Cross applications by the Plaintiffs and the Defendant in relation to disclosure. Rules 65, 69 and 71 of the Royal Court Civil Rules 2007.

[2023]GRC024

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

(1) RUI MARIO FERNANDES RODRIGUES **Applicants**

(as trustee of the Stins settlement)

(2) MARIA JOSE GOMES TEXEIRA

(as trustee of the Stins settlement)

-AND-

STANLEY GIBBONS GROUP PLC **Respondent**

Case heard on: 5 October 2022

Judgment handed down: 27 June 2023

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Applicants: Advocate A Horsburgh-Porter
Counsel for the Respondent: Advocate B M Manchak

Legislation, texts and cases considered:

Royal Court Civil Rules 2007

Hollander on Documentary Evidence (14th Edition)

Westminster Airways LD v Kuwait Oil Co LD [1951] 1 KB 134
Guinness Peat Properties Ltd v Fitzroy Robinson Partnership 1987 WL 492190
Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2004] UKHL 48, [2005] 1 AC 610
Director of the Serious Fraud Office v Eurasian Natural Resources corporation (Law Society Intervening) [2018] EWCA Civ 2006
West London Pipeline and Storage Ltd v Total UK [2008] EWHC 1729
United States v Philip Morris [2004] EWCA 330
WH Holdings Ltd and Another v E20 Stadium LLP [2018] EWHC 2784 (Ch)
Tchenguiz v Director of the Serious Fraud Office [2013] EWHC 2297 (QB)
Civil Aviation Authority v R Jet2 com Ltd [2020] EWCA Civ 35

Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154
The State of Qatar v Banque Havilland SA (a company incorporated under the laws of Luxembourg), & Vladimir Bolelyy [2021] EWHC 2172 (Comm)
Kyla Shipping Co Ltd & Anor v Freight Trading Ltd et al [2022] EWHC] 376 (Comm)
Investec Trust et al v Glenalla Properties Limited et al 6.12.11
Fort Trustees Limited and Balchan Management Ltd v ITG Limited and Bayeux Limited [2022] GCA 092

Introduction

1. In this matter, there are cross applications by the Plaintiffs and the Defendant in relation to disclosure. In an application dated 14 April 2022, pursuant to Rule 71 of the Royal Court Civil Rules 2007 ("RCCR") the Plaintiffs' application (the "Plaintiffs' Application") is for the Defendant to disclose and provide copies of all the documents listed in Schedule 2 of the Defendant's Disclosure Statement and List of Documents dated 1 April 2022 (the Plaintiffs no longer requiring the relief set out in paragraphs 1 and 2 of the Plaintiffs' Application). The Defendant's application dated 6 May 2022 (the "Defendant's Application") is for the Plaintiffs to provide disclosure of documents and communications as set out in the Defendant's Application and to provide a list pursuant to Rule 69 of the RCCR of those documents in respect of which the Plaintiffs claim a right or duty to withhold inspection.. A stay application by the Defendant dated 12 April 2022 was resolved by consent by a consent order dated 22 April 2022.

2. Both parties have filed skeleton arguments which they augmented orally at a hearing on the 5 October 2022. I also had an affidavit of Tessa Kovacs in support of the Plaintiffs' position ("Kovacs 2") and two affidavits filed on behalf of the Defendant from Christa Feltham dated 13 April 2022 and Advocate Manchak dated 17 June 2022 ("Manchak 1").

Background

3. The Plaintiffs who are resident in Madeira are the trustees of the Stins Settlement based in the Isle of Man (the "Trustees"). Mr Peter Builder ("Mr Builder") was the Original Protector of the Settlement until his death on 14 July 2015. He was authorised to act for the Plaintiffs and had delegated general authority from them. Ms Tessa Kovacs ("Ms Kovacs") was appointed as Joint Protector with Mr Builder in substitute for Thomas May by a Deed of Appointment on 10 January 2013 and has been Sole Protector since Mr Builder's death and, as such, has authority to act as an agent for the Plaintiffs and has delegated general authority. Ms Kovacs was Mr Builder's granddaughter.

4. The Defendant is a company registered in Jersey, as well as in England and Wales (as an overseas company) with an establishment in England and Wales. It is the parent company of a group which is concerned with the marketing and sale of stamps and other collectibles.

5. Stanley Gibbons Guernsey Limited (SGGL) was a company registered in Guernsey and a subsidiary of the Defendant. It was placed into administration by order of the Royal Court of Guernsey on 21 November 2017.

6. Mr Builder on behalf of the Plaintiffs entered into a number of agreements with SGGL to invest in stamps. Mr Builder dealt with Mr Anthony Love and then after December 2014, Mr Keith Heddle. After Mr Builder's death, Ms Kovacs dealt with Mr Heddle.

7. The Plaintiffs allege that the Defendant acted as an investment adviser to the Plaintiffs through Mr Love and Mr Heddle. In acting as such, the Defendant assumed a duty of care towards the Plaintiffs. The Defendant subsequently breached this duty of care in the advice which it gave to the Plaintiffs.

As a consequence of the breach or breaches, as set out in the Cause dated 6 August 2021, the Plaintiffs say that the Defendant has caused the Plaintiffs loss and damages.

8. The Defendant tabled its Defences on 19 November 2021 and the parties subsequently agreed a Consent Order dated 10 December 2021 (the "December Order") which provided for certain procedural directions. Pursuant to the December Order, the Plaintiffs filed a Réplique on 21 January 2022. The Defendant did not file a Duplique. The parties subsequently exchanged disclosure lists and disclosure statements on 1 April 2022. Pursuant to the December Order, the parties were permitted to request inspection of the documents on 4 April 2022. Both parties identified issues with the other's disclosure which were not resolved in correspondence. The Defendant's documents listed on Schedule 1 were disclosed to the Plaintiffs on 25 April 2022 and the Plaintiffs produced theirs to the Defendant on 26 April 2022.

Plaintiffs' Application

9. The Plaintiffs' Application seeks specific disclosure in relation to documents listed on Schedule 2 of the Defendant's disclosure list ("Schedule 2") over which the Defendant claims privilege. Certain documents in Schedule 2 have not been disclosed by the Defendant on the grounds that they are covered exclusively by litigation privilege. Other items are being withheld on the grounds that they are both covered by legal advice privilege and litigation privilege (after clarification from the Defendant no documents were being withheld purely on the basis of legal advice privilege).

The Law

10. Rule 65 of the Royal Court Civil Rules ("RCCR) provides:

> *(1) An order to give disclosure is an order to give standard disclosure unless the Court directs otherwise.*
> *(2) The Court may dispense with or limit standard disclosure.*
> *(3) The parties may agree in writing to dispense with or to limit standard disclosure.*
> *(4) Standard disclosure requires a party to disclose only –*
> *(a) the documents on which he relies, and*
> *(b) the documents which –*
> *(i) adversely affect his own case,*
> *(ii) adversely affect another party's case, or*
> *(iii) support another party's case, and*
> *(c) the documents which he is required to disclose by a relevant practice direction.*

11. Rule 71 of the RCCR provides:

> *(1) The Court may make an order for specific disclosure or specific inspection.*
> *(2) An order for specific disclosure is an order that a party must do one or more of the following things -*
> *(a) disclose documents or classes of documents specified in the order,*
> *(b) carry out a search to the extent stated in the order,*
> *(c) disclose any documents located as a result of that search.*
> *(3) An order for specific inspection is an order that a party permit inspection of a document referred to in Rule 64(2).*

Summary of Parties' Submissions

12. The test for litigation privilege was accepted by both parties to mean that the material in question must:

(i) be a confidential communication between the lawyer (acting in a professional capacity) and the client, or between either of them and a third party (or be a document created by or on behalf of the client or the client's lawyer);
(ii) be made for the dominant purpose of litigation;
(iii) relate to litigation which is pending, reasonably contemplated or existing.

Both parties agreed that the burden is on the party claiming privilege to establish it.

13. The Plaintiffs identify three groups of documents in the Defendant's Schedule 2:
    (a) Internal communications: these are items 1 – 41; 48; 63; 64; 66; 68 and 99 (i.e. 47 communications);
    (b) Communications with a third party (i.e. Tim Worlledge or Clive Whiley of Evolution China / Harry Wilson): these are items 42; 44; 46; 47; 50 – 55; 57 – 59; 61; 62; 69; 85 – 95; 97; 98 and 100 (i.e. 30 communications);
    (c) Communications with Phil Ladmore.

14. The Plaintiffs say that they are entitled to production of the entirety of Schedule 2. They rely on three main arguments against the Defendant's entitlement to rely on litigation privilege. First, that the vast majority of documents were created prior to litigation being contemplated. Second, the Plaintiffs argue that the dominant purpose of the documents in Schedule 2 is not litigation, but rather for the Defendant to seek advice about insolvency options. Their third argument is that 41 out of the 100 documents over which privilege is claimed are internal emails, and therefore, they say litigation privilege cannot be claimed at all.

15. In relation to the contemplation of litigation, the Plaintiffs say that the Defendant has failed to show that litigation was reasonably contemplated or anticipated. It must be more than a mere possibility. As Eder J stated *in Tchenguiz v Director of the Serious Fraud Office* at paragraph 48 (iii):
    "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".

16. The Plaintiffs say that none of the documents in Schedule 2 were created at time where litigation was reasonably contemplated. It was not until 15 February 2017 that the Plaintiffs received an email from the Defendant indicating that because they had not triggered the contractual buyback provision at the appropriate time, they were not entitled to the buyback of the stamps for a guaranteed sum. The claim by the Plaintiffs is based on the failure of the Defendant to advise the Plaintiffs to trigger the buyback. As a consequence, the Plaintiffs say that litigation cannot be in reasonable contemplation before this date. For example, the emails on Schedule 2 that appear to be related to emails sent to and from Mr Builder, whilst the Plaintiffs accept that Mr Builder felt that there had been misrepresentations made to him, and that there had been some robust exchanges between Mr Builder and Mr Heddle, this did not mean that that legal action was contemplated against the Defendant or SGGL. He had instructed Mr Heddle to sell the stamps before he died. In any event, after Mr Builder's death in 2015, it was Ms Kovac's intention to liquidate the stamp investments as soon as possible and in the most cost-effective way and that they sought Mr Heddle's advice about how to do this in the best way. There was a meeting between Mr Heddle, Mr A Pritchard (the husband of one of the beneficiaries of the Stins Settlement) and Ms Kovacs on 1 September 2015 arranged with the intention that the parties work together going forward. The emails after that meeting, as set out in the Cause, show that the relationship was cordial and cooperative. This does not support the claim by the Defendant that litigation was reasonably in prospect as no one was contemplating litigation at this stage. The Plaintiffs also submit that Ms Kovacs did not know about the correspondence sent by her grandfather, although they accept that Mr Heddle had described it as a "*falling out*" to her.

17. Even after 15 February 2017 and up to 3 July 2017, which is the date of the last email over which privilege is claimed, the Plaintiffs say that it cannot be said litigation was reasonably contemplated. The letter before action for the current claim against the Defendant was not sent by Field Fisher

solicitors on behalf of the Plaintiffs until 24 April 2018. The email of 15 February 2017 didn't merely inform the Plaintiffs of the failure to trigger the buyback, the Defendant also provided advice to the Plaintiffs about waiting for the market to improve. Whilst there was some correspondence on behalf of the Plaintiffs and SGGL which led to a settlement agreement with the Administrators, the Plaintiffs say that the correspondence was not a pre-cursor to litigation. This is because this correspondence related to SGGL being in administration and seeking proofs of debt which the Plaintiffs in turn submitted. Following this there was a settlement agreement between the Administrators and the Plaintiffs. Thus, the Defendant has failed to show on the balance of probabilities that in relation to any of the emails which form Schedule 2 that litigation was reasonably in prospect and therefore the claim for litigation privilege fails.

18. In relation to the test for dominant purpose, this must be viewed objectively on the evidence and it is the purpose of the person who created the document at the time "*or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence*" (see the judgment of Lord Justice Slade page 6 *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership 1987 WL 492190).*

19. The Plaintiffs say the documents identified by them as category b above, do not fulfil the dominant purpose requirement. For example, document 42, which is an email dated 22 November 2016 to Evolution Securities China who are turnaround insolvency specialists. The Plaintiffs say this is an example of the communications with a third party but where the dominant purpose cannot be said to be litigation. The Plaintiffs rely on the exhibits to Kovacs 2, including an excerpt from Evolution Securities China Group's website and also Mr Tim Worlledge's LinkedIn page which sets out that he works as a director of Evolution Securities China Limited with a narrative that it is "*a financial advisory company specialising in turnaround situations and in crisis management*." She also attaches an email between Anthony Love and Keith Heddle in January 2017 referring to Tim Worlledge, requesting Mr Love's attendance at a "*Stins review*" conducted by Mr Worlledge.

20. The Plaintiffs say at this time when the Defendant had assumed a duty of care towards the Plaintiffs, there was a looming solvency crisis within the Stanley Gibbons Group (as identified in a management report which was before the Court) which identified that they were running out of cash. As set out in the Cause, in August 2016 SGGL stopped offering any form of guaranteed resale price. The Plaintiffs say that this background of a solvency crisis in the Stanley Gibbons Group, is critical to their case against the Defendant and therefore these documents should be disclosed. The Plaintiffs say the Defendant was being pulled in two directions: the desire to preserve solvency by avoiding the obligation to pay £2 million by virtue of the buyback provisions in the contract versus the duties, which the Plaintiffs say that the Defendant had assumed to inform the Plaintiffs that they should trigger the contractual buyback by the Defendant for the guaranteed £2 million as the market for collectibles had declined. These documents whilst germane to the Plaintiffs' case against the Defendant, cannot attract litigation privilege as to the extent that there is any reference to litigation it cannot be the dominant purpose of the creation of the documents. Further, and in any event, these documents are all created prior to the time where litigation can be said to have been reasonably contemplated so the Defendant cannot rely on litigation privilege in relation to these documents.

21. The Plaintiffs say any internal communications cannot be subject to litigation privilege because they are internal communications. They are not with a third party or a lawyer. An internal discussion of prospective litigation is not enough. They say there must be an outside body and in the absence of a third party, the Defendant has wrongly claimed privilege over these documents.

22. In relation to those documents over which the Defendant claims legal advice privilege, both parties agreed that in order for the Defendant to claim legal advice privilege the communication must be:

    (i) confidential;
    (ii) pass between a lawyer and their client;
    (iii) and come into existence for the dominant purpose of giving or receiving legal advice.

23. The Plaintiffs rely in particular on the key principles identified at paragraph 69 of *Civil Aviation Authority v R Jet2 com Ltd [2020] EWCA Civ 35*:

> *"Therefore, summarising the position as indicated by the authorities (and still leaving aside for the time being the issue of whether the relevant purpose has to be "dominant"):*
> *(i) Consideration of LAP has to be undertaken on the basis of particular documents, and not simply the brief or role of the relevant lawyer.*
> *(ii) However, where that brief or role is qua lawyer, because "legal advice" includes advice on the application of the law and the consideration of particular circumstances from a legal point of view, and a broad approach is also taken to "continuum of communications", most communications to and from the client are likely to be set in a legal context and are likely to be privileged. Nevertheless, a particular communication may not be so - it may step outside the usual brief or role.*
> *(iii) Similarly, where the usual brief or role is not qua lawyer but (e g) as a commercial person, a particular document may still fall within the scope of LAP if it is specifically in a legal context and therefore, again, falls outside the usual brief or role.*
> *(iv) In considering whether a document is covered by LAP, the breadth of the concepts of legal advice and continuum of communications must be taken into account.*
> *(v) Although of course the context will be important, the court is unlikely to be persuaded by fine arguments as to whether a particular document or communication does fall outside legal advice, particularly as the legal and non-legal might be so intermingled that distinguishing the two and severance are for practical purposes impossible and it can be properly said that the dominant purpose of the document as a whole is giving or seeking legal advice.*
> *(vi)Where there is no such intermingling, and the legal and non-legal can be identified, then the document or communication can be severed: the parts covered by LAP will be non-disclosable (and redactable), and the rest will be disclosable (see, e g, Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd [1987] 2 Qd R 335 and GE Capital Corporate Finance Group Ltd v Bankers Trust Co [1995] 1WLR 172).*
> *(vii) A communication to a lawyer may be covered by the privilege even if express legal advice is not sought: it is open to a client to keep his lawyer acquainted with the circumstances of a matter on the basis that the lawyer will provide legal advice as and when he considers it appropriate."*

24. The Plaintiffs question whether Mr Ladmore is a lawyer. Further, even if he is, they say it is not evident that the documents have come into existence for the dominant purpose of giving or receiving legal advice. Rather, the Plaintiffs say he appears only to have been copied into correspondence with Evolution Securities China and this points to the dominant purpose being in relation to the solvency issues at the time and not legal advice. Therefore, the Plaintiffs say that the Defendant cannot rely on legal advice privilege in relation to any of the documents.

25. In order to resolve the arguments on privilege, the Plaintiffs offered through correspondence that a confidential bundle be provided to the Court to allow the Court to assess whether legal professional privilege applied to any of the documents in Schedule 2, but this was rejected by the Defendant. If the Court is not minded to order inspection and production of the documents on Schedule 2, they reiterate that examination of the Court of the documents is the best way to deal with the issue, as they have raised valid questions which the Defendant has failed to answer properly, and this will resolve the issue. They do not accept the Defendant's argument that the documents listed in Schedule 2 do not come within standard disclosure.

26. The Defendant's primary position is that having reconsidered the disclosure list, the documents in Schedule 2 are not ones that come within standard disclosure and that that it should not be obliged to produce the documentation. At paragraph 19 of Manchak 1, Advocate Manchak sets out the disclosure process that the Defendant adopted. The Defendant engaged a specialist third party service provider to recover data from the Defendant. 118,117 documents were uploaded onto a

data review platform. Thereafter, a series of search terms and date ranges were used to identify potentially relevant documents in the litigation. This process reduced the number of documents to 4,140. A team of qualified lawyers at the specialist third party service provider carrying out a multi-level review of these documents. This reduced the number of documents in that population to 823. There was a further review to identify privilege and data privacy issues, which was itself a three-tier review at the specialist third party service provider. These documents were then further reviewed by Mourant Ozannes and those are the 100 documents in Schedule 2.

27. However, the Defendant submits that by the nature of the disclosure process only a proportion of those documents will be used at trial. This becomes apparent at the witness statement stage when there is greater focus on what is required by the Plaintiffs to prove their case and by the Defendant to undermine the Plaintiffs' case. After the Plaintiffs' Application, the analysis by the Defendant of the Schedule 2 documents has led the Defendant to the conclusion that in fact none of the documents will be able to come into evidence at trial.

28. The Defendant says that the Plaintiffs' case against the Defendant is built around apparent authority i.e. whether the Defendant had authority to deal with the Plaintiffs in such a way so as to create the relationship relied on by the Plaintiffs and the duties that the Plaintiffs say that the Defendant assumed and then breached as set out in the Cause. The Defendant says that in terms of documents these must be grounded in the interactions between the Plaintiff and the Defendant in the absence of a contractual relationship. The internal communications of the Defendant or communications with Evolution Securities China are irrelevant to this. In terms of causation, it will be for the Plaintiffs to prove that, had Ms Kovacs been told by the Defendant to trigger the buyback provisions she would have done so. Even if there was a "*smoking gun*" document where the Defendant appeared to accept that it had a duty towards the Plaintiffs, the Defendant says that is irrelevant because any duties will be established as a matter of law rather than the views of the Defendant about its obligations at the time. The Defendant says in terms of damages these are ascertained already – the guaranteed buyback amount less the sale of the stamps by the Plaintiffs received from the settlement with SGGL, and documents in Schedule 2 do not go to the relief sought.

29. The alternative position is that the Defendant is entitled to rely on litigation privilege for all the documents. In Manchak 1 there is a distinction between Category 2 and 3 but on reconsidering the nature of the documents, the one document identified below as Category 2 should be in Category 3. Manchak 1 also contained a number of corrections to the original list in Schedule 2.

    (a) Category 1: Documents covered by litigation privilege. Communications of a confidential nature passing between the Defendant, its employees, agents, representatives, and other non-professional agents or other third parties when litigation was contemplated and/or pending.

        i. The documents falling within Category 1 are those numbered 1 through 70, 72, 77, 80, and 85 through to 100 in Schedule 2 of the Defendant's disclosure list. These documents came into existence following a threat of proceedings by Mr Builder at the beginning of 2015, and later Ms Kovacs in 2016. The communications were created for the dominant purpose of preventing and defending the threatened litigation and include internal discussions in which information was being collated that would need to be passed along to the Defendant's lawyers and used in the dispute, discussions about the Defendant's legal options, and general reference to matters about which the Defendant would need to seek legal advice, which reveals the nature of the legal advice that would ultimately be obtained.

        ii. He also corrects a number of errors: documents numbered 74 and 80, which were noted as falling into Category 1 on Schedule 2 of the Defendant's disclosure list, should instead be considered to fall within Category 3 (LA

Documents). There are two copies of an attachment to the email exchanges that make up the majority of the documents in Category 3, as described below. Document number 72, which was noted as falling into Category 3 on Schedule 2, should instead be considered a Category 1 LP Document. It is another version of document numbers 70 and 77.

(b) Category 2: Documents covered by legal advice privilege. Communications of a confidential nature passing between the Defendant, their employees, agents, representatives, and legal advisors for the purpose of obtaining or giving legal advice and assistance.

i. The document falling within Category 2 is numbered 83 on the Defendant's disclosure list. This document was prepared for the purpose of receiving advice from the Defendant's legal advisor, Phil Ladmore, in 2017. The Defendant says in retrospect that this could have been included in Category 3 documents in relation it claims both legal advice and litigation privilege.

(c) Category 3: Documents covered by litigation privilege and legal advice privilege. Communications of a confidential nature passing between the Defendant, their employees, agents, representatives, and legal advisors for the purpose of obtaining or giving legal advice and assistance when litigation was contemplated and/or pending. The Defendant says that the documents falling within Category 3 are those numbered 71, 73 through 76 (now including document number 74), and 78 through 84 (now including document numbers 80 and 83).

30. Exhibited to Manchak 1 at pages 84 to 91 is an updated version of Schedule 2, showing the adjustments to the privilege claims and other amendments dealing with timings (impacted by time zones), information about the participants in the emails and attachments found in Category 3 documents. There were also description amendments to two of the documents.

31. When considering whether a document is created in contemplation of litigation, the Defendant says that context is everything. The authorities are clear that court review of the privileged documents which is suggested by the Plaintiffs as the solution to this matter if Schedule 2 is not ordered to be produced, is one of last resort. This is because it is wrong for privileged to be reviewed out of context. The Defendant submits what the Plaintiffs have done is cherry pick emails in their submissions which they say show a cordial relationship, however, that is not the true picture of the situation at the time that the documents were created. For example, document 1, which is between Keith Heddle and Michael Hall headed "*Problem!*" and is dated 9 March 2015 has in fact been disclosed as part of document number 61 of Schedule 1 and that email in turn contains a reference to a phone call that Mr Heddle had with Mr Builder, where Mr Builder informed him that he had just been to see his lawyers "*and his lawyer is advising him to sue us for breach of contract and not fulfilling our obligations*".

32. There is a gap from 5 May 2015 until the 22 November 2016 which marks the period after Mr Builder's death and the period during which the threat of litigation subsided, however the threat of litigation increased again after November 2016. Even if these documents did not contain direct threats of litigation, what was said in these emails means it was objectively reasonable for the Defendant to think litigation was reasonably in contemplation.

33. The Plaintiffs are wrong on the law on litigation privilege. Litigation privilege can apply to internal communications. There is no need for communication to a lawyer (unlike legal advice privilege). In *Director of the Serious Fraud Office v Eurasian Natural Resources corporation (Law Society Intervening) [2018] EWCA Civ 2006*) makes clear that an internal investigation can attract litigation privilege. The need to communicate externally is not a requirement. *WH Holdings Ltd and Another v E20 Stadium LLP [2018] EWHC 2784 (Ch)* distinguishes between purely commercial discussions

about the settlement of the claim and the conduct of the litigation but the principle that it could have applied to internal communications was not in doubt.

34. The Defendant says that the Plaintiffs have jumped to conclusions about the withheld documents without evidential basis. In Manchak 1 at paragraph 17.1.1 he says:

> *"The documents falling within Category 1 are those numbered 1 through 70, 72, 77, 80, and 85 through to 100 in Schedule 2 of the Defendant's Disclosure List. These documents came into existence following a threat of proceedings by Mr Builder at the beginning of 2015 and later Ms Kovacs in 2016. The communications were created for the dominant purpose of preventing and defending the threatened litigation, and include internal discussions in which information was being collated that would need to be passed along to SGGPLC's lawyers and used in the dispute, discussions about SGGPLC's legal options, and general reference to matters about which SGGPLC would need to seek legal advice, which reveals the nature of the legal advice that would ultimately be obtained.".*

35. The dominant purpose test is therefore satisfied by this affidavit evidence. The Defendant says that the test is satisfied by any litigation based on the same factual matrix between the parties as opposed to the exact claim which is the subject of the cause and says that *West London Pipeline and Storage Ltd v Total UK [2008] EWHC 1729* and *Tchenguiz v Akers 2013 EWHC 2297 (QB)* support this proposition.

36. Where the Plaintiffs allege that the dominant purpose criteria is not fulfilled because it was advice about solvency for SGGL, the Defendant says that in making this assertion the Plaintiffs rely on the ungrounded speculation in paragraphs 34 and 35 of Kovac 2. Manchak 1 sets out the basis upon which it is claimed which should be preferred over the Plaintiffs' conjecture. The Defendant relies on *West London Pipeline and Storage Ltd v Total UK (ibid.)* which summarises at paragraph 86, the principles Court should apply when considering whether to go behind an affidavit:

> *"(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:*
>
> *(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed…..:*
> *(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect:…*
> *(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: …"*

37. The Defendant acknowledges that the "*reasonably certain"* test has been moderated by the Court of Appeal in *WH Holdings Ltd and Another v E20 Stadium LLP (ibid)* where starting at paragraph 39 the Court held that the power of the Court to inspect a document :

> *"….is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied. The need for "reasonable certainty" appears to have sprung from the earlier case of Attorney-General v Emerson, which was concerned with the position prior to the introduction of the express power of inspection in November 1893 and which was followed in Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co.*
>
> *40. The court may inspect the documents in relation to which privilege is claimed in order to see whether the test has been correctly applied, although it should be cautious about doing so and should be alive to the dangers of looking at documents out of context. The discretion must be exercised in accordance with the overriding objective, which requires*

balancing dealing with cases justly, proportionately and at proportionate cost and allocating an appropriate share of the court's resources. Among the factors which will be relevant to the exercise of the discretion are (a) the nature of the privilege claimed (b) the number of documents involved and (c) their potential relevance to the issues."

38. The Defendant says this means that whilst it is not necessary for the Court to be reasonably certain before it exercises its discretion to inspect the documents, the three reasons listed (a)-(c) remain those where the Court might exercise its discretion and in this case none of those elements are present. The Court should find the affidavit conclusive (see also *Westminster Airways LD v Kuwait Oil Co LD [1951] 1 KB 134*).

39. The Defendant says a cursory examination of the documents shows that there is no basis for the Plaintiffs' suppositions on dominant purpose. For example, where the subject header is "*Response to Tessa Kovacs*" and a document "*Draft Response to TK email 060317 (v3)*". The Defendant says the Plaintiffs cannot realistically argue with this subject header that the dominant purpose cannot be about the litigation. Further, the Plaintiffs will be aware of the relevant email sent by Ms Kovacs in her 6 March 2017 email (and which was handed up by the Defendant in the oral hearing). The Defendant says that objectively this email can be seen as a pre-cursor to Ms Kovacs commencing litigation against the Defendant and quite clearly any privileged reaction to it is not about the potential insolvency, as alleged by the Plaintiffs. The Plaintiffs will also have been aware of a meeting agreed for 8 May 2017. Immediately, prior to the meeting, Ms Kovacs requested should be on a "*without prejudice*" basis. The flurry of email reactions to this request must be apparent to the Plaintiffs from the subject headings in the Schedule 2. Thereafter, the communications relate to the meeting itself and subsequent emails discussing the meeting all headed by reference to Ms Kovacs or her initials. The Plaintiffs know all this. The Court should decline to enquire further into these privileged communications.

40. Legal advice privilege is only claimed for a small number of documents which also said by the Defendant to be covered by litigation privilege. Manchak 1 makes clear that Mr Ladmore is a lawyer and the Court should not go behind this affidavit without good reason to do so (which the Defendant says there is none). Further to have to prove that any lawyer who is referred to in a discovery log was in fact a lawyer, would be contrary to the overriding objective. In oral submissions, Advocate Manchak confirmed that Mr Ladmore is or was an external legal adviser as is evident from his email address and not an internal adviser. There is no evidence that in the communications of which he was a party that the dominant purpose was not legal advice. The documents over which legal advice privilege is claimed all bear the email subject "*Re: Response to Tessa Kovac*". He says that the Court should not look behind his affidavit which confirms the basis upon which legal advice privilege has been relied on by the Defendant.

Discussion

41. The Defendant's primary argument at the hearing was the documents in Schedule 2 should not have been part of standard disclosure under Rule 65. As set out above, Rule 65 of the RCCR contains duty to disclose documents which a party wishes to rely on or support or adversely affect either party's case. Whilst in theory, a narrower test than the discovery test under the previous rules, it is not clear that it has in fact led to a reduction in the number of documents that are disclosed, mostly because at the same time electronic communication has increased the amount of communication exponentially. Advocate Manchak was right that a modern disclosure process is likely to produce many more documents than will be relied on by the parties at trial. It is also evident from Manchak 1 that the Defendant has gone through to produce its disclosure, it has been a careful and sophisticated one.

42. As I said at the hearing the Plaintiffs' Application, although it was frequently referred to as a disclosure application, it is in fact an application for inspection (and production) not disclosure.

The documents in Schedule 2 have already been disclosed by the Defendant by way of the Disclosure Statement dated 1 April 2022 signed by Graham Shircore CEO of the Defendant.

43. Rule 64 (1) of the RCCR provides*:*

> *(1) A party to whom a document has been disclosed has a right to inspect that document except where –*
>
> *(a) the document is no longer in the control of the party who disclosed it,*
>
> *(b) the party disclosing the document has a right or duty to withhold inspection of it, or*
>
> *(c) paragraph (2) applies.*
>
> *(2) Where a party considers that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document disclosed under standard disclosure –*
>
> *(a) he is not required to permit inspection of documents within a category or class, but*
>
> *(b)he must state in his disclosure statement that inspection of those documents will not be permitted on the grounds that to do so would be disproportionate.*

44. Thus, the documents having been disclosed to them, the Plaintiffs have a qualified right to inspect the documents. Inspection may be resisted only on the limited grounds set out in Rule 64. The party opposing inspection bears the burden of justifying displacing the general rule of inspection and must make their position clear on inspection in their disclosure statement. The only ground that the Defendant has relied on in their disclosure statement is under Rule 64 (1) (b) i.e. it has the right to withhold inspection on the grounds of privilege. Whilst neither of the parties were able to point to any authority which provides guidance on what appears to be a straightforward rule, I am satisfied that in the circumstances of this case, the Defendant cannot in effect back track on the decision-making around disclosure on the basis that it now considers that it was over generous. In any event, whilst the Defendant may consider that these documents will not be relied on in trial, which is not the test for disclosure.

45. The argument that these documents are not disclosable seems to be at odds with the alternative argument of the Defendant which relies on litigation privilege. It is difficult to imagine that it is possible on the one hand to argue that these documents should be protected by litigation privilege and thus satisfy the tests of that privilege, including that they were created for the dominant purpose of litigation and relate to litigation which is reasonably contemplated or existing and yet on the other hand argue that they do not satisfy the standard disclosure test in the first place. I am satisfied that the Defendant cannot resist inspection of the documents on this basis.

46. The Defendant's second argument is that the documents are all covered by litigation privilege. It is Lord Carswell's summary in *Three Rivers District Council v Governor and Company of the Bank of England (No 6) [2004] UKHL 48, [2005] 1 AC 610* ("Three Rivers") at paragraph 102 that sets out authoritatively what this is:

> *"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."*

47. There is no argument in this case as to whether the proceedings are adversarial. However, so far as the first requirement is concerned, where – as here – litigation is not actually in progress at the time the relevant communications were made or procured, what is required is that litigation should be reasonably contemplated or anticipated. What reasonably contemplated or anticipated means was addressed in *The State of Qatar v Banque Havilland SA (a company incorporated under the laws of Luxembourg), & Vladimir Bolelyy [2021] EWHC 2172 (Comm):*

> *"What is meant by that was addressed by the Court of Appeal in United States of America v Philip Morris Inc. [2004] EWCA Civ 330, [2004] 1 CLC 811 ("Philip Morris"). The first instance judge, Moore-Bick J, said that:*
>
> > *"The requirement that litigation be 'reasonably in prospect' is not in my view satisfied unless the party seeking to claim privilege can show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility."*
>
> *On appeal, Brooke LJ held at [68] that the judge had not misdirected himself: a " mere possibility " of litigation did not suffice for litigation privilege, nor was it enough that there was " a distinct possibility that sooner or later someone might make a claim "; but, by using the phrase " real likelihood ", the judge was not suggesting that there must be a greater than 50% chance of litigation."*

48. Conducting litigation can mean avoiding or settling litigation as set out at paragraph 102 of the Court of Appeal's judgment in *Director of the Serious Fraud Office v Eurasian Natural Resources corporation (Law Society Intervening) [2018] EWCA Civ 2006:*

> *"In both the civil and the criminal context, legal advice given so as to head off, avoid, or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings."*

49. The purpose of the document must be for the sole or dominant purpose of conducting litigation (see the judgment of Lord Wilberforce *Waugh v British Airways Board [1980] A.C. 521*). However, as set out *WH Holdings Ltd and Another v E20 Stadium LLP (ibid.)* the purpose of the communications must be for obtaining legal advice or obtaining evidence to be used in the litigation or of obtaining information which might lead to obtaining such evidence so that a litigant can prepare for litigation without fear that any documents produced for that purpose will subsequently have to be disclosed. This means that it is possible for specific internal communications to come within litigation privilege, but it cannot be used to cover commercial discussions.

50. Establishing whether a document has been created with the sole or dominant purpose of conducting litigation is to determine the actual purpose of the party claiming privilege at that time, and if more than one, what is the dominant purpose of the author or of the person or entity commissioning the creation of the document. Relevantly as Edwards J found at paragraph 101 in *The State of Qatar v Banque Havilland SA (a company incorporated under the laws of Luxembourg), & Vladimir Bolelyy (ibid.)*:

> *"the best guide to his or her purpose may be to consider matters at the point in time when the relevant communication is procured, recognising, of course, that a party's purpose may change."*

51. However, as the Court of Appeal in *WH Holdings Ltd and Another v E20 Stadium LLP (ibid.)* found "*We would accept that a document in which advice or information obtained for the sole or dominant purpose of conducting litigation cannot be disentangled, or a document which would otherwise reveal the nature of such advice or litigation, would itself be covered by litigation*

privilege." In doing so, the exercise of determining dominant purpose in each case is a question of fact "*and the court must take a realistic indeed commercial view of the facts"*[1].

52. Thus, a party claiming litigation privilege must be able to show that documents were created for the dominant purpose of adversarial litigation and that the litigation was in reasonable prospect. The most reliable and effective way to do this is to produce contemporaneous documentary evidence. The test for litigation privilege is a fact sensitive one and the dialogue between the parties at the relevant time is likely to be of direct relevance to whether litigation had gone beyond being a mere possibility and reached the stage of reasonably contemplated. In terms of what litigation is contemplated, the treatment of the prospective litigation by Charles Hollander KC sitting as a Deputy High Court judge in *Kyla Shipping Co Ltd and another v Freight Trading Ltd [2022] EWHC 376 (Comm)* is instructive. In that case the instruction of an expert was not covered by litigation privilege where the report was for the purpose of trying to provide backing for an anticipated mismanagement claim where the parties to such a claim would have been different, but not the mispricing claim that was brought.

53. Both parties in this case point to the nature of the ongoing relationship between Mr Builder and Ms Kovacs and the Defendant as the best indicator of whether or not it could be said that litigation was reasonably contemplated at the time. In Manchak 1, Advocate Manchak refers to a threat of litigation by Mr Builder in 2015 and later by Ms Kovacs in 2016. However, other than the emailed letter dated 6 March 2017 handed up during proceedings and a quote from an email from Mr Builder given by Advocate Manchak during his submissions, the Court does not have the assistance of non-privileged contemporaneous evidence, such as open correspondence between the parties in order to objectively assess whether litigation was a real likelihood between the parties at the time they were created. I do not consider that the Defendant has yet shown that objectively, the litigation writing was on the wall in 2015 and then again after the death of Mr Builder in 2016 in circumstances where the letter before action was not sent until 2018. Further, these proceedings were not issued until 2021 where the loss pleaded is focused on the reliance on an alleged breach of duty of care by the Defendant which it is said led to the failure by the Plaintiffs to trigger the buyback which had to be crystallised in November 2016. Again, whilst litigation can have a long lead in, I am not satisfied that the Defendant has shown that the correspondence which it seeks to withhold as privileged can reasonably be said to be contemplation of proceedings of the nature of the claim contained in the Cause still so far into the future. Whilst the Plaintiffs point to correspondence cited in the pleadings as supporting their contention that rather than being the language in the run up to litigation, correspondence was cordial and meetings occurred to find a way forwards, this does not mean there was no other dialogue between the parties that clearly contemplated litigation. Nevertheless the onus is on the Defendant to show that litigation was reasonably contemplated and it has not yet done so.

54. I have also considered the description in Manchak 1 of the basis of the litigation privilege claim over the internal documents: "*The communications were created for the dominant purpose of preventing and defending the threatened litigation and include internal discussions in which information was being collated that would need to be passed along to the Defendant's lawyers and used in the dispute, discussions about the Defendant's legal options, and general reference to matters about which SGGPLC would need to seek legal advice, which reveals the nature of the legal advice that would ultimately be obtained*." It would appear from this description, subject to the other tests being satisfied that the Defendant may be able to rely on this ground in relation to at least some of the documents. However, I am concerned due to the extended length of time over which this is being claimed prior to proceedings being issued that particularly the earlier dated documents which are said to come within the description as "*internal discussions in which information was being collated that would need to be passed along to the Defendant's lawyers and used in the dispute, discussions about the Defendant's legal options, and general reference to*

[1] See *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation (Law Society Intervening) (ibid)* paragraph 104

matters about which SGGPLC would need to seek legal advice" may not properly come within the required purpose and fall into commercial discussions or other internal discussions. Again, contemporaneous correspondence and information about what was happening at the relevant time would assist in establishing this. Further there is no evidence before the Court of the information being passed to the Defendant's lawyers (and Mr Ladmore does not appear to have been involved until January 2017) which could be done without waiving privilege.

55. As I consider that in the circumstances in this case it is necessary for there to be further inquiry dealing with the issues I have identified above, the question for me is how this should be addressed. Advocate Manchak urged me to rely on Manchak 1 and that nothing that the Plaintiffs had said should undermine the general principle that the Court should exercise its discretion and go behind his affidavit. As Beatson J set out in *West London Pipeline and Storage Ltd v Total UK (ibid.)* at paragraph 86:

> *"A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: Bank Austria Akt v Price Waterhouse; Sumitomo Corp v Credit Lyonnais Rouse Ltd (per Andrew Smith J)."*

56. The Guernsey Court of Appeal in *Fort Trustees Limited and Balchan Management Ltd v ITG Limited and Bayeux Limited [2022] GCA 092* confirmed that the correct description of the power which the Court has to inspect a document is one of general discretion. They found that that it was not appropriate to characterise this power as one of "*last resort*" but nevertheless "*this is not a power which should be exercised lightly.*"[2]. In *West London Pipeline and Storage Ltd v Total UK (ibid.)* set out useful guidance for what Beatson J considered were the possible steps to take where the Court is not satisfied on the evidence before it that the right to withhold inspection is established:

> *"……there are four options open to it. It may conclude, as happened in Neilson v Laugharne and Lask's case, that the evidence in the affidavit does not establish that which it seeks to establish, i.e. that the person claiming privilege has not discharged the burden that lies on him, and order disclosure or inspection. It may order a further affidavit to deal with matters the earlier affidavit does not cover or on which it is unsatisfactory. This is seen in cases on inadequate affidavits disclosing assets in response to freezing orders, but also in the case of an affidavit as to disclosure or inspection: see Birmingham and Midland Motor Omnibus Co. Ltd. v London and North Western Railway Co. [1913] 3 KB 850. See also National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2332 (Comm) at [53] and [63]; Atos Consulting Ltd. v Avis plc (No 2) [2007] EWHC 323 (TCC) at [36-37], although in those cases the evidence was by witness statement rather than by affidavit: see [2006] EWHC 2332 (Comm) at [34] – [44] and [2007] EWHC 323 (TCC) at [7], [12], [18]. They are also cases on the third option open to the Court, to inspect the documents, which it may do in the circumstances set out in the next two paragraphs. The fourth option is that, subject to the restrictions in paragraphs 79-84 of this judgment, the Court may order cross-examination of the deponent."*

57. However, as the Court of Appeal made clear in *Fort Trustees Limited & Blachan Management v ITG Limited & Bayeux Limited (ibid.),* it would not be consistent with the nature of the discretionary power to lay down an absolute rule as to how issues of privilege are addressed.[3]

[2] See paragraph 97 *Fort Trustees Limited & Blachan Management v ITG Limited & Bayeux Limited (ibid.)*
[3] Paragraph 99. *Fort Trustees Limited & Blachan Management v ITG Limited & Bayeux Limited (ibid.)*

58. I do not consider that at this point it would be fair nor an appropriate exercise of my discretion to order that the privileged documentation be subject to an examination by the Court. Addressing the issues I have identified above I direct that the Defendant must provide a further affidavit which is "*as specific as possible*" and with as much contemporary material as is possible without waiving privilege. If the information provided is sufficient, it would require some very compelling reason to justify the Court in ordering production of the documents so that it could inspect them itself. As I said at the hearing, it was appropriate that the original affidavit was sworn by a qualified lawyer with personal knowledge of the circumstances within which the documents were generated. However it was unsatisfactory that it was Advocate Manchak, who appeared as the advocate for the Defendant, who had also sworn the affidavit that was being relied on particularly in circumstances where one of the options suggested in *West London Pipeline and Storage Ltd v Total UK (ibid.)* above is cross examination of the maker of the affidavit even if unlikely.

59. Of course, a document which cannot be brought within the scope of litigation privilege may still be covered by legal advice privilege and the Category 2 and 3 documents are withheld on the basis of both litigation privilege and legal advice privilege. The affidavit evidence before me is that Mr Ladmore is the Defendant's legal advisor. He has a separate email address from the Defendant and also from Evolution Securities China.

60. The Plaintiffs have argued ostensibly on the basis that one of the parties to the emails being Tim Worlledge of Evolution Securities China and due to the solvency issues of Defendant, SGGL and the Stanley Gibbon Group at the time, that this means that the dominant purpose of these emails is not legal advice but rather the solvency issue. This is despite the email subject header on each occasion relating directly to a clearly relevant matter e.g. Stins or Stins/Kovacs or letter to Tessa Kovacs. In submissions and on the evidence of Manchak 1, the link between the open correspondence between the Parties and the privileged communications of which Mr Ladmore was a recipient is set out clearly. There does not appear to be any good reason to go behind Manchak 1 in this regard and it would not be in accordance with overriding objective to do so. I am satisfied that the confirmations set out in Manchak 1 are sufficient to show that on the balance of probabilities that the Defendant is entitled to rely on legal advice privilege in relation to these documents.

Defendant's application

61. The Defendant's Application is for the Plaintiffs to give specific disclosure of the following documents or categories of documents:

    a. All documents and communications related to the investments purchased on behalf of the Trustees of the Stins Settlement from Stanley Gibbons (Guernsey) Limited (SGGL), including, but not limited to the following:

        - documents and communications evidencing the decision-making process to purchase the investments in the CPGP Portfolio;
        - documents and communications reflecting any negotiations over the terms of the CPGP agreement, both internal to the Stins Settlement (i.e., between/among Mr Builder, Ms Kovacs, Mr Pritchard, the Trustees, and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees) and external (i.e., between/among Mr Builder, Ms Kovacs, Mr Pritchard, the Trustees, or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and any third party, including any agents of the Stanley Gibbons family of companies);
        - documents and communications reflecting deliberations to exercise any option under Clauses 3.1 or 4.1 of the CPGP Agreement, whether internal or external to the Stins Settlement (as described above); communications between/among Mr Builder and/or Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and the Trustees, regarding the

investment, continuing investment and/or termination of investment in the CPGP Portfolio, at any time;

- communications between/among Mr Builder and/or Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and any third party, regarding the investment, continuing investment and/or termination of investment in the CPGP Portfolio, at any time.

b. All documents and communications related to the administration of SGGL in the custody or control of the Trustees or any other person connected to the Stins Settlement or acting on behalf of the Trustees, including but not limited to the following:

- communications between/among Mr Builder and/or Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and the Trustees, regarding the administration;
- communications between/among Mr Builder and/or Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and the Administrators of SGGL;
- communications between/among Mr Builder and/or Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and any advisors, regarding the Trustees' rights and obligations in the administration;
- documents and communications reflecting the negotiations of the Settlement Agreement dated June 2018;
- a fully executed version of the Settlement Agreement;
- documents or communications about any other agreement reached between Mr Builder and/or Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and the Administrators, and the agreement/s itself / themselves.

c. All documents and communications regarding the marketing and sale of the stamps within the CPGP Portfolio for £712,000, as alleged in the Cause. Such documents would include the following:

- documents reflecting the identity of the stamps sold;
- documents and communications related to the valuation of the stamps sold;
- communications and/or minutes or notes of meetings between Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and any person or entity (and its agents) valuing the stamps, marketing the stamps for sale, acting as an intermediary, or otherwise having any role in the proposed sale of the stamps;
- communications between/among Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and the purchaser(s) of the stamps; and
- documents or communications regarding any proposed sale of the stamps, including any documents reflecting why only a portion of the CPGP Portfolio was sold.

d. All documents and communications between/among Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, regarding the valuation, marketing, and sale of the remainder of the stamps within the CPGP Portfolio, at any time. Such documents would include the following:

- documents reflecting the identity of the remaining stamps;
- documents and communications related to the valuation of the stamps;

- communications between/among Ms Kovacs and/or Mr Pritchard and/or any other person connected to the Stins Settlement or acting on behalf of the Trustees, and any person or entity (and its agents) valuing the stamps, marketing the stamps for sale, acting as an intermediary, or otherwise having any role in the proposed sale of the stamps; and
- documents and communications regarding any proposed sale of the stamps at any time.

62. The second part of the Defendant's Application is for the Plaintiffs to provide a list pursuant to Rule 69 of the RCCR of those documents in respect of which the Plaintiffs claim a right or duty to withhold inspection..

Summary of Parties' Submissions

63. The Defendant's Application is premised on its submission that there has been a failing by the Plaintiffs to undertake a reasonable search as required by the standard disclosure process. They say Plaintiffs have not participated in the disclosure process but rather it is Ms Kovacs who has led the process which in the second disclosure statement dated 19 April 2022 they appear to have adopted the original disclosure statement dated 1 April 2022 signed by Ms Kovacs. However, there are still areas where the Defendant says it is surprising that there is no documentation. The Defendant's accept that the lack of documentation in the areas identified in the Defendant's Application may be because there are not any documents, but this cannot be the conclusion yet. This is because the Plaintiffs have not adequately documented the process to demonstrate that they have undertaken a reasonable and proportionate search. This position is supported by the piecemeal approach to disclosure taken by the Plaintiffs. The first disclosure list and statements produced dated 1 and 19 April 2022 failed to include documents dealing with quantum and mitigation. After the Plaintiffs protested that there were not any more documents, a supplemental disclosure list consisting of 262 documents plus attachments served on 22 May 2022 and then a subsequent supplemental disclosure on the 26 May 2022 has been disclosed. The Defendant argues that the Court cannot have confidence in the Plaintiffs' disclosure process because of the way the Plaintiffs have approached disclosure.

64. This is a claim by the Plaintiffs of £1.3 million and therefore it is reasonable for the Court to require the process to be undertaken properly and not in a piecemeal way. It has not been documented how Ms Kovacs who appears to have undertaken the disclosure process has determined what came within the standard disclosure test. The Plaintiffs' disclosure process stands in stark contrast to the exacting process undertaken by the Defendant. This was a thorough and structured review process that followed a thorough search. The Court should exercise its discretion to order the Plaintiffs to have a further search and document the process properly.

65. In support of their application, the Defendant says that it has identified gaps in the Plaintiffs' disclosure. For example, the Defendant says that the Plaintiffs have not produced all the communications between Ms Kovacs and the Defendant which is evident from the Defendant's own disclosure; there do not appear to be communications with either of the Protectors with the Trustees or with the beneficiaries; there is a lack of communications between the Trustees or the beneficiaries about the investment; and there are no documents which go to the decision making around the buyback or the dispute with Defendant or the SGGL. Whilst, the Plaintiffs have argued that the documents under category b of the Defendant's Application do not go to issues in the case, the Defendant says that these documents go to the understanding of the Plaintiffs of their losses i.e. on what basis they put forward their proof of debt claim and their rights and obligations vis a vis SGGL as against those the Plaintiffs say that are owed by the Defendant about the contracts that have entered into with SGGL.

66. However, this is not a case where the Defendant is searching for a "*crock of gold*" but rather to ensure that a proper disclosure process has been undertaken which can be relied upon. The

Defendant does not accept any criticism of delay or litigation tactics. The Defendant's concern, based upon the haphazard and piecemeal way in which the Plaintiffs have approached disclosure, is that further documents will be found later, which may include documents which support the Plaintiffs' pleaded case. The Defendant will have been advised about prospects of success at trial, and will have conducted the litigation accordingly, based upon an incomplete understanding of the case. Further, after the Defendant suggested that this matter be dealt with in correspondence and staying the other directions whilst this was undertaken, the Counsel for the Plaintiffs disagreed, remained adamant that the Plaintiffs had complied, and that it was necessary for the Defendant to apply for specific disclosure. It was only after the filing of the Defendant's Application on the 6 May 2021 that the Defendant's Advocates received the disclosure of the documents from the Plaintiffs on damages & mitigation. The extensions sought by the Defendant were all within the timetable for the Court hearing of the applications so did not delay matters.

67. The Defendant also argues that the Plaintiffs have failed to comply with Rule 69 of the RCCR by failing to list the documents over which they claim privilege individually. The plain language of the rule is that a proper log of these documents should be provided. The excerpt from Hollander on Evidence[4] deals with the English position not the Guernsey position. Nevertheless, the excerpt sets out that the rule under CPR31 and the Practice Direction (CPR PD 31A) contemplate that privileged documents will be listed in precisely the same way as non-privileged documents. If a claim is made to withhold a document from inspection, the document or part of the document in question must be identified. Whilst Hollander acknowledges that the invariable practice of solicitors is to list privileged documents compendiously the Court has the power to order privileged documents to be listed individually in order to enable the Court better to judge whether the claim for privilege can be supported.

68. Even if the Court considers that the Plaintiffs have adequately complied with the practice of Rule 69, the Defendant says that the Court should exercise its discretion to order the log. This is because the Plaintiffs have misunderstood litigation privilege and therefore the Defendant needs to interrogate the Plaintiffs' own claims for privilege, further the Plaintiffs have put the Defendant to expense and time on a misguided attack on the Defendant's detailed privilege log so fairness dictates that the Defendant's should have the same opportunity. Justice and fairness to require the Court to level the playing field.

69. The Plaintiffs say that this application is part of a strategy by the Defendant to delay and cause expense to the Plaintiffs. Further that any issues have been resolved by the information and confirmations contained in Kovacs 2 which in addition to setting out what searches she (and others) have done and confirms that the other documents do not exist.

70. The Plaintiffs set out the steps which they say that the Defendant has taken deliberately to delay matters which include: the application for a stay, arguing that the Trustees (although they are resident in Madeira) had to sign the statement rather than the Ms Kovacs as Protector, refusing to allow the Plaintiffs to inspect the Defendant's list of documents until this issue had been resolved and seeking three extensions on the exchange and filing of skeleton statements (this was in addition to mutually agreed extensions of the directions timetable).

71. The Plaintiffs rely on Rule 69(4). They say the Stins Settlement should be seen as an "other organisation" under that rule and therefore Ms Kovacs was identified as an appropriate person to make the statement. As a consequence, the rules have been complied with by Ms Kovacs, who had full authority from the Plaintiffs, signing the statement. She was the one who had the disclosure documents in her possession (along with Adrian Pritchard who was married to one of the beneficiaries). Nevertheless, in order to progress matters the Plaintiffs produced a list signed by the Plaintiffs on 21 April 2022.

[4] Page 1009 15-06 and 15- 07

72. In terms of the substance of the Defendant's Application, the Defendant's letter of 5 April 2022 identified 5 categories of documents which it perceived to be missing and this was responded to in correspondence. For a number of reasons, the documents which the Defendant has identified in its application do not exist despite the search that has been undertaken and which Ms Kovacs has set out in detail in her affidavit. The reasons include that Mr Builder was 93 when he died, he kept no records of why he invested in the stamps, the Trustees are not professional trustees and unpaid for their roles, and there were face to face meetings or telephone conversations rather than correspondence. The Defendant's Application amounts to 20 different types of docs in 4 categories and is an attempt to steamroll the Plaintiffs. Nevertheless, the Trustees, Ms Kovacs and Mr Pritchard are aware of the disclosure obligations and have conducted reasonable and proportionate searches and have disclosed all that they have found. The Plaintiffs say whilst they may have missed documents on the first search these have now been disclosed. The Plaintiffs say that the documents around the settlement agreement with SGGL are not relevant to these proceedings however in any event the settlement agreement itself has been disclosed. The Court should not exercise its discretion to go behind the Plaintiffs' affidavit as the Defendant has failed to show that Kovacs 2 is inadequate.

73. The Defendant's position on Rule 69 and the listing of the individual items of privileged material is just another timewasting argument by the Defendant and is contrary to the practice in this jurisdiction. To list each item individually is not cost effective and the Court should not exercise its discretion to make such an order in the absence of any substantive criticism of the Plaintiffs' determinations of privilege.

Discussion

74. Rule 66 of the RCCR provides:

> *"66. (1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within Rule 65(4)(b) or (c).*
>
> *(2) The factors relevant in deciding the reasonableness of a search include the following-*
>
> *(a) the number of documents involved,*
>
> *(b) the nature and complexity of the proceedings,*
>
> *(c) the ease and expense of retrieval of any particular document, and*
>
> *(d) the significance of any document which is likely to be located during the search.*
>
> *(3) Where a party has not searched for a category or class of document on the grounds "that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document."*

75. Although the Plaintiffs have taken issue with the Defendant requiring the Plaintiffs to sign the disclosure statement, it is the Plaintiffs who have the obligation to ensure that as the parties to the claim, they have properly engaged in the process and that they are personally satisfied that their disclosure obligations have been met. I do not agree that the Stins Settlement which is a trust should be read as an *"other organisation"* under Rule 69 (4) in any event it is not a party to the litigation. The Plaintiffs are the parties who have initiated these proceedings and it is important that they take responsibility for their own disclosure.

76. As set out above, paragraph b of the Defendant's Application seeks documentation surrounding the settlement of the proof of debt with the Administrators of SGGL which the Plaintiffs have resisted save for provision of the settlement agreement itself saying that these documents do not go to the issues in the pleadings. It is the Defendant's pleaded case that it did not owe to the Plaintiffs any of the duties which the Plaintiffs say it did, rather the Plaintiffs had a contractual relationship with the SGGL and did not have a contractual or other legal relationship with the Defendant. As set out in the Plaintiffs' Cause, SGGL was placed in administration by order of the Royal Court of Guernsey on 21 November 2017. The Plaintiffs in reliance on the arrangements they had with SGGL submitted a proof of debt and entered into a Settlement Agreement with the Administrators

and claims against the Defendant were explicitly excluded although it is accepted that the terms of the settlement goes to the value of their claim against the Defendant. Given the Plaintiffs are seeking to rely on a duty of care which they say is owed by the Defendant to the Plaintiffs in relation to the same assets and which they say operated concurrently with the contractual relationship with SGGL, I have come to the conclusion that these documents do go to pleaded issues in the case and thus it is more likely that not that these are documents which will support or adversely affect one or other party's case and it is reasonable for the Plaintiffs to provide disclosure as sought under paragraph b of the Defendant's Application as set out above.

77. In relation to paragraphs a, c and d where the Plaintiffs say, even where they had reservations about the documents coming within standard disclosure, they have conducted a reasonable and proportionate search as set out in Kovacs 2, the non-exhaustive list of factors set out at Rule 66 (2) make clear that what a *'reasonable search'* is will be case-specific. Although framed as a specific disclosure save in relation to paragraph b which I have dealt with above, the Defendant's Application is in essence an application centred round the obligation of a party to comply properly with Rule 66. There is not an expectation of "*a crock of gold at the end of the rainbow*"[5] in the form of a particular document but rather due to what the Defendant says are identified failings in the Plaintiffs' disclosure process, it cannot be relied on despite Kovacs 2. In order to be satisfied that that I should give the relief sought by the Defendant, I consider that I should first identify whether I can conclude that there has been a failure to comply with their obligations by the Plaintiffs. I need to be satisfied that there is a likelihood (as opposed to a possibility) of further relevant documents existing.

78. There can be all sorts of reasons why one side to litigation does not have many documents to disclose and it would not be enough in this case that a dearth of documents should mean that the Plaintiffs have to undergo a further search. However, I am satisfied that there is evidence that there is documentation which should have been disclosed but has not been disclosed by the Plaintiffs despite the supplementary disclosure statement and the additional tranche of documents. For example, there are documents which are on the Defendant's disclosure list but do not appear on the Plaintiffs' disclosure list although they are both parties (or in the case of the protectors acting on their behalf) to the correspondence. By comparing the two parties' disclosure lists and taking a generous view of what *"email string"* might mean, there are evidently numerous emails sent or received from Ms Kovacs which are listed within the disclosure statement of the Defendant but not in that of the Plaintiffs. It is surprising that this has not been corrected or properly addressed by the Plaintiffs despite this being raised by the Defendant. Concerningly, these include documents which the Plaintiffs specifically rely on in their Cause and therefore it seems unlikely that the Plaintiffs do not have them. For example, an email dated 30 July 2015 from Ms Kovacs to Mr Heddle, an email dated 18 September 2015 and an email dated 19 October 2015 are all documents pleaded by the Plaintiffs in the Cause but are not within their disclosure list.

79. Both parties have throughout the Applications referred to relevance and in Kovacs 2 there is a reference to "*relevance to the category identified by the Defendant*". As I said on a number of occasions during the hearing, relevance is not the test under Rule 65 of the RCCR which is set out above and the test under the current rules must be applied.[6] Setting to one side the issue of whether Ms Kovacs should have taken responsibility for the disclosure exercise, although she has confirmed by way of the standard statement that she understands the disclosure exercise, given the questions that had been raised by the Defendant in correspondence, it would have been helpful in the affidavit on behalf of the Plaintiffs for there to have been at the very least confirmation, without waiving privilege, that the process and the obligations thereunder had been explained by the Plaintiffs' legal advisors. It is very important that the Court should see that a disclosing party has been made fully aware of its obligations by those advising that party and that for example, any decision not to search for documents or disclose documents has been made in good faith, even if it is the wrong decision.

[5] *Investec Trust et al v Glenalla Properties Limited et al 6.12.11* page 9.
[6] See *Shah v HSBC Private Bank (UK) Ltd [2011] EWCA Civ 1154*

80. I also note that despite the wide wording of the references to those connected with the Stins Settlement, there is no reference to Mr May (the Joint protector until 2013, a period covered by the Plaintiffs' disclosure statement) whether to describe why it not reasonable and proportionate to include him within the search or to describe the outcome of the search. Although Ms Kovacs sets out in her affidavit that she, the Plaintiffs and Mr Pritchard have conducted reasonable and proportionate searches for the documents including those identified in the Defendant's Application, she does not set out how this process was undertaken. If it was not for the failings which were identifiable on a reasonably cursory look at the Cause and the disclosure statements, then the Plaintiffs' actions may have been adequate. However, having found that there are failings in disclosure I am satisfied that there is a likelihood that this is indicative of a greater failure to deal with disclosure adequately. These failings have undermined confidence in the process that has been undertaken by the Plaintiffs and has raised sufficient concern for me to consider that it is reasonable and proportionate in what is a sizable claim against the Defendant to require the Plaintiffs to conduct a further search, to file and serve a further affidavit setting out the process that has been undertaken and to disclose any further documents that should be disclosed as a consequence.

81. The second part of the application relates to the obligations of the Plaintiffs to conform with Rule 69 of the RCCR in relation to those documents over which the Plaintiffs claim privilege.

> *"Rule 69 provides:*
>
> *(1) In the case of standard disclosure, each party shall serve on every other party a list of documents identifying the documents in a convenient order and manner and as concisely as possible.*
> *(2) The list referred to in paragraph (1) must indicate –*
> *(a) those documents in respect of which the party claims a right or duty to withhold inspection, and*
> *(b) those documents which are no longer in the control of that party, and what has happened to those documents."*

82. The wording of Rule 69 in relation to the list required is the same as found under CPR 31.10. As a consequence, it is helpful to consider the authorities and guidance which has informed practise in England and Wales. As the White Book sets out at 31.10.3:

> *"So far as describing documents is concerned, there is a difference between documents for which privileged from production is claimed and other documents. As regards privileged documents, the description is not for the purpose of enabling the other party to learn the contents of the document or to test the truth of the plea of privilege.; nor is it for the purpose of causing the party giving disclosure to furnish evidence against themselves (Gardner v Irwin (1878) 4 Ex D at 53, CA). It is not required that the dates of the documents should be specified nor the names of the makers (ibid.). "Correspondence between the defendant and his solicitors for the purpose of obtaining legal advice" is sufficient. (ibid.)*.""

83. Advocate Manchak is correct that it could be argued that the common practice of grouping the privileged documents together in the manner that the Plaintiffs have is not in accordance with the strict terms of the requirement of Rule 69 to identify documents in the list. However, I am not persuaded that in the circumstances of this case, the fact that the Defendant has applied itself more rigorously to the rules means that therefore fairness dictates that the Plaintiffs must do the same. The effect of the Plaintiffs applying the arguments that they have made above to their own documents would be to not claim privilege where the Defendant has so claimed. Nevertheless given my concerns about the Plaintiffs' disclosure which I have set out above, I do consider that it is necessary for the deponent of the affidavit that I have ordered to be filed by the Plaintiffs above to

also set out that they have properly considered anew whether or not privilege has been correctly claimed in relation to the documents already disclosed and within that affidavit the basis upon which this has been done as well as in relation to any additional documents over which they claim privilege which are disclosed as a consequence of the further search that they are required to undertake.

Conclusion

84. Having considered the Plaintiffs' Application, the Defendant is directed to file a further affidavit in relation to those documents where it is relying on litigation privilege addressing the issues that I have identified above. In relation to the Defendants' Application, the Plaintiffs must have a further search and disclose any documents in the four categories identified by the Defendant and provide a further affidavit verifying the disclosure process. It may be having done this that the parties are able to resolve their respective applications without further assistance of the Court, however failing which there will need to be a further hearing.

85. Both parties have won part of their respective applications and lost other parts. I will reserve costs on the basis that the parties may be able to agree how costs should fall however either party is free seek an order by giving the due notice and arranging for the matter to be listed in the Interlocutory Court.