Neutral Citation Number: [2021] EWHC 2172 (Comm)

Case No: CL-2019-000238

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2021

Before :

DAVID EDWARDS QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

THE STATE OF QATAR	**Claimant**
- and -	
(1) BANQUE HAVILLAND SA (a company incorporated under the laws of Luxembourg)	
(2) VLADIMIR BOLELYY	**Defendants**

- -
- -

David Mumford QC, Mr Thomas Munby and Mr Hugo Leith (instructed by **Macfarlanes LLP**) for the **Claimant**
David Quest QC and Mr Philip Hinks (instructed by **Reed Smith LLP**) for the **Defendants**

Hearing dates: 21 June 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

DAVID EDWARDS QC

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30 July 2021 at 10:30 am"

David Edwards QC :

Introduction

1. On 5 March 2020 a first case management conference ("CMC") in this action was heard by Cockerill J. Her order gave directions to trial in the usual way. Paragraph 15 provided that there should be a further CMC on the first available date after 9 December 2020 for the determination of any outstanding matters relating to disclosure and expert evidence.

2. In the event, the second CMC was heard by me on 21 June 2021. Most of the matters that arose were dealt with at the hearing. This judgment deals with the one matter on which I reserved judgment, namely an application made by the Claimant seeking various orders in relation to the Defendants' disclosure, and an issue that has arisen since the hearing concerning one of the proposed issues for expert evidence.

Factual Background

(i) The parties

3. The Claimant in this action is The State of Qatar ("Qatar").

4. The First Defendant, Banque Havilland SA ("the Bank"), is incorporated in Luxembourg and has a London branch. The Bank's shares are held subject to a discretionary trust of which the enforcer is David Rowland, an English businessman. A number of members of Mr Rowland's family are, or have at one time been, employees and/or directors of the Bank.

5. The Second Defendant, Vladimir Bolelyy ("Mr Bolelyy"), is a former employee of the Bank who worked at its London branch with the title Senior Investment Analyst until 9 November 2017, when he resigned.

(ii) The alleged conspiracy

6. On 5 June 2017 a number of Arab nations, including Saudi Arabia and the United Arab Emirates, severed diplomatic ties with, and took a number of other measures against, Qatar, including the closure of sea, land and air borders. Those actions have become popularly known as "the blockade". The precise reasons for those actions are unimportant, at least in the context of the present application.

7. This action concerns an alleged conspiracy, which is said by Qatar to have coincided with, and to have been entered into by the alleged conspirators in order to further the policy reflected in, the blockade. Its alleged aim was to attack the Qatari economy and to cause financial damage to Qatar by:

    i) Manipulating the market in the currency issued by the Qatar Central Bank, the Qatari Riyal ("QAR") and, by so doing, to exert pressure on the pegged exchange rate maintained by the Central Bank between the QAR and the United States dollar; and

ii) Manipulating the market in United States dollar-denominated debt instruments issues by Qatar ("USD Qatari Bonds").

8. The parties to the alleged conspiracy are said to have included a number of Saudi Arabian and United Arab Emirates banks. Proceedings have been commenced by Qatar against four of the banks allegedly involved in New York and England, but these are currently stayed pending or with a view to settlement. I am told that Qatar has engaged in pre-action correspondence with other alleged conspirators.

9. The Bank and Mr Bolelyy are alleged by Qatar to have been participants in this alleged conspiracy. The case made against them is principally, but not solely, based on the preparation by Mr Bolelyy in 2017 (according to the Bank and Mr Bolelyy in September 2017), while employed at the Bank, and the alleged subsequent dissemination, of a seven-page slide presentation entitled "Distressed Countries Fund" ("the Presentation").

10. The origin, nature and purpose of the Presentation, and the extent to which it was disseminated and acted upon by the Bank (if at all), are all matters for trial. The strategy described on pages 3 to 5 of the Presentation, however, described how:

i) A pool of existing Qatari bond holdings would be placed into a protected cell company to maintain confidentiality;

ii) An execution strategy would be adopted for trading in QAR and Credit Default Swaps ("CDSs") which would include "*mak[ing] targeted use of investment banks' friendship with Qatar to affect loyalty and add confusion to the marketplace*";

iii) There would be established "*a crossing transaction arrangement whereby another affiliated party sells the same bond holdings back to the original seller and thereby creates additional downward pressure*"; and

iv) Steps would be taken to "*fire up the PR machine to remind people there is a problem with Qatar*" and to "*focus on the prospect of restricted access to US Dollar and now-doubtful stability of the country*".

11. The Presentation was prepared by Mr Bolelyy in 2017 – accordingly to the Bank and Mr Bolelyy in mid-September 2017 – and it appears that at least one other Bank employee, David Weller, the Bank's Head of Asset Management, was involved in its creation at least to some extent. There is a dispute between the parties as to who else within the Bank was involved and as to the extent (if at all) to which the Presentation was disseminated outside the Bank.

12. The Presentation was referred to in an article published by the news website "Business Standard" on 12 October 2017. It featured more substantively in a lengthy article published by a US website entitled "The Intercept" on 9 November 2017 under the headline: "Leaked Documents Expose Stunning Plan to Wage Financial War on Qatar – and Steal the World Cup" ("the Intercept Article").

13. The flavour of the Intercept Article can be gleaned from its first three paragraphs:

> "A plan for the United Arab Emirates to wage financial war against its Gulf rival Qatar was found in the task folder of an email account belonging to UAE Ambassador to the United States Yousef al-Otaiba and subsequently obtained by The Intercept.
>
> The economic warfare involved an attack on Qatar's currency using bond and derivative manipulation. The plan, laid out in a slide deck provided to The Intercept through the group Global Leaks, was aimed at tanking Qatar's economy, according to documents drawn up by a bank outlining the strategy.
>
> The outline, prepared by Banque Havilland, a private Luxembourg-based bank owned by the family of controversial British financier David Rowland, laid out a scheme to drive down the value of Qatar's bonds and increase the cost of insuring them, with the ultimate goal of creating a currency crisis that would drain the currency's cash reserves."

14. The Intercept Article went on to explain that the metadata for the Presentation had been obtained by The Intercept and that it identified Mr Bolelyy as its creator. There were embedded screenshots within the article of particular slides.

(iii) The claim against the Defendants, and their defence

15. The claim by Qatar against the Bank and Mr Bolelyy, based on their alleged participation in this alleged conspiracy, is advanced in tort for unlawful means conspiracy, unlawful purpose conspiracy and/or causing loss by unlawful means. The damages claimed are substantial – the Particulars of Claim refer to figures running into the $billions – but are not presently particularised (at least adequately).

16. The Bank and Mr Bolelyy deny the claim. In essence, whilst they do not admit the existence of the alleged conspiracy, they deny in their Amended Defence that they were themselves party to, or took any action in furtherance of, any such conspiracy, in particular, in the case of the Bank, denying that they took steps to establish a protected cell company or that they carried out any material trades in QAR or USD Qatari Bonds.

17. In a Response to a Request for Further Information dated 15 April 2020, the Defendants said the following about the purpose for which, and the circumstances in which, the Presentation was prepared:

> "On 3 August 2017, David Rowland and Edmund Rowland met socially with Khaldoon Al Mubarak [CEO of the Abu Dhabi sovereign wealth fund, Mubadala], as he happened to be in London at the time. There was no particular purpose or agenda for the meeting.
>
> At the end of the meeting, while David Rowland was temporarily absent, Mr Al Mubarak mentioned to Edmund Rowland that UAE banks had holdings of Qatari bonds and were considering

> strategies to ring-fence and hedge the risk associated with those holdings. Mr Al Mubarak did not give further details.
>
> On or about 12 September 2017, Edmund Rowland asked Mr Bolelyy to research and put together a short document on a hedging strategy for Qatari bonds. Edmund Rowland was planning to visit Abu Dhabi with David Rowland at the end of September and envisaged meeting with Mr Al Mubarak. He wanted to have the document available in case the issue came up.
>
> Mr Bolelyy prepared and drafted the Fund Presentation between 12 September and 18 September 2017. During that period, he had input from David Weller (an employee of Banque Havilland) and David Henry (a consultant to Liwathon Limited).
>
> Mr Bolelyy completed drafting the Fund Presentation on 18 September 2017. The Defendants did not engage in any further consideration of the Fund Presentation or the matters addressed in it until its existence and contents became public."

18. During the course of the hearing before me, an issue arose as to the issues to be addressed by the proposed expert in bond trading strategy, an expert for whom Cockerill J had given permission. Qatar proposed that one of the issues to be addressed by the bond trading expert should be: "*Are the features of the Presentation such as would be characteristic of a 'hedging strategy"*?"

19. The Defendants' case on this issue was not entirely clear, and so I asked Mr Quest, QC, who (with Mr Hinks) appeared before me on behalf of both Defendants, whether his clients accepted that what was produced by Mr Bolelyy could not be described as a hedging strategy; as I pointed out, if that was indeed accepted by the Defendants, then there was obviously no need for expert evidence on that issue.

20. Mr Quest took time to consider the matter and to take instructions. His ultimate answer (given, he made clear, without conceding either that there was anything improper about what was drafted or about Mr Bolelyy's belief or honesty in terms of how he described it) was that:

> "It isn't, and isn't going to be, the bank's case that the presentation as drafted in fact set out a bond hedging strategy".

The significance of that answer, in light of the Defendants' pleaded case as to what Mr Bolelyy was asked to produce and what he did produce, is obviously a matter for trial.

21. Mr Mumford, QC who appeared (with Mr Munby and Mr Leith) for Qatar, suggested that, if that was the Defendants' position, amendments might be required to the Defendants' pleadings. The matter was left on the basis that the parties would discuss the matter and, in the event of disagreement, would write to me after the hearing. In the event, I received a letter from Qatar's solicitors, Macfarlanes LLP ("Macfarlanes"), about this on 22 July 2021 and a response from the Defendants' solicitors, Reed Smith LLP ("Reed Smith"), on 27 July 2021. I will deal with the point later.

Procedural history

22. The directions given at the first CMC including directions for disclosure, which was to be given in accordance with CPR PD 51U ("the Disclosure Pilot") on the basis of an approved Disclosure Review Document that identified some 38 Issues for Disclosure. Subject to certain exceptions, in most cases disclosure was to be given by the Defendants by reference to Model D, i.e., narrow, search-based disclosure.

23. Following a series of extensions of time, disclosure was given by all three parties on 11 January 2021. The Bank's Disclosure Certificate was signed by Juho Hiltunen, the Bank's Deputy CEO. Mr Bolelyy's Disclosure Certificate was signed by him personally. Both certificates stated that production of certain documents or parts of documents was being withheld; the Bank's Disclosure Certificate stated:

Description of document, part of a document or class of documents	**Grounds upon which production is being withheld**
Documents covered by legal professional privilege	The First Defendant objects to inspection of these documents because they are by their nature privileged.
The redacted parts of the original and copy documents marked as redacted in the List of Documents in Appendix C.	The First Defendant objects to inspection of the redacted parts of these documents because they are (i) privileged (marked with a 'P'); or (ii) confidential and/or commercially sensitive and irrelevant to the LOID (and not adverse to the Defendants) as they relate to customers and/or to matters which are entirely unconnected to these proceedings and which are confidential and/or commercially sensitive (marked with an 'I') or (iii) contain personal data (marked with a 'DP').

24. A number of aspects of the Bank's Disclosure Certificate feature in Qatar's disclosure application, and it is convenient to identify them now.

25. First, Appendix B of the Bank's Disclosure Certificate identified a number of email accounts within the Bank's control that had been searched. 12 custodians were identified, each of whom – with one exception – was stated as having (or having had) an email address in the form of name@banquehavilland.com. The exception was David Rowland, whose Bank email address was noted as d.rowland@banquehavilland.old.

26. Secondly, Appendix B listed the electronic devices provided by the Bank to the various custodians for the purposes of their employment that had been searched. Mr Bolelyy was noted as having been provided with a laptop and an iPhone 7+. As to these:

i) In relation to the laptop, it was said that "*Mr Bolelyy's laptop is encrypted with a BitLocker key. Mr Bolelyy cannot recall the key used for this laptop and so that data is not reviewed. The First Defendant is continuing to consider ways to obtain access to this device and will keep the Claimant informed with respect to any developments*". By the time of the hearing before me, the Bank had managed to access the laptop;

ii) As for Mr Bolelyy's iPhone 7+, it was said that a forensic investigation had determined that "*All items in web history, searched items, calendar, call logs, contacts, sms/mms messages, emails, documents and applications (e.g. WhatsApp) were deleted from the phone (except for bank holidays and text messages sent by Microsoft or Vodafone). WhatsApp was deleted from Mr Bolelyy's phone and the application was used until 15 November 2017*."

27. As indicated in paragraph 5 above, Mr Bolelyy left the Bank's employment on 9 November 2017. He was seemingly allowed to keep his iPhone 7+, and (colloquially) he wiped the phone before it was returned; the reason Mr Bolelyy gave, as recorded in the Bank's Disclosure Certificate, was that the applications on the phone may have contained irrelevant personal data.

28. Thirdly, eight of the identified custodians, including Mr Bolelyy, Mr Weller, and Edmund Rowland (one of David Rowland's sons and the acting CEO of the Bank's London branch from 26 September to 13 December 2017) were identified as having recorded telephone lines. Appendix B stated that the telephone recordings for the period 23 August to 10 November 2017 for these three individuals had been reviewed.

29. In the period from 11 January 2021 there was extensive correspondence between Macfarlanes and Reed Smith in relation to their respective clients' disclosure. A number of issues raised in relation to Qatar's disclosure were ultimately resolved at a hearing before Waksman J on 7 May 2021.

30. As for the Defendants' disclosure, on 3 February 2021 Macfarlanes sent a letter to Reed Smith attaching a schedule listing some 54 questions and requests. Reed Smith replied substantively on 15 March 2021, addressing some of the questions and requests to Macfarlanes' satisfaction, but by no means all. The present application was made by Application Notice issued by Qatar on 19 March 2021.

31. Before this application was heard, pursuant to the directions given by Cockerill J (as varied) the parties served their (initial) trial witness statements. The Defendants' witness statements included statements from Mr Bolelyy, David Rowland, Edmund Rowland, Harley Rowland and Mr Hiltunen. Although these were statements prepared for trial, they were referred to by both parties before me without objection.

Qatar's disclosure application

32. Qatar's disclosure application seeks orders, pursuant to Disclosure Pilot, paragraphs 12.3, 14.2, 16.2, 17.1 and/or 18.1, that the Defendants should take further steps in relation to their disclosure in light of a number of alleged deficiencies.

33. The application, as issued, sought relief by reference to a number of schedules that were attached to the draft order accompanying the Application Notice. In essence:

i) Schedule A sought an order (under Disclosure Pilot, paragraph 17.1(2)) that the Bank carry out further searches and/or further reviews of documents, including a more extensive review of certain telephone recordings by reference to Model E (see Disclosure Pilot, paragraph 18.1);

ii) Schedule B1 sought an order (under Disclosure Pilot, paragraphs 12.3 and 17.1(5)) that the Bank provide a witness statement from a senior executive responsible for the Bank's extended disclosure explaining various matters. Schedule B2 sought a similar order for a witness statement from Mr Bolelyy addressing a more limited number of matters in relation to his disclosure;

iii) Schedules C1 and C2, the former applying to the Bank and the latter to Mr Bolelyy, sought to challenge claims of privilege and relevance on the basis of which inspection of certain documents had been withheld and/or parts of documents had been redacted, seeking inspection of the full documents (see Disclosure Pilot, paragraphs 14.2, 16.2 and 17.1(4)); and

iv) Schedule D sought an order that the Defendants take the further steps in relation to their disclosure that they had already agreed to take in correspondence (see, in particular, Reed Smith's 15 March 2021 letter), and that they provide a further Disclosure Certificate detailing those steps and the results.

34. The contents of the schedules to the draft order largely reflected the questions and requests made in Macfarlanes' 3 February 2021 letter that Qatar considered had not been adequately addressed.

35. Qatar's application was supported by the third witness statement of Daniel Lavender of Macfarlanes dated 19 March 2021. A response was served on 19 April 2021 in the form of the sixth witness statement of George Hoare of Reed Smith. Further witness statements were served in the run-up to the hearing, as follows:

i) A second witness statement of Matthew McCahearty of Macfarlanes dated 25 May 2021;

ii) An eighth witness statement of George Hoare of Reed Smith dated 16 June 2021; and

iii) A third witness statement of Matthew McCahearty dated 19 June 2021, sent to me on the Saturday before the hearing and which (with the agreement of the parties) I initially read *de bene esse*, but the admission of which was ultimately not opposed.

36. As a result of these exchanges, the issues between the parties narrowed somewhat. Mr McCahearty's second witness statement attached a revised draft order reflecting the matters by then agreed. A further revised draft order was sent to me on 20 June 2021, following service of both parties' skeleton arguments. This final draft identified the following disputed matters:

Schedule A, paragraphs 1 to 5;

Schedule B1, paragraphs 1 to 5;

Schedule B2, paragraphs 1 and 2;

Schedule C1, paragraphs 1 to 10; and

Schedule C2, paragraphs 1 and 2.

37. I deal with the particular aspects of the disclosure application in the subsequent sections of this judgment. Mr Mumford, however, made a number of general points which, he submitted, indicated that the evidence of the Bank's witnesses could not be trusted and that the court should carefully test various assertions made on behalf of the Bank about its disclosure.

38. Specifically, Mr Mumford submitted that:

    i) The disclosure so far given undermined key aspects of the Defendants' pleaded case and demonstrated that evidence contained in some of the Defendants' trial witness statements was plainly false; and

    ii) The disclosure also revealed attempts by the Bank from autumn 2017 onwards to cover up wrongdoing, including by deactivating email accounts, by moving discussions off-line, and by concocting the story ultimately presented to the Bank's regulators (and, in its pleadings, to this court) as to how the Presentation came to be prepared.

39. I will mention some of these matters later in the context of particular aspects of Qatar's disclosure application, but I have borne them in mind more generally. I have also borne in mind the Defendants' denials, including Mr Quest's submission that some of the documents relied upon in support of the alleged cover-up have been mischaracterised. The ultimate significance of many of the documents is a matter for trial.

Schedules C1 and C2

40. In the immediate aftermath of the Intercept Article, the Bank, through its Luxembourg lawyers Elvinger Hoss Prussen ("EHP"), instructed PricewaterhouseCoopers ("PwC") to carry out what was described at the time as a "forensic" or "IT" investigation.

41. Most of the hearing before me was taken up by submissions concerning the status of PwC's investigation, and whether a report produced by PwC on 7 June 2018 ("the PwC Report") attracted litigation privilege, as the Bank had claimed. This was the subject of Schedule C1, paragraphs 1 to 3 and was also relevant to some of the other paragraphs within Schedules C1 and C2. It is convenient for these reasons to deal with this first.

(i) The facts concerning PwC's investigation

42. The circumstances of PwC's appointment were dealt with in the sixth witness statement of Mr Hoare and in the witness statement of Mr Hiltunen from whom Mr Hoare drew his instructions. The chronology of events is tolerably clear from the disclosed documents, and most of what follows is taken from them.

43. As I explained in paragraph 12, the Presentation was published on 9 November 2017 in the Intercept Article. It appears from Edmund Rowland's witness statement that the

Bank had some advance notice of this: he had been contacted by a journalist from The Intercept on two occasions in October 2017 and was aware that it had obtained a copy of the Presentation, it was thought as a result of a hack or leak.

44. Mr Hiltunen explains his immediate reaction to the publication of the Intercept Article in paragraph 15 of his witness statement. He explains that it was obvious to him that the article was:

> "… a serious matter for the Bank which could have serious legal, regulatory and legal consequences"

and that he agreed with Peter Lang, the Bank's then CEO, that, amongst others, the Bank's home (Luxembourg) regulator, the Commission de Surveillance du Secteur Financier ("the CSSF"), needed to be informed. He says that:

> "Our immediate concern, therefore, was notifying the regulator and informing it that the Bank was investigating the issue as a matter of priority."

45. On the following day, Friday 10 November 2017, Mr Lang contacted the CSSF by telephone. Subsequently at 13:18[1] Mr Lang sent an email to the CSSF attaching a link to the Intercept Article, explaining that the person referred to in it was Mr Bolelyy and saying that:

> "… we are investigating the matter, and Mr Bolelyy has been suspended until further notice".

Mr Bolelyy's evidence is that he had, in fact, not been suspended but had already resigned.

46. Mr Hiltunen explains in paragraphs 17 and 18 of his witness statement that Didier Mouget, an independent member of the Bank's Board of Directors, effectively took the lead as to "*how the document trail should be investigated*", and that it was Mr Mouget who recommended that a forensic investigation should be carried out by PwC and who had discussions with the Head of the Banking Division at the CSSF.

47. The recommendation that PWC should appointed was apparently endorsed (at least on a preliminary basis) at an emergency meeting of the Bank's Board of Directors on Saturday 11 November 2017, when a decision was also taken that the Bank should instruct Luxembourg lawyers.

48. At 16:11 on 11 November 2017 (it is not clear whether this was before or after the emergency board meeting) Mr Mouget circulated an email with his recommendations. Referring to a conversation with Mr Lang the previous day, Mr Mouget said:

> "From our conversation, we all seemed convinced that the document referred to in the article (which you subsequently

[1] It is not always clear whether emails were sent from Luxembourg (on Central European Time) or from London or elsewhere. The precise timing of the emails does not matter for the purposes of this application.

forwarded me) was a forged document prepared by a rogue ex-employee of the bank.

The conclusion of our call was that a number of actions to be undertaken without any delay.

1 Inform the regulator transparently. Please confirm this was done.

2 launch a forensic/IT investigation (internal audit + external expert) on the systems of the bank (Luxembourg and London) to determine the origin, circulation, … etc of the document in order to confirm the forged nature of the document. I have given you the contact details of a key specialist to conduct this type of investigation and I confirmed that he was available to help the bank at any time. To my knowledge the person has not been contacted yet. Could you please confirm internal audit has started the investigation and an expert has been contacted. We also agreed it was useful to inform Peter Rose as chairman of the audit committee and ask his approval for this necessary and urgent procedure.

3 contact a PR professional to prepare for possible media developments. Recommendation already made last July during a board for another incident. I understand Venetia is now in contact with a specialist.

After reading the press article I recommend the following additional steps.

4 consult without delay one of your Luxembourg law firms (EHP, Arendt …) to analyse the possible consequences of such event depending on the result of the investigation.

Should it appear that the document was prepared by the rogue employee when he was still employed by the bank, the risk of criminal offence should be carefully analysed and the necessary actions taken. The possibility that other persons were involved with this should also be determined and the consequences carefully analysed.

The lawyers should assess the responsibilities of the bank, its board and authorised management (actions, denunciation …). I think the board should be briefed on this aspect during the call on Monday.

5 I further strongly recommend to involve the bank's compliance officer if not yet done.

6 I recommend to start the IT investigation as soon as possible, preferably this weekend of Monday at the latest if not yet

> done. I assume proper instructions have already been given to protect the integrity of the systems and data.
>
> 7 I finally recommend to visit the regulator this week to discuss these events, preferably when you have clarity about what has happened."

49. Mr Lang responded to this email explaining that "*[Mr Hiltunen] is trying to get hold of the forensic expert*". At 18:15 on 11 November 2017 Mr Lang sent an email, copied to Mr Hiltunen, explaining his contact with the CSSF to date, the fact that there would be a conference call with the Board of Directors at 10:00 on Monday 13 November 2017 and that:

> "… it has already been agreed with Didier Mouget and Peter Rose that an independent investigation on this matter will be performed asap – as I am writing this email [Mr Hiltunen] is already contacting a forensic expert from PwC."

50. The individual at PwC whose details had been provided by Mr Mouget to Mr Hiltunen was Gregory Blachut. An email sent by Mr Hiltunen at 08:35 on Sunday 12 November 2017 indicates that he had, by this stage, already spoken to Mr Blachut; it also sheds some light on the nature of the contemplated investigation and the subsequent interposition in the instructions to PwC of the Bank's Luxembourg lawyers:

> "FYI, spoke with Gregory [Blachut] now and he will have a quick word with Cyril now.
>
> He might call me again later today and in any case he will come to the bank on Monday. He is back from Barcelona at 5.20 today. Asked if we can make trusted IT person, ideally IT security person, available for him and told him it's not a problem.
>
> I asked if there are precautions measures to take other than blocking access for the person in question that we have done already and he told not really. Told him that we haven't done other than that until now not to compromise independency of their audit which he appreciated.
>
> He also asked if we have a lawyer available for him and us to talk to about privilege issues when conducting such searches/investigation. Promised to him that we speak to our lawyer tomorrow latest."

51. Mr Mouget had, in the meantime, been in contact with the CSSF. At 15:57 on 12 November 2017 Mr Mouget sent an email to the Bank's directors attaching a copy of his email to, and reporting on a subsequent conversation with, the CSSF in the following terms:

> "Please find hereafter my message to Mr Simon yesterday.

> He called me a few minutes ago with a few additional questions including the actions undertaken.
>
> The tone of the discussion was fairly positive and I think the communication channel is good for both the regulators and the bank.
>
> He asked details about legal advice (Lux and London) and communication. Also the open point of UK regulators information to be considered by the bank.
>
> He might contact/write to the bank to detail the points they would like to be covered by the IT investigation. The critical points are:
>
> 1 to ensure no transaction took place
>
> 2 to bring clarity on the document preparation, circulation, responsibilities, etc.
>
> Actions will have to be taken after clarity.
>
> He is also considering to meet the bank's management on this topic probably Tuesday"

52. At 08:55 on Monday 13 November 2017, before the conference call with the Board of Directors, Mr Mouget sent an email to Harley Rowland, copied to Mr Hiltunen and Mr Lang, in which he asked that they forward, and warn him in advance by SMS or telephone call, in the event of any requests from the CSSF. That, he said, would allow him to help "*in case of adverse developments (not expected)*".

53. At 10:00 on 13 November 2017 the conference call among the Board of Directors took place. Mr Hiltunen explains in paragraph 24 of his statement that he attended in an executive capacity and that the purpose of the meeting was to update the Board on the matters that had been discussed at the emergency meeting on the preceding Saturday and formally to ratify the decisions that had been taken at that meeting.

54. The minutes of the 13 November 2017 10:00 conference call include the following. They reflect the confirmation given by the Board that PwC should be appointed:

> "Mr Lang confirmed that on Friday, the management contacted Mr Robeson [a director] to agree the next steps to be taken by the Bank in light of the publication of this article, and it was agreed as follows:
>
> - Notify the CSSF
>
> - Review the impact of the article in the media, which began in Middle East websites
>
> - Meeting with local PR expert
>
> - Inform internal audit and compliance

- Two independent board members to coordinate a full investigation, reflecting the request of the CSSF as communicated to Mr Mouget

Mr Mouget has proposed a contact at PwC who has been deeply involved in the Luxleaks investigation. There should be no independence issue with respect to the external auditor being requested to conduct the investigation and would also limit the distributing of sensitive information to different service providers.

…

Mr P Rose queried whether a formal statement needed to be made to the CSSF, to which Mr Lang confirmed that he had spoken to provide an update to Mrs Marina Sarmento on the Friday after the article was released and prior to the already scheduled regulator's college. Mr Mouget confirmed various discussions with Mr Claude Simon over the weekend in which Mr Simon was concerned about the article and had many detailed questions on the matter. Based on the responses given, overall, the CSSF were reassured about the events but now await the results of the requested investigations.

…

Mr Mouget confirmed that the CSSF are convinced that the Bank was not involved with the plan but that there existed a potential criminal offence aspect by virtue of preparing a document showing an intention to manipulate the markets and references involvement of a US counterparty and therefore extremely serious.

The CSSF require clarity on the full picture because as Mr Bolelyy is an employee of the Bank, the Bank's responsibility is engaged. The CSSF requires a written testimony from Mr Bolelyy to demonstrate that he operated outside of the normal functioning of the Bank and details of who validated and approved this report, and further querying whether the Bank had taken possession of his laptop.

…

The Board agreed that the FCA needed to be advised as soon as possible and that Gytis Keraitis should make contact following agreement of the contact with Exco. It was proposed that in addition to the FCA, the ADGM may need to be advised of the press exposure. It was agreed that there should be no proactive statement offered to a wide media forum but due to the seriousness of the matter, a statement will be prepared to give to

> the press in case of contact with the Bank, which would be shared with the CSSF in advance of being made available.
>
> As a recap of the action points agreed with the Board:
>
> - Notify FCA
> - [redacted]
> - Statement to the CSSF (by way of a including a response to their letter dated 13 November 2017)
> - Agreed to appoint PwC to audit trail of document
> - [redacted]
> - Statement from Mr Bolelyy
> - Media statement to be prepared in conjunction with Isabelle Faber, the local PR expert and Venetia
>
> Lawyers to be used, UK or Lux. Peter Rose considered both. Who in UK, Dentons or Forsters. Peter Rose suggested it should be a Magic Circle firm. Further debrief this afternoon at 5pm Luxembourg time."

55. Ms Venetia Lean, a member of the Bank's Executive Committee, sent an email to leitmotif, a firm of PR consultants, at 12:23 on 13 November 2017. Reporting on the conference call, she said:

> "… the directors are clear that no communication can go out until approved by both Board and CSSF. They are also prioritising the investigation into how the presentation was allowed to be created and then sent to UAE and how it got to the journalist. This work has started and we are having a 2nd Board later today to see how things are developing - at 5pm. They will also be contacting the UK regulator to inform them of the issue."

56. At noon on 13 November 2017, according to paragraph 25 of his witness statement, Mr Hiltunen attended a meeting with EHP at their offices. Mr Hiltunen says that, at this meeting:

> "It was agreed that PwC would be engaged to carry out a forensic investigation into the Presentation and to produce a report setting out their findings. The findings of this investigation would allow EHP to advise the Bank as to possible liability and to assist the Bank in dealing with the CSSF."

57. At 14.15 on 13 November 2017 Mr Hiltunen sent an email to Mr Blachut of PwC and Mr Reckinger of EHP. The subject line of the email was: "Contact – potential mandate for forensic audit". The email provided as follows:

> "We have spoken to both of you earlier today about likely mandate to engage PwC to perform a technical forensic audit for the matter at hand.
>
> We have independently agreed that it might be a good idea to organise the engagement through bank's legal counsel EHP. As time is of essence can you please get in touch and start preparing a mandate letter that we can then quickly engage should our board confirm the mandate later today.
>
> Ideally we should be in a position to start the work as early as tomorrow morning."

58. In an email sent later that day PwC said that, as they were the Bank's auditors, approval for their engagement would be needed from the Bank's Audit Committee. They subsequently agreed that a resolution of the full Board of Directors would suffice. This was dealt with at a second board meeting at 17:00 on 13 November 2017, and PwC's appointment was confirmed to PwC shortly afterwards.

59. As reflected in the minute of the 10:00 conference call set out in paragraph 54 above, by the time the minute was drawn up the CSSF had sent a letter to the Bank asking for further information about the Intercept Article. The letter sent was attached to an email sent by the CSSF to Mr Lang, Mr Hiltunen and Mr Mouget at 15:35 on 13 November 2017. It posed some 13 questions, which included:

> "1. How and when did the London branch and the Luxembourg head office become aware of the issue?
>
> 2. Has the scheme described in the article been designed by Vladimir Bolelyy? Who else in the bank contributed to this or was informed about this plan?
>
> 3. Do the documents referenced to in the article exist in the IT system of the bank (Luxembourg and/or London)? When was this scheme created?
>
> …
>
> 9. Is an internal forensic investigation being done, and who is conducting the investigation? Did you secure or identify documents or other information in relation to the issue, if so please provide details?
>
> …
>
> 12. Have any disciplinary measures (temporary or final) been taken, and if so when, by whom, on what grounds, against whom?"

60. It appears that when, by email sent at 17:44 on 13 November 2017, Mr Hiltunen informed PwC that the Bank's Board of Directors had formerly confirmed their appointment, he sent them a copy of the CSSF letter. His email asked PwC to:

> "… review attached letter and make sure your mandate covers any technical point where you can help me to answer these questions".

He asked PwC to send its draft engagement letter to EHP.

61. On Tuesday 14 November 2017, as Mr Hiltunen explains in paragraph 30 of his witness statement, he met with the CSSF and there was discussion of the investigation to be carried out by PwC. On the same day, Edmund Rowland contacted the Financial Conduct Authority ("the FCA"). In his response to an email from the FCA requesting details of what had occurred, Edmund Rowland explained the position as follows:

> "1. Newspaper article published in Al Jazeera website.
>
> 2. Informed CSSF our lead regulator.
>
> 3. Started a Forensic Investigation.
>
> 4. The junior analyst mentioned in the article was going to be suspended but resigned beforehand.
>
> 5. Hired PR advisor, took legal advice – on the news front to state the true and correct facts.
>
> 6. The lead regulator has been met. We would be happy to share the findings of the report with you subject to CSSF approval."

62. At about this time a draft press release was prepared by the Bank (it was not clear from the evidence whether it was ultimately issued) explaining that:

> "… an internal investigation has been initiated by Banque Havilland Luxembourg, to know if the document in question [the Presentation] was sent from the bank and if so, to reveal the reasons and the identity of its initiator."

63. Although PwC and EHP had both been instructed on 13 November 2017, their terms of engagement were only drawn up on 20 November 2017. EHP's terms of engagement were only signed much later in January 2018.

64. PwC's terms of engagement were contained in a letter from PwC dated 20 November 2017. The letter was addressed to EHP and headed "Privileged and Confidential". The subject line was: "Proposal for a forensic analysis – Project Gulf". The letter was signed by EHP on the following day, although PwC's engagement was stated in the letter to be retroactive to 13 November 2017.

65. The letter provided in part as follows:

"**1. Background information**

Following a trigger event indicating a disclosure of a confidential file that allegedly was created by an employee of the Bank, You have been selected to investigate on this context in accordance with a contract between You and the Bank. You would now like us to proceed, as subcontractor under legal privilege, with the capture of the professional computers or any other electronic device of the suspected individuals, and perform a deep analysis to retrieve information around the data leakage and file creation.

2. Context, Objective, Services, and Scope

Context

PwC's role will be to provide our methodologies and experience in Computer Forensic assignments to support Your work of related aspects of this matter.

For purposes of this engagement, PwC shall be reporting directly to, and taking direction exclusively from You. As such, all of PwC's work pursuant hereto, including its communications with You and with BH personnel, shall be subject to legal privilege and confidential to the maximum extent provided by the attorney-client, the work-product doctrine, and any other applicable privilege. All documents created in this matter by PwC, an[d] all communications in this matter (whether by email or otherwise), shall be marked 'LEGALLY PRIVILEGED AND CONFIDENTIAL' to reflect the privileged nature of the engagement and they will not be PwC branded.

…

With the exception of disclosure to the relevant authorities in Luxembourg and with the exception of disclosure to the Bank we have agreed with You that any PwC work product or part thereof will not be referred to or provided to any other party, other than the Bank, for any purpose, nor available for publication, transmission, quotation or dissemination in whole or in part or reference to PwC without our express written consent.

…

Objective

In close collaboration with You, our objective will be to help You to investigate and understand how the file in scope of the investigation, and any potentially linked files or aspects, have been created and potentially shared from systems of the Bank

with external or internal parties. We will investigate, to the extent possible in the given IT environment of the Bank, the life cycle of the file on the suspect's assets, or any other asset involved in the investigation, will be supported by factual evidence.

Services

For this project, You and the Bank would like PwC to provide its support as of November 13, 2017, by:

- Providing You our expertise in forensic investigations, more particularly here in all aspects regarding the analysis of computer systems, using renowned and leading-edge methodologies and tools;

- Analysing the forensic images or any other collected information to provide evidence around the creation and disclosure of confidential information allegedly belonging to the Bank;

- Performing a forensic acquisition of new systems or data, should any other source of evidence be required during the course of the review;

- Attending work meetings with You and BH representatives, to discuss our results, and possibly extending the scope of our Services to refine the review;

- Preparing a factual, detailed report presenting our findings within the agreed scope, after our review.

…

Scope and Limitations

…

We propose You a phased approach, in order to integrate findings and developments as they occur.

For the purpose of this initial stage and as discussed with You and the Bank, we suggest the following initial workplan:

For purposes of carrying out a forensic investigation into the basis of the Intercept article, we will focus on investigating and verifying the following aspects:

1. Evidence of any existence of the 2 files as quoted in the Intercept article on any system of the Bank or professional computers of employees of the Bank.

2. Identifying who is the author of the files, when and where they have been created.

3. Identifying who inside the Bank had access to the files and who has effectively opened them or worked with them.

4. Identifying if the files have been shared with internal parties electronically, or where applicable in hard copy.

5. Identifying if the files have been shared with external parties electronically, or where applicable in hard copy.

…

In agreement with the bank, You will provide us with the custodians/targets in scope of this investigation, who are initially starting with VB, the employee quoted in the Intercept article dated November 9, 2017. Additional custodians will have to be added following an initial review as required.

…

Deliverables

Upon completion of our work we will prepare a report containing the result found during our investigation. Prior to the issuance of the report, we shall provide You with draft report that will enable You to provide us with Your comments.

We understand that we will communicate with You as to the details of the work performed, findings and our progress. We shall do so on a regular schedule, and in a manner agreed with You (e.g., oral, written, etc.) as PwC may be directed to from time to time by You."

66. EHP's terms of engagement, ultimately executed in January 2018, explained the scope and nature of their engagement as follows, referring to their instruction, at the request of the Bank, of PwC:

"**1. Scope and nature of engagement**

…

In our discussions, we have determined that our assignment would comprise providing legal support to the Client in connection with the disclosure of a confidential file that was allegedly created by an employee or former employee of Banque Havilland S.A. Our mandate is to assist you on determining potential liabilities and guiding you in regulatory disclosure and proceedings with the CSSF.

> You have instructed us in that context to enter into on your behalf and at your risk a forensic mandate agreement with PWC in the form attached hereto."

67. On 6 December 2017, by which time PwC's work was underway, there was a meeting of the Bank's Board of Directors.

68. The minutes of the meeting (which are the subject of Schedule C1, paragraph 4) are headed: "Confidential Information conducted at the direction of Legal Counsel. These are privileged and confidential notes of a meeting held to discuss the Qatar presentation." They contain three redactions, the first at the foot of page 1 and the second and third on page 2.

69. So far as these are concerned, Mr Hoare explains in paragraph 32 of his sixth witness statement that:

    i) The first and second redactions involve discussions concerning the logistics and the findings of the ongoing PwC investigation and how they might inform the Bank's interactions with the CSSF and were made on the grounds of litigation privilege;

    ii) The third redaction concerns confidential communications with EHP, including advice as to the Bank's liability given both by EHP and an English law opinion, which the Bank was entitled to withhold on the grounds of legal advice privilege, and discussions concerning the logistics and the findings of the ongoing investigation, which it was entitled to withhold on the grounds of litigation privilege.

70. On 7 December 2017 Mr Mouget and Mr Rose met with the CSSF. Most of the notes of this meeting (which is the subject of Schedule C1, paragraph 8) have been redacted on the grounds of relevance. Mr Hoare says in paragraph 40 of his witness statement that the redacted parts concern confidential matters not responsive to the List of Issues nor any issue in the proceedings, specifically:

> "… requests for information from the CSSF made at the said meeting; comments made by the CSSF concerning the Bank's corporate governance and controls; communications passing between the CSSF and the FCA; and the logistics of when the Bank would be in a position to respond to the CSSF's correspondence."

71. On 11 December 2017 the CSSF wrote to the Bank referring to its 13 November 2017 letter and to the ongoing investigation. The CSSF explained that, in order to obtain assurance of the fitness and propriety of the Bank's senior management positions, it required a number of people to sign declarations of honour confirming, amongst other things, that they had not been involved in any way in the plan cited in the Intercept Article.

72. On 14 December 2017 the Bank received a letter from Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss"), US attorneys for the Qatar Central Bank. The letter read in part as follows:

> "In light of recent reports concerning attempts to manipulate the market for the Qatari Riyal, as well as the markets for other Qatari government-backed financial instruments and related derivatives, and in connection with potential claims that our client may have, we hereby request that you preserve and secure all documents in the possession, custody and control of Banque Havilland, as well as its subsidiaries and affiliates, that relate in any way to Qatari Riyal or any Qatari government-backed financial instruments or other related instruments."

73. Mr Hiltunen refers to this letter in paragraph 33 of his witness statement, where he says that receipt of the letter:

> "… re-enforced in my mind the importance of PwC's investigation to allow the Bank to respond effectively to any claim the QCB might make."

74. On 18 December 2017 the Bank sent a lengthy letter to the CSSF (which is the subject of Schedule C1, paragraph 5), providing an interim response to the questions asked in the CSSF's 13 November 2017 letter. The opening paragraph referred to the Intercept Article, to the publication of the Presentation, and to subsequent meetings with the CSSF. It explained that:

> "Given that the journalists state that these documents appear to have been prepared by the Bank, the CSSF has requested the Bank to investigate these allegations and raised a number of related questions that will be addressed below."

75. The letter went on as follows:

> "Since the article was published, an extensive investigative team was put together by the Bank's head office with external legal counsels (on Luxembourg and UK law matters) and technical help for purposes of establishing the facts surrounding the article.
>
> So far, the forensic work has focused on an analysis of bank internal e-mail addresses and traffic for certain identified target persons, and also the internal file server. In a second instance, relevant electronic devices used for professional purposes are currently being analysed. Additional steps that the Bank intends to take are detailed under question 13 below.
>
> The answers to the CSSF questions given below are based on the current state of the investigation process, and will be updated if need be, as the investigation evolves.
>
> We think that it would be helpful to begin a summary of the sequence of events that appeared to lead to the creation of the Qatar Opportunity document, our interpretation of how it arose,

> and the disciplinary action taken so far and proposed to be taken."
>
> *Summary*
>
> The following derives from the forensic examination of electronic devices by PwC and interviews of, and statements from, some of the people concerned by the events but not necessarily involved in the initiation, preparation or circulation of the documents."

76. Most of the remainder of the document, including the summary narrative referred to at the start and the answers to most of the CSSF's 13 questions (only the answers to questions 7, 10, 11 and 12 are completely unredacted), has been redacted by the Bank on grounds either of privilege or of relevance. According to paragraphs 33 and 34 of Mr Hoare's sixth witness statement, and as was explained to me at the hearing:

    i) Most of the redactions on the grounds of litigation privilege (those on pages 2, 3, 4, the top of page 5 and the middle of page 6) have been made on the basis that they refer to the findings of the PwC investigation;

    ii) The partial redaction to the answer to question 6 (the middle of page 5) has been made on the grounds of legal advice privilege on the basis that it refers to communications between the Bank and UK and Luxembourg solicitors and counsel; and

    iii) The redactions on pages 10-14 have been made on the basis that they refer to a communication from the Bank's Risk Management team to internal audit recording the transactions (or the absence thereof) carried out by the Bank which was made to provide information to be used in connection with reasonably contemplated litigation and which is protected by litigation privilege.

77. On 15 February 2018, as Mr Hiltunen explains in paragraph 34 of his witness statement, the FCA wrote to the Bank seeking information about the creation of the Presentation and whether Mr Bolelyy had worked at the Bank's London branch. The letter from the FCA was not itself in evidence before me, but Mr Hiltunen says that:

> "… receipt of this request from the FCA emphasised the importance to me of obtaining PwC's findings to allow the Bank to respond effectively to the FCA."

78. On 30 March 2018 the Bank wrote to the CSSF again, the subject line of the letter saying: "Article Published by 'The Intercept' – Second Interim Report Letter". The letter is the subject of Schedule C1, paragraph 6, and one of its attachments, a statement prepared by Mr Weller in the context of disciplinary proceedings brought by the Bank, is the subject of Schedule C1, paragraph 7.

79. The first three and a half pages of the letter have been redacted on grounds of relevance, according to Mr Hoare on the basis that they are not responsive to any issue in the List of Issues. The letter went on to explain that Mr Bolelyy, Mr Tricks and Mr Weller had

refused to provide a declaration in the form sought by the CSSF, but that declarations in a different form had been, or would be, sent by Mr Bolelyy and Edmund Rowland.

80. In relation to Mr Weller, the letter said:

> "David Weller provided a written statement to the Bank in the context of his disciplinary hearing which was transmitted to the Bank's external advisors on 26 March 2018. The written statement for a large part covers the subjects of his interview, but also covers other subjects not addressed during the interview. The facts stated therein are currently being analysed and checked against the evidence collected so far."

A copy of Mr Weller's statement was enclosed. The version of the statement disclosed in these proceedings has some parts redacted on grounds of relevance and two parts redacted on the grounds of privilege, (a) legal advice privilege in relation to Mr Weller's description of a conversation with Edmund Rowland in which Mr Rowland informed him of legal advice that he had received, and (b) litigation privilege in relation to a reference to a request that Mr Weller attend an interview with EHP.

81. The letter then went on to provide updated answers to the questions posed by the CSSF. As with the 18 December 2017 letter, substantial parts were redacted on the grounds of litigation privilege on the basis that they recounted PwC's investigation and findings or interviews conducted by EHP with Bank personnel at a time when litigation was reasonably in contemplation to gather information for the purposes of such litigation.

82. I was told by Mr Quest during the course of his submissions that PwC issued its report on 7 June 2018. Mr Hiltunen explains in paragraph 35 of his witness statement that a copy of the report was given to the CSSF at its request on 8 June 2018 "*subject to professional secrecy restrictions*" and that a copy was subsequently provided by the CSSF to the FCA under mutual assistance provisions subject to the same restrictions.

83. I should mention, finally, the Bank's 2017 Annual Report, which appears to have been issued on or around 6 July 2018 and to which Mr Mumford referred in his submissions. The notes to the Bank's Consolidated Annual Accounts mentioned the media reports concerning the Presentation, and the Bank's response to them, explaining that:

> "The Bank has cooperated with its regulators openly and launched immediately an independent forensic investigation on the matters led by an independent external legal counsel. While the investigation on these events is in its final stage the Bank considers that it has already factually established in the meantime that the Bank did not engage in any transaction contemplated in the said articles. Whilst there is still an uncertainty concerning the final regulatory outcome of this matter, actual and expected legal and consultancy costs related to this event have been recorded for an amount of EUR 2.5m in Other administrative expenses on the profit and loss account. Moreover, the Bank considers that appropriate measures have been taken to ensure that possible regulatory and financial

> consequences would not affect either the Group's financial position or its results."

84. Ultimately, as Mr Hiltunen explains in paragraph 36 of his witness statement, no proceedings were ever commenced against, and no sanctions were ever imposed upon, the Bank by the CSSF in relation to the Presentation.

(ii) The requests

85. Schedule C1, paragraphs 1 to 3 seek disclosure of:

    i) The PwC Report;

    ii) Any drafts of the PwC Report (or working papers, memoranda, notes or similar prepared in connection with that report); and

    iii) To the extent that any documents refer to the contents of the PwC Report (or any work done by PwC or any other aspect of PwC's engagement) and have either (a) not been disclosed or (b) have been disclosed with those reference redacted on the basis that the PwC Report (or PwC's engagement) is subject to privilege, disclosure of those documents or of the relevant redacted parts.

    All of these documents have been withheld from production by the Bank or redacted on the grounds of litigation privilege.

86. Schedule C1, paragraphs 4 to 8 seek disclosure of a number of the documents mentioned in paragraphs 42 to 84 above where redactions have been made, in particular (but not exclusively) on the grounds that the relevant sections refer to the PwC investigation and are protected by the same litigation privilege that protects the PwC Report itself.

87. Schedule C1, paragraph 9 and Schedule C2, paragraph 1 seek disclosure of a letter from Mr Bolelyy to the Bank dated 15 November 2017, also withheld on the grounds of litigation privilege, and the removal of redactions from a transcript of an interview that Mr Bolelyy attended with the FCA in September 2019 that refer to the 15 November 2017 letter.

88. Schedule C1, paragraph 10 and Schedule C2, paragraph 2 seek an order, effectively, that the Bank's and Mr Bolelyy's solicitors revisit their clients' disclosure in light of my decision in relation to privilege to ensure that any necessary corrective disclosure is given.

(iii) Litigation privilege

89. There was, unsurprisingly, a good deal of common ground between Mr Mumford and Mr Quest as to the principles applicable to litigation privilege.

90. Both counsel took as their starting point Lord Carswell's authoritative summary of the scope of, and the requirements for, a claim of litigation privilege in his speech in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 ("Three Rivers") at [102]:

> "102. The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

91. Certain aspects of the three requirements identified by Lord Carswell have been elucidated in subsequent authorities.

92. So far as the first requirement is concerned, where – as here – litigation is not actually in progress at the time the relevant communications are made or procured, what is required is that litigation should be reasonably contemplated or anticipated.

93. What is meant by that was addressed by the Court of Appeal in *United States of America v Philip Morris Inc.* [2004] EWCA Civ 330, [2004] 1 CLC 811 ("Philip Morris"). The first instance judge, Moore-Bick J, said that:

> "The requirement that litigation be 'reasonably in prospect' is not in my view satisfied unless the party seeking to claim privilege can show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility."

On appeal, Brooke LJ held at [68] that the judge had not misdirected himself: a "*mere possibility*" of litigation did not suffice for litigation privilege, nor was it enough that there was "*a distinct possibility that sooner or later someone might make a claim*"; but, by using the phrase "*real likelihood*", the judge was not suggesting that there must be a greater than 50% chance of litigation.

94. This passage in *Philip Morris* was cited with approval by the Court of Appeal in *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at [15] (Etherton LJ), and has been referred to in a number of first instance authorities including *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) ("*Starbev*") at [11(3)] (Hamblen J).

95. The second requirement – that the relevant communication must be for the sole or dominant purpose of conducting litigation – was established (or confirmed) by the House of Lords in *Waugh v British Railways Board* [1980] AC 521 ("*Waugh*"), a case where an internal inquiry report, incorporating statements of witnesses, was prepared by the Board following a collision between two locomotives in which Mr Waugh died.

96. There were in that case three reports: an initial report made by the Board to the Railways Inspectorate on the day of the accident; a joint internal inquiry report, incorporating statements of witnesses, prepared by two officers of the Board two days after the

accident and sent to the Railways Inspectorate; and a report prepared by the Inspectorate for the Department of the Environment: see Lord Wilberforce's speech at 529H-530A.

97. As Lord Wilberforce explained at 531A-C, the Board's own evidence made clear that the second report, which was the report of which disclosure was sought in the litigation brought by Mr Waugh's widow, was prepared for a dual purpose:

> "… for what may be called railway operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation, the first being more immediate than the second, but both being described as of equal rank or weight."

The question was whether a dual purpose was sufficient to support a claim for litigation privilege, or whether the second purpose had to be the sole or dominant or main purpose of the report. As is well-known, the House of Lords decided that the latter was the case.

98. The principle established in *Waugh* has been applied on numerous occasions. *In Re Highgrade Traders* [1984] BCLC 151 ("*Highgrade*"), a case concerned with disclosure of reports prepared by loss adjusters and forensic experts on the instructions of insurers following a fire, the court held that, although it might be possible to discern two purposes, they were, in fact, simply part of a broader (litigation) purpose. As Oliver LJ explained:

> "The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the Insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow."

99. A similar point arose in *Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2018] EWCA Civ 2006, [2019] 1 WLR 791 ("*ENRC*") where Sir Geoffrey Vos C explained at [118]:

> "The policy of the board in Waugh requiring it to investigate all accidents was a distinct purpose that prevented the possible litigation being the dominant purpose. The need to identify the cause of the fire in Highgrade or to investigate the existence of corruption in this case was just a subset of the defence of the contemplated proceedings."

100. In considering whether a communication is made for the dominant purpose of litigation, it is important to recognise that, depending upon the circumstances, what matters may not be the state of mind of the author of the communication but of the person or party that commissioned or procured it: see *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 ("*Guinness Peat*"), 1037 (Slade LJ).

101. As a necessary corollary of this, as Mr Mumford submitted, although ordinarily the privileged status of a communication falls to be assessed at the time the communication

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

102. In *Guinness Peat* and *Highgrade* it was the purpose of the insurers, at whose behest the relevant communications were made or relevant reports were prepared, that mattered. In the present case, in relation to PwC's investigation and the PwC Report, it is common ground that it is the purpose(s) of the Bank which, itself and/or through EHP, engaged PwC and required PwC to prepare its report that matters.

103. In *Three Rivers*, Lord Carswell spoke of a communication being made for the sole or dominant purpose of "conducting litigation", but subsequent authorities have made clear that this embraces communications made for the dominant purpose of obtaining information or advice in order to *settle or avoid* litigation: see *WH Holding Limited v E20 Stadium LLP* [2018] EWCA Civ 2652 ("*WH Holding*") at [12]-[15].

104. So far as the third requirement is concerned, a number of cases have considered whether particular types of proceeding are properly regarded as adversarial or as investigative or inquisitive. The issue was considered by the House of Lords in *In Re L* [1997] AC 16, a case which was concerned with local authority care proceedings under the Children Act 1989, which were held not to be adversarial.

105. Rather closer to the present case are the decisions of the Competition Appeal Tribunal ("CAT") in *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6 ("*Tesco*") and of the Court of Appeal in *R v Jukes* [2018] EWCA Crim 176, [2018] 2 Cr App R 9 ("*Jukes*") and *ENRC,* each of which involved an investigation, or a potential investigation, by a regulatory or prosecuting authority.

106. *Tesco* concerned a challenge to fines imposed by the Office of Fair Trading ("the OFT") by a decision dated 26 July 2011 for Tesco's participation in concerted practices to increase prices for certain dairy products. The issue was whether Tesco was entitled to assert litigation privilege in communications between Tesco and/or its legal advisors and potential witnesses between January 2011 and 26 July 2011.

107. The argument made on behalf of the OFT was that the administrative procedures under the Competition Act were investigative and non-adversarial, and so litigation privilege was, by implication, excluded. The Chairman of the CAT held that this description of the OFT's procedures was too general. As he explained, there were a number of different stages in the procedure under the Competition Act:

> "7. There is, first of all, the administrative procedure established by the Act. As one would expect, the OFT begins by investigating and gathering facts in relation to suspected infringements of the Act and/or Articles 101 and 102 of the Treaty on the Functioning of the European Union ('TFEU'). To that end, it is given extensive powers to conduct investigations (section 25), obtain documents and information (section 26), and enter premises with or without a warrant issued by the High Court (sections 27 to 29). If the OFT decides to proceed with the case, it must consider whether to

> propose to make a decision that a relevant prohibition has been infringed. If it proposes to make such a decision, the OFT issues a so-called 'statement of objections' to give the persons concerned an opportunity to be heard (section 31). Having received the parties' representations and weighed up the evidence (and assuming it does not close the case file) the OFT decides whether the prohibitions imposed by the Act and/or Articles 101 or 102 TFEU have been infringed. Where the OFT makes a decision as to whether the Chapter I prohibition has been infringed, that decision is appealable to the Tribunal (section 46)."

108. The Chairman went on to say that, whilst there might be some non-adversarial investigations carried out by the OFT, it would be wrong to characterise *all* competition law investigations as inquisitive, irrespective of the nature of the proceedings and irrespective of the particular circumstances.

109. The dates of the relevant communications, and the stage that proceedings had reached were also, he considered, important. As the Chairman said at [44]-[46]:

> "44. […] In my judgment the proceedings in this case were confrontational by the time Tesco began collecting the Potential Witness Material in early 2011. By then, the OFT had issued an SO and an SSO, both of which proposed to find that Tesco had infringed the Chapter I prohibition; the investigation was not simply an inquiry to get to the bottom of the facts. Tesco stood accused of wrongdoing. As noted above, Tesco was contesting the OFT's proposed decision that the Chapter I prohibition had been infringed. By this point the character of the administrative procedure was no less confrontational than ordinary civil proceedings involving the same alleged infringements.
>
> 45. Further, the OFT was about to decide Tesco's liability under the Act. The outcome of the procedure in this case was by no means certain, but there was a serious risk that Tesco could be found liable for infringing the Act and be fined up to a maximum of 10 per cent of worldwide turnover of the infringing undertaking and be potentially liable in damages. As already noted, it was common ground that the procedure whereby a fine is imposed for a breach of the Chapter I prohibition falls under the 'criminal head' of Article 6 of the ECHR. I accept the submission of counsel for the OFT that the fact that Tesco's Article 6 rights were engaged does not automatically mean that litigation privilege applies. But it is a factor which is relevant to characterising the nature of the investigation.

> 46. In these circumstances I consider that the administrative procedure under the Act was sufficiently adversarial by the time Tesco contacted third party witnesses that the Potential Witness Material it gathered was subject to litigation privilege."

Thus, a process that might have started out as an investigatory process had become adversarial by the time of the relevant communications.

110. *Jukes* concerned a manager of a waste and recycling company who was charged with an offence under section 7 of the Health and Safety at Work etc. Act 1974 following a fatal injury to an employee.

111. The prosecution sought to rely upon a statement the defendant had provided to the company's solicitors about 6 weeks after the accident, but over a year before the defendant was interviewed by the Health and Safety Executive and the police, in which he had admitted taking over responsibility for health and safety. The defendant claimed that the statement was privileged on the basis that it had been prepared for the dominant purpose of anticipated civil or criminal litigation.

112. On an appeal by the defendant against his conviction, the Court of Appeal agreed with the trial judge that the statement was not privileged and that, in any event, any privilege that did exist was that of the company and the defendant could not rely upon it for his own benefit. In relation to the first point, at [23]-[24] Flaux LJ, who gave the judgment of the court, said this:

> "23. At the time, in February 2011, no decision to prosecute had been taken by the Health and Safety Executive and matters were still at the investigatory stage. An investigation is not adversarial litigation. As Andrews J said in Director of *Serious Fraud Office v Eurasian Natural Resources Ltd* [2017] EWHC 1017 (QB); [2017] 2 Cr. App. R. 24 (p.296); [2017] 1 W.L.R. 4205 at [154]:
>
> > 'The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution.'
>
> We agree with the analysis of the judge in that case at [160]-[161] as to when a criminal prosecution can be said to be in reasonable contemplation:
>
> …
>
> 24. The difficulty with Mr Ageros' argument that the statement attracts litigation privilege is that there is no evidence from the company or from Gaskell, let alone from the defendant, that at the time that these investigations by the company were taking place in February 2011, any of them had enough knowledge as

> to what the investigation would unearth or had unearthed when the Health and Safety Executive concluded its investigations, that it could be said that they appreciated that it was realistic to expect the Health and Safety Executive to be satisfied that it had enough material to stand a good chance of securing convictions. It does not seem to us that it is any answer to that point and the critical absence of evidence that, as Mr Ageros submitted to us today, where there is a death and on the face of it a breach of duty, the Health and Safety Executive normally prosecutes. There is, as we have said, no evidence as to the state of mind of any of the people who were subsequently prosecuted, nor any evidence from the Health and Safety Executive as to the stage of their investigation as at 9 February 2011."

113. At the time that *Jukes* was decided *ENRC* had been decided at first instance, but the case had not yet reached the Court of Appeal. As apparent from the extract above, some reliance was placed by Flaux LJ upon the first instance judgment.

114. *ENRC* involved a criminal investigation commenced by the Serious Fraud Office ("the SFO") in April 2013 into possible corruption. The background was that in 2009/2010 ENRC had become aware of allegations of criminality on the part of certain African companies that it was seeking to acquire, and in December 2010 it had received an email from an apparent whistle-blower alleging corruption and financial wrongdoing at a subsidiary.

115. After the whistle-blower email had been brought to the attention of ENRC's Board of Directors, ENRC's Audit Committee engaged DLA Piper United Kingdom LLP ("DLA Piper") to investigate the allegations. The partner involved, Mr Gerrard, subsequently joined Dechert LLP ("Dechert"). Some months later, ENRC also instructed forensic accountants to undertake a books and records review. The forensic accountants' work subsequently expanded, and in July 2011 they were formally instructed by Dechert.

116. On 25 April 2013 the SFO announced that its Director had accepted ENRC for criminal investigation. The issue for the court was whether ENRC was entitled to claim legal advice privilege and/or litigation privilege over various categories of documents, in particular over notes taken by Dechert of evidence given to them by various individuals when asked about the events being investigated, as well as materials generated by the forensic accountants as part of their books and records review.

117. The judge decided that neither legal advice nor litigation privilege was available. So far as litigation privilege is concerned, the judge held that:

    i) Whilst ENRC anticipated that an SFO investigation was imminent, and that such an investigation was reasonably in contemplation by no later than 11 August 2011, such an investigation was not adversarial litigation; and

    ii) Even if an SFO prosecution had been reasonably in contemplation, the documents for which litigation privilege was claimed were not created for the dominant purpose of being used in the defence of any such prosecution.

118. The Court of Appeal said at [88] that, whilst it regarded these matters as primarily factual, it disagreed with the judge on both points.

119. So far as the first point is concerned, the Court of Appeal explained at [96] that, whilst not every SFO manifestation of concern would properly be regarded as adversarial litigation, when the SFO specifically made clear to a company the prospect of a criminal prosecution, and when legal advisers were engaged to deal with that situation, as had happened, there was a clear ground for contending that criminal prosecution was in reasonable contemplation.

120. The court went on to say at [98] that the fact that a party anticipating possible prosecution will often need to make further investigations before it can say with certainty that proceedings are likely does not, in itself, prevent proceedings being in reasonable contemplation. As the court put it, the fact that there is uncertainty does not mean that, in colloquial terms, the writing may not be clearly written on the wall.

121. The Court of Appeal disapproved of the distinction drawn by the judge between civil and criminal proceedings, which it regarded as illusory. It noted the approval of that distinction by the Court of Appeal in *Jukes*, but said that the relevant passage was *obiter* and that the decision in *Jukes* was justified on its facts. Summarising its decision on this point, the court said at [100] that:

> "For the reasons we have given, Andrews J was not right to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative."

122. As for the second point, the Court of Appeal explained by reference to *Highgrade* and *Bilta (UK) Ltd v Royal Bank of Scotland* [2017] EWHC 3535 (Ch), [2018] Lloyd's Rep FC 202 ("*Bilta*") that, in ascertaining the dominant purpose of communications, the court should take a realistic, commercial view of the facts, and that there might be cases where it might be impossible or inappropriate to distinguish two separate purposes, a litigation purpose and a non-litigation purpose.

123. At [108]-[109] the Court of Appeal addressed the submission, accepted by Andrews J, that ENRC's dominant purpose in relation to the relevant communications was not to defend litigation but to investigate the facts to see what had happened and to deal with compliance and governance:

> "108. […] We have already decided that a criminal investigation and a potential prosecution was reasonably in the contemplation of ENRC at the time that it commissioned DLA Piper's investigation. ENRC had been advised by its solicitors to that effect, even if it could reasonably be suggested that the solicitors had put the risk at a higher level than could, perhaps, be justified. In these circumstances, the issue becomes whether it would have been reasonable to regard ENRC's dominant purpose as being to investigate the

> facts to see what had happened and deal with compliance and governance or to defend those proceedings. Andrews J held that it was the former.
>
> 109. In our judgment, in this case, the answer can be achieved by unpacking the words 'compliance' and 'governance'. Although a reputable company will wish to ensure high ethical standards in the conduct of its business for its own sake, it is undeniable that the 'stick' used to enforce appropriate standards is the criminal law and, in some measure, the civil law also. Thus, where there is a clear threat of a criminal investigation, even at one remove from the specific risks posed by the SFO should it start an investigation, the reason for the investigation of whistle-blower allegations must be brought into the zone where the dominant purpose may be to prevent or deal with litigation."

124. The Court of Appeal went on to note at [111] that:

> "… even if litigation was not the dominant purpose of the investigation at its very inception, it is clear from the evidence that it swiftly became the dominant purpose."

This remark confirms the correctness of the suggestion by the author of Passmore, *Privilege* (4th ed.) at 3-100, in a passage cited to me, that what may begin as a (non-adversarial) "fact-find" investigation may, at some point, become adversarial such that litigation privilege is then available, although, as the author suggests, identifying the "tipping point" may not be easy.

125. The paragraphs above address the substantive principles applicable to litigation privilege. So far as the court's approach to challenges to claims of privilege is concerned, in *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm), [2008] 2 CLC 258 ("*West London Pipeline*") at [86] Beatson J summarised the position as follows (references to authorities have been omitted):

> "86. It is possible to distil the following propositions from the authorities on challenges to claims to privilege:
>
> (1) The burden of proof is on the party claiming privilege to establish it … A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect.

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved.

(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed.

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points.

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

(a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection.

(b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory.

(c) It may inspect the documents … Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

> (d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets … However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents … In cases where the issue is whether the documents exist … the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue."

126. This summary has been cited with approval on a number of occasions, see, e.g., *Starbev* at [11]-[13] (Hamblen J) and *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch), [2016] 1 WLR 361 ("*Property Alliance*") at [17]-[18] (Birss J).

127. In *WH Holding*, however, in the context of an issue as to inspection of documents by the court, the Court of Appeal expressed some doubt about the correctness of Beatson J's "reasonably certain" test, holding at [39] that inspection of documents by the court was a matter of broad discretion:

> "39. It seems to us that, contrary to Beatson J's narrow formulation contained in [86(3) and (4)(c)] of the *West London Pipeline* case, as the Court of Appeal identified in both the *Birmingham and Midland Omnibus* and the *Westminster Airways* cases the power to inspect a document is a matter of general discretion. That was also the approach of Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1971] 2 QB 102 at 130D-H. It is not limited to cases in which (without sight of the documents in question) the court is 'reasonably certain' that the test has been misapplied. The need for 'reasonable certainty' appears to have sprung from the earlier case of *Attorney-General v Emerson*, which was concerned with the position prior to the introduction of the express power of inspection in November 1893 and which was followed in *Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co*."

128. Mr Mumford submitted that, in light of *WH Holding*, the requirement for the court to be "reasonably certain" before it could go behind a witness statement served in support of a claim of privilege was no longer good law; if it was, he said, the "reasonably certain" test was, in any event, simply a threshold, and so, if the court decided it was

appropriate to assess the evidence in relation to the claim for privilege, it should then resolve the matter simply on the balance of probabilities.

129. *WH Holding* was cited with approval by Sir Geoffrey Vos C in *UTB LLC v Sheffield United Limited* [2019] EWHC 914 (Ch) ("*UTB*"). That case, like this one, concerned a challenge to legal professional privilege made under paragraph 14.2 of the Disclosure Pilot. At [76]-[77] the Chancellor explained that the provisions of the Pilot represented the backdrop against which the application fell to be determined:

> "76. In deciding whether to allow Extended Disclosure, the court has to consider whether the application is 'reasonable and proportionate having regard to the overriding objective' (see paragraph 6.4 of PD51U). Each of the factors in that paragraph is to be given weight. In this case, which is obviously a complex and important one, the factors that have particular significance are '(3) the likelihood of documents existing that will have probative value in supporting or undermining [one party's case] … (4) the number of documents involved … and (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost'. These provisions provide a necessary backdrop to the application under paragraph 14.2 challenging the claim to privilege.
>
> 77. In addition, it is important to note that Mr Travers [the Claimant's solicitor] has acted under the continuing obligations to the court found in paragraph 3.2 of PD51U (or their equivalent predecessors), namely '(4) to act honestly in relation to the process of giving disclosure … and (5) to undertake a review to satisfy [himself] that [the claims of the UTB parties] to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained'. His evidence must be viewed in that light."

(iv) The parties' submissions

130. The submissions made by Mr Mumford on behalf of Qatar in relation to the Bank's claim for litigation privilege in relation to the PwC Report and associated documents (Schedule C1, paragraphs 1 to 3) were, in essence, as follows.

131. First, Mr Mumford observed that the basis for the claim to privilege, as articulated in paragraphs 23-24 of Mr Hoare's sixth witness statement, was that:

i) The PwC Report was prepared at a time when adversarial proceedings by the CSSF, the FCA and emanations of the State of Qatar were reasonably anticipated; and

ii) The PwC Report was produced for the purpose of collecting evidence and enabling legal advice to be given to the Bank in relation to those anticipated proceedings and "*not … for any other purpose*".

132. Secondly, he said that the evidence now available – the disclosed documents and the witness statement of Mr Hiltunen from whom Mr Hoare had drawn his instructions – failed to demonstrate that, at the time the PwC Report was commissioned and produced, there was a reasonable prospect of adversarial proceedings from any of the three sources identified.

133. Specifically, Mr Mumford submitted that:

i) The evidence gave no support to the suggestion that the prospect of action by the FCA or by "*emanations of the State of Qatar*" formed part of the Bank's thinking in instructing PwC; and

ii) Whilst concerns about the CSSF did form part of the Bank's purpose in engaging PwC, the evidence did not indicate a purpose capable of giving rise to privilege: there was no evidence as to what sort of Luxembourg regulatory action was said to have been in prospect, and in any event no, or at least no sufficient, evidence to show that what was contemplated were adversarial proceedings.

134. Thirdly, he argued that, even if there was a reasonable prospect of adversarial proceedings at the relevant time, the evidence did not support the case advanced by the Bank that the PwC Report was prepared solely for the purpose of conducting those proceedings (noting that the Bank advanced no alternative case that, if there were a number of purposes, the conduct of proceedings was the dominant purpose).

135. On the contrary, Mr Mumford said, the evidence revealed numerous other purposes; in his skeleton argument he listed no less than seven; to:

i) Ensure as a matter of propriety that there was a proper independent investigation;

ii) Bring clarity in relation to the facts (see Mr Mouget's 12 November 2017 15:57 email);

iii) Comply with the request of the CSSF that there should be an investigation (see the minutes of the 13 November 2017 10:00 conference call);

iv) Put the Bank in a position where it could answer the CSSF's questions;

v) Improve the Bank's controls, policies and procedures;

vi) Enable the results of the investigation to be publicised so as to combat the PR damage of The Intercept Article; and

vii) Identify wrongdoers against whom disciplinary action could be taken.

136. Fourthly, he submitted that litigation privilege did not protect documents communicated (or intended to be communicated) to the opposing party; thus, it did not protect the PwC Report which was always intended to be, and which ultimately was,

provided to the CSSF which, on the Bank's case, was the anticipated claimant, or one of the anticipated claimants, in any adversarial proceedings.

137. Insofar as the redactions made to the documents referred to in Schedule C1, paragraphs 4 to 9 involved references to PwC's investigation and the PwC Report, Mr Mumford challenged them on the same grounds as summarised above. He also challenged some of the redactions made on the grounds of relevance on the basis that, even as described by Mr Hoare, it was hard to see why the redacted parts were irrelevant.

138. Mr Quest's response on behalf of the Defendants was essentially as follows.

139. First, he submitted that, given the incendiary allegations in the Intercept Article, it was entirely unsurprising that, from the time the article was published, the Bank reasonably anticipated that adversarial regulatory or legal proceedings would be brought against it by the CSSF, the FCA and/or by Qatar. Mr Quest said that it was important to be realistic, and that the Bank was not dealing with some minor regulatory issue.

140. Mr Quest relied in this context upon paragraphs 15 and 20 of Mr Hiltunen's witness statement in which Mr Hiltunen said that:

> "It was obvious to me after I read 'the Intercept' article that, given the references in it to the Bank, this was a serious matter for the Bank which could have significant legal, regulatory and legal consequences"

and, referring to the emergency meeting of the Board of Directors on 11 November 2017, that:

> "My recollection is that everyone who attended this meeting recognised the seriousness of 'the Intercept' article. Having regard to the nature of the allegations made in the article, I felt sure that the CSSF would want to investigate the matter."

141. Mr Hiltunen's evidence, Mr Quest submitted, was consistent with the minutes of the 13 November 2017 10:00 conference call in which Mr Mouget confirmed that the CSSF was convinced that the Bank was not involved with the plan referred to in the Intercept article, but that:

> "… there existed a potential criminal offence aspect by virtue of preparing a document showing an intention to manipulate the markets and references involvement of a US counterparty and therefore extremely serious."

It was also, he submitted, consistent with the CSSF's 13 November 2017 letter the tenor of which, he said, made it obvious that it did not involve some routine regulatory enquiry.

142. Mr Quest also relied upon the Paul Weiss letter of 14 December 2017 and Mr Hiltunen's evidence in paragraph 33 of his witness statement in that regard. Mr Quest submitted that, whilst the question in the Bank's mind on 9 November 2017 might have been

"*what has happened*", it moved very quickly to "*what is our legal exposure as a result of these allegations*".

143. Secondly, so far as the purpose behind PwC's engagement was concerned, Mr Quest submitted that, having regard to the principles in *West London Pipeline*, Mr Hiltunen's evidence in paragraph 25 of his witness statement, where he said the following, should be treated as conclusive:

> "It was agreed that PwC would be engaged to carry out a forensic investigation into the Presentation and to produce a report setting out their findings. The findings of this investigation would allow EHP to advise the Bank as to possible liability and to assist the Bank in dealing with the CSSF."

Mr Quest relied, in addition, on the terms of the EHP and PwC engagement letters, specifically the paragraphs of the EHP engagement letter (referring to PwC's intended instruction), referred to in paragraphs 64-66 above.

144. Thirdly, Mr Quest submitted that it was nothing to the point that the PwC Report was shared with the CSSF (or, subsequently, with the FCA). He said that the report was given to the CSSF subject to professional secrecy restrictions under Luxembourg law in such a way as to maintain the privileged nature of the document (and was given to the FCA under mutual assistance provisions subject to the same restrictions).

145. Mr Quest said that the proper approach in this regard was to consider the matter in stages:

i) Was the PwC Report, when provided to the Bank on 7 June 2018, protected by litigation privilege?

ii) Assuming it was, then the relevant question was whether the fact that the report was sent on to the CSSF meant that this privilege had been lost or abrogated.

146. On the latter point, Mr Quest said that any waiver of privilege by providing the PwC Report to the CSSF and to the FCA was only a limited waiver. He relied in that context on the decision of Birss J in the *Property Alliance* case referred to in paragraph 126 above.

147. *Property Alliance* was a case concerning what has colloquially been referred to as "Libor-rigging". The defendant, the Royal Bank of Scotland ("RBS"), had been found guilty of misconduct by the financial regulator and a financial penalty had been imposed on it. RBS was subsequently sued by a customer which alleged that, by proposing GBP Libor as a reference rate for certain swaps, RBS had impliedly represented that it was not manipulating rates for its own ends.

148. The dispute dealt with by Birss J was whether RBS was obliged to produce for inspection various Libor-related documents over which RBS had claimed privilege. One of the grounds on which the claimant challenged the claim to privilege in certain documents was to say that they had been handed over to the regulator and accordingly that any privilege had been waived.

149. The factual position was set out in [102] of Birss J's judgment. As he there explained, every document that had been shown or provided to the regulator had been shown or provided on a confidential, non-waiver basis. The judge explained that:

> "There are non-waiver agreements with the CFTC, SEC, DoJ and the Attorneys General of various US states in evidence. The only case for which an express non-waiver agreement does not exist is relating to the provision of one document to the Japanese regulator, the JFSA. However Mr Coulthard's evidence confirms that it was provided on the same agreed basis as the others. I was not persuaded by PAG's argument that the position of the JFSA is different."

150. RBS's submission against this background was that it could maintain its claim to privilege because two conditions were satisfied. First, the agreements with the US authorities explicitly stated that the documents had been provided on the basis that confidentiality and privilege would be preserved as against third parties. Secondly, the documents were provided for the limited purpose of the ongoing investigation.

151. After referring to a number of English and Commonwealth authorities, Birss J held at [113] that there had been only a limited waiver:

> "By applying the existing English law and supported by the decisions of the courts in Ireland and Hong Kong, I hold that RBS were entitled to maintain the claim to privilege of documents which were only shown or provided to regulators on a limited basis and despite the existence of legal rights or duties on the part of the regulators to use, act on or even published the documents pursuant to their regulatory powers. In this case the agreements between RBS and the regulators expressly provide that privilege and confidence are maintained. That should not be undermined by the existence of the carve outs. The fact that the carve outs recognise the regulator's rights and obligations to take a step, which might go as far as even publishing the information in the document, makes no difference if that has not happened. Until they do, I fail to see why the confidentiality and privilege would not be preserved. I reject PAG's case that the terms of the agreements pursuant to which RBS showed or provided documents to regulators mean that those acts led to a waiver of privilege."

152. As apparent from the paragraphs quoted above, in the *Property Alliance* case there were express confidentiality and non-waiver agreements between bank and the regulator. No such express agreements are said to exist between the Bank and the CSSF (or the FCA) here.

153. One of the cases relied upon by RBS and referred to by Birss J, however, was the decision of the Hong Kong Court of Appeal in *Citic Pacific Ltd v Secretary for Justice* [2012] 2 HKLRD 701. In that case, as [112] of Birss J's judgment records, privileged documents had been provided by Citic to the Hong Kong Securities and Futures

Commission ("the SFC") *without* any express statement as to the limited basis upon which they were being provided.

154. Hartmann JA, giving the principal judgment of the court in *Citic*, referred at [56] to the decision of the English Court of Appeal in *Berezovsky v Hine and others* [2011] EWCA Civ 1089. At [28]-[29] the Court of Appeal said this:

> "28. Fourthly, '[i]t does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see *British Coal Corporation v Dennis Rye (No 2)* [1988] 1 WLR 113 and *Bourns Inc v Raychem Corporation* [1999] 3 All ER 154' – per Lord Millett giving the judgment of the Privy Council in *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736, para 68. As Lord Millett went on to say, it 'must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause the privilege to be lost'.
>
> 29. Fifthly, where privilege is waived, the question whether the waiver was limited, and, if so, the parameters of the limitation, must be determined by reference to all the circumstances of the alleged waiver, and, in particular, what was expressly or impliedly communicated between the person sending, and the person receiving, the documents in question, and what they must or ought reasonably have understood – cf. per Hoffmann LJ in *Brown v Guardian Royal Exchange plc* [1994] 2 Lloyd's Rep 325, 328, as discussed by Aikens J in *Winterthur Swiss Insurance Company v AG (Manchester) Ltd (in liquidation)* [2006] EWHC 839 Comm, para 74."

155. The import of these paragraphs, as it seems to me, is that the absence of an express non-waiver agreement between the Bank and the CSSF is not necessarily fatal. The question of whether there has been a general or only a limited waiver requires the court to have regard to *all* the circumstances, including what was impliedly communicated between the parties and what each must or ought reasonably to have understood.

(v) Discussion and decision

156. I have carefully considered these submissions.

157. I have also taken into account the deference to be accorded to Mr Hoare's sixth witness statement, in which he asserts that the PwC Report and other materials are privileged, having regard both to [86(3)] of Beatson J's judgment in *West London Pipeline* and to the obligations imposed upon the Defendants' solicitors by Disclosure Pilot, paragraph 3.2(5).

158. Having done so, however, I am satisfied that:

i) This is a case where the evidence is such that I can and should look behind Mr Hoare's assertions of privilege; any necessary threshold has been satisfied;

ii) The evidence as a whole does not establish that the Bank has a right to withhold inspection of the PwC Report on the ground of litigation privilege (I deal with the other categories of material sought below).

159. I have reached this conclusion for the following reasons.

160. First, I remind myself, consistently with [86(1)] of Beatson J's judgment in *West London Pipeline*, that the burden lies on the Bank to make good its claim to privilege, and that, as the Bank and its lawyers are, effectively, judges in their own cause, it is important that the court scrutinise carefully how and whether the claim for privilege is made out.

161. Secondly, bearing in mind that the PwC investigation was carried out and the PwC Report was produced at the Bank's instigation (either directly, or because the Bank instructed EHP to retain PwC), in considering the sole or dominant purpose for which the report was produced, it is plainly the state of mind of the Bank that is most important.

162. Thirdly, whilst I have considered the entirety of the period up to June 2018 when the PwC Report was produced, I agree with Mr Mumford that, absent some evidence that the Bank's purpose changed, the most important point in time is the position on 13 November 2017 when PwC was instructed to carry out its work and to produce its report, its terms of engagement being retrospective to that date.

163. The Bank also relied upon subsequent matters, in particular upon the Paul Weiss letter of 14 December 2017 and the FCA's letter of 15 February 2018 (see paragraphs 73 and 79 above). I have taken these into account. However:

i) Insofar as privilege is asserted in relation to communications to or from PwC prior to these communications, for example PwC's communication to the Bank of its interim findings, it is difficult to see how an assessment of the dominant purpose of those communications can be affected by these two letters; and

ii) In truth, and notwithstanding the sending and receipt of these letters, there is, in my judgment, little or no evidence that the dominant purpose of the Bank in engaging PwC to carry out its forensic or IT investigation and in asking PwC to produce a report setting out its findings ever changed.

164. Fourthly, I accept the Bank's evidence that the Intercept Article and the disclosure within it of the Presentation were (and would reasonably have been) regarded by the Bank as a serious matter.

165. However, what Mr Hiltunen says in paragraph 15 of his witness statement – that it was obvious to him that these matters "*could have significant legal, regulatory and legal consequences*" – is, in my judgment, far too general to support the claim for litigation privilege. Nor is what Mr Hiltunen says in paragraph 25 of his witness statement, set out in paragraph 144 above, good enough.

166. As I explained earlier, the decision in *Philip Morris* establishes that litigation is not reasonably contemplated simply because of the "*mere possibility*" of litigation; nor is it enough that there is "*a distinct possibility that sooner or later someone might make a claim*". Something more concrete is needed, albeit litigation does not need to be likely and, as the Court of Appeal said in *ENRC*, there can be cases where (so to speak) the writing is clearly on the wall.

167. So far as the present case is concerned, in my judgment one can usefully test the position by considering the position as at 13 November 2017 (and, indeed, as at the dates thereafter prior to June 2018 when the PwC Report was produced) in relation to the each of the three bodies by whom the Bank suggested it contemplated adversarial proceedings might be brought.

168. I start with the CSSF. The Bank recognised, no doubt rightly, that the fact and content of the Intercept Article was a matter that needed to be brought to the attention of the CSSF as its primary regulator, and it was. I accept Mr Hiltunen's evidence that he was sure that the CSSF would want to investigate the matter, and as part of that investigation would ask questions.

169. But, as at 13 November 2017, or indeed in the period thereafter prior to June 2018, there is little in the evidence to suggest that the CSSF's position was, or was regarded by the Bank as, hostile, or that adversarial regulatory proceedings were, or were regarded by the Bank, as reasonably in contemplation. On the contrary:

i) Mr Mouget's 12 November 2017 15:57 email (see paragraph 51) reported that the "*tone of the discussion [with the CSSF] was fairly positive*" and that Mr Mouget thought "*the communication channel is good for both the regulators and the bank*";

ii) In his email on 13 November 2017 at 08:55 (see paragraph 52) Mr Mouget referred to "*adverse developments (not expected)*" in relation to the CSSF;

iii) The minutes of the meeting of the conference call of the Board of Directors at 10:00 on 13 November 2017 (see paragraph 54) recorded Mr Mouget explaining that:

> "… Based on the responses given, overall, the CSSF were reassured about the events but now await the results of the requested investigations.

and that:

> " … the CSSF are convinced that the Bank was not involved with the plan";

iv) The CCSF's letter 13 November 2017 letter (see paragraph 59) asked a number of questions about the Intercept Article and the Presentation, but it was not particularly aggressive or adversarial and it made no threat of proceedings;

v) There is nothing in the Bank's subsequent communications with the CSSF – the meeting on 7 December 2017, the CSSF's letter of 11 December 2017 or the

> Bank's letters of 18 December 2017 and 30 March 2018 (see paragraphs 70-72, 75-78 and 80-83) – that suggested that the CSSF was adopting an adversarial posture towards the Bank.

170. The authorities demonstrate that what is required for litigation privilege is contemplation of adversarial litigation; a claim for litigation privilege cannot be based upon the existence or contemplation of an investigative or inquisitive procedure, although I accept that, as in the *Tesco* case, what may start as an investigation may develop into an adversarial proceeding.

171. I have no detailed evidence as to the CSSF's powers, but I would, if necessary, have been prepared to assume that, like most financial regulators, the CSSF has enforcement powers, including the power to impose fines. Mr Hiltunen, in fact, explained in paragraph 15 of his witness statement that the Bank was subsequently fined by the CSSF in relation to an entirely different matter.

172. However, whether viewed as at 13 November 2017, when PwC was instructed, or by reference to the entire period to June 2018, I do not consider that the CSSF's involvement went beyond the investigative stage, nor that there was there anything to suggest that it would do so. Of course, one cannot judge matters with hindsight, but the position remains that no proceedings were ever commenced against, and no sanctions were ever imposed on, the Bank by the CSSF.

173. The second body whom the Bank suggested might commence adversarial proceedings was the FCA. The evidence in that regard in relation to the period prior to June 2018 is extremely thin. The position appears to be that:

i) The Bank had had no contact with the FCA prior to 13 November 2017;

ii) During the conference call at 10:00 on 13 November 2017 the Board of Directors recognised that the FCA should be informed of the Intercept Article. Edmund Rowland's evidence in paragraph 54 of his witness statement is that he notified the FCA about the Intercept Article on the following day (see paragraph 61 above); and

iii) On 15 February 2018 the FCA wrote to the Bank seeking information about the creation of the Presentation and whether Mr Bolelyy had worked at the Bank's London branch. I do not doubt Mr Hiltunen's evidence when he says in paragraph 34 of his witness statement that:

> "… the Bank's receipt of this request from the FCA emphasised the importance to me of obtaining PwC's findings to allow the Bank to respond effectively to the FCA."

But this evidence, in my judgment, falls far short of an anticipation of adversarial proceedings.

174. So far as Qatar is concerned, there is no evidence of any communication between Qatar and the Bank, or of any intimation or fear of a claim by Qatar against the Bank, prior to 13 November 2017 when PwC was instructed. The first contact was on 14 December

2017 when Paul Weiss sent a letter to the Bank asking it to preserve documents "*in connection with potential claims that our client may have*".

175. Mr Hiltunen deals with this in paragraph 33 of his witness statement where he says that:

> "Receipt of the letter re-enforced in my mind the importance of PwC's investigation to allow the Bank to respond effectively to any claim the QCB might make."

Although Paul Weiss's letter referred to a "*potential claim*" that Qatar might have, Mr Hiltunen's evidence stops someway short of suggesting that the Bank did, in fact, anticipate a claim by Qatar. There is no evidence of any further communication by or with Qatar prior to June 2018.

176. Fifthly, however, even if it were the case that the Bank reasonably contemplated adversarial litigation as at 13 November 2017 when PwC was instructed, or at some later stage prior to June 2018, for example a claim by Qatar, I am not satisfied that PwC's instruction, or the Bank's request that PwC should produce a report, was for the dominant purpose of anticipated litigation.

177. The Bank's case, as set out in paragraph 24 of Mr Hoare's sixth witness statement, was that the PwC Report was prepared *solely* for the purpose of anticipated litigation. No alternative case was advanced, either in Mr Hoare's witness statement or in argument, that if I were to find that the PwC Report was produced for a number of purposes, a litigation purpose was the dominant purpose.

178. The assertion that the PwC Report was produced for the sole purpose of anticipated (adversarial) litigation is, in my judgment, untenable. Whilst, given the limited nature of the Bank's case, I could stop there, I would not have accepted that the PwC Report was produced for the dominant purpose of anticipated adversarial litigation, amongst a number of purposes, even if such a case had been advanced.

179. In my judgment, there were a number of purposes behind PwC's instruction, which included a requirement to produce a report. The two most prominent, and dominant, purposes were (a) to find the facts, including how a copy of the Presentation had been obtained from the Bank's files, and (b) to satisfy the CSSF and put the Bank in a position where it could answer the CSSF's questions.

180. So far as the first is concerned, the idea of carrying out a forensic or IT investigation appears to have emerged at a very early stage. Mr Mouget's email at 16:11 on 11 November 2017 containing his recommendations (see paragraph 48) included:

> "launch a forensic/IT investigation (internal audit + external expert) on the systems of the bank (Luxembourg and London) to determine the origin, circulation, … etc of the document in order to confirm the forged nature of the document."

181. The transcripts of the calls between Edmund and David Rowland that I refer to later record their concern even before the Intercept Article was published that their mobile phones and/or the Bank's email systems may have been hacked or the subject of a leak.

See also Ms Lean's 13 November 2017 12:23 email (paragraph 55 above) in which she referred to an investigation:

> "… into how the presentation was allowed to be created and then sent to UAE and how it got to the journalist".

182. As for the second, the evidence is somewhat uncertain, but it appears that the suggestion of a forensic or IT investigation may have come from the CSSF itself. I note:

i) Mr Mouget's email of 15:57 on 12 November 2017 (see paragraph 51) where he said that the CSSF might write "*to detail the points they would like to be covered by the IT investigation*";

ii) The minute of the 13 November 10:00 conference call (see paragraph 54) in which Mr Mouget said that the CSSF was reassured but awaited the results of "*the requested investigations*";

iii) The Bank's letter to the CSSF dated 18 November 2017 (see paragraph 75) in which the Bank said that "*Given that the journalists state that these documents appear to have been prepared by the Bank, the CSSF has requested the Bank to investigate these allegations*".

183. Even if PwC's investigation was not requested by the CSSF, it is plain that one of the principal purposes of the investigation was to enable the Bank to answer its questions: see, for example, Mr Hiltunen's 13 November 2017 17:44 email (set out in paragraph 60 above). If I had to identify a single dominant purpose, it would be this. The short point, however, is that the documents and evidence provide little support for contemplated adversarial proceedings being the sole or dominant purpose of PwC's instruction.

184. I should deal at this point with the reliance place by Mr Quest upon the fact that PwC was not engaged by the Bank itself but by EHP, and also upon the terms of PwC's and EHP's engagement letters.

185. So far as the former is concerned, Mr Quest accepted in his oral submissions that the fact that it was EHP that engaged PwC and that it was to EHP that PwC formally reported was not conclusive. I attach limited weight to these matters because the chronology shows that a decision was taken by the Bank to instruct PwC independently of its instruction of EHP; it appears that the instruction may have been channelled through EHP with the aim of improving the prospect of a successful claim for privilege.

186. As for the latter:

i) There is nothing in PwC's own terms of engagement that suggests a litigious purpose for its work;

ii) EHP's terms of engagement (see paragraph 66) refer to its mandate being to assist the Bank in determining its potential liabilities and guiding the Bank in regulatory disclosure "*and proceedings*" with the CSSF, but there is little or nothing in the evidence to support the proposition that adversarial proceedings by the CSSF were (or were reasonably) contemplated at the time.

187. So far as Paul Weiss's 14 December 2017 letter is concerned, by the time this letter was received, the Bank had already engaged PwC. But, even if it might be said that, from that point onwards, one of the purposes of PwC's investigation and report (or at least one of the anticipated uses for it) was in relation to anticipated proceedings by Qatar, I would not accept that this was or became the dominant purpose. The dominant purpose or purposes, in my judgment, were those I have described in the paragraphs 179-183 above.

188. For these reasons, in my judgment:

    i) The PwC Report (Schedule C1, paragraph 1) is not protected by litigation privilege and must be produced for inspection;

    ii) So too, to the extent these are within the Bank's control – PwC's own working papers may well not be (see Hollander, *Documentary Evidence* (13th ed.), paragraph 5-16) - any drafts of PwC's report, working papers, memoranda, notes or similar prepared in connection with that report (Schedule C1, paragraph 2).

    Likewise, any documents withheld or redacted on the basis that they refer to the PwC Report or PwC's engagement (Schedule C1, paragraph 3) must similarly now be produced for inspection.

189. As I have found that the PwC Report was not privileged, it is unnecessary for me to address Mr Mumford's submission, that a document that is prepared in order to be, and is in fact, communicated to an opponent is not capable of being protected by litigation privilege. The fact that a document is prepared in anticipation of communication to an opponent cannot, in itself, be enough: see *ENRC* at [102].

190. Nor is it necessary for me to lengthen this judgment by dealing with Mr Mumford's argument, that privilege in the PwC Report had been waived by the provision of the report to the CSSF and ultimately to the FCA. I will simply say that I would have needed a good dealing of persuading that the circumstances in which the document was provided to the regulators meant that privilege in the report had been waived generally.

191. It remains for me to deal with the other items within Schedules C1 and C2.

    Schedule C1, paragraph 4: the Minutes of the Bank's Board of Directors on 6 December 2017 (see paragraphs 68-69)

192. The first and second redactions concern PwC's investigation and the relevant parts should now be disclosed. The third redaction concerns discussions with EHP and is the subject of a claim for legal advice privilege, which I have no reason to doubt. This part need not be disclosed.

    Schedule C1, paragraph 5: the letter from the Bank to the CSSF on 18 December 2017 (see paragraphs 74-77)

193. Those redactions that have been made on pages 2, 3, 4, the top of page 5 and the middle of page 6 on the basis that they reveal the findings of the PwC investigation and that are the subject of a claim for litigation privilege should be disclosed.

194. Likewise the redactions on pages 10-14 concerning the communication from the Bank's Risk Management Team to Internal Audit which have been made on grounds of litigation privilege; for the reasons I have explained, I do not consider that adversarial litigation was in reasonable contemplation, nor am I satisfied that this communication was made for the dominant purpose of any such litigation.

195. The partial redaction of the answer to question 6 on the middle of page 5 is the subject of a claim for legal advice privilege which I have no reason to doubt. This need not be disclosed.

196. So far as the redactions made on the ground of relevance are concerned, Reed Smith's letter of 1 February 2021 explained that two sections had been redacted on the basis that they were irrelevant:

i) A section concerning the logistics and scope of the PwC investigation (this appears to be on pages 6 and 7 of the document in the answer to question 9); and

ii) A section concerning internal and external action points adopted by the Bank in light of the Presentation (this appears to be on page 8 in the answer to question 13).

I am not satisfied that the first of these is irrelevant; the PwC Report is plainly relevant, and I consider it is also relevant to understand its scope and how it was conducted. The first redaction should be disclosed. I am not satisfied that there is any basis to challenge the second redaction.

Schedule C1, paragraph 6: the letter from the Bank to the CSSF on 30 March 2018 (see paragraphs 78-79 and 81)

197. As I explained earlier, the first three and a half pages have been redacted on the grounds of relevance. Reed Smith's 1 February 2021 letter says that they:

> "… concern the logistics and scope of the PwC investigation, and internal measures adopted by the Bank since its letter to the CSSF of 18 December 2017"

198. For the reasons set out in paragraph 196 above, I do not consider that the logistics and scope of the PwC investigation are irrelevant, and any parts redacted on that basis should be disclosed. (It appears, consistent with what was done in relation to the Bank's 18 December 2017 letter, that the answer to question 9 has been redacted on this same basis and, if so, that should also be disclosed.)

199. Consistent with my decision in relation to privilege attaching to the PwC Report, those parts of the letter that have been redacted on the grounds that they recount PwC's investigation and findings should now be disclosed. So too those parts that refer to interviews conducted by EHP with Bank personnel; I am not satisfied that these are protected by litigation privilege.

Schedule C1, paragraph 7: Mr Weller's 2018 statement (see paragraph 80)

200. I am not satisfied that there is any proper basis for either of the redactions that have been made to the statement prepared by Mr Weller on grounds of privilege. Specifically, and addressing the two parts identified in paragraph 80 above:

i) It is not clear to me on what basis the Bank considers it is able to assert a legal advice privilege which, on the facts, would seem to belong to Edmund Rowland, nor how Mr Rowland could rely upon that privilege in circumstances where he had chosen to disclose that advice to Mr Weller. No argument was advanced before me that the circumstances in which this took place meant that any waiver was limited;

ii) Redactions have been made on the ground of litigation privilege on the basis that they concern a request that Mr Weller attend an interview with EHP. I am not satisfied that adversarial proceedings were reasonably in contemplation by the Bank or that any communication with Mr Weller was made for the dominant purpose of such litigation, and accordingly I do not consider that the requirements for a claim of litigation privilege are made out.

201. A number of redactions have also been made on grounds of relevance on the basis (as set out in Reed Smith's 1 February 2021 letter) that these concern:

> "… alleged problems with the Bank's operational systems, steps taken by the Bank in connection with Mr Weller's suspension from employment, communications between Mr Weller and the Bank in connection with such suspension, and a complaint received by Mr Weller from one of the Bank's customers."

202. Given that Mr Weller's suspension was, as I understand it, related to his involvement in the Presentation, and also that Mr Weller's account of the circumstances in which the Presentation was created is not the same as other Bank employees, I am not satisfied that all these matters are irrelevant, apart from the alleged problems with the Bank's systems and a complaint received by Mr Weller from one of the Bank's customers, if they are truly unconnected.

203. The explanation given for the redactions is, however, a compendious one which is said to apply to a number of redactions. The appropriate course, in these circumstances, is to require the Bank to provide a better description of the grounds for each redaction, if it is maintained, in a further Disclosure Statement. Once that has been provided, the court will be in a better position to deal with any challenge that is made.

Schedule C1, paragraph 8: the notes of the meeting with the CSSF on 7 December 2017 (see paragraphs 70)

204. The issue in relation to this document concerns the redactions made on the ground of irrelevance.

205. The explanation given in Reed Smith's 1 February 2021 letter was that the relevant passages concerned:

> "… demands for information made by the CSSF … concerns expressed by the CSSF … and communications between the CSSF and the FCA".

A more detailed explanation was provided in paragraph 40 of Mr Hoare's sixth witness statement where he said that the redacted passages involved:

> "… requests for information from the CSSF made at the said meeting; comments made by the CSSF concerning the Bank's corporate governance and controls; communications passing between the CSSF and the FCA; and the logistics of when the Bank would be in a position to respond to the CSSF's correspondence."

206. It seems to me that some of these matters may well be relevant, for example discussion of the logistics of when the Bank would be in a position to respond to the CSSF's correspondence insofar as that involved a discussion of the scope of the PwC investigation and its progress. In the face of a compendious response applicable to all the redacted paragraphs, however, it is difficult to tell.

207. As in the case of the previous request, I consider that the appropriate course is to require the Bank to provide a better description of the grounds for each redaction, insofar as maintained, in a further Disclosure Statement.

Schedule C1, paragraph 9 and Schedule C2, paragraph 2: the letter from Mr Bolelyy to the Bank dated 15 November 2017 and parts of the transcript of Mr Bolelyy's interview with the FCA that refer to it

208. This letter has been withheld, and the sections of the transcript of Mr Bolelyy's interview with the FCA have been redacted, on the grounds of litigation privilege on the basis that the letter was requested by the Bank and produced at a time when litigation was in contemplation and for the dominant purpose of obtaining information from Mr Bolelyy to be used in connection with the litigation.

209. For the reasons given earlier, I am not satisfied that adversarial litigation was reasonably in contemplation by the Bank as at 15 November 2017, or that the dominant purpose of the communication from Mr Bolelyy to the Bank was for obtaining information to be used by the Bank in connection with any such litigation. The letter should be disclosed, and any relevant redactions from the transcript removed.

Schedule C1, paragraph 10 and Schedule C2, paragraph 1

210. I consider that it is appropriate that the Bank and Mr Bolelyy cause their solicitors to consider whether my rulings on privilege affect claims to privilege advanced in respect of any other documents and make any necessary corrective disclosure.

Schedule A

211. Schedule A seeks an order under Disclosure Pilot, paragraph 17.1(2) that the Bank carry out further searches and/or further reviews of documents, including a more extensive review of certain telephone recordings by reference to Model E.

212. To the extent that Qatar's application is made under Disclosure Pilot, paragraph 17.1(2) on the basis that there has or may have been a failure by the Bank adequately to comply with the order already made by Cockerill J for Extended Disclosure, it is for Qatar to satisfy me that it would be reasonable and proportionate for me to make the order it seeks.

213. Insofar as Qatar seeks to vary or extend Cockerill J's order, most obviously by requiring disclosure to be conducted by reference to Model E rather than Model D, Qatar bears a more onerous burden: under Disclosure Pilot, paragraph 18.3 it must persuade me not just that it would be reasonable and proportionate to make such an order, but also that such an order is necessary for the just disposal of the proceedings.

214. I will take each paragraph of Schedule A in turn.

Paragraph 1

215. Schedule A, paragraph 1 seeks an order that the Bank undertake a disclosure search and review (by solicitors or counsel with at least five years' post-qualification experience), in accordance with Model E, of telephone records relating to five individuals, Mr Bolelyy, Edmund Rowland, Harley Rowland, David Weller and Jonathan Unwin, over the period 1 June 2017 to 31 December 2017.

216. All five named individuals had recorded telephone lines during the period 1 January to 31 December 2017. However, in its Disclosure Certificate the Bank said that it reviewed the telephone records of only three[2] of these individuals, and that in the interests of proportionality it had confined its review (which had been carried out by reference to Model D) to records over the period 23 August 2017 to 10 November 2017.

217. Initially, there was resistance by the Bank to a broader review. However, by the time of the hearing before me, the Bank had agreed to:

    i) Review the telephone records of Harley Rowland; and

    ii) Extend the review of all five individuals to the full period from 1 June 2017 to 31 December 2017.

    The dispute between the parties was limited to whether this more extended review should be conducted according to Model E, and whether the telephone recordings already reviewed should be re-reviewed on the same Model E basis.

218. Mr Mumford's submission was that, whilst Model D may have been appropriate as at the date of the hearing before Cockerill J, in the events that had happened a Model E review was now necessary and appropriate. He made essentially three points.

219. First, he pointed to the Bank's initial decision not to disclose a recording of the telephone call between David and Edmund Rowland on 13 October 2017. This decision

[2] Mr Mumford's skeleton argument suggested that the Bank's Disclosure Certificate said that a review of recordings in relation to a fourth individual, Jonathan Unwin, had also been undertaken, but paragraph 19 of the Bank's Disclosure Certificate does not itself seem to say this. Schedule A to Mr Hoare's sixth witness statement, however, says that records relating to Mr Unwin either have been or will be reviewed and I have accordingly proceeded on the basis that there is no issue in this regard.

had been reversed in May 2021, when the transcript was disclosed on the basis that it was at least "arguably relevant", but Mr Mumford suggested that what had occurred cast some doubt on the adequacy of the initial review.

220. Secondly, Mr Mumford relied upon the content of the 13 October 2017 recording, the content of a recording of another telephone conversation between David and Edmund Rowland on 19 October 2017, and on other issues concerning the Bank's disclosure which, he said, demonstrated that the telephone recordings were a crucial source of evidence, recording the unguarded comments of key individuals.

221. Specifically, Mr Mumford argued that:

i) The transcript of the 13 October 2017 call demonstrated that two aspects of the proposed trial evidence of David and Edmund Rowland were false or incomplete, namely:

a) David Rowland's assertion that he had not read the Presentation until it was published on 9 November 2017, which he said was falsified by his reference during the call to the Presentation by its title "Distressed Countries Fund"; and

b) The absence of any reference in either David or Edmund Rowland's witness statements to a joint meeting that they had attended in Abu Dhabi, said to be evidenced by the reference during the call to the possibility that David Rowland's telephone had been hacked whilst "*they*" were having coffee with "*the bloke*".

ii) David Rowland's reference during the call to having "*been through my box*" cast doubt on the statement by the Bank (and by David Rowland in his trial witness statement) that emails sent to David Rowland's Bank email address and automatically forwarded to a personal email account had been automatically deleted after seven days. The Presentation had been sent to David Rowland on 18 September 2017; if what was said about the auto-delete function was correct, it would not have been in his inbox on 13 October 2017;

iii) The transcripts of the 13 October and 19 October 2017 calls included discussion of plans to dispose of telephones, to deactivate David Rowland's bank email address (which subsequently happened on 19 October 2017) and to send documents outside the Bank's email system; thus, Mr Mumford said, they were consistent with a plan to cover up evidence of wrongdoing; and

iv) There was also discussion in the 19 October 2017 call of taking "Vladimir" – Mr Bolelyy – off the Bank's payroll and giving him an email account at another one of David Rowland's businesses; of the fact that whoever had hacked David Rowland's telephone had only acquired attachments, and not the emails themselves; and of what Mr Mumford suggested was the concocted story ultimately put forward about the origin of the Presentation.

222. Thirdly, Mr Mumford suggested that the additional work required to re-review the recordings already disclosed, some 42.5 hours of telephone calls, was relatively modest

in the context of the litigation. Thus, an order that they should be re-reviewed would not be unduly burdensome or disproportionate.

223. Mr Quest submitted that neither the original decision not to disclose the recording of the 13 October 2017 call nor the content of the 13 and 19 October 2017 calls justified a review or a re-review of telephone recordings on a Model E basis. He said that the interpretation placed on the recordings was misplaced: the discussion about disposal of mobile phones, for example, took place because of a concern that David Rowland's telephone had been hacked and was not indicative of an intent to destroy evidence.

224. As reflected in her judgment, at the time of the first CMC Cockerill J was not satisfied that the evidence justified the application to the Defendants' disclosure of Model E to any of the Issues for Disclosure, Model E, she said, being intended to be used only in exceptional cases. In the context of Issue for Disclosure 12, however, Cockerill J said this at [31]:

> "31. Insofar as this is concerned, although I entirely take on board what Mr Howard had to say in reply in particular, I am going to say to both parties to apply Model D for the moment. This is an area where, if necessary, Model E can be come back to, but when one looks at what should be caught by Model D, particularly in the context then of the other queries, communications and so forth which are identified, one would expect Model D to catch either everything or sufficient to provide a focused basis for a specific train of enquiry. In particular, what we have here is although one can entirely see that there may be things off camera, it may not be a written-out agreement signed and sealed, if there is any agreement, what we do not have is the material to enable me to say what the chain of inquiry is. In the disclosure pilot it does indicate that the court should, when ordering Model E, be in a position to determine the scope of the search using the information provided in the disclosure review document. That is backed up by the authorities to which I have referred looked at in the light of the change sought by the Pilot. I am not now in that position of being able to determine the scope of the search. So for those reasons I am not going to order Model E at this stage. It may be a question for coming back."

225. Issue for Disclosure 12, I should explain, is in the following terms:

> "What agreement, arrangement or understanding was reached between [1 January 2017 and 31 December 2017] between any two or more of the Ds, the Identified Conspirators, and the other parties, as to the Qatari financial system or Qatari-related assets (including the QAR, QAR forwards, bonds issued by the State of Qatar or other Qatari entities, credit default swaps on such bonds, or other QAR-related assets – 'Qatar-related assets'); and

> what was the nature, scope, content and purpose of such agreement, arrangement or understanding?"

226. It seems to me that, in light of the further material now available and what it reveals, it is appropriate to revisit this issue. In my judgment Model E disclosure is appropriate on a limited basis, namely (a) limited to Issue for Disclosure 12, and (b) with the search carried out on a Model E basis confined to the telephone recordings of the five identified custodians over the identified period, i.e., 1 June 2017 to 31 December 2017.

227. I say this for the following reasons.

228. First, I am concerned about how the 13 October 2017 recording came initially to be withheld. I accept, of course, that mistakes happen, but it was plainly required to be disclosed on the basis of a Model D search. The significance of the recording is a matter for the trial judge, but I accept Mr Mumford's point, that its content bears upon the evidence proposed to be given by David and Edmund Rowland at trial.

229. Secondly, whilst I take on board that the context of the recordings included a concern about hacking, there are references to communications about relevant matters being taken "*off line*" and to other matters that bear on the issues and the supposed conspiracy: whether, for example, the explanation for the origin of the Presentation, namely that it followed an enquiry about a hedging strategy, was the true explanation or a concoction.

230. Thirdly, I see the force of the submission made by Mr Howard, QC at the first CMC, namely that, where there is a covert conspiracy, it is often very unlikely that any smoking gun will be found. The Presentation has been located, but almost as important will be the communications around it. The telephone recordings may lead to the identification of other documents concerning the genesis of the Presentation, its dissemination and other matters falling within Issue for Disclosure 12.

231. Fourthly, I bear in mind that certain potentially important sources of information are, for one reason or another, not available to Qatar or to the court:

    i) Mr Bolelyy's iPhone was, as I have explained, wiped of data before it was handed back to the Bank (see paragraphs 26 and 27 above);

    ii) David Rowland's bank email address (d.rowland@banquehavilland.old) was deactivated on 19 October 2017, and before that apparently – but see paragraph 221 (ii) above - had been the subject of an auto-forwarding instruction whereby emails were sent to a personal email account that was subject to an auto-delete function after seven days. David Rowland apparently has a number of other personal email accounts, but the Bank's position is that they are not within its control and Mr Rowland is, seemingly, unwilling to provide access to them voluntarily; and

    iii) Mr Bolelyy's hard copy notebooks have apparently been lost – see below.

232. I consider against this background that a fuller review of the telephone recordings may well lead to a train of enquiry which will result in the disclosure of other relevant documents. In my judgment, a Model E review, limited to this particular category of

documents and limited to Issue for Disclosure 12, is reasonable and proportionate, and is also necessary for the just disposal of these proceedings.

Paragraph 2

233. Schedule A, paragraph 2 seeks an order that the Bank make enquiries with each of its custodians as to whether they are aware of any known adverse documents and, if so, that the Bank take steps to locate such documents.

234. The starting point is that all forms of Extended Disclosure include known adverse documents: see Disclosure Pilot, paragraph 8.3. Known adverse documents are defined in Disclosure Pilot, paragraph 2.8 as follows:

> "'Known adverse documents' are documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse."

Disclosure Pilot, paragraph 2.9 explains the circumstances in which a corporate entity, such as the Bank, is regarded as aware of known adverse documents.

> "For this purpose a company or organisation is 'aware' if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation."

235. In *Castle Water Limited v Thames Water Utilities Limited* [2020] EWHC 1374 (TCC) ("*Castle Water*"), Stuart-Smith J explained at [12] that these provisions impose an obligation upon a party to undertake reasonable and proportionate checks to see if it has, or has had, known adverse documents, and if so to undertake reasonable and proportionate steps to locate them. These include checks with persons with accountability or responsibility for relevant events even if they have left the company.

236. Mr Mumford submits that the checks carried out by the Bank are insufficient. Specifically, he says that:

i) The Bank's Disclosure Certificate made no mention of steps taken to identify known adverse documents;

ii) When pressed, the Bank said that it would make enquiries of Mr Bolelyy, Mr Hiltunen and Mr Robeson (the former Chairman), but of no other custodians; and

iii) The Bank then said (in Mr Hoare's sixth witness statement) that "*it would contact disclosure custodians with a view to determining whether they used personal email accounts to send or receive work-related communications, and*

> *whether they used personal devices to store work related documents*", but this did not constitute the required check for known adverse documents.

237. Mr Quest submits that what the Bank has done or has agreed to do is sufficient.

238. I disagree. The position, as it seems to me, is that, if an individual is a person with accountability or responsibility within the meaning of Disclosure Pilot, paragraph 2.9, then a check to see if he or she is aware of any known adverse documents is not satisfied simply by asking whether he or she used a personal email account which was used to send or receive work-related emails or a personal device that was used store work-related documents. At the risk of stating the obvious, the answer to those questions may be "no", but the individual may still be aware of adverse documents stored elsewhere.

239. I simply do not understand the difficulty suggested by the Bank's solicitors in correspondence in educating custodians about the issues in the case so that they are aware of what might constitute a known adverse document. There ought to be no difficulty about this, and it is clear from Stuart-Smith J's judgment in *Castle Water* case at [10] what is required: a generalised question that fails to identify the issues to which any adverse documents may relate was, he held, not enough.

240. I accordingly direct the Bank to make further enquiries of its custodians about the existence of known adverse documents.

Paragraph 3

241. Schedule A, paragraph 3 arises out of the transcript of an 18 October 2017 telephone call between David and Edmund Rowland.

242. The conversation took place following a second call to Edmund Rowland from a journalist at "The Intercept" and at a stage when, seemingly, he was aware that the Presentation was, or was likely to be, published. After identifying the reporter to David Rowland, the transcript of the call records this exchange:

> "ER: Know what he said about some – well, he – they've obviously only got the attachment.
>
> DR: Yeah.
>
> ER: - because he said, oh we read the metadata and it was for my ex person, not –
>
> DR: We did what?
>
> ER: We got the metadata, which is basically – who created it and it looks like it was a UK-created file, so maybe it came from you. They've obviously got – they've obviously not talked to anyone, about this story.
>
> DR: Yeah.
>
> ER: Because then Herb, his email, and said, oh, this is three things we said.

> DR: Yeah.
>
> ER: And we said, then there's no story. So they've obviously not talked to anyone, He's obviously just – the attachments, that's all they have."
>
> …
>
> ER: Someone has hacked it and they've got no story. They're just having around with an attachment."

243. The point being made by Edmund Rowland in these remarks, Mr Mumford surmises (and on the materials before me I would agree) was that the reporter at "The Intercept" had the attachments to one or more emails – a copy of the Presentation – but not the email(s) themselves.

244. Qatar seeks an order that a search be carried out by the Bank for the covering emails or for any other documents sent with, or simultaneously with, the Presentation when emailed within the Bank, or when emailed to or from the Bank's employees, agents, consultants or officers (and for such other documents as Edmund Rowland meant by his use of the phrase "the attachments").

245. Reed Smith in their letter of 16 June 2021 said that the search that had been carried out for the Presentation had also involved a manual review of any emails from Edmund Rowland during the relevant period attaching a copy of the Presentation such that any relevant communications (cover emails and attachments) had already been disclosed. However, as observed by Mr Mumford:

    i) This response only refers to emails "from" Edmund Rowland; it does not extend to emails to him; and

    ii) It also does not refer to emails to or from anyone else to which the Presentation may have been attached.

246. In my judgment, a further search should be carried out as sought.

Paragraph 4

247. Schedule A, paragraph 4 concerns David Rowland's personal email accounts. The position in relation to this requires a little explanation.

248. As explained in paragraph 30 above, Qatar's disclosure application was made by an Application Notice dated 19 March 2021. Schedule A to the draft order exhibited to the Application Notice made no mention of David Rowland's email accounts, although Schedule B1, paragraph 3 sought further information as to when and why the automatic forwarding function was set up on his Bank email account and certain other matters. It was accordingly not dealt with in Mr Lavender's third witness statement in support of the application.

249. The Defendants responded to the disclosure application by way of the sixth witness statement of Mr Hoare. In a number of areas, in addition to matters they had already

agreed to in correspondence, the Defendants agreed to carry out further searches, and this was reflected in the revised draft order produced by Mr McCahearty along with his second witness statement served on 25 May 2021.

250. This revised draft, however, introduced a new Schedule A, paragraph 4, seeking an order that Havilland obtain from David Rowland and search the contents of various mailboxes:

david@havillandmanagement.com

djr@havilland.gg

djr@ havillandmanagement.com and

djr@evenfort.com

insofar as they contained emails concerning the Bank's business, alternatively insofar as they consisted of emails that had been automatically diverted to any of those mailboxes from David Rowland's Bank email account, including any replies.

251. Mr Quest objected to this new request. It did not, he said, reflect relief sought in the original application; and, because it had not been raised, it had not been responded to in the Bank's evidence. Mr Quest said that the argument put forward in paragraph 29.2.3.3 of Mc McCahearty's second witness statement, that David Rowland acted throughout the relevant period as a *de facto* director, shadow director or agent of the Bank, was not an argument that could be dealt with at the present hearing.

252. With this seemingly in mind, in a further revised draft order produced by the Bank on 20 June 2021, Schedule A, paragraph 4 was revised to seek an order as follows:

> "Without prejudice to the Claimant's right to seek further disclosure with respect to David Rowland's email accounts (or other matters), in a further Disclosure Certificate to be provided by 5 July 2021 the First Defendant is to provide confirmation (or otherwise state the position) and an explanation as to the matters set out in paragraph 30 of David Rowland's witness statement of 7 May 2021 and as to the matters concerning David Rowland under headings 1 and 4 of the Defendants' solicitors second letter of 14 June 2021. That confirmation and explanation is to take account of and address the matters raised in 2nd McCahearty, paragraphs 29.2.3.4, 29.2.3.5, 29.2.3.6 and 29.2.4 and is otherwise to meet the requirements of paragraph 12.3 of PD 51U."

253. So far as the matters reflected in this proposed order are concerned:

i) In paragraph 30 of his trial witness statement David Rowland explains that an automatic deletion policy had been applied to david@havillandmanagement.com and djr@havilland.gg, which he believed had been set up in 2016 and resulted in all emails being automatically deleted seven days after receipt;

ii) Paragraphs 1 and 4 of Reed Smith's second letter of 14 June 2021 referred to confirmations by David Rowland, first that he had not made permanent deletions of bank-related emails or documents and secondly that no work-related documents were stored within his personal email addresses or his personal devices.

254. Mr McCahearty's second witness statement sought a better explanation of what had been done to check whether emails had in fact been completely deleted from david@havillandmanagement.com. He referred to the 13 October 2017 telephone conversation between David and Edmund Rowland (see paragraph 221(ii) above) which, he said, suggested that David Rowland might still be able to access his emails and pointed to the fact that David Rowland had received bank-related documents at other email addresses.

255. The difficulty, it seems to me, in making any order at this stage, is that it appears to be accepted that the email addresses of David Rowland in question are personal email addresses, or at least that there is no material on which I could properly find at present that the Bank had control of these email accounts. Mr Quest submitted that the Bank had no direct information on the basis of which it could answer these questions beyond what David Rowland (who was not a party to this action) had chosen to put in his witness statement.

256. I understand the reason why the questions were proposed in the revised draft order: as Mr Mumford put it, if there is nothing to be found in these email accounts, then Qatar may never need to pursue the issues concerning David Rowland's status (whether he was a *de facto* director etc.) or of control. But it seems to me that it would be wrong to make any order in relation to this at the moment.

Paragraph 5

257. Schedule A, paragraph 5 concerns Mr Bolelyy's hard copy notebook.

258. Mr Bolelyy explains in paragraph 23 of his trial witness statement that he generally used a notebook to keep notes, and that when one notebook was finished he would copy over any notes that were relevant to current work and would shred the old notebook. He said that he did not know what had happened to the notebook he was using when he left the Bank on 9 November 2017, but that he did not recall taking it with him.

259. The order originally proposed by Qatar required the Bank to search for Mr Bolelyy's notebook. Reed Smith's letter of 16 June 2021, however, explained that the Bank had searched all the repositories in which it maintained hard copy documents, and had searched its London office generally, and that it had not located any of Mr Bolelyy's notebooks.

260. On the basis of that explanation, the revised draft order produced on 20 June 2021 sought an order in the following terms:

> "The First Defendant is to include within its further Disclosure Certificate, in respect of the hard copy notebook used by the Second Defendant (and referred to in his witness statement of 30 April 2021 at paragraph 23), an explanation pursuant to

> paragraph 12.3 of Practice Direction 51U to the best of the First Defendant's knowledge of the circumstances in which, and the date when, the notebook ceased to exist or left its possession or the other reason for non-production."

261. The problem with this suggestion, however, is that it does not seem that there is anything that the Bank could usefully say, other than what it has already said, namely that it has searched for the notebook and cannot find it. It appears from Reed Smith's letter that the Bank does not know when Mr Bolelyy's notebook ceased to exist or left its possession; all it knows is that Mr Bolelyy says that he did not take it with him, but that the Bank does not have it.

262. Although the Bank will be producing a further Disclosure Certificate dealing with the additional searches that it has agreed and/or I have ordered it to carry out, in these circumstances I see no purpose in making the order sought.

Schedules B1 and B2

263. Schedule B1 seeks an order that the Bank provides a witness statement (or statements) made by a senior executive with responsibility for the conduct of the bank's extended disclosure exercise, or a Disclosure Certificate, addressing various specified matters.

264. To the extent that any order is appropriate, I am satisfied that a Disclosure Certificate is sufficient. The Bank has already agreed that it will provide a further Disclosure Certificate dealing with the further searches that it has agreed to carry out and any additional searches I require it to make.

Paragraphs 1 and 2

265. Schedule B1, paragraph 1 and 2 seek confirmation and/or an explanation of certain matters concerning the operation of David Rowland's email accounts. Specifically:

    i) Paragraph 1 seeks confirmation of the arrangements by which emails sent to David Rowland's Bank email address (d.rowland@banquehavilland.old) were auto-forwarded to one of David Rowland's personal email addresses (david@havillandmanagement.com) set out in paragraphs 9 and 28 of David Rowland's witness statement and paragraph 7 of Reed Smith's first letter dated 16 June 2021;

    ii) Paragraph 2 seeks an explanation as to the circumstances in which the account d.rowland@banquehavilland.old was deactivated, including confirmation of the matters set out in paragraph 8 of Reed Smith's first letter dated 16 June 2021.

266. The Bank's submission was that the first matter was one that Qatar would have to take up with David Rowland himself, and that, so far as the second was concerned, the Bank had given as good an explanation as it could give.

267. Whilst I accept that it is unclear whether there is much more of substance that can be given by the Bank by way of explanation, I agree with Mr Mumford that this particular point is of sufficient importance that it ought to be addressed in a Disclosure Certificate.

Paragraph 3

268. Schedule B1, paragraph 3 seeks a proper explanation of the basis on which documents disclosed by the Bank had been redacted and confirmation that each redaction had been reviewed by Reed Smith and that they had been applied in accordance with that basis.

269. By the time of the hearing before me, there was no dispute between the parties about this. In certain cases, the Bank had already provided an explanation as to the basis upon redactions had been made; as apparent from the paragraphs above, some of those were challenged. Where no explanation had been made, the Bank agreed that it would give the explanation required by Disclosure Pilot, paragraph 16.

Paragraph 4

270. Schedule B1, paragraph 4 seeks an explanation from the Bank as to any steps taken to restore the data deleted from Mr Bolelyy's iPhone 7+ and an explanation of why those steps have been unsuccessful (assuming they have).

271. The Bank dealt with this in paragraph 10 of Reed Smith's letter of 16 June 2021 in which it said, by reference to its earlier letter dated 12 May 2020, that the Bank held no back up of the data on Mr Bolelyy's phone, apart from the emails sent and received, which had been saved to the Bank's server and had been reviewed, and accordingly that the Bank was unable to restore the data deleted from Mr Bolelyy's iPhone 7+.

272. Mr Quest's submission was that there was nothing more that the Bank could say. I agree. I make no order in relation to this paragraph.

Paragraph 5

273. Schedule B1, paragraph 5 seeks an order that various statements made by Reed Smith on 15 March 2021 in the schedule to Reed Smith's letter of that date concerning the Bank's disclosure be confirmed by a statement of truth, as they would be in a Disclosure Certificate.

274. Mr Quest submitted that this was unnecessary. I agree and make no order in relation to this paragraph.

Schedule B2

275. There were only two matters in this Schedule, and in relation to each what was sought by Qatar was a witness statement or Disclosure Certificate in which an explanation or confirmations would be given subject to a statement of truth. Insofar as a response is required, in my judgment a Disclosure Statement will suffice.

Paragraph 1

276. Schedule B2, paragraph 1 was the mirror of Schedule B1, paragraph 3 and sought a proper explanation of the basis on which each redaction had been applied and confirmation that the redactions had been reviewed by Reed Smith and that they had been applied in accordance with that basis.

277. As explained in paragraph 270 above, by the time of the hearing before me, there was no dispute between the parties about this. Mr Bolelyy agreed that he would give the explanation required by Disclosure Pilot, paragraph 16.

Paragraph 2

278. Schedule B2, paragraph 2 was the mirror of Schedule B1, paragraph 5 and sought an order that various statements made by Reed Smith on 15 March 2021 in the schedule to Reed Smith's letter of that date concerning Mr Bolelyy's disclosure be confirmed by a statement of truth, as they would be in a Disclosure Certificate.

279. Mr Quest submitted that this was unnecessary. I agree and make no order in relation to this paragraph.

Schedule D

280. Schedule D lists various disclosure steps that the Defendants have already agreed to take in correspondence.

281. The draft order seeks an order that the Defendants take the steps that they have agreed to take. That, in my judgment, is unnecessary, and I decline to make an order to that effect. The Defendants have already agreed to serve a further Disclosure Certificate explaining any searches carried out and the results.

Bond trading expert evidence

282. As I mentioned in paragraph 21 above, whilst I was preparing this reserved judgment Macfarlanes wrote to me on behalf of Qatar raising an issue concerning expert evidence.

283. At the hearing on 21 June 2021, as explained earlier, the Defendants confirmed that it was not their case that the Presentation as drafted *in fact* set out a bond hedging strategy. On the basis of that confirmation, I was satisfied that expert evidence from a bond trading expert as to whether the features of the Presentation were characteristic of a hedging strategy was unnecessary.

284. There was correspondence between the parties following the hearing as to whether, in light of this confirmation, it was appropriate for the Defendants to amend their Amended Defence. Reed Smith said in a letter dated 30 June 2021 that it was not on the basis that the Amended Defence had never alleged that the Presentation set out a "*bond hedging strategy*"; the allegation made (see, e.g., paragraphs 4.5 and 12) was that it set out a proposed "*trading strategy*" or an "*investment strategy*".

285. Macfarlanes responded on 9 July 2021 pointing out that:

i) The Bank's Response to the Request for Further Information (see paragraph 17 above) said that the origin of the Presentation was a question raised by Mr Al Mubarak about strategies to ring-fence "*and hedge*" the risk associated with holdings of Qatari bonds and that Edmund Rowland had asked Mr Bolelyy to put together a short document "*on hedging strategy for Qatari bonds*";

ii) Mr Bolelyy described in his witness statement Edmund Rowland's request to him as a request to "*do some research into ways to hedge large Qatari bond holdings*"; he referred to the work he did as being "*find out as much as he could about hedging*; and he explained Mr Weller's "*idea for a strategy to hedge Qatari bonds*". Edmund Rowland similarly said in his witness statement that he had asked Mr Bolelyy "*to put together a note on hedging strategy*"; and

iii) There were other documents in the Defendants' disclosure that referred to "*the hedging strategy explanation*", including the Declaration of Honour signed by Edmund Rowland for the CSSF, but none which referred to the Presentation as a "*trading strategy*" or an "*investment strategy*".

286. Macfarlanes said that if the Defendants were to maintain their pleaded case that the Presentation contained a legitimate "*trading strategy*" or "*investment strategy*" (other than a "*hedging strategy*"), then it was incumbent upon them to explain what they meant and that expert evidence would be required to address the question of whether the Presentation did, in fact, set out something with the characteristics of a legitimate "*trading strategy*" or "*investment strategy*".

287. Reed Smith responded on 15 July 2021. They said that:

i) The Defendants' case was adequately pleaded, and required no amendment or clarification; and

ii) No expert evidence was required (a) because it was obvious that the Presentation did set out a trading strategy in that it contemplated trading in Qatari securities, and (b) whether or not the proposed strategy was legitimate or unlawful was not a matter for a trading expert, but a matter of law (and, insofar as Luxembourg and/or Qatari law was relied upon, that was already being dealt with by foreign law experts).

288. In its letter of 22 July 2021, Macfarlanes said that Qatar's position was that the Presentation did not set out any form of commercial or market-recognised trading or investment trading or investment strategy, but simply a strategy aimed at injuring Qatar. They suggested that the position taken by the Defendants raised the following issue on which market-based expert evidence was either required or would be of assistance:

> "Are the features of the Presentation such as would be characteristic of any form of 'trading strategy' or 'investment strategy'?"

As the Presentation, on its face, referred both to currencies and to bonds, Macfarlanes invited me on behalf of Qatar to order that expert evidence could be given by both the foreign exchange and bond trading experts on this issue.

289. Reed Smith responded in a letter dated 27 July 2021 raising a number of objections, including that the issue proposed is a new expert issue, that the time for raising issues for the foreign exchange experts has passed (the service of their reports being overdue or imminent), and that a report dealing with the new issue is not reasonably required (within CPR 35.1).

290. I am not prepared to make an order in the terms suggested by Macfarlanes.

291. First, I agree with the Defendants that the question of whether the strategy set out in the Presentation was a legitimate strategy is not one for a trading expert, but a matter of law for submission. Macfarlanes' statement, that Qatar's case is that the Presentation did not set out any form of "*commercial*" or "*market-recognised*" trading strategy, seems to be just another way of expressing the same point; insofar as it is something different, it does not appear to be a pleaded issue.

292. Secondly, the issue that it is suggested could be addressed by a trading expert – are there features of the Presentation that are characteristic of "*any*" form of trading or investment strategy – is, as framed, so broad that it seems to me to be susceptible of only one answer: insofar as the Presentation contemplated trading in (and investment through the purchase of) Qatari bonds, it plainly did contain such features. I do not see how the court would be assisted by expert evidence on such an issue.

293. I quite accept that there may be questions that Qatar will wish to put to the Bank's witnesses based upon the Bank's Response to the Request for Further Information and their witness statements and the references in them to "*hedging*", but that does not justify the expert evidence sought.

Conclusion

294. I am grateful to counsel (and to their instructing solicitors) for their assistance. I invite them to draw up an order reflecting the terms of his judgment. I will deal with any consequential matters, including costs, in due course.