 27, Mr Chen refers to various agreements and policies (which he defines as the “CFIUS Agreements and Policies”) each expressed to be governed by and interpreted according to the federal laws of the United States namely (1) a National Security Agreement dated 30 September 2021 (the “NSA”) (2) Communication Policy dated 9 November 2021 (3) Data Restriction Agreement dated 22 November 2021 and a Security Plan as last revised on 3 January 2022.
73. Mr Chen at paragraph 69 states that “Section 7 (h) of the Discovery Guide refers to the Company’s (Mr Chen’s underlining) source code repository as provided to Mr Ferrara. It does not refer to the source code belonging to third party entities and I am not aware of the Company, or any of its shareholders, having a legally enforceable right to access the code repository of other entities”. Mr Chen says that the CFIUS Agreements and Policies expressly prohibit the Respondents from having

access to the code repositories of the Company, Spigot, Eightpoint, Polarity or any of their affiliates. Mr Chen adds at paragraph 70 that “Those code repositories are therefore not in the possession, custody or power of the Respondents”. At paragraph 73, Mr Chen deals with EET’s agreement to provide Mr Ferrara with “direct read-only access to ET’s source code repositories for the apps in relation to which allegations were raised.”

74. Mr Chen does not in clear terms state that any attachment to the email dated 24 November 2021 will be disclosed. At paragraph 86, he says “Having reviewed the documents, Campbells have identified two further families of documents comprising four additional documents in total, which were withheld due to reviewer error and will be produced as part of the supplemental production.” Insofar as I understand Mr Faulkner’s position, it is that these documents include the attachment and it will be, subject to his review, provided pursuant to the undertakings he has given to the court.
75. At paragraph 87, Mr Chen confirms that when the Respondents’ supplemental documents are produced they together with documents previously produced “comprise the extent of the documents responsive to numbered paragraph 2 of Schedule One to the Discovery Summons which are, or have at any time been, in the Respondents’ possession, custody or power.”
76. At paragraphs 90-100, Mr Chen deals with the custodians’ personal devices and personal email accounts and, from paragraph 101 onwards, privileged documents.
77. At paragraph 116, Mr Chen says he considers that “the Respondents have discharged their discovery obligations. I am aware that the Respondents are under a continuing obligation to give discovery until the conclusion of these proceedings.”

Stephens 8

78. Mr Stephens in his eighth affidavit sworn on 18 March 2025 (“Stephens 8”) refers to the Respondents’ apparent changes of position and in effect says the “no-fault divorce” offer was not accepted due to costs concerns and the abrogation of the protections of section 99 of the Companies Act. Mr Stephens refers to the NSA and at paragraph 10 says that the “reality is that the Respondents are capable of directing the entities concerned to provide code repository access in a manner that would not violate the NSA”. At paragraph 20, Mr Stephens refers to searches of Mr Chen’s personal devices for discoverable material and states that “there is no evidence that any other custodian (save Mr Lash) was asked to do so, irrespective of the Respondents’ ability or

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inability to enforce any such request as a matter of law.” At paragraph 22, Mr Stephens refers to the Petitioner’s suggested amendments to the key word searches.

Chen 6

79. Mr Chen, in his sixth affidavit sworn on 31 March 2025 (“Chen 6”), deals with the Petitioner’s suggested amendments to the Respondents’ keyword search terms. There is reference to a further review undertaken by Campbells and at paragraph 15 it is stated that “The Respondents will continue with the above exercise and provide a supplemental list of documents in accordance with paragraph 11 of the Discovery Protocol once the quality control checks have been completed.” At paragraph 17, Mr Chen says that the data drive containing the Company’s source code was delivered to Denton’s office on 18 March 2025. At paragraph 18, Mr Chen says that he “understands the Respondents’ discovery obligations, consider the search term parameters applied by the Respondents as part of their discovery exercise to be reasonable and proportionate, and certify that the Respondents have carried out their duties to the best of my knowledge and belief, and no discoverable documents have been intentionally omitted, save for those subject to a privilege claim.”

Determination

80. I now come to my determination of the relief claimed in the Summons, insofar as it has not been disposed of by the undertakings given during the hearing.
81. The Summons specifies two areas where it is stated further discovery is required. Firstly, code repositories and secondly drafts and final versions of a document referred to in an email between Benjamin Newall and Dirk Van Dyke sent on “24 November 2024”. 2024 appears to be an error for 2021. The undertakings provided by Mr Faulkner on behalf of the Respondents cover the second area.

(1) The EET source code repositories

82. The Petitioner seeks the code repositories for the mobile applications stated to be in issue in these proceedings relating to “apps published by Position Mobile Ltd SEZC, East End Technologies Limited, Advanced Commerce Solutions, Inc and other Genimous related entities maintained by
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Spigot, Inc (now Eightpoint Interactive, Inc)” (paragraph 1 of Schedule One to the Summons). During submissions, Mr Wingrave limited this limb of the relief requested to the source code repositories of EET.

83. It seemed to be common ground that EET, a company incorporated under the laws of the Cayman Islands, was indirectly a wholly owned subsidiary of Genimous Investment HK, one of the Respondents (paragraph 15 of Chen 5).
84. The Petitioner says that one of the central issues is that the Respondents, their appointed directors and other companies forming part of the “Genimous Group” misappropriated intellectual property and proprietary information belonging to the Company and deployed it elsewhere under other entities wholly owned by the “Genimous Group”.
85. The Petitioner does not refer in its Outline Submissions to the relevant law in respect of when documents can be treated as being within the “power” of a party.
86. The Petitioner at paragraph 33 of its Outline Submissions, firstly, says that the Respondents were able to arrange access to Mr Ferrara of the code repositories and they must be taken to have an operational means of doing so. Secondly, the Petitioner says that the Respondents are the sole owners of Eightpoint, which it says is the sole owner of EET, and it adds that Mr Chen is a director of Eightpoint and Spigot. The Petitioner says that code repositories belonging to EET are in the power of the Respondents because the Respondents are in a position to exercise their control over both companies to provide access.
87. The Petitioner says it seeks “an order that access be granted to the code repositories not yet provided, similar to that granted to Mr Ferrara”. In my preparation for the hearing, I noticed that at paragraph 16 of Stephens 7, it was stated “In subsequent correspondence, Campbells indicated that access would be provided to the repositories to which Mr Ferrara had been granted access.” The evidence (see for example paragraphs 73 of Chen 5) indicated that Mr Ferrara had been provided “direct read only access to EET’s source code repositories for the apps in relation to which allegations were raised.” If Mr Stephens’ opening statement at paragraph 16 of Stephens 7 had been true it would have been important evidence because it would have at least suggested that the Respondents had access to the EET source code repositories. I therefore looked long and hard to find the “subsequent correspondence” in the bundles placed before the court but could not find it.

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At the hearing, I asked Mr Wingrave where it was. His response was startling. He said that the opening statement at paragraph 16 of Stephens 7 was “a mistake”. Without my question, I do not know when that “mistake” would have been brought to my attention. It is important that attorneys, as officers of the court, correct “mistakes” or false statements in affidavits as soon as possible after such “mistake” or falsity comes to their attention and provide a full and frank explanation for such “mistake” or falsity. It is a serious matter for a mistake or false statement to appear in an affidavit on the court record. I give Mr Wingrave the benefit of the doubt and assume it only came to his attention on the day of the hearing and that without my question, he would nevertheless have brought it to my attention at some point during the hearing and before I made any determinations based upon it. I do not want to throw this point out of reasonable proportion, but the truth and accurate statements in affidavits still matter in courts of law.

88. The Respondents’ answer to the Petitioner’s request for the code depositories involving EET is twofold:

- (1) they are not within the possession, custody or power of the Respondents; and
- (2) the CIFIUS Agreements and Policies (as defined at paragraph 27 of Chen 5), which arise from the NSA entered with the US Government, prohibit the Respondents from having a right to access the source code repositories.

89. The highwater mark of the Petitioner’s case on “power” as forcefully and persistently presented to the court by Mr Wingrave had its foundation in paragraph 73 of Chen 5, which stated:

“In the context of the Respondents’ engaging Mr Ferrara to prepare an expert report on certain allegations made by the Petitioner in the Second PL Application, the Respondents, in conjunction with their Board representatives, coordinated with the Spigot Security Officer within the confines of and in compliance with the CFIUS Agreements and Policies to request that Spigot provide Mr Ferrara with direct read-only access to the Company’s source code repositories on Spigot’s GitLab account, which included the source code for certain of the Company’s Android and iOS apps as well as certain backend web services. Access was provided to Mr Ferrara alone, and was not provided to the Respondents. In light of the allegations made by the Petitioner, and in circumstances where Spigot and EET denied (and continue to deny) the allegations made, Mr Ferrara was also provided with

direct read-only access to EET's source code repositories for the apps in relation to which allegations were raised. I understand that such restricted access was provided by the Security Officer to Mr Ferrara at the time with the consent and agreement of EET. Again, the Respondents were not provided with the same access due to the restrictions imposed by the CFIUS Agreements and Policies.”(“Paragraph 73”)

90. Both counsel spent some time analysing Paragraph 73. Mr Wingrave did not include in the evidence in support of the Summons the affidavit and report of Mr Ferrara, although he made many references to such evidence in his Outline Submissions and oral submissions. It was unsatisfactory of him to place reliance upon such evidence but not include it in the bundles he placed before the court.
91. In respect of the evidence placed before the court in support of the Summons, the best Mr Wingrave could do was to refer to an email dated 25 February 2025 2:26pm which he sent to Campbells and in which he states “Attachment 2 to the First Affidavit of Mr Ferrara clearly indicates that he was granted access to the code repository of EET, amongst other sources”. Mr Wingrave also referred to the diagrams in his email, which he said “illustrate the scale of the issue”. Mr Wingrave added “it has long been our client's case that PM i/p appears in EET apps as a result of wrongful misappropriation”. Campbells responded on 26 February 2025, noting the filing of the Summons and indicating that they would respond to the evidence filed in support in accordance with the procedural timetable.
92. It is a little surprising that if the Petitioner's case relied on the disclosure of EET's source code repositories, the Petitioner did not insist on such wording being expressly included at paragraph 7 h) of the agreed Discovery Guide which only made reference to “the Company's source code repository as provided to Nick Ferrara”. It is now common ground that “the Company's source code repository as provided to Nick Ferrara” has been provided to the Petitioner, but EET's has not.
93. Mr Faulkner says that such is not within the “power” of the Respondents.
94. The Petitioner's Outline Submissions did not refer to the law in respect of the relevant legal test when considering whether documents are within the “power” of a party. Mr Wingrave referred to the authorities relied upon by Mr Faulkner on the meaning of the word “power” in this context

(including *Lonrho v Shell* and *WAFR*). Mr Wingrave also referred to certain parts of the commentary in the Hong Kong Civil Procedure 2024 at 24/2/8, which he found in the Respondents' authorities bundle. He did not provide the court with the underlying authorities. Sitting as a judge at first instance in the Cayman Islands, I consider myself bound by *WAFR*, a judgment of the Court of Appeal of the Cayman Islands which followed *Lonrho v Shell*. I, therefore, take the applicable legal principles on the meaning of the word "power" in this context from *WAFR* and the authorities referred to therein with approval. I appreciate, however, that all these cases are fact-sensitive.

95. In respect of the facts of this case, Mr Wingrave says that Paragraph 73 is evidence that the Respondents have unfettered access to the EET source code repositories by way of an existing understanding or arrangement. Mr Wingrave says that there is no evidence that the arrangement referred to at Paragraph 73 has been terminated, and the court must therefore infer that it is still in existence and, in effect, it gives the Respondents "power" in respect of the EET source code repositories. In his words, Paragraph 73 "is evidence of a power to provide unfettered access". Mr Wingrave says that in this case, consent has already been asked for and granted, and the EET source code repositories have been provided to Mr Ferrara. Mr Wingrave says that Mr Ferrara is, in fact, the agent of the Respondents. Mr Wingrave stresses that Paragraph 73 is evidence of an existing arrangement and uses it to support his submission that the EET source code repositories are within the power of the Respondents.
96. I am unable to accept Mr Wingrave's submission. The burden is on the Petitioner to prove that the EET source code repositories are within the power of at least one of the Respondents. The fact that EET is, albeit indirectly, a wholly owned subsidiary of one of the Respondents is insufficient (as is clear from *Shell v Lonrho* and *WAFR*). In certain cases (such as *Schlumberger*), if a "general consent" has already been given, that may suffice. If there is evidence that the parent already has unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve access, that may also suffice.
97. There is presently before this court no evidence of any "general consent" that one of the Respondents is entitled to access EET's source code repositories. Mr Chen's evidence in Paragraph 73 is clear. Access was provided to Mr Ferrara alone and was not provided to the Respondents. EET appears to have agreed to EET's source code repositories being provided on a read-only basis to Mr Ferrara. There is no evidence before me that one of the Respondents has unfettered access

to EET's source code repositories. Indeed, quite the contrary. Mr Chen says that the Respondents were not provided access due to the restrictions imposed by the CFIUS Agreements and Policies. In light of the evidence before the court, I am unable to infer or conclude that there is some existing understanding or arrangement by which the Respondents have the right to achieve access to the EET source code repositories. Indeed, the evidence reveals that there was never any such agreement, arrangement or understanding. As a matter of law and fact, I therefore hold that the EET source code repositories are not within the "power" of the Respondents.

98. Having said that if in due course it is the intention of the Respondents to rely on expert evidence at the trial and such evidence refers to the EET source code repositories then normally one would expect such material to be made available to the Petitioner in accordance with B5.7 of the Financial Services Division Guide, as I mentioned during my exchanges with counsel at the hearing. On the evidence presently before the court, I am unable to grant the relief the Petitioner seeks at paragraph (b) and paragraph 1 of Schedule One of the Summons.

(2) *Electronic messages on personal email accounts and personal devices*

99. Although not specified in the Summons or in the Schedule to the Summons, I am willing to consider and determine the relief sought in respect of personal email accounts and personal devices. I do not, however, wish to encourage sloppy drafting or further attempts by parties to seek relief outwith the wording of their specific discovery applications.

100. I note all that Mr Wingrave has had to write and say on behalf of the Petitioner in respect of paragraphs 3 and 4 of the March 2025 Schedule. I note also paragraphs 90 to 100 of Chen 5. It appears that:

- (1) neither of the Respondents has any employees and has not issued a corporate mobile phone device to its current or former directors (Chen 5 at [91]);
- (2) the directors, officers and employees of the Company have not been issued with a corporate mobile phone device, and the same applies to the Company's contractual service providers. Pursuant to the terms of the Services Agreement, the Company does not have a legal right

to access or image the personal electronic devices of the employees of these service providers (Chen 5 at [92]);

- (3) the personal electronic devices which may have been used by one or more of the Custodians are not within the possession, custody or power of the Respondents, and the Respondents have no legally enforceable right to the same (Chen 5 at [93]);
 - (4) Mr Chen has searched his personal devices, and there were no relevant or potentially relevant documents (Chen 5 at [95]);
 - (5) messages from Spigot employees formed part of the US Data Pool collected (Chen 5 at [96]);
 - (6) the Respondents took steps to identify custodians who appeared to have used personal email addresses for work email, such as John Lash, and made a request for Mr Lash to search his personal email account for relevant documents, which he complied with voluntarily. The Respondents have no reason to believe that Mr Lash has not fully complied with the request made (Chen 5 at [97]);
 - (7) Mr Wong used his work email address for work-related matters, and these emails were collected and reviewed as part of the US Data Pool (Chen 5 at [98]); and
 - (8) the Respondents do not have a legally enforceable right to compel the Custodians to search their personal email accounts or to allow the Respondents to access or image their personal email accounts. The Respondents' position is that business-related emails have been sent and received by and from work email addresses, and those emails have been preserved and searched as part of the discovery process (Chen 5 at [100]).
101. Mr Wingrave attempted to draw a distinction between personal electronic devices and personal email addresses and any business messages on such devices or captured at such email addresses. It is, however, a distinction without a difference. The evidence from the Respondents is that they do not have access to personal electronic devices or the messages, business or otherwise, contained on those personal electronic devices or within those personal email accounts.

102. The Respondents state that the personal email accounts and personal devices of the custodians identified and not within the possession, custody or power of the Respondents and as such the Petitioner's request for relief in that respect must fail. I agree.
103. The burden is on the Petitioner to satisfy the court that these devices and any messages are within the power of the Respondents. It has failed to discharge that burden, and I make no orders in respect of paragraphs 3 and 4 of the March 2025 Schedule.
104. The Petitioner, at paragraph 55 of its Outline Submissions, asks for an Order that the Respondents request the collection of custodians' personal devices for imaging in order that these devices might be searched for discoverable material. Such an order is not requested in the Summons. It has not been justified, and I do not grant it.

(3) *Relevant partially privileged documents*

105. The Petitioner did not develop paragraph 5 of its March 2025 Schedule, simply entitled "Relevant partially privileged documents" in its Outline Submissions. Moreover, in applications in effect for specific discovery, the documents, or at least the classes of documents sought, should be identified with precision in the application. Parties on the receiving end of applications for specific discovery and the Court, which has to determine such applications, should not have to deal with moving targets. I would discourage any rolling, piecemeal, rambling and unfocused discovery applications. Such waste a great deal of time and money and are not in accordance with an attorney's duty, as an officer of the court, to assist the court in the efficient and fair administration of justice. Great care needs to be taken when drafting specific discovery applications, and full particulars should be provided together with relevant supporting evidence, caselaw and submissions.
106. During his oral submissions, Mr Wingrave presented what surely must be considered as a prime contender for the 2025 Understatement of the Year Award when he admitted that paragraph 5 of his March 2025 Schedule could have been drafted with a little more clarity. He then unattractively tried to shoe-horn or rather crow-bar in under the wording "Relevant partially privileged documents" his submissions under Section N of the Discovery Protocol and the redaction of certain PRC documents and the failure of the Respondent to provide the required affidavit, which formed no part of the Summons or the March 2025 Schedule. I deprecate the unsatisfactory way in which the Petitioner has sought relief not based in the Summons or the March 2025 Schedule.

107. Although I failed to see how such could possibly come within the category of “Relevant partially privileged documents”, I noted the provisions of Section N of the Discovery Protocol PRC Redaction Regime and, in particular, paragraph 55 and the need for an affidavit or affirmation. It appeared common ground that an affidavit or affirmation had not been provided, and no arguments were presented by the Respondents against the court making such an order, so I ordered its production.

Order

108. The attorneys should, within 7 days from the delivery of this judgment, forward to my PA a draft Order, agreed as to form and content, dealing with the determinations contained in this judgment.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT