Neutral Citation Number: **[2026] EWHC 2280 (Comm)**

**Claim No. CL-2025-000476**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (KBD)**

Date: 3rd September, 2026

**Before**:

**Peter MacDonald Eggers KC**
**(sitting as a Deputy Judge of the High Court)**

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**Between:**

**(1) MR THOMAS BENSKI**

**(2) MS MARISA CLIFFORD**

**Applicants/Potential Claimants**

**-and-**

**(1) PULSE FILMS LIMITED**

**(2) MR HOZEFA LOKHANDWALA**

**(3) MR BRUCE DIXON**

**(4) MS NANCY DUBUC**

**Respondents/Potential Defendants**

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**Mr Mo Haque KC** (instructed by **Rosenblatt Law Ltd**) for the **Applicants**

**Mr Jonathan Allcock** (instructed by **Stephenson Harwood LLP**) for the **Respondents**

Hearing date: 15th May 2026

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# JUDGMENT

## Introduction

1. The Applicants, Mr Benski and Ms Clifford, have applied for an order for pre-action disclosure pursuant to CPR rule 31.16 and section 33(2) of the Senior Courts Act 1981.

2. The Applicants were the founders of, directors of and shareholders of the First Respondent (“**Pulse**”), an independent media and production company. In December 2021, the Applicants sold their remaining shareholding to the Vice Group for US$10 million in cash and a secured loan note of US$43.24 million payable in instalments (“**the Secured Loan Note**”).

3. The Vice Group was an international digital media and broadcasting group of companies and included Vice Europe Holding Limited (“**VEH**”), Vice Holding Inc (“**VH**”) and Vice Europe Pulse Holding Limited (“**VEPH**”). VH was the 100% shareholder of VEH and VEH was the 100% shareholder of VEPH. The parent company in the group was Vice Group Holding Inc. VH had issued a guarantee (“**the VH Guarantee**”) under the Secured Loan Note.

4. The Secured Loan Note was subordinated to a Senior Credit Agreement in favour of Senior Lenders, and provided that upon default, the Applicants were entitled to invoke a right of forced sale (“**Forced Sale Right**”) requiring the sale of Pulse to realise value sufficient to repay the debt.

5. The Second, Third and Fourth Respondents were at all material times directors, officers or senior employees of the Vice Group and/or Pulse.

6. The Applicants contend that they have a claim arising out of a substantial unpaid debt in excess of US$20 million by the Vice Group to the Applicants and have advanced serious allegations of fraudulent misrepresentation and unlawful means conspiracy against the Respondents. In particular, the Applicants’ case is that they were induced not to exercise valuable contractual enforcement rights (in particular, the Forced Sale

Right and rights under the VH Guarantee) by alleged repeated and false assurances by the Respondents as to the valuation, solvency and an imminent sale of the Vice Group. Whether the allegations of fraud and conspiracy can be established will be an issue in any substantive proceedings which may be issued by the Applicants in respect of their claim and will turn on the Respondents' knowledge about the Vice Group's financial position and the failure of the sale process at the time they were allegedly giving assurances to the Applicants.

7. The Applicants maintained that these issues can best be resolved only by reference to documents held by the Respondents and not currently available to the Applicants. Further, the Applicants maintain that they cannot infer the Respondents' state of knowledge on the materials currently available. That said, the Applicants also state that they already have "*a coherent and substantial evidential basis for their claims, including contemporaneous communications, contractual documentation, and material emerging from Chapter 11 proceedings*" and that the Applicants could bring their claim without the disclosure now being sought "*on an inferential basis*" (the first witness statement dated 15th October 2025 of Mr Anthony Field of Rosenblatt Law Ltd, para. 32).

8. The Applicants seek an order for pre-action disclosure of such documents, as might exist, which relate to the Respondents' knowledge and state of mind, in order to enable the Applicants properly to formulate and particularise their claim and, if appropriate, to resolve their claim without proceedings.

9. The Respondents deny the allegations of fraud and conspiracy, which they state are couched in "*unacceptably nebulous terms, based on unwarranted inferences, and without any sufficient evidential foundation*".

10. The Respondents resist the application for pre-action disclosure, because the Applicants' case is based on an uncommercial and baseless contention that the Respondents were obliged to keep the Applicants fully updated about the Vice Group's financial position and the sale process so that the Applicants could "*cause disruption [to the sale] or use the potential for disruption as a negotiating tool*". The Respondents' case is that they were obliged to deal with the Applicants with honesty and integrity, and no more, and they did so at all times.

11. The Respondents contend that the application for pre-action disclosure is an unfocussed and unjustified fishing expedition, failing to provide even basic particulars of the serious case which the Respondents have to meet, and seeking broad categories of documents not because the claim could not otherwise be brought at all - the Applicants accept they can already do that - but instead in order to discover what exactly the claim might look like and whether it would be a good one. The Respondents contend that there is nothing unusual about this case which might justify the unusual order for pre-action disclosure now being sought.

**Factual background**

12. I set out the factual background to the current application for pre-action disclosure. In so doing, I have drawn on the evidence. However, I am conscious that a number of matters set out below may be contentious. My aim is to explain the nature and substance of the Applicants' claim against the Respondents, as I understand it, based on the factual assertions the Applicants make.

13. On about 24th March 2016, the Vice Group acquired a majority shareholding in Pulse and, at the same time, entered into a shareholders' agreement with the Applicants which granted to them a put option, pursuant to which they could (subject to conditions) require VEH, as the purchaser of the shares, also to purchase their remaining 22% shareholding in Pulse.

14. On 19th April 2021, that put option was exercised by the Applicants, with the result that VEH was obliged to purchase that remaining 22% shareholding for a cash amount determined by reference to the shareholders' agreement.

15. The exercise of the put option resulted in the following transactions being executed on 8th December 2021:

    (1) A sale and purchase agreement ("**the SPA**") between the Applicants as the Sellers, VEPH as the Buyer, and VEH, VH and Pulse.

    (2) A secured loan note ("**the Secured Loan Note**") instrument made between VEPH, VEH and VH, constituting 10% secured and guaranteed redeemable loan notes in the sum of US$43,240,000 due 2023. The Secured Loan Note was

fully subordinated to the Senior Credit Agreement pursuant to a Subordination and Intercreditor Agreement dated 8th December 2021, representing the rights of the Senior Lenders in respect of a debt of US$450-475 million owed to Fortress Investment Ltd ("**Fortress**").

16. By clause 2 of the SPA, the Applicants agreed unconditionally to sell their 22% shareholding of the issued shares ("**the Shares**") in Pulse, comprising 38,461 and 3,846 ordinary shares of £0.01 respectively, to VEPH. According to Mr Benski's first witness statement dated 14th October 2025, at para. 18, the Shares had a value, according to the formula used in the 2016 sale, of at least US$200 million.

17. By clause 3 of the SPA, the consideration to be paid by VEPH for the Shares was prescribed as (a) the sum of US$10,000,000, payable upon completion, and (b) the issue of the Secured Loan Note.

18. At the same time, VEH (the original purchaser) agreed to transfer the original 78% shareholding in Pulse from VEH to VEPH.

19. In December 2021, VEPH made the required immediate cash payment of US$10 million to the Applicants. In January, March and June 2022, three instalments were paid by VEPH.

20. According to the evidence of Mr Guy Harper of Stephenson Harwood LLP on behalf of the Respondents (first witness statement dated 6th February 2026, para. 31-33 and second witness statement dated 2nd April 2026, para. 6.4), in 2021-2022, the Vice Group business was experiencing liquidity difficulties. In the Spring of 2022, the management of the Vice Group started to work with professional advisers, Shearman & Sterling (for legal advice), Alix Partners (financial advisers), LionTree and PJT Partners, to explore a possible sale of the group. By 19th May 2022, two bidders had been engaged, the first of which was the Antenna Group. From July 2022 onwards, the Vice Group undertook a due diligence process with the potential bidders, which continued to the end of 2022 and into 2023. During this process, a purchase price was never agreed with the Antenna Group or any other interested bidder.

21. In September 2022, the Vice Group failed to pay the Applicants a required instalment of US$5 million then due and any of the subsequent instalments, failing to pay, in total,

US$20,430,000. The Applicants contend that this was failure under clause 9.1(a) of the Secured Loan Note.

22. Throughout 2022, Mr Benski continued to work with Pulse as a producer of television programmes under the terms of a producer agreement. This gave rise to various disputes between the parties in 2022, which were the subject of many meetings and telephone calls during 2022 (Mr Harper's first witness statement, para. 38-41).

23. Between May and December 2022, the Applicants, Mr Lokhandwala and Mr Dixon had a number of meetings, discussions and telephone calls regarding the proposed sale of the Vice Group. No written records of these discussions are in the hands of the Applicants. It is the Applicants' case that, during these exchanges, they were repeatedly told that the value of the entire Vice Group was (and remained) more than US$1 billion and that Pulse was worth at least between US$100 million and US$150 million, so that if the Vice Group was sold, the Applicants would be made good under the Secured Loan Note (Mr Benski's first witness statement, para. 33).

24. On 8th October 2022, the Applicants served the Forced Sale Notice pursuant to clause 8.1 of the SPA on VEPH, and on VEH and VH. Clause 8.1 provides that:

> "*Subject to the next paragraph, solely in the event of a payment default pursuant to clause 9.1(a) of the Secured Loan Note, the Sellers shall have the right, but not the obligation (the "Forced Sale Right"), to cause the Buyer to initiate a process for a sale of all or any of the Shares or all or any of the assets of the Company and its subsidiaries (as determined by the Buyer acting reasonably and in the exercise of a good faith judgment that proceeds from any such sale would be equal to, and not less than, the amount required to ensure full payment of the SL Amount and all amounts outstanding at the relevant time under the Secured Loan Note, and after consultation with the Sellers in reasonable detail about the rationale therefor) to a bona fide purchaser (a "Third Party Buyer") on arm's length terms at a price of not less than fair market value (a "Sale"). The Forced Sale right shall be exercisable by the Sellers, at their sole discretion (acting together), within any 45 Business Day period commencing on the date the Sellers provide written notice to the Buyer of a payment default pursuant to Section 9.1(a) of the Secured Loan Note (such written notice, the "Forced Sale Notice"). In no event shall the Noteholders be entitled to exercise the Forced Sale Right other than in the event of a default under clause 9.1(a) of the Secured Loan Note occurring as a result of the Buyer failing to pay scheduled principal or interest when due under the Secured Loan Note and in no event shall the Sellers be entitled to exercise any Forced Sale Right as a result of the failure of the Buyer to make any payment on the Secured Loan Note as a result of the acceleration of amounts owing under the Secured Loan Note under clause 9.2 of the Secured*

> *Loan Note as a result of an event of default occurring under clause 9.1 of the Secured Loan Note*."

25. Having served the Forced Sale Notice, the Applicants were entitled to exercise the Forced Sale Right between 10th October and 12th December 2022.

26. The Applicants' case is that, following service of the Forced Sale Notice on 8th October 2022, Ms Lucinda Treat, the Chief Legal Officer and subsequently a special adviser for the Vice Group, telephoned Mr Robert Earl (who was acting for the Applicants) and informed him that the Vice Group was in the process of being sold to the Antenna Group, that the sale was expected to close on 28th October 2022, and that at that point all outstanding amounts under the Secured Loan Note would be accelerated and paid in full (Mr Benski's first statement, para. 37-38), and that representations to the same effect were made by and on behalf of the Respondents, as a result of which the Applicants were persuaded to refrain from exercising their enforcement rights which arose by reason of the service of the Forced Sale Notice and under the VH Guarantee; and that the Applicants were never told the true state of affairs, namely that the Vice Group was financially distressed and that no genuine sale process capable of generating full repayment was underway.

27. The Applicants further contend that, in early November 2022, they were assured that the sale of the Vice Group was delayed, the expected closing date for the sale having passed, but was expected to complete in the near future, and that Mr Earl confirmed to Mr Benski during a call he had had with Ms Dubuc that she stated that if the Applicants exercised the Forced Sale Right before the sale completed, it would disrupt the sale and make it unlikely that the Applicants would receive anything under the Secured Loan Note (Mr Benski's first witness statement, para. 43).

28. Further, the Applicants rely on an email dated 29th November 2022 addressed to Mr Benski, whereby Ms Dubuc offered to keep the Applicants "*updated with pertinent milestones*" and stated that the sale was still "*progressing and positive*", and that the Applicants' support was "*key*" to any sale, and that the Applicants accepted these statements at face value and that when the Applicants sought information about the sale of the Vice Group they were consistently ignored (Mr Benski's first statement, para. 44, 46-47).

29. On 9th December 2022, there was a default under the Senior Credit Agreement. Thereafter, the Vice Group and the Senior Lenders entered into a series of forbearance agreements dated 12th December 2022, 27th December 2022 and 12th January 2023, by which the Senior Lenders agreed to refrain from enforcement action subject to certain conditions.

30. On 12th December 2022, the Applicants' then solicitors, Paul Hastings (Europe) LLP, sent a reservation of rights letter on behalf of the Applicants to VEPH, VEH and VH.

31. On the same day, Mr Benski replied to Ms Dubuc raising the issue of the tax implications which may result from the delay in payment due to the Secured Loan Note default, a matter which had been raised in the Second Forced Sale Notice.

32. In an email dated 21st December 2022 addressed to Mr Benski, Ms Dubuc stated that "*… We are not delaying a sale update - it's simply a matter of giving one when we have one. We are still engaged with Antenna as well as Fortress on a longer-term funding commitment to enable a more competitive process. It looks like timing will now be in Q1, especially given the holidays, but the process is still in full force and that is the intended outcome for our investors, you and the company. I would encourage you not to believe what you may be reading because as you know the press is more often wrong than right when it comes to VMG…*". Later, on 21st December 2022, in reply to a further email from Mr Benski, Ms Dubuc stated in a separate email that she needed to "*get more up to speed on the tax item*".

33. In these communications, Ms Dubuc did not refer to any of the Vice Group's financial issues or issues with the sale process or to the forbearance agreements. Ms Dubuc has confirmed that she believed her statements in this email to be accurate (Mr Harper's first statement, para. 49).

34. On 28th December 2022, pursuant to the forbearance agreements agreed between the Vice Group and the Senior Lenders, Mr Frank Pometti, a bankruptcy specialist, was appointed as Chief Restructuring Officer of the Vice Group (Mr Benski's first statement, para. 59). At para. 56 of his first witness statement, Mr Benski set out his belief and that of Ms Clifford that preparations for his appointment must have been well underway following the occurrence of the event of default on 9th December 2022 and that all relevant people, including the Respondents, were certainly well aware that his

appointment was imminent when the email from Ms Dubuc was sent on 21st December 2022.

35. According to Mr Benski's first statement, at para. 52-53, the Applicants were not aware that the senior secured term loans advanced under the Senior Credit Agreement matured on 9th December 2022 and that the debtors were not in a position to repay or refinance the senior loans when they fell due. The failure to repay the senior loans constituted an event of default under the Senior Credit Agreement, which in turn triggered a cross-default under the Secured Loan Note.

36. On 7th January 2023, Mr Benski wrote to Ms Dubuc referring to the "*consistent lack of transparency and clarity*" and asked her to "*proactively engage and provide useful information*". Ms Dubuc replied to Mr Benski's request for information about the sale denying a lack of transparency and stating that "*we are working on a revised sale strategy*". On 9th January 2023, Mr Benski asked whether the Antenna sale was still proceeding and, on 10th January 2023, Ms Dubuc replied that the sale had "*just stalled and investors feel we should be more aggressive on other paths so we are redirecting our energies*".

37. On 18th January 2023, the Applicants' solicitors, Paul Hastings (Europe) LLP, wrote to Shearman & Sterling asking "*what number would we be looking at to get paid?*". The reply was that it was difficult to gauge, but "*probably run through about $400 [million], depending on timing of closing*". After further exchanges on 19th and 23rd January 2023, Shearman & Sterling stated that "*The situation is very fluid and there are too many variables. We don't have a dollar by dollar waterfall right now and it will depend on how much money the company has to borrow to get through the sales process*".

38. In January 2023, an expected quarterly payment of around US$34 million due to the Vice Group was not made. The agreement under which the payment was due and which had been the source of US$134 million in annual revenue was terminated on 13th February 2023. On 1st March 2023, an arbitration award was made against the Vice Group in the sum of approximately US$10 million (including interest). On 4th May 2023, a judgment was issued against the Vice Group in New York and a subsequent restraining notice was served on the bank accounts of Vice Media at JP Morgan.

39. On 15th May 2023, the Vice Group entities filed for Chapter 11 bankruptcy, with the Senior Lenders submitting a credit bid ultimately valued at US$350 million in June 2023. The Vice Group and Pulse thereby passed into the hands of the Senior Lenders and were released from any liability to the Applicants.

40. On 15th May 2023, Mr Pometti filed a Declaration in support of the Chapter 11 Petitions filed by VEPH, VEH and VH. At para. 65 of his Declaration, Mr Pometti stated that when no sale transaction was able to be completed, the Vice Group was unable to pay its debts and entered into the first forbearance agreements.

**The Applicants' complaint against the Respondents**

41. According to Mr Benski's first witness statement, at para. 70, Shearman & Sterling, acting on behalf of the Vice Group, continued to give the Applicants' solicitors, Paul Hastings (Europe) LLP, the impression that the sale process was ongoing well into January 2023, knowing that those communications would be passed to the Applicants. Against this background, the Applicants argue that this caused them not to take any steps to protect their position.

42. The Applicants advance a case that they were being deliberately kept in the dark and that material facts were being withheld from them, including that the senior loans under the Vice Group's credit facilities were due to mature on 9th December 2022 and were heading for default and were defaulted, that the Vice Group was facing potential insolvency, that the original sale process had collapsed, and that a wholly separate distressed disposal was being managed by bankruptcy specialists appointed by the Senior Lenders, which must have been well known within the Vice Group and Pulse. The Applicants contend further that there had been a number of representations made to them to the effect that the sale process would realise a sufficient sale price to pay the full sums due to the Applicants.

43. The Applicants argue that the Respondents' conduct caused them to believe that the putative sale was likely to be completed by 28th October 2022 and would relate to companies and assets worth more than US$1 billion, sufficient to discharge the sums due under the Secured Loan Note and thus induced them not to exercise their Forced Sale Right which arose by reason of their first Forced Sale Notice (Mr Benski's first witness statement, para. 29-51, 63, 80, 85; Mr Benski's second witness statement dated

11th March 2026, para. 7-13). Mr Benski also stated that had the Applicants known the truth, they would have become involved in the conversations concerning the Vice Group with the leverage of being able to force the sale of Pulse if needed (Mr Benski's first statement, para. 61), and to call on the VH Guarantee (Mr Benski's first witness statement, para. 10, 41, 63, 80, 85; Mr Benski's second witness statement dated 11th March 2026, para. 14-17).

44. Mr Anthony Field of Rosenblatt Law Ltd, in his first witness statement dated 15th October 2025, at para. 2-14, explained the Applicants' claim as follows:

(1) During 2022 and 2023, the Respondents made various representations ("**the Representations**") to the Applicants with respect to payments due to the Applicants from VEPH and assurances that payments would be made whether on the sale of Pulse, the Vice Group or otherwise. The Representations were that:

(a) The value of the Vice Group was in excess of US$1 billion. This representation was made by Mr Lokhandwala and/or Mr Dixon and/or Ms Dubuc during meetings and telephone conversations with Mr Earl and/or the Applicants from May 2022 to December 2022.

(b) The Vice Group was in the process of being sold and that the Applicants would be paid in full from the proceeds of sale. This representation was made by Mr Lokhandwala and/or Mr Dixon and/or Ms Dubuc during meetings and telephone conversations with Mr Earl and/or the Applicants from October 2022 to December 2022 and into 2023.

(c) There were no insolvency issues with the Vice Group. This representation is implied from the two representations referred to above.

(2) The Representations were untrue because:

(a) The value attributed to the Vice Group of US$1 billion was not true and/or was not honestly believed to be true and/or was not reflected in the offers made by the Antenna Group or any other prospective purchaser. This is evident from the fact that the Vice Group was bought out of Chapter 11 bankruptcy for US$350 million.

(b) The solvency of the Vice Group, save for Pulse, must have been in doubt for a significant period of time, as confirmed by the timing of the appointment of Mr Pometti in December 2022.

(3) The Respondents were obliged immediately to inform the Applicants if the Representations became untrue, but the Respondents did not so inform the Applicants.

(4) The Respondents conspired in making the Representations in order to stop the Applicants from exercising enforcement rights pursuant to the Secured Loan Note, or taking any other action in order to protect their position. It is the Applicants' case that, had they known the true financial state of the Vice Group (other than Pulse), they would have exercised their Forced Sale Right or taken any other steps available to them to protect their position, including calling on the VH Guarantee.

(5) In reliance on the Representations, the Applicants did nothing, took no enforcement action, did not protect their position, and believed what they were told by the Respondents, and thereby lost the opportunity to enforce their rights pursuant to the Secured Loan Note, to call on the VH Guarantee or to take any other steps against the Vice Group to recover the sums due to them.

(6) The Representations were made with the intention of (a) inducing the Applicants into not exercising their Forced Sale Right, and/or (b) avoiding making payments due to the Applicants, and/or (c) inducing the Applicants not to take any steps to call on the VH Guarantee and/or (d) inducing the Applicants to remain quiet and not take any steps, whether enforcement or otherwise, until it was too late.

(7) In making the Representations, the Respondents acted in combination with the predominant intention, alternatively the intention, of causing such loss to the Applicants.

(8) The Respondents' tortious conduct caused the Applicants loss in the sum of at least US$20,430,000.

45. In his skeleton argument, Mr Mo Haque KC on behalf of the Applicants stated that the substantive issues arising between the parties in respect of the Applicants' claim are as follows:

(1) Whether there was a sale process at all after Autumn 2022 and before 12th January 2023 and if so, what it was.

(2) When did the Respondents recognise there would be a default on the US$450-475 million Senior Loan due on 9th December 2022 and/or of any other matters that would create an insolvency situation?

(3) When did the Respondents approach Mr Pometti leading to the Chapter 11 process?

(4) Why did the Respondents not advise the Applicants of any of the above matters as they were contractually obliged to do?

46. I should note that the Respondents have submitted that the details of the Applicants' claim as set out in their skeleton argument have altered the summary provided by Mr Field in his witness statement.

47. On 26th September 2023, the Applicants' then solicitors wrote a pre-action letter to the Respondents setting out their claims and requesting various documents.

48. On 30th October 2023, the Respondents through their solicitors refuted the claims, denying the allegations of fraud and conspiracy, explaining that the claim would fail in any event because the Applicants could never have recovered the sums due to them given their subordinated creditor status, and declining to undertake the pre-action disclosure exercise which had been requested.

49. On 2nd May 2025, the Applicants' solicitors, Rosenblatt Law, sent a letter before action, setting out their claims and seeking pre-action disclosure of (i) emails, correspondence and attendance notes between the Respondents, (ii) copies of bids received for the purchase of Pulse between 1st January 2022 and 15th May 2023, (iii) copies of financial

statements, accounts and management documents in relation to Pulse for the period from 1st March 2022 to 15th May 2023, and (iv) copies of all sale agreements in relation to Pulse during 2022 and 2023.

50. On 15th May 2025, Gibson Dunn on behalf of the Respondents replied to Rosenblatt Law, referring to their last letter dated 11th January 2024, to which they had received no response, and refusing to provide the disclosure requested and indicating that their clients would oppose any application under CPR rule 31.16.

**The Application**

51. On 16th October 2025, the Applicants issued an application for pre-action disclosure under CPR rule 31.16 in respect of the specified categories of documents.

52. On 5th December 2025, Stephenson Harwood LLP on behalf of the Respondents responded to the application for pre-action disclosure by asking for further particulars of the Applicants' claim against the Respondents. On 19th December 2025, Rosenblatt Law replied that the Respondents had sufficient information to understand the case which the Respondents must answer.

53. After the receipt of evidence filed by the Respondents, the Applicants amended the categories of disclosure sought, with the result that the following documents are now sought to be disclosed:

(1) Category 1: Documents relating to the sale of the Vice Group and/or Pulse to the Antenna Group and/or any other prospective purchaser that mention any potential sale price or valuation of the Vice Group for the period from 15th June 2022 to 30th May 2023.

(2) Category 4: Correspondence between (a) the directors of VEPH, VEH, VH and Pulse, and (b) the Respondents, for the period from 15th June 2022 to 30th May 2023, regarding (i) the value of the Vice Group and/or the value of Vice Group being less than US$1 billion, (ii) the assertion that the Applicants would be paid in full from the proceeds of any sale, (iii) the solvency of the Vice Group (including whether or not to pay the Applicants the sums due to them in September 2022 and December 2022), and (iv) the commencement of the

Chapter 11 bankruptcy process entered into by the Vice Group (excluding Pulse) on 15th May 2023 (and/or any other insolvency procedures involving Pulse Films Limited or its sale).

(3) Category 5: Any and all documents in the possession of the Respondents, for the period from 15th June 2022 to 30th May 2023, which refer to (i) concealing the true sale value of the Vice Group away from the Applicants, (ii) concealing information about the progress of any purported sale of the Vice Group away from the Applicants, (iii) concealing from the Applicants the fact that the Vice Group would not be able to pay its senior debt when it became due in December 2022, (iv) the decision whether or not to pay the Applicants the sums due to them in September 2022 and December 2022, and (v) any discussions about withholding information from the Applicants in order to ensure they did not take any steps to recover the monies owed to them.

54. As stated above, the Respondents resist the application for pre-action disclosure.

**The CPR and the principles**

55. The application is made for pre-action disclosure under CPR rule 31.16, which provides that:

"*(3) The court may make an order under this rule only where–*

*(a) the respondent is likely to be a party to subsequent proceedings;*

*(b) the applicant is also likely to be a party to those proceedings;*

*(c) if proceedings had started, the respondent's duty by way of standard disclosure, set out in rule 31.6, would extend to the documents or classes of documents of which the applicant seeks disclosure; and*

*(d) disclosure before proceedings have started is desirable in order to –*

*(i) dispose fairly of the anticipated proceedings;*

*(ii) assist the dispute to be resolved without proceedings; or*

*(iii) save costs*."

56. CPR rule 31.16 is preserved by para. 1.9 of CPR PD 57AD, which provides that nothing in the Practice Direction is intended to change the application or working of CPR rule 31.16 which is reproduced in Part II of the Practice Direction.

57. There are certain jurisdictional requirements which must be satisfied before the Court has a discretion to exercise as to whether to allow pre-action disclosure, namely that:

(1) The applicant and the respondent to the application must each be "*likely*" to be a party to an action subsequently instituted. In *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, at para. 72-73, Rix LJ noted that the word "*likely*" is not intended to reflect at least a 51% probability, but rather indicating that the respondent "*may well*" become a party to the contemplated litigation. That is, there must be a distinct and credible prospect that each of the applicant and the respondent will be parties to legal proceedings. The justification for this requirement is that the ordering of disclosure impacts parties to an action before the Court and there must be some, even if only a modest, level of confidence that the respondent who is required to provide the disclosure will eventually be before the Court. Rix LJ considered that the jurisdictional threshold was not intended to be a high one. This does not mean that any contemplated proceedings are "*likely*", but rather merely that the Applicants and the Respondents are "*likely*" to be parties to any such proceedings if issued (*Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, para. 71).

(2) The documents sought by the applicant must come within "*standard disclosure*" as defined in CPR rule 31.6. This presupposes that there is a clear sense of what the issues in the contemplated proceedings are likely to be, because otherwise it will not be possible to identify whether the disclosure to be provided is adverse to or supportive of either party's case in respect of those issues in dispute (*Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, para. 76-78; *Assetco plc v Grant Thornton UK LLP* [2013] EWHC 1215 (Comm), para. 17(2); *AtTheRaces Ltd v Ladbrokes Betting and Gaming Ltd* [2017] EWHC 431 (Ch), para. 29). That does not mean that, in order to deal with an application for pre-action disclosure, a statement of case must have been formulated by the applicant; indeed, it may well be that the disclosure sought

will assist in the preparation and articulation of the statement of case; on the other hand, the absence of any statement of the applicant's case has the capacity to undermine the application for pre-action disclosure, especially in complex cases (*Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, para. 68; *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269, para. 27, 29; Hollander, *Documentary Evidence* (15th ed., 2024), para. 1-23).

(3) The provision of pre-action disclosure is "*desirable*" to dispose fairly of the subsequent proceedings, to resolve the dispute without proceedings or to save costs. The word "*desirable*" reflects the balancing exercise that the Court will have to exercise in carrying out their case management powers under the CPR (*Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269, para. 26). For this purpose, there must be a real prospect that the provision of disclosure will have one of the specified desirable effects (*Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, para. 81).

58. Once these jurisdictional requirements are satisfied, it is up to the Court to decide whether it should exercise its discretion to order the disclosure sought prior to the commencement of proceedings. The desirability of the disclosure, being one of the jurisdictional conditions, does not automatically translate into the Court exercising its discretion to allow the disclosure, not least because this jurisdictional condition is expressed very broadly (*Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, para. 82-83).

59. In exercising this discretion, the Court should hesitate to evaluate any substantive issues reflecting the merits of a party's putative case. In *Rose v Lynx Express Ltd* [2004] EWCA Civ 447; [2004] BCC 714, at para. 4, Peter Gibson LJ said:

> "*We think therefore that courts should be hesitant, in the context of an application for pre-action disclosure, about embarking upon any determination of substantive issues in the case. In our view it will normally be sufficient to found an application under CPR, r.31.16(3) for the substantive claim pursued in the proceedings to be properly arguable and to have a real prospect of success, and it will normally be appropriate to approach the conditions in CPR, r;31.16(3) on that basis*."

60. That said, whether a party's case is "*properly arguable*" is not a matter touching one of the jurisdictional conditions; it is relevant to the Court's discretion (*Smith v Secretary*

*of State for Energy and Climate Change* [2013] EWCA Civ 1585; [2014] 1 WLR 2283, para. 26-27; *Jet Airways (India) Ltd v Barloworld Handling Ltd* [2014] EWCA Civ 1311, para. 13).

61. Rix LJ's judgment in *Black v Sumitomo Corp* remains an authoritative statement on the meaning and application of CPR rule 31.16 (see *e.g. The ECU Group plc v HSBC Bank plc* others [2017] EWHC 3011, para. 17). At para. 88, Rix LJ said with respect to the exercise of this discretion:

> "*That discretion is not confined and will depend on all the facts of the case. Among the important considerations, however, as it seems to me, are the nature of the injury or loss complained of; the clarity and identification of the issues raised by the complaint; the nature of the documents requested; the relevance of any protocol or pre-action inquiries; and the opportunity which the complainant has to make his case without pre-action disclosure*."

62. All material circumstances must be weighed in the exercise of the Court's discretion. This includes the diligence with which the application has been made or whether it has suffered from delay (*First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827 (Comm), para. 25); whether the claim could be made and proceedings instituted without the benefit of pre-action disclosure (*AtTheRaces Ltd v Ladbrokes Betting and Gaming Ltd* [2017] EWHC 431 (Ch), para. 42; *Zhang v Mischcon de Reya LLP* [2025] 4 WLUK 168, para. 39); and whether the documents sought to be disclosed contain confidential or commercially sensitive information (*Hays Specialist Recruitment (Holdings) Ltd v Ions* [2008] EWHC 745 (Ch), para. 48).

63. Although all of the circumstances should be taken into account by the Court, the discretion to be exercised for the purposes of CPR rule 31.16 is heavily influenced by the precision with which the applicant's allegations and claim are formulated and the categories of documents sought to be disclosed are described. At para. 95, Rix LJ said:

> "*In my judgment, the more focused the complaint and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of pre-action disclosure, even where the complaint might seem somewhat speculative or the request might be argued to constitute a mere fishing exercise. In appropriate circumstances, where the jurisdictional thresholds have been crossed, the court might be entitled to take the view that transparency was what the interests of justice and proportionality most required.*

*The more diffuse the allegations, however, and the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise*."

64. The provision of disclosure is a staple of litigation. Disclosure follows, almost as an invariable step, the institution of proceedings by a party, which introduces the Court's supervision of the conduct of those proceedings by the named parties, and it follows the exchange of statements of case, whereby the issues in dispute between the parties are defined and readily ascertainable. The entire exercise of disclosure involves each of the parties embarking on the demanding task of searching for, identifying and producing for inspection documents which relate to those pleaded issues.

65. The provision of disclosure prior to the commencement of proceedings upends, and can even distort, this methodical approach. Accordingly, the indulgence which pre-action disclosure represents must be one which limits the burden on the respondent, especially in circumstances where no proceedings may eventuate, and, where an action is instituted, the disclosure process may well have to be repeated (*Assetco plc v Grant Thornton UK LLP* [2013] EWHC 1215 (Comm), para. 30-31; *Dennis v Queenwood Golf Club Ltd* [2024] EWHC 3191 (Ch), para. 63-65). It is for this reason that the documents sought to be disclosed should be confined, by identifying individually specified documents or by framing narrow categories of documents. Thus, in *Carillion plc (in liq) v KPMG LLP* [2020] EWHC 1416 (Comm), at para. 67, Jacobs J said that "*The request must be "highly focussed" and confined to what is "strictly necessary" for the purposes for which pre-action disclosure may be ordered*". A significant aspect of ordering such disclosure is to limit the onus on the respondent to carry out any evaluation of what is or is not disclosable or what documents fall within any broadly-defined categories.

**Jurisdiction**

66. Mr Mo Haque KC on behalf of the Applicants submitted that the jurisdictional requirements of CPR rule 31.16(3) are satisfied because:

(1) Having regard to the authorities, the threshold for jurisdiction is deliberately low. The applicant need only show a case that is more than speculative and that disclosure will assist in confirming or refuting it. CPR 31.16 is designed to enable a claimant to obtain documents where those documents are necessary to

understand, evaluate or properly plead a claim, particularly where the key evidence lies within the defendant's control.

(2) The Applicants are likely to be parties to subsequent proceedings, as they have a complaint against the Respondents for their breaches of the Vice Group's contractual obligations to the Applicants. There is no need to prove that proceedings are themselves likely to be issued.

(3) Each of the Second, Third and Fourth Respondents are or were senior individuals within the Vice Group and/or Pulse and compounded the original failure to pay by making or orchestrating the misrepresentations and have participated in the alleged conspiracy. The representations were made on Pulse's behalf as well as on behalf of the individual Respondents. It is likely that Pulse will hold key financial and management documents.

(4) The categories of documents sought to be disclosed fall squarely within standard disclosure in the contemplated action in that they relate directly to knowledge, solvency, valuation, and what was communicated (or withheld) and why.

(5) The question of desirability is to be approached in a practical, cost-sensitive way. Disclosure is plainly desirable; the date range of the disclosure sought (15th June 2022 to 30th May 2023) is focused and proportionate.

67. Mr Jonathan Allcock on behalf of the Respondents submitted that:

(1) The Applicants have failed to particularise the intended claim or identify the issues in it with anything approaching the clarity required to allow the Court to conclude that the documents being sought fall within standard disclosure.

(2) There is no clarity as to the person(s) said to have made the Representations. Mr Harper's first witness statement, at para. 7-21, explained that there is an inconsistency in the evidence given on behalf of the Applicants as to who made the representations and when; for example, one of the Representations relied on by the Applicants was said to have been made by the Respondents during telephone conversations or meetings during 2022, but Mr Benski refers only to

a single conversation between Ms Treat and Mr Earl in October 2022. Further, Mr Field's evidence does not explain how the second Representation - that there was a sale process underway - was untrue.

(3) Mr Harper explained that the date(s) and circumstances of the alleged making of the Representations are not precisely identified. The Applicants simply identify broad time periods, alleging that the representations were made "*from May 2022 to December 2022*" or "*from October 2022 to December 2022 and into 2023*".

(4) The Applicants have not produced a draft statement of case, even though it is their own position that the claim could be brought without the disclosure now being sought (Mr Field's first witness statement, para. 32).

(5) As for the conspiracy claim, there is no identification of the primary facts from which the alleged conspiracy might be inferred. Nor is there any attempt to identify the date on which the Respondents allegedly combined for the relevant purposes.

(6) Such matters which should have been identified, but are not, are critically relevant in a fraud claim not only to the question of whether the Representations were made at all and what they meant, but also (for example) to the questions whether the Representation could be characterised as continuing, whether the Representations were dishonest, whether the Representations were relied upon and if so in what way, and whether and if so when the Applicants knew the Representations (if made) were false.

(7) The Applicants must be able to identify the issues in the claim with sufficient clarity to enable the Court to determine that the documents would fall within standard disclosure. The basic elements of the claim would determine, in a standard disclosure exercise, the relevance of documents, and for what periods of time. It is impossible to assess such matters on the basis of a vague and inconsistent articulation of the proposed claim.

(8) The Applicants have served a skeleton argument for the hearing of the application which dramatically departs from the case which Mr Field stated

unequivocally would be the one pursued at this hearing. In any event, the case now being run remains unacceptably vague, perhaps even more so than before. Briefly, the Respondents' points can be summarised as follows:

(a) The Applicants' skeleton relies on an alleged representation (presumably said to be false, although it is not clear why) made not by any of the Respondents, but by Ms Lucinda Treat on the telephone. This representation is said to have been followed by "*a series of further representations to the same effect made by and on behalf of the Respondents*" made on unspecified occasions thereafter.

(b) It is said that VEPH, which is not a Respondent, made "*an implied contractual warranty which it knew to be false*" as a result of clause 7.8 in the Subordinated Loan Agreement dated 8th December 2021 (a year before the relevant events). This new point is a demonstrably bad one, as the warranty was given only as at the date of the agreement.

(c) It is now said that whether the content of an email dated 21st December 2022 from Ms Dubuc was accurate is "*a matter squarely in dispute*". It was not, however, in dispute, squarely or otherwise, until the Applicants' skeleton was served. Even now, it is not made clear on what basis the statement is challenged.

(d) It is now suggested that a partner in Shearman & Sterling was involved in a "*pattern of deflection*" and perhaps something even more serious than that. This is not a matter which Mr Field anywhere suggested would be relied upon.

(e) It is said that the Applicants, over an unspecified period, "*continued to receive assurances that a sale was progressing*". Again, that is not supported by the evidence or identified by Mr Field as something on which they would rely.

(9) It is readily apparent that the classes of documents sought to be disclosed will encompass documents which would not fall within standard disclosure, although they might include documents which fall within standard disclosure.

The categories of documents sought are therefore, on any view, too broad and poorly-defined and would impose a burdensome responsibility on the Respondents.

(10) None of the three jurisdictional tests - that the disclosure is "*desirable*" - under CPR rule 31.16(3)(d) is satisfied.

(11) It is not realistic to expect that disclosure would avoid the need for proceedings. The Applicants are proposing to invest nearly half a million pounds in this disclosure exercise if it is ordered. The Applicants cannot show that there is something unusual about this case which makes it "*desirable*", whether for the purposes of avoiding the proceedings, disposing fairly of the proceedings or saving costs.

68. I am prepared to accept that the Applicants and the Respondents are "*likely*" to be - meaning that they may well be - parties to any proceedings which are commenced by the Applicants. Further, I am prepared to accept that the disclosure of at least some of the documents is desirable for one or more of the purposes referred to in CPR rule 31.16(3)(d).

69. However, I have difficulty in accepting the Applicants' submission that all of the categories of the documents sought to be disclosed would fall within standard disclosure.

70. The chief obstacle to concluding that this jurisdictional requirement (standard disclosure) is satisfied is the uncertainty surrounding the formulation of the claim or complaint so far articulated by the Applicants. There is much to justify the critique undertaken of the formulation of the Applicants' claim by Mr Harper in his evidence. As the Applicants' case is dependent on the Representations being made to the Applicants, and the Applicants relying on those Representations, the Applicants' case is vague in identifying which individuals are said to have made the Representations, in what terms and in what circumstances, and precisely when they were said to have been made. The details relating to the claim based on an alleged conspiracy are even more difficult to distil. These are matters which should be known to the Respondents before being required to review the documents in their control with a view to disclosing the same.

71. As a result, as the scope of the Applicants' case is not sufficiently specifically defined, it is equally difficult to conclude that all of the documents sought would fall within the scope of standard disclosure, given the description of the categories of the documents sought.

72. I suspect that it is likely that at least some of the documents sought by the Applicants would fall within the bounds of standard disclosure, but I do not consider that would extend to all of the documents within Category 1 (documents referring to a sale price or valuation in respect of the Vice Group), Category 4 (inter-partes correspondence relating to the value of the Vice Group, the payment of the sums due to the Applicants, the solvency of the Vice Group and the commencement of Chapter 11 proceedings), and Category 5 (documents held by the Respondents which point to concealing specified information from the Applicants). More importantly, I cannot be certain that even those documents which I suspect would fall within the scope of standard disclosure, would do so. The difficulty in identifying which of the documents within each category falls within the scope of standard disclosure militates against the establishment of the Court's jurisdiction.

73. In my judgment, the Applicants have not satisfied the jurisdictional requirements of CPR rule 31.16(3), at least for much of the documents sought by the Applicants.

74. These considerations, in any event, are relevant to the exercise of the Court's discretion which I now address.

**Discretion**

75. Mr Haque KC submitted on behalf of the Applicants that the Court's discretion should be exercised in their favour for the following reasons:

(1) The documents sought are likely to fill in the gaps in the history of the matter and shed light on the key matters in issue. The material would also help the Applicants plead a more focused case, which was preferable in a large and complex case.

(2) The Applicants cannot properly plead issues of knowledge and dishonesty without access to the Respondents' internal documents. The very essence of the

contemplated claims - fraudulent misrepresentation and unlawful means conspiracy - turn on the state of mind of the representors at the moment they made the Representations. That state of mind is not accessible through inference alone; it can only be established from the Respondents' documents.

(3) It is sufficient to justify an order for pre-action disclosure if the substantive claim pursued in the proceedings is properly arguable and has a real prospect of success.

(4) If the documents demonstrate that the Respondents were aware of the parlous financial position of the Vice Group whilst continuing to assure the Applicants that a sale was progressing, the central factual question will be resolved. As Mr Field observed in his witness statement, at para. 25-26, the documents will either support or impair the Applicants' case; in either case, their disclosure will be desirable.

(5) The jurisdiction is particularly apt where the documents sought go to issues of knowledge, state of mind, or internal decision-making, which cannot otherwise be accessed. The critical issues of knowledge, intention and concealment in this case can be established only from documents in the Respondents' control. Without disclosure, the Applicants face the precise predicament CPR rule 31.16 is designed to address - being required to make serious allegations of fraud against parties who alone hold the contemporaneous records that would confirm or refute them.

(6) The Court should not attempt to resolve substantive disputes or determine the merits of the claim at the pre-action stage. It is sufficient that the claim is properly arguable.

(7) According to Mr Harper's second witness statement dated 2nd April 2026, at para. 7-8, the cost to the Respondents in providing disclosure would be at least £440,000 (plus VAT) and the Respondents will have to review a starting pool of approximately 264,000 documents, which may reduce to approximately 6,600 documents for substantive review. That is a proportionate and justified exercise; it is not an excessive burden. The Court has ample power to impose focused

search terms and custodian limits to manage the exercise, and the Applicants invite the Court to do so if minded to grant the order.

(8) If disclosure may enable the dispute to be resolved, or may avoid proceedings altogether, that is a powerful factor in favour of granting relief.

76. Mr Allcock on behalf of the Respondents submitted that:

(1) The clarity and identification of the issues raised by the complainant is one of the "*important considerations*" at the discretionary stage identified by Rix LJ in *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, para. 88. To allow pre-action disclosure in circumstances where "*the complaint, its factual and legal basis, and the issues which it raises, are speculative in the extreme"* would be to replace "*focused allegation by a roving inquisition*" (*Black v Sumitomo Corp*, para. 91-92).

(2) In this case, there is strikingly little clarity about the case which the Applicants intend to bring and the issues to which it would give rise. On the contrary, it is vague, confusing and internally inconsistent. This highly unsatisfactory situation has now been compounded by the new case which the Applicants seek to run in their skeleton argument, which is not only unfair to the Respondents, but further adds to the confusion. The Respondents submit that there should plainly be no order for pre-action disclosure in these circumstances.

(3) It is right that the Court should not "*attempt to resolve substantive disputes*" at the pre-action stage, but the merits may, in an appropriate case, be a consideration to be taken into account when the Court exercises its discretion. The Court must take into account the lack of ostensible merit in the claims, which it can do so even without resolving contentious factual issues:

(a) The Applicants' inability to articulate and particularise the misrepresentation case is not only a reason to refuse the relief sought but is also a clear indication that it could not succeed at trial. The case is based on alleged oral misrepresentations which, contrary to what is suggested by the Applicants, the Respondents deny making. If the Applicants cannot even put forward a case as to the gist of what was said, or when it was said, or by whom it was said, or to whom it was said, there is no real prospect of that case succeeding at trial.

(b) There is no prospect of the implied representation case succeeding, as it depends on the alleged oral representations, which are vague in content.

(c) Having regard to confidential documents which were placed before the Court, the Applicants' case on the falsity of the alleged Representations cannot be maintained, as the value of the Vice Group is evidenced to be approximately US$1 billion.

(d) The unlawful means conspiracy claim relies on the same alleged Representations and therefore suffers the same problems articulated above. In addition, there is no attempt to identify the date of the combination, or the circumstances in which it was reached. In particular, it is impossible to see how the Applicants could show that the predominant intention of the conspiracy (assuming it to have existed, which it did not) was to injure them, rather than to benefit Pulse and the Vice Group.

(e) The claims are also bound to fail on causation and loss, because the Applicants cannot demonstrate that the exercise of the Forced Sale Right, or the enforcement of the VH Guarantee, would have resulted in their recovery of US$20,430,000 (the Applicants' alleged loss).

(4) The documents or classes of documents sought by the Applicants have not been "*crafted with great care*", have not been "*properly limited to what is strictly necessary*", and are not "*highly focussed*" (*Carillion plc (in liq) v KPMG LLP* [2020] EWHC 1416 (Comm), para. 67). The Applicants have proposed broad and unfocussed categories of documents which would require a vast collection and review process by the Respondents' solicitors. It is inappropriate to require a respondent to identify which of its documents are within the scope of standard disclosure. The fact that the Applicants would pay for it is no answer to the point; it is not fair and it is inconsistent with the adversarial nature of litigation for the Applicants to be permitted to review thousands of internal and

confidential documents of the Respondents in order to see whether they can sue them for fraud.

(5) The scale of the proposed exercise and the reasons why it would require a large amount of individual review is explained in Mr Harper's first witness statement, at para. 54.6, and in his second witness statement, at para. 7-8: the Respondents would have to review a starting pool of documents of 264,000 documents, which are likely to reduce to 6,600 documents, at a cost of at least £440,000 (plus VAT).

(6) Mr Field has stated in his first witness statement, at para. 32, that "*The Applicants can make their claim on an inferential basis without disclosure but the evidence is incomplete and in all likelihood any pleadings would require significant amendment*". If that is right, and a viable claim can already be pleaded, then there is no realistic possibility of any alleged fraudulent conduct would escape detection in the litigation. If the applicant can bring the claim without the pre-action disclosure, that militates against the grant of the order sought (*First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827 (Comm), para. 23-27)).

(7) The Vice Group's internal documents relating to the sale process and its business in the months leading to the Chapter 11 process, as well as those relating to its dealings with the Applicants, are confidential *vis à vis* the Applicants. The public interest in the fair disposal of civil disputes routinely justifies an interference with parties' rights of confidentiality as part of the disclosure process in ongoing litigation. There is no equivalent consideration before proceedings have been commenced and before the parties have pleaded their case.

(8) This is not a case in which there is some unusual feature which justifies a departure from the normal course of events in litigation, still less a departure of this significance involving such an extensive pre-action process.

(9) The Court should not order pre-action disclosure "*to encourage fishing expeditions to enable a prospective plaintiff to discover whether he has in fact*

*got a case at all*" (*Zenith Insurance plc v LPS Solicitors Ltd* [2020] EWHC 1260 (QB), para. 26(5)).

(10) Orders for pre-action disclosure in the Commercial Court have frequently been described as "*unusual*" (*First Gulf Bank v Wachovia Bank National Association* [2005] EWHC 2827 (Comm), para. 24; *Assetco plc v Grant Thornton UK LLP* [2013] EWHC 1215 (Comm), para. 17(6); *Carillion plc (in liq) v KPMG LLP* [2020] EWHC 1416 (Comm), para. 15).

(11) Although the jurisdictional threshold may be passed relatively easily in many cases, that does not mean that an order will therefore be appropriate as a matter of discretion, or that there is any presumption to that effect.

77. In my judgment, even assuming the Court otherwise had the jurisdiction to make the order under CPR rule 31.16, the application for an order for pre-action disclosure should be refused as a matter of the Court's discretion for the following reasons.

78. First, the categories of documents sought to be disclosed are not precisely and narrowly defined but are broad and generalised in scope in that:

(1) The period for the dates of creation of the documents sought is one year (June 2022 to May 2023). This is a considerable period of time and represents the type of date range one encounters in the disclosure exercise implemented as part of legal proceedings. However, in the context of pre-action disclosure, imposing a requirement on a party to garner, search for and review what may be a sizeable cache of documents over many months speaks against the exercise of the Court's discretion in favour of pre-action disclosure.

(2) The documents to be disclosed are described as documents which "*relate to*" the sale of the Vice Group or Pulse and must "*mention*" a potential sale price or valuation (category 1), and which "*regard*" the value and solvency of the Vice Group, and the prospect of the Applicants being paid from the proceeds of sale (category 4), and which "*refer to*" the Applicants' concealing or withholding information from the Applicants (category 5). These are terms which are amorphous in scope and require the exercise of judgment by the Respondents

to determine whether the documents ultimately to be disclosed fall within these descriptions.

(3) The date range and description of the documents sought to be disclosed will impose a considerable burden on the Respondents in evaluating what must and what must not be disclosed, if an order were made.

79. Second, the disclosure exercise sought to be imposed on the Respondents is a very substantial one. According to Mr Harper's evidence, the starting pool of documents to be reviewed comprises 264,000 documents. Even if one considers only the estimated number of documents which might require a substantive review (6,600 documents), that still translates into a substantial disclosure exercise. The estimated cost of this exercise is £440,000 (plus VAT). Even though the Applicants would be required to bear that cost if disclosure were ordered, an additional disclosure exercise would have to be undertaken, perhaps involving substantial duplication, if proceedings are commenced. I consider that this to be a disproportionately heavy burden to be borne by the Respondents, both in resources and in time. That does not represent an efficient approach to case management.

80. Third, there is a lack of clarity in the formulation of the Applicants' substantive claim against the Respondents. As mentioned above, I consider that there is substance in Mr Harper's critique of the way in which the Applicants have formulated their claim. For example, at one stage, reference was made to a specific representation made by Ms Treat in October 2022, but elsewhere the Applicants refer to representations allegedly being made in a variety of number of meetings, discussions and telephone calls over several months, without any attempt to identify which individual(s) made the specific representations to which individual(s), the circumstances in which the Representations were made, and the words used in the relevant context. The same criticism carries more weight in respect of the allegation of conspiracy, where no particulars are offered in respect of the Respondents' alleged intention and agreement. In such circumstances, it is difficult to define the issues to which the documents sought might properly be said to be relevant. The absence of a draft statement of case prepared by the Applicants - especially when it is said that a claim could currently be brought (as to which see below) - underlines the uncertainties in this respect.

81. These three considerations weigh most heavily in the exercise of the Court's discretion. I would have refused the application based on these considerations alone. However, the following further considerations reinforce my decision not to make an order for pre-action disclosure.

82. Fourth, Mr Field's evidence is that the Applicants are in a position to bring a claim based on the documents currently available to them and on inferences to be drawn, although I note that Mr Field also states that any such statement of case would not benefit from all of the relevant evidence and would require amendment. In those circumstances, it seems to me that the preferred course would be for the Applicants, if they choose, to commence proceedings and serve their particularised claim against the Respondents, to which the Respondents can respond with their own statement of case. If such a course were undertaken, the issues in dispute between the parties will be precisely defined, which would enable the Court to make an order for disclosure in the usual way. There is nothing unusual or noteworthy in the Applicants' complaint which justifies making an order for pre-action disclosure.

83. Fifth, although I have not sought to assess the merits of the Applicants' claim against the Respondents, it is not obvious to me that there is concrete evidence of dishonesty which would justify the making of the order for pre-action disclosure. That said, I have not concluded that such an allegation could not properly be made. In considering the exercise of the Court's discretion, I have had regard to what Rix LJ said in *Black v Sumitomo Corp* [2001] EWCA Civ 1819; [2002] 1 WLR 1562, at para. 54, that the mere fact that an allegation of fraud is made does not give the applicant a privileged access to disclosure prior to the institution of proceedings, noting that "*it cannot be right that an allegation of fraud should assist the potential claimant to obtain pre-action disclosure, unless his allegations carry both some specificity and some conviction and his request for disclosure is appropriately focussed*". At para. 92, Rix LJ further said that:

> "… *unless there is some real evidence of dishonesty or abuse which only early disclosure can properly reveal and which may, in the absence of such disclosure, escape the probing eye of the litigation process and thus possibly all detection, I think that the court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition*."

84. Sixth, the provision of pre-action disclosure may well extend to commercially sensitive and/or confidential information contained in the documents to be produced. That is not to say that such documents may not have to be disclosed as part of the disclosure exercise if proceedings are commenced, but this is a consideration which counts against the exercise of the Court's discretion.

85. Seventh, I do not consider that there is any substantial prejudice to the Applicants if the order were not granted, as they maintain that they can plead their claims against the Respondents even without the disclosure sought.

86. I would add that there was a considerable period of time - 18 to 24 months - between the Applicants' first intimation of an application for pre-action disclosure and the making of the application itself. The Respondents did not place any emphasis on this consideration in their opposition to the application. Accordingly, I have given little weight to the period of delay in the exercise of the Court's discretion.

**Conclusion**

87. For the reasons explained above, the Applicants' application for pre-action disclosure under CPR rule 31.16 is dismissed.

88. I am grateful to both counsel for their helpful submissions.