[2021 Gib LR 61]

ENTERPRISE INSURANCE COMPANY PLC (in liquidation) v. EHL REALISATIONS LIMITED (formerly ENTERPRISE HOLDINGS LIMITED) (in liquidation) and THIRTEEN OTHERS (CHICHON as Part 20 defendant)

SUPREME COURT (Restano, J.): March 12th, 2021

2021/GSC/04

Evidence—privilege—legal professional privilege—document protected by legal advice privilege if dominant purpose to obtain or give legal advice

A claim was made against directors.

A provisional liquidator of Enterprise Insurance Co. was appointed on the application of the Gibraltar Financial Services Commission on July 25th, 2016. He was appointed liquidator on October 26th, 2016 on the ground that Enterprise was insolvent.

Large sums were claimed against the defendants, which related to the periods when each of them was in office. The claim was based on the directors' dishonest and non-dishonest breach of their fiduciary and common law duties.

The fourth defendant had misgivings about the disclosure provided by Enterprise. He challenged Enterprise's right to withhold inspection of 95 written communications between Enterprise's liquidator and the GFSC in the days leading up to the liquidator's appointment as provisional liquidator on July 25th, 2016 and thereafter. The documents had been withheld on the basis that 89 were protected by legal advice privilege and 6 by litigation privilege. The fourth defendant further sought specific disclosure and inspection pursuant to CPR 31.12 of all communications between Enterprise, Grant Thornton Ltd. and the GFSC (and all their agents) from July 21st, 2016 to date and on an ongoing basis.

In relation to legal advice privilege, the fourth defendant submitted that (a) inspection should be ordered because he had lost confidence in Enterprise's ability to comply with its standard disclosure obligations. The fourth defendant relied on various mistakes made by Enterprise in the disclosure exercise; (b) it was not believable that there were no more than 43 largely inconsequential disclosable documents passing between the liquidator and the GFSC; (c) communications between Enterprise and the GFSC were not communications between a lawyer and client and it was inconceivable that they were covered by legal advice privilege; (d) in order to withhold

inspection on the ground of legal advice privilege, Enterprise was required to show that the documents being withheld from inspection had been made confidentially and for the dominant purpose of giving legal advice, which Enterprise had failed to establish; and (e) the language used to claim privilege was ambiguous and obscure.

Enterprise submitted in reply that (a) the fourth defendant's obsession about an improper relationship between the liquidator and the GFSC underpinned the application and there was no basis for his misgivings; (b) in relation to the errors made by Enterprise in the disclosure exercise, they had to be seen in the context of the scale of the disclosure exercise; (c) if errors were to be relied on to support a challenge of this sort, there needed to be a causative link between any errors made and the relief being sought, and there was no such link in the present case; (d) the communications between the liquidator and the GFSC over which privilege was asserted were part of a continuum of communications where Triay & Triay had been instructed at the time by both Enterprise and the GFSC and consisted of either a request made by Enterprise or the GFSC for advice either separately or on behalf of both of them with a limited waiver of privilege to the other; and (e) a stand back analysis of Enterprise's evidence as a whole showed that the claim to legal advice privilege had been properly taken.

In relation to litigation privilege, the fourth defendant submitted that (a) Enterprise had failed to discharge the burden of establishing that litigation privilege applied to the 6 documents in question; (b) Enterprise had failed to provide sufficiently detailed evidence to make out the claim that these communications were created for the sole or dominant purpose of conducting this litigation; (c) there was at least one other purpose for which these communications could have been created, namely regulatory reporting by the GFSC on the liquidation of Enterprise; (d) extensive detail was expected when making a claim to litigation privilege; (e) this was not the sort of case where the court should find it difficult to go behind the witness statements relied on by Enterprise because those witness statements did not contain the detail required to support the claim and could not be said to be determinative; and (f) the court should now order inspection because Enterprise had had a "second bite at the cherry" with the second witness statement of Charles Simpson and had still failed to establish its claim.

Enterprise submitted in reply that (a) litigation privilege was properly claimed; (b) it had provided contemporaneous evidence to support the conclusion that this claim was in contemplation when the 6 documents were created; and (c) the court should not approach a claim to privilege as a box-ticking exercise; it was ultimately a question of judgment for the court as to whether it should go behind the affidavit referred to.

In relation to the specific disclosure application, the fourth defendant submitted *inter alia* that there were bound to be more disclosable documents in the light of the close collaboration between the GFSC and the liquidator. Enterprise submitted that it had conducted an individual review of the documents and concluded that the vast majority of them had no relevance to the litigation. That was followed by a second tier review based on a sample

of approximately 300 of the documents. Enterprise rejected the suggestion that there was a lack of willingness to provide proper disclosure and submitted that the application was based on nothing more than speculation.

Held, ruling as follows:

(1) In order for a particular communication or document to be protected by legal advice privilege, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice. In the circumstances of the present case, which concerned communications between the GFSC and the liquidator involving Triay & Triay, who were the legal advisers to both parties at the time, and where it was asserted that those communications formed part of the continuum of communications in which legal advice was sought and given, the claim to legal advice privilege was not inconceivable although the fact that Triay & Triay was included in the exchanges was not determinative in assessing whether they attracted legal advice privilege. Whether the communications were covered by legal advice privilege ultimately depended on their purpose. If the dominant purpose of a multi-party communication including a lawyer as addressee was to obtain the commercial views of the non-lawyer addressees, it would not be privileged even if a subsidiary purpose was simultaneously to obtain legal advice from the lawyer addressee unless it might disclose the nature of legal advice requested or obtained from a lawyer. Whilst the various corrections which Enterprise had had to make to its disclosure were unfortunate and fueled suspicion in the fourth defendant that something was amiss in the disclosure provided, there was nothing to suggest that the errors made were anything other than genuine mistakes which had not in fact prejudiced the fourth defendant or the other defendants. The court therefore dismissed the application for inspection insofar as it related to the 50 documents which it had originally been stated did not exist, and which were later said not to be disclosable. In relation to 25 documents dated after July 25th, 2016 which were said not to be standard disclosable, the court was not satisfied that sufficient explanation had been provided as to why those documents were not material to the claim. In relation to 79 documents dated after July 25th, 2016 over which legal advice privilege was claimed, the court did not consider the language used when making the privilege claim to be elliptical or to suggest an improper privilege claim. However, only a very short and all-encompassing description had been provided to cover the 79 multi-addressee documents. There was no direct evidence of the dominant purpose for each of the communications. Further detail was required to support the claim to legal advice privilege. The court would order a further affidavit. The court had not overlooked the submission that Enterprise should be refused a further "bite at the cherry" but ordering inspection would risk abrogating Enterprise's claim to privilege which would not reflect a proper balancing of the parties' rights. That was a solution of last resort and should only be undertaken if there was credible evidence that those claiming privilege had misunderstood their duty, were not to be trusted with the decision making, or where there

was no reasonable practical alternative, none of which applied in this case. The court would therefore order Enterprise to provide further evidence on its claim to legal advice privilege in relation to communications between the GFSC and Enterprise dated after July 25th, 2016 (paras. 44–54).

(2) The assessment which needed to be undertaken in determining whether a claim to litigation privilege had been properly made was ultimately contextual, not prescriptive. A balance had to be struck between the need to be as specific as possible without making disclosure of the very matters the claim for privilege was designed to protect. A fair reading of Mr. Simpson's witness statement showed that his assessment was the result of a principled and responsible interrogation of the documents on the part of Enterprise's legal representative which was consistent with the evidence provided. The court was satisfied that Enterprise and its legal team had properly addressed their minds as to whether the claim to litigation privilege was justified and that there were no grounds on which to go behind the evidence relied on by Enterprise in this regard. The court therefore declined to make the order sought and upheld Enterprise's claim to litigation privilege over the 6 documents (para. 62).

(3) CPR r.31.12 gave the court discretion to make an order for specific disclosure taking into account all the circumstances of the case. The power was designed to ensure that the parties gave access to documents which would assist the other's case and to make such an order the court needed to satisfy itself as to the relevance of the documents sought by reference to the pleadings. There were no doubt cases where it was so obvious that documents of a certain kind might exist or their nature was sufficiently well understood by the court that the failure to provide such documents gave rise to an inference that the disclosure process had failed or was deficient, but this was not such a case. The fourth defendant's complaint stemmed from his lack of confidence in Enterprise and its legal team, which was not a proper basis to support such an application in this case. This was a far-reaching application based largely on conjecture and a lack of confidence in Enterprise's assessment on standard disclosability. The fourth defendant's concerns had been met with a second tier review by Mr. Simpson, who confirmed he had checked a sample of some 300 documents and they were not standard disclosable. The just and proportionate way forward was for Enterprise's second tier review to be completed. If any documents were identified as being standard disclosable following the further review they should be disclosed. Enterprise should provide a further witness statement to confirm the results of that exercise. If Enterprise found that there were documents which were disclosable but which were protected from inspection on the ground of legal professional privilege, the reasons should be appropriately explained in the witness statement (paras. 71–76).

Cases cited:

(1) *Balabel* v. *Air India*, [1988] Ch. 317; [1988] 2 W.L.R. 1036; [1988] 2 All E.R. 248, referred to.

(2) *R. (Jet2.com Ltd.)* v. *Civil Aviation Auth.*, [2020] EWCA Civ 35; [2020] Q.B. 1027; [2020] 2 W.L.R. 1215; [2020] 4 All E.R. 374, considered.
(3) *Starbev GP Ltd.* v. *Interbrew Central European Holdings BV*, [2013] EWHC 4038 (Comm), considered.
(4) *Sumimoto Corp.* & *Credit Lyonnias Rouse Ltd.*, [2001] EWCA Civ 1152; [2002] 1 W.L.R. 479; [2002] 4 All E.R. 68; [2001] CPLR 462; [2001] 2 LLR 517; [2002] C.P. Rep. 3, considered.
(5) *Tchenguiz* v. *Serious Fraud Office*, [2013] EWHC 2297 (QB), considered.
(6) *Waugh* v. *British Railways Bd.*, [1980] A.C. 521; [1979] 3 W.L.R. 150; [1979] 2 All E.R. 1169, considered.
(7) *West London Pipeline & Storage Ltd.* v. *Total UK Ltd.*, [2008] EWHC 1729 (Comm); [2008] 2 CLC 258, considered.
(8) *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675, considered.

Legislation construed:
Civil Procedure Rules (S.I. 1998/3132), r.31.12:

"**Specific disclosure or inspection**
31.12
(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 31.3(2).
(Rule 31.3(2) allows a party to state in his disclosure statement that he will not permit inspection of a document on the grounds that it would be disproportionate to do so)."

P. Caruana, *KCMG*, *Q.C.*, *C. Allen* and *P. Dumas* (instructed by Peter Caruana & Co.) for the fourth, fifth and sixth defendants;
N. Jones, *Q.C.*, *C. Simpson*, *S. McCann* and *S. Triay* (instructed by Triay & Triay) for the claimant;
G. Stagnetto, *Q.C.* (instructed by TSN) for the third, eighth and ninth defendants;
C. Gomez and *D. Benyunes* (instructed by Charles Gomez & Co.) for the tenth and thirteenth defendants.

1 **RESTANO, J.:**

Introduction

In an application dated October 7th, 2020 the fourth defendant, Nicholas Cruz, has challenged the claimant's ("EIC") right to withhold inspection of

ninety-five written communications passing between Frederick White, EIC's liquidator and the Gibraltar Financial Services Commission ("GFSC") in the days leading up to Mr. White's appointment as provisional liquidator on July 25th, 2016 and thereafter. Mr. White has withheld inspection of these documents on the basis that eighty-nine of those communications are protected by legal advice privilege and that six of them are protected by litigation privilege.

2 Mr. Cruz further seeks specific disclosure and inspection pursuant to CPR 31.12 "of the above documents" on terms of an attached draft order which refers to all communications between EIC, Grant Thornton Ltd. and the GFSC (and all their agents) from July 21st, 2016 to date and on an ongoing basis. This is sought subject to the condition that the documents "relate to or touch on" specified categories set out in a schedule to the draft order under the following headings: EIC's business model, its capitalization and accounts. I have emphasized the reference "the above documents" in this part of the application because there is a dispute as to whether this part of the application relates to the same ninety-five documents in respect of which privilege is asserted or whether it refers to the non-privileged exchanges between the GFSC and Mr. White which total just under one thousand documents and which EIC has assessed as being non-disclosable.

3 The issues raised in this application can therefore be summarized as follows:

(1) Whether EIC is entitled to withhold inspection of some or all of the eighty-nine documents in respect of which legal advice privilege has been claimed;

(2) Whether EIC is entitled to withhold inspection of some or all of six documents in respect of which litigation privilege has been claimed; and

(3) Whether specific disclosure and inspection of documents should be ordered in relation to all documents passing between the GFSC and Mr. White in the days leading up to and following his appointment.

4 Whilst the application has only been brought by Mr. Cruz who was a non-executive director of EIC, Mr. Stagnetto, Q.C., who appeared for Mr. Flowers, Mr. Longstaff and Mr. Evans, who were all directors of EIC, confirmed that they supported the application. Mr. Gomez and Mr. Benyunes, who appeared for Mr. Stone and Mr. Newing, confirmed that they had no instructions in relation to the application.

Factual background

5 Mr. White was first appointed as the provisional liquidator of EIC on the application of the GFSC on July 25th, 2016. He was then appointed liquidator on October 26th, 2016 on the ground that EIC was insolvent. A claim form

with brief details of claim was issued by the claimant against the defendants on October 9th, 2017 but it was only served with accompanying particulars of claim dated January 25th, 2018 on January 29th, 2018. Large sums are claimed against the defendants which relate to the periods when each of the defendants was in office and which range from around £7m. to £50m.

6 The claim is based on the directors' dishonest and non-dishonest breach of their fiduciary and common law duties. There is also a tracing claim against Mr. Flowers (and EIG Services Ltd. ("EIG"), EHL Realisations Ltd. ("EHL") and Rhone Holdings Ltd. ("RHL")) in permitting payments of around £54m. to the second defendant and not seeking to recover those payments. A central issue in the claim is the legitimacy of a so-called "triangular model" employed under which EIC paid large amounts to EIG under a marketing and services agreement and which, it is alleged, was used by EIC to siphon away large amounts of moneys which it would not have otherwise been allowed to pay out by way of dividends due to regulatory constraints. The defendants deny this allegation and say that this model was standard in the industry, that none of the numerous reputable advisers involved had ever expressed any concerns about it and that the regulator, the GFSC, was fully apprised throughout about this having received accounts regularly which set out the fees paid. Other transactions are also relied on by EIC to support the claim that moneys were diverted from EIC. One such transaction concerns the alleged unjustified payment of a £300,000 reinsurance arrangement fee paid by EIC to EIG and which EIC had received shortly before from Echelon Insurance Co. Ltd. ("Echelon"). There is also the transfer of a property owned by EIC at The Sails to RHL which it is alleged took place without EIC receiving consideration. EIC also relies on EIC's underwriting of the so-called "icebreaker" schemes, tax avoidance schemes which were eventually shut down by HMRC. The defendants deny all these allegations and further rely on the defence that any breaches of duty would have been consented to by EIC's shareholders. In response, EIC alleges that any alleged ratification is ineffective as EIC was of doubtful solvency from at least November 18th, 2010 and was actually insolvent from at least 2012 onwards, a fact which it relies on also in support of its claims for dishonest and non-dishonest breaches of fiduciary duty. As part of their defence, the defendants say that the GFSC was fully aware of and approved EIC's business model and ongoing operations and it is for this reason that Mr. Cruz seeks inspection of further communications passing between the GFSC and Mr. White.

7 Standard disclosure was agreed between the parties on the basis set out in the agreed order for directions dated June 14th, 2019 which provided for a date range of "25 May 2016 to date." This was the subject of some discussion between the parties but the start date was eventually agreed and fixed at May 25th, 2016. The reason for this was that Mr. White was appointed provisional liquidator on July 25th, 2016 and it was agreed that the date range

should cover the period immediately preceding that appointment in the same way that EIC required the defendant directors to provide disclosure prior to their own appointments.

Evidence

8 Mr. Cruz's challenge is supported by his third witness statement, dated October 7th, 2020, which sets out the background to the application and his misgivings about the disclosure provided by EIC. He points out that only thirty-four anodyne communications passing between the GFSC and Mr. White were disclosed by EIC. This small number of documents together with a comment made by Triay & Triay in a draft proposed letter to the GFSC led him to believe that EIC did not consider this class of documents to be relevant. This was taken up by his lawyers, Peter Caruana & Co., with EIC's lawyers, Triay & Triay, who complained about deficient disclosure on the part of EIC and sought further disclosure.

9 Nine further documents were then disclosed by EIC on September 7th, 2020 under cover of a letter from Triay & Triay. This letter also confirmed that any other exchanges between the GFSC and EIC were either withheld from inspection on the grounds of legal advice and/or litigation privilege or irrelevant and could broadly be summarized under six listed categories. The small number of additional documents provided only served to heighten Mr. Cruz's concerns, together with the fact that one of the documents which was provided was a letter from the GFSC to the Attorney General dated April 20th, 2012 in relation to the Echelon transaction and which stated that EIG had carried out extensive work for which it was paid £300,000. Mr. Cruz contends that this document should have been disclosed previously as it adversely affects EIC's reliance on the Echelon transaction as part of its case that EIG did not do any work to justify that fee. Mr. Cruz states that he is particularly aggrieved about this late disclosure because he considers that it would have undermined an application by EIC for permission to amend its particulars of claim. At this application, EIC applied for permission to include claims of dishonest breach of fiduciary duty based on various grounds including the allegation that there was no evidence of any work having been carried out to justify the fee paid by EIC to EIG in relation to the Echelon transaction.

10 Mr. Cruz states that he is further concerned about the fact that Triay & Triay acted for the GFSC as well as the provisional liquidator/appointed liquidator during the provisional liquidation and subsequent liquidation, and he considers that this dual role has placed Triay & Triay in a position of conflict of interests and means that he is being deprived of full disclosure. Mr. Cruz accepts that documents passing between Mr. White as his lawyers and the GFSC and their lawyers for the purposes of obtaining or giving legal advice attract legal professional privilege but he seeks disclosure of the

exchanges between the GFSC and Mr. White during this period which he does not consider should be withheld from inspection. Mr. Cruz expresses concerns about the "inappropriate and incestuous relationship" between EIC and the GFSC especially as he has brought a defamation claim against Ms. Barrass, Mr. Taylor and the GFSC arising from statements made when Mr. White was appointed based on information provided to them by Mr. White. Further, he states that it "defies credibility" that there are no more disclosable documents especially as Mr. Taylor and Ms. Barrass have both stated in witness statements in the defamation proceedings that they liaised closely with Mr. White, a fact which Mr. White also confirms in his provisional liquidator's report.

11 Mr. Cruz further contends that EIC cannot rely on legal professional privilege to withhold inspection as insufficient detail has been provided in relation to the documents over which privilege is asserted. Further, as regards the claim to litigation privilege, he states that EIC has failed to show that communications withheld from inspection were made for the dominant purpose of use in litigation and he refers to the reports prepared by Mr. White to show why, in his view, this cannot be the case. In particular, he refers to the following extracts from those reports:

> "*Provisional liquidator's report dated 21 October 2016:*
>
> 14. My investigations to date have indicated a number of potential claims which may be available to the Company which would require further investigation and assessment by a liquidator with the benefit and consideration of appropriate advice. It would be inappropriate to go into any detail about such claims in a public document, and while I note the possibility of such claims, I have not made any allowance in the SAL for the possibility of such recoveries improving the Company's ultimate financial position. This is because I consider any such estimate of net recoveries to be premature and subject to further advice.
>
> *Liquidator's report dated 22 December 2016:*
>
> Further enquiries are required, in my opinion, into the conduct of the business and affairs of the Company. Upon completion of my enquiries and after obtaining the necessary legal advice I will consider if it is appropriate to pursue any claims which may result in benefit and increased assets for the liquidation estate.
>
> Until my enquiries have been further advanced I am unable to determine at this stage as to whether I will pursue claims under Part 10 of the Insolvency Act 2011.
>
> *First liquidator's progress report dated 14 August 2017:*
>
> My investigations to date have indicated potential claims which may be available to the Company. I am currently considering those potential

claims along with my legal advisors. I consider it inappropriate to go into detail about such claims in a public document at this time."

12 Mr. Cruz's view is that these reports show that as late as August 14th, 2017, Mr. White was still only considering potential claims as he states in the report of that date. Further, he states that the fact that the claim form was issued on October 9th, 2017 without a prior letter of claim supports the conclusion that these proceedings were only in contemplation at a late stage and shortly before proceedings were issued.

13 Mr. Cruz states that what was known to and approved by the GFSC is an important part of his defence and he asks for inspection on an "enhanced disclosure" basis of all EIC's communications with the GFSC by reference to key terms so that disclosure will not depend on EIC's assessment of relevance/disclosability under the test in CPR r.31.6. He claims that given EIC's extensive access to the GSFC's records for the conduct of this claim and bearing in mind his right to a fair trial and to equality of arms, the court should not permit EIC to withhold inspection of these documents, especially in the light of EIC's deficient standard disclosure, the very large claim which he is facing, and the relative ease and low cost with which the disclosure he is asking for could be provided.

14 EIC's first response to this application came in the form of the fourth witness statement of Sebastian Triay. Mr. Triay points out that because Mr. White was not contacted by the GFSC until Thursday, July 21st, 2016, there is no correspondence between him and the GFSC prior to his appointment as provisional liquidator on Monday, July 25th, 2016 other than certain standard documents such as a certificate of eligibility, details of his charging rates and an application for his appointment. Mr. Triay further confirms that EIC has provided extensive disclosure, that it takes its disclosure obligations very seriously and that it even agreed to go further than was required and provided the entirety of EIC's documents "harvested" by Mr. White from EIC's servers, totalling around 2.3 million documents, as requested by the defendants up until the date of the provisional liquidation, namely July 25th, 2016.

15 Mr. Triay states that non-privileged and disclosable communications between the GFSC and Mr. White have been provided and that there are a further 1,334 documents between the GFSC and Mr. White which have not been disclosed as they are not material to this claim because they fall into the six broad categories referred to in Triay & Triay's letter dated September 7th, 2020, namely:

(a) correspondence with reference to the provisional liquidation/ liquidation/reporting generally;

(b) correspondence reference claims management;

(c) correspondence with regulators in other foreign jurisdictions/ compensations schemes/updates to policy holders through regulators and updates to GFSC about this;

(d) communications in relation to other claims involving Enterprise Insurance in various jurisdictions which have no relevance to this litigation and a number of which are in any event privileged;

(e) communications concerning exchange of information and cooperation with GFSC which are not relevant and a number of which are in any event privileged; and

(f) communications in relation to the sharing of documents held by the liquidator with inspectors and in relation to the grant of access to the inspectors to the relativity platform.

16 Mr. Triay further states that inspection has been withheld in respect of ninety-six documents since July 25th, 2016, ninety-two of which are covered by legal advice privilege and four of which are covered by litigation privilege. As regards litigation privilege, Mr. Triay states that litigation was in contemplation as early as September 2016 and he relies on a letter dated September 22nd, 2016 sent to EHL in this regard.

17 Mr. Triay also makes the point that there is nothing untoward about the GFSC and Mr. White's cooperation which is to be expected given EIC's failure as a regulated insurer and the repercussions this has had for policy holders and compensation schemes in various jurisdictions. He also states that there is nothing improper about Triay & Triay acting for the GFSC and EIC. He confirms that the issue of knowledge of the GFSC is a relevant one and that this is the reason why some communications with the GFSC have been disclosed but that this does not mean that Mr. Cruz has an entitlement to inspect every communication which has passed between Mr. White and the GFSC, nor that he has an entitlement to privileged documents. As for the additional nine documents provided on September 7th, 2020, Mr. Triay states that this was done pursuant to EIC's ongoing duty of standard disclosure and he notes that not all of these documents related to communications between the GFSC and the liquidator. Mr. Triay states that the 2012 letter from the GFSC to the Attorney-General concerning the Echelon transaction does not undermine EIC's claim but simply highlights the extent to which the GFSC were misled as a result of a backdated invoice.

18 Mr. Cruz responded with his fifth witness statement and points out that Mr. Triay was wrong to state that he had been told that there were no documents passing between the GFSC and Mr. White prior to his appointment on July 25th, 2016 as he had been told that there were no such communications in the period May 25th–July 21st, 2016 but that there had been no mention of the period July 21st–25th, 2016. Further, he states that Mr. Triay was wrong to say that he was seeking all documents for this period when it was

clear that he was limiting the disclosure to the categories of documents listed in the schedule to the draft order he was seeking which in his view could be highly relevant. He further states that the categories of documents set out by EIC to justify its view that these documents are irrelevant are too wide and that documents in some of the categories could be highly relevant. Further, he states that the documents he seeks are no less relevant than the transcript of his interview with the GFSC's inspectors after Mr. White's appointment which he has provided at EIC's request.

19 Mr. Triay provided a reply to Mr. Cruz's witness statement in his sixth witness statement where he corrects an inconsistency in his previous statement and confirms that he had wrongly stated that there was no correspondence which Mr. White has or has had with the GFSC prior to his appointment as provisional liquidator when the correct position was that there was no disclosable correspondence capable of inspection in that period. He confirms that the position is that there were in fact fifty documents in the period July 21st–25th, 2016, thirty-nine of which had been marked as irrelevant (and some were also privileged) and eleven of which had been marked as privileged. These eleven documents formed part of the set of ninety-six privileged documents he had previously referred to in conjunction with the set of eighty-five documents dated after July 25th, 2016. Mr. Triay apologizes for the inaccuracy in his previous statement but states that this error had no material impact on the application as EIC's position continued to be that there are no documents to disclose in the period July 21st–25th, 2016.

20 This was the position when the first part of the hearing of this application took place on November 1st, 2020 but which had to be adjourned because the time estimate of one day proved to be inadequate and the matter was adjourned, part-heard, to November 24th, 2020. Following that adjournment, EIC filed and served the second witness statement of Charles Simpson on Thursday, November 20th, 2020 in response to Sir Peter's opening submissions. As this witness statement was only served shortly before the adjourned hearing date, the matter was adjourned again by consent to February 1st, 2021.

21 The initial position taken by Peter Caruana & Co. in response to this witness statement was that EIC needed to obtain the court's permission for it to be admitted and that they would be filing a witness statement in response. Peter Caruana & Co. then indicated that Mr. Cruz would not object to the admission of this witness statement provided that Mr. Cruz could file a witness statement in reply, if so advised, and that Mr. Cruz's counsel could reopen at the hearing on February 1st, 2021. An order was made on January 21st, 2021 granting EIC permission to rely on Mr. Simpson's witness statement and granting Mr. Cruz permission to file a witness statement in response by January 8th, 2021 (later extended to January 12th, 2021). In the event, no witness statement in response was filed by Mr. Cruz.

22 Mr. Simpson confirms in his witness statement that due to the seriousness of the submissions made by Sir Peter concerning the alleged inaccuracies of EIC's disclosure and the challenge to documents marked as privileged on the first day of the hearing, he undertook a personal review of the contested documents which he had not carried out previously and that he was supported in this exercise by Sarah McCann, EIC's London junior counsel of 19 years' call. Following this review, Mr. Simpson concludes that EIC had been unduly generous to the defendants and that none of the fifty documents covering the period July 21st–25th, 2016 were in fact standard disclosable in the first place as they did not concern the claim and related to the following matters:

(a) correspondence with the FSC in relation to the issue of roadside assistance;

(b) correspondence in relation to the FSCS and its operation;

(c) correspondence relating to authorization for emergency windscreen repairs;

(d) correspondence with Mr. Michael Ozon;

(e) correspondence received from Hassans with reference to the Legal Ex claim/Jiva claim. This claim is well known to the fourth defendant as he was involved in giving evidence pre-provisional liquidation and the claim has no relevance to this litigation;

(f) correspondence in relation to CCSL, EIC's then claims manager;

(g) correspondence in relation to policy cancellations and the issue of the return of premium pending the appointment of the provisional liquidator;

(h) confidential and privileged correspondence in relation to, prior to, and arising from the hearing of the GFSC application for the appointment of a provisional liquidator of the claimant on July 25th, 2016;

(i) the forwarding of an email received from NSL Telecoms Ltd., which was a company who provided telecom solutions; and

(j) the forwarding of an email on July 25th, 2016 notifying of a press release on the EHL website.

23 Based on this review, Mr. Simpson confirms that the eleven documents originally marked as privileged for the period July 21st–25th, 2016 were not standard disclosable and that twenty-five out of the eighty-five documents marked as privileged for the period after July 25th, 2016 were not standard disclosable either. He also confirms that he was satisfied that these documents had in any event all correctly been marked as privileged except one, namely an email from him to Peter Taylor and others, dated July 22nd, 2016, setting up a meeting and asking Mr. White whether he consented to being appointed provisional liquidator, and which

he exhibits to his statement. By way of further explanation, Mr. Simpson states at para. 11(b) that these thirty-six documents withheld from inspection:

> "are all communications which involve Triay & Triay and Mr. White/GFSC in circumstances where Triay & Triay acted for both parties and where advice was sought by both parties and Triay was advising in respect of the liquidation proceedings and/or the Provisional Liquidation order and/or other steps those parties should take."

24 Mr. Simpson confirms that the remaining sixty documents dated after July 25th, 2016 and originally marked as privileged had been correctly withheld from inspection by Mr. Triay who had marked four documents as subject to litigation privilege and eighty-one as attracting legal advice privilege. His view, however, is that two documents dated April and May 2017 should be reclassified as attracting litigation privilege rather than legal advice privilege. Mr. Simpson further explains that the other four documents withheld from inspection on the ground of litigation privilege are all dated November 2016 and that all six documents came into existence for the dominant purpose of litigation. To support this conclusion, Mr. Simpson exhibits the letter to the directors of EHL dated September 22nd, 2016 referred to by Mr. Triay. In this letter, EIC puts EHL on notice of a proprietary claim in relation to amounts allegedly wrongfully paid to EHL from payments made by EIC to EIG and sought an undertaking that EHL would not dispose of these moneys. This letter contains a table where actual staff costs and wages are set against the alleged (and vastly greater) fee paid to EIG for these services and goes on to state as follows:

> "In making the substantial and excessive payments from the Company to EIG Services, Mr. White asserts that the directors were acting both in conflict of interest and also breach of fiduciary duties owed to the Company given that the payments necessarily aggravated the extent of the Company's solvency difficulties during the relevant periods and were self-evidently not commensurate with the services provided by EIG Services Limited or in the commercial interests of the Company. Rather, the payments made through the Marketing Agreement amounted to a device to extract monies from the Company that could not at the material time have been declared as a dividend by the Company itself given the issues that had arisen concerning it meeting solvency requirements in accordance with Gibraltar regulatory law."

25 Mr. Simpson also exhibits an exchange of correspondence which followed from this letter with Drydensfairfax solicitors acting for EHL's representatives as further evidence that litigation was in contemplation in September/October 2016 and justifies the marking of these six documents as subject to litigation privilege. Finally, Mr. Simpson also exhibits a file note of a meeting between Mr. White and Mr. Clayden which took place on August 8th, 2016 which states that the cost of EIC's services was the

employees and that the payment of 8% GWP "was a means of extracting profits from the insurance company without declaring a dividend which would not have been permitted by FSC/solvency."

26 As for all eighty-nine documents withheld from inspection on the grounds of legal advice privilege, Mr. Simpson states as follows at para. 16 of his witness statement:

> "As a result of my evidence set out above, there are now 89 documents which continue to be marked and withheld from inspection on the ground of legal advice privilege. Those are communications where Triay are engaged by both the GFSC and Mr. White and the parties to the communications concerned are part of the continuum of communications in which advice was sought and given. There is therefore no misconception on the part of the claimant or its legal team."

27 Mr. Simpson then turns to the "enhanced disclosure" sought by Mr. Cruz of 1,334 documents and confirms that these have been reviewed by Mr. Triay and marked as irrelevant, not by reference to the categories referred to in Triay & Triay's letter dated September 7th, 2016 but because they are irrelevant following an individual review carried out by Mr. Triay of each document concerned. Mr. Simpson then states that, given time constraints, he reviewed a sample of 300 out of these 1,334 documents and that they are not standard disclosable and that some of these are also privileged. Further, he confirms that fifty-four documents were duplicates, three documents had erroneously remained on the list but had in fact been disclosed to the defendants and that 255 documents were not in fact communications between GFSC and the liquidator. As a result, the total number of documents in this category was reduced to just under one thousand.

Submissions on the challenge to EIC's entitlement to withhold inspection on the grounds of legal professional privilege

Legal advice privilege

28 One of Sir Peter's overarching submissions was that inspection should be ordered because Mr. Cruz had lost confidence in EIC's ability to comply with its standard disclosure obligations. He relied on the various mistakes made by EIC in the disclosure exercise. Mr. Triay had stated in his fourth witness statement that there were no documents in the period July 21st–25th, 2016 (in keeping with earlier correspondence on February 18th, and March 1st, 2019 from Triay & Triay) but he then had to correct and apologize for this error in his sixth witness statement when he confirmed that there were fifty documents within this date range, ten (originally eleven) of which were standard disclosable but withheld from inspection because they were subject to legal advice privilege. He further confirmed that the remaining documents were irrelevant. When a further review was carried out by Mr. Simpson, the

view taken was that none of these fifty documents were standard disclosable in the first place. As for the documents dated after July 25th, 2016, Mr. Simpson's view was that twenty-five documents had been incorrectly marked as standard disclosable and two were reassigned as falling under litigation privilege.

29 Further, Sir Peter submitted that it beggared belief that there were no more than forty-three largely inconsequential disclosable documents passing between Mr. White and the GFSC when Mr. Taylor's and Ms. Barrass's respective witness statements suggested otherwise. In particular, they referred to the regular contact they enjoyed with Mr. White in the period July to October 2016 in the lead up to the completion of the provisional liquidator's report and when they said they had become aware about several concerns about EIC such as the "icebreaker" policies, the writing of 10,000 allegedly free-standing unauthorized roadside policies and the nature of the EIG contract from Mr. White. Despite this, there was no disclosed material in that regard.

30 Against that background, Sir Peter submitted that communications between the GFSC and EIC were not communications between a lawyer and client and that it was inconceivable that they were covered by legal advice privilege. Further, EIC could not assert privilege on behalf of the GFSC. In Sir Peter's submission, these were therefore communications between EIC and a third party which did not attract legal advice privilege following the principle established in *Wheeler* v. *Le Marchant* (8).

31 Sir Peter further submitted that in order to withhold inspection on the grounds of legal advice privilege, EIC was required to show that the documents being withheld from inspection had been made confidentially and for the dominant purpose of giving legal advice as the English Court of Appeal had confirmed in *R. (Jet2.com Ltd.)* v. *Civil Aviation Auth.* (2). He said that EIC had failed to establish this, even after service of Mr. Simpson's witness statement which Sir Peter criticized as being ambiguous, obscure or deficient. The first key passage in that witness statement to which Sir Peter referred was para. 11(b). Sir Peter submitted that the reference to these communications "involving" Triay & Triay strongly suggested that Triay & Triay had been copied into these exchanges, which in turn suggested that these communications did not concern the seeking or receiving of legal advice. Further, he submitted that the language used, including "involve" and "in circumstances" was all designed to weave a complex and convoluted form of words which failed to state clearly or at all that these were communications where advice was sought or obtained by EIC from Triay & Triay.

32 Sir Peter levelled similar criticisms against the language used in para. 16 of Mr. Simpson's witness statement which deals with the claim to legal advice privilege generally. In that paragraph, Mr. Simpson states that these

documents were "part of the continuum of communications in which advice was sought and given." Sir Peter submitted that the sentence construction used was stilted, ambiguous and obscure and sought to create a cloak of entitlement to privilege which was potentially wider than the law provided for. Further, in order for the court to determine the "dominant purpose" of a document, it had to take a realistic and commercial view of the position which it was unable to do on the limited material provided by EIC in this regard.

33 In response, Mr. Jones submitted that Mr. Cruz's obsession about an improper and incestuous relationship between Mr. White and the GFSC underpinned the application and that there was no basis for his misgivings in that regard. As regards the errors made by EIC in the disclosure exercise, Mr. Jones submitted that they had to be seen in the context of the scale of the disclosure exercise undertaken. EIC had a total of around 2.5 million documents, and this large number of documents was reduced to 858,000 when search terms were applied to them. Apart from this, there were a total of 88,674 of Grant Thornton documents which were reduced to 25,500 when search terms were applied to them. This brought the total number of documents "harvested" by reference to search terms to around 884,000, of which 50,000 were ultimately disclosed and inspected. Mr. Jones also pointed out that the defendants had requested generic disclosure of all EIC documents created prior to liquidation which totalled 2.3 million documents and which had been provided by EIC for pragmatic reasons. Where a small number of mistakes had been identified, they had either not been material or had ended up benefiting the defendants. If errors were going to be relied on to support a challenge of this sort, Mr. Jones said that there needed to be a causative link between any errors made and the relief being sought and there was no such link here.

34 Mr. Jones confirmed that despite some initial confusion, each of the communications between Mr. White and the GFSC over which privilege was being asserted had been individually reviewed by Mr. Triay as Mr. Simpson had confirmed in his witness statement. Further, Mr. Simpson had also reviewed the documents and, supported by Miss McCann, had confirmed the position in clear and unambiguous terms. Mr. Jones submitted that these documents were part of a continuum of communications where Triay & Triay had been instructed at the time by both EIC and the GFSC and consisted of either a request made by EIC or the GFSC for advice either separately or on behalf of both of them with a limited waiver of privilege to the other. These documents had accordingly been properly withheld from inspection and the principle in *Wheeler* (8) had no application in these circumstances. More generally, Mr. Jones submitted that a stand back analysis of EIC's evidence as a whole showed that the claim to legal advice privilege had been properly taken.

Litigation privilege

35 Apart from relying on Mr. Cruz's general concerns about the integrity of the disclosure exercise and level of disclosure, Sir Peter submitted that EIC had failed to discharge the burden of establishing that litigation privilege applied to the six documents in question. He submitted that EIC had failed to provide sufficiently detailed evidence to make out the claim that these communications were created for the sole or dominant purpose of conducting this litigation and consisted of little more than bare assertions. Sir Peter submitted that there was at least one other purpose for which these communications could have been created, namely regulatory reporting by the GFSC on the liquidation of EIC. To make good this submission, Sir Peter relied on the guidance provided by Beatson, J. in his judgment in *West London Pipeline & Storage Ltd.* v. *Total UK Ltd.* (7), which concerned the explosion and fire at Buncefield oil terminal which led to an application for specific disclosure of an internal investigation report which had been given to the company's solicitors following the accident. The question was whether the court could go behind an affidavit claiming litigation privilege, and if so in what circumstances and by what means. The judge said as follows ([2008] EWHC 1729 (Comm), from para. 51):

> "51. Litigation privilege differs from legal advice privilege, which protects all communications to lawyers. It relates only to communications at the stage when litigation is pending or in contemplation, and only those made for the sole or dominant purpose of obtaining legal advice or conducting that litigation. The modern law on litigation privilege stems from the decision of the House of Lords in *Waugh v British Railways Board* [1980] AC 521, a decision in which the approach of the High Court of Australia in *Grant v. Downs* (1976) 135 C.L.R. 674, and in particular the formulation of Barwick CJ (at 677), was adopted.
>
> 52. In *Waugh's* case Lord Edmund Davies stated that he would certainly deny a claim for privilege when litigation was merely one of several purposes of equal or similar importance intended to be served by the material sought to be withheld from disclosure. He stated (at 542) 'it is surely right to insist that, before the claim is conceded or upheld, such purposes must be shown to have played a paramount part' and (at 543) that 'the public interest is, on balance, best served by rigidly conforming within narrow limits the cases where material relevant to litigation may lawfully be withheld'. Lord Wilberforce said (at 531) that it was clear that the due administration of justice strongly required the disclosure and production of the Board's report on an accident, and that in order to override this public interest the sole or

dominant purpose of the report had to be to prepare for litigation. In *Bank Austria Akt. v Price Waterhouse* 16 April 1997 Neuberger J said:

> 'A claim for privilege is an unusual claim in the sense that the legal advisers to the party claiming privilege are, subject to one point, the judges in their own client's cause. The court must therefore be particularly careful to consider how the claim for privilege is made out.'

53. Thus, affidavits claiming privilege whether sworn by the legal advisers to the party claiming privilege as is often the case, or, as in this case, by a Director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect. On the need for specificity in such affidavits, see for example, Andrew Smith J in *Sumitomo Corp v Credit Lyonnais Rouse Ltd* [2001] 151 NLJ 272 at [39], referred to without criticism by the Court of Appeal [2002] 1 WLR 479 at [28], although the court did not (see [81]) consider the criticisms of the affidavit in that case were justified."

36 Staying with *West London Pipeline & Storage Ltd.*, the judge then set out a summary of the law which deals with the circumstances under which an affidavit of documents is conclusive and the options open to the court when the right to withhold inspection is not established (*ibid.*, at para. 86):

"(1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* (2007) 11–46, and paragraph [50] above. 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).

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved: *Re Highgrade Traders Ltd; National Westminster Bank plc v Rabobank Nederland.*

(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: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority.*

(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: *Neilson v Laugharane* (the Chief Constable's letter)*, Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co,* per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montivedeo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland*.

(4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it:

(a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection: *Neilson v Laugharane; Lask v Gloucester Health Authority.*

(b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory: *Birmingham and Midland Motor Omnibus Co Ltd v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland.*

(c) It may inspect the documents: see CPR 31.19(6) and the discussion in *National Westminster Bank plc v Rabbo Bank Nederland* and *Atos Consulting Ltd v Avis plc (No. 2).* Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

(d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a

> defendant to a freezing injunction should disclose his assets: (*House of Spring Gardens Ltd v Wait; Yukong Lines v Rensburg; Motorola Credit Corp v Uzan (No. 2)*). However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents: *Frankenstein's* case; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* and *Fayed v Lonrho.* In cases where the issue is whether the documents exist (as it was in *Frankenstein's* case and *Fayed v Lonrho*) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue."

37 To further illustrate the importance of a party asserting litigation privilege having to provide detailed evidence so that the claim can be subjected to "anxious scrutiny," Sir Peter cited *Tchenguiz* v. *Director of Serious Fraud Office* (5), where Eder, J. stated as follows ([2013] EWHC 2297 (QB), at para. 52):

> "52. First, as submitted by Ms Phelps, it is important to bear in mind that Mr Verrill is not the individual who was involved in producing any of the Reports; nor was he involved in relation to the instructions given at the time to order such production. However, as submitted by Mr Trower, that is not necessarily fatal. Notwithstanding the observations made in the cases referred to by Ms Phelps, I see no reason in principle why someone in the position of Mr Verrill (who is, in his capacity as a solicitor, an officer of the court) should not give evidence as to the provenance and purpose for which a document is produced on information and belief. However, if that is done, I accept that it is entirely proper and justifiable to subject such evidence *a fortiori* to 'anxious scrutiny' in particular because of the difficulties in going behind that evidence. I did not understand Mr Trower to disagree with that approach although he submitted that if I was not satisfied with the evidence as it stood, I could and should in effect adjourn the matter to permit cross-examination of Mr Verrill or to allow the Joint Liquidators to put in further evidence. I do not accept that submission at least in the circumstances of the present case. The Joint Liquidators have had ample notice of this application and I see no reason why they should be given what would in effect be a second bite at the cherry. That does not seem to me to be consistent with the overriding objective."

38 There were a number of further authorities relied on by Sir Peter which he submitted illustrated the level of detail expected when making a claim to litigation privilege. In *Waugh* v. *British Railways Bd.* (6), a challenge to withhold an accident inquiry report on the grounds of legal professional privilege succeeded because the purpose of obtaining legal

advice in anticipated litigation was of no more than equal rank and weight with the purpose of railway operation and safety. In *Sumitomo Corp.* v. *Credit Lyonnais Rouse Ltd.* (4), it was held that the privilege conferred on a selection of unprivileged documents by lawyers to prevent the nature of advice given being given away did not extend to copies or translations that were the result of selection made for litigious purposes from the documents of the lawyers' own client. *Starbev GP Ltd.* v. *Interbrew Central European Holdings BV* (3) concerned a successful challenge by Starbev against Interbrew's claim to withhold inspection of two categories of documents on the grounds of litigation privilege on the grounds that they involved pre-litigation fact-finding exercises. The claim arose from Starbev's purchase of Interbrew's brewing business where the sale provided for deferred consideration to be paid to Interbrew in the event of a subsequent sale of the business if the sale exceeded certain thresholds. The first category of documents withheld related to advice from a bank concerning the structure of the consideration for the sale by Starbev. The second concerned work done by accountants in relation to the agreement governing the sale. Hamblen, J. (as he then was) held that the bank's role was investigatory and unless it confirmed there was substance to the suspicion, there was no real reason to anticipate litigation which was only a possibility. Insofar as the documents with the accountants were concerned, Interbrew accepted that the purpose of instructing them had been to carry out an audit pursuant to its rights under the agreement and neither the retainer letter nor a later email from them to the accountants mentioned anticipated litigation either as the context to, or the purpose of, a request for a report. Sir Peter referred to the extensive evidence that was given in that case by Interbrew on their communications with the bank and the accountants, the reason for these communications and, in the case of the accountants, contemporaneous documents all of which enabled the court to subject the evidence to "anxious scrutiny."

39 Further, Sir Peter submitted that the letter sent to EHL on September 22nd, 2016 did not support EIC's position that this litigation was pending or reasonably in prospect at the time the documents were created as the purpose of that letter was only to prevent the dissipation of funds by EHL. Instead, Sir Peter focused on Mr. White's various reports which he said showed that the intention to bring this claim can only be said to have been formed after August 14th, 2017. He submitted that the report of October 21st, 2016 only identified potential claims, the report of December 22nd, 2016 only stated that Mr. White was taking legal advice to consider whether it was appropriate to pursue claims and the report of August 14th, 2017 stated that he was considering potential claims but that it was inappropriate to go into detail at that time. Further, Sir Peter referred to EIC's failure to serve a pre-action letter of claim prior to the claim being issued and submitted that this further supported the conclusion that the

intention to bring the proceedings had only crystallized shortly before the claim was issued.

40 For these reasons, Sir Peter submitted that this was not the sort of case where the court should find it difficult to go behind the witness statements relied on by EIC because those witness statements did not contain the detail required to support the claim in the first place and could hardly be said to be determinative. Further, he submitted that the court should now order inspection because, following the reasoning in the *Tchenguiz* (5) case, EIC had had a "second bite at the cherry" with the second witness statement of Charles Simpson and had still failed to establish its claim.

41 In response, Mr. Jones submitted that Mr. Simpson had confirmed the correctness of Mr. Triay's original assessment as to the four documents marked as being subject to litigation privilege. Further, little or no importance should be attached to the fact that two documents dated April 2017 and May 2017 had been re-categorized from legal advice privilege to litigation privilege in circumstances where, given the time of creation of those documents, those privileges could in any event legitimately have overlapped and where this caused no prejudice. Further, he submitted that the evidence relied on by EIC was sufficient to claim litigation privilege and that it was now conclusive following the guidance set out in Beatson, J.'s judgment in *West London Pipeline & Storage Ltd.* (7) ([2008] EWHC 1729 (Comm), at para. 86(3)) as it could not be said that it was reasonably certain that these statements erroneously represented or misconceived the character of the documents in respect of which privilege was claimed or that they were incorrect or incomplete on the material points.

42 Further, Mr. Jones submitted that EIC had provided contemporaneous evidence to support the conclusion that this claim was in contemplation when the six documents had been created and which Mr. Simpson had confirmed were dated November 2016, April 2017 and May 2017. Mr. Jones also said that Sir Peter was seeking to minimize the significance of the letter of September 22nd, 2016 in referring to it as nothing more than a letter giving notice of a claim to prevent the dissipation of funds by EHL when the threat of an injunction contained in that letter could only have been made if this litigation was in contemplation. Further, he said that this letter referred specifically to the fact that in the course of his investigations Mr. White had discovered that substantial payments had been made to EHL via EIG in breach of fiduciary duty, that these payments were not commensurate with the services provided and that this amounted to a device to extract moneys from EIC which could not have otherwise taken place. Mr. Jones also referred to the other contemporary evidence exhibited by Mr. Simpson, namely the file note of a meeting between Mr. White and Mr. Clayden dated August 8th, 2016 which records Mr. Clayden's reference to the extraction of

profits from EIC and the correspondence with Drydensfairfax solicitors, solicitors for the administrators of EHL.

43 Mr. Jones submitted that the court should not approach a claim to privilege as a box ticking exercise and that it was ultimately a question of judgment for the court as to whether the court should go behind the affidavit referred to. Mr. Jones commended a stand back analysis as to whether the challenge should succeed and, in his submission, EIC's evidence, especially following the service of Mr. Simpson's witness statement, was determinative as to the claim to litigation privilege. Further, he said that Mr. Cruz was not entitled to know the subject of the discussions which were the subject of legal professional privilege and that he was seeking to undermine the protection which this privilege was designed to protect.

Discussion on the challenge to EIC's entitlement to withhold inspection on the grounds of legal professional privilege

Legal advice privilege

44 In order for a particular communication or document to be protected by legal advice privilege, the proponent of the privilege must show that the dominant purpose of that communication or document is to obtain or give legal advice. Sir Peter's primary submission that it was inconceivable that communications passing between EIC and the GFSC as a third party could attract legal advice privilege was based on the principle set out in *Wheeler* (8). That was a case where a claim for inspection was made in relation to correspondence passing between surveyors and solicitors and legal advice privilege was sought to be extended to the surveying advice provided. It was held that the surveyors were not employed as agents to communicate with the solicitors to obtain legal advice, that there was no litigation active or contemplated at the time of the correspondence and that the documents sought had to be produced. The facts of this case are different as they concern communications between the GFSC and Mr. White involving Triay & Triay, who were the legal advisers to both parties at the time, and where Mr. Simpson has stated that those communications form part of the continuum of communications in which legal advice was sought and given. In these circumstances, the claim to legal advice privilege is not inconceivable although the fact that Triay & Triay is included in those exchanges is clearly not determinative in assessing whether they attract legal advice privilege.

45 Whether these communications are covered by legal advice privilege ultimately depends on the purpose of each of them: *R. (Jet2.com Ltd.)* v. *Civil Aviation Auth.* (2). Further, as Hickinbottom, L.J. observed in his judgment in *Jet2.com Ltd.*, in the case of a single multi-addressee email sent simultaneously to various parties including a lawyer, the purpose of the communication needs to be identified taking into account the wide

scope and expansive interpretation given to "legal advice" and the concept of "continuum of communications." The latter meaning ongoing exchanges between a solicitor and client in order that advice can be sought and given and which may include communications sent by way of information only if they are part of a rolling series of communications with the dominant purpose of instructing the lawyer. So, if the dominant purpose of a multi-party communication including a lawyer as addressee is to obtain the commercial views of the non-lawyer addressees, it will not be privileged even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee unless it may disclose the nature of legal advice requested or obtained from a lawyer.

46 With this guidance in mind, I turn to the various categories of documents. Mr. Triay originally stated that the fifty documents dated between July 21st–25th, 2016 (which we now know exist) did not exist as had been previously stated in earlier correspondence from Triay & Triay. He then corrected this and said that there was no disclosable correspondence capable of inspection in this date range because thirty-nine were irrelevant and eleven were privileged. Mr. Simpson's review led him to conclude that all these documents were all wrongly marked as standard disclosable documents. The detailed description Mr. Simpson provides at paras. 8(a)–(j) to support his conclusion is helpful as it provides a sound evidential basis to support the final view that none of these documents are in fact standard disclosable.

47 Whilst the various corrections which EIC has had to make are unfortunate and have served to fuel suspicion in Mr. Cruz that something is amiss in the disclosure provided by EIC, there is nothing to suggest that the errors made are anything other than genuine mistakes which have not in fact prejudiced Mr. Cruz or the other defendants. In the light of these explanations and in particular Mr. Simpson's reasoned conclusion in this regard, I consider that his witness statement marks the end of this aspect of Mr. Cruz's complaint and I dismiss the application for inspection of these documents insofar as it relates to those fifty documents.

48 The position is different in relation to the documents dated after July 25th, 2016 where Mr. Simpson concludes that twenty-five are also not standard disclosable. In his oral submissions, Mr. Jones said that his reading of paras. 8 and 10 of Mr. Simpson's second witness statement was that these documents had been bundled together with the fifty earlier documents so that the categories of description provided at paras. 8(a)–(j) of Mr. Simpson's second witness statement applied to these later documents as well. Paragraph 8 of Mr. Simpson's witness statement, however, clearly links those categories of documents to the fifty documents dated July 21st–25th, 2016 and it is not clear to me that they apply to the later twenty-five documents. I am not therefore satisfied that Mr. Simpson has provided an itemized description or any fuller explanation to explain why the later documents are not material to

the claim. This is something which in my view should be explained further especially as Mr. Simpson has taken a different view to that taken originally by Mr. Triay and he has provided an explanation for this in relation to the earlier documents. I will therefore now proceed to determine whether Mr. Cruz should have inspection of the seventy-nine documents dated after July 25th, 2016 being documents over which legal advice privilege is claimed.

49 In his oral submissions, Sir Peter heavily criticized the language used in paras. 11 and 16 of Mr. Simpson's witness statement and said that the complex form of words used made the meaning behind them unclear and submitted that inferences should be drawn from this. In my view, the form of wording used does not suggest any sinister intent on the part of EIC when making the claim to legal advice privilege. For example, the reference to these communications forming part of a "continuum of communications in which advice was sought and given" rather than suggesting an attempt to obfuscate on the part of EIC is in fact something of a stock phrase when legal professional privilege is being claimed (see *Balabel* v. *Air India* (1), cited in *Jet2.com Ltd.* (2)) and simply refers to ongoing exchanges in order that advice can be sought and given and which may include communications sent by way of information only if they are part of a rolling series of communications with the dominant purpose of instructing the lawyer. On the whole, I do not consider that Mr. Simpson's use of language is elliptical or suggests that an improper claim to legal advice privilege is being made.

50 Mr. Jones on the other hand said that there was no error in Mr. Simpson's evidence and that it should be treated as conclusive. Further, he said that there was little to be gained from further particularizing the documents over which privilege was being asserted because what Mr. Cruz really wanted to know was the subject of the advice which was privileged and which he was not entitled to. Mr. Jones submitted that some of these documents relate to advice sought by either the GFSC or Mr. White and on behalf of both of them and others relate to advice from one client which Mr. Jones submitted was the subject of a limited waiver of privilege to the other. This, however, has not been detailed in the evidence provided. Only a very short and all-encompassing description has been provided to cover seventy-nine multi-addressee documents which fall into these different categories. More importantly, other than by reference to the position taken by EIC in relation to these documents, there is no direct evidence spelling out clearly that the dominant purpose for each of these communications whether created by the GSFC or Mr. White was to seek or obtain legal advice, whether as part of a continuum of communications or otherwise. There is no reason to believe that Mr. Simpson's conclusion has been reached other than as a result of a responsible and thorough analysis of the documents but given the nature of the communications and the different categories which they fall into, further detail is required to support the claim to legal advice privilege. This of course does not mean that EIC is

required to make disclosure of the very confidentialities that its claim to privilege is designed to protect. The fact, however, that Mr. Cruz may not get what he wants from this further particularization does not diminish the need for an appropriate level of detail to be provided in support of this part of EIC's claim to legal advice privilege.

51 Beatson, J.'s judgment in *West London Pipeline & Storage Ltd.* (7) summarizes the various options open to the court when it concludes that the court is not satisfied with the evidence before it that the right to withhold inspection has been established in a case where litigation privilege was claimed. One of those options is to order a further affidavit to deal with matters which the earlier affidavit does not cover or which is unsatisfactory and in my view, that is the proper course in this case.

52 I have not overlooked Sir Peter's submission that EIC should be refused a further "bite at the cherry" but I do not consider that ordering inspection is appropriate in this case. In *Tchenguiz* (5), Eder, J. considered that it was consistent with the overriding objective not to allow the joint liquidators "a second bite at the cherry" by allowing them to put in further evidence and their claim to litigation privilege failed because the dominant purpose test had not been met. In making that order, the court understood the nature of the documents sought to be withheld from inspection and which were central to the case. In this case, the position is quite different and ordering inspection runs the risk of abrogating EIC's claim to privilege which would not reflect a proper balancing out of the parties' rights. That is a solution of last resort and should only be undertaken if there is credible evidence that those claiming privilege have either misunderstood their duty, are not to be trusted with the decision making, or where there is no reasonable practical alternative, none of which apply here.

53 I do not consider that Mr. Cruz's arguments regarding EIC's failings in the disclosure exercise can bear the weight which Sir Peter seeks to ascribe to them and have to be seen in the light of the scale of the disclosure exercise which has been carried out as a whole. Further, except for the late production of the 2012 Echelon letter, the errors may well have been frustrating for the defendants but, if anything, they have resulted in greater disclosure than required being provided by EIC which has ultimately benefited the defendants. EIC has also provided the defendants with generic disclosure of all documents prior to July 25th, 2016, *i.e.*, its full electronic database, which means that wider disclosure than would usually be the case has been provided. Whilst the late disclosure of the 2012 Echeleon letter is more significant than the other errors made, it has now been disclosed as part of EIC's ongoing duty of disclosure and has to be viewed against a background of wide-ranging disclosure having been provided by EIC. Whilst it is of course important that standard disclosure is conducted in a rigorous and timely fashion, it is not unusual for further disclosure to be provided in this way.

54 I therefore order that EIC provides further evidence on its claim to legal advice privilege in relation to communications between the GFSC and EIC dated after July 25th, 2016.

Litigation privilege

55 The fact that Mr. Simpson (along with Miss McCann) determined that two documents dated April and May 2017 are covered by litigation privilege as distinct from legal advice privilege is of no significance even when viewed as one of several mistakes made by EIC in the disclosure process. The reclassification is of no practical consequence and it does not undermine the integrity of the disclosure exercise. I therefore turn to Mr. Cruz's contention that EIC has not established that this litigation was contemplated at the time these six documents were made and that they were not therefore made for the dominant purpose of conducting that litigation.

56 Mr. Simpson expressly states at paras. 13 and 14 of his witness statement that none of these six documents predates the date when litigation was in contemplation, that they came into existence for the dominant purpose of litigation and that the claim to litigation privilege is properly made. He has also confirmed that these documents are dated November 2016, April 2017 and May 2017 and therefore came after the letter to EHL dated September 22nd, 2016 and the other related documents which Mr. Simpson exhibits. Whilst the purpose of the letter dated September 22nd, 2016 was to ensure that moneys held by EHL were frozen, the demand made against EHL was based on a claim that funds had been misapplied by EIC's directors and that moneys had been unlawfully extracted from EIC. This claim was set out in some detail in the letter by reference to the differential between the actual staff costs and wages and the vastly greater fees paid to EIG under the marketing and services agreement for these services in alleged breach of fiduciary duty which is at the centre of this claim. In my view, this letter and the follow up correspondence with Drydensfairfax solicitors which provides further information concerning that claim clearly show that these proceedings were in contemplation before November 2016 when the first four of these six documents were created.

57 Although Mr. Simpson refers to the fact that these facts came into existence for the dominant purpose of litigation and not to "this litigation," when one reads paras. 13 and 14 of Mr. Simpson's witness statement and the exhibits as a whole he can hardly be said to be referring to anything other than this claim. It will be recalled that the letter of September 22nd, 2016 and the other documents exhibited by Mr. Simpson refer to a claim arising from the alleged siphoning away of moneys from EIC and this allegation goes to the very heart of this claim where EHL is one of the defendants.

58 Further, I do not consider that this conclusion is at odds with the reports provided by Mr. White as provisional liquidator and later liquidator because he only refers in those reports to potential claims on which he is taking advice. Mr. White clearly stated at para. 14 of his report as provisional liquidator dated October 21st, 2016 that whilst his investigations had indicated a number of potential claims which required further investigation, he did not consider that it was appropriate to go into detail about prospective or ongoing claims in a public document. This is a view he repeated in his first liquidator's report dated August 14th, 2017. That approach is entirely understandable and in no way displaces the clear conclusion to be drawn from the letter to EHL of September 22nd, 2016 that EIC's intention to bring these proceedings had crystallized by November 2016.

59 It does not follow either that because the pre-action protocol was not complied with before the claim was issued in October 2017, this litigation cannot have been anticipated or contemplated until shortly before that point. Whilst Mr. Cruz and the other defendants may feel aggrieved about the manner in which this claim was commenced (even though a stay was agreed to following service of the claim to remedy the failure to serve a pre-action protocol letter) there could be many reasons for this and this does not take things further for him in the light of the letter dated September 22nd, 2016 and other material exhibited by Mr. Simpson which bear out his statement that litigation was in contemplation in September/October 2016.

60 This therefore only leaves the complaint that EIC has not provided sufficient detail about these six documents which have been withheld from inspection on the grounds of litigation privilege. *West London Pipeline & Storage Ltd.* (7) refers to the need for evidence to be specific enough and to show something of the deponent's analysis as to the documents and the claim to litigation privilege and to refer to contemporary material if possible. That was a case where the court held that the affidavits relied on to support the claim to litigation privilege were not satisfactory because they failed to address evidence that pointed to the documents having been created for another purpose. Some cases will therefore require a higher level of detail than others. A similar issue arose in *Starbev* (3), where contemporaneous documents undermined the claim to privilege. In *Sumitomo* (4), one area of concern about the evidence supplied was that it did not address whether the party claiming privilege was concerned about a regulatory investigation, about actual litigation, about anticipated litigation which in fact materialized, or about anticipated litigation which never came about. In *Waugh* (6), it was clearly important for the party seeking to withhold inspection of an investigation report to fully address the dominant purpose for the creation of that report in circumstances where railway safety was one of the reasons why the report had been commissioned. All these cases show is that the level of detail required when making a claim to privilege about the documents to be withheld is ultimately fact sensitive

and that if there is cogent evidence undermining the claim to litigation privilege, it needs to be properly addressed by the proponent of the privilege.

61 Mr. Simpson's second witness statement includes the dates of each of the documents, exhibits contemporaneous material clearly establishing that these proceedings were in contemplation at the time when these documents were created and states that these documents came into existence for the dominant purpose of litigation which can only mean this claim. Further, there is no inherent implausibility in this claim. On the contrary, the claim to litigation privilege is entirely plausible in the light of the information provided by EIC and there is no basis to suggest that Mr. Simpson who is an experienced litigator and has been supported in his assessment by Miss McCann has made any error or that he has misconceived the character of the documents. Contrary to what Mr. Simpson expressly states to be the case, the mere possibility that there might have been some other dominant purpose for the creation of these communications because Mr. White liaised with the GFSC regularly generally during this period (including for other purposes) or the small number of documents supplied is in my judgment too slender a basis to mount a case challenging EIC's claim to litigation privilege over these documents. Concerns of this sort on the part of Mr. Cruz or other misgivings such as the mistakes made in the disclosure exercise by EIC do not provide a solid basis to mount this challenge and they are not analogous to cases where there is firm evidence pointing to a document having been created for some another dominant purpose and which therefore calls for further explanation.

62 The assessment which needs to be undertaken in determining whether a claim to litigation privilege has been properly made is ultimately a contextual one, not a prescriptive one. A balance must always be struck between the need to be as specific as possible without making disclosure of the very matters the claim for privilege is designed to protect. In my view, a fair reading of Mr. Simpson's witness statement as a whole shows that his assessment is the result of a principled and responsible interrogation of the documents on the part of EIC's legal representative which is consistent with the evidence provided. I am therefore satisfied that EIC and its legal team have properly addressed their minds as to whether the claim to litigation privilege is justified and that there are no grounds on which to go behind the evidence relied on by EIC in this regard. I therefore decline to make the order sought and uphold EIC's claim to litigation privilege over these documents.

Specific disclosure application

Submissions

63 Sir Peter submitted that the reference to "the above documents" in the application notice was clearly a mistake as can be seen from the draft order

attached to it and the correspondence leading up to the application. In his submission, therefore, this part of the application, described as "enhanced disclosure," relates to all communications passing between the GFSC and Mr. White.

64 Sir Peter said that there were bound to be more disclosable documents in the light of the close collaboration which had clearly taken place between the GFSC and Mr. White as evidenced by the witness statements of Mr. Taylor and Ms. Barrass and the fact that the GFSC had provided confidential documents to Mr. White. In his submission, the documents sought following Mr. White's appointment were just as important as the transcript of the interview carried out by the GFSC's inspector which had also been carried out following Mr. White's appointment and which Mr. Cruz had provided. Further, Sir Peter said that EIC had approached disclosure of these documents wrongly by assessing whether they belonged to one of the six categories of documents drawn up by them and which were so wide that at least two of them could not be dismissed as being irrelevant, namely "correspondence with reference to the provisional liquidation/liquidation/reporting generally" and "communications concerning exchange of information and cooperation with the GFSC which are not relevant and a number of which are in any event privileged." Sir Peter submitted that all of this coupled with Mr. Cruz's loss of confidence in the integrity of the disclosure exercise for the reasons set out above militated in favour of all these documents being produced by EIC especially when this would not result in any significant cost and would not cause EIC any prejudice if they considered them to be irrelevant.

65 Mr. Jones's primary position was that this part of the application specifically referred to privileged documents and did not support an application for disclosure of the one thousand or so documents of non-privileged documents passing between the GFSC and Mr. White. Despite this objection, he confirmed that EIC had conducted an individual review of all these documents and had concluded that the vast majority of them had absolutely no relevance to this litigation. Further, he said that the six categories of documents had been drawn up by EIC to help Mr. Cruz understand the decision taken but had not been created as a substitute for an individual review being carried out which he confirmed had been undertaken by Mr. Triay. This was followed by Mr. Simpson's second tier review, supported by Miss McCann, based on a review of a sample of approximately three hundred of these documents. Mr. Jones submitted that this part of the application did not even begin to get off the ground as relevance had not been established by Mr. Cruz. Further, he said that inspection could not be ordered before disclosure had even taken place and that this was important because an assessment had yet to be carried out as to whether these documents could also be withheld from inspection on the grounds of legal professional privilege.

66 Mr. Jones rejected the suggestion that there was a lack of willingness on the part of Mr. White to provide proper disclosure and submitted that the application was based on nothing more than speculation and represented an attempt by Mr. Cruz to try and find material to feed his unsubstantiated belief that the GFSC and Mr. White had improperly colluded. Further, the unreasonable nature of this request was clear from the wide terms of the order sought which referred not only to all documents to date but to an ongoing obligation to provide such communications by reference to the communications which "howsoever relate to or touch on any of the issues" in Mr. Cruz's schedule. Mr. Jones said that the transcript of Mr. Cruz's interview dealt with what Mr. Cruz said about EIC historically and that this was hardly a sound basis on which to say that the communications sought were equally relevant. He accepted that if these communications contained something which was relevant to the GFSC's knowledge about a particular issue in the claim, it would be disclosable and that it was for that reason that some communications between Mr. White and the GFSC had been disclosed. Mr. Jones said that whilst Mr. Cruz may wish that there were more such communications in existence, those were the only ones which fell within standard disclosure and that this application was nothing more than a fishing expedition which should be dismissed.

Discussion on specific disclosure

67 Although a literal reading of the application notice suggests that this application is only concerned with disclosure and inspection of documents over which privilege was claimed, the draft order attached to that application refers to all communications between the GFSC and Mr. White from July 21st, 2016 to date. EIC has engaged with this part of the application more generally subject to its reservation that if an order is made in favour of Mr. Cruz, the first stage is only for disclosure to take place which would give EIC the option of asserting privilege at the inspection stage as envisaged in CPR r.31.12. In the circumstances, I consider that the correct way to deal with this part of the application is for me to determine whether or not specific disclosure should be ordered in relation to the entire class of documents passing between Mr. White and the GFSC.

68 CPR r.31.12 confers on the court discretion to make an order for specific disclosure taking into account all the circumstances of the case. As stated in the notes at CPR 31.12.2, this is a power designed to ensure that the parties give access to documents which will assist the other's case and in order to make such an order, the court needs to satisfy itself as to the relevance of the documents sought by reference to the pleadings.

69 Mr. Triay states in his fourth witness statement that to the extent that, other than privileged documents, the exchanges between the GFSC and Mr. White relate to the categories originally provided in Triay & Triay's letter

dated September 7th, 2020 and none of the categories are relevant to the claim. Following a concern that an individual review of documents had not been carried out, Mr. Simpson confirms in his second witness statement that Mr. Triay did in fact carry out an individual review of each of the documents and that they were not marked as irrelevant on the basis of the categories of documents identified by EIC. Rather than undermining the disclosure exercise, the categories of documents provided by EIC assist because they explain the basis on which Mr. Triay reached his conclusion. Leaving to one side for a moment categories (a) and (e) which Sir Peter said might be relevant, the other four categories clearly refer to irrelevant classes of documents such as correspondence regarding claims management, correspondence in relation to other claims, correspondence with regulators in other jurisdictions, on compensation schemes and updates to policy holders and correspondence on the sharing of information on the relativity platform.

70 The first of the two categories which Sir Peter submitted could be potentially relevant refers to correspondence regarding the provisional liquidation/liquidation/reporting generally. There is no reason to conclude that such correspondence is disclosable when it has been assessed as not being disclosable. Similarly, the other category containing potentially relevant material refers to exchanges between the GFSC and EIC which are stated to be irrelevant and a number of those documents are also stated to be privileged.

71 This therefore leaves Mr. Cruz's more general point that there are bound to be more documents because only a small number have been disclosed and that this is incompatible with what Mr. Taylor and Ms. Barrass have said in their witness statements about their close collaboration they enjoyed with Mr. White and what they learnt from him about some of the key issues in this case from him, in particular the icebreaker scheme, the 10,000 roadside policies and the marketing and services agreement. In my view, there is little force in this argument. At least two of the issues referred to by Mr. Taylor and Ms. Barrass are covered in documents disclosed. The allegation that shareholders removed millions of pounds from the company is referred to in the draft provisional liquidator's report attached to an email from Mr. White to Mr. Taylor dated August 14th, 2016. The report of the provisional liquidator further refers to the 10,000 roadside policies and to substantial claims to be made against EHL and other group companies, namely EIG. There are clearly more documents which have not been disclosed but that is because they have been assessed to be either privileged or not standard disclosable but that is a different matter. There are no doubt cases where it is so obvious that documents of a certain kind may exist or their nature is sufficiently well understood by the court that the failure to provide such documents gives rise to an inference that the disclosure process has failed or is deficient but this is not

such a case. Mr. Cruz's complaint in relation to this part of the application again boils down to Mr. Cruz's lack of confidence in EIC and its legal team which is not a proper basis to support such an application in this case.

72 Further, Mr. Cruz's reliance on the fact that he provided Mr. White with a copy of the GFSC's inspector's report to justify the release of these documents is in my view based on tainted logic. The GFSC's report is self-evidently standard disclosable as it concerns an inquiry into relevant historic matters concerning EIC even though it was produced after Mr. White's appointment, and the same cannot be said of all communications passing between the GFSC and Mr. White.

73 All in all, this is a far-reaching application based largely on conjecture and a lack of confidence in EIC's assessment on standard disclosability. Mr. Cruz's concerns have been met with a second tier review carried out by Mr. Simpson who has confirmed that he has checked a sample of some 300 of these documents and a limited number of the balance of the documents, that Miss McCann has also reviewed a selection of these documents and that he agrees that they are not standard disclosable. He has also identified a number of errors in the exercise which are not material. EIC has further expressly stated that it would disclose any non-privileged documents which relate to the GFSC's knowledge about the issues which form part of the claim. This represents a principled and responsible interrogation of these documents by EIC's legal representatives in determining whether they are standard disclosable. My only reservation about this is that Mr. Simpson's review was limited to a sample of around three hundred documents because he stated time did not permit a full review. The errors which Mr. Simpson identified have not caused any prejudice to the defendants but the possibility exists that there may be further errors not captured by his partial review.

74 In my judgment, the just and proportionate way forward is for EIC's second tier review to be completed by EIC. This will enable EIC to determine whether there are any documents in this category of documents which have not already been disclosed and which support the defendants' case or damage EIC's case generally in particular, on the question of what the GFSC knew and approved by reference to all the issues in the parties' pleaded cases.

75 There may be a temptation to say that EIC should disclose non-privileged documents which it regards as irrelevant if nothing else as a pragmatic response to Mr. Cruz's complaint. That, however, is not a principled way for the court to deal with an application for specific disclosure in circumstances where relevance has not been established by Mr. Cruz. I am not therefore persuaded that there is a proper basis on which to make the order sought, however cost-effective such an exercise might be.

76 I therefore direct the completion of the second tier review in relation to these one thousand documents or so. If any documents are identified as being standard disclosable following this further review in particular, by reference to the GFSC's knowledge about the issues which form part of the claim these should be disclosed. In any event, EIC should provide a further witness statement to confirm the results of that exercise. If EIC finds that there are documents which are disclosable but which are protected from inspection on the grounds of legal professional privilege, the reasons for this should be appropriately explained in that witness statement. I will hear the parties as to a reasonable period of time for this exercise to be completed.

Summary and conclusions

77 As a result, I make the following orders:

(1) Mr. Cruz's challenge that EIC be entitled to withhold inspection of the exchanges between Mr. White and the GFSC in the period July 21st–25th, 2016 is dismissed.

(2) EIC is at liberty to provide further evidence explaining why twenty-five documents dated after July 25th, 2016 are not standard disclosable.

(3) EIC to provide further evidence on its claim to legal advice privilege in relation to communications between the GFSC and EIC dated after July 25th, 2016.

(4) The challenge to EIC's claim that it is entitled to withhold inspection of six documents over which litigation privilege is claimed is dismissed.

(5) EIC to complete the second tier review of non-privileged documents passing between the GFSC and Mr. White to determine whether there are any documents which have not already been disclosed which support the defendants' case as to what the GFSC knew and approved by reference to all the issues in the parties' pleaded cases. A witness statement should then be filed by EIC confirming the results of that exercise. If EIC considers that any document or documents identified in the course of this second tier review are disclosable but are protected from inspection on the grounds of legal professional privilege, the reasons for this should be given in the witness statement.

78 The parties are asked to agree a form of order giving effect to my judgment including the time period to be provided for compliance with it. I will hear the parties in relation to any dispute which may arise on the precise form of wording which the order should contain and any consequential matters arising on the handing down of this judgment.

Ruling accordingly.