[2019 Gib LR 137]

LAVARELLO and CONWAY (joint liquidators of KIJANI RESOURCES LIMITED and RATIO LIMITED, both in liquidation) v. ROYAL BANK OF SCOTLAND INTERNATIONAL LIMITED (trading as NATWEST)

SUPREME COURT (Butler, J.): June 6th, 2019

Civil Procedure—disclosure—pre-action disclosure—liquidators granted pre-action disclosure against bank—reasonable belief that cause of action for dishonest assistance likely to exist against bank—fraud or dishonesty against bank or individual employees to be properly pleaded—pre-action disclosure appropriate in all circumstances of case

The applicants sought an order for pre-action disclosure.

The applicants were the liquidators of Kijani Resources Ltd. ("KRL") and Ratio Ltd. ("the companies"). They sought an order against the defendant bank for pre-action disclosure of numerous documents. The main action contemplated against the bank was for damages for dishonest assistance in failing to protect the companies from fraud by their own officers in relation to the bank's management of various accounts opened by the companies and related entities. The applicants were also contemplating a possible claim based on a breach by the bank of its *Quincecare* duty of care.

It was alleged *inter alia* that KRL was a key component in a fraudulent investment scheme. The bank had initially expressed concerns about KRL's proposed activity (namely to receive commissions on commodity trades in precious metals in Tanzania) and declined to accept the business. Little more than a year later, KRL successfully reapplied and opened an account. The bank appeared to be willing to facilitate a complex structure involving a web of connected entities in different jurisdictions and extensive transfers into and out of KRL's account, without any apparent change in KRL's position since the initial rejection of its application. Even after expressing serious concerns, the bank appeared to have taken no action to close the account or to investigate.

In an action against the bank based on dishonest assistance, the applicants would have to prove (i) the existence of a trust or fiduciary relationship; (ii) breach of a trust or fiduciary obligation owed to the claimant; (iii) that the bank assisted such a breach; and (iv) that the bank was dishonest. The applicants were confident that they could establish (i) to (iii), but considered that they needed the requested disclosure to assess the strength of the case, if any, in relation to dishonesty. The applicants sought extensive disclosure of the bank's relevant records and anti-money-laundering practices and protocols, and the nature of its relationship with various parties.

CPR r.13.16(3) provided:

"The court may make an order under this rule *only* where—

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

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

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

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

(i) dispose fairly of the anticipated proceedings;

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

(iii) save costs."

Held, ruling as follows:

(1) Consideration of an application for pre-action disclosure was a two-stage process. First the court had to decide the jurisdictional issue under CPR r.31.16(3) and then, if it decided that issue in favour of the liquidators, the court had discretion whether to order disclosure and, if so, on what terms. The threshold for jurisdiction was low. The court set out the principles to be applied when considering jurisdiction (para. 26).

(2) The jurisdictional requirement was satisfied in principle in the present case (subject to its being limited to that which would fall within standard disclosure if proceedings were commenced). As CPR r.31.16(3)(a) and (b) were conceded, the only jurisdictional issues were whether the requirements of (c) and (d) were satisfied. The court dealt with (c) briefly. If the disclosure revealed that the bank had done nothing wrong or dishonest, it would thereby adversely affect any case that the applicants might bring. To the extent that it revealed an arguable case of dishonest assistance, it would assist the case and come within the requirements of standard disclosure. In respect of (d), the three sub-limbs of the provision were disjunctive but the court was satisfied that each sub-limb was satisfied. Disclosure was desirable to enable the liquidators to consider properly whether they had a claim worth investing in, to enable them properly to frame any claim they might have, to assist them in

obtaining funding for such a claim, to give their claim the focus that a claim against a financial institution should have, and for other reasons, in order to dispose fairly of the anticipated proceedings. It was not necessary to decide exactly what proceedings might be anticipated (pre-action disclosure might sometimes be ordered with the purpose of identifying whether there was any cause of action, even where it was not known what the cause might be). In the present case, the applicants had identified the possible causes of action. There was no reason why costs should not be saved by disclosure at this stage, particularly for the bank. There was a real risk of injustice to those who might be found to have been defrauded if the applicants were driven to decide that they could not properly frame a case against the bank because pre-action disclosure was denied. The application was not simply a fishing expedition. The applicants had shown grounds for suspicion relating to the conduct of the bank and some of its employees and had disclosed all the particulars that they were in a position or could be expected to disclose at this stage. It was legitimate for them to seek disclosure to ascertain whether there was a pleadable case worth pursuing and, if there was, how it should be pleaded. It was relevant that the applicants would have to bear the costs of the application for pre-action disclosure (paras. 27–32).

(3) The court set out the principles it would have in mind when deciding whether and to what extent to grant an application for pre-action disclosure (para. 36).

(4) The court had no doubt that the applicants were entitled to substantial further disclosure from the bank. In reaching that conclusion the court took into account the following in particular. Having considered the pre-application correspondence, the court was satisfied that the applicants had particularized their case as far as they could, or could reasonably be expected to, at this stage. In the pre-application correspondence, the applicants set out with reasonable clarity their reasons for concern and surprise that the large and elaborate alleged fraud could have taken place without the knowledge of the bank if the bank had properly performed its functions (common law, statutory and regulatory). They were reasonably surprised at the bank's apparent willingness to open KRL's account so soon after having refused to do so. The bank had given no explanation for that change nor for its willingness to facilitate what appeared obviously to have been a complex structure involving a web of connected entities in different jurisdictions and extensive transfers into and out of KRL's account, without any apparent change in KRL's position since the bank's initial rejection of its application. Even after expressing serious concerns, the bank appeared to have taken no action to close the account or investigate. The circumstances gave rise to the reasonable belief by the applicants that a cause of action based on dishonest assistance was likely to (or might) exist against the bank. It was not for the court to decide the merits of such a claim at this stage. It was, nonetheless, important that the court did not find the suggestion fanciful, flimsy, vague, lacking in focus

and particulars, lacking in real prospect of success, or a fishing expedition. The circumstances currently known to the applicants called for explanation. There had been no unreasonable delay by the applicants and there was no reason to doubt their assurance that they were concerned not to waste resources on pointless litigation. The court had initially considered that the applicants could particularize their claim sufficiently to commence proceedings, relying on inferences which might be drawn in the absence of explanations from the bank and which might be fortified by standard disclosure. However, the court agreed with the applicants that they should not plead a case of fraud or dishonesty against the bank or individual employees without being able to particularize the claim properly and as fully as possible. The court allowed the application with caution. It should not be thought that pre-action disclosure would be appropriate against a bank as a matter of course when an account had been used for fraudulent purposes by a client. The present case was a matter of very substantial importance, involving very substantial losses to many innocent investors. The disclosure requested was extensive but not disproportionate or oppressive in the circumstances. Pre-action disclosure was likely to further the overriding objective. If proceedings were to follow, they were likely to be much more focused and clear with fewer, if any, amendments. It was likely to further the interests of justice in this case. The fact that the applicants were unable to make allegations without more specificity at this stage was not fatal to their application, rather, it enforced it. Standing back, taking the context and circumstances leading to the application, it was clear that the application should succeed (paras. 38–53).

Cases cited:

(1) *Anglo Irish Bank Corp. plc* v. *West LB AG*, [2009] EWHC 207 (Comm), considered.

(2) *Assetco plc* v. *Grant Thornton UK LLP*, [2013] EWHC 1215 (Comm), referred to.

(3) *BSW Ltd.* v. *Balltec Ltd.*, [2006] EWHC 822 (Ch), considered.

(4) *Barclays Bank plc* v. *Quincecare Ltd.*, [1992] 4 All E.R. 363, referred to.

(5) *Barlow Clowes Intl. Ltd.* v. *Eurotrust Intl. Ltd.*, [2005] UKPC 37; [2006] 1 W.L.R. 1476; [2006] 1 All E.R. 333; [2006] 1 All E.R. (Comm.) 478; [2006] 1 Lloyd's Rep. 225; [2005] W.T.L.R. 1453; (2005), 8 I.T.E.L.R. 347, referred to.

(6) *Belmont Fin. Corp. Ltd.* v. *Williams Furniture Ltd.*, [1979] Ch. 250; [1978] 3 W.L.R. 712; [1979] 1 All E.R. 118, referred to.

(7) *Black* v. *Sumitomo Corp.*, [2001] EWCA Civ 1819; [2002] 1 W.L.R. 1562; [2003] 3 All E.R. 643; [2002] 1 LLR 693; [2002] 1 Lloyd's Rep. 693, considered.

(8) *First Gulf Bank* v. *Wachovia Bank Nat. Assn.*, [2005] EWHC 2827 (Comm), considered.

(9) *Ittihadieh* v. *Metcalf*, [2016] EWHC 376 (Ch), considered.

(10) *Lipkin Gorman* v. *Karpnale Ltd.*, [1989] 1 W.L.R. 1340; [1992] 4 All E.R. 409; [1989] BCLC 756, referred to.

(11) *Patel* v. *Mirza*, [2016] UKSC 42; [2017] A.C. 467; [2017] 1 All E.R. 191; [2016] 3 W.L.R. 399; [2016] 2 Lloyd's Rep. 300; [2016] Lloyd's Rep. F.C. 435; (2016), 19 ITELR 627, referred to.
(12) *Singularis Holdings Ltd.* v. *Daiwa Capital Markets Europe Ltd.*, [2017] EWHC 257 (Ch); [2017] 2 All E.R. (Comm) 445; [2017] 1 Lloyd's Rep. 226; [2017] 1 BCLC 625; [2017] Bus. L.R. 1386, considered.
(13) *Smith* v. *Energy & Climate Change Secy.*, [2013] EWCA Civ 1585; [2014] 1 W.L.R. 2283, considered.
(14) *Snowstar Shipping Co. Ltd.* v. *Graig Shipping plc*, [2003] EWHC 1367 (Comm), referred to.
(15) *Stone & Rolls Ltd.* v. *Moore Stephens*, [2008] EWCA Civ 644; [2008] 3 W.L.R. 1146; [2008] Bus. L.R. 1579; [2008] 2 Lloyd's Rep. 319; [2008] 2 BCLC 461; [2008] P.N.L.R. 36, considered.
(16) *Three Rivers D.C.* v. *Bank of England (No. 3)*, [2003] 2 A.C. 1; [2001] UKHL 16; [2000] 2 W.L.R. 1220; [2000] 3 All E.R. 1; [2000] Lloyd's Rep. Bank. 235; [2000] 3 C.M.L.R. 205, referred to.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.31.16: The relevant terms of this rule are set out at para. 23.
r.31.6: The relevant terms of this rule are set out at para. 24.
r.46.1: The relevant terms of this rule are set out at para. 25.

A.A. Vasquez, *Q.C.* and *D. Nagrani* for the applicants;
G. Stagnetto, *Q.C.* and *O. Smith* for the defendant.

1 **BUTLER, J.:** The applicants in this matter ("the liquidators") are liquidators of Kijani Resources Ltd. and Ratio Ltd. ("KRL" and "Ratio" respectively; together, "the companies"). They seek an order against the defendant bank ("the bank") for pre-action disclosure ("PAD") of numerous documents. The main contemplated action against the bank is for damages for dishonest assistance in failing to protect the companies from fraud by their own authorized officers, in relation to the bank's management of various accounts opened by the companies and related entities. The applicants also propose commencing proceedings against the principals of the companies and have commenced proceedings against KRL's auditors. The relevant period is February 2012 to March 2015. In addition, they have in mind a possible claim based upon breach by the bank of its *Quincecare* duty of care.

2 In their letter dated January 25th, 2018 seeking PAD, the liquidators refer to a suspected fraud which was facilitated by the bank's officers having engaged in a "systematic pattern of behavior by which it provided active and dishonest assistance to the principals of the Companies in the implementation of the fraudulent scheme."

3 The disclosure sought was claimed to be necessary to enable the liquidators to complete a comprehensive and accurate assessment of events and to decide how to proceed in relation to the bank.

Background

4 The substantive allegation is that KRL (a Gibraltar incorporated company) was a key component in a fraudulent investment scheme. The alleged fraud was by way of purporting to deal with investors' funds by trading them in commodities through a sophisticated proprietary trading system, generating returns through arbitrage. The holding fund was known as the Kijani Commodity Fund ("KCF"). In fact there was no relevant trading in commodities. Instead, most of the investment assets (about $82m.) were transferred to KRL under "loan agreements" which were repayable on demand with interest. Those agreements were wholly out-with the stated objectives of KCF.

5 In November 2014, the funds were transferred to a Cayman Islands company ("Brighton"). The benefit of the loans was then assigned to each of the investors' funds early in 2015.

6 In April 2015, the Cayman Islands Monetary Authority ("CIMA") appointed PwC to investigate and report upon Brighton. CIMA appointed Mr. Conway of PwC and another as controllers of Brighton. As control-lers, they demanded from KRL repayment of the loans, giving five business days' notice, according to the terms of the loan agreements. On June 19th, 2015, in the absence of repayment of the loans, the applicants were appointed joint liquidators of KRL.

7 The sole investment of the funds was the loans. Almost the entirety of the invested moneys was dissipated by KRL and its known associates into highly illiquid and questionable equities, incurring very high suspected commissions and fees to associated bodies and persons. All redemption obligations to investors were met from new subscriptions. Virtually no returns have been received under the loans.

8 Liquidation of the funds' bank accounts and the companies' invest-ment portfolios has generated about $4m. There appear to be negligible prospects of investors recovering any of their investments from the company as things stand. It appears that investors were misled as to the funds' investment strategy and as to their asset values and that the funds had been misappropriated.

9 In November 2010, the bank (through its relationship manager, "H") expressed its concerns about KRL's proposed activity, namely to receive commissions on commodity trades in precious metals in Tanzania, a high risk jurisdiction and a high risk strategy. The bank declined to accept the business in the absence of onerous overviews.

10 Early in 2012, little more than a year later, KRL applied again, describing KRL's business as "commodity trading and receiving funds from a Mauritius regulated fund, with an estimated turnover of $44m in 2012," the source of the funds being said to be from "primary investors: Generali, Irish Life, Standard Life, Royal London 360 Hansard." KRL denied that the entity was connected with a high risk jurisdiction or was involved in trading, and that commissions/consultancy fees were a source of wealth, and that it was part of a complex structure. The liquidators say that the documentation supplied to the bank showed that KRL was a typical master feeder account for a collective investment scheme which was indeed complex. It was also made clear that the investor funds were the only source of KRL's funds. Yet the liquidators have found no evidence that anyone at the bank even enquired of KRL or the GFSC as to whether KRL was properly licensed to carry out its activities. In fact it was not licensed, as required, in Gibraltar to carry out collective investment business. Nor, seemingly, were any other enquiries made. Although the stated estimated turnover of KRL for the following year was $44m., there is no apparent evidence that anyone made enquiries as to the basis for that figure. KRL's application was approved by an employee of the bank in its corporate new business management team and the account was opened. The liquidators' case is that it was (or should have been) patently obvious that the bank was being asked to set up a master fund with moneys from primary investors in the KCF. The relationship manager allocated to the account (who appears to have had little relevant experience) wrote a letter "to whom it may concern" suggesting that KRL was a valued client of NatWest Bank and had anticipated annual revenue of $45m. to be used to trade commodities. The liquidators' case is that the bank had no evidence to support such statements (save for the statements in KRL's mandate form). KRL then opened a gold deposit and trading account in Dubai, through which substantial investors' moneys were passed.

11 In March 2013, the account signatories were replaced by the directors and beneficial owners of KRL with no comment by the bank (which had in November 2010 expressed concern that signatories would be the beneficial owners and directors of the company). The reason, say the liquidators, was obvious, namely to enable the dissipation of KRL's funds. KRL received into its account investor moneys through small receipts from the funds and also directly, all described as "investments."

12 Those investor moneys went into a complex structure of underlying related companies, which the liquidators say was for no apparent reason other than the deliberate layering of transfers through an opaque structure within which multiple layers of commissions, luxury expenses and simple withdrawals were paid out with impunity. Many of the related companies held accounts with the bank, into which such payments were made.

Examples are set out in the liquidators' letter dated January 25th, 2018, which I shall not repeat in detail. At least $4.1m. of payments from the KRL account were apparently for luxury items such as yachts and motor vehicles, with no apparently valid commercial purpose. KRL paid substantial sums, allegedly for commissions, to ALF Capital Management Ltd. (BVI), an associated company. It would be extraordinary, say the applicants, if these facts were not known to the bank. But it made no identified effort to question KRL's activities (including, for example, the use of pre-loaded cash cards and third party transaction providers where substantial moneys were deposited, disguising further their true use, without query from the bank). The bank appears to have been the only independent party which had the information to question what was going on. It was aware that investor funds were being routed by KRL through Mauritius, a high risk jurisdiction. In its company mandate dated February 27th, 2012, KRL had declared to the bank that it was not connected with a high risk jurisdiction. It had also declared that it was not part of a complex structure and was not involved in trading (which was inconsistent with a statement on the previous page that the nature of its business was commodity trading). It had further declared that consultancy fees were not a source of wealth, though they appear certainly to have been when ALF was established. It is almost inconceivable, on the face of it, say the applicants, that the bank's suspicions would not have been aroused. It had failed to comply with its statutory obligation to monitor properly the transactions and to report any suspicions to the GFSC. Of about $134m. eventually invested in the KCF, only the $4m. which I have mentioned has been recovered.

13 The bank did indeed eventually raise concerns but not until November 2013 by which time at least about $50m. of investors' moneys had disappeared. In a letter dated November 1st, 2013 from the bank's relevant relationship manager to KRL's directors, there is reference to a periodic review of KRL's bank accounts classed by the bank as high risk. The bank stated that on review the account did not meet the bank's current environmental, social and ethical (ESE) policy and that it would therefore close the account in 60 days. By then, the scheme had been running for more than a year. It seems, therefore, that the bank was aware that the activities were high risk. There has been no explanation as to why there had been no such enquiry before then or what had changed. Despite that letter, however, the account was not closed and the bank continued providing banking services to KRL until all the relevant accounts were frozen in 2015, by which time a further $28.9m. is said to have disappeared.

14 Two other letters are of relevance. On March 17th, 2011, in a letter from H, there was a threat to close Ratio's account in 60 days. In 2012, the bank's Mr. F wrote to the GFSA praising Ratio profusely, a reference

described forcefully by Mr. Vasquez in his oral submissions as "bizarre." The picture by then, he says, was clearly one of fraudulent schemes.

15 The liquidators have already been supplied by the bank in other proceedings concerning Ratio with substantial disclosure of bank statements relating to all relevant associated individuals and other entities. That was in order to enable the liquidators to perform the necessary tracing exercise, in accordance with their duties. It was an extremely complex and opaque scheme, involving transfers between numerous companies in different jurisdictions. Large sums had been paid to alleged service providers and other companies and individuals without apparent justification.

The tort of dishonest assistance

16 The applicants, in an action against the bank based upon dishonest assistance, would have to prove:

(1) The existence of a trust or fiduciary relationship;

(2) Breach of a trust or fiduciary obligation owed to the claimant;

(3) That the bank assisted such a breach;

(4) That the bank was dishonest.

17 The applicants are confident that they can establish the first three of these requirements (and this has not for present purposes been challenged by Mr. Stagnetto on behalf of the bank). The applicants suggest, however, that they need the requested disclosure in order to assess the strength of their case, if any, in relation to the issue of dishonesty. The test is objective and must be applied in the context of all the circumstances and facts known to the defendant at the relevant time. In the January 25th, 2018 letter, the liquidators said:

> "A significant amount of circumstantial evidence has come to light to suggest that certain officers of the Bank must have been aware that the directors of KRL were acting in breach of their fiduciary duties but chose not to make enquiries."

That evidence is said also to indicate an inappropriately close relationship between the bank's relationship manager and KRL, culminating in his taking up employment with KRL and becoming a director of another related company which was at the heart of misvaluation of KRL assets in 2015. I have been assured by Mr. Vasquez on behalf of the liquidators that they have disclosed all relevant information which they have concerning the role of the bank's employees in the relevant events.

18 The test is objective. The issue is whether the defendant acted dishonestly by the ordinary standards of reasonable, honest people. There

must be evidence, however, of the defendant's state of knowledge of the facts. This may involve suspicions and a conscious decision not to make enquiries which might result in knowledge.[1] Importantly, the claimant must plead dishonesty clearly and with particularity.[2] The claimant must plead the facts, matters and circumstances relied upon.

19 It is in these circumstances that the applicants seek extensive disclosure of the bank's relevant records and its anti-money-laundering practices and protocols and the nature and extent of its relationship with KRL, its principals and other associated entities, without which it is said that they will have insufficient information to particularize fully a claim of dishonesty on the part of the bank. They have provided a list of known entities who have been associated with the relevant companies, in respect of which this court has already ordered disclosure of accounts and statements against the bank on November 23rd, 2016 in the litigation concerning Ratio. Clearly, repetition of disclosure already made is not sought now. I do accept, however, that the disclosure already made relates to the liquidators' tracing exercise and not to any possible dishonesty or breach of trust on the part of the bank.

20 I have carefully considered the lists of documents and classes of documents of which the applicants now seek disclosure. They are extensive but I am satisfied that they are, in general, documents which the bank would be required to disclose in the event that proceedings were commenced. Some items on the lists refer to information rather than documents but in context they are intended to refer to the documents which reveal the information. The initial impression of the wide scope of the documentation required is somewhat misleading. Most of it will be apparent from a reading of the relevant records for the companies and entities concerned. No disclosure of the accounts previously produced will be necessary. Although no doubt a considerable amount of work would be involved, that is in the nature of this type of litigation and, it seems to me, is likely to be proportionate and in accordance with the overriding objective. It is likely to be necessary in order to ensure a just outcome, bearing in mind the importance of the issues, the likely size of the potential claim, the resources available to the bank, the importance of the matter to those investors who have lost large sums of money and the importance of a level playing field.

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1 *Barlow Clowes* (5) ([2006] 1 All E.R. 333, at paras. 10 and 15).

2 *Belmont Fin. Corp.* v. *Williams Furniture Ltd.* (6) ([1979] Ch. at 268). See also *Three Rivers District Council* v. *Bank of England (No. 3)* (16) (*Bank of England (No. 3)* (16) ([2003] 2 A.C. 1, at 183–186) and *Lipkin Gorman* v. *Karpnale Ltd.* (10) ([1989] 1 W.L.R. at 1352) (the knowledge relied on must be expressly pleaded).

Quincecare

21 The applicants also seek the same disclosure with regard to a potential claim against the bank for breach of its duty to protect KRL from fraud by virtue of its *Quincecare* duty.[3] The principle is that a bank will be liable to its customer in negligence if it makes a payment in circumstances where it had reasonable grounds for believing that the payment instruction was an attempt to misappropriate the funds of its customer. In essence, the duty will usually arise when a bank is put on inquiry in this respect. Once the duty is triggered, a bank is required to protect its customer by not paying out unless and until it is "off inquiry" (*i.e*. the grounds for believing that the payments are an attempt to misappropriate no longer exist). This type of cause may justifiably require detailed consideration of the bank's actions and those of its employees. Whether the bank has exercised prudent banker's standards is relevant.

22 The liquidators claim not to have decided yet whether they have an arguable case for breach of the bank's *Quincecare* duty. It is a relatively new development. A possible real difficulty for them is that if the evidence shows that the whole purpose of KRL, and all of its officers and its beneficial owners was illegal and that it was a sham from the start, this could provide an unanswerable defence for the bank. That appears to be the present view of the liquidators but will in due course require detailed consideration of the factual context. The scope of the *Quincecare* duty is narrow, namely to protect a banker's customer from losing funds held in a bank account with that banker whilst the circumstances put the banker on enquiry. The bank's duty is to protect funds in the account from fraudulent disposition. In *Singularis Holdings Ltd.* v. *Daiwa Capital Markets Europe Ltd.* (12), it was found ([2017] EWHC 257 (Ch), at para. 192) that "Any reasonable banker would have realized . . . obvious . . . signs [of] fraud on the company." There was a failure of the bank at every level. Denying the claim would have had a material impact on the growing reliance on banks to help reduce financial crime. The court considered the conflicting duties of banks and issues of Nelsonian blindness, knowledge of dishonesty, failure to make enquiries which a reasonable person would make, whether there were reasonable grounds for believing that an instruction to transfer moneys was an attempt to misappropriate the company's funds, *etc*. The court also emphasized that the basis of a bank's dealings with customers is trust. The test was whether any reasonable, honest banker would have had reasonable grounds for believing that there was a serious or real possibility of fraud. I am informed that there may be further developments or clarification of the *Quincecare* principle in a pending appeal in *Singularis*

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3 *Barclays Bank plc* v. *Quincecare Ltd.* (4).

in the United Kingdom. In that case, it was held that the company was not created purely to perpetrate the fraud. It had a large and genuine business. What is clear is that the *Quincecare* cause of action is highly context specific. Whether fraudulent actions of a director or shareholder of a company are attributable to the company (thereby acting as a bar to a *Quincecare* claim) is a matter of public policy.[4] The duty is to the company rather than to its creditors as such. It is irrelevant that only creditors would benefit. The threshold is high and it seems that it will be rare that a bank will be found liable.

The law relating to pre-action disclosure

23 The starting point is CPR r.31.16 which, so far as is relevant, reads as follows:

"(2) The application *must* be supported by evidence.

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

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

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

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

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

(i) dispose fairly of the anticipated proceedings;

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

(iii) save costs.

(4) An order under this rule *must*—

(a) specify the documents or the classes of documents which the respondent must disclose; and

(b) require him, *when making disclosure*, to specify any of those documents—

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4 See, for instance, *Stone & Rolls Ltd.* v. *Moore Stephens* (15), the leading authority on illegality and *ex turpi non oritur actio*, in which it was held that a *Wednesbury*-type test should be applied. See also *Patel* v. *Mirza* (11).

(i) which are no longer in his control; or

(ii) in respect of which he claims a right or duty to withhold inspection.

(5) Such an order *may*—

(a) require the respondent to indicate what has happened to any documents which are no longer in his control; and

(b) specify the time and place for disclosure and inspection." [Emphasis added.]

24 CPR r.31.6 provides, so far as is relevant, that:

"Standard disclosure requires a party [to proceedings 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 . . ."

25 CPR r.46.1 provides that where a PAD order is made:

"(2) The general rule is that the court will award the person against whom the order is sought that person's costs—

(a) of the application; and

(b) of complying with any order made on the application.

(3) The court may however make a different order, having regard to all the circumstances, including—

(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and

(b) whether the parties to the application have complied with any relevant pre-action protocol."

The jurisdictional issue

26 The following basic principles apply to this issue:

(i) Consideration of an application for PAD is a two-stage process. First, and separately, I must decide the jurisdictional issue under CPR r.31.16(3). The threshold is low but only if I decide that issue in favour of the liquidators does the court have a discretion whether to order disclosure and, if so, on what terms.

(ii) I must not conduct a mini-trial relating to factual issues which must be decided at the final trial if proceedings are ultimately commenced.

(iii) It is for the applicant to show that the jurisdictional hurdle is surmounted.

(iv) The issue under CPR r.31.16(3)(a) and (b) is whether the respondent and the applicant are likely to be parties to the proceedings *if* any are issued following the disclosure ordered.[5] The test is not high. It does not require, for instance, proof on the balance of probabilities. In this case, sub-rules (a) and (b) are conceded and the only jurisdictional issues are whether the requirements of CPR r.31.16(3)(c) and (d) are satisfied.

(v) Both counsel recognize that there is some circularity in deciding, for the purposes of sub-rule (c), the width of standard disclosure which would apply if proceedings were commenced before it is known what causes of action may be revealed by PAD. In practice the problem is, in my view, more apparent than real. Of course I must not assume the possibility of causes being revealed which are not anticipated or in mind at all. It seems to me that in this case I should make my decision on the basis of the standard disclosure which would be required if an allegation of dishonest assistance were pleaded generally (and no application to strike out the claim were made). Although dishonest assistance is the main thrust of the liquidators' present thinking, they are justified, in my view, in also bearing in mind the possibility that disclosure would reveal a claim for breach of the bank's *Quincecare* duty. I have done so but that possibility has not materially affected my conclusion.

(vi) It must be right to consider the issue of standard disclosure on the assumption that a cause of action might be disclosed (if I find that to be so). It is not, however, necessary at this stage that the exact course of action is identifiable. In *BSW Ltd.* v. *Balltec Ltd.* (3), it was said that in considering whether the disclosure sought would come within standard disclosure the court is required ([2006] EWHC 822 (Ch), at para. 76)—

> ". . . to take a cautious and principled view of what the issues in any subsequent proceedings are likely to be. In one sense, sub-rule (c) is therefore at odds with the low threshold test set for sub-rules (a) and (b) because it does require the Court to formulate the claim and seemingly to extract from the evidence the causes of action which appear to be viable. If the purpose of [PAD] is to allow a party to see

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5 *Smith* v. *Energy & Climate Change Secy.* (13) ([2013] EWCA Civ 1585, at para. 10(3), *per* Underhill, L.J.); *Black* v. *Sumitomo Corp.* (7) ([2002] 1 LLR 693, at para. 73, *per* Rix, L.J.).

> whether it has a cause of action and what it is, it is difficult . . . to determine what the limits of . . . disclosure should be."

Therefore the premise must be that the suspected cause is found to exist. The applicant should identify the likely claim or alternative claims. In that case, disclosure was refused because the application lacked substance, evidence and focus.

(vii) Equally, there is some circularity in relation to CPR r.31.16(3)(d).

(viii) There is no arguability threshold, as such, in considering whether the court has jurisdiction.[6] It is, however, relevant if there seem to be very poor prospects of success.[7] There must be sufficient factual basis to support a claim—for liability to be at least one of the possible inferences or conclusions which can reasonably be drawn from the known facts disclosed by the evidence.[8] In my view, the various attempts, in the many authorities to which I have been referred, to define exactly what is required are simply indications that the court must consider all of the circumstances, particularly weighing in the balance the strength or otherwise of the evidence at this early stage. It is not a requirement that there be a clear *prima facie* case or one which would survive a strike-out application (though that is likely to be a relevant consideration in context). It may be sufficient in all the circumstances if there is a reasonable basis for believing that a cause of action might be revealed if PAD is ordered. It must be more than a "speculative punt."

(ix) In *Smith* (13), Underhill, L.J. said that ([2013] EWCA Civ 1585, at para. 24):

> "It is inherently better that questions about the likelihood of the applicant being able in due course to establish a viable claim are considered as part of a flexible exercise of the court's discretion in a particular case."

And (at para. 25):

> "so far as possible the issues arising in an application . . . should be dealt with at the discretionary stage."

Later he said that he preferred to ask (at para. 28)—

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6 *Patel* v. *Mirza* (11) ([2016] UKSC 42, at para. 23); *Smith* v. *Energy & Climate Change Secy*.

7 *Smith* v. *Energy & Climate Change Secy.* (13); see also *BSW Ltd.* v. *Balltec Ltd.* (3), in which it was said that there must be something more than fanciful, something realistic, a real prospect of success, something with ([2006] EWHC 822 (Ch), at para. 20) "sufficient factual basis to support it."

8 *BSW Ltd.* (3).

"whether the applicant has shown some reason to believe that he may have suffered a compensatable injury; and, if so, with what degree of likelihood . . ."

27 I can deal with sub-rule (c) briefly. If the disclosure reveals that the bank has done nothing wrong or has done nothing dishonest, it thereby adversely affects any case which the liquidators might bring. To the extent that it does reveal an arguable case of dishonest assistance, clearly it would assist KRL's case and would come within the requirements of standard disclosure. In itself, that is too simplistic an approach. It must be put in the context of the current evidence available and the possible claims which the liquidators wish to investigate. As I have mentioned, there is inevitably some overlap between the jurisdictional issue and the discretionary exercise. If I were to feel that some of the liquidators' PAD application would not come within standard disclosure if proceedings were commenced, I could tailor and limit the order accordingly (assuming that in performing the court's discretionary function I were to decide that PAD is appropriate).

28 Mr. Stagnetto's submission as to jurisdiction was directed largely to CPR r.31.16(3)(d). The three sub-limbs of that requirement are disjunctive. Having considered all of the evidence and authorities to which I have been referred and listened to counsel's oral submissions, however, I am satisfied that each sub-limb is satisfied. Pre-action disclosure is not intended to assist only those who could already plead a cause of action but also those who need disclosure in order to decide whether to litigate at all or as a vital ingredient in pleading their case. I have considered the two stages of the application separately but inevitably there is overlap in my reasoning. It will be plain from what I say later in more detail why I find each of these alternative requirements satisfied. In a nutshell, I find that disclosure is desirable in order to enable the liquidators to consider properly whether they have a claim worth investing in, in order to enable them properly to frame any claim they may have, in order to assist them in obtaining funding for such a claim, to give their claim the focus which a claim against a financial institution should have, and for the other reasons which I mention later, in order to dispose fairly of the anticipated proceedings. It is not necessary to decide exactly what proceedings might be anticipated (PAD may sometimes be ordered with the purpose of identifying whether there is any cause of action, even where it is not known what the cause may be). In this case, however, the causes which the liquidators have in mind have been identified. I am also satisfied that disclosure is desirable in order to assist the dispute to be resolved without proceedings. Whilst the wording used in pre-application correspondence may seem to support Mr. Stagnetto's submission that the liquidators have already decided to issue proceedings, I accept Mr. Vasquez's assurance that the liquidators have not made a settled decision and that they are as

anxious as the bank to resolve this matter, in the interests of those to whom they owe a duty. It is not realistic to expect the parties to enter into talks about compromise or settlement until there has been substantial disclosure, which may well assist in resolving the case. Finally, I see no reason why costs should not be saved by disclosure at this stage (particularly for the bank). If proceedings were commenced now, they would be with a view to obtaining disclosure. Of necessity they would be phrased generally and unsatisfactorily expressed and lacking in the focus which would help to identify the real issues at the outset. By then, the parties will have discussed and agreed and, one hopes, narrowed down the real issues. Further disclosure may not be required and would certainly be limited. Without PAD, the need for amendment of the pleadings would be virtually certain. The pleadings would be likely to become lengthy and confusing. With it, any amendments, if any, will be minimized and delay in the proceedings will be reduced. It is likely that the liquidators will be able to assess prior to issue of proceedings whether any *Quincecare* cause should be pursued. The documents, disclosure of which is now sought, are different in nature from those disclosed by the bank in the related proceedings concerning Ratio. The disclosure hitherto has related to the liquidators' tracing exercise; that now sought concerns the bank's dealings with the relevant entities. PAD should also assist in quantification of any claim against the bank (for example, by establishing date ranges when the bank may be shown to have acted dishonestly) and in enabling the parties to have meaningful discussions if there is a real issue identified, even if the parties are unable to resolve that issue. There is a chance that proceedings will not ensue. There is a real risk of injustice to those who may be found to have been defrauded (particularly the companies) if the liquidators are driven to decide that they cannot properly frame a case against the bank because PAD is denied.

29 Mr. Vasquez submits that, as things stand, the liquidators "are simply not in any position . . . to present anything approaching a sufficiently particularised case to issue substantive proceedings against the Bank." It is not desirable that proceedings based upon serious allegations against a financial institution and its individual employees be brought without careful consideration of all of the admissible evidence. I find that the application is not simply a fishing expedition. The applicants have shown grounds for suspicion relating to the conduct of the bank and some of its employees and have disclosed all the particulars which they are in a position or could be expected to disclose at this stage. It is legitimate for them to seek disclosure to ascertain whether there is a pleadable case worth pursuing and, if there is, how it should be pleaded.

30 Since the documents would be disclosable under standard disclosure if proceedings were begun, the liquidators argue that PAD, *a fortiori*,

would not be unfair. If that argument were good, however, there would be no need for limb (d) as an additional requirement.

31 It is relevant in this case particularly (though not determinant alone) that the liquidators will have to bear the costs of the PAD exercise, as provided by CPR r.46.

32 In relation to the jurisdictional issue and the discretionary exercise I have borne in mind that PAD application should generally be limited to what is strictly necessary[9] in that case the ambit of disclosure sought was "wide and woolly." It is certainly not the court's function at this stage to examine, scrutinize and restrict the documents requested.

The discretionary exercise

33 Mr. Vasquez, has suggested that I decide first whether the application is good in principle. Then the parties may have further discussions in order to agree, if possible, the extent of disclosure which should initially be made. In such discussions, he says, the parties are likely to find ways of limiting the disclosure in order to save costs, which is in the interests of both parties but particularly the liquidators, who have a duty to protect the interests of KRL. They are conscious of the need to act proportionately and not to cause needless expense with little probable advantage. They have this in mind particularly since the cost of the exercise will be borne by the liquidators, whereas they would not necessarily have to bear the costs of standard disclosure after issuing proceedings. Prior to this hearing, the liquidators had already narrowed their request and, during the course of oral submissions, they suggested further ways to do so.

34 Mr. Stagnetto, for the bank, did not strongly demur from this suggestion. He was particularly concerned that the bank should retain the right to object to disclosure (or, more accurately, inspection) of particular documents on the grounds, for instance, of legal professional privilege or confidentiality. I refer to CPR r.31.16(4)(b), which will require the bank, before making disclosure, to specify any of the documents which are no longer in its control or in respect of which it claims a right or duty to withhold inspection. Whilst the parties have rightly dealt with this application on the basis that what is sought is disclosure and inspection (and in the many authorities to which I have been referred the same approach has been adopted) it is clear that the distinction between the two requirements is preserved. Mr. Stagnetto's concern is therefore dealt with in the rule.

35 I adopt the approach which I have been invited to take, which I

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9 *Snowstar Shipping Co. Ltd.* v. *Graig Shipping plc* (14) ([2003] EWHC 1367 (Comm), at para. 35).

regard as sensible and practical. For the reasons which I have already mentioned, I find that the jurisdictional requirement is satisfied in principle (subject to its being limited to that which would fall within standard disclosure if proceedings were commenced—which I consider further below). There is good reason for the liquidators to query the bank's actions and lack of action during the relevant period and for their wish to investigate whether there is a good case against the bank based on dishonest assistance. The disclosure which I shall order will be limited to such disclosure as would amount to standard disclosure under CPR r.31.6 if proceedings were commenced alleging dishonest assistance or breach of the bank's *Quincecare* duty. Mr. Stagnetto's submission that I must adopt a two-stage approach is clearly correct. He agreed that the threshold for the jurisdiction issue was low and, in my view correctly, mainly concentrated on the discretionary exercise, emphasizing that that issue is not automatically satisfied by a finding that the court has jurisdiction.

36 In deciding whether and to what extent to grant the application I have borne in mind particularly the following principles, which in my view can be derived from the numerous authorities to which I have been referred:

(i) Each case depends on its own facts and circumstances.

(ii) The burden of showing that PAD is appropriate rests on the applicant.

(iii) The court's discretion is wide but must be exercised judicially and be based upon a detailed examination of the evidence.

(iv) PAD is not the norm. The usual procedure remains disclosure under the CPR following pleadings, which may require amendment thereafter.[10]

(v) It would be rare to depart from the usual procedure for disclosure during proceedings unless there were apparent good reason for doing so. Civil procedure in Gibraltar is not inquisitorial.

(vi) There is, nevertheless, nothing in the legislation or the CPR to justify restricting PAD to exceptional cases.

(vii) It is necessary to consider the nature of the injury alleged (which is obvious in this case, namely the very large financial loss caused to KRL as a result of the use of its accounts and those of associated companies with

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10 See also *Anglo Irish Bank Corp. plc* v. *West LB AG* (1) ([2009] EWHC 207 (Comm), at para. 24):

> "Standard disclosure on a reciprocal basis following the exchange of properly particularised statements of case represents the norm in Commercial Court proceedings of this kind between two large, well-resourced and evenly matched counter-parties . . ."

the bank), the clarity and identification of the issues, the nature of the documents requested, the relevance of PAD requested and the opportunity for the applicant to make a case without PAD.

(viii) I must balance the various circumstances and considerations in order to decide whether to allow the application. Each should be decided in context with the others.

(ix) Part of CPR procedure is the now established system of pre-action protocols. Failure to adhere to them will be an important factor to weigh in the balance.[11] Where there is no protocol, the parties nevertheless have a duty to act reasonably in exchanging relevant information and documents and to comply with the CPR overriding objective.

(x) In some cases the applicant will be able to produce draft particulars of claim, which may enable the applicant to plead a likely or potential case without the need for later amendment or re-amendment following disclosure. Absence of draft particulars may weigh against PAD. If it is impossible to draft particulars without disclosure but there are other reasons justifying PAD, that may weigh in favour of the application, particularly if the draft particulars would not be likely to add clarity or detail significantly to a letter before action (or before application for PAD). It is not generally necessary to show that the applicant cannot plead a case without PAD, though this is clearly a relevant consideration to weigh in the balance.

(xi) Purely fishing exercises should not generally be encouraged. In a sense, all such applications are fishing and many will be fishing because the applicant is unable to know whether or not a cause of action exists until after disclosure. The real point, in my opinion, is that the clearer and more focused an application is, the more likely the application is to succeed. If there is no identifiable evidence or reason to believe that disclosure may reveal a cause of action, clearly that will weigh heavily in favour of refusing the application. The court will not, of course, wish to encourage "flimsy" or "fragile" or "purely speculative" applications. The court will be slow to allow a merely prospective litigant to conduct a review of the documents, replacing focused allegation by a "roving inquisition." The more diffuse the allegations are and the wider the disclosure sought, the more sceptical the court is entitled to be.

(xii) Whilst the court must resist the temptation to judge the merits of a potential allegation in advance of disclosure and evidence, it must consider the application in some detail and its order must specify the

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11 See, *e.g.*, Matthews & Malek, *Discovery* (1992).

documents or classes of documents to be disclosed. It should not rule on matters of construction and substantive issues which are for the trial judge.

(xiii) It is generally sufficient if the case is arguable and has a reasonable prospect of success but there is no arguability threshold as such.[12] The nature and importance of the contemplated claim and the clarity of the issue raised are important considerations, as are the ability of the applicant to make a case without the documents and, particularly, how focused the allegations are. In *BSW Ltd.* (3), it was suggested that there must be a real prospect of success, something more than fanciful, something realistic.

(xiv) In appropriate cases the court may order disclosure only to legal advisers or to specified persons and subject to such conditions as it thinks fit.

(xv) The documents or classes of documents included in a PAD order should normally only relate to the key potential issues. It is necessary to consider whether the volume of documents involved is disproportionate and then all the relevant facts in detail.[13] In *BSW Ltd.* the court examined the factual basis for the application in great detail.

(xvi) Cases involving allegations of complicity in fraud or dishonesty (knowingly or recklessly) on the part of financial institutions (particularly banks) or their professional or other employees do, in my judgment, require particular care and consideration. It has been appropriate in this application to examine the background facts and evidence in some detail. In *Black* v. *Sumitomo Corp.* (7), Rix, L.J. said ([2001] EWCA Civ 1819, at para. 39):

> ". . . [T]he court should be cautious about letting possible fraudsters escape down the 'black hole' of the absence of documentation which made it impossible for the claimant to plead his case. Indeed . . . 'the inhibitions on pleading fraud in English law and practice militate in favour of allowing [PAD]'."

Later he emphasized that allegations of dishonesty should not lightly be made. A defendant should know plainly what is alleged against him but (at para. 54):

> "dishonesty does not spread its cloak over the means by which it can be detected and revealed . . . It cannot be right that an allegation of fraud should assist the potential claimant to obtain [PAD], unless his

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12 In the *Anglo Irish Bank* case (1) the parties accepted that there was already sufficient material to plead a case.

13 Matthews & Malek (*op. cit.*).

allegations carry both some specificity and some conviction and his request . . . is appropriately focused."

Again (at para. 57) he emphasized the obligation on counsel to satisfy himself that he can properly plead fraud.

(xvii) Where there are serious potential allegations which one would be hesitant about advancing by way of a pleaded case as a barrister without appropriate supporting material (such as in a potential conspiracy claim), that may weigh in favour of PAD.[14]

(xviii) It may be relevant that PAD may result in the disclosure exercise having to be performed twice or that it would result in increased costs. So far as is possible, the applicant should identify the issues in order to show that the requested disclosure is proportionate, relevant and reasonable. It may well be that failure to provide clarity will result in failure of the application until it is provided (this is also relevant at the jurisdiction stage).[15]

(xix) It may suffice, together with all the circumstances, that PAD would enable the applicant to improve its case and to be better informed in pleading its case or to improve its case or in deciding whether to proceed or if it might enable resolution without proceedings, whether by ADR or otherwise.

(xx) It is relevant that costs may be saved.

(xxi) It is relevant that there has already been substantial disclosure, perhaps in previous related litigation.[16]

(xxii) It may be relevant that the respondent too may have legitimate claims for disclosure.

(xxiii) Delay in making the application may be a significant consideration.

(xxiv) It is important to consider whether the exercise would be disproportionately costly, time-consuming or burdensome. In this respect it is not necessarily decisive that the applicant will be paying.

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14 See, *e.g.*, *Ittihadieh* v. *Metcalf* (9). Though in that case disclosure was refused because there was little support for any conspiracy claim, the applicant was extremely entrenched, it was extremely unlikely that PAD would assist in resolving the matter without proceedings, and the case was speculative and vague in the extreme.

15 *E.g. Assetco plc* v. *Grant Thornton UK LLP* (2).

16 See, *e.g. First Gulf Bank* v. *Wachovia Bank Nat. Assn.* (8), in which it was held best to require the applicant in the circumstances of that case to plead such case as it could and that PAD was tipping the case too far in favour of the applicant.

(xxv) "Disclosure of commercially sensitive material is a necessary part of litigation in this court . . ." (*BSW Ltd.* (3) ([2006] EWHC 822 (Ch), at para. 83). There is no power to conduct a *de bene esse* exercise for these purposes.

(xxvi) It is relevant that an applicant might be unable even to commence proceedings without the help of PAD, for example for the purpose of obtaining legal aid (or, in this case, without financial backing, which would be unlikely to be forthcoming without PAD).

(xxvii) After considering all the relevant circumstances, it is necessary to stand back to take an overall view of whether the proposed order is right.

Decision in principle

37 I have summarized the background to this application at some length. I am also familiar with it, having dealt previously with connected litigation concerning the position of Ratio and its directors and owners.

38 In principle, I have no doubt that the liquidators are entitled to substantial further disclosure from the bank. In reaching that conclusion, I have taken into account particularly the following.

39 Having considered the pre-application correspondence, I am satisfied that the liquidators have particularized their case so far as they reasonably can or can be expected to at this stage. In the pre-application correspondence, the liquidators did set out with reasonable clarity their reasons for concern and surprise that this alleged enormous and elaborate fraud could take place without the knowledge of the bank and if the bank had performed its functions (common law, statutory and regulatory) properly. They are reasonably, in my judgment, surprised at the bank's apparent willingness to open KRL's account so soon after having refused to do so for the reasons which I have mentioned. The bank has not, hitherto, given any explanation for that change and for its willingness to facilitate what appears obviously to have been a complex structure involving a web of connected entities in different jurisdictions and extensive transfers into and out of KRL's account, without any apparent change in KRL's position since the bank's initial rejection of its application. Even after expressing serious concerns later, the bank appears to have taken no action to close the account or to investigate in order to ensure that it was being used properly and not for fraudulent or over-risky purposes. The bank, say the liquidators, was the only available protector of the interests of KRL at the time, since only it had access to necessary information. Banks have traditionally operated on the basis that normally they take their accountholders on trust unless they have cause not to. But increasingly banks are required in this age of frequent international fraud to monitor and carry out checks on accounts which are complex or risky or unusual. On the

face of it, KRL's mandate forms should have alerted the bank to the risk that something serious may be wrong, say the liquidators. It should have been obvious that the various dealings and transfers between entities with common ownership and officers were not in accord with KRL's stated objectives and that it was not trading in commodities. Even a relatively cursory monitoring exercise would have alerted any competent and honest banker to the likelihood that something was dangerously wrong. Not only is it strange that the bank changed its position so soon after its initial rejection of KRL's application but it is, again on the face of it, extraordinary that it did so without proper consideration, without alarm bells ringing as a result of the mandate forms and without the minimal monitoring to check that the account was being used genuinely for the purposes initially stated. The liquidators express further surprise that the bank should have given a glowing reference to the world at large, stating that anticipated turnover was likely to be over $44m. without any apparent supporting evidence for that reference. Even when the alarm bells were eventually heard and the bank threatened to close KRL's account, it took no action to do so until huge further sums of money were fraudulently dissipated. To top it all, the bank's account manager dealing with this account then left the bank to take up employment within the very network of fraudulent activity which one might have expected him to be monitoring.

40 These facts alone, in my opinion, give rise to the reasonable belief of the liquidators that a cause of action based upon dishonest assistance (at least by way of Nelsonian blindness) is likely to (or may) exist against the bank. It is not for me to decide the merits of such a claim at this stage. It is, nevertheless, important that I find the suggestion neither fanciful, nor flimsy, nor vague, nor lacking in focus and particulars, nor lacking in real prospect of success, nor a roving inquisition. The circumstances currently known to the liquidators do, in my opinion, call for explanation. In reaching this conclusion, I have kept in mind that disclosure may reveal the bank and its employees not to have been dishonest, or even at fault, as a result of circumstances which cannot be anticipated until after disclosure. There is no apparent collateral purpose in this application.

41 I have read fully all of the numerous authorities to which I have been referred. I have not seen fit to analyse them in detail in this ruling but I have found it helpful to consider the circumstances in which PAD applications have and have not succeeded. Each depends on its own facts and circumstances. I conclude that this application is different and easily distinguishable from those cases in which PAD was refused. There has been no unreasonable delay in this case. There is no reason to doubt the liquidators' assurance that they are concerned not to waste the little money they have left on pointless litigation.

42 I was initially of the view that the liquidators could particularize their claim sufficiently to commence proceedings, relying on inferences which may be drawn in the absence of explanations from the bank and which may be fortified by standard disclosure in the ordinary way. But it is the liquidators' and their advisers' view that they should not plead a case of fraud or dishonesty against the bank or individual employees of it without being able to particularize that claim properly and as fully as possible. Upon reflection, I agree. Draft particulars of claim could have been produced but they would be unlikely to reveal anything which has not already been covered in the pre-application correspondence. I accept the liquidators' assurance, given through Mr. Vasquez, that they have no further information which they have failed to disclose.

43 It is perhaps surprising that the bank argues that proceedings should be commenced and disclosure should take place under the usual standard disclosure procedure following the parties' pleadings. It is seriously worrying for anyone to be accused of dishonesty, especially in the world of finance and banking. One might think that PAD would be preferred by the bank, in that it may avoid it or its employees facing possibly stressful and lengthy legal proceedings, although I do understand that they will not wish to encourage or to open the floodgates to this type of application. The liquidators at present do not know what enquiries were made by the bank, what exactly they were told, what steps were taken in accordance with its own internal policies and pursuant to financial services regulations or statutory monitoring requirements under money laundering and/or anti-terrorism legislation or concerning such pre-paid card guidance or requirements as may have existed during the relevant periods. Nor do they know what investigations, if any, were pursued by it once the accounts manager left and joined one of the relevant companies. They recognize, as do I, that the bank may have a perfectly legitimate answer to the liquidators' concerns. It may have been given further information which misled it. It may have been given explanations which gave it some confidence. It may be that disclosure will uncover some incompetence which, standing alone, would not justify proceedings. It is with caution that I allow this application because it should not be thought that PAD will be appropriate against a bank as a matter of course when an account has been used for fraudulent purposes by a client.

44 It is true that some of the liquidators' case seems to suggest that they have decided already to pursue a claim against the bank. Mr. Vasquez says that they do not have anywhere near sufficient properly to plead such a claim at this stage. Despite the force with which the liquidators have expressed their case, I do not accept that PAD is unlikely to result in the matter being resolved without the need for proceedings. The disclosure may not support the view that the bank or its employees have been dishonest or that a *Quincecare* claim would succeed. The burden of proof

will remain on the liquidators. If disclosure supports possible but uncertain litigation, there may well be negotiations or alternative dispute resolution in order to reach a compromise. The liquidators, unlike some involved in the reported cases, are not proceeding with any malicious or improper motive. It is their duty to realise KLR's assets, one of which may be a prospective claim against the bank.

45 The matter is one of very substantial importance, involving very substantial losses to many innocent investors. The disclosure requested is extensive, though less so than the initial request. It is not, however, disproportionate or oppressive given the size and importance of the issues. The bank will have a team or teams which deal with this kind of exercise. It will involve substantial work and time but the liquidators, for KRL, will bear the cost. They will, I hope and accept from Mr. Vasquez, be as anxious as the bank to keep the enquiry to the minimum necessary to enable them to evaluate whether a claim exists or is worth pursuing and what allegations can properly be made in particulars of claim. I am told that the plan is for the parties to communicate in order to agree ways in which the scope of the disclosure may be minimized even further than it has been.

46 PAD in this case is likely to further the overriding objective. If proceedings follow, they will be much more focused and clear. The need for amendments will be avoided, if not completely then largely. It is likely to further the interest of justice in this case. The exercise will not be repeated, though it is possible that there will need to be some supplementary disclosure.

47 The disclosure now sought, however, is different in nature from that previously provided by the bank. It is not concerned with the tracing task in which the liquidators have engaged. It is for the purposes which I have mentioned.

48 In my view PAD is also justifiable in order that the liquidators can assess the prospects of a *Quincecare* claim. It is not appropriate for me to analyse that in depth at this stage and the liquidators will no doubt need to consider the issue carefully with their advisers following the disclosure. If this stood alone, without the possibility of a claim for dishonest assistance, the application may have been weaker. It would be unfortunate, however, if the initial PAD were to lead to a further and separate application based upon alleged breach of the *Quincecare* duty. The two potential causes overlap significantly in terms of the disclosure required.

49 It is relevant that the directors of KRL claim that its records have been moved to Dubai and lost or confiscated. To that extent it is not, therefore, possible for the liquidators to obtain from those records the information they now seek. I accept the liquidators' assurance that they have not obtained undisclosed information from "Corinthian" which may

affect this application. My decision, however, will be conditional upon them disclosing the "material already gathered by our clients from various sources," in so far as it would come within standard disclosure if proceedings had been commenced, in order to ensure that the parties are on an equal footing.

50 I do not consider it necessary *in this case* to require the liquidators to identify every payment or transaction which gives rise to concern. It is clear that, in this case, the liquidators' case is that the whole organization, involving the entities and individuals listed, was fraudulent. They will need to identify once the PAD exercise has been performed, what evidence there is of dishonest assistance in the context of the whole picture.

51 The fact that the liquidators are unable to make allegations with more specificity at this stage is not fatal to their application. On the contrary, it reinforces it.

52 The liquidators' enquiries are genuine. I am told that they intend, if appropriate, to seek crowd funding or some other source of funding for any proceedings which may ensue. Any provider of finance for such proceedings will wish to have as much information available as possible in order to assess the prospects of success. That will not only affect the availability of funding but also the terms upon which it may be available. In this regard, there is not a level playing field between the bank, which has the financial capacity to fund any subsequent litigation, and the liquidators.

53 In my view this case falls outside the usual run of such cases. I have performed the exercise of standing back before reaching a final conclusion. Taking the context and circumstances leading to the application, in my view it is clear that the application should succeed.

Detailed consideration of the disclosure sought

54 Although I have been asked to decide this application in principle at this stage, in doing so I have considered the classes of documents still pursued in some detail. I have little doubt that co-operation between the bank's team, including the bank's Mr. Cross (whose statement is helpful), and the liquidators will help to contain the costs of the exercise as much as possible.

55 The application as now framed is focused on the key players in the allegedly fraudulent scheme and the bank's relationship with them. So far as objections based upon privilege or confidentiality are concerned, they can (indeed must) be raised prior to discovery and inspection, if necessary upon application to the court.

56 My inclination is that at first disclosure might be limited to the period from 2012 to 2015 unless it is more cost-effective to perform that enquiry

at the same time and save insofar as the bank may have conducted a later investigation. I can understand the liquidators' point that disclosure of what the bank did after the account was closed may well be relevant and some of the post-closure records may well cast light on what was known previously. Equally, it is possible that initial disclosure would make the further exercise unnecessary, at least at this stage.

57 Overall, I do think that having as suggested made my decision in principle, it is best to leave the exercise to the good sense of the parties, who will be able to bring it back to this court if they cannot agree on certain items. Although I have considered each class of documents in detail, my conclusion is that there are problems in anticipating precisely what will transpire in the process and therefore what disclosure will prove helpful. What may appear unreasonable at first may seem essential in the light of disclosure as it progresses. If, therefore, I impose strict limits now, that may well result in more applications. I hope that the liquidators and Mr. Cross and his team may be able to perform the task together. The more that access to records is provided to the liquidators, the more efficiently everything may be handled. The liquidators may quickly form the view, for instance, that following up a particular avenue is not cost-effective or likely to assist. In respect of some issues, they may be willing to accept assurances that nothing relevant exists.

58 It may not be necessary for every document disclosed to be copied to the liquidators. If facilities are made available for inspection, they will be able to specify which they need copied.

59 After handing down this ruling, I am sure that counsel and the parties will (as was indicated during oral submissions, subject to my allowing the application in principle) attempt to achieve a sensible timetable and way forward. I suggest that the matter be relisted after about two weeks with a view to the final order then being made. If there remain specific points which require the court to resolve, this can be done at the resumed hearing.

60 I ask that counsel agree a draft order in appropriate terms, incorporating the relevant provisions of CPR r.31.4. My ruling is on the basis that KRL (through the liquidators) shall pay the bank's costs of the application and of complying with my order. Though the liquidators have succeeded, they have conceded limitations and further limitations to the extent of disclosure and Mr. Stagnetto has presented the bank's case in a moderate and appropriate manner.

Ruling accordingly.