



In The Supreme Court Of Bermuda

CIVIL JURISDICTION (COMMERCIAL COURT)

2021: No. 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124,
125 & 126

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

**AND IN THE MATTER OF THE AMALGAMATION AGREEMENT BETWEEN
JMH INVESTMENTS LIMITED AND JMH BERMUDA LIMITED AND JARDINE
STRATEGIC HOLDINGS LIMITED**

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981

Before: The Hon. Chief Justice Hargun

Appearances: Jonathan Adkin KC, Charles Hollander KC, Mark Chudleigh, Laura Williamson and David Thom of Kennedys Chudleigh Limited, Matthew Watson of Cox Hallett Wilkinson Limited, Delroy Duncan KC and Ryan Hawthorne of Trott and Duncan Limited for the Plaintiffs

Martin Moore KC and John Wasty of Appleby (Bermuda) Limited for
Jardine Strategic Holdings Limited and Jardine Strategic Limited

Dates of Hearing: 12 – 16 December 2022

Date of Judgment: 14 February 2023

JUDGMENT

Whether documents held by publicly listed subsidiary companies are within the power custody and control of their holding company; the test for “practical control”; whether there existed an arrangement or understanding whereby the parent company would have free and unfettered access to the documents held by its publicly listed subsidiary companies; whether English rule relating to joint privilege between a company and its shareholders is part of Bermuda law; whether a past shareholder may have access to documents of the company on the ground that they are subject to joint privilege; whether appraisal proceedings under section 106 of the Companies Act 1981 are hostile proceedings against the company and may constitute an exception to the joint privilege between a company and its shareholders

HARGUN CJ

A. Introduction

1. These proceedings concern, as set out in the earlier Judgment of this Court dated 24 November 2022, 18 separate actions commenced by Originating Summonses whereby the Plaintiffs seek, pursuant to the terms of section 106(6) of the Companies Act 1981 (the “**Act**”), appraisal of the fair value of their shares in Jardine Strategic Holdings Limited (the “**Company**”). These proceedings arise out of the amalgamation of the Company with JMH Bermuda Limited (“**JMH Bermuda**”) on 14 April 2021 (the “**Amalgamation**”) pursuant to the provisions of the Act, on which date JMH and the Company continued as Jardine Strategic Limited (“**Jardine Strategic**”). The Company and Jardine Strategic are collectively referred to as the “**Defendants**”.

2. During a five-day hearing in December 2022 the Court heard three applications on behalf of the Plaintiffs made by Summons dated 10 August 2022. The first application seeks an order that the Defendants give discovery on the footing the documents over which they have possession, custody or power (“**PCP**”) include the documents held by the following subsidiary companies or their agents:

- (i) Jardine Matheson Limited (“**JML**”);
- (ii) Jardine Matheson Holdings Limited (“**Jardine Matheson**”);
- (iii) Hongkong Land Holdings Limited (“**Hongkong Land**”);
- (iv) DFI Retail Group Holdings Limited (formerly known as Dairy Farm International Holdings Limited) (“**Dairy Farm**”);
- (v) Mandarin Oriental International Limited (“**Mandarin Oriental**”);
- (vi) Jardine Cycle & Carriage Limited (“**JC&C**”);
- (vii) PT Astra International Tbk (“**Astra**”);
- (viii) Jardine Motors Group Holdings Limited (“**Jardine Motors**”);
- (ix) Jardine Pacific Holdings Limited (“**Jardine Pacific**”); and
- (x) Zhongsheng Group Holdings Limited (“**Zhongsheng**”),

(together, the “**Principal Group Companies**”).

3. The second application seeks an order that the Defendants produce documents over which they presently assert privilege which were created before 12 April 2021.

4. The third application seeks an order that “*the Company shall, in accordance with paragraph 7.1 of the Order herein dated 12 November 2021, upload to the Data Room all documents within their possession, custody or power which are required by a Valuation Experts in these*

proceedings". This application is concerned with the Defendants having given disclosure of what they say is "*the essence of the request*".

5. The Court also heard two applications on behalf of the Defendants. First, by Summons dated 21 February 2022, the Defendants seek an order that the Plaintiffs provide discovery in accordance with paragraph 1 of Appendix 2 to the Directions Order dated 12 November 2021. It is said that the Plaintiffs have provided trade schedules produced for the purposes of these proceedings but have not given discovery of documents in their PCP during the relevant look-back period, as required by the Directions Order.
6. Second, by Summons dated 21 February 2022, amended with the leave of the Court granted on 28 September 2022, the Defendants seek an order that certain of the Plaintiffs provide in an unredacted form a number of documents disclosed pursuant to paragraphs 2 and 3 of Appendix 2 to the Directions Order. The Defendants contend that it is clear from the Plaintiffs' approach to redactions and from the redacted documents themselves that the redactions obscure relevant material, which should be provided.

B. The background

7. The background to these proceedings is set out in the Judgement of this Court dated 12 November 2021 and is repeated here for ease of convenience. As Mr Parr, the former-Group General Counsel of the Jardine Matheson group of companies (the "**Group**"), explains in his First Affidavit (dated 10 September 2021), Jardine Matheson is a company limited by shares and incorporated in Bermuda. It has a primary listing on the Main Market of the London Stock Exchange. It is also secondary listings in Singapore and Bermuda.

8. Prior to the Amalgamation, amongst other interests in the Group, Jardine Matheson held, indirectly, approximately 84.9% of the shares in the Company. Prior to the Amalgamation, the Company was also incorporated in Bermuda and had as its primary listing a standard listing on the Main Market of the London Stock Exchange. It also had secondary listings in Singapore and Bermuda.
9. The Group is comprised of a broad portfolio of businesses operating principally in China and Southeast Asia. Across the Group, over 400,000 employees work in a wide range of businesses in sectors including motor vehicles and related operations, property investment and development, food retailing, health and beauty, home furnishings, engineering and construction, transport services, restaurants, luxury hotels, financial services, heavy equipment, mining and agribusiness.
10. The Group's structure included a cross-holding structure between Jardine Matheson and the Company. The Company owned, directly and indirectly, 59.3% of the shares in Jardine Matheson. In addition, the Company held most of the Group's major listed interests, including, for example, approximately 50.4% of Hongkong Land, 77.6% of Dairy Farm, 79.5% of Mandarin Oriental and 75% of JC&C.
11. On 8 March 2021, the Company and Jardine Matheson announced plans to simplify the structure of the Group. In summary, the planned simplification would involve (1) the acquisition by Jardine Matheson, for cash, of the approximately 15% of the issued share capital of the Company that it did not already own directly or indirectly and (2) the subsequent cancellation by Jardine Matheson of the Company's almost 59% shareholding in it. The present claims by the Plaintiffs are concerned with the first of those two steps.
12. The acquisition was implemented by way of an amalgamation under the Act. Under Bermuda law and the Company's bye-laws, the Amalgamation required the approval of at least 75% of the votes cast by shareholders in the Company. Jardine Matheson had undertaken to the

Company that it would vote and would procure that its wholly-owned subsidiaries would vote the 940,903,135 shares (representing 84.89% of the existing issued share capital of the Company) in favour of the resolution. The requisite approval was therefore, certain to be secured.

13. Under the terms of the Amalgamation, shareholders in the Company (other than Jardine Matheson and its wholly owned subsidiaries) were entitled to receive US\$ 33.00 in cash for each ordinary share which they held in the Company (the **Acquisition Price**). Mr. Parr states that the Acquisition Price valued the shares at US\$ 5.5 billion, representing a premium of approximately: (i) 20.2% to the closing middle market price of US\$ 27.45 per share on the Singapore Stock Exchange on 5 March 2021; (ii) 29% to the volume-weighted average closing middle market price of US\$ 25.58 per share on the Singapore Stock Exchange over the one-month period ended 5 March 2021; and (iii) 40.3% to the volume-weighted average closing middle market price of US\$ 23.53 per share on the Singapore Stock Exchange over the six-month period ended 5 March 2021.
14. As a number of the directors of the Company were also directors of Jardine Matheson, the Company's board delegated responsibility for considering the Amalgamation to a committee of directors who were not also directors of Jardine Matheson (the "**Transaction Committee**"). The members of the Transaction Committee were Lord Powell of Bayswater KCMG and Mr Lincoln KK Leong.
15. The Transaction Committee, advised by Evercore Partners International LLP ("**Evercore**") as to the financial terms of the Amalgamation, considered the terms of the Amalgamation to be fair and reasonable so far as independent shareholders in the Company were concerned. At the General Meeting of the Company held on 12 April 2021, a resolution approving the Amalgamation Agreement was passed. The Amalgamation became effective on 14 April 2021.

16. On 12 and 15 April 2021, 18 originating summonses were filed in relation to the Amalgamation. By those summonses, the Plaintiffs seek appraisals pursuant to section 106 of the Act to determine the fair value of their shares in the Company.

C. The Possession, Custody or Power (“PCP”) issue

17. This issue arises in the context of requests made by Mr Bezant, the Plaintiffs’ valuation expert, in his letter to the Plaintiffs dated 14 November 2022. In that letter Mr Bezant explains that the Jardine Group is a highly complex, multi-layered conglomerate with investments covering a wide range of industries. The Company is an investment holding company within the group, and its substantial assets - which are the sources of its value - are its direct and indirect interests in the Principal Group Companies (some of which are themselves conglomerates, namely JC&C and Astra).

18. Mr Bezant states that holding companies such as the Company are commonly valued on a “*sum of parts*” basis, which requires: (i) assessing the value of the holding company’s individual assets and liabilities (such as the Company’s interests in the Principal Group Companies); and (ii) consideration of the relationship between the sum of these values and the overall value of the holding company. Mr Bezant considers that in performing a sum of parts valuation of the Company it will be necessary to ascribe a value of each of its direct and indirect interests in the Principal Group Companies. Among other things, he says, this will require an understanding of the Principal Group Companies’ past performance and their prospects during a period in which the recent and potential ongoing effects of the COVID-19 pandemic on the individual businesses need to be taken into account.

19. By way of examples, Mr Bezant states that he has made requests for the following material and for which, he says, either no or a limited response has been received:

- (i) Monthly management accounts for the Company and the Principal Group Companies.

- (ii) Spreadsheets and other data sources underlying the Company's 2021 budget.
- (iii) Additional forecasts, including longer-term forecasts, prepared in respect of the Company and the Principal Group Companies.
- (iv) Internal valuation analyses in respect of the Company and the Principal Group Companies.

20. The Defendants have taken the position that they can only provide documents which are within their PCP and that the documents held by the Principal Group Companies are not within the PCP of the Defendants. The Plaintiffs do not accept this contention by the Defendants. It is the Plaintiffs' contention that the material sought by Mr Bezant and held by the Principal Group Companies has been and remains within the Defendants' power, and they should be ordered to produce it on that footing. In order to determine this issue, it is necessary for the Court to consider the relevant law and the factual basis for the assertion by the Plaintiffs that the documents held by the Principal Group Companies are within the control of the Company. It should be noted at the outset that Mr Bezant does not contend that he would be unable to undertake the "*sum of parts*" valuation without the requested documents held by the Principal Group Companies.

The relevant legal principles

21. RSC Order 24 rule 1 requires that after the close of pleadings in an action begun by writ there shall be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action. It is common ground that on this application the question arises whether the material sought by Mr Bezant held by the Principal Group Companies is or has been within the power of the Defendants and therefore falls to be disclosed by them in response to his requests. This issue requires the Court to consider the authorities in which disclosure was sought of the documents in the hands of third parties but over which it was said the disclosing party had "*power*" within the meaning of Order 24 rule 1.

Lonrho v Shell

22. In *Lonrho Ltd v Shell Petroleum Co Ltd and another* [1980] 1 WLR 627 the House of Lords was concerned with the issue of whether documents held by the subsidiaries of Shell Petroleum and British Petroleum were within the “power” of the holding companies such that the holding companies were obliged to disclose the documents held by their subsidiaries. In the underlying arbitration proceedings, Shell Petroleum and British Petroleum had disclosed many documents in their possession but did not disclose documents in the possession of the subsidiaries in Rhodesia and South Africa which the local directors had refused to disclose, although in some cases 100% of the shareholding of the local subsidiaries was owned or controlled by the holding companies. The plaintiffs contended that the documents in possession of such subsidiaries were in the “power” of the company within Order 24 rules 1 and 3. Lord Diplock defined the concept of “power” in this context as a presently enforceable legal right without the need to obtain consent of anyone else. Lord Diplock held at 635 E-H:

Your Lordships are not concerned with any other consequences of the relationship between parent and subsidiary companies than those which affect the duty of a parent company of a multi-national group, whose company structure is that of the Shell or B.P. groups, to give discovery of documents under R.S.C., Ord. 24; and this, as I have pointed out, depends upon the true construction of the word “ power “ in the phrase “ the documents which are or have been in his possession, custody or power.”

...As a first stage in discovery, which is the stage with which the subsidiaries appeal is concerned, it requires a party to provide a list, identifying documents relating to any matter in question in the cause of matter in which discovery is ordered. Identification of documents requires that they must be or have at one time been available to be looked at by the person upon whom the duty lies to provide the list. Such is the case when they are or have been in the possession or custody of that person; and in the context of the phrase “ possession, custody or power “ the expression “ power “ must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. (emphasis added)

23. Lord Diplock further explained the notion of “*presently enforceable legal right*” at 636F-H:

*For the reasons already indicated Shell Moçambique’s documents are not in my opinion within the “power” of either of Shell or B.P. within the meaning of R.S.C, Ord. 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association of Consolidated and procuring Consolidated through its own board of directors to take steps to alter the articles of association of Shell Moçambique, which Order 24 does not require them to do; or (2) by obtaining the voluntary consent of the board of Shell Moçambique to let them take copies of the documents. **It may well be that such consent could be obtained; but Shell and B.P. are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made.** (emphasis added).*

24. Mr Adkin KC points out that notwithstanding this expression of principle, Lord Diplock added the “caveats” that “*The circumstances which have given rise to the disputes about discovery are quite exceptional; they are unlikely to recur in any other case and, for that reason, they do not in my view provide a suitable opportunity for any general disquisition by this House upon the principles of law applicable to the discovery of documents*” (at pages 631-632); and that “*In dismissing the subsidiaries appeal on its own special facts, I expressly declined an invitation to roam any further into the general law of discovery...*” (at pages 636-637).

25. Despite the “caveats” in the judgment of Lord Diplock, the Court is satisfied that *Lonrho* is the leading authority on the meaning of the concept of “*control*” as set out in Order 24 rule 1 and remains good law. None of the subsequent authorities which have cited the decision in *Lonrho* have cast any doubt as to its standing as good law. *Hollander on Documentary*

*Evidence (14th ed) confirms that *Lonrho* is the leading authority on the issue of “control” and remains good law. Thus, at 9-20, dealing with “The *Lonrho* Test” *Hollander* states that:*

*The important word was “power”. This was held to mean a presently enforceable legal right to obtain the document from the holder without the need to obtain the consent of anyone else. **In the leading case, *Lonrho***, the claimants sought disclosure of the documents of the foreign subsidiaries of Shell and BP. They argued that the documents were in the power of the parent, because the parent could if necessary obtain possession by winding up the subsidiary. The House of Lords held that this did not constitute a presently enforceable legal right, and the application for disclosure failed. **The *Lonrho* test remains good law since the CPR. This has never really been doubted,** notwithstanding the different wording, and is apparent from the Court of Appeal decision in *Anstead*. (emphasis added)*

26. At 9-21 *Hollander* dealing with “One-Man Companies” states that:

*The mere fact that one person or entity held a controlling shareholding was held in *Lonrho* to be insufficient for the documents to be in that person’s control. But there were circumstances in which the relationship of parent and subsidiary was such that one was the alter ego of the other and the circumstances were such that it would be wrong to treat the two as separate.*

27. The Court is satisfied that *Lonrho* establishes that: (i) the word “power” in Order 24 rule 1 means a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else; (ii) the mere fact that one person or entity holds a controlling shareholding in a subsidiary company is insufficient for the documents to be in that person’s control; (iii) the mere fact that a 100% subsidiary company is likely to give its consent to disclosure to the parent company does not amount to “control” by the parent company; and (iv) a parent company is not required by Order 24 to seek the consent of its subsidiary companies to disclose documents held by the subsidiary companies to a third-party.

28. It is noteworthy that Lord Denning in the Court of Appeal in *Lonrho* ([1980] 1 QB 358) had held that even if, as a matter of practice, the subsidiaries or the auditors will hand over the

documents at once to the parent company for the purposes of “group accounts” that would not amount to “control” within the meaning of Order 24. At 372C-E, Lord Denning held:

We then come to the question in this case. One hundred per cent. Of the shares were owned by Shell and B.P. Did that give them the "power" over these documents? Did it give them the "power" to order them? Were they in their "power" so that they could require them at the instant? That is a difficult question, which has been discussed before us.

No doubt, in many ordinary circumstances, what the parent company requests is automatically complied with by the subsidiary. Brandon L.J. mentioned at the end of the argument the question of "group accounts." The parent company probably has the same auditors as its subsidiaries. If the parent company calls for the accounts of its subsidiaries in order to make up the group accounts, as a matter of practice the subsidiaries or their auditors will hand them over at once. That is all part of the ordinary working of business.

Schlumberger Holdings Limited

29. ***Schlumberger Holdings Limited v Electromagnetic Geoservices AS*** [2008] EWHC 56 concerned an application by the defendant seeking disclosure of documents within the Schlumberger group to develop or to evaluate electromagnetic methods of exploring subsea reservoirs. The application was made with the background that Schlumberger Holdings had already conducted a search of “the claimant’s facilities” and of the “files of the claimant’s employees” without reference to the specific group company. The files of three different companies were being examined with the consent of the companies concerned.

30. Given this factual background Floyd J held at [21]:

I accept that the mere fact that a party to a litigation may be able to obtain documents by seeking the consent of a third party will not on its own be sufficient to make that third party’s documents disclosable by the party to the litigation. They are not within his present or past control precisely because it is conceivable that the third party may refuse to give consent. But what happens where the evidence reveals that the party has already enjoyed, and continues to enjoy, the co-operation and consent of the third party

*to inspect his documents and take copies and has already produced a list of documents based on the consent that has been given and where there is no reason to suppose that that position may change? Because that is the factual situation with which I am confronted here. In my judgment, the evidence in this case sufficiently establishes that relevant documents are and have been within the control of the claimant. I should emphasise that **my decision does not turn in any way on the existence of a common corporate structure**. My decision depends on the fact that it appears from the evidence that a **general consent has in fact been given to the claimant to search for documents properly disclosable in this litigation**, subject only to the caveats contained in paragraph 4 of Mr. Griffin's witness statement concerning corporate acquisition documents and unreasonably onerous requests. (emphasis added)*

31. In *Schlumberger* Floyd J found that Schlumberger Holdings had control over the documents held by its relevant subsidiaries because Schlumberger Holdings already enjoyed, and continued to enjoy, the co-operation of the relevant subsidiaries to inspect their documents and take copies and had already produced a list of documents based on that consent. This consent was given by the subsidiaries in the context of the existing litigation and there was nothing to suggest that that would change. From these facts, the Court inferred the existence of a “*general consent*” to search for documents properly disclosable in the litigation. It is noted in *Hollander* at 9-22 that this finding was described as a decision on special facts by Patten J in *Thunder Air Ltd v Hilmarsson* [2008] EWHC 355 (Ch).
32. It is to be noted that the decision in *Schlumberger* had nothing to do with the structure of the group. Floyd J accepted that the mere fact that a parent company may be able to obtain documents by seeking the consent of its subsidiaries will not on its own be sufficient to make the subsidiary companies' documents disclosable by the parent company. The rationale for this proposition is that it is conceivable that the subsidiaries may refuse to give consent.

North Shore Ventures Ltd

33. *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWHC Civ 11, was not concerned with pre-trial discovery but with the production of documents in aid of judgment enforcement. It was alleged by the judgment creditor that the judgment debtors had transferred their assets to the trustees in order to make themselves judgment-proof and that the trustees would comply with whatever steps the judgment debtors wished in their administration. The judgment creditor had obtained worldwide freezing orders against the judgment debtors and sought documents from the trustees after disclosure by the judgment debtors that their assets had been transferred to the trustees.

34. Floyd J noted the submission of the judgment creditor that the setting up of the trusts was substantially contemporaneous with the intimation of the claim and that the purpose of setting up the trust was to render themselves judgment-proof and to make it harder for the claimants to enforce that judgment. The beneficiaries of the trusts were the wives and the children of the judgment debtors. In the circumstances, Floyd J held that it was wholly unrealistic to suppose that if the judgment debtors did not keep copies of the trust documents themselves then there was no way in which they would not be able to obtain copies. Accordingly, Floyd J ordered that the trust documents be produced.

35. The Court of Appeal held at [38] that Floyd J was entitled to make that order for the following reasons:

38. The circumstances surrounding the appointment and behaviour of the trustees were undoubtedly suspicious. For a wealthy man (or in this case two wealthy men acting simultaneously) to make himself a pauper, with the genuine intention of disposing of his money down to his last dollar irrevocably and with no ability to control what was to happen to it, is an unlikely scenario. Family trusts are a well known possible device for trying to place assets ostensibly beyond the reach of creditors, and the timing of the simultaneous creation of the trusts fits such a pattern. Suspicion that these were not entirely arm's length arrangements is heightened by the later steps taken by the trustees, for example, in seeking to prevent cross examination of the appellants in

*the English proceedings and in apparently removing the appellants from even being discretionary beneficiaries for reasons and in circumstances which are unexplained. **The circumstantial evidence gave reasonable ground to infer that there was in truth some understanding or arrangement between the appellants and the trustees by which they were to shelter the appellants' assets, consistent with the appellants' real aim, and that the nature of that understanding and arrangement was such that the trustees would take whatever steps the appellants wished in the administration of the trusts.***

39. *In the particular circumstances of this case, Floyd J was in my judgment entitled to deduce that such was the true nature of the relationship between the appellants and the trustees on the material then before the court...*

40. *If that was the true relationship between the appellants and the trustees, the judge was entitled in my view to regard documents in the physical possession of the trustees relating to the administration of the trust as documents in the appellants' control within the meaning of CPR 31.8. In determining whether documents in the physical possession of a third party are in a litigant's control for the purposes of CPR 31.8, the court must have regard to the true nature of the relationship between the third party and the litigant. **The concept of "right to possession" in CPR 31.8(2)(b) covers a situation where a third party is in possession of documents as agent for a litigant. The same would apply in my view if the true nature of the relationship was that the litigant was to be the puppet master in the handling of money entrusted to him for the specific purpose of defeating the claim of a creditor. The situation would be akin to agency...**(emphasis added)*

Ardila Investments

36. In *Ardila Investments NV v ENRC NV* [2015] EWHC 3761, documents were sought from the indirectly held (but wholly-owned) subsidiaries of the defendant. Males J reviewed the existing authorities in relation to the issue of "practical control" and held at [11]:

*...It seems to me that caution is needed here. To refer to the test as one of practical control is indeed a helpful label, but **it could be misleading to regard that as the test without regard to the facts of the previous cases from which it is derived.** It might be thought that if there are third parties who can be expected to comply with the requests of the party to the litigation, then a test of practical control, if that were the test, would be satisfied. **But in fact, as the Schlumberger and North Shore cases demonstrate, something more than that is required. What is required is evidence of some existing understanding or arrangement from which a right of access in practice can properly be inferred.** (emphasis added)*

37. Males J summarised the existing position in relation to practical control at [13-14] in this way:

13...First, it remains the position that a parent company does not merely by virtue of being a 100 parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request, although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.

14. Fourth, however, a party may have sufficient practical control in the sense which the Schlumberger and North Shore cases indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access. (emphasis added)

38. In support of the application for discovery in *Ardila*, the claimant relied upon the obligations undertaken by ENRC in the share purchase agreement which was the subject matter of the litigation. In particular, ENRC undertook to keep the claimant fully informed in respect of the subsidiary's progress in satisfying each of the payment conditions described, including by "... upon the reasonable request of the seller, promptly make any director, officer or employee of **any target group company** as may reasonably be requested by the seller, available to cooperate with and provide **all necessary information and assistance required or reasonably requested by the seller**, [various Brazilian Governmental bodies] or any other Governmental authority in order to facilitate the expedient satisfaction of the conditions described in sub-clause 3.4 of this agreement and in order to assist the seller in monitoring compliance by the purchaser with the terms of this schedule 1." (emphasis added)

39. Males J held at [17] that the above obligation undertaken by ENRC in the share purchase agreement demonstrated that ENRC expected its subsidiaries to perform those obligations but did not amount to any understanding or arrangement which would enable ENRC to have free access to all of the subsidiaries' documents:

The fact that ENRC undertook these obligations certainly demonstrates, as it accepts, an expectation on its part that it would be able to ensure that Bamin and any other subsidiaries did what was necessary to enable ENRC to perform those obligations. It seems to me, however, that extensive as those obligations are, they fall well short of any understanding or arrangement which would enable ENRC to have free access to all of Bamin's or other subsidiaries' documents. It is one thing to undertake specific obligations of that nature, it is quite another to permit free range through the documents, including those held electronically, of the subsidiary company, potentially extending much more widely.

40. The claimant in *Ardila* also relied upon the evidence of the Group General Counsel of the parent company to demonstrate that there was the necessary arrangement or understanding. The evidence relied upon comprised the statements that: (i) the subsidiaries, while indirectly owned by ENRC, were active companies with their own management structures and workforces and boards comprised of directors who exercise their own judgement in the day-to-day running of the respective companies; (ii) the share purchase agreement was concluded in the “reasonable anticipation that the [subsidiaries] would cooperate with ENRC in seeking to achieve the Company's common goal” ; and (iii) in order to deal with matters arising in the litigation, ENRC had on occasion requested and the subsidiaries had consented to provide certain information and documents relating to the background to the projects on which the claimant relied in support of its clients. Males J held at [21] that he was not satisfied that this evidence demonstrated an understanding or arrangement giving ENRC access to the subsidiaries' documents:

In my judgment, this material does not evidence any existing right or understanding or arrangement giving ENRC access to documents. It is merely the evidence of the normal relationship that one would expect between a parent and subsidiary without the particular features of the Schlumberger or North Shore cases. Such cooperation as there may have been in the past as to compliance with specific requests, for example production of certain of the licences in issue, does not, in my judgment, amount to evidence that ENRC has the necessary control in the sense which the cases show is necessary over [subsidiary's] documents... (emphasis added)

Roman Pipia

41. In *Pipia v BGEO Group Limited* [2020] EWHC 402 (Comm), the defendant had written letters to its subsidiaries, which they countersigned, seeking documents from them which were included in the defendant's initial disclosure. The defendant's additional request to be provided with open access to the subsidiaries' documents so their solicitors could search them were refused by the subsidiaries. In this context an issue arose as to whether the defendant had control over the subsidiaries' documents.

42. The primary submission of the claimant in relation to the issue of control was not in fact based upon the letter agreement by the subsidiaries. Instead, the claimant contended that a more wide-ranging, general control arrangement was in place prior to and independently of the letters and had not been terminated. The claimant submitted that the court should infer the existence of such a control arrangement from: (i) the fact that there was a common directing mind throughout the group, Mr Gilauri, who "*must have had access*" to the subsidiaries' documents; (ii) the minutes of a board meeting of the defendant granting Mr Gilauri power to "*adopt and sign any and all decisions with respect to any issues related to the subsidiaries*"; (iii) information in a report of the defendant which must have been provided by the subsidiaries; (iv) an arrangement reserving matters to the defendant which would necessarily have entailed the provision of documents associated with those reserved matters; and (v) an adverse inference, it was said, should be drawn. This primary submission was rejected at [55] by Baker J:

*I agree with Ms Tolaney QC that there is nothing in the background or surrounding circumstances relied on by Mr George QC, prior to or after the 30 March Letters, to suggest **the existence of any standing consent of any kind**. I also agree with her that the decision to document, by each Letter, an apparently new arrangement whereby to enable BG UK, for the purposes of the Claim, to get hold of BG Georgia and BoG documents, is inconsistent with the existence of some other arrangement by way of standing consent. In short, had it not been for the 30 March Letters, **I would have agreed with Ms Tolaney QC that this was a case where I could find no more than that the Subsidiaries may***

have chosen to assist by providing some documents on one or more prior occasions, and that falls short of control. (emphasis added)

43. Baker J held that the claimant's secondary case, based on the fact that the subsidiaries had signed letters agreeing to provide the company with "*all documents pertaining to [the claim] as requested by us or our advisers*", succeeded. Baker J held that the fact that the subsidiaries had signed the letters in the context of the existing litigation constituted a "*standing promise*" to provide documents on request.

44. At [50], Baker J considered that the concept of "control" could properly be analysed by considering its three separate elements:

50. A true analysis is that there are three elements to the question whether a third party's documents, or particular such documents or classes of such documents, are within the 'control' of a party so as to be within the scope of its disclosure obligations in English civil litigation, by virtue of some standing consent given by the third party to the disclosing party in respect of its (the third party's) documents that falls short of an enforceable contract:

i) firstly, the scope (subject matter) of the consent – the documents or types of document covered by the consent;

ii) secondly, the type of consent – how, under the consent given, the disclosing party will get hold of those documents (e.g. by looking through documents for itself and taking copies if it wishes, or by having documents located and sent (or copied) to it, or by having documents located and sent (or copied) to it to the extent they match some further (review) criteria);

iii) thirdly, the quality of the consent – whether it involves free and unfettered access to the documents covered, of which (or copies of which) the party will get hold in that way.

51. These elements are distinct in concept; and the question of control is concerned only with the third element, the quality of the consent. The scope of the consent will define the documents over which the disclosing party has control by virtue of the consent (if it is of the right quality), so that its disclosure obligations extend to those documents. The type of consent will affect what the disclosing party can be expected and required to do so as

to discharge any disclosure obligation to conduct a search for those documents (again, if the consent is of such a quality as to confer control). (emphasis added)

45. In analysing the concept of “control”, Baker J held that a party’s control over a third party’s documents, including a parent company’s power over the documents of its subsidiary, is not confined to a situation where the parent company has control over the entirety of the subsidiary’s documents. It is open to the court to conclude, including as a matter of inference, that a parent has power over certain classes of documents held by the subsidiary.

Berkeley Square Holdings Limited

46. In *Berkeley Square Holdings Limited v Lancer Property Asset Management* [2021] EWHC 849, Mr Robin Vos, sitting as a judge of the Chancery Division, reviewed the authorities relating to practical control and summarised the position at [46].¹

47. On the evidence in *Berkeley Square*, Vos J had no doubt that the people whose documents were said to be under the control of the claimants had permitted the documents to be searched as part of the disclosure exercise which had already taken place. On the basis of the available evidence, Vos J held that he was satisfied that there had always been, and continued to be, an arrangement or understanding that the claimant would be able to access the documents held by

¹ 46. Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents: i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship; ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched; iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement; iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor; v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them; vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature.

the third parties. The only party who had not permitted his documents to be searched, Sheikh Khalifa, was held not to be subject to the arrangement or understanding.

Wong v Grand View

48. In *Wong v Grand View PTC* [2020] SC (Bda) 57 Com (30 December 2020) Kawaley AJ considered at paragraphs 12 to 22 whether certain documents held in the finance department of a third-party corporate group were within the power of the defendant private trust companies (“PTCs”) for the purposes of discovery in the action. No suggestion was made that the principles applied in the English cases were inapplicable or somehow modified in Bermuda because of the distinction between the relevant provisions of the RSC and the CPR, and Kawaley AJ expressly relied at paragraph 17 on what was said in paragraph 21 of *Schlumberger* in concluding that the relevant material was within the company’s power.

49. On its facts, the *Wong* case raised similar issues as those raised in *Schlumberger*. The relevant third-party documents had already been accessed for the purposes of giving discovery. On that basis, Kawaley AJ at [17] inferred the existence of a “*general consent... to search for documents properly disclosable in this litigation*”. It is to be noted that the respondent’s primary opposition to the order was not that the documents could not be searched but that “*no more reasonably needs to be done*”.

Ivanishvili v Credit Suisse

50. In *Ivanishvili v Credit Suisse* [2021] SC (Bda) SC 81 (30 September 2021) this Court was concerned with an application for an unless order requiring discovery of certain documents held by a third-party bank which the defendant, CS Life, had been ordered to disclose on the footing that they were within the defendant’s power because the defendant had a legal right to

the documents under Swiss law, which was the system of law applicable to the relationship between CS Life and the third-party bank.

51. *Credit Suisse* is of limited relevance to this case given that in an earlier judgement ([2020] SC (Bda) 11Civ.), the Court had held that, as a matter of Swiss law pursuant to Article 400 of the Swiss Code of Obligations, the defendant had legal power over the documents of Credit Suisse AG. The plaintiffs in that case did not advance a case that the documents of Credit Suisse AG, the bank, were within the “*practical control*” of the defendant.

Estate of Osama Abudawood

52. Mr Moore KC drew to the attention of the Court the Cayman authority of *Re Abudawood* (unreported, Cayman Islands, 27 July 2022), where the Grand Court was concerned whether the respondent had power over the documents of its subsidiaries.

53. In considering this issue, Kawaley J first addressed the question of burden of proof. Kawaley J held that the applicant for an order of specific discovery (and indeed for most forms of interim relief) assumes both (a) the burden of persuading the Court that the relief sought should be granted and (b) the evidential burden of proving that the requisite interlocutory factual findings should properly be made. In the interlocutory context, Kawaley J held, it must generally be the case that the approach to the evidence, when it is untested by cross-examination, must be somewhat different to the position at trial. Interlocutory factual findings based on documentary evidence alone are implicitly always made on the assumption that: (a) the findings can safely be made without a full factual inquiry; and (b) the applicant for interlocutory relief has discharged the evidential and persuasive burden of demonstrating that it is appropriate both for: (1) the interlocutory findings upon which the application is founded to be recorded in the applicant’s favour; and (2) the relief sought to be granted applying the relevant legal jurisdictional test.

54. Kawaley J held at [37] that it is likely to take unusual circumstances for such voluntarily disclosed information to reveal sufficient detail about the inter-group operations to support a positive finding that as a matter of practical reality the parent company has an unfettered right of access to its subsidiaries' documents for discovery purposes. In support of the contention that the parent can in fact access its subsidiaries' documents whenever it wishes to do so, the applicant relied on factors which included that: (i) the respondent was a family-owned company and the parent of a group which has common directors and prepared accounts on a consolidated basis; (ii) all documents were maintained at a single "*family office*"; (iii) the ease with which the respondent was able to collate documents to comply with an undertaking; and (iv) the respondent had elected not to "*lift the shroud of mystery*" covering the question of how documents were collated for consolidated financial accounting or valuation purposes generally, or how it gained access to them for the purpose of an undertaking it had given.

55. At [38], Kawaley J set out the Court's approach in evaluating the evidence presented in support of the contention that the respondent had access to its subsidiaries' documents whenever it wished to do so:

In evaluating the available evidence, it is important to distinguish material which affords grounds for suspicion from material which affords grounds for factual findings, whether as a matter of inference or otherwise...unless one is justified in ignoring (1) the positive denial that any arrangement or understanding exists, (2) the burden of proof borne by the [applicant], and (3) the entire corporate structure (which, prima facie, absent veil-piercing, one is not), it is not possible to infer from these core facts that [the respondent] has in reality an unfettered right of access in the requisite legal sense.

56. Kawaley J emphasised the fundamental distinction between access to documents granted by subsidiary companies because it is in the subsidiary companies' commercial interest to do so and an arrangement or understanding reflective of an understanding or arrangement reached between the parent qua parent and the subsidiaries qua subsidiaries. At [39] Kawaley J held:

...in my judgment, there is a fundamental distinction between (1) a state of affairs which I do infer must exist, namely that [the respondent] can potentially obtain whatever documents it needs from its subsidiaries because inter-group conflicts of interest will not ordinarily exist so requests made of subsidiaries are likely to be granted, and (2) the type of arrangement or understanding which the law requires for discovery purposes. A qualifying arrangement or understanding in my judgment must be reflective of an understanding or arrangement reached between the parent qua parent and the subsidiaries qua subsidiaries in relation to the general or specific basis upon which the parent will be able to access its subsidiaries' records. As Males J observed in Ardila Investments... "an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control."

57. In making the finding that the subsidiaries' documents were not in the control of the respondent, Kawaley J held that it was not open to him to reject direct, unchallenged and sworn evidence refuting the existence of the arrangement or understanding. In that regard, Kawaley J relied upon the judgment of Harman J in *Re Corbenstoke Ltd* (No. 2) [1989] BCC 767 at 777G:

I have not referred at any point to the evidence sworn in reply by Mr Gabr, which Mr. Highley attacked. I am of the view that no judge is entitled to disbelieve an affidavit-that is a document upon oath-or an affirmation unless the deponent or affirmant is cross-examined upon his affidavit so that the judge may be satisfied that he is not telling the truth. I do not say that there may not be some absolutely glaring example where documents can show that a document in a statement in an affidavit is untrue. But mere inferences as to the truth or untruth of a statement are impossible to draw from paper evidence.

58. In relation to the Court's unwillingness to reject affidavit evidence, Mr Moore KC also referred the Court to the observations of Rimer J at [58] in *Coyne v DRD Distribution Ltd* [2008] EWCA Civ 488:

...The basic principle is that, until there has been such cross-examination, it is ordinarily not possible for the court to disbelieve the word of the witness in his affidavit and it will not do so. This is not an inflexible principle: it may in certain circumstances be open to the court to reject an untested piece of evidence on the basis that it is manifestly incredible, either because it is inherently so or because it is shown to be so by other facts that are admitted or by reliable documents...

Constantin Medien AG v Ecclestone

59. In *Constantin Medien AG v Ecclestone* [2013] EWHC 2676 (Ch) it was contended by the claimant that as the defendant, Mr Ecclestone, was able to obtain documents in his capacity as a director of the Formula 1 companies, he should be ordered to disclose those documents in proceedings brought by the claimant against the company for compensation arising out of the sale of a substantial stake in the Formula 1 Group allegedly induced by a bribe paid by Mr Ecclestone. Vos J rejected the submission at [64] on the ground that a director's right to inspect the books of the company could only be used for the purpose for which it was conferred:

*64. In these circumstances, it seems to me that I must be bound by the decision of the company's own board of directors as to what is in its best interests. The director here, Mr Ecclestone, may wish to inspect the FOG companies' documents so as to give disclosure in these proceedings. But, as it seems to me, following Chadwick LJ's dictum in Oxford Legal Group Limited supra, Mr Ecclestone only has a right to do so in order to enable him to carry out his duties as a director of those companies. **Whether or not Mr Ecclestone's purposes would be improper in seeking to inspect the FOG companies' documents for the purposes of giving disclosure in this action, it is clear to me that such a right would not be invoked for the purpose for which it had been conferred, namely to allow the director to protect the interests of the FOG companies.** At least, it can be said that that is clearly the view of the board of directors of the FOG companies; and that is a view that, in considering an application for ordinary specific disclosure against Mr Ecclestone, in my judgment I cannot second guess.*

65. For these reasons I have concluded that Mr Ecclestone has not been shown to be in physical possession of the documents of which disclosure is sought. Accordingly I cannot require that he give disclosure against the wishes of the board of directors of the FOG companies themselves. (emphasis added)

60. Having regard to the authorities reviewed above, the following principles are relevant in determining whether documents held by a subsidiary company are within the "power" of its parent company within the meaning of Order 24 rule 1:

- (1) The word “*power*” in Order 24 rule 1 means a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else: *Lonrho* at 635H.
- (2) A parent company does not merely by virtue of being a parent company have control over the documents of its subsidiary: *Lonrho* and *Ardila* at [14].
- (3) A mere expectation that the subsidiary company will comply with a request of the parent company for its documents is not enough to amount to control over those documents, and there is no obligation to make such a request: *Lonrho*, *Schlumberger* at [21], and *Ardila* at [13].
- (4) Given that the parent and a subsidiary company are likely to enjoy shared commercial interests, a parent company may ordinarily expect its subsidiary to comply with a request for its documents, but such an expectation alone is insufficient to amount to control over those documents: *Lonrho* (CA) at 372 D-E; *Ardila* at [21]; and *Abudawood* at [39].
- (5) In an exceptional case, documents of third parties may be within the “*practical control*” of the relevant party to the proceedings notwithstanding that they had no presently enforceable right to obtain such documents. A litigant, including a parent company, may have “*control*” over the documents of a third party where there is “*an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free [or unfettered] access to the documents of the third party*”: *Ardila* at [10] and [14] and *Hollander* at 9-23.
- (6) A party to the litigation from whom disclosure is sought may not have *free or unfettered access* to the documents of the third party, if the third party has provided the access to the documents for a particular limited purpose: *Ardila* at [16]-[17], *Berkeley Square* at [46(vi)], *Constantin Medien* at [61] and [64], *Pipia* at [21], [35(iii)-(iv)], and [55].

- (7) Such an arrangement or understanding can be inferred: *North Shore* at [38], *Ardila* at [14], *Pipia* at [54] and *Berkeley Square* at [45]. Such an inference may be drawn if there is repeat behaviour which is sufficient to imply a promise to meet future requests: *Pipia* at [21]. Determining whether there is such an arrangement or understanding requires a review of all the relevant circumstances: *Berkeley Square* at [45].
- (8) It is not necessary to show that there is an arrangement or understanding that the relevant party will have free or unfettered access to the entirety of the documents of the relevant third party. It is sufficient if there is an arrangement or understanding for free or unfettered access to defined material which would be provided in response to certain requests: *Pipia* at [19] and [48] to [51].
- (9) There is no material distinction for the purposes of the analysis between the concept of “power” under RSC Order 24 and “control” under CPR 31.8: *Schlumberger* at [16], *Ardila* at [4], *Berkeley Square* at [28] and *Abudawood* at [4], [14] and [19].
- (10) It is for the applicant to establish that the Court should find the existence of the alleged arrangement or understanding on an interlocutory basis by persuading the Court that the relevant findings can be safely made without a full factual inquiry and that the applicant has discharged the evidential and persuasive burden. In evaluating the evidence, it is important to distinguish material which affords grounds for suspicion from material which affords grounds for factual findings, whether as a matter of inference or otherwise: *Abudawood* at [20] and [38].
- (11) The Court will reject affidavit evidence which has not been tested in cross-examination only where it is manifestly incredible, either because it is inherently so, or because it is shown to be so by other facts that are admitted or by reliable documents: *Coyne v DRD Distribution* at [58].

Evidence relied upon by the Plaintiffs in support of “practical control” by the Company

61. The evidence relied upon by the Plaintiffs is set out in Chudleigh 2 and Chudleigh 6 and the evidence relied upon by the Defendants is set out in Krige 2, Parr 5 and Parr 6. Briefly, the Plaintiffs rely upon: (i) board documents; (ii) audit materials; (iii) the financial database; (iv) agreements entered into by the Company; (v) the Defendants’ position at the Directions Hearing; and (vi) requests made of the Group for the purposes of this litigation.
62. Before considering this evidence, it is convenient to deal with a preliminary point taken by the Defendants. The Defendants contend that pursuant to paragraph 5 of the Order dated 23 March 2022, the Plaintiffs’ application was required to be made by 8 April 2022. The Defendants drew that fact to the Plaintiffs’ attention both before and after the passage of the deadline. The Plaintiffs did not issue any application within that period. Nor have they sought an extension or to explain the eventual five-month delay in issuing their application.
63. Mr Moore KC readily accepted that the Plaintiffs are able to issue another summons to deal with the PCP issue. In all the circumstances, the Court is satisfied that since the issue has been fully argued before the Court, the appropriate course to take is to deal with the issue on its merits.
64. In opening this application, Mr Adkin KC invited the Court to consider the structure of the Group, pointing out that there were two companies at the top of the group structure: the Company and Jardine Matheson who at all times held majority cross-shareholdings in each other. Mr Adkin KC contended that it was not entirely accurate to refer to the Company as an “*intermediate holding Company*” given that the Company and Jardine Matheson each had a majority shareholding in the other. Moreover, the vast bulk of the Principal Group Companies sit under Jardine Strategic and sat under the Company itself (and contain most of the Group’s value) and not under Jardine Matheson.
65. Mr Adkin KC also referred to Article 112(A) of the Company’s Articles requiring that the appointment of a General Manager of the Company had to be either Jardine Matheson or a

wholly owned subsidiary of Jardine Matheson appointed by it. In the event, JML, a Hong Kong-based management company, was appointed the General Manager of the Company and was paid management fees in the sum of US\$141 million in 2018, US\$130 million in 2019 and US\$102 million in 2020. Mr Adkin KC contends that the existence of these fees undermines the Company's attempts to distance itself from JML and relegate its role in the Group to a mere "*intermediate holding company*." He contends that these very substantial payments plainly cannot have been simply for the provision of management services to the Company alone (which had no employees, no separate business and no operational life apart from the rest of the Group) and must therefore have been made by the Company in respect of the management services provided by JML (and its sub-delegees) across the Group.

66. The Plaintiffs contend that at the head of the Group, it is clear that the boards of the Company and Jardine Matheson operated in tandem. From December 2018, the Plaintiffs contend, it is apparent that the board members of the Company attended the quarterly board meetings of Jardine Matheson (with which there was in any event a considerable overlap in membership) and that detailed discussion of the Group's affairs simply took place as part of the Jardine Matheson board meeting. This included detailed consideration of the Principal Group Companies, which were treated as "*major business units*", regardless of whether the interest in question was held under the Company or Jardine Matheson. The Company's board meetings were then held immediately afterwards in the same location.

67. The Court is satisfied that prior to the Amalgamation, the Company was a subsidiary of Jardine Matheson and an intermediate holding company within the Group. In this regard, the Court accepts the evidence of Mr Parr that Jardine Matheson operated as a fully functioning stand-alone controlling parent company of the Company and was at all relevant times and remains the principal holding company for the Group. In this regard, the Court notes that the subordination of the Company to Jardine Matheson reflects the history of the Group. Jardine Matheson was formed in 1984 as the Group's main holding company. The Company was formed subsequently in 1986 as part of the initiative to restructure some of the Group's shareholding.

68. As Mr Parr explains, the Company's subordination to Jardine Matheson can also be seen from the fact that: (i) the memorandum of association of the Company provided for the Chairman of Jardine Matheson to be, or to appoint, the permanent and managing director of the Company; and (ii) the bye-laws of Company provided for Jardine Matheson, or such wholly-owned subsidiary as it should nominate, to be the general manager of the Company. In addition, the bye-laws of the Company provided for the Chairman of Jardine Matheson to be the Chairman of the Company.

69. The Court accepts Mr Parr's evidence that Jardine Matheson and the Company did not operate in tandem. The two companies have always operated separately and held separate board meetings with separate and different board packs. The only exception to the strict separation is the Audit Committee, which was a joint committee of the two companies. It is the evidence of Mr Parr, which the Court accepts, that for reasons of efficiency, from December 2018 onwards, directors of the Company who were not also directors of Jardine Matheson were invited to attend Jardine Matheson board meetings as observers in order to avoid duplication of certain content and to achieve greater efficiency. Separate board meetings continued to be held.

70. In relation to the issue of fees, the position is that under the General Manager Agreement dated 17 August 1995 the Company agreed to pay a fee to JML equal to 0.0625% of the consolidated net asset value of the Company. The Court has no evidence as to the amount of the fee which was payable by the Company to JML in 1995. It appears that the agreed position in 1995, as set out in clause 5.1 of the Agreement, has not been revised during the intervening period. However, the Court is satisfied that this fee was payable for the services which JML rendered directly to the Company. This is the evidence of Mr Parr which is supported by, for example, page 99 of the 2019 Annual Report for the Company which notes that the fees paid by the Company to JML were for services provided to the Company.

71. Furthermore, the Court accepts Mr Parr's evidence that the Principal Group Companies paid management fees to JML for services provided directly to them by JML. Mr Parr's evidence in this regard is supported by the 2020 Annual Report for Hongkong Land which states at page 54 that *"The management fees payable by [Hongkong Land and its subsidiaries], under an agreement entered into in 1995, to [JML] in 2020 was US\$4.8 million (2019: US\$5.4 million), being 0.5% per annum of [Hongkong Land and its subsidiaries] underlying profit in consideration for management consultancy services provided by JML, a wholly owned subsidiary of [Jardine Matheson]."*

(i) Board Documents

72. The Plaintiffs contend that the board agendas and board minutes for the quarterly board meetings of the Company from May 2016 to March 2021 and for Jardine Matheson from December 2018 until March 2021, exhibited in Chudleigh 6, show that the performance of the Principal Group Companies was discussed by the boards in detail. The board papers provided to the Company included detailed financial and other information in relation to the companies in the Group and which, it is said, can only have been derived from material provided by those companies. Mr Chudleigh states that the board papers provided to the Company and Jardine Matheson's boards were typically in the nature of papers relating to audit, budgets, financial results and forecasts (including consideration of dividends), treasury reports, plus individual papers on each of the Group businesses.

73. It is the evidence of Mr Parr, which the Court accepts, that the board papers on individual group businesses were prepared by the Principal Group Companies themselves, based on their own internal books and records, and not by the Company, Jardine Matheson or their agents. These documents were then presented for compilation by the Group Secretariat into the board packs of the Company or Jardine Matheson. None of the Company, Jardine Matheson or JML (acting on behalf of either company), accessed, or could have accessed, any internal documents of the Principal Group Companies to compile these papers. This provision of management

information to the boards of the Company and Jardine Matheson reflected the ordinary and commonplace flow of information in any corporate group.

74. In addition to the board reports, Mr Chudleigh also refers to and exhibits various other documents which were presented to the boards of the Company and Jardine Matheson at their board meetings, and which were derived from detailed information supplied by other Group companies, including the Principal Group Companies. In this regard, Mr Chudleigh refers to: (i) the budgets prepared on a group-wide basis, including information from the Principal Group Companies; and (ii) board papers of the Company and Jardine Matheson which set out the results of the Group companies, and which considered the performance of the Group against forecasts. Mr Parr states that the budget papers, results and forecast papers submitted to the board of the Company were prepared by JML, acting on behalf of the Company, using the consolidated financial data that was available to the Company through the Jardines Financial Reporting System (“JFRS”). Mr Parr further states that the Company could access consolidated financial data provided by the Principal Group Companies in JFRS. It is the evidence of Mr Parr that the Company did not have a right to access the underlying documents held by the Principal Group Companies.

75. Mr Chudleigh also refers to the treasury reports for the Company and Jardine Matheson. Mr Parr states that treasury reports were prepared by JML for Jardine Matheson to fulfil its oversight role in respect of the Group’s capital, liquidity and cash flow from consolidated data on JFRS and monthly and quarterly information supplied by the Group companies to Jardine Matheson. The Company received treasury reports based on a subset of this information (reflecting its correspondingly lesser need for management information).

76. It is reasonably clear that in the preparation of board papers, budget papers, forecast reports and treasury reports, the Principal Group Companies were not providing any of their underlying documents to the Company or Jardine Matheson but merely the provision of information which the Company and Jardine Matheson requested in order for their directors to

discharge their fiduciary duties as directors of holding companies. The Court does not accept the submission, advanced on behalf of the Plaintiffs, that merely because the Company and Jardine Matheson were receiving information in the form of board papers, budget papers, forecast reports and treasury reports, the Court can conclude that the Company and Jardine Matheson were able to exercise free or unfettered access to the underlying documents of the Principal Group Companies. In the circumstances, the Court accepts Mr Moore KC's submission that the mere provision of information contained in the board packs does not establish that the Company enjoyed unfettered rights of access to the underlying documents of the Principal Group Companies.

77. The Court accepts Mr Parr's evidence that, from his experience, reporting of this kind is commonplace in corporate groups and merely reflects evidence of the normal relationship between a parent and subsidiary (as referred to in *Lonrho* (CA) at 372 D-E; *Ardila* at [21]; and *Abudawood* at [39]). Furthermore, it appears to the Court that the information in the form of board packs, budget papers, forecast reports and treasury reports provided to the Company and Jardine Matheson, was provided by the Principal Group Companies for a particular purpose, namely, to allow the Company and Jardine Matheson to discharge their functions and duties as holding companies. As Mr Moore KC submits, it is difficult to see how any director of any holding company could discharge his or her fiduciary duties without reportage from the subsidiary companies. The Court accepts that it is not possible to infer from the fact that subsidiary companies prepared reports for their principal and intermediate holding companies that the intermediate holding company (or indeed the principal holding company) had free or unfettered access to the subsidiary company's underlying documents.

78. In relation to the preparation of the budgets, the Plaintiffs also rely on an email of Kelly Kong in relation to the preparation of the 2021 Budget. The Plaintiffs contend that: (i) responses to the email should have been disclosed; (ii) "*entities sitting at the top of the Group*" could call for detailed financial information; (iii) Ms Kong's email "*can only sensibly have been sent on behalf of the Company*"; and (iv) Ms Kong felt able to require the recipients of her email to provide information requested in the form she requested it.

79. The Court accepts Mr Parr's evidence that the email explains (and attaches) certain broad guidelines and assumptions to be adopted across the Group for the preparation of each entity's budget. Mr Parr says that he has verified with Ms Kong, that the email was sent by her, working for JML (Group Finance) on behalf of Jardine Matheson, to enable Jardine Matheson to produce its budget as evidenced by Ms Kong's reference to "*the preparation of our Budget*" (the use of "*our*" being a reference to Jardine Matheson). The email from Ms Kong was received by the Company (and thereby came into the Company's PCP) because the assumptions and guidelines set out in the email applied equally to the Company (as a subsidiary within the Group) for the preparation of its budget. The email requested certain consolidated financial information for use by Jardine Matheson in preparing its budget. Mr Parr says that he is informed by Ms Kong that the major business units within the Group subsequently submitted consolidated financial data for budget purposes into JFRS. The Court is satisfied that Ms Kong's email does not assist in establishing that the Company had free or unfettered access to the documents of the Principal Group Companies.

80. Finally, the Plaintiffs rely on the fact that the Company and Jardine Matheson were able to obtain detailed reports or information from the Group companies, including the other Principal Group Companies, in response to specific requests for particular information. This list includes board papers considering the impact on the Group of the US-China trade conflict and detailed papers considering the impact through the evolving COVID-19 pandemic on the Group (including the Principal Group Companies) in March 2020, May 2020, July 2020 and December 2020. The Plaintiffs contend that the provision of information in relation to the impact of the COVID-19 pandemic on the Group provides a good example of the way in which it was expected, on the part of the boards of the Company and Jardine Matheson, that information would be freely provided to them by the Group companies in relation to particular matters that had arisen. In the Court's view, the provision of information by the Principal Group Companies to the Company and Jardine Matheson in relation to strategic issues such as the US-China trade conflict and the financial implications of COVID-19 (a one hundred-year event) merely evidences the normal flow of information between a parent and subsidiary. The

Court is satisfied that it provides no cogent evidence of an arrangement or understanding between the parent and the subsidiary that the parent would be provided free or unfettered access to the documents of the subsidiary company.

(ii) *Audit Materials*

81. Under the topic of “*Audit Materials*” the Plaintiffs rely upon the Audit Committee’s terms of reference; audit representation letters; and the Group Audit and Risk Management function (known as “**GARM**”).

The Audit Committee

82. The Plaintiffs assert the function of the Audit Committee was to ensure that the Group’s businesses conduct themselves in accordance with acceptable ethical standards and comply with all applicable laws, regulations and the policies and directives of the boards and that: “*to meet these objectives at a Group level and within the operating units, satisfactory and functioning systems of internal control and adequate monitoring must be maintained*”. The Audit Committee “*Terms of Reference*” came before the boards of the Company and Jardine Matheson in 2016 in order to approve slightly amended Terms of Reference that had been in place since December 2010.

83. The Plaintiffs rely upon the updated Terms of Reference for the Company and Jardine Matheson which include the following:

The Audit Committee is authorized to:

- *Investigate any activity within its terms of reference;*
- *Seek any information that it requires from Group companies and all such companies are required to co-operate with any request made by the Audit Committee...*

3.5.4 Ensure the internal audit function has full, free and unrestricted access to all Group activities, records, property and personnel and receives such professional advice necessary to fulfill its agreed objectives.

84. The Plaintiffs say that these provisions demonstrate that the board of the Company (and the board of Jardine Matheson), by the Audit Committee, clearly considered that they were in a position to require the rest of the Group companies to provide any information which the Audit Committee might require, and they were able to ensure “*full, free and unrestricted access*” to “*all Group... records...*” In short, the Plaintiffs contend that there was an understanding that such information and material would indeed be freely available, and it was an understanding of such importance that the Company mandated that the Terms of Reference be published on its website.
85. The objectives of the Audit Committee are set out in paragraph 3 of the Terms of Reference which provides that the Audit Committee will satisfy itself, by such means as it shall consider appropriate, that adequate information and control systems are in place together with arrangements to monitor their effectiveness; and that the businesses of the operating units are conducted in a proper, commercially sound and ethical manner. It further provides that the Audit Committee will act in an advisory capacity to the board and will ensure coordination between the internal and external auditors.
86. The Court accepts that there is nothing in the Terms of Reference which provides any evidence in relation to any alleged arrangement or understanding from the perspective of the Principal Group Companies. The Court is able to draw an inference that the boards of the Company and Jardine Matheson had an expectation that, so far as the Audit Committee requested documents from the Group companies for the purposes of discharging its duties, then those requests would be complied with.

87. Mr Moore KC submits that at most the Terms of Reference are evidence that the board considered that it was delegating to the Audit Committee the powers it required to meet the objectives specified in paragraph 3 of the Terms of Reference. The Court accepts that the Audit Committee's powers are necessarily qualified by reference to these objectives and any access to the documents of the Principal Group Companies is necessarily confined to achieving the objectives of the Audit Committee. Accordingly, the Court accepts the submission that the Audit Committee's Terms of Reference do not support the existence of any wider arrangement or understanding whereby the Company enjoyed *free or unfettered access* to the documents held by Principal Group Companies which were not required for the purposes of achieving the objectives of the Audit Committee.

The Audit Representation Letters

88. It is accepted by the Company and Jardine Matheson that they each separately provided a Representation Letter to PwC as their auditors, which are in near identical form each year. The Plaintiffs contend that, similar to the Terms of Reference for the Audit Committee, the Representation Letters provide wide-ranging representations in relation to the Group. Each year the Representation Letter from each of the Company and Jardine Matheson included the following under the heading "*Information Provided*":

We have provided you with:

- *Access to all information of which we are aware that is relevant to the preparation of the financial statements such as records, documentation, and other matters*
- *Additional information that you have requested from us for the purpose of the audit and*
- *Unrestricted access to persons within the Group from whom you determined it necessary to obtain audit evidence.*

So far as each director is aware, there is no relevant audit information of which you are unaware. (emphasis added)

89. Each Representation Letter defined the companies to which it covered as “[*the Company*] and its subsidiaries, associates and joint ventures (together the “Group”)”. The Plaintiffs contend that given the serious consequences of the representations made by the Company being incorrect, it must be assumed that the board of the Company believed that it had indeed provided to the auditors “*access to all information of which we are aware that is relevant to the preparation of the financial statements such as records, documentation, and other matters*” of the Group. The Plaintiffs argue that there was plainly an understanding that such material would be provided to or at the request of the Company by the Group companies.

90. The Court accepts Mr Parr’s evidence that this representation is an entirely standard requirement for any Company undergoing an audit and it is a representation in relation to the past (“*we have provided you with*”). It is Mr Parr’s evidence, which the Court accepts, that the relevant directors were able to give the representation as a consequence of their confidence in the robustness of the systems, policies and procedures promulgated across the Group by Jardine Matheson which underpin the consolidation process of the Group and the Group’s overall approach to risk management and financial stability. The Court accepts Mr Moore KC’s submission that the fact that the Company was prepared to provide this standard representation to its auditors does not provide any cogent evidence of whether the subsidiaries would, or had agreed to, accede to a request to disclose its documents. The Court accepts that, at its highest, the representation is evidence that the Company had an *expectation* that the subsidiary companies would do so and that does not evidence control over those documents (*Lonrho*, *Schlumberger* at [21], and *Ardila* at [13]).

Group Audit and Risk Management (known as “GARM”)

91. The Company and Jardine Matheson delegated audit and risk functions to GARM. The GARM Terms of Reference dated March 2020 state:

“The Boards of Directors of Jardine Matheson Holdings Limited and Jardine Strategic Limited (“The Boards”) have overall responsibility for the Group’s system of

governance, risk management and internal control. ... The Boards have delegated to the Group Audit Committee responsibility for reviewing areas of risk and uncertainty, the operation and effectiveness of the Group's internal controls and the procedures by which they are monitored. Group Audit and Risk Management ("GARM") assists the Group Audit Committee in fulfilling its assurance and reporting roles. It also assumes an advisory role to the Group Audit Committee and the business units in terms of governance, risk management and internal controls."

92. Under the heading "Authority" the document provides as follows:

"GARM is authorised by the Group Audit Committee to:

- Have full, free and unrestricted access to all business functions, records, properties and personnel.

- Have full, free and unrestricted access to the members of the business unit audit committees and risk management and compliance committees.

...

- Obtain the necessary assistance from personnel in the Group's businesses, as well as other specialist services from within or outside the organisation. "

93. The Plaintiffs assert that GARM prepared reports and provided them to the Audit Committee. They further contend that GARM was routinely able to obtain information from across the Group, including the Principal Group Companies, on a wide range of matters to compile its reports to the Audit Committee. Accordingly, the Plaintiffs submit that this is consistent with an understanding that such material would be readily available to the Company and Jardine Matheson, through their delegated agents.

94. It is the evidence of Mr Parr that GARM's ability to access documents within the Group is circumscribed by the scope of its role, which is defined as "*i) providing independent assurance over internal controls, ii) advising on the risk management and business processes developed by the business units, and iii) reporting on the significant non-compliance issues*". GARM's ability to access documents is limited to the function it performs. GARM's ability to access documentation is fettered by the express provisions of the GARM Terms of Reference.

95. Mr Parr further states that the limited nature of the data collected and used by GARM is further illustrated by the requirement for GARM, as set out in its Terms of Reference, to “[a]dhere to the professional standards as established and revised from time to time by The Institute of Internal Auditors”. These professional standards are mandatory and are set out in a Code of Ethics and Implementation Guides. The Code of Ethics requires that GARM “[c]ollect only the data required to perform the assigned engagement and use this information only for the engagement’s intended purposes”.
96. There is no reason why the Court should not accept Mr Parr’s evidence in this regard which appears to the Court to be rational and compelling. Accordingly, the Court accepts Mr Parr’s evidence and Mr Moore KC’s submission that GARM is permitted only to gather a limited set of information that can be used for the specific and prescribed purposes set out in the Terms of Reference and the Code of Ethics and Implementation Guides. It provides no cogent evidence that the Principal Group Companies were parties to an arrangement or understanding whereby the Company had free or unfettered access to documents held by the Principal Group Companies.

(iii) The Financial Database

97. Relying upon Chudleigh 2 and Chudleigh 6, the Plaintiffs state that the financial database (JFRS) appears to contain detailed financial information including financial budgets, forecasts, and projections for Group companies. The Plaintiffs further contend that it appears that non-public financial information was fed into JFRS from across the Group which could be accessed by Group companies, including at least the Company and Jardine Matheson.

98. In response, Mr Parr states that it is not correct that the Company, or JML acting in its capacity as general manager for the Company, had access through JFRS (or otherwise) to the underlying books and records of the Principal Group Companies, as the Plaintiffs contend. He says that the Principal Group Companies maintain their own separate financial databases and record keeping systems, to which neither the Company nor Jardine Matheson have access. The Principal Group Companies upload consolidated financial information from those systems onto JFRS and that is how the database is populated.

99. Mr Parr further states that to facilitate the preparation of the Company's accounts and consolidated budget, the Company (via JML) was able to access the consolidated financial data that was inputted by Principal Group Companies into JFRS. This data has been disclosed to the Plaintiffs as part of the Defendants' responses to the First and Second Information Requests. However, the Company did not have a right to access all the data on JFRS (for example, it did not have a right to access the consolidation adjustments performed for the purposes of Jardine Matheson's budget).

100. The Court accepts Mr Parr's evidence in this regard which appears to the Court to be rational and plausible. On the basis that the Principal Group Companies maintain their own separate financial databases and upload consolidated financial information from those systems onto JFRS, the Court does not consider that this provides any cogent evidence supporting the existence of an arrangement or understanding whereby the Company enjoyed or Jardine Strategic enjoys free or unfettered access to the documents held by the Principal Group Companies.

(iv) Agreements entered into by the Company

The Evercore Agreement

101. The Plaintiffs assert that the board of the Company, represented by its Transaction Committee, caused the Company to enter into an agreement with Evercore dated 22 February 2021 (“**Evercore Agreement**”) pursuant to which Evercore advised the Transaction Committee on the proposed Amalgamation. It is clear from the Evercore Agreement that the Transaction Committee considered that the Company had very wide access to the documents held by the Company’s subsidiaries and other Group companies.

102. The Evercore Agreement incorporated in a schedule a number of terms concerning the provision of information to Evercore, including the following:

“5.1 The Company agrees that Evercore will have access to the Company, its Associates (as appropriate) and their respective directors, senior management, auditors, accountants, legal advisers and other advisers and to any information or documents that it requires to perform the Services.

5.2 The Company will promptly provide Evercore with all information which might reasonably be expected to be relevant to enable Evercore to fulfil its responsibilities in carrying out the Services to the best of its ability, whether created or acquired by the Company or by anyone acting on its behalf. The Company represents that all information provided and statements made by it or on its behalf, or by or on behalf of its Associates, to Evercore and/or its Associates will be accurate and complete in all material respects.”

103. The definition of Associates in clause 1.2(a) of the schedule provided that “*Associates shall mean, in relation to any person, ... (ii) the subsidiaries and holding companies (if any) from time to time of that person, (iii) each of the subsidiaries of any such holding company from time to time, and (iv) the officers, directors, employees, subcontractors, advisors,*

representatives and agents from time to time of any subsidiary or holding company which is itself an Associate”.

104. The Plaintiffs contend that it is apparent from these provisions that the members of the Transaction Committee of the Company’s board believed that they would be in a position to provide Evercore with access to any information or documents which it required to perform the services under the Evercore Agreement, including the information and documents of the Company’s subsidiaries and holding companies, together with access to the directors, officers and employees of such subsidiaries and holding companies.

105. In response, Mr Parr says that the provisions of the Evercore Agreement are standard terms and conditions or boilerplate clauses. In the Court’s view the provisions of the Evercore Agreement relied upon by the Plaintiffs do not, standing alone, establish that there was an arrangement or understanding between the Company and the Principal Group Companies providing to the Company free or unfettered access to the Principal Group Companies. The Court accepts that the Company had *an expectation* that the Principal Group Companies would provide the relevant documents under the provisions of the Evercore Agreement (as explained in *Lonrho*, *Schlumberger* at [21] and *Ardila* at [13]). However, there is no evidence from the Principal Group Companies in relation to this issue at all. There is no evidence that the Principal Group Companies were asked to provide any information or documents pursuant to the Evercore Agreement or whether they in fact provided any information or documents to either the Company or Evercore.

The Implementation Agreement

106. The Implementation Agreement provided for the preparation by the Company of a “Circular” to be dispatched to the shareholders of the Company in connection with the acquisition contemplated by the Implementation Agreement, which would include within it various information as set out in the definition in clause 1.1. Clause 7.6 of the Implementation Agreement provided as follows:

7.6 Provision of Information

Each party undertakes to provide as soon as reasonably practicable to the other all such information about itself, its Group and its directors as may be reasonably requested and which is required for the purpose of inclusion in the Circular or any other document required to implement the Acquisition and to provide all other assistance which may be reasonably required with the preparation of the Circular and such other documents including access to, and ensuring reasonable assistance is provided by, the relevant professional advisers.

107. The term “Group” is defined in clause 1.1. of the Implementation Agreement as follows:

"Group" means, in relation to any person, its subsidiaries, subsidiary undertakings, holding companies and parent undertakings and the subsidiaries and subsidiary undertakings of any such holding company or parent undertaking.

108. The Plaintiffs contend that these provisions show that the Company’s board was content to undertake to provide information about both itself and its subsidiaries, amongst others, which was required for inclusion in the Circular and to facilitate obtaining assistance from professional advisors (such as Evercore). It is submitted, on behalf of the Plaintiffs, that it is clear that the Company’s board believed that, in practice, it had access to such information.

109. The Implementation Agreement is an agreement between Jardine Matheson and the Company. In the Court’s view, the Implementation Agreement, like the Evercore Agreement,

does not establish that there was an arrangement or understanding between the Company and the Principal Group Companies providing to the Company free or unfettered access to the documents of the Principal Group Companies. The Court accepts that the Company had an *expectation* that the Principal Group Companies would provide any relevant documents under the narrow scope of the Implementation Agreement. However, there is no evidence from the Principal Group Companies in relation to this issue at all. There is no evidence that the Principal Group Companies were asked to provide any information or documents pursuant to the Implementation Agreement or whether in fact they provided any information or documents either to the Company or Jardine Matheson.

110. Further, the Court accepts Mr Moore KC's submission that the Plaintiffs' case appears to be that both the Company and Jardine Matheson have free access to the documents of the Principal Group Companies and as such there is no obvious reason why Jardine Matheson would be requesting, pursuant to the Implementation Agreement, documents from the Company which, on the Plaintiffs' case, it already had.

(v) *The Defendants' position at the Directions Hearing*

111. The Plaintiffs complain about the inconsistency of the representations made by the Defendants at the Directions Hearing and the position taken now in relation to the PCP issue. The Plaintiffs point out that the Defendants' submission at the Directions Hearing was that general discovery would be wholly disproportionate and unmanageable given the size of the Group. At the Directions Hearing, the Defendants' counsel submitted that: "... *the idea that it is going to be remotely useful to have to look at 35 million documents for the purposes of a fair value appraisal of the Company right- well, not right at all but one under the top of the group is really, well, quite extraordinary.*"

112. The Plaintiffs point out that the Defendants have now taken the position in this litigation that they are not able to disclose the documents held by any of the Principal Group Companies because they are not within their possession, custody, or power. The Defendants' case is that there is no understanding or arrangement that makes such documents disclosable by them. The Defendants maintain that nothing they have ever said suggests that they have ever accepted there was such an understanding or arrangement. The Plaintiffs complain that this raises the question as to how the Defendants were able to represent to the Court at the Directions Hearing that the discovery application would involve 35 million documents.

113. The Plaintiffs acknowledge that the Defendants did make it clear in argument at the Directions Hearing that there remained a possession, custody and power issue, at least as regards certain information. Indeed, Mr Parr made clear in Parr 3 that the Defendants' position that the disclosure exercise apparently sought by the Plaintiffs would be colossal was "*subject to questions of possession or custody of and power over documents*". The Court is satisfied that the PCP issue was expressly reserved by the Defendants for a future hearing.

114. The Court is satisfied that there is no relevant inconsistency between the Defendants' position at the Directions Hearing and its position at this hearing which can have any material impact on the Court's determination of the PCP issue.

(vi) Requests made by the Group for the purposes of this litigation

115. The Plaintiffs assert that it can be seen from the evidence that the Company has already been able to obtain such documents and information as it has requested from the rest of the Group for use in this litigation when it suits its purposes to do so.

116. Firstly, the Plaintiffs refer to paragraph 77 of Parr 3 where Mr Parr states that “*I have consulted with the Finance Directors of the various divisions of the Group as to the numbers of monthly management accounts, annual financial budgets and other internal financial reporting documents produced and reviewed within their divisions.*” Mr Parr then sets out in paragraph 79 of Parr 3 a table within which the responses were compiled. The Plaintiffs submit that it is clear that Mr Parr was able to obtain this detailed information, for use in this litigation, from the other companies within the Group without difficulty and the fact he made the request in the first place indicates that he did not think it would be a futile one and had an expectation that the information would be provided.

117. Secondly, the Plaintiffs point out that Mr Parr exhibited at paragraph 47 of Parr 3 the audited financial statements for Jardine Motors and Jardine Pacific. The Plaintiffs submit that “*the fact that the Company was able to access such material is simply another example, consistent with the considerable body of evidence which has now emerged, of the Company being able to obtain financial information from other companies within the Group on demand*”.

118. The Court accepts Mr Moore KC’s submission that, in relation to the documents received from the Finance Directors of the various divisions of the Group, it is not possible to infer anything about the existence of an arrangement providing free access to documents from the facts that: (i) Mr Parr asked for information as to the number of such documents; and (ii) the various Finance Directors were content to answer him. Likewise, in relation to the audited financial statements for Jardine Motors and Jardine Pacific, it is the evidence of Mr Parr that these documents were sought from the relevant entities for the specific and limited purpose of being referred to and exhibited to his Third Affidavit. Again, the Court accepts Mr Moore KC’s submission that the fact that the Company was able to request and obtain, for a limited purpose, the audited financial statements of another Group Company is not any cogent evidence of any arrangement or understanding allowing the Company free or unfettered access to the documents held by the Principal Group Companies (*Lonrho* (CA) at 372 D-E; *Ardila* at [21]; and *Abudawood* at [39]).

119. The Court is required to consider the totality of the evidence presented and relied upon in support of this factual assertion that there is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free or unfettered access to the documents of the third party. In this case, the Court has considered the totality of the evidence outlined above and is not satisfied that this evidence establishes that there is an existing arrangement or understanding, the effect of which is that the Company has in practice free or unfettered access to the documents held by the Principal Group Companies.

120. The above finding, based upon the evidence relied upon by the Plaintiffs, is sufficient to determine the Plaintiffs' application for discovery of the documents held by the Principal Group Companies. However, there are additional reasons which support this finding made by the Court.

121. First, Mr Parr, the Group General Counsel at the relevant times, confirmed unequivocally that the alleged arrangement or understanding does not exist and has never existed:

(1) At paragraph 11 of Parr 5, Mr Parr states that: *"To be absolutely clear, the Alleged Agreement or Understanding does not exist and, so far as I am aware, has never existed. The Defendants do not have "free access" to the documents of the Principal Group Companies (or any Group companies). On conventional principles, those documents are under the control of the respective boards of each relevant Group company."*

(2) At paragraph 10 of Parr 6, Mr Parr states that: *"In Chudleigh 2, the Plaintiffs contended that there was in place between Jardine Strategic and at least the Principal Group Companies and remains in place between the Company and the Principal Group Companies, an arrangement or understanding the effect of which was that the*

Defendants had and have free access to the documents of those entities (Alleged Arrangement or Understanding). In Parr 5, I addressed in detail the factors on which the Plaintiffs relied (as set out in Chudleigh 2) for the existence of the Alleged Arrangement or Understanding and responded to the matters raised by Mr Chudleigh in Section D of Chudleigh 2 as regards documents that are in the Defendants' possession, custody or power (PCP). In doing so, I explained that the Alleged Arrangement or Understanding does not exist and, so far as I was aware, has never existed. That remains my unequivocal evidence."

122. Mr Adkin KC submits that the evidence of Mr Parr in relation to the existence of the alleged arrangement or understanding is likely to be important if the issue is whether there was an *express agreement* to that effect. He says that it provides little assistance to the Court when the Court is considering whether to infer the existence of such an arrangement or understanding from the facts and circumstances presented to the Court.

123. The Court accepts that the evidence of a witness as to the existence of an arrangement or understanding is likely to be more relevant and probative in the case of an express agreement, than in a case where the Court is asked to infer an arrangement or understanding from the evidence relied upon by one of the parties. However, even in the case of an inferred arrangement or understanding, the evidence of a witness such as Mr Parr is not irrelevant and has evidential value. Mr Parr was the Group General Counsel and a director of certain companies within the Group between 2015 and 2022. Prior to that role, he was a corporate partner of Linklaters LLP and global head of the firm's corporate division. Here, Mr Parr was responding to the affidavit evidence of Mr Chudleigh, a Bermuda barrister and attorney representing some of the Plaintiffs. In Chudleigh 2, Mr Chudleigh states that the evidence presented to the Court by the Defendants at the Directions Hearing together with what is apparent from the documents in fact disclosed, "*is consistent, and only consistent, with there being in place between JSHL and at least the Principal Group Companies, and remaining in place between JSL and the Principal Group Companies, an arrangement or understanding the effect of which was that the Company had and have free access to the documents of those entities.*"

124. In the Court's view, Mr Parr is entitled to respond to the evidence of Mr Chudleigh as to the existence of an arrangement or understanding based upon the evidence referred to in Mr Chudleigh's affidavits and based upon Mr Parr's own understanding of the position. Mr Parr's evidence is consistent with the finding made by the Court that there was in fact no arrangement or understanding the effect of which was that the Company had and has free access to the documents of the Principal Group Companies and as such there is no basis for the Court to reject his evidence.

125. Secondly, the Court accepts Mr Moore KC's submission that in the particular circumstances of this case there is no discernible logic for the allegation that the Principal Group Companies would give the Company free access to the documents held by them. It is the Plaintiffs' case that the parties to the alleged arrangement or understanding for free access to the documents of the Principal Group Companies are as follows:

- (a) Jardine Matheson, the principal holding company of the Group. Jardine Matheson is listed in the UK, Singapore and Bermuda. It is the Company's ultimate holding Company. Prior to the Amalgamation, Jardine Matheson held indirectly approximately 85% of the shares in the Company, and the Company held, directly and indirectly, 59.3% of the shares in Jardine Matheson.
- (b) A number of listed companies which were majority owned by the Company prior to the Amalgamation (and are now majority owned by Jardine Strategic), each with a market capitalisation in the USD billions, namely:
 - (i) Hongkong Land, a company listed in the UK, Singapore and Bermuda (held directly as to 50.4%);
 - (ii) Dairy Farm, a company listed in the UK, Singapore and Bermuda (held directly as to 78%);
 - (iii) Mandarin Oriental, a company listed in the UK, Singapore and Bermuda (held directly as to 79%); and

- (iv) JC&C, a company listed in Singapore (held indirectly as to 75%).
- (c) Astra, a company which is held directly as to 50.1% by JC&C and listed on the Indonesian stock exchange, with a market capitalisation in the USD billions.
- (d) Zhongsheng, a company with a market capitalisation in the USD billions and listed in Hong Kong (held indirectly as to 19.2%).
- (e) Three private companies which are wholly owned by Jardine Matheson (not the Company):
 - (i) JML, a subsidiary of Jardine Matheson, which provides management services to a number of companies within the Group pursuant to management agreements with those entities and provides general management services to Jardine Strategic pursuant to the General Manager Agreement.
 - (ii) Jardine Motors and Jardine Pacific, each of which operates a large, complex, standalone business (with revenues in the year ended 31 December 2020 of USD 5bn and USD 6.2bn, respectively).

126. As Mr Parr explains at [10] in Parr 3, each of the listed subsidiary companies below the level of the Company in the Group operates relatively autonomously, commensurate with their status as listed companies with external shareholders. In particular, each of the listed subsidiary companies has its own board of directors, including both executive and non-executive directors, and is subject to its own financial reporting and continuous disclosure requirements.

127. At [30] of Parr 3, Mr Parr states that in very broad terms, the Group's structure might be thought of as a series of pyramids within a larger overall pyramid, with Jardine Matheson at the top. There are several listed holding companies in the upper levels of the Group, in turn holding (directly or indirectly, and among other things) a number of subsidiary companies. These, in turn, each hold further subsidiary companies, which in turn hold further subsidiary

companies, and so on. At [57] of Parr 3, Mr Parr advises that consistent with the “*pyramids within a larger overall pyramid*” concept he has described, the Principal Group Companies in turn have a number of subsidiaries of their own. In particular:

- (a) Hongkong Land has a total of 407 subsidiary companies, of which 266 are active or operating;
- (b) Dairy Farm has a total of 64 subsidiary companies, of which 36 are active or operating;
- (c) Mandarin Oriental has a total of 115 subsidiary companies, of which 100 are active or operating;
- (d) JC&C has 19 subsidiary companies, of which 11 are active or operating; and
- (e) Astra has 235 subsidiary companies, of which 227 are active or operating. Four of Astra’s subsidiary companies are listed companies, holding their own respective groups of companies and preparing their own audited consolidated financial statements.

128. At [58] of Parr 3, Mr Parr confirms that Jardine Motors and Jardine Pacific each holds a substantial number of subsidiaries of its own, including a large proportion that are active or operating. Jardine Pacific has 177 subsidiaries of which 52 are active or operating. Jardine Motors has 78 subsidiaries of which 48 are active or operating.

129. The Court accepts Mr Moore KC’s submission that there has been no adequate explanation as to why a number of listed companies with independent shareholders, their own boards and operational management, operating in the public sphere and subject to the rules and regulation that come with that status, would reach an arrangement or understanding with the Company to provide it with free access to their documents. Still less is there any reason why, having chosen to do so, those companies would not document that arrangement, despite documenting other intra-Group arrangements.

130. It is to be noted that the other three private companies are subsidiaries of Jardine Matheson, the ultimate holding company of the Group, not of the Company. The Company's relationship with JML was, as Mr Moore KC points out, the subject of a contract. If "*free access*" to JML's documents were to be conferred on the Company, that fact would have been documented in that contract.
131. Lastly, assuming there exists an arrangement or understanding to provide free and unfettered access to the Company of the documents held by the Principal Group Companies, it is not clear why such an arrangement or understanding would not also apply to the remaining 1,000 or so companies in the Group. No adequate explanation has been given as to why there is any conceptual distinction, as far as the alleged arrangement or understanding is concerned, between the position of the Principal Group Companies and the remaining 1,000 or so companies in the Group. The proposition that there existed an arrangement or understanding granting to the Company access to the documents held by the Principal Group Companies and their 1000 or so subsidiary companies would be extraordinary and would appear to be contrary to the rationale in *Lonrho*.

D. The Privilege Issue

132. In the discovery given so far, the Defendants have asserted that they are entitled to maintain claims for privilege against the Plaintiffs in the same way as against any other litigant. The Plaintiffs' case is that this is misconceived and because of the relationship of shareholder and company, and the joint interest arising therefrom, no such right exists. As a result, the Plaintiffs claim that they have been denied access to documentation created prior to the Amalgamation which should not have been the subject of a claim for privilege.
133. The Plaintiffs seek an order (at paragraph 7 of the Discovery Summons) that the Defendants are not entitled to withhold certain, relevant documents from the Plaintiffs in these proceedings on grounds of privilege. This follows the general principle under English law that

a shareholder of a company is entitled to see privileged documents of the company obtained in the course of the company's administration of its affairs, including legal advice.

134. The Defendants contend that the Plaintiffs' application for an order precluding the Company from withholding from inspection privileged documents created before 12 April 2021 should be dismissed on the grounds that:

(a) None of the Plaintiffs are shareholders in the Company or Jardine Strategic. The general English law rule relied upon by the Plaintiffs, which disables a Company from asserting privilege against its shareholders in litigation, does not extend to past shareholders.

(b) In any event, the legal advice obtained by the Company in connection with the Amalgamation falls within an established exception to the general English law rule as it was obtained in circumstances where the Company's board (and independent Transaction Committee) reasonably contemplated hostile litigation against the Defendants.

(c) Finally, in the event that the Court were to disagree on points (a) and (b), the Defendants invite the Court not to adopt the English rule. The basis of the English rule is "*distinctly dubious*" (a description used in *Hollander* at 5-02) and has not been followed in other common law jurisdictions, including Canada and the US.

The position under English law

135. It is common ground that the English rule precluding a company from claiming privilege against its shareholders has its origin in cases decided in the 1880s, directly applying partnership and trust principles. At that time, there was a widely held view that a beneficiary of a trust, if he established an equitable interest in trust property, had a right to inspect documents held by trustees because he had a proprietary right in them and they were, in a

sense, his own. Thus, in *Lewin on Trusts*, 20th ed., the learned editors state at paragraph 21-021 that:

*There was a widely held view, supported by earlier editions of this work, that a beneficiary, if he established that he had an equitable interest in the trust property, had a right of inspection of documents owned or held by trustees because he had a proprietary right in them, and they were in that sense his own (citing *O'Rourke v Darbishire* [1920] AC 581 at 626, HL, per Lord Wrenbury).*

136. Again, it appears to be common ground that the trust principles were directly carried across to the company–shareholder relationship without regard for a company’s separate legal personality. In *Mayor and Corporation of Bristol v Cox* (1884) 26 Ch D 678, which is one of the earliest cases of the English rule in a company–shareholder context, Pearson J held:

“He says ... he is also a ratepayer of the City of Bristol, and being a ratepayer he has contributed towards paying for [the privileged documents], and having done that, the case comes within the authorities of those cases where trustees have taken counsel’s opinion at the expense of the trust estate and the cestuis que trust are entitled to see it. He says that the corporation are trustees for Mr Cox, that they have got these [privileged documents] practically at the expense of Mr Cox, and Mr Cox is therefore entitled to see them.

I think that if this was an action by Mr Cox as a ratepayer against the corporation of the city of Bristol with regards to some matter or other which related to the raising of the rates, or to the expenditure of the rates, it may be quite possible, and it is very probable, that Mr Cox would have a right to see them, but this is an action by the mayor, alderman and burgesses of the city of Bristol, not as against Mr Cox in any way whatever as a ratepayer, but as a corporation really defending the interests of the ratepayers themselves against the Defendant, who they say is injuring those interests. That is a totally different case altogether ...”.

137. The statement of Pearson J in *Corporation of Bristol* was applied as “the general principle” in the shareholder and company context in *Gouraud v The Edison Gower Bell Telephone Co* (1886) 57 LJ Ch 498, a common law derivative action by the plaintiff shareholder personally “on behalf of himself and all other shareholders” for an injunction to restrain the company

and its counterparty from acting upon an agreement said to have been made in fraud of the rights of shareholders. Chitty J held at pages 499-500:

Mr Justice Pearson, in The Mayor of Bristol v Cox, has, however, intimated rather, perhaps, than laid down the rule which governs questions like the present. He says in his judgement, "I think that if this action was an action by Mr Cox, as a ratepayer, against the corporation of the city of Bristol with regard to some matter or other which related to the raising of the rates or to the expenditure of the rates, it might be quite possible, and it is very probable, that Mr Cox would have a right to see [those documents]; and he founds that statement, as I understand him, on the general principle that obtains in partnership actions, and also in actions by a cestui que trust against a trustee - namely, that a party cannot resist production of documents which have been obtained by means of payment from the moneys belonging to the party applying for their production. I think that that is the general principle, and one which, to my mind, applies as between a shareholder and the directors who manage his property, when the documents are paid for out of his property. I hold that the principle applies between a shareholder and the managing directors of a company.

138. In *Woodhouse v Woodhouse* (1914) 30 TLR 559, the Court of Appeal (comprising Phillimore LJ and Lush J) considered that the rule was founded upon the common interest in property expended on obtaining legal advice in the context of a shareholder seeking discovery from a company. Phillimore LJ held at 560:

The principle was that if people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, i.e., company's money or trust fund, was the common property of the shareholders, or cestui que trust. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged...

Lush J held at 560:

Where a company obtained advice in the common interest and paid for it out of the common fund, undoubtedly the shareholder would have a right to see it. But that did not apply where the interest of the company and the shareholder were adverse.

139. In *Dennis & Sons v West Norfolk Farmers Manure and Chemical Co-op* [1943] Ch 220, Simonds J referred at page 222 to the “general rule” which applied “*equally as between a company and its shareholders and as between a trustee and his beneficiaries*”:

The general rule which applies equally as between a company and its shareholders or as between a trustee and his beneficiaries is stated at pp 518, 519 of the Annual Practice:

'A cestui que trust ... is entitled to see cases and opinions submitted and taken by the trustee for the purpose of the administration of the trust; but where stated and taken by the trustees not for that purpose, but for the purpose of their own defence in litigation against themselves by the cestui que trust they are protected ... On the same principle a ratepayer would be entitled to see cases and opinions taken by the corporation on the subject of rates ... and so in Gouraud v. Edison, an action by shareholders against the company, the plaintiffs were held entitled to see communications between the company and their solicitors: but similarly a shareholder could not see counsel's opinions taken by the company in respect of the matter in dispute between them ...

140. The modern statement of the rule is set out in the judgment of Nugee J in *Sharp v Blank* [2015] EWHC 2681 (CH) at [9]:

The foundation, as I understand it, of the general rule is the same as the foundation of the similar general rule that applies in the case of trustees and beneficiaries. Just as a trustee who takes advice as to his duties in relation to the running of a trust, and pays for it out of the trust assets cannot assert privilege against the beneficiaries who have, indirectly, paid for that advice, so too a company taking advice on the running of the company's affairs and paying for it out of the company's assets cannot assert a privilege against the shareholders who, similarly, have indirectly paid for it.

141. In *CAS (Nominees) Limited v Nottingham Forest PLC* [2001] 1 All ER 954 Evans-Lombe J held at [17] that in applying this rule no relevant distinction could be drawn between small private companies with limited shareholdings and publicly listed companies with substantial numbers of shareholders given that “*the directors are subject to the same duty to shareholders regardless of the size of the company concerned*”:

...Nothing in the Woodhouse case or the subsequent authorities down to and including the Hydrosan case supports the proposition that the rule is to be differently applied depending on the size and importance of the company concerned. As the authorities show the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show directors though not properly described as trustees of the assets of the company within their charge, nonetheless owe fiduciary duties to the shareholders which prevent them from applying those assets save for the purpose of the company. Directors are subject to the same duty to shareholders regardless of the size of the company concerned.

142. In *Thanki: The Law of Privilege* (3rd ed) the existence of the rule is justified on the basis of the joint interest of the parties as opposed to the interest of the shareholder in the property of the company:

6.07 Joint privilege can also arise, even though party A and party B had not jointly retained a lawyer (and only one of them is a party to the relevant lawyer-lawyer relationship), they have a joint interest in the subject matter of the communication. The defining characteristic of this aspect of joint privilege is that the joint interest must exist at the time that the communication comes into existence. So joint privilege will only rise in respect of a document created during the period when the joint interest subsists; in other words, the documents must have come into being for the furtherance of the joint purpose or interest...

6.08 If a joint interest exists then the same principles as those set out above in relation to joint retainers with generally apply. Accordingly, neither party can assert privilege as against the other in respect of communications coming into existence at the time the joint interest subsisted; hence, each party to a relationship can obtain disclosure of the other's (otherwise privileged) document so far as they concern the joint purpose or interest. However, both parties are entitled to maintain privilege as against the rest of the world. As with a joint retainers, the privilege is not lost simply because the parties subsequently fall out...

6.09 Examples of joint interests. Whilst not rigidly defined concept, examples of situations where such a joint interest has been held to arise are between:

- *a trustee (properly so-called) and the beneficiary;*
- *a parent company and its wholly-owned subsidiary;*
- *a company and its shareholders;*

- *a limited liability partnership and its members a company and its members;*
- *a company and its director; and*
- *partners.*

143. As the cases reviewed above demonstrate, it is established under English law that a company may not claim privilege against its shareholders. The rule was originally based upon the proprietary interest of the shareholder in the property of the company expended on obtaining legal advice. The justification of the rule has changed to the discharge of the fiduciary duties owed by a director to the shareholders (Evans-Lombe J in *CAS (Nominees) Limited v Nottingham Forest PLC* [2001] 1 All ER 954) and the existence of a joint interest in the subject matter of the communication (*Thanki: The Law of Privilege* (3rd ed)).

The application of the rule to past shareholders

144. The Defendants contend that there is no authority the Plaintiffs can point to for the proposition that a company may not claim privilege against a past shareholder. Instead, the Defendants contend that it is clear from the authorities that the English rule is limited to a company's present shareholders. They argue that it is a person's status as shareholder which precludes a company from claiming privilege.

145. The Defendants argue that to extend the general rule to past shareholders would be inconsistent with its basis as formulated in the case law. Once a shareholder has disposed of his shareholding, he can, on no footing, be described as having any proprietary interest in the company's assets. The consequence of the Plaintiffs' argument, if accepted, would lead to an ever-increasing pool of persons who can go behind its assertion of privilege. The pool could only get bigger, not smaller, as a company's shareholder base changes over time, and is

potentially unlimited. A publicly traded company, like the Company, would end up with potentially tens of thousands of unrelated persons entitled to inspect its privileged documents in litigation.

146. As noted earlier, *Thanki* considers that the relationship of the company and its shareholders gives rise to joint interest privilege. He further states that the defining characteristic of joint privilege is that the joint interest must exist at the time that the communication comes into existence and that the privilege is not lost simply because the parties subsequently fall out.

147. The above analysis is supported by a number of authorities. In *Dennis & Sons v West Norfolk Farmers Manure and Chemical Co-op* [1943] Ch 220, a report obtained by a company from chartered accountants on the interpretation of one of the articles of association of the company involving the duty of the directors in administering the affairs of the company was held to be a report obtained on behalf of all shareholders and was not privileged if ordered before, or even if received after, the commencement of legal proceedings by certain shareholders against the company to determine a dispute on the construction of the article. Thus, this case supports the thesis that the relevant time to consider the existence of the privilege is at the time of the relevant communication under consideration.

148. In *BBGP Managing General Partners Ltd v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch) [2011] Ch 296, Norris J approved the statement of the law in *The Law of Privilege* (2006), ed Bankim Thanki QC, para 6.12:

“in order for joint privilege to arise the joint interest must exist at the time that the communication comes into existence. If the parties subsequently fall out and sue one another, neither of them can claim privilege as against the other in respect of any documents that are caught by the joint privilege, as the original joint interest is not destroyed by a subsequent disagreement between the parties.”

149. Paragraphs 6.7-6.9 were referred to and set out with apparent approval in the Court of Appeal judgments of Clarke P and Subair-Williams JA in *Wang v Grand View Private Trust Co Limited* [2021] Bda LR 29, at [77], [138] and [139].

150. The Court of Appeal decision in *CIA Barca De Panama S.A. v George Wimpey & Co Ltd* [1980] Lloyd's Law Reports 598, further supports the proposition that the relevant time for the consideration of the joint interest is at the time of communication. In this case, in the 1960s Barca and Wimpey formed a company called DLW, each having a 50% holding. The object of the joint venture was to provide services to the oil companies and all or most of DLW's work was undertaken in the Middle East. In 1972, the parties decided to terminate the joint venture, the chosen method being that Wimpey should buy Barca's interest in DLW, and entered into an agreement which provided in detail how this was to be achieved. One outstanding item under the agreement was the settlement of disputed claims between DLW and Aramco. Negotiation of the disputed claims arising out of the DLW contracts were conducted by Wimpey and Aramco, and in May 1975 a settlement was agreed. No approval, written or otherwise, of Barca was ever sought when the compromise was concluded, nor were Barca informed in advance of the terms of that agreement. Barca rejected the settlement and sought discovery of documents in relation to this claim including documents which would be the subject of legal professional privilege.

151. The Court of Appeal held that: (i) it was clear that Barca and Wimpey had a common (joint) interest in the dispute between DLW and Aramco; (ii) up to the point where the unapproved compromise was concluded between Aramco and Wimpey, there was no dispute between Wimpey and Barca; and (iii) since there was no litigation between Wimpey and Barca to which the documents relating to the earlier dispute with Aramco were relevant, legal professional privilege for those documents could not be claimed by Wimpey. The Court of

Appeal clearly took the view that the settlement agreement was relevant to this issue of joint privilege. However, as a proposition of general application, Bridge LJ held at 615 that:

“If A and B have a common interest in litigation against C and if at that point there is no dispute between A and B then if subsequently A and B fall out and litigate between themselves and the litigation against C is relevant to the disputes between A and B then in the litigation between A and B neither A nor B can claim legal professional privilege for documents which came into existence in relation to the earlier litigation against C.

Applying that broad general principle in the circumstances of this case, it is clear beyond argument... that Barca and Wimpey had a common interest in the dispute between DLW and Aramco... there was no dispute between Barca and Wimpey...to which the documents relating to the earlier dispute and Aramco are relevant that legal professional privilege for those documents cannot be claimed by Wimpey.”

Stephenson LJ held at page 615 that:

“I cannot accept Mr Tackaberry's argument that by severing their relationship of the shareholders and so on by some of the terms of the purchase agreement, the plaintiffs in some mysterious way destroyed their interest in the Aramco proceedings. If they still have that interest, they must be entitled to inspect all the documents for which privilege is claimed.”

152. Here, the documents in respect of which discovery is sought by the Plaintiffs came into existence when the Plaintiffs were still shareholders of the Company, a relationship which, as the English authorities appear to indicate, gives rise to joint interest privilege. The fact that the parties fall out after the relevant privileged documents came into existence or a party is no longer in the relationship giving rise to joint interest privilege, does not affect the privileged communications which have already taken place and the documents which have already come into existence during the privileged relationship. It follows, in the Court's judgment, that any documents which were, at the time of their creation, the subject of joint interest privilege between the Company and the Plaintiffs, remain the subject of joint interest privilege in the

present proceedings commenced by the Plaintiffs as shareholders under section 106 of the Act.

153. The Defendants argue that any entitlement of a shareholder to see a company's privileged documents in litigation could not be a personal right independent of a person's shareholding. Instead, it would be a right derived from, and incidental to, that person's status as a member. It would follow, it is contended, that once a shareholder ceases to be a member, whether by transfer or cancellation of his shares, any rights to see the company's privileged documents in litigation, like all of his rights incidental to his status as a member, cease to exist and, in the case of a transfer, would be assumed by his successor in title. Therefore, the Defendants contend, a former shareholder does not retain any "*joint interest rights*".

154. In relation to this argument advanced by the Defendants, the Court accepts Mr Hollander KC's submission that there is a distinction in analysis between: (i) documents created during a relationship which gives rise to joint interest privilege; and (ii) whether a new shareholder is entitled to see the documents which were created during the period before he became a shareholder. In relation to the documents created during the relationship which gives rise to joint interest privilege, the relevant issue is whether the documents were created during the period of the relationship. The privilege does not disappear when the shareholder ceases to be a shareholder. In relation to whether a new shareholder is entitled to see the documents which were created during the period before he became a shareholder, the analysis is indeed concerned with property rights. Authorities show that shareholders are entitled to be treated as successors in title of prior shareholders for purposes of legal professional privilege. Under this analysis, privilege can be regarded as an incident of a property right, such that privilege may be asserted by successors in title to the property (*Hollander on Documentary Evidence* (14th Ed) 13-08 and 19-04, approved in *Travelers Insurance Company v Armstrong* [2021] EWCA Civ 978; *Surface Technology plc v Young* [2002] FSR 25; *Winterthur Swiss Insurance v AG (Manchester) Ltd* [2006] EWHC 839 (Comm); *Crescent Farm v Sterling Offices* [1972]

Ch 553; and *St. John's Trust Company (PVT) v James Watlington et al.* 2015 SC (Bda) 447 Civ 14 December 2020).

Hostile litigation within reasonable contemplation exception

155. The Defendants submit that even if the joint privilege rule applies to the circumstances of this case, the exception is engaged in that the prospect of litigation had been contemplated since the Amalgamation was first considered on the basis that the Company was advised that an amalgamation would afford any shareholder a statutory right to have the fair value of their respective shares appraised. It follows, argue the Defendants, that the Company (and now Jardine Strategic) can assert privilege vis-à-vis its former shareholders in relation to advice received in connection with, or relevant to, such litigation.

156. The Defendants contend that the application of this exception is fact sensitive. The present litigation could be (and, without waiving any privilege over legal advice received by the Company or the Transaction Committee, was) reasonably contemplated by the Company when first considering the Amalgamation proposal. The Defendants say that is unsurprising given:

(a) There is a statutory right to file an action for appraisal. The Circular specifically informed shareholders of that right, as well as in the letter from the Transaction Committee, Explanatory Statement and the Notice of the Special General Meeting. The Defendants point out that no specific statutory remedy for a corporate transaction was available in any of the cases where the hostile litigation exception applied.

(b) Approximately 78% of the Plaintiffs acquired their shares (or depositary receipts) after the first announcement of the proposed Amalgamation, with the knowledge that the Amalgamation was a foregone conclusion (given Jardine Matheson's direct and indirect

aggregated shareholdings of c. 85%) and merely as an arbitrage opportunity for the sole purpose of pursuing appraisal proceedings. The Defendants contend that the Plaintiffs were themselves contemplating litigation very shortly after the announcement. In this regard, the Defendants rely upon, for example, the fact that, as at 17 March 2021, United First Partners, a special situations investment and advisory group, was “*working with a large New-York based attorney with vast experience in dissensions in Cayman and Delaware cases*” and, already at that time, they understood “*that many Bermudan lawyers have been conflicted out to act for dissenters*”.

(c) Similar steps had been taken in relation to recent amalgamations in other jurisdictions, including by at least four of the Plaintiffs (Maso Capital Investment, Blackwell Partners LLC, Crown Managed Accounts SPC and Star V Partners) in the Cayman Islands.

(d) In those circumstances, the Plaintiffs’ contention that hostile litigation could only reasonably be contemplated from 12 April 2021, the date on which the Amalgamation was approved by shareholders, is entirely unrealistic.

157. The Plaintiffs submit that the exception has no application where the real hostility or conflict is not between company and shareholder but between different shareholders. The Plaintiffs rely upon *Re Hydrosan* [1991] BCC 19, where Harman J held that a contributory’s petition for a just and equitable winding up was not hostile litigation by a shareholder against the company. It is a claim by a shareholder based upon wrongful acts by other shareholders or directors which have amounted to equitable wrongdoing within the articles. The Plaintiffs also rely upon *Arrow Trading v Edwardian Group* [2004] BCC 955.

158. The Plaintiffs submit that there is no conflict between the position of the Company and the dissenters until 12 April 2021, the date upon which the first of these proceedings were commenced by the Plaintiffs. In this regard, the Plaintiffs contend that following the announcement that Jardine Matheson had made an offer to the Company to purchase the

minority's shares for \$33 per share, the Company was under a duty to act in the best interests of its shareholders and had a statutory obligation to ensure that the minority had been offered fair value. Accordingly, the Company's board put in place the Transaction Committee, who in turn engaged Evercore, to assess whether Jardine Matheson's offer of \$33 per share would, if agreed, reflect the fair value of the minority's shares. This process, the Plaintiffs contend, was for the exclusive benefit of the minority shareholders, and the Company was not acting adverse to the interests of the minority shareholders.

159. The Plaintiffs further rely upon the fact that the Transaction Committee, with the assistance of Evercore, was performing a statutory obligation to consider whether the minority shareholders would receive fair value if paid \$33 per share. Having discharged this obligation, the Company was then in a position to proceed with the Amalgamation and issued the Circular and SGM Notice with the draft Amalgamation Agreement. The draft Amalgamation Agreement envisaged that Jardine Matheson (not the Company) would pay \$33 per share to the minority shareholders. To the extent there were dissenters and fair value is appraised at more than \$33 per share, the draft Amalgamation Agreement provided that Jardine Strategic would pay the difference. In the circumstances, the Plaintiffs contend that to the extent that any conflict of interest arises at all between the Plaintiffs and the Defendants, it cannot arise until on or about 12 April 2021 because at least until then the interests of the Company and the Plaintiffs were not in any sense in conflict and there was no adversity between those parties.

160. *Re Hydrosan Ltd* concerned an application by the petitioner in a petition under section 459 of the English Companies Act 1985 seeking discovery of documents for which legal professional privilege was claimed. There were two sets of documents: first, solicitors' bills relating to an earlier petition, and second, documents relating to a rights issue proposed by the company. The respondents argued that the first set of documents was not discoverable, as an exception to the ordinary rule that advice by solicitors to the company was disclosable to shareholders,

because the section 459 petition constituted hostile litigation between the petitioner and the company; and that the second set was not discoverable because when the documents were created litigation was in contemplation. Harman J held that a minority shareholder's petition was not hostile litigation between the petitioner and the company such as to prevent the first set of documents being producible. Harman J held at 20 D-F that section 459 proceedings are essentially proceedings between shareholders, and the company is merely a nominal party and indeed is prohibited from expending any monies in relation to that dispute:

"The proposition is reinforced by a recent decision of Hoffmann J (junior counsel for the company in A & B C Chewing Gum) in Re Crossmore Electrical and Civil Engineering Ltd (1989) 5 BCC 37 at p. 38G where he said:

"The company is a nominal party to the sec. 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between the shareholders ... "

161. In relation to the documents concerning the rights issue, it was argued on behalf of the company that from the nature of the relations between the parties it was reasonably to be contemplated that there would be litigation arising. Harman J held that any legal advice obtained by the company in relation to a contested rights issue after the date on which the company had posted the circular for the EGM, at which the rights issue was approved, was not disclosable. He held at 23 B-C that from that date it plainly could be contemplated that litigation might well arise against the company in the true sense:

"In this case, it seems to me, the issue of the notice convening the extraordinary general meeting and of the circular explaining the nature of the business to be considered at the EGM was a date from which it plainly could be contemplated that there might well arise litigation. No communication between the client, that is I suppose the company, because the company would be the subject of the claim, and the solicitors after the date of the circular should be open to production. Down to that date I cannot think that there can have been contemplation of litigation because down to that date the company could have decided not to seek to make its rights issue and there would never have been an occasion for litigation. It seems to me that the cut-off date therefore is the date of the notice and

circular convening the EGM. Down to that date the documents are within the general rule which I have already enunciated that all documents concerning the administration of the company being advice by solicitors to the company about its affairs are disclosable to shareholders; after that date litigation against the company in the true sense within the doctrine which I have already mentioned was in contemplation within the decision of Malins VC and is not producible. In my view, therefore, disclosure down to that date ought to be made of all such documents."

162. *Arrow Trading v Edwardian Group* [2005] 1 BCLC 696 also concerned applications, in proceedings against unfairly prejudicial conduct under section 459 of the English Companies Act 1985, by the petitioners for an order restraining the company whose affairs were the subject of the petition from expending its money or other assets in the course of participation in the proceedings other than for certain limited purposes, and for disclosure of certain financial information. In relation to the issue whether the documents were privileged and whether the exception applied, Blackburne held at [24]:

"It is well established by authority that a shareholder in the company is entitled to disclosure of all documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where the advice relates to hostile proceedings between the company and its shareholders: see Re Hydrosan Ltd [1991] BCC 19 and CAS (Nominees) Ltd v Nottingham Forest plc [2002] BCC 145. The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company." (emphasis added)

163. *CAS (Nominees) Ltd v Nottingham Forest PLC* [2001] 1 All ER 954 again concerned applications for disclosure of documents made by the claimants against defendants in a petition brought by the claimants against 8 defendants under section 459 of the English Companies Act 1985.

164. In *Sharp v Blank* [2015] EWHC 2681 (Ch) Nugee J reviewed the scope of the exception to the general rule that a company taking advice on the running of the company's affairs and paying for it out of the company's assets cannot assert privilege against the shareholders who have indirectly paid for it. Nugee J held that: (i) the foundation of the exception is the existence of actual or threatened litigation **and** the taking of advice in connection with the actual or threatened litigation; (ii) the exception goes beyond actual or threatened litigation and encompasses litigation in contemplation; (iii) the foundation of the exception is the fact that not only the interests of the parties have diverged, but that litigation, actual, threatened or in contemplation, has caused the company to take advice in defence of or in connection with, the actual, threatened or contemplated litigation; and (iv) it is only the advice in defence of or in connection with the contemplated litigation, obtained by the company to enable it to carry on with litigation, that is privileged against the shareholders:

"10. The decision in Woodhouse does not, I think, give any support to the notion that the determining question of whether the general rule or the exception applies is whether the interests of the company and the interests of its shareholders are wholly aligned or not... The foundation of the exception is still, it seems to me, the existence of actual or threatened litigation, and the taking of advice in connection with the actual or threatened litigation.

11. It is not disputed that the exception goes beyond actual threatened litigation and encompasses litigation in contemplation. It was expressed by Blackburne J. in Arrow Trading and Investments & Anr v Edwardian Group Limited & Ors [2004] EWHC 13/9 (Ch) at [24] as follows: "...The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company in defence of an action, actual, threatened or in contemplation, by a shareholder against the company."

...

13... Those citations are all, it seems to me, consistent statements to the effect that the foundation of the exception is the fact that not only the interests of the parties have diverged, but that litigation, actual, threatened or in contemplation, has caused the company to take advice in defence of, in connection with, or relevant to, that actual, threatened or contemplated litigation.

...

20... Even if it were shown that there were circumstances which made it appropriate to conclude that litigation was in reasonable contemplation on 18th September or 8th October (or any other date in 2008), it does not follow that all legal advice taken from that date by the board was advice in defence of or in connection with that contemplated litigation.

21 In my judgment, for the reasons I have sought to express it is only advice of the latter type, advice which was obtained by the company to enable it to carry on with litigation, advice which was in connection with that dispute, advice in defence of the contemplated litigation, which falls within the exception to the general rule, and that is privileged against the shareholders... ”

165. The above review of the authorities clearly establishes that in relation to minority oppression proceedings under section 111 of the Act or under section 459 of the English Companies Act 1985: (i) the company is only a nominal party to the proceedings; (ii) the proceedings concern disputes between the shareholders inter-se; (iii) the company is expected to maintain a neutral position in the dispute between the shareholders; and (iv) the company is not allowed to expend its monies in relation to these proceedings. Based upon these features of the minority oppression proceedings, the courts have held that these proceedings are not in the nature of hostile proceedings against the company.

166. The Court does not consider that the appraisal actions under section 106 of the Act by the shareholders against the company are in the same category as minority oppression proceedings. Proceedings under section 106 are capable of constituting hostile proceedings against the company. In section 106 proceedings, the shareholders are pursuing a statutory remedy against the company. The company (following amalgamation) is not merely a nominal defendant in section 106 proceedings but a defendant who would be liable to pay the difference to the shareholders in the event the Court determines that the fair value of the shares is higher than under the terms of the amalgamation. A company in section 106 proceedings faces, as these proceedings demonstrate, protracted and bitterly fought litigation which may last many years. In the present proceedings, there have already been three hearings lasting for

12 days at which the Plaintiffs have been represented by four leading English counsel. Such proceedings clearly have a financial impact on the company in question, but they also represent a huge burden on the management resources of the company. In the circumstances, the Court has no hesitation in concluding that, unlike minority oppression proceedings, section 106 appraisal actions are capable of constituting hostile proceedings against the company. Any company faced with such hostile proceedings is entitled to obtain legal advice in connection with such proceedings and that advice is protected from disclosure to shareholders in such hostile proceedings.

167. In this case, for the reasons set out in paragraph 156 above, the Court concludes that it was virtually inevitable that there would be appraisal actions by the shareholders if the Amalgamation was going to be announced and implemented. This is demonstrated by the fact that 78% of the Plaintiffs acquired their shares (or depositary receipts) after the first announcement of the proposed Amalgamation, with the knowledge that the Amalgamation was a foregone conclusion. It is also demonstrated by similar steps having been taken in relation to recent amalgamations in the Cayman Islands involving Hong Kong based companies. The Court holds that, as at the time when the Company and Jardine Matheson decided to implement the necessary steps to accomplish the Amalgamation, section 106 proceedings against the Company were in the contemplation of the Company. Any other conclusion, in the Court's view, would be entirely contrary to the Cayman Islands experience of similar amalgamations involving Hong Kong based companies and the actual experience in this case. The Court accepts Mr Moore KC's submission that the present litigation was in the contemplation of the Company by the time the Transaction Committee was established on 19 February 2021.

168. The Court accepts the Transaction Committee and indeed the Company had an obligation to ensure that the minority shareholders were paid fair value for their shares in accordance with section 106 of the Act. The Court does not accept that the existence of this obligation on the

part of the Company or the Transaction Committee necessarily means that the Company could not at the same time take the view that section 106 appraisal proceedings (hostile proceedings) were in contemplation and indeed inevitable. There is no conceptual reason why (i) the obligation on the part of the Company and the Transaction Committee to ensure that the minority shareholders receive fair value for their shares; and (ii) an appreciation on the part of the Company and the Transaction Committee that appraisal litigation was in contemplation and indeed inevitable, could not exist at the same time.

169. Accordingly, the Court concludes that based on the facts set out in paragraph 156 above, litigation in the form of section 106 proceedings was indeed in contemplation by the time the Transaction Committee was established on 19 February 2021. As a result, in accordance with the decision of Nugee J in *Sharp v Blank*, any legal advice sought and received, on or after 19 February 2021, by the Company and/or the Transaction Committee in defence of or in connection with the contemplated section 106 proceedings will fall within the exception to the general rule and is privileged against the Plaintiffs.

Should the English rule be imported into Bermuda law

170. As set out in paragraphs 135 to 143 above, the English rule precluding a company from claiming privilege against its shareholders has its origin in cases decided in the 1880s, directly applying partnership and trust principles. At that time, there was a widely held view that a beneficiary of a trust, if he established an equitable interest in trust property, had a right to

inspect documents held by trustees because he had a proprietary right in them and they were, in a sense, his own. The trust principles were directly carried across to the company--shareholder relationship without regard for a company's separate legal personality.

171. As *Hollander* rightly observes at 5-02, the principle was established in the 19th century before cases such as *Salomon v Salomon & Co Ltd* [1897] A.C. 22 and *Macaura v Northern Assurance Co Ltd* [1925] A.C. 619 drew a clear distinction between a company and its shareholders and held that shareholders have no interest in the property of the company. The position is now confirmed by the Supreme Court in *Marex Financial Ltd v Sevilleja* [2021] AC 39 at [31] that “...*A share is not a proportionate part of a company's assets: Short v Treasury Comrs. Nor does it confer on the shareholder any legal or equitable interest in the company's assets: Macaura v Northern Assurance Co Ltd. As the court stated in Prudential, a share is a right of participation in the company on the terms of the articles of association.*”

172. As a result of these decisions, the basis of the rule as far as the company and shareholders was concerned disappeared. *Hollander* considers that the basis of the rule is “*distinctly dubious*” and arguably, once the separation between the company and shareholders had been established, the law should have changed course: “*There is much to be said for the view that English law has taken a wrong turn here, but the principle seems settled below the Supreme Court, and even they might take the view that it was too well settled to change now.*”

173. Secondly, as noted earlier, the shareholder-company privilege was based upon the beneficiary-trustee rule that if a beneficiary could establish that he had an equitable interest in the trust property, he had a right of inspection of documents owned or held by the trustees because he had a proprietary right in them, and they were in that sense his own (See *Lewin on Trusts*, 20th ed, at 21-020 citing *O'Rourke v Darbishire* [1920] AC 581 at 626, per Lord Wrenbury). However, its application to the shareholder-company context does not produce

the same result. As noted by *Hollander*, outside of litigation, a shareholder has no right to access the privileged documents of the company. The right which arises from this line of cases only arises in the course of litigation.²

174. Thirdly, as noted earlier, Evans-Lombe J in *CAS (Nominees) Ltd v Nottingham Forrest PLC* appeared to rely upon the existence of fiduciary duties owed by the directors to the shareholders. At [17] Evans-Lombe J held that:

“As the authorities show the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show directors though not properly described as trustees of the assets of the company within their charge, nonetheless owe fiduciary duties to the shareholders which prevent them from applying those assets save for the purpose of the company.”

175. However, as a general proposition it is doubtful that the directors owe fiduciary duties “to the shareholders”. As a general proposition, directors’ duties as directors are not owed to the shareholders individually but are owed to the company (See *Percival v Wright* [1902] 2 Ch 421).

176. Fourthly, other common law jurisdictions and in particular Canada has taken a different view, rejecting the English authorities on the basis that the shareholders have no proprietary interest in the property of the company. Thus, Master Peterson in *McKinlay Transport Ltd. v. Motor Transport Industrial Relations Bureau of Ontario (Inc.)*, 3 W.D.C.P. (2d) 478 declined to

² The Privy Council decision in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 has, in any event, discarded the proprietary right analysis in the beneficiary context. Lord Walker held that it was fundamental to the law of trusts that the court had jurisdiction to supervise and, if appropriate, intervene in the administration of a trust, including a discretionary trust and that the more principled and correct approach was to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts.

follow *Gouraud* on the ground that it was decided pre-*Salomon*, at a time when corporations and their interests were not considered distinct from those of their shareholders:

*“[7] [t]he corporation was the trustee for the shareholder’s property which included the [legal] opinions. That is, each shareholder, or at least all the shareholders given the class action nature of the suit, had a property interest in the corporation’s assets. This is not now the law. The law since Salomon is that a shareholder does not have a property interest in the underlying assets of the corporation. The shareholder’s only property interest is in the shares of the corporation.”*³

177. Master Peterson justified the decision on the ground of public policy allowing companies to seek legal advice on matters arising in the ordinary course without the risk that such communications may have to be disclosed to its shareholders in any subsequent proceedings:

“[5] [t]he implications of the Plaintiff’s proposition are very wide indeed. Corporations, large and small, routinely seek legal advice on a wide variety of topics. If the Plaintiff’s submission is correct, in any later litigation by a shareholder, such a shareholder will have a right to see such opinions unless the opinions were generated in relation to potential litigation with such a shareholder. The effect of such a holding can only be to substantially impede a corporation’s ability to seek legal advice on matters arising in the ordinary course and to impede counsel’s ability to express opinions which freely and openly discuss with a corporation the legal risks of a proposed course of conduct. Such a chill in open communications between corporations and their solicitors will necessarily result as, if the Plaintiff’s submissions are accepted, corporations will face the disclosure of all legal opinions generated in the normal course to any shareholder who may later feel aggrieved and commence an action. The “full and confident” communication between clients (corporations) and solicitors which is a necessary adjunct to the right to counsel will be impeded and destroyed.”

178. On the other hand, it needs to be noted that, as the passages from *Thanki* show, the modern justification for the existence of the rule is based upon the joint interest of the company and

³ Mr Hollander KC rightly points out that the Canadian cases do not deal with the modern justification of the privilege based upon the joint interest of the company and its shareholders.

its shareholders. Further, it is to be noted that the rule has been referred to in Bermuda cases, albeit without any argument as to whether it should be adopted in Bermuda.

179. In *Daniel v Exxon Services (Bermuda) Ltd* [2011] Bda L.R. 54, Kawaley J, in the context of privilege in a discovery application, referred to *Gouraud* without any apparent dissent or qualification:

“12. However, the following passage in the 1999 White Book, which I put to the Defendant’s counsel, was also potentially relevant:

“Privilege cannot be claimed by a trustee against his cestuis que trust (Re Mason (1883) 22 ChD 609; Wynne v Humberston (1858) 27 Beav 421; Devaynes v Robinson (1855) 20 Beav.421; Devaynes v Robinson (1855) 20 Beav. 42; Re Postlethwaite, Re Rickman, Postlethwaite v Rickman (1887) 35 ChD 722); nor against persons in an analogous position (Gouraud v Edison Co 10 (1888) 57 LJ Ch 498; cf. Bristol Corp v Cox (1884) 26 ChD 678 at 683. See also Re Whitworth (solicitor trustee)).”
(emphasis added)

180. In *Medlands (PTC) Limited v Commissioner of the Bermuda Police Service* [2020] SC (Bda) 20 Civ (26 March 2020) this Court noted the existence of the rule and the qualifications and reservations set out in *Hollander*:

“51. In paragraph 5-02 of [Hollander], the author accepts that this general rule is well established under English law although its basis is “distinctly dubious”. [He] says that the principle was established in the 19th century before cases such as Salomon v Salomon [1897] A.C. 22 drew a clear distinction between a company and its shareholders and held that the shareholders have no interest in the property of the company. Once the separation between the company and the shareholders had been established, the law should have changed but it did not. They point out that the Canadian courts have taken a different view and Australian authority, whilst not clear-cut, also suggests a contrary view.

...

54. In the circumstances I conclude that the rule that a company cannot assert privilege as against a shareholder does not apply to Mr Tamine as he is not a shareholder in the relevant company. The rule does not, in my judgment, extend to a shareholder of a shareholder. The same analysis applies to the suggestion that the privilege does not exist because Mr Tamine is the sole director of Cabarita. ”

181. The most recent authority is the decision of the Court of Appeal in *Wang and Wong v Grand View Private Trust Co Ltd and Ors* [2021] Bda LR 29 where paragraphs 6.07-6.09 of *Thanki* were cited verbatim in the judgment on the basis that the treatment of “joint privilege” in *Thanki* represents Bermuda law.

182. At [77] of the judgment of Subair-Williams JA, the learned judge notes that “*This Court was referred to a line of English authorities as to the meaning and scope of joint interest privilege. Both parties relied on various passages in Thanki on The Law of Privilege (3rd ed) (“Thanki”) at §6.07-6.09”* and the entirety of paragraphs 6.07 to 6.09 are reproduced in the judgment. At [111] Subair-Williams JA states that:

“I would accept that the case law contains a series of examples of pre-existing legal relationships which have been held to give rise to joint interest privilege. I would also accept, as Mr Adkin QC contended during his oral arguments, that each of these recognized relationships involve a person or entity who has a fiduciary or quasi-fiduciary duty to act on behalf of and/or in the interest of the other party to the relationship. However, this list of relevant relationships is not closed.”

183. Clarke P also dealt with the issue of “joint privilege” by reference to the passages in *Thanki*:

“138. In the classic cases in which joint privilege has been held to exist the nature of the relationship between A and B is such that the courts have held that it gives rise to a right in favour of B to have access to the material; and a duty on the part of A to make it available. As is said in Thanki, A and B must “have a joint interest in the subject matter of the communication”, existing at the time the communication comes into existence, and

“the interested party must be able to establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained” per Moore-Bick J in Commercial Union Assurance. That formulation begs the question as to when a common interest in the subject matter gives rise to a right to obtain access to it. The mere fact that the subject matter is of interest to B in some general sense is not sufficient.

139. There are a number of cases in which a right to obtain access has been held to exist by reason of the nature of the existing relationship between A and B. The classic examples are where A and B are partners. The list includes (a) partners; (b) joint venturers or those who are party to something like a joint venture, e.g. because they have an entitlement to a share in the fruits of a development, or at least a claim to that effect; (c) beneficiaries and trustees; (d) shareholders and companies in relation to the property of the company; (e) parents and subsidiaries; (f) insured/reinsured and insurer/reinsurer (g) beneficiaries under a will and executors; (h) principal and agent.

140. In each of these cases the relationship is such that B is properly held to be entitled as against A to access to the privileged material. Sometimes the relationship is in the nature of a shared enterprise (partners and joint venturers). Sometimes the relationship is one of ownership, as in the case of shareholders. Sometimes the relationship is one of contractual obligation. Sometimes the relationship is one where A holds assets for, and owes duties to B, as in the case of a trustee.” (emphasis added)

184. As noted earlier, the modern justification for the existence of the rule is said to be based upon the joint interests of the parties and in this case the joint interests of the shareholders and the company. This modern justification, as appears from the judgment of Clarke P in *Wang*, appears to be accepted by the Court of Appeal as representing Bermuda law. It is correct that there does not appear to have been any argument in the *Wang* case as to whether the English principle of joint interest privilege, as it applies to shareholders and companies, should be imported into Bermuda law. However, it does appear that Clarke P was content to summarise the passage from *Thanki* (paragraph 6.09) as representing Bermuda law without any apparent reservation.

185. Given the apparent acceptance of the existence of joint privilege between a shareholder and the company by the Court of Appeal in the *Wang* case, the Court has concluded that the appropriate court to revisit the issue is the Court of Appeal itself. The Court does not consider that, having regard to the judgment in *Wang*, it is appropriate for this Court to undertake this task.

E. The “essence” of the request issue

186. The Plaintiffs seek an order “*that the Defendants shall, in accordance with paragraph 7.1 of the Order herein dated 12 November 2021, upload to the Data Room all documents within their possession, custody or power which are requested by Valuation Expert in these proceedings*” (paragraph 2 of the Discovery Summons).

187. In support of this application the Plaintiffs refer to the fact that in response to the First Information Request, a number of requests by the Plaintiffs’ expert were refused by the Defendants on the basis that they were said to be overbroad, but the Defendants’ lawyers said they would “*endeavour to identify and thereafter disclose documents which they understood to reflect the **essence** of what is sought.*” The Plaintiffs complain that despite Mr. Bezant following-up for further documents in his Second Information Request in the face of the Defendants disclosing what they considered to be the “*essence*” no meaningful progress has been made after two requests.

188. The Plaintiffs object to such an approach which they say appears to: (i) involve a form of giving discovery not known in this jurisdiction; and (ii) give the Defendants a complete discretion as to what it discloses, replacing the obligation to produce all responsive documents with their discretion.

189. The Defendants' response is that the application is pointless. They point out that all that has happened is this: (i) Mr Bezant has made a request; and (ii) the Defendants have objected to the request on the basis that it was overbroad and/or incoherent but agreed at the same time to provide what they thought Mr Bezant was looking for. If the Plaintiffs' position is that the Defendants should not have objected as they did, the solution is simple. Either: (i) the Plaintiffs should apply under the liberty in ¶7.1 of the Directions Order for an order requiring the Defendants to comply with the request; or (ii) Mr Bezant should make a further, more refined request in relation to the documents sought. The Defendants complain that the application is in substance seeking to amend the existing provision of ¶ 7.1 of the Directions Order.

190. The Court has considered this matter and directs as follows:

- (1) Going forward the Defendants should refrain from endeavouring to identify and thereafter disclosing documents which they understand to reflect the "*essence*" of what is sought by the Information Request. The Defendants should comply with the Information Requests as initially made and/or clarified by any subsequent correspondence between the parties.
- (2) The Defendants remain entitled to object and/or seek clarification in respect of any Information Request based on lack of clarity, relevance, the request being disproportionate or otherwise.
- (3) Nothing said in this direction amends the scope of ¶ 7.1 of the Directions Order.

F. Appendix 2 category 1 Application

191. Appendix 2 to the Directions Order identified the documents that each of the Plaintiffs was required to upload to the Data Room as follows:

“Appendix 2

Documents which exist and are within the Plaintiffs’ possession, custody or power between 12 April 2018 and 12 April 2021, which are relevant to the question of the fair value of the Plaintiffs’ shares in the Company as at the Valuation Date and which fall within the following categories:

- 1. A full history of the Dissenters’ dealings in shares in the Company, specifying the price(s) and date(s) of all trades.*
- 2. Any valuations or similar analyses of the Company or the Company’s shares prepared, reviewed or considered by the Dissenters in contemplation of an amalgamation.*
- 3. All documents information and material provided to or reviewed or considered by the Dissenters’ Investment Committee(s) or equivalent body for their consideration of an amalgamation.”*

192. The Defendants contend that pursuant to paragraph 1 of Appendix 2 to the Directions Order, the Plaintiffs were required to give discovery of documents existing and within the Plaintiffs’ PCP between 12 April 2018 and 12 April 2021, which are relevant to the question of the fair value of the Plaintiffs’ shares in the Company as at the Valuation Date and which fell within the category there set out, namely *“A full history of the Dissenters’ dealings in shares in the Company, specifying the price(s) and date(s) of all trades”*. The Defendants say that the Plaintiffs are required to provide not only a schedule of trades but also the underlying documents which might evidence that schedule.

193. The Court was taken through the drafting of Appendix 2 by Mr Adkin KC and the Court is satisfied that the original proposal made in a letter dated 13 August 2021 from Appleby, on

behalf of the Defendants, was simply that each Plaintiff be required to provide a schedule of trades and not the underlying documents. The Court accepts that it was the insertion of the preamble by the Plaintiffs which created the disjunct with paragraph 1 which the Defendants now say has the opposite effect. In the circumstances, the Court is satisfied that the intent of category 1 is simply to provide a schedule of the trades and not documents which might evidence that schedule. Accordingly, the Court dismisses the Defendants' application in respect of Appendix 2, paragraph 1 of the Directions Order.

G. Appendix 2 category 2-3 Application (Redactions)

194. As noted above, pursuant to paragraphs 2-3 of Appendix 2 to the Directions Order, the Plaintiffs were required to give discovery of documents existing and within the Plaintiffs' PCP between 12 April 2018 and 12 April 2021, which are relevant to the question of the fair value of the Plaintiffs' shares in the Company as at the Valuation Date and which fell within the categories there set out.

195. The Defendants say that in relation to categories 2 and 3, the Respondents have redacted material within their disclosed documents which appears, based on the context and the Plaintiffs' approach to redactions as a whole (i) to engage the terms of categories 2-3 in precisely the same way as the unredacted material; and (ii) (in some cases) to obscure the meaning of the unredacted text. The Category 2-3 Respondents are:

(a) The First and Second Plaintiffs in Case No. 116, namely Wakeland Securities LP and Wakefield Securities LLC (the Elliott Funds);

(b) The Fifth and Sixth Plaintiffs in Case No. 125, namely Qube Master Fund Ltd and QRT Master Fund SPC – Torus Fund SP (the Qube Funds); and

(c) The 24th and 25th Plaintiffs in Case No. 125, namely Man Funds XII SPC-MAN 1783 II SP and MAN GLG Credit Multi Strategy Master Fund (the Man Funds).

196. The Defendants contend that the Court should order the Category 2-3 Respondents to give discovery of the documents identified below (the “**Redacted Documents**”) in unredacted form on the basis that it is clear from (i) what is known of the redaction process generally and (ii) the redacted documents themselves, that the redactions were not appropriately made. Alternatively, if there is doubt as to the appropriateness of the redactions, the Court is invited to review for itself the small number of redactions in issue, and thereafter to determine whether the redacted material should be produced. The Defendants take issue with five Redacted Documents, together with the additional redacted documents in each chain of emails, as set out in the Amended Summonses and referred to in paragraphs 48-60 of the Defendants’ Skeleton Argument dated 24 November 2022.

197. The Court was referred to *Atos Consulting v Avis plc* [2007] EWHC 323 as indicating the appropriate approach for the court to take where redactions are in issue:

“(1) The Court has to consider the evidence produced on the application.

(2) If the Court is satisfied that the right to withhold inspection of a document is established by the evidence and there are no sufficient grounds for challenging the correctness of that asserted right, the Court will uphold the right.

(3) If the Court is not satisfied that the right to withhold inspection is established because, for instance, the evidence does not establish a legal right to withhold inspection, then the Court will order inspection of the documents.

(4) If sufficient grounds are shown for challenging the correctness of the asserted right then the Court may order further evidence to be produced on oath or, if there is no other

appropriate method of properly deciding whether the right to withhold inspection should be upheld, it may decide to inspect the documents.

(5) If it decides to inspect then having inspected the documents it may invite representations.”

198. Having considered the submissions of the parties, the Court has concluded that the appropriate way to deal with the Redacted Documents is for the Court to inspect the documents for itself. In this regard, it is noted that none of the Redacted Documents contain privileged material, and the only issue is whether the redacted material is relevant and should be disclosed.

H. Conclusion

199. In relation to the issue of “*practical control*”, the Court is required to consider the totality of the evidence presented and relied upon in support of the factual assertion that there is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has, in practice, free or unfettered access to the documents of the third party. In this case, the Court has considered the totality of the evidence outlined at paragraphs 61 to 131 above and is not satisfied that this evidence establishes that there is an existing arrangement or understanding, the effect of which is that the Company has in practice free or unfettered access to the documents held by the Principal Group Companies.

200. In relation to the issue of joint privilege: (i) any documents which were, at the time of their creation, the subject of joint privilege between the Company and the Plaintiffs, remain the subject of joint privilege in the present proceedings even after the Plaintiffs ceased to be shareholders in the Company; (ii) hostile litigation against the Company in the form of section 106 proceedings was indeed in contemplation by the time the Transaction Committee was

established on 19 February 2021 and, as a result, any legal advice sought and received on or after 19 February 2021 by the Company and/or the Transaction Committee in defence of or in connection with the contemplated section 106 proceedings will fall within the exception to the general rule, and that is privileged against the shareholders; and (iii) in relation to the issue of whether the English rule relating to joint privilege between a company and its shareholders should be imported into Bermuda law, that issue should properly be reviewed by the Court of Appeal as opposed to this Court.

201. In relation to the “*essence*” of the Request issue, the Court directs that: (i) going forward the Defendants should refrain from endeavouring to identify and thereafter disclosing documents which they understand to reflect the “*essence*” of what is sought by the Information Request. The Defendants should comply with the Information Request as initially made and/or clarified by any subsequent correspondence between the parties; (ii) the Defendants remain entitled to object and/or seek clarification in respect of any Information Request based on lack of clarity, relevance, the request being disproportionate or otherwise; and (iii) nothing said in this direction amends the scope of ¶ 7.1 of the Directions Order.

202. The Defendants’ application in relation to Appendix 2, category 1 is dismissed by the Court.

203. In relation to the Defendants’ application in relation to Appendix 2, categories 2-3, the Court has determined that the appropriate way to deal with the Redacted Documents is for the Court to inspect the documents for itself in order to determine whether the redacted material is relevant and should be disclosed.

204. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 14th day of February 2023



N. Khargun
NARINDER KHARGUN
CHIEF JUSTICE