Companies - two applications - the plaintiffs to limit discovery and the third defendants seeking specific discovery.

[2019]JRC004A

ROYAL COURT
(Samedi)

17 January 2019

Before : Advocate Matthew John Thompson, Master of the Royal Court.

Between	**CMC Holdings Limited**	**Plaintiffs**
	CMC Motors Group Limited	
And	**Martin Henry Forster**	**Defendants**
	RBC Trust Company (International) Limited	
	The Regent Trust Company Limited	
And between	**RBC Trust Company (International) Limited**	**Third Party Plaintiffs**
	The Regent Trust Company Limited	
And	**Jeremiah Kiereini**	**Third Party Defendants**
	Charles Mugane Njonjo	
	The estate of Jack Mordejay Benzimra	
	The estate of Prahlad Kalyanji Jani	
	Martin Henry Forster	
And between	**Martin Henry Forster**	**Third Party Plaintiff**
And	**RBC Trust Company (International) Limited**	**Third Party Defendants**
	The Regent Trust Company Limited	

Advocate S. C. Thomas and Advocate J. M. Sheedy for the Plaintiffs.

The First Defendant not appearing.

Advocate S. J. Alexander for the Second and Third Defendants.

Advocate N. G. A Pearmain for Mr Kiereini

Advocate D. S. Steenson for Mr Njonjo.

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JUDGMENT

THE MASTER:

Introduction:

1. This judgment represents my decision in respect of two applications; the first by the plaintiffs to limit discovery and the second by the second and third defendants in essence seeking specific discovery.

2. The application by the plaintiffs was set out in their summons dated 31st July, 2018, and sought the following relief:-

> *"The Plaintiffs be given leave to undertake a limited search for discoverable documents, limited to a sampling of the documents contained in the storerooms of the Plaintiffs, as described in the affidavit of Sally Patricia Mukabana dated 26 May 2017".*

3. The application was somewhat elliptical because by the time the application came to be determined by me, the plaintiffs' position was that they had carried out the limited search in the storerooms sought by the summons as well as providing other discovery, which will be described later in this judgment. The plaintiffs' application effectively therefore sought permission that no further discovery enquiries were required.

4. The second and third defendants' application in summary sought the following:-

(i) The claim that communications between the plaintiffs and the first defendant were subject to litigation privilege was challenged.

(ii) Communications between the plaintiffs and Mr Kiereini and Mr Njonjo concerning the termination of their employment, disposal of their shareholding in the plaintiffs or any indemnity or compromise of any potential liability of Mr Kiereini and Mr Njonjo relating to the present proceedings.

(iii) Information concerning the electronic discovery process carried out by the plaintiffs.

(iv) Communications between the plaintiffs and vehicle manufacturers in relation to the ordering of vehicle units, the negotiation of terms of purchase and the payment arrangements.

(v) The challenge to litigation privilege was also made against the first defendant.

5. The present application follows on from my previous decision in 2017 to limit searches for documents reported at CMC Holdings Ltd v Forster & Ors [2017] JRC 188 and the Royal Court decision to set aside my previous decision to limit discovery reported at CMC v Forster and Ors [2018] JRC 078. The key paragraphs of that judgment are paragraphs 52 to 65 as follows:-

> ***"52. It is clear that in making the Order the Master neither exceeded his jurisdiction nor had regard to other than the correct principles.***
>
> ***53. In the light of the information that was both before the Master and is before us, that the challenges that arise within the discovery exercise take this case out of the norm. To us it may well call for both an iterative and imaginative approach to the discovery exercise such as that it ensures, so far as is possible, any relevant material is identified and disclosed without requiring any party to undertake an unnecessarily expensive exercise, which would be unlikely to reveal any further documentation of a discoverable nature.***
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> ***54. However, it seems to us that in the main this appeal turns upon one point, namely whether or not the Master, in saying that "what is at the heart of this case is whether or not the alleged Scheme was approved by the Plaintiffs, or whether it was a secret Scheme. Whilst the Scheme is said to have operated over many years, the key issue is who knew about it and authorised it", was correct. If that were the determinative issue in the case***

then we can see justification for the Master limiting discovery in the way that he has done.

55. Whilst the scheme as pleaded by the plaintiffs is not admitted by the second and third defendants, it appears to be common ground that some form of scheme existed given the assertion to that effect by the first defendant in his answer. Is the existence of some form of scheme, whether in the form as pleaded by the plaintiffs or accepted by the first defendant sufficient to limit discovery insofar as it might disclose, absent limitation, documentation relating to the details of that scheme? We can see, looking at the picture overall, that the Master could legitimately form the view that he did. However, we are less confident in holding that that must be the case.

56. There is no doubt that the statement referred to above identifies one of the central issues to the case. That does not mean, however, that other issues are not equally important. Furthermore, to express the central issue in those terms, appears to presuppose that a scheme in the form as pleaded by the plaintiffs existed. That is, on the face of the pleadings, not of course a position that is accepted by the second and third defendants.

57. In our view, with some reluctance, we think that the case against the second and third defendants must, in the light of the non-admittance contained in the pleadings, be proved in all of its elements to the appropriate standard by the plaintiffs.

58. Accordingly, we do not see any alternative but that the plaintiffs must prove the existence of the scheme in the form they have pleaded, and given that it appears to us that part of that scheme encompasses the payment of secret commissions generated by an over-invoicing arrangement (which for the reasons set out above appears to us to have been accepted in effect by the plaintiffs) then it must be that the plaintiffs must establish every element of that operation. Once they have established the existence of the scheme and the payment of monies to the entities in Jersey, they will then also have to establish that such was a breach of duties by the directors to prove that the second and third defendants had knowledge of the fact that the scheme was created in breach of duties owed by the directors to the plaintiffs and, in the light of that knowledge, dishonestly assisted the plaintiffs in the manner alleged. The existence of a scheme cannot in our view be assumed, and the second and third defendants are entitled to test whatever evidence may be available to support the fact that such a Scheme existed.

59. As we understand the pleadings and arguments, the allegation is to the effect that the over invoicing and/or payment of secret commissions was as a result of arrangements made directly with the suppliers of vehicles to the plaintiffs. There must, so it seems to us (and as argued by the second and third defendants), be a number of documents that reflect those transactions. It may be that were those documents to become available through the process of discovery that would give greater understanding of the nature of any scheme that might have existed, who would have been aware of it, and indeed enable the Court to reach conclusions by way of inference that it might have otherwise been reluctant to do. It is not, in our view, simply a matter of requiring the plaintiffs to prove a negative. It is not a matter of proof in that sense at all. It is a matter of looking for evidence as to what happened, and that to our mind must be evidence that follows a proper evaluation.

60. We do not in any sense suggest that it is not appropriate in many cases to limit the scope of discovery, perhaps as to dates or particular files. Much will depend upon the nature of the case. The nature of this case, however, is that a key element that needs to be established and understood so far as possible is what happened with regard to the payment of secret commissions and over-invoicing. That may suggest who was, or should be supposed to have been, aware of it.

61. Accordingly, whilst we fully understand and sympathise with the Master's desire to limit what was otherwise a very substantial exercise in discovery, we do not feel able to uphold his order.

62. We are not intending to suggest that some appropriate limitation as to discovery process is not possible in this case. In fact, we feel it should be and is desirable. It may be, for example, that review of documentation can be limited in some way, perhaps to those where payments are known and set out in schedule 2 to the Order of Justice. It may be that this is not possible. Perhaps service records could be excluded or sampled. We are not in a position to say because we were not addressed about any alternative. We were asked to uphold the order of the Master or to overturn it in favour of a full discovery exercise.

63. Without a greater understanding, we are unable to offer any suggestions as to what may be possible, and we are left, we think, with no alternative but to overturn the order of the Master and to find that the normal discovery exercise should take place. We wish to be clear that all we are doing at this point is expressing the view that a 10% dip sampling process will not, in

our view, suffice to meet the justice of this case as it is currently pleaded. However, were those parameters to alter, in other words were the pleadings to change or some other method limiting the discovery process to be identified, then we do not mean anything in this judgment to suggest that it would be inappropriate to explore and order discovery in accordance with those limitations.

64. We do not fault the plaintiffs for seeking to limit discovery. We do not, however, agree that a 10% dip sampling approach meets the justice of the case. In that sense, and for that reason, we overturn the order of the Master. That being said, we also note the fact that the limitation was not originally opposed before the Master by the second and third defendants. This appeal in effect represents a change of position and we think that the costs before the Master in connection with this matter and of this appeal should be costs in the cause.

65. Lastly, and for the avoidance of any doubt, we wish to specify that in our view the issue of discovery is as it was prior to the making of the order by the Master and there is accordingly liberty to make any further application in connection with discovery (including its limitation) as may be appropriate. We see no reason why any such application should not be made to the Master."

6. When the application was first before me and the Royal Court, the affidavits provided by the plaintiffs were the first and second affidavits of Sally Mukabana dated 26th May, 2017, and September 2017, the plaintiffs' first affidavit of discovery dated 15th September, 2017, the first affidavit of Katherine Margaret Ferbrache dated 21st September, 2017, and the affidavit of Advocate Simon Thomas dated 20th October, 2017.

7. Subsequent to the hearing of the appeal before the Royal Court, the plaintiffs have produced the following affidavits:-

(i) The plaintiffs' second affidavit of discovery dated 12th December, 2017, sworn by Advocate Sheedy;

(ii) The first affidavit of Moses Muchiri dated 14th December, 2017;

(iii) The second affidavit of Katherine Margaret Ferbrache (an ecrivain) dated 4th June, 2018;

(iv) The plaintiffs' affidavit of discovery dated 13th July, 2018;

(v) The second affidavit of Advocate Sheedy dated 13th July, 2018;

(vi) The first affidavit of the first defendant dated 23rd July, 2018;

(vii) The plaintiffs' supplemental affidavit of discovery dated 6th August, 2018, also sworn by Advocate Sheedy;

(viii) The plaintiffs' further supplemental affidavit of discovery dated 10th September, 2018, sworn by Katherine Margaret Ferbrache ; and

(ix) The sixth affidavit of Advocate Sheedy dated 14th September, 2018.

8. It was the affidavit of the first defendant that led to the second and third defendants' application to cross-examine him. For the reasons set out in my judgment dated 19th November, 2018 reported at CMC Holdings Limited and CMC Motors Group Limited v Forster and Ors [2018] JRC 211 I allowed limited cross-examination and stated at paragraphs 60 to 63 as follows:-

> ***"60. However I also limited the scope of the cross-examination to the location and whereabouts of documents and not the operation of the scheme itself. Questions relating to any operation of any scheme were matters for trial only. Cross examination could not be used to explore issues that went beyond the scope of the challenge to the plaintiffs' application to limit discovery. I therefore made it clear that the cross-examination would be strictly controlled. Allowing cross-examination but ensuring its scope was limited in the way described below met the test of dealing with the application for cross-examination justly but at a proportionate cost. I should add that while I have referred to the scheme, this is not a finding on the matters alleged by the plaintiff but simply a shorthand phrase to describe the arrangements said to have existed. The nature and cope of any scheme is a matter for trial.***
>
> ***61. Limiting cross-examination in this way also meant that I was discharging the obligation to actively manage cases because the effect of ordering cross-examination was only to delay the hearing of the plaintiffs' application by a few weeks. In the context of how long the proceedings have***

taken to date this short period of delay was neither unjust nor disproportionate and still meant that the case was progressing.

62. My reasons for permitting cross-examination are as follows:-

(a) I was shown certain written records referring to payments to be made from the companies administered by the second and third defendants contrary to the first defendant's assertions that there was nothing in writing in relation to the Scheme. While this may be explainable because the first defendant was referring to whether there were any documents relating to arrangements with the suppliers of vehicles whereas the documents produced related to payments to employees, the second and third defendants should be permitted to explore this issue with the first defendant.

(b) The suppliers identified by the first defendant at paragraph 11 of his affidavit were not all the suppliers referred to in the order of justice alleged to have made payments under the scheme;

(c) the first defendant's assertions in his affidavit that there were no documents in the warehouse might be inconsistent with the email he sent to Mr Kass in 2016 requesting access to documents;

(d) It was not clear whether the first defendant had understood the applicable test on discovery by reference to the statement at paragraph 42 of his affidavit that there were no documents in the warehouse that referred "directly" to the scheme.

63. I also permitted the second and third defendants to cross-examine on the first defendant's knowledge of the storage arrangements that applied at the warehouse. However I warned Advocate Alexander that the knowledge expected should be that of a chief executive and not that of persons operating or managing the warehouse on a day to day basis."

9. It is also right to record in relation to the second and third defendants' pleadings that at paragraph 74 to 76 I ruled as follows:-

"74. In reviewing the pleadings for the present application, in relation to the plaintiffs' pleaded case that various payments had been made into and out of the entities administered by the second and third defendants, the

answer filed on their behalf did not admit these payments. Yet, this part of the plaintiff's case was based on records previously disclosed by the second and third defendants. The approach of the second and third defendants was therefore to put the plaintiffs to proof of matters based on the second and third defendants' own documents and within their own knowledge. I did not regard this approach as consistent with the overriding objective which includes requiring me to identify issues between the parties as part of active case management (see Rule1/6(6)(b) and (c)).

75. I therefore ordered the second and third defendants to make their case clear in respect of monies paid in and out of the entities they administered. This was an exercise of the power vested in me under Rule 6/15 of the Rules. The rationale for this was to identify whether the second and third defendants disputed the payments said to have been made into and out of the entities they administered. If they did dispute any payment or payments then a positive case setting out the reasons why was required, pleading all relevant facts.

76. The purpose of taking this approach was to identify whether any issue existed between the parties in respect of payments in and out of the entities administered by the second and third defendants. Otherwise significant costs would be incurred in proving matters already known to the second and third defendants. This is neither just nor proportionate and would be a waste of valuable time and money. Obviously, if the second and third defendants consider that the figures claimed are erroneous in some way then they are free to dispute any erroneous calculations as long as any error and the reasons why are identified. Any such pleading would then allow the parties to understand the extent of the issues between them on this point. I should of course make it clear that this order did not in any way affect the second and third defendants' denial of liability. The order was simply focused on the quantum of payments in and out made through the entities concerned."

10. The cross-examination of the first defendant took place on the morning of 19th November, 2018. Submissions were then made by the parties dealing firstly with the plaintiffs' summons and secondly with the second and third defendants' specific discovery applications. Judgment was reserved on all matters.

11. In this judgment I deal with the two applications separately save that in respect of the second and third defendants' application for communications and discussions between the plaintiffs and vehicle manufacturers, determination of this application was extrinsically linked to the plaintiffs'

application to limit discovery. I have therefore dealt with this part of the second and third defendants' application within the section of the judgment dealing with the plaintiffs' application.

12. Finally, I should clarify in relation to this judgment that where I refer to the Scheme, this is simply shorthand to refer to the plaintiffs' allegations which are disputed by the second and third defendants because, as noted by the Royal Court at paragraph 55 of its judgment, *'**some form of Scheme existed**'*. The issue before this application is what discovery is required in relation to the extent of any Scheme operated.

THE APPLICATION TO LIMIT DISCOVERY

The parties' submissions

13. In relation to the plaintiffs' application to limit discovery, the plaintiffs firstly contended that the principle of limiting discovery was recognised by the Royal Court in its judgment [2018] JRC 078 at paragraph 62 where the Royal Court stated:-

> ***"62. We are not intending to suggest that some appropriate limitation as to discovery process is not possible in this case. In fact, we feel it should be and is desirable."***

14. Since the Royal Court's judgment, there had been a clear change of circumstances, in particular in terms of the first defendant's evidence, which was now available, and which was not available before the Royal Court. If I accepted the first defendant's evidence, which Advocate Thomas contended I should, there was no reason to believe that there would be anything concerning the alleged scheme in the plaintiffs' warehouses. According to Advocate Thomas, the first defendant was unmoveable in his conclusion that there was nothing in the warehouses and was able to articulate the reasons why.

15. His evidence should therefore be accepted according to Advocate Thomas for the following reasons:-

    (i) The affidavit was an admission against the first defendant's own interest because the first defendant was being sued. If there were documents which showed the existence of the Scheme being approved by the plaintiffs then it would be in the first defendant's interest to disclose those documents or to point out where they were located rather than say there were no such documents;

(ii) The first defendant's evidence was consistent with the results of the sampling to date;

(iii) Any documents that had been found referring directly to the Scheme emphasised the confidential nature of the arrangements;

(iv) The evidence was consistent with the second and third defendants' own discovery, in particular the matters pleaded at paragraphs 45, 49, 53 and 59 of the order of justice and the internal file notes of the second and third defendants referred to in those paragraphs;

(v) The first defendant's answers during cross-examination were consistent with the evidence he gave to the Kenyan Capital Markets Authority; and

(vi) The first defendant's evidence was consistent with the way the Scheme had been structured, namely that there were no communications between suppliers and the plaintiffs with nothing being written down and nothing appearing on the face of individual invoices recording the order of goods.

16. The process of placing orders was explained in the sixth affidavit of Advocate Sheedy leading to all the invoices and supporting shipping documentation being produced. However, it was not possible to reconcile those orders placed with what monies were paid to the companies administered by the second and third defendants. This was because of the limited documentation kept in relation to the scheme by successive CEOs of the plaintiffs, and because communications between the CEOs and vehicle suppliers were generally not in hard copy and were not filed.

17. The email to Mr Mark Kass was not related to any documents in warehouses – it was the first defendant's seeking access to what had been in his office.

18. To the extent any discrepancies were put in cross-examination, these were answered by the first defendant. He referred to those materials he was aware of; there was no intent on his part to seek to deceive and he gave a satisfactory explanation in relation to why he had not mentioned CNH (New Holland).

19. The only material produced about the Scheme related to payments to employees. There was nothing about discussions with the suppliers. Apart from one individual, the few documents that existed came from private personnel files disclosed not from any storeroom in the warehouses.

The fact that one document relating to an individual who received payments under the Scheme did not justify extensive searches in the warehouses.

20. Ultimately, the first defendant was trying to assist.

21. Advocate Thomas also contended that the second and third defendants approach was an oversimplification of all the steps carried out by the plaintiffs to discharge their discovery obligations which had led to discovery of:-

(i) all the board minutes of the plaintiffs from 1997 to the end of the Scheme;

(ii) all personnel records of those known to have benefitted from the Scheme;

(iii) the entire contents of the shipping files including all invoices for vehicles supplied to the plaintiffs by suppliers named in the order of justice;

22. All relevant available databases had also been searched through the electronic discovery process.

23. In respect of the storerooms, the entirety of zone 2 of Room 1 was searched; zone 1 was not searched as its contents were said to be irrelevant (which was not challenged). Rooms 4 and 5 were also treated as being irrelevant and again this was not challenged. Rooms 7 and 8 were reviewed.

24. It was therefore only in respect of Rooms 2, 3 and 6 where the dip-sampling approach was applied. Even then the shipping documents disclosed in their entirety came out of Room 2. This led to a disclosure of 3,150 shipping files (see paragraph 14 of the sixth affidavit of Advocate Sheedy).

25. The process of disclosing documents, and the nature of the searches of the storerooms was set out in paragraphs 14 to 25 of Advocate Sheedy's second affidavit as follows:-

"14. Between the end of 2016 and early March 2017 an extensive search was conducted of the Plaintiffs' premises consisting of multiple offices and warehouses in Nairobi, on a site occupying approximately 12 acres. The Plaintiffs

were guided in their search for potentially relevant documents by reference to guidance provided by Baker & Partners on i) the scope of the Plaintiffs' discovery obligations under Jersey law and ii) broad criteria as to what types of documents might be relevant.

15. The search revealed the eight warehouses described in the previous affidavits of the Plaintiffs' company secretary, Sally Patricia Mukabana.

16. It was determined that it would not be logistically possible to remove the entirety of the Plaintiffs' hardcopy archive of documents from Africa for the purposes of search and review. It was apparent that in order to search through such a large number of hardcopy documents across the eight warehouses, it would be necessary to engage a team of individuals with familiarity of document-heavy discovery exercises and practical experience in dealing with fraud cases to work through the documents in situ in Nairobi. Having searched, without success, for a local firm of Kenyan lawyers with appropriate experience to undertake the task, it was determined at the beginning of April that Baker & Partners should engage a team of UK lawyers with appropriate experience to work in Nairobi.

17. Baker & Partners worked with discovery counsel to devise a process by which it would be possible to complete a reasonable search in a reasonable time frame at a reasonable cost, for relevant documents from the warehouses. As described in the earlier affidavits of Sally Patricia Mukabana, for the main, the documents in the warehouses did not appear to be organised in any discernible way. Documents that were on their face, obviously relevant or appeared on their face to be potentially obviously relevant on the basis of the factual and legal issues in the litigation were to be deemed "responsive". Not all documents determined to be responsive were relevant upon closer inspection. The 'responsive' designation was devised to allow the discovery team to progress reasonably quickly through the documentation in the warehouses without being required to read every single page to determine actual relevance.

18. Every person involved in determinations as to whether documentation was responsive, relevant or not relevant has been provided with:

a. copies of the pleadings;

b. a briefing sheet on the issues in the case;

c. copies of the Jersey practice directions on discovery and e-discovery; and

d. a set of keywords/terms ;

19. At least 10% of the documents in each of the rooms which were not, on their face, responsive, (which forms the vast bulk of the hardcopy material in the warehouses) were then subject to a systematic dip-sampling process to determine whether its contents were responsive. The process, agreed with the discovery team, was that where it appeared that dip-sampled documents appeared to be responsive, documents in close physical proximity to the responsive documents would also be subject to scrutiny and reviewed to establish whether they too were responsive.

20. Documents which were designated as responsive (i.e. were obviously relevant or appeared on their face to be potentially obviously relevant) included:

a. Documentation referring expressly to entities, individuals or subject matter known to have had an association with the Scheme;

b. Minutes of meetings of the Plaintiffs' senior management;

c. Documentation pertaining to the ownership and control of the Plaintiffs throughout the period of the Scheme;

d. Documentation found in any of the offices of CMC's former senior management;

e. Documentation pertaining to the CMA's investigation into allegations that money had been paid by vehicle suppliers into offshore accounts;

f. Internal memoranda and correspondence;

g. Communications with vehicle suppliers to the Plaintiffs;

h. Documentation referring to commissions or margins, save those documents that pertain to known bonus or commission arrangements pertaining to the Plaintiffs' business within Africa;

i. Documentation pertaining to the pricing and invoicing of vehicle supplied to the Plaintiffs;

j. Documentation pertaining to individuals known to have benefitted from the Scheme including their personnel files and terms of employment;

k. Documentation pertaining to the Plaintiffs' various employee pension schemes; and

l. Documents pertaining to the internal or external audit of the Plaintiffs.

21. Documents deemed not to be responsive included:

a. Documents pertaining to the Plaintiffs' business of selling and servicing vehicles or parts within Africa (on the basis that our understanding of how the Scheme operated, given by Martin Forster to the CMA, indicated the payments were all external to Africa);

b. Documentation pertaining to personnel issues (including payroll) of lower level employees of the Plaintiffs (on the basis that only a select number of senior executives within CMC ever benefitted from the Scheme); and

c. Promotional or technical information pertaining to vehicles or parts.

22. The decisions as to what documentation was to be considered as prima facie responsive have been informed by the Plaintiffs' clear instructions that no one within Plaintiffs' organisation, other than the participants, was aware of a Scheme of the nature described in the Order of Justice prior to Martin Forster's departure from CMC in 2011. The decision as to what documentation was to be considered as prima facie responsive has also been based upon Martin Forster's admissions and descriptions of an arrangement with CMC's vehicle suppliers (who are external to Africa) who, he says, paid a small percentage on the sums they invoiced CMC, into accounts in Jersey. That account is at least partially consistent with the records disclosed to Baker & Partners by the Second and Third Defendants in July 2013 which show the receipt of commissions from CMC's vehicle suppliers into accounts in Jersey.

23. The extent to which it was possible to swiftly identify responsive material varied considerably across the eight warehouses. In the case of Room 6,

where some of the documents were stored in boxes that were labelled so as to briefly describe their contents, it was possible to identify responsive material based upon the descriptions given on the boxes without the need to dip-sample. In the case of Rooms 2, 3, 4 and 5, where the material was not organised in any discernible way, a greater proportion of the documents were subject to the 10% dip-sampling. The court should note that the dip-sampling methodology was only adopted after all the documents in Room 1, Zone 2 (the archived documents of CMC's former Land Rover Kenya division), Room 7 and 8 were reviewed in their entirety to determine whether any of the material was prima facie responsive. The volume of the documents in these rooms made dip-sampling necessary in order to progress the search.

24. Whilst each member of the discovery team has been provided with the same materials to ensure consistency in their decision making in relation to the relevance of documents, there is necessarily an element of subjectivity inherent in the review process and I therefore cannot rule out the possibility of some inconsistencies in categorisation between reviewers. I am confident however that any such inconsistencies, if indeed there are any, only concern material that might assist in proving the negative. In other words, there is only an element of subjectivity in determining whether a document that does not contain a reference to the scheme, could conceivably contain a reference to the scheme. Only the Plaintiffs could be prejudiced by this as such material does not assist or further the defence case and is simply further evidence of a lack of company knowledge or authorisation. It goes without saying that material that could assist the defence - i.e. material that does contain a reference to possible company knowledge or authorisation of the Scheme will have been marked as relevant, and that a broad approach to relevance in general was adopted by all the reviewers.

25. On 16 May 2017 the Plaintiffs requested The first defendant provide them with information as to the location of documents that would support the averments in paragraph 10 of his Answer. The Plaintiffs renewed their request that The first defendant identify the possible location of documents that might support his case and also to give a broad description as to their nature on 29 September 2017. At the date of this affidavit no response has been received. The strong inference is that no documents that support the proposition that the Scheme described in the Order of Justice was known and authorised by the Plaintiffs exist."

26. This led to some 344,424 documents being treated as responsive. Out of the total number of responsive documents reviewed by the plaintiffs' legal team, around 70,000 were discoverable. The vast majority of these came out of Room 2, where the shipping invoices and supporting documentation were stored which have been disclosed as noted above. Despite the number of disclosable documents, only one document of the 70,000 emerging from the warehouse referred expressly to the alleged scheme. The document was also about a payment to an employee

under the Scheme, and was not a document showing any communication between a supplier and the plaintiffs.

27. In relation to electronic documents the process followed had also been independently verified and tested.

28. In relation to what has to be proved for the plaintiffs' claims to succeed, Advocate Thomas contended that the approach of the second and third defendants was eliding what had to be proved at trial with the extent of the plaintiffs' discovery obligations. This led Advocate Thomas in respect of paragraph 58 of the Deputy Bailiff's judgment to make the following contentions:-

(i) A very significant part of the plaintiffs' case on dishonest assistance will be proved on the basis of the second and third defendants' own documents;

(ii) The affidavit of the first defendant addresses that secret commissions were generated by over invoicing;

(iii) The affidavit of the first defendant also explained:-

(a) the practice of suppliers paying commissions was never documented in Kenya;

(b) records about payments by suppliers were never kept in warehouses in Kenya, all the documents kept about suppliers making payments were kept in the CEO's office;

(c) Mr Benzimra told the first defendant never to mention the Scheme to anyone;

(d) payments to and from the accounts in Jersey were always *"off the books"* as far as the plaintiffs were concerned;

(e) discussions about payments out of the Scheme were all one on one and were also all on an oral basis;

(f) the payment of commissions to Jersey was never discussed by the plaintiffs' boards; and

(g) the second and third defendants never sent paperwork about the Trust to Kenya.

29. In addition to the first defendant's evidence, the plaintiffs were also entitled to rely on the first affidavit of Mr William Lay, what the first defendant had said to Mr Lay when the first defendant ceased to be CEO, and the various memos found in the personnel files that payments from offshore entities were to be kept confidential.

30. In relation to the plaintiffs having to establish the payment of monies in Jersey, these payments were characterised as 'commissions' by the second and third defendants' own discovery.

31. The question whether any Scheme was in breach of duty was ultimately a matter for trial; this question did not have to be established conclusively from documents in warehouses. In that regard it was significant to the question of proof at trial that the board minutes were silent in relation to the plaintiffs' knowledge of the Scheme. The lack of discussion recorded in the board minutes was also consistent with the first defendant's affidavit;

32. The question of dishonesty is a question of inference by reference to normally acceptable standards of honest conduct (see Nolan v Minerva Trust and Others [2014] JRC 078A paragraphs 177-191).

33. The question of whether the second and third defendants should be fixed with liability for dishonest assistance is also a matter for trial. The case on dishonest assistance did not have to be proved from documents in warehouses. There was nothing inappropriate in presenting a case at trial based on inviting the court to draw inferences of dishonesty. The second and third defendants however were confusing the trial court being invited to draw inferences which was entirely appropriate with supposition.

34. The second and third defendants' approach also failed to set out what issues would be addressed by further searches in the warehouses. .The plaintiffs' approach is that there were two issues - the existence of the Scheme and the operation of the Scheme. These issues have been addressed by the approach taken to date by the Phase 1 discovery, the electronic discovery and the affidavit evidence of the first defendant. Advocate Thomas was therefore critical of the second and third defendants for failing to identify what other issues further discovery from the warehouses might assist beyond knowledge or operation of the Scheme. Saying there may be other issues in general terms was too vague.

35. In terms of the extent of the searches carried out the affidavit of Advocate Sheedy sworn on 12th December, 2017, (which was not before the Royal Court) now meant that I was much more informed of the extent of the searches carried out in the warehouses (see in particular the table at paragraph 27), and by way of electronic discovery in addition to the Phase 1 discovery.

36. Significant resources had been spent on the discovery exercise resulting in over £1.4 million having been spent. This justified the court taking a pragmatic approach based on the likelihood of what would be discovered in the warehouses.

37. Advocate Alexander for the second and third defendants firstly contended by reference to paragraph 63 that the Royal Court had ruled that a 10% dip sampling process would not meet the justice of the case. Yet no different approach had been put forward and therefore the application by the plaintiffs was an abuse of process because it was a rerun of their previous application. The affidavits of Sally Mukabana were before the court on the previous occasion. The affidavit of Advocate Sheedy sworn on 12th December, 2017, could also have been placed before the court.

38. In relation to the first defendant's evidence this was central to the plaintiffs' application. Advocate Alexander contended that I should treat the first defendant's evidence with caution because the first defendant had confirmed that he had no responsibility for the warehouses and no knowledge of what documents were in the warehouses. His awareness therefore of material in the warehouses was only based on how he understood the Scheme was structured by Mr Jack Benzimra

39. In respect of the first defendant's own evidence, Advocate Alexander suggested that the affidavit of the first defendant was wholly unreliable and there were several contradictions:-

    (i) a memo had been found in a warehouse which referred expressly to payments to a Mr Ludin, and therefore to the Scheme;

    (ii) the first defendant did not know what arrangements had been put in place with Land Rover or Leyland two of the suppliers who had paid commissions (see the second and third defendants' own records at exhibit KMF3(;

    (iii) he had to clarify his evidence in respect of payments being received from New Holland;

(iv) he resiled from his position that there was only paperwork in the CEO's office and accepted that there were other documents;

(v) he did not understand the test of relevance; and

(vi) he had no understanding about where pre-invoice documentation might be located;

40. Advocate Alexander was also critical of the qualifications of Mrs Mukabana and submitted that she did not understand the appropriate test on for discovery.

41. The plaintiffs had approached discovery in the warehouses by simply looking at 10% of documentation which was a random approach, this approach; this was outside the scope of what was permissible by reference to the Royal Court's judgment, the approach was a novel one and had not been replicated anywhere else.

42. The second and third defendants were also critical of how long the plaintiffs had taken to formulate this approach.

43. The fact that the approach to date for the warehouses had produced some 70,000 relevant documents meant that there was likely to be more documentation if the remaining warehouses were searched properly.

44. The size of the dispute justified requiring such searches to be carried out. If the plaintiffs were successful at trial, they could recover their costs of discovery on taxation.

45. Advocate Steenson and Advocate Pearmain submitted to the wisdom of the court, albeit observing that the first defendant was adamant that there were no documents in the warehouses in relation to any Scheme insofar as it involved payments to individuals in Kenya.

Decision

46. In respect of the issue for me to decide, there was no dispute between the parties that I had power to limit discovery. I addressed the power to do so at paragraphs 31 to 34 of my judgment in this matter dated 8th November, 2017. The Royal Court, having agreed a jurisdiction existed to limit discovery, also stated at paragraph 53 as follows:-

> ***"53. In the light of the information that was both before the Master and is before us, that the challenges that arise within the discovery exercise take this case out of the norm. To us it may well call for both an iterative and imaginative approach to the discovery exercise such as that it ensures, so far as is possible, any relevant material is identified and disclosed without requiring any party to undertake an unnecessarily expensive exercise, which would be unlikely to reveal any further documentation of a discoverable nature."***

47. What the Royal Court then focused on was what had to be proved, which led to the Royal Court saying at paragraph 58:-

> ***"58. Accordingly, we do not see any alternative but that the plaintiffs must prove the existence of the scheme in the form they have pleaded, and given that it appears to us that part of that scheme encompasses the payment of secret commissions generated by an over-invoicing arrangement (which for the reasons set out above appears to us to have been accepted in effect by the plaintiffs) then it must be that the plaintiffs must establish every element of that operation. Once they have established the existence of the scheme and the payment of monies to the entities in Jersey, they will then also have to establish that such was a breach of duties by the directors to prove that the second and third defendants had knowledge of the fact that the scheme was created in breach of duties owed by the directors to the plaintiffs and, in the light of that knowledge, dishonestly assisted the plaintiffs in the manner alleged. The existence of a scheme cannot in our view be assumed, and the second and third defendants are entitled to test whatever evidence may be available to support the fact that such a Scheme existed."***

48. In relation to this summary, there have been two significant developments material to the plaintiffs' present application.

49. Firstly, the second and third defendants are now required to make their case clear in respect of monies paid in and out of the entities they administered (see paragraphs 74-76 of my last judgment set out above). This is because although the second and third defendants put the plaintiffs to proof of monies paid in and out of the Scheme, in their amended answer at paragraphs 42 and 47 the second and third defendants had pleaded that they *"were aware of the fact and quantum of all payments into and out of COI Panama COI Liberia*". This requirement on the part of the second and third defendants to clarify how far they now dispute the plaintiffs' figures based on their own records is material to what documents should be looked for in the warehouses. At present the second and third defendants admit they were aware of the fact and

quantum of payments in and out of the entities they administered, but do not admit the amounts pleaded by the plaintiffs. The second and third defendants also do not admit the allegations as to where monies came from or to whom monies were paid. In the near future they will have to make their case clear in relation to monies paid into and out of the entities they administered. I should add in that regard that exhibited to the plaintiffs' further affidavit of discovery dated 10th September, 2018, sworn by Katherine Margaret Ferbrache (exhibit KMF3) were examples of documents from the second and third defendants' own discovery showing on their face receipts of '*commissions*' from various vehicle manufacturers. Unless the plaintiffs have miscalculated figures pleaded in their order of justice, in my view the issue of the plaintiffs having to prove payment of monies to and from Jersey is unlikely to be at the heart of this dispute and therefore does not justify further searches in the warehouses.

50. Secondly, there is new evidence filed, in particular that of the first defendant. In relation to the evidence of the first defendant, this was not available either for the hearing in 2017 before me or before the Royal Court. This evidence is highly material both in relation to commissions being generated by over invoicing and the Scheme being a secret and in breach of duty.

51. The first defendant's affidavit sets out his evidence as to which suppliers paid commissions to accounts in Jersey, how commissions were paid, who arranged for the payment of commissions, to what degree these were calculated, the extent of any relationship between the suppliers invoices and commissions paid and that it would be impossible to reconcile suppliers invoices with commissions paid to Jersey. The affidavit further explains that

(i) the practice of suppliers paying commission to Jersey was not documented in Kenya;

(ii) records about the payments by suppliers were never kept;

(iii) all the documents about the Scheme were kept in the CEO's office;

(iv) he was told by Mr Jack Benzimra never to mention payments to anyone;

(v) payments to and from accounts in Jersey were off the books; and

(vi) documents about payments out of the Scheme were on a one on one basis between the Chief Executive and any recipient.

52. In respect of his oral evidence, the first defendant at the outset of his cross-examination was candid that he was unaware of what was in the warehouses or how many documents were located there. However, he was clear why documents about the Scheme would not be in the warehouses; he was quite confident and remained so that there were no relevant documents in the warehouses and to look through them was *"a waste of time"*. In my view, the cross-examination did not lead the first defendant to amend or alter his conclusion in relation to documents of conversations with suppliers or with recipients of monies based in Kenya under the Scheme. The fact that there were isolated documents on personnel files (not kept in warehouses) did not affect his evidence.

53. Insofar as the first defendant was challenged that his evidence was inconsistent with his email to Mr Kass (a later CEO) and his request to have access to files previously stored in his own office in an, in my judgment the first defendant explained this request. I therefore accept the first defendant's evidence that his email to Mr Kass was not suggesting that there were documents in the warehouses which should be looked for to enable the first defendant to explain the Scheme.

54. The first defendant answered what he understood to be meant by '*directly relevant'* referred to in paragraph 42 of his affidavit. He was clear he was referring to communications with suppliers and there is no basis not to accept that evidence.

55. Insofar as he was challenged on not recalling who all the suppliers were, the first defendant explained he only referred to those suppliers he dealt with. He clarified in respect of New Holland this was not a normal over-invoicing scheme; the clarification he gave did not lead me to conclude that there are significant documents in the warehouses relating to discussions with suppliers which should be looked for. In addition, as noted above, who made payments to the companies administered by the second and third defendants is likely no longer to be an issue at the heart of a trial. Rather what is in issue is how far those payments were documented in Kenya and therefore who knew about any Scheme. The first defendant's evidence was that communications with suppliers were not documented (apart from two emails sent from his office asking that suppliers to cease making payments). The fact of these two emails does not however affect the first defendant's evidence that documents in respect of suppliers will not be found in the warehouses. For the sake of completeness, I record that these two emails have not been disclosed as they have not been found but this is not a reason not to accept the first defendant's evidence and to require further searches in the warehouses.

56. In respect of the one document found in the warehouses, being a memorandum from Mr Ludin the then managing director of the plaintiffs' Tanzania operation in or about 1985, the first defendant thought that there were less concerns about payments to Tanzania. Subsequent to the

hearing I was informed by both counsel that Mr Ludin did in fact receive payments under the Scheme. However, the fact that one document only has been found in the warehouses referring directly to the Scheme, in view of the extent of the searches I describe below, in my judgment does not affect my overall conclusions about the first defendant's evidence and the conclusions he reaches about it being a waste of time to search for Scheme documents in the warehouses.

57. All other documents recording discussions about payments to individuals were found in the personnel files kept at head office. The location of these documents at head office rather than in any warehouse is also consistent with the first defendant's evidence that looking for further documents in the warehouses would be a waste of time.

58. It is also relevant to note that in the context of a review of 344,424 responsive documents (see paragraph 28 of the plaintiffs' second affidavit of discovery sworn on 12th December, 2017) and around 70,000 relevant documents, that the plaintiffs' advocates to have found only one document in the warehouses referring to the Scheme expressly. The existence of this single document referring only to a payment out of the Scheme is not a basis to reject the first defendant's evidence or find that it is unreliable. In my view the fact that only one document referring to a payment out of the companies administered (which the second and third defendants' advocates after the hearing confirmed was made) was found with no documents being found referring to payments by suppliers out of a review of nearly 350,000 documents from the warehouses supports rather than diminishes the first defendant's evidence.

59. In my judgment, the first defendant generally wanted to assist all parties by both explaining how the Scheme operated and the extent to which there were any documents in the warehouses.

60. In respect of his affidavit I also agree with Advocate Thomas that it is appropriate to evaluate the first defendant's evidence in light of the fact that the affidavit might not be said to be in the first defendant's interests because the plaintiffs are pursuing the first defendant. This adds more rather than less weight to the first defendant's evidence.

61. The first defendant's explanation about how the Scheme operated is also consistent with his explanation to Mr Lay his successor as CEO. This explanation is significant because it was given before any allegations of breach of duty had been made and to that extent is contemporaneous rather than being made after proceedings had been commenced or suggestions made that the first defendant should explain where documents were located rather than face a discovery application.

62. The first defendant's explanation about the confidential nature of the Scheme was not only consistent with his statement to Mr Lay but also his statement to the Kenyan Capital Markets Authority when interviewed. It is also consistent with the various file notes of the second and third defendants pleaded in the order of justice at paragraphs 45, 49, 53 and 59.

63. The evidential picture that has now emerged is as follows:-

(i) The relationship between the plaintiffs and the suppliers apart from two emails ending the Scheme was not documented;

(ii) The limited documentation about payments out of the scheme apart from the Ludin memo came from files at head office which have been reviewed

(iii) All the invoices ordering vehicles and related shipping documents have been disclosed – these documents do not show any commission arrangements on their face;

(iv) There is unlikely to be an evidential issue about what sums were paid into the companies administered by the second and third defendants and what sums were paid out;

64. In relation to the directors' knowledge of the Scheme, the relevant board minutes have been disclosed as have personnel files of all directors, as well as all recipients under the Scheme. An electronic discovery exercise has also been carried out as described in the affidavit of Mr Muchiri sworn on 31st December, 2017 (again after the last hearing before the Royal Court). At paragraph 8 of this affidavit it indicated that all the email accounts of the divisional managers were searched. I was informed this search extended to all directors and anyone who received a payment under the Scheme.

65. I therefore agree with Advocate Thomas that whether or not directors acted in breach of duty is now a matter for witness evidence and cross-examination at trial. The most likely sources of documentary evidence about any knowledge of the Scheme have been looked for in a manner that I regard as reasonable, namely disclosure of board minutes, personnel files and available email accounts. The ambit of the plaintiffs' approach also puts the remarks of the first defendant that reviewing further documents in the warehouses would be a waste of time in a wider context. The obvious sources for documentation showing knowledge of the Scheme have been reviewed and disclosed. While it is a matter for trial, I also agree with Advocate Thomas that there is nothing inappropriate in inviting the trial court to draw inferences that the directors did not know of the Scheme because the obvious sources of documents make no reference to it.

66. In relation to the question of whether or not the second and third defendants can be found liable for dishonest assistance based on their knowledge of the Scheme, again it is appropriate for the trial court to be invited to draw inferences following on from witness statements and cross-examination. I have already referred to relevant file notes above. No doubt witnesses will be cross-examined on those file notes and the Jurats invited to draw conclusions from any answers given. In addition, nothing has been produced to me by the second and third defendants to suggest that the plaintiffs held any material relevant to the second and third defendants' knowledge. Had there been such documentation in the second and third defendants' discovery, no doubt such material would have been drawn to my attention. I therefore consider the fact that no such documentation was produced to show that information relating to the second and third defendants knowledge of the Scheme was held in Kenya, allows me to conclude that the allegations of dishonest assistance do not justify further searches in the warehouses.

67. The difficult area in relation to the plaintiffs' application concerns how commissions were calculated by suppliers by reference to orders placed for vehicles. In his sixth affidavit sworn on 14th September, 2018, Advocate Sheedy deposed at paragraphs 5 to 7 as follows:-

> *"5. On my visit I met with Paul Muchene who is the Logistics Division Operations Supervisor with CMC who is the source of my knowledge concerning CMC's internal processes for raising invoices for the importation of vehicles. I was told that the process described below had been the procedure for as long as he could remember. He had been employed by CMC since 1991.*
>
> *6. CMC's business is divided into divisions that are responsible for specific vehicle franchises and vehicle types. Where a divisional manager perceives a need to place an order for vehicles, the divisional manager will contact CMC's central Logistics Department. The Logistics Department is responsible for all orders of vehicles and parts.*
>
> *7. Having received notice of the need for new vehicles, the Logistics Department will request the divisional manager to produce a pro-forma invoice for the vehicles. The Logistics Department will send this pro-forma invoice to the Kenyan Revenue Agency, which must issue an Importation Declaration Form ("IDF"). This document must be issued in order to lawfully import the vehicles into Kenya."*

68. This explanation however does not provide a complete picture and is the area which overlaps with the second and third defendants' specific discovery application seeking documentary evidence of all communications between the plaintiffs and the vehicle manufacturers relating to the ordering of vehicle units. While 3,150 shipping files including final invoices had been

disclosed, what is not clear is how the ordering of vehicles worked in practice. The explanation given by Advocate Sheedy does not paint a sufficiently clear picture to show how prices were provided by suppliers to the logistics department. In particular, it was not clear whether price lists were provided which included a marked up element or whether the marked up element was added by the logistics department. It is also not clear whether divisional managers, perceiving a need to place an order for vehicles, were aware of any percentage being added to any basic price for vehicles. In other words, while the first defendant has described how the payment of alleged commissions was dealt with at the suppliers' end and was not part of day to day dealing, the explanation in Advocate Sheedy's affidavit does not contain sufficient detail of what was contained in price lists supplied and the mechanics of ordering vehicles and how the high level arrangements described by the first defendant worked in practice. Finally, it is also not clear to me whether Mr Muchene, who had worked for the plaintiffs since 1991, knew of the Scheme or whether he simply ordered vehicles required by divisional managers based on price lists supplied by the suppliers.

69. A more detailed explanation is therefore required than that provided in Advocate Sheedy's sixth affidavit. Furthermore, the explanation should come from the person best able to give evidence, namely Mr Muchene, not Advocate Sheedy. I therefore require an explanation on affidavit from Mr Muchene to describe in as much detail as he can recollect the process of obtaining prices from suppliers and the placing of orders, including any evidence he may give about commissions paid by suppliers to offshore companies, his source of knowledge and when he first became aware of the Scheme. He should also explain any knowledge he may have whether documents relating to the placement of such orders was kept or not, for how long and where they might have been kept.

70. However, I do not consider that the production of such an affidavit justifies a further review of documents in the warehouse at this stage. The 3,150 shipping files have already been disclosed for orders of vehicles. The defendants have their own records of what monies were received and paid. The evidence at present from the first defendant and the plaintiffs is that it is impossible to reconcile monies received into the companies administered by the second and third defendants with orders placed. No evidence was adduced by the second and third defendants in relation to this application to challenge this assertion. Providing discovery of the mechanism by which every invoice was raised and order made will therefore simply add to the documentation already produced without any significant evidential value, if any value at all. The price, however, for not requiring the plaintiffs to look through the remaining parts of the remaining storerooms not searched for documents relating to the ordering of vehicles and prices supplied is that the plaintiffs must provide evidence in affidavit form at this stage as to the processes followed in ordering documents and the issues raised in the preceding paragraph, and in particular how suppliers provided prices to the plaintiffs. I accept in relation to this affidavit that Mr Muchene can

only give evidence back to 1991 but he may have knowledge of how any orders were placed prior to that time based on what he was told when he joined the plaintiffs in 1991.

71. The reason for requiring production of an affidavit, to paraphrase the words of the Royal Court in paragraph 53 of its judgment, is that the affidavit required is intended to lead to identification of more relevant material without requiring the plaintiffs to undertake an unnecessarily expensive exercise. In my judgment, the affidavit will provide greater clarity about the process of ordering vehicles and the prices charged by the suppliers and who was aware of any over-invoicing scheme. To the extent that Mr Muchene or the logistics department themselves produced documentation about prices paid, the production of the affidavit may lead to such documentation being identified and its possible whereabouts without having to search for the proverbial needle in the haystack.

72. I also consider that the affidavit will give all parties a greater understanding of the nature of any Scheme that might have existed and who would have been aware of it, which is what the Royal Court was referring to in paragraph 59 of its judgment.

73. The above approach is also an appropriate order to make in response to this part of the second and third defendants' application for specific discovery. To ask for all documents in relation to 3,150 shipping files will take months, will be very costly, will produce mountains of paperwork, much of which will not have any real or significant relevance. Applying the test on a specific discovery application, disclosure of such documents is not necessary in light of the affidavit I have ordered. To require that many documents to be produced would clearly be oppressive. On this ground alone this part of the second and third defendants' specific discovery application also fails.

74. What other orders may be sought as a consequence of the affidavit is therefore a matter for another day. Much will depend on what the affidavit contains. It may also lead to more discovery. However, what I am clear about is that the requirement for the plaintiffs to explain in more detail how prices were supplied and/or orders placed does not justify otherwise refusing the plaintiffs' application or requiring the plaintiffs to provide full discovery.

75. In reaching this conclusion, I have taken into account the fact that the plaintiffs have spent in excess of £1.4 million on providing discovery. By reference to the matters described in the second affidavit of discovery sworn on 12th December, 2017, the approach taken by the plaintiffs demonstrates a proper understanding of discovery obligations, led by their Jersey Advocates. I therefore reject the criticisms by the second and third defendants of the affidavits of Mrs Mukabana as not demonstrating what was required. In my judgment, the plaintiffs have taken a

thoughtful and responsible approach to discovery and apart from the affidavit I had ordered to be produced, have carried out reasonable searches.

76. I appreciate my conclusion means that in large part I have confirmed the order I previously made. However, I have ordered a further affidavit to be filed. In addition, when the matter was before the Royal Court the full extent of the exercise carried out in respect of Phase1 discovery electronic discovery and the review of the warehouses was not addressed in the evidence then filed. While perhaps some of the evidence could have been provided, the full picture now before me addresses the concerns raised previously before the Royal Court. The Royal Court also did not have the benefit of the affidavit of the first defendant tested on cross-examination; the pleadings of the second and third defendants are also required to be modified as noted above. These differences in my view permit me to reach my present conclusions.

77. The additional evidence also allows me to conclude that the application before me is not therefore an abuse of process.

The second and third defendants' specific discovery applications

The relevant legal principles

78. In respect of the relevant legal principles on a specific discovery application, there is no dispute between the parties on the applicable tests I have to apply: do the documents exist, are they relevant, and if they exist and are relevant would it be oppressive to produce the same or not. I applied these principles in Vilsmeier v AI Airports Int. Ltd & PI Power Int. Ltd [2014] JRC 101 at paragraph 9 as follows:-

> ***9. Generally the test on a specific discovery application is well settled. The leading case is Victor Hanby Associates Limited v Oliver [1990] JLR337. The relevant principles in Hanby were cited more recently in Trust Corporation Limited & Ors v Barclays Private Bank and Trust Limited [2007] JRC043. In summary on a specific discovery application the applicant is required to show:-***
>
> ***(i) There is a prima facie that the defendant has, or has had, documents which have not been disclosed;***

(ii) Where there is a prima facie case of non-disclosure, the documents in question must be relevant to matters in issue in the case. Relevance is determined, primarily, by reference to the issues pleaded;

(iii) If a prima facie case of possession and relevance is made out, the court has to consider whether an order for specific discovery is necessary for disposing fairly of the case."

79. In relation to the second and third defendants' specific discovery applications I propose to deal with these in the following order:-

(i) Certain documents relating to Mr Kiereini and Mr Njonjo ("the third party documents");

(ii) The first defendant's laptop/hard-drive;

(iii) The claim for litigation privilege.

The third party documents

80. In relation to the third party documents, what was sought were any documents relating to the termination of the third parties' involvement with the plaintiffs, the disposal of their shareholdings in the plaintiffs, or the compromise of any liability the third parties may have had to the plaintiffs in relation to the matters set out in these proceedings. In relation to the third parties, they ceased to be directors in 2011. In 2013, ultimate ownership of the plaintiffs was acquired by a group known as the Al-Futtaim Group by a public offering which resulted in the plaintiffs being delisted from the Kenyan stock exchange.

81. However, I was not prepared to grant this part of the application where the second and third defendants' advocates had not reviewed the minutes disclosed by the plaintiffs to see whether those minutes contained anything about the resignation of the directors concerned. Normally where directors resign this should be recorded in some way in a minute, in particular if financial terms are agreed.

82. Nor had the second and third defendants reviewed any public documents or documents disclosed in relation to the de-listing of the plaintiffs in 2013. Generally, for a company being acquired by a public offer, some form of general prospectus is made available which includes setting out any

terms materially different for some shareholders to those generally being offered, including any compensation that a director might receive if ceasing to hold office as a result of the proposed transaction proceeding. While no evidence was produced to me as to whether Kenyan law in practice is any different, I consider I am entitled to take into account the general practice for commercial transactions of the kind described to me in relation to the plaintiffs. If the general practice I have referred to was not the position, it was for the second and third defendants to produce evidence that Kenyan practice was different. They failed to do so.

83. In addition, because the directors resigned in 2011 i.e. some 18 months to 2 years before the delisting of the plaintiffs, the second and third defendants have not shown me that any relevant documents exist or are likely to exist or are referred to in the 2013 delisting concerning a compromise of any liability of any third party. I was not therefore persuaded that any relevant documents in respect of this application existed. More investigatory work is therefore required before such an application can be justified to address the above points.

The first defendant's laptop

84. In respect of this part of the second and third defendants' application, this application was based on an email from the first defendant dated 25th April, 2018, to Advocate Sheedy responding to a question about an email the first defendant had sent to Nissho Iwai asking that company to cease the over-invoicing arrangements. In his email the first defendant stated that he had no access to this email as his *"office laptop"* was confiscated on the day his employment was terminated. This email led the second and third defendants to question why this laptop had not been searched. The basis for this question was that neither the laptop nor any hard-drive maintained for the first defendant was identified in the electronic discovery searches carried out and described in the plaintiffs' second affidavit of discovery dated 12th December, 2017 at paragraph 47.

85. The answer to this criticism lies in the affidavit of Mr Moses Muchiri dated 14th December, 2017. Mr Muchiri is the Group IT Manager at the first plaintiff. At paragraph 5 of his affidavit he describes himself as having the greatest knowledge of the plaintiffs' IT systems. At paragraph 6 he describes the 35 servers used by the plaintiffs. At paragraph 7 he describes which of the servers were served. At paragraph 8 he explains that searches were carried out of all email accounts of CMC divisional managers for the period of duration of the Scheme. This included the first defendant. In light of this affidavit, the second and third defendants have not persuaded me that it is appropriate to go behind the plaintiffs' supplemental affidavit of discovery dated 12th December, 2017, and Mr Muchiri's affidavit of 14th December, 2017.

86. In addition, the first defendant during his cross-examination explained that his secretary had a computer and he only acquired a laptop which he used himself after he had left the plaintiffs. At the outset of the hearing, Advocate Thomas also indicated that he had no objection to the first defendant being cross-examined on the whereabouts of any laptop. Despite this concession, the evidence of the first defendant that he did not in fact have a laptop, notwithstanding his email of 25th April, 2018, was not challenged by Advocate Alexander.

87. For the above reasons, the second and third defendants have not persuaded me in respect of this part of their application that it is appropriate to go behind the affidavits filed. The fact that Mr Muchiri only joined in 2010 does not matter. He was the IT Manager and therefore should be presumed to know what hard-drives, email accounts and systems the plaintiffs maintained. The second and third defendants have not persuaded me that Mr Muchiri did not have such knowledge.

The challenge to litigation advice privilege

88. In respect of this part of the second and third defendants' application, it is right to recall the procedural history of this part of the second and third defendants' application set out at paragraph 11 of my judgment dated 19th November, 2018 where I stated as follows:-

> ***"11. I record at this stage that the second and third defendants' summons seeking discovery of specific categories of documents included seeking an order for production of the communications made on a without prejudice basis or where litigation privilege was claimed (see sub- paragraphs 1(a)(ii) and (iii)). . However during the course of argument Advocate Alexander was specifically asked by me during his submissions in reply whether he was withdrawing paragraphs 1(a)(ii) and (iii) set out above, and he accepted that was the position. Subsequent to the hearing Advocate Alexander wrote to me indicating that his concession was limited to a without prejudice documents only and not the challenge to litigation privilege. Both my notes of the hearing and the transcript records me putting that the Advocate Alexander whether he was withdrawing sub-paragraphs (ii) and (iii). I sought this clarification because of the contention of Advocate Thomas that allowing cross-examination would be unfair because Advocate Thomas could not effectively re-examine without waiving privilege. In answering my question Advocate Alexander did not state that he was maintaining a challenge to litigation privilege. I informed Advocate Alexander of my notes. This led him to clarify that he was not seeking to cross-examine the first defendant on his understanding of any agreement with the plaintiffs as I had ruled he could not do so (which I explain later in this judgment). However he still wished to***

challenge the claim to litigation privilege. Ultimately I agreed that he could still make such a challenge because he referred me to authorities which indicated that there was a real argument to be determined on whether a claim to litigation privilege could be maintained."

89. I also noted in the final sentence of paragraph 68:-

"The question of whether the claim for litigation privilege can be sustained is now correctly being dealt with as a separate issue."

90. Advocate Alexander in support of his application for discovery of documents said to be subject to litigation privilege only, confirmed that he was not seeking any documents said to represent without prejudice communications between the plaintiffs and the first defendant. He otherwise made the following submissions:-

(i) The onus was on the plaintiffs as the party asserting privilege to justify it.

(ii) The public interest was best served by confining the scope of litigation privilege.

(iii) Litigation privilege could not be claimed in respect of communications between opposing parties to litigation based on McKay v McKay [1988] NILR 79 and Faraday Capital Limited v SBG Roofing Limited & Ors [2006] EWHC 2522 (Comm). These decisions were supported by the 1999 Supreme Court Practice 1999 ("the White Book") (paragraph 24/5/18) and the comments in Matthews & Malek, Disclosure, 5th Edition (2017) (Extract) at paragraph 3 – 274.

(iv) Discussions between opposite parties to litigation lacked the requisite confidentiality.

(v) Confidentiality between opposing parties could not be created by an agreement. Any such agreement was subordinate to the obligation to disclose communications between opposing parties.

91. Advocate Thomas for the plaintiffs contended that the evidence provided by the first defendant went to an interlocutory issue and not the case as a whole because it related to whether the plaintiffs should make further disclosure from the warehouses. While the first defendant had to give some evidence about the scheme in order to indicate whether or not documentation was

likely to be found in the warehouses, the affidavit was not a document which went to the entirety of the scheme.

92. There was a public interest in encouraging parties to talk to each other under the guise of litigation privilege to resolve interlocutory matters. He therefore distinguished the McKay and Faraday cases as relating to statements concerning the merits of a dispute rather than an interlocutory dispute. He also contended that for the purposes of the plaintiffs' application to limit discovery, the plaintiff and the first defendant were on the same side and so were not opposing parties. The first defendant was also a witness assisting the plaintiffs.

93. In this case in addition, the plaintiffs and the first defendant had anticipated potential challenges to their communications and had signed an express agreement of confidentiality. They were not therefore relying on any general obligation of confidentiality being assumed; rather they had expressly agreed between them that their communications were confidential. I was referred to Matthews & Malek, Disclosure, 5th Edition (2017) (Extract) at paragraph 3 – 255 which recognised the prudence of a litigant taking such a step.

94. In deciding whether or not the plaintiffs should succeed in their claim to litigation privilege, I start by reference to what is meant by litigation privilege. From a Jersey law perspective this was considered in Café de Lecq v R.A. Rossboroughs (Insurance Brokers) Limited [2011] JLR 182 at paragraphs 25 to 26 as follows:-

> ***"25 There are two principal forms of legal professional privilege, namely legal advice privilege and litigation privilege. Litigation privilege provides protection for a wider range of documents but only applies where litigation is in reasonable prospect. Legal advice privilege applies even if litigation is not in reasonable prospect but the range of documents to which it applies is narrower. We are concerned in this case with litigation privilege and we consider that the general nature of that privilege is accurately summarized in Phipson on Evidence, 17th ed., para. 23–89, at 688 (2010):***
>
> ***"The second category of legal professional privilege is wider than the first, but arises only when litigation is in prospect or pending. From that moment on, any communications between the client and his solicitor or agent, or between one of them and a third party, will be privileged if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence for use in the litigation. This is the basis for claiming privilege for correspondence with witnesses of fact or experts, and proofs, reports or documents generated by***

them. The principle is that a party or potential party should be free to seek evidence without being obliged to disclose the result of his researches to the other side. In Anderson v. Bank of British Colombia James, L.J. said:

'. . . as you may have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief.'

In order for litigation privilege to apply, there must be a confidential communication between client and lawyer or lawyer and agent, or between one of these and a third party made for the dominant purpose of use in litigation; that is, to seek or provide information or evidence to be used in, or in connection with, litigation in which the client is or may become a party, and when litigation is either in process or reasonably in prospect."

26 An authoritative description of litigation privilege, approved by the House of Lords in Waugh v. British Rys. Bd. (15), is to be found in the statement of Barwick, C.J. in the Australian case of Grant v. Downs (6) (135 C.L.R. at 677):

"Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

That summary of litigation privilege is equally applicable under the law of Jersey."

95. I also regard as helpful the judgment of Lawrence Collins J (as he was then) in Istil Group Inc v Zahoor [2003] 2 All ER 252 at paragraphs 55 to 60 as follows:-

"55. The second category, litigation privilege, was classically described as documents which come into existence for obtaining evidence to be used in litigation, or for obtaining information which might lead to the obtaining of evidence: see Wheeler v. Le Marchant (1881) 17 Ch. D 675 , 681 (Sir George Jessel MR), 684–5 (Cotton LJ). But information obtained by the

legal adviser for litigation may also be information to be used to advise the client whether he ought to defend or prosecute the action: Anderson v. Bank of British Columbia (1876) 2 Ch.D 644 , 649–650, per Sir George Jessel MR.

56. The rationale for litigation privilege was said to be that "… the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected" (Wheeler v. Le Marchant (1881) 17 Ch. D 675 , 684–5, per Cotton LJ) or "… as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief" (Anderson v. Bank of British Columbia (1876) 2 Ch.D 644 at 656, per James LJ, cited with approval by Lord Simon of Glaisdale in Waugh v. British Railways Board [1980] AC 521 , 537).

57. That rationale is not very attractive, and is perhaps ripe for reconsideration in the light of reforms which are designed to make litigation more open and less like a game of poker. More attractive as a rationale is the consideration that preparation of a case is inextricably linked with the advice to the client on whether to fight or to settle, and if so, on what terms. As Sir Richard Scott V-C said in Re Barings plc [1988] 1 All ER 673, 681:

"… documents brought into being by solicitors for the purposes of litigation were afforded privilege because of the light they might cast on the client's instructions to the solicitor or the solicitor's advice to the client regarding the conduct of the case or on the client's prospects. There was no general privilege that attached to documents brought into existence for the purposes of litigation independent of the need to keep inviolate communications between client and legal adviser. If documents for which privilege was sought did not relate in some fashion to communications between client and legal adviser, there was no element of public interest that could override the ordinary rights of discovery and no privilege. So, for example, an unsolicited communication from a third party, a potential witness, about the facts of the case would not, on this view, have been privileged. And why should it be? What public interest is served by according privilege to such a communication?"

58. So also in Ventouris v. Mountain [1991] 1 WLR 607, at 612 Bingham LJ said:

"The courts must not in any way encroach on the right of a litigant or potential litigant to seek and obtain legal advice on his prospects and the conduct of proceedings under the seal of confidence nor on the right of such a litigant and his legal adviser to prepare for and conduct his case without, directly or indirectly, revealing the effect of that advice. In recognition of these rights, perhaps generously interpreted, proofs of witnesses, whether factual or expert, and communications with potential witnesses, have been held immune from production."

59. The privilege is that of the client, and may of course be waived.

60. Where privileged communications are in the hands of a third party on a confidential basis, the court has power to protect the litigant's privilege and right to have the documents kept confidential. This applies even if the third party is a witness. Although there is no property in a witness, the court may prevent the disclosure by the witness of information imparted to the witness in confidence by or on behalf of the litigant. I have already expressed the view that it does not necessarily follow from the fact that a communication with a witness is privileged in the hands of the client or the lawyer that it is a confidential communication in the hands of the witness. But it will often be so."

96. I note in particular at paragraph 60 that Lawrence Collins J considered that the court had a power to protect information supplied in confidence to a third party witness. There is an observation to like effect in Berezovsky v Hine [2011] EWHC 1904 (ch) at paragraph 30, where Mann J stated:-

"30 …… Accordingly, in circumstances in which it would be obvious to a witness that material is confidential, confidentiality will be imposed and there will not be a blanket loss of privilege on the grounds of a blanket waiver of confidentiality. So the position is that some communications with witnesses may be confidential in the hands of the witness and some may not. Whether it is confidential or not must depend on the nature of the information and the circumstances of the communication. If the witness is shown some obviously privileged information or becomes privy to it, then the use that the witness can make of that information is likely to be restricted in use. It is likely that it cannot have been intended by either the provider of the information or the witness that the information communicated purely for the purpose of proofing becomes information which that witness is allowed to use generally. He or she could not go out and broadcast to the world what the content of the information was merely because he wished to do so. In terms of confidentiality

the information has lost its confidential quality vis-à-vis the witness, and to some extent, but not vis-à-vis the rest of the world and not generally."

97. While the observations of Mann J are made in a different context, both Mann J and Lawrence Collins J clearly recognised the power of the court in appropriate cases to restrain information supplied in confidence to third party witnesses. The issue for me to decide is whether this power extends to a party who also acts as witness for an opposing party, whether in relation to an interlocutory or a substantive dispute. This requires consideration of how far parties to a dispute can communicate with each other without such communications becoming known to other parties or made use of at trial.

98. Clearly parties to disputes in multi-party litigation on the same side of the fence can communicate with each other on the basis of common interest privilege. Provided that the grounds for a claim to common interest privilege exist, in the present case the first defendant on the one hand and the second and third defendants at any time are free to talk to each other on the basis of such a privilege, their common interest being that they have both been pursued by the plaintiffs.

99. In addition, parties on the opposite side of a dispute whether plaintiff and defendant or defendant and a third party are free to approach each other at any time on a without prejudice basis. In my judgment, this is not only to resolve a substantive dispute but also to settle either parts of a dispute or interlocutory disputes. Accordingly, Advocate Alexander was right to concede that it would not be appropriate to seek to challenge the plaintiffs' claims to withhold without prejudice communications between the plaintiffs and the first defendant in relation to the present application, because in principle such communications are perfectly appropriate. There is no difficulty in principle with the plaintiffs approaching the first defendant on a without prejudice basis to try to resolve potential disputes about discovery. If that approach was rejected, it does not mean that a claim to privilege to withhold without prejudice communications cannot be made.

100. The question that arises is whether communications between the opposing parties which are not covered by without prejudice communications can be the subject to a claim of litigation privilege alone.

101. Advocate Thomas argues that such communications fall within the definition of what is litigation privilege contained Three Rivers District Council v Governor and Co of the Bank of England (No.6) [2005] 1 AC 610 at paragraph 102 as follows:-

"102. The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:

(a) litigation must be in progress or in contemplation;

(b) the communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) the litigation must be adversarial, not investigative or inquisitorial."

102. However Three Rivers relates to communications internal to a corporate entity. Three Rivers does not address the issue before me which is communications between opposing parties. While therefore litigation is in contemplation and the communications between the plaintiffs and the first defendant were made with the sole purpose of conducting the litigation in particular disputes about discovery and the litigation is clearly adversarial, this does not mean that litigation privilege arises. The rationale of the litigation privilege is as put in the Istil Group Inc v Zahoor case as follows:-

"…inextricably linked with the advice to the client on whether to fight or to settle, and if so, on what terms."

103. The focus of litigation privilege is the relationship between client and lawyer not opposing parties. This was clearly put by Lord Hutton L.C.J. in McKay v McKay at page 617 where he states:-

"Therefore, as the basis of the privilege is that the communications which a party makes to his professional lawyer should be kept secret from the adverse party and that the adverse party cannot ask to see them before the trial it follows that the privilege cannot apply where the adverse party has himself supplied the information and is therefore aware of it."

104. The same conclusion was reached by Cooke J in Faraday who followed on from McKay and therefore stated at paragraphs 18 and 19 as follows:-

> ***"18 The reasoning, as set out in that decision, is to my mind compelling. When looking at the decision in Feuerheerd , the Lord Chief Justice for Northern Ireland pointed out that it was contrary to principle, as established in earlier authority, and contrary to the whole run of authorities commencing with Kennedy v Lyell . Confidentiality is the basis upon which privilege is asserted and, in the context of information supplied by or on behalf of one party to another, there can be no question of confidentiality. I need not go through the reasoning that is set out in McKay v McKay , but, as I say, it seems to me to be compelling and, because the Court of Appeal decision in Feuerheerd was made without citation of relevant authority, I take that as being made per incuriam and decline to follow it.***
>
> ***19 In those circumstances, the position in law I take as being established that, as set out in the White Book , which likewise says that Feuerheerd was incorrectly decided:—***
>
> ***"No communication made by or on behalf of the opposite party can be confidential.""***

105. He therefore granted the application of the second and third defendants for disclosure of witness statements by former employees of the first defendant made to the first defendant's insurers who were the claimants. Paragraph 24/5/18 of the White Book is to likely effect as noted in Faraday, Matthews v Malek Fifth Edition at paragraph 3-275 described Faraday as "***a sensible decision***".

106. In my judgment, the authorities clearly draw a distinction between communications with third parties, where the confidence of such communications may be protected, and communications between opposing parties. While confidential communications with third party witnesses may be protected for the reasons articulated by Lawrence Collins J and Mann J, there is no authority produced to me which suggests that communications between opposing parties (where a claim that the communication is without prejudice cannot be made) can be protected as being confidential. This means that, once an opposing party agrees to provide a statement, whether in relation to a substantive matter or an interlocutory issue, that statement and any communications relating to it are disclosable. This means that any discussions or communications leading to an agreement to provide a statement are confidential if they are without prejudice but anything containing a statement from one party to an opposing party is otherwise disclosable. This conclusion does not mean that any privilege is lost between a party and its own legal adviser in respect of a communication from another party; rather it is only communications between opposing parties where litigation privilege cannot be claimed. There may also be difficult questions to resolve whether a particular communication falls under the guise of a without

prejudice communication but that is for another day; I am only asked to address the principle at this stage.

107. My conclusion is also consistent with the more recent trend of the courts to encourage parties to take a cards on the table approach to their case; the danger of the plaintiffs' argument is that it might lead to relevant evidence being suppressed under the guise of a claim to privilege.

108. I also do not consider it to be helpful or a correct approach to attempt to answer whether litigation privilege can be justified to depend on an analysis of whether a party is on the same side or the opposing side to a dispute – whether interlocutory or substantive – or is a witness rather than a party on a particular issue. Such an approach is likely to lead to a complicated analysis in many cases and also runs the risk of abuse. Litigation privilege should not depend on which hat a party claims to be wearing at a particular point in time. The clear statements of principle in McKay and Faraday cannot therefore be distinguished on this basis.

109. In relation to the agreement entered into between the plaintiffs and the first defendant, had the first defendant been a witness or potential witness I fully understand why a party would enter into an express agreement of confidentiality with the witness so that a party could ensure that any explanation about any evidence required and enquiries made would be on a confidential basis and would not be open to scrutiny by an adverse party to the dispute. I also accept that ordinarily one party does not have to disclose an approach to a third party witness; however that witness cannot be restrained from providing evidence to any other party even if they can be restrained from not revealing information supplied in confidence. Istil and Berezovsky suggest that such agreements may be enforced by the courts in appropriate cases which is also for another day. However, in my judgment the existence of such an agreement is not sufficient to override the clear statements of principle that communications between adverse parties cannot be subject to an obligation of confidentiality to enable a claim to litigation privilege to be made. It is not the agreement that gives rise to the claim to privilege, but rather the importance of advice from a lawyer to a client being kept confidential. While an agreement with a witness to keep information supplied confidential may well be sensible and prudent (and enforceable in appropriate cases), an agreement between opposing parties to keep matters confidential cannot be used to create a claim to litigation privilege where one could not otherwise be made. This is a "bootstraps" approach to attempt to circumvent McKay and Faraday which cannot be allowed to succeed.

110. In reaching this conclusion I have also taken into account that any exceptions to privilege should be construed no more widely than is necessary and that the burden is on the party claiming privilege to establish it (see West London Pipeline Storage and Anor v Total UK and Ors [2008] EWHC 1729 at paragraph 86(1)). The plaintiffs have not met that burden in respect of their claim

for litigation privilege in respect of communications with the first defendant and the provision of his first affidavit.

111. The second and third defendants' challenge to the claims to litigation privilege by the plaintiffs and the first defendant is therefore successful.

Authorities

CMC Holdings Ltd v Forster & Ors [2017] JRC 188.

CMC v Forster and Ors [2018] JRC 078.

CMC Holdings Limited and CMC Motors Group Limited v Forster and Ors [2018] JRC 211.

Nolan v Minerva Trust and Others [2014] JRC 078A.

Vilsmeier v AI Airports Int. Ltd & PI Power Int. Ltd [2014] JRC 101.

McKay v McKay [1988] NILR 79.

Faraday Capital Limited v SBG Roofing Limited & Ors [2006] EWHC 2522 (Comm).

1999 Supreme Court Practice 1999 (Extract).

Matthews & Malek, Disclosure, 5th Edition (2017) (Extract).

Café de Lecq v R.A. Rossboroughs (Insurance Brokers) Limited [2011] JLR 182.

Istil Group Inc v Zahoor [2003] 2 All ER 252.

Berezovsky v Hine [2011] EWHC 1904 (ch).

Three Rivers District Council v Governor and Co of the Bank of England (No.6) [2005] 1 AC 610.

West London Pipeline Storage and Anor v Total UK and Ors [2008] EWHC 1729.