IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 068 of 2016 (NSJ)

BETWEEN:

PALLADYNE INTERNATIONAL ASSET MANAGEMENT B.V. ("PIAM")

Plaintiff

and

(1) UPPER BROOK (A) LIMITED (*Balanced*)
(2) UPPER BROOK (F) LIMITED (*Advanced*)
(3) UPPER BROOK (I) LIMITED (*Diversified*)
(4) AHMED MOHAMMED JEHANI (*Dr Jehani*)
(5) ALI JALAL BARUNI (*Mr Baruni*)

Defendants

JUDGMENT ON APPLICATION FOR INSPECTION OF THE DELOITTE DOCUMENTS
Made on the papers – 2 August 2018

Introduction

1. The Plaintiff has applied, pursuant to Order 24, rule 11(2) of the Grand Court Rules (***GCR***), for an order that the Defendants give inspection of the Deloitte Documents. The application was initially made by letter dated 27 April 2018 from Walkers, the Plaintiff's attorneys (the ***Walkers Letter***). The Deloitte Documents are documents prepared by Deloitte, the accounting firm, described and referred to in paragraph 4 of Part 2 of the Re-Amended List of Documents dated 29 March 2018 (the ***Re-Amended List***) which was served by Appleby, the attorneys for the Defendants, on that date following the conclusion of the trial of the Plaintiff's action (the ***Proceedings***). The trial concluded on 23 March.

2. Appleby responded to the Walkers Letter on 9 May (the ***Appleby Letter***) and at the same time filed a further affirmation of Mr Breish (***Breish 2***). Mr Breish had given a witness statement and evidence on behalf of the Defendants in the Proceedings. I then

directed that the Plaintiff's application be supported by affidavit evidence, as required by GCR O.24, r.11(3), and that Walkers and Appleby file written submissions in support of their respective positions. I invited them to confirm their clients' consent to the application being dealt with on the papers, which they subsequently did.

3. On 29 May Walkers filed the Plaintiff's skeleton argument with supporting authorities and the first affidavit of Elaina Bailes (***Ms Bailes***), a senior associate in Stewarts Law LLP, the London solicitors who are advising the Plaintiff (in conjunction with Walkers).

4. On 12 June Appleby filed the Defendants' skeleton argument with supporting authorities.

5. On 19 June Walkers filed reply submissions on behalf of the Plaintiff.

6. The Defendants oppose the application for inspection. They do so on the basis that the Deloitte Documents are subject to litigation privilege which is properly and adequately made out in Breish 2 and the other evidence filed in the Proceedings. The claim to privilege is therefore a key issue on the application. The Defendants invite the Court to inspect the Deloitte Documents if it is not satisfied that the privilege claim is made out. But the Defendants also say that even if the claim to privilege cannot be sustained inspection should not be ordered in this case on the basis that the production of the Deloitte Documents is not necessary for the fair disposal of the matter or for saving costs.

7. I have concluded, for the reasons I set out below, that:

   (a). I am not satisfied on the basis of the affidavit and the other evidence before me that the Defendants' claim to privilege and the right to withhold inspection are established.

   (b). nonetheless I should dismiss the Plaintiff's application and not make an order requiring the swearing of a further affidavit to support the claim to privilege or for inspection of the Deloitte documents by the Court. I consider that even if the Plaintiff were able to show or the Court was to conclude following such further affidavit evidence or inspection that the claim to privilege was not made

out, it would not be necessary for fairly disposing of the Proceedings or for saving costs to order inspection of the Deloitte Documents.

The application

8. GCR O.24, r.11(3) states that the affidavit in support must describe the documents of which inspection is sought and state the deponent's belief that they are in the possession, custody or power of the other party and that they relate to a matter in question in the relevant proceedings. GCR O.24, r.14(1) provides that no order for the production of any documents for inspection shall be made unless the Court is of the opinion that the order is necessary either for disposing fairly of the relevant proceedings or for saving costs. GCR O.24, r.14(2) provides that where inspection is objected to on the ground of privilege the Court may inspect the documents for the purpose of deciding whether the objection is valid.

9. The Re-Amended List states that it is served in compliance with GCR O.24, r.2 and (in paragraph 2) that:

> "*The Defendants object to producing the documents enumerated in Part 2 of [Schedule 1] on the ground that they are privileged from production.*"

10. Paragraph 4 of Part 2 of the Re-Amended List (***Paragraph 4***) states as follows:

> "*Reports prepared by Deloitte for the purpose of intended litigation against the Plaintiff sent to the LIA and to the Fourth and Fifth Defendants dated 22 October 2103 and 14 January 2014 (both marked "draft") together with emails of 22 October 2013 and 9 April 2014 under cover of which the report were respectively sent to the parties and an email forwarding the report dated 14 January to Enyo Law on 10 April 2014.*"

11. Paragraph 4 is one of two new paragraphs added to the Plaintiff's list of documents following completion of the trial. The other new paragraph (paragraph 3) refers to:

> "*A memorandum conveying legal advice from Enyo Law to the LIA dated 1 May 2014(and drafts of the memorandum), emails from Dr Jehani and Mr Baruni of 1May 2014 conveying the memorandum to Messrs Breish and Ismail on behalf of the LIA and earlier emails conveying drafts of the memorandum.*"

12. Paragraphs 1 and 2 of the Re-Amended List, which had not been changed, state as follows:

> "*1. Communications and other documents passing between the Defendants and*

their legal advisers for the sole or dominant purpose of obtaining and/or giving confidential legal advice or assistance

2. *Communications made and documents created after litigation with the Plaintiff was contemplated or commenced for the dominant purpose of that litigation (including obtaining evidence for use in such litigation, obtaining information that might lead to the obtaining of evidence for use in litigation, and/or of conducting or aiding in the conduct of litigation)."*

13. There are three background points to mention.

(a). the references to the LIA are to the Libyan Investment Authority, the Libyan sovereign wealth fund, that directly and indirectly owns or controls the shares in Balanced, Advanced and Diversified (the ***Funds***). The Funds hold valuable assets in the form of securities and investments deposited with third party custodians and the LIA is the party with the main economic interest in the Funds and therefore the securities and investments. The LIA is not a defendant or party to the Proceedings but the actions taken by it or on its behalf are central to the issues in dispute. The action taken to remove the Plaintiff as a director of the Funds was taken by those purporting to act on behalf of the LIA as a shareholder in the Funds and the action to remove the Plaintiff as the investment manager of the Funds was taken by Dr Jehani and Mr Baruni who were purportedly appointed as new directors of the Funds. But the Plaintiff claims against the Funds because it asserts that it remains a director and investment manager of, and seeks relief from, the Funds despite the steps taken to remove it.

(b). the privilege which the Defendants assert is the LIA's privilege. The Deloitte Documents are said to have been prepared on the instructions of and for the LIA (acting mainly through Mr Breish who was the chairman of the LIA's board of directors at the relevant time). The Plaintiff has not challenged the Defendants' right to resist the application on the basis of the LIA's privilege and there has been no suggestion that notice should be given to the LIA to allow it to intervene and assert and defend its privilege claim.

(c). this is no doubt the result of the continuing uncertainty and disputes concerning the identity of those who have authority to act for and bind the LIA. Since the overthrow of the regime of Colonel Gaddafi in October 2011 there have been disputes and litigation as to who is the legitimate government of Libya and these disputes have given rise to competing bodies and individuals who purport

to be authorised to act for and represent the LIA. The Proceedings have revealed that there appear currently to be three individuals who claim to be able to act on behalf of the LIA and they are often unable to agree.

The Plaintiff's submissions

14. In her affidavit Ms Bailes refers to the Walkers Letter and states that:

(a). based on the statements made in Paragraph 4 she understands and believes that the two reports by Deloitte therein referred to (the ***Deloitte Reports***) are in the possession custody and control of the Defendants.

(b). the Deloitte Documents relate to matters in issue in the Proceedings.

(c). production of the Deloitte Documents is necessary for the fair disposal of the Proceedings.

15. The Walkers Letter sets out the Plaintiff's position and arguments in detail. These arguments have been supplemented, pursuant to directions issued by me, by a detailed (and lengthy) skeleton argument dated 28 May prepared by the Plaintiff's counsel, Mark Hapgood QC and Brian Kennelly QC (and by reply submissions dated 19 June filed in response to the written submissions filed by Appleby on behalf of the Defendants).

16. The main submissions made can be summarised as follows.

(a). the Plaintiff submits that the Defendants' claim to litigation privilege in respect of the Deloitte Documents is bad. There is therefore no justification for their refusal to give inspection of the Deloitte Documents.

(b). while it appears from the positon set out in the Appleby Letter (paragraph 28) that the Defendants do not rely on the Deloitte Documents to prove any of the matters discussed and stated in them, nonetheless they are still relevant to the issue of whether the LIA had (and had a reasonable basis for) serious and real concerns as to the performance and integrity of the Plaintiff which caused, as the LIA and the Defendants have claimed, the LIA and the Defendants to take

action to remove the Plaintiff as a director and investment manager of the Funds.

(c). production is necessary for the *fair* disposal of the Proceedings since:

(i). sight of the Deloitte Documents may assist the Plaintiff in several ways: they may undermine what the Defendants have said if, for example, they refer to different concerns from the Defendants' witnesses or have different emphases; they may show that Deloitte was given wrong information about the Plaintiff; they may show that some alleged concerns were not held at all; or they may contain information that means it is not credible to say that other professed concerns were held. It would be wrong, the Plaintiff submits, to refuse production on the basis of speculation about their contents. It is wrong to suggest, as the Defendants do, that the Deloitte Reports are unlikely to shed light on what Deloitte was told or instructed by the LIA as forensic reports of this type commonly set out or refer to instructions, assumptions or facts provided by those giving the instructions.

(ii). it would be unfair to deprive the Plaintiff of the opportunity properly to consider the application of the Deloitte Documents to the issues in the Proceedings (in particular the issues I have identified above). The fact that the Deloitte Documents were in the possession, custody or power of the Defendants was not, but should have been, disclosed to the Plaintiff and Walkers before the trial (indeed the Defendants and Appleby had – perhaps impliedly - represented that the Deloitte Reports were not in their possession, custody or power by not listing them in the original list of documents and by failing to explain that they had copies when questioned about the documents by Walkers). The failure to disclose that they had copies of the Deloitte Documents in their possession, custody or power, and the delay in confirming this until after the end of the trial, gave the Defendants an unfair and improper litigation advantage that prejudiced the ability of the Plaintiff's counsel to cross-examine the Defendant's witnesses and properly to conduct the trial. This failure also justifies the Plaintiff's late

application and the making of an order for production after the end of the trial.

17. The challenge to the Defendants' claim to litigation privilege in respect of the Deloitte Documents is based on the following submissions:

(a). the claim for privilege on the face of the Re-Amended List was deficient and Breish 2 fails to make good the claim to litigation privilege.

(b). Briesh 2, which is the document which now sets out the basis for the claim to privilege and on which the Defendants rely, contains three paragraphs dealing with the Deloitte Documents as follows:

> "*4. The [Deloitte Documents] came into being at a time when Deloitte was undertaking a number of different work streams for the LIA. I have looked at the [Deloitte Documents] for the purposes of reminding myself of what led to their preparation. The first of the [Deloitte Documents] is a report prepared by Deloitte and sent to the LIA and others dated 22 October 2013 (the October report). The October report was prepared in consequence of and following a meeting that I had had with Deloitte in which Deloitte told me that they had identified some significant issues of concern that would require urgent action in the Netherlands to protect LIA investments with [the Plaintiff] and to prepare for potential legal claims. The document was an overview of Deloitte's key findings in relation to the LIA's investments with [the Plaintiff] following that meeting. The report contains a recommendation to instruct lawyers to take certain steps in the Netherlands with regard to LIA investments with [the Plaintiff]. I do not intend to waive privilege by providing this explanation, but to provide the court with sufficient facts to assess the claim for privilege made for the [Deloitte Documents].*
>
> *5 Without waiving privilege, I confirm that Deloitte's second report dated January 2014 was a further development of the October report and to the best of my knowledge and belief was prepared for the same purposes. It was sent to Enyo Law and concludes with a recommendation that legal advice be taken in relation to civil and criminal litigation in relation to Mr Abudher and [the Plaintiff. I do not intend to waive privilege by providing this explanation, but to provide the court with sufficient facts to assess the claim for privilege made for the[Deloitte Documents].*
>
> *6. The reports were both prepared at a time when litigation in the Netherlands was in prospect. They were prepared for the sole or dominant purposes of collecting information for the purposes of that prospective litigation and getting legal advice in relation to it.*"

(c). Breish 2 does not establish, and there is no evidence, that litigation against the Plaintiff (or any particular person or class of person) was contemplated (the ***Target Point***) at the time that Deloitte was instructed to prepare or at the time of the delivery of the Deloitte Reports. The Re-Amended List seeks to justify privilege on the basis of contemplated litigation against the Plaintiff and no other person (see the language of Paragraph 4) and Breish 2 does not say that litigation against the Plaintiff was contemplated. The Plaintiff submits that there is therefore no evidence to support the claim to privilege in the Re-Amended List and Mr Breish 2 (Mr Breish does not identify any other person against whom litigation was contemplated). There is accordingly no basis on which the Court could find that litigation was contemplated against a particular person or class of persons. This the Plaintiff submits is in itself fatal to the claim to privilege.

(d). but in addition there is no evidence that litigation was a real likelihood rather than a mere possibility (the ***Litigation Not Likely Point***). On the evidence either litigation was not contemplated at all or was not contemplated as a real possibility:

(i). the Plaintiff relies on a letter dated 23 December 2013 (the ***Enyo Letter***) sent by the LIA's London solicitors to the Plaintiff's London solicitors Enyo Law LLP (***Enyo***) in which Enyo said as follows:

> *"No proceedings are contemplated against [the Plaintiff] in relation to its involvement in trying to settle the dispute between the LIA and Goldman Sachs and our approach is simply to assist the LIA with regard to key documents and information which [the Plaintiff] is likely to retain. ... However, we can also confirm that no proceedings are currently contemplated against [the Plaintiff] in relation to its management of such funds and, unless our investigations reveal wrongdoing, this will continue to be the case."*

(ii). the Plaintiff notes that Mr Breish only deals with the Enyo Letter briefly in Breish 2. He says (at paragraph 7) that:

> *"I have reviewed the [Enyo Letter] which is referred to at paragraph 36 of [the] Walker' Letter. To the extent that it suggests that litigation in the Netherlands was not in prospect, it is wrong."*

(iii). the Plaintiff says that the Defendants have failed to explain how Enyo, an experienced and reputable firm, made such a statement incorrectly. The suggestion that Enyo misrepresented the position, or made such a statement (of obvious import to any litigator) without clear instructions and authority is not credible. That is all the more so in the absence of any explanation at all of how this occurred from those in a position to explain, if there is any explanation (the Plaintiff also submits that Mr Breish failed to address the many other matters on which the Plaintiff relies which were set out in the Walkers Letter and the Annex to the Plaintiff's skeleton argument).

(iv). in these circumstances the Plaintiff invites the Court to prefer the contemporaneous documents (which the Plaintiff says make clear that litigation against the Plaintiff was not contemplated at the time of the production of the Deliotte Reports) over the unexplained assertions set out in Breish 2.

(v). the Plaintiff also submits that the Court does not need to go so far as rejecting Mr Breish's assertions since Breish 2 makes it clear that any contemplated litigation against the Plaintiff (which the Plaintiff does not accept existed) was not contemplated as a real likelihood. The highest, it is said, that Mr Breish's evidence goes is to say the October 2013 report was prepared *"for potential legal claims"*. The Plaintiff submits that this does not establish a real likelihood of litigation. Mr Breish says that the October 2013 report recommended that lawyers be instructed to take *"certain steps in the Netherlands"* but does not suggest these steps included litigation. Litigation was, on Mr Breish's own evidence, a mere possibility. Furthermore, Mr Breish says that the January 2014 report was prepared for *"the same purposes"* as the October 2013 report and concludes with a recommendation to the LIA, not for litigation, but that *"legal advice be taken in relation to civil and criminal litigation in relation to Mr Abudher and [the Plaintiff]"*. This, the Plaintiff says, suggests that there was no (or as yet no) real likelihood of litigation.

(e). in any case, the Defendants have failed to establish that the Deloitte Documents were prepared for the dominant purpose of any litigation against the Plaintiff (the ***No Dominant Purpose Point***). This, too, is fatal to the claim to privilege:

(i). Mr Breish asserts that the Deloitte Documents were prepared for the *"sole or dominant purposes of collecting information for the purposes of that prospective litigation and getting legal advice in relation to it"* but does not attempt to square this with his earlier assertion that the October 2013 report was prepared for two purposes: *"urgent action in the Netherlands to protect LIA investments with [the Plaintiff] and to prepare for potential legal claims"*. The Plaintiff says that Mr Breish treats these as distinct purposes. But taking "urgent action" does not necessarily entail litigation, nor does Mr Breish suggest it did here. Mr Breish then says that the January 2014 report was prepared for the same purposes. Mr Breish therefore cannot say whether there was one or were several purposes (he cannot say if preparation was for the "sole or dominant" purpose of litigation) and fails to explain which of the two purposes he himself identifies, one of which does not and is not said to entail litigation, was dominant.

(ii). this the Plaintiff submits amounts to a failure "*to grapple with the obvious need to establish which of dual or even multiple purposes was dominant if a plausible claim to privilege was to be made out*", in reliance on Hollander, *Documentary* Evidence, 12th edn (2015) at paragraph 18-07 (***Hollander***) ((I note that the 13th edition of Mr Hollander's book has recently been published but the passage relied on by Walkers has not been changed). The Plaintiff also relies on the judgment of the Court of Appeal in *Rawlinson v Akers* [2014] EWCA Civ 136, which rejected the claim to privilege precisely because the deponent had committed a similar failure.

(f). Mr Hapgood and Mr Kennelly summarise in the Annex to their skeleton argument the problems with Breish 2 and the correspondence and evidence

on which they rely. They say, in summary, as follows:

(i). as regards Breish 2, Mr Breish's evidence is inconsistent with litigation against the Plaintiff being contemplated as a real likelihood in October 2013 and January 2014 and with the dominant purpose of preparation of the Deloitte Documents being such litigation:

(A). the evidence in Breish 2 is that: (i) Mr Breish had already instructed Deloitte to conduct a root and branch review of LIA's investments prior to referring matters concerning the Plaintiff to Enyo in September 2013; (ii) the LIA's investment with the Plaintiff was brought to Mr Breish's attention as part of that review; and (iii) that review flagged a number of concerns about the Plaintiff and as a result, the LIA would have to investigate further.

(B). but Mr Breish does not say that litigation with the Plaintiff was at that time contemplated at all, that he considered litigation with the Plaintiff to be a real likelihood, or that the October 2013 Report was prepared for the dominant purpose of such litigation (he says instead it was prepared as part of the already ongoing root and branch review of LIA's investments).

(ii). as regards the contemporaneous correspondence and other evidence, reliance is placed on:

(A). the Enyo Letter.

(B). the evidence of the Defendants' other witnesses and Dr Gergab.

(1). Mr Baruni, who Dr Jehani in his witness statement in the Proceedings says had carriage of dealings with Enyo, does not suggest that litigation against the Plaintiff was contemplated between October 2013 and

January 2014.

(2). nor do Mr Benyezza or Mr Ismial suggest that litigation against the Plaintiff during that period was contemplated.

(3). Dr Jehani mentions suggestions by Mr Breish to the LIA Board of Trustees that litigation might be required sometime between April and October 2013: (see paragraph 4 of his witness statement) but Mr Hapgood and Mr Kennelly submit that this evidence does not make the timing of litigation clear, is not addressed specifically to dealings with Deloitte (and the dominant purpose of the Deloitte Reports), cannot make up for the absence of evidence from Mr Breish that litigation was contemplated, and in any case does not provide a basis for findings of contemplation of a real likelihood of litigation against the Plaintiff nor that such litigation was the dominant purpose of preparation of the Deloitte Reports.

(4). Dr Gergab's evidence (at the London examination) was that the purpose of Deloitte's activities was to conduct an evaluation of the LIA's assets generally (it was not specific to the Plaintiff) and that legal actions may follow after Deloitte had reported depending on what Deloitte's investigations identified. This Mr Hapgood and Mr Kennelly submit suggests that the Deloitte Reports, as part of Deloitte's work, were not prepared for the dominant purpose of litigation against the Plaintiff but instead formed a wider review of the LIA's assets as a result of which further action might follow. Dr Gergab did not at any point suggest that litigation with the Plaintiff was contemplated between October 2013 and January 2014.

(5). the contemporaneous LIA Board of Directors minutes in respect of meetings held in December 2013 and February 2014 indicate that, in relation to the Plaintiff (by contrast to other entities with whom Enyo was dealing on behalf of the LIA), litigation was not at those times contemplated.

(6). furthermore the fact that the Re-Amended List claims privilege over the Reports and *"an email forwarding the report dated 14 January 2014 to Enyo Law on 10 April 2014"* makes it apparent that the October 2013 report was not communicated to the LIA's lawyers at that time and that the January 2014 report was provided to Enyo for the first time on 10 April 2014. Furthermore, the Deloitte Reports were not sent to the LIA's Dutch counsel, litigation did not ensue promptly and the Plaintiff was not sued in the first Dutch proceedings, all suggesting that litigation was not contemplated in the relevant period.

(7). it is not clear from the Re-Amended List or correspondence whether either of the Deloitte Reports are the documents from Deloitte referred to in the minutes of the LIA's board of directors' meetings in December 2013 and the February 2014 (which have been put in evidence in the Proceedings). Mr Hapgood and Mr Kennelly point out that despite Walkers having raised with Appleby these uncertainties and the problems flowing from the redactions made to the minutes put in evidence no satisfactory answer has been provided.

(g). the disclosure of the contents of the October 2013 report in documents filed with the Court in the Proceedings (or at least those parts of that report which are summarized in those documents) means that they are no longer

confidential and therefore cannot be privileged (the ***Waiver Point***). The documents in question are Mr Breish's witness statement and the closing submissions filed by the Defendants' counsel in respect of the UN sanctions issues which arise in the Proceedings (the ***Defendants Sanctions Closings***):

(i). as regards Mr Breish's written evidence, reference is made in the Walkers Letter (paragraph 66) to paragraph 37 of Mr Breish's witness statement. This states as follows:

> *"At that time [September 2013] I had asked Deloitte to conduct a root and branch review of the LIA's investments. A number of investments were brought to my attention as part of this review, among which was the investment of USD$300m by the LIA in the Third Defendant. Deloitte flagged a number of concerns which I immediately referred to Enyo as it was clear to me at that point that the LIA would have to investigate further. The main concerns at that point (October 2013) were in respect of the investigation of the Plaintiff by the Dutch (and possibly US) authorities, the exorbitant management fees being charged by the Plaintiff, lack of transparency as to the performance of the investments and discrepancies between different reports circulated by the Plaintiff for the same period, lack of track record in asset management of key officers of the Plaintiff and misrepresentation by the Plaintiff to the LIA as to its level of staffing and assets under management. I was also troubled by suspicions as to how the Plaintiff had obtained this mandate given Mr Abudher's family relationship with Mr Ghanem."*

(ii). the Plaintiff submits that this is a summary of the contents of the October 2013 report and that this is conceded by Appleby in the Appleby Letter. The Appleby states that:

> *"The Deloitte Reports at [Paragraph 4] were referenced in the following instances before the commencement of the trial: (1) in Mr Breish's witness statement at paragraph 37. That clearly references communications from Deloitte dating from October 2003. It cannot credibly be suggested that this evidence referred only to oral communications."*

This it is said to be a clear acknowledgement that the contents of the October 2103 report were referenced in paragraph 37 of Mr Breish's witness statement.

(iii). as regards the Defendants Sanctions Closings, reference is made to paragraph 39 (and footnote 13) where the following is said:

"39. After becoming aware of the Dutch investigation, Mr Breish referred the

matter to Enyo Law LLP, who had already been appointed to conduct litigation for the LIA (Breish §36). At or around the same time, Mr Breish also instructed Deloitte to conduct a review of the LIA's investments, including with [the Plaintiff] (Breish §37). In October 2013, Deloitte flagged a number of concerns in respect of the LIA's investments with [the Plaintiff]. The main concerns at that point were (Breish §37); see also Baruni §§16-17):

39.1. the investigation of the Plaintiff by the Dutch authorities;
39.2. the exorbitant IMA Fees being charged by [the Plaintiff;
39.3. the lack of transparency as to the performance of the investments, and discrepancies between different reports circulated by [the Plaintiff]covering the same period; and
39.4. the lack of track record in asset management of key officers of [the Plaintiff], and misrepresentations by [the Plaintiff] to the LIA as to the level of staffing and assets under its management.

Fn 13 Deloitte prepared a written report, however that is subject to privilege. That privilege belongs to the LIA and cannot be waived: ... The Plaintiff appeared to accept that this document "obviously exist[s]"

(iv). this is said to reveal the contents of the October 2013 report and result in a loss of confidentiality and therefore the privilege.

The Defendants' submissions

18. The Defendants position is that the Deloitte Documents are privileged but since the privilege vests in the LIA and not the Defendants the Defendants cannot waive it and are required to object to inspection and assert the privilege, subject to the decision of the Court. Their approach is summarised in Appleby's skeleton argument as follows.

> "*The Defendants are in possession of documents that they believe are privileged in respect of which they cannot waive privilege. They consider that they have no choice but to maintain a claim for privilege and see their role on this application as being to assist the Court in determining whether an order should be more for their production to the Plaintiff. Their hope is that this determination will be made speedily so as not to further increase the cost or delay of reaching judgment.*"

19. Appleby have made submissions as to why the Plaintiff's challenge to the claim to privilege is unfounded and should be rejected but have also indicated that the Defendants would welcome inspection by the Court. They say that the documents are not being withheld from production for forensic reasons but because the Defendants consider that they have no choice. Inspection by the Court would allow a proper independent assessment to be made of the claim to privilege and if the Plaintiff agreed could expedite the resolution of the application. But the Plaintiff has not consented. Mr Hapgood and Mr Kennelly, in their skeleton argument,

submit that there is no need for the Court to inspect the Deloitte Documents since Breish 2 does not say that the Deloitte Documents themselves contain anything that shows the purpose for which they were created. Instead Breish 2 implicitly accepts that the claim to privilege turns on the surrounding circumstances. Furthermore, even if inspection were to be appropriate, Mr Hapgood and Mr Kennelly submit that inspection would need to be undertaken by another judge – this being they say the usual practice where the application to inspect is made to the trial judge. Appleby disagree and say that Mr Hapgood and Mr Kennelly have not cited the basis for their view and they, Appleby, can find no support for it in the textbooks or authorities.

20. On the propositions of law relied on by the Plaintiff Appleby submits as follows:

(a). the privilege does not depend on the documents in question having been brought into existence purely for the purposes of contemplated litigation which is to be against the Plaintiff. Appleby submit that this conclusion follows from the principle that "once privileged always privileged" and cite Hollander at paragraph 13-05 in support of the principle and the proposition that "*this means that if a document is privileged in one action, the party entitled to assert that privilege or his successor in title may assert the same privilege in a subsequent action in which the document is relevant. There is no requirement of identity or substantial identity of subject-matter in the different proceedings.*" (this passage has not been changed in the 13th edition of Mr Hollander's book). Appleby also refer also to the notes in the 1999 White Book at 24/5/23 "Subsequent Litigation" which are to a similar effect *("If the privilege which prevailed in the original action is properly claimed in a subsequent action by the person originally entitled to it, or his successor, there is no additional requirement that the subsequent action :should be between the same parties or involve the same subject-matter; provided there is sufficient connection for the document to be relevant, the party entitled to privilege is able to assert it in the subsequent action.*" [my underlining])

(b). Appleby submit that the test is whether litigation is reasonably in prospect and refer to the statement to that effect in Matthews and Malek, *Disclosure*, 5th edn (2017) at paragraph 11.43). They accept that the requirement that litigation be reasonably in prospect is not met by the mere possibility of litigation and rely on the summary of the applicable principles by Brooke LJ in *USA v Philip*

Morris Inc (No 1) [2004] EWCA Civ 330 at [62]-[68]. They note that the authorities establish that the level of likelihood of litigation does not need to be more than fifty percent.

(c). Appleby say that the Defendants' primary case is that the only purpose of the documents was litigation and only alternatively that the dominant purpose was litigation. It only falls to the Court to consider the dominant purpose of documents where there is more than one purpose. In this case there was only one.

21. Appleby submit that on the evidence:

(a). as regards the Target Point, reading Mr Breish's evidence as a whole, it is clear that Mr Breish is referring to and that what was in contemplation at the time of the Deloitte Reports was litigation against the Plaintiff and/or related entities in the Netherlands. It cannot credibly be said that Mr Breish is referring to litigation which has no target at all.

(b). as regards the Litigation Not Likely Point:

(i). Mr Breish gave evidence in Breish 2 about the circumstances in which the Deloitte Reports were prepared. As to the October 2013 report, he explains that it was prepared following a meeting he had with Deloitte in which Deloitte told him that they had identified "*significant issues of concern*" that would require *"urgent action in the Netherlands to protect LIA investments and to prepare for potential legal claims.*" [underlining added by Appleby]. Appleby note that the October 2013 report was therefore prepared after Deloitte had advised that there was a need for urgent action in the Netherlands to prepare for potential legal claims. There was, therefore, they submit, already present in the mind of Mr Breish before the report was prepared an awareness of the need to prepare for potential legal claims. Appleby submit that it not credible to suggest that there was not a reasonable prospect of litigation in such circumstances.

(ii). Appleby also say that there is further evidence which goes to the prospect and likelihood of litigation. Mr Breish states in Breish 2 that Deloitte's October 2013 report contains a recommendation to instruct lawyers to take steps in the Netherlands with regard to the Plaintiff and LIA's investments. This statement feeds into Mr Breish's further evidence in Breish 2 in which he says in terms that both reports were prepared when litigation was in prospect. Appleby submit that even looking solely at Breish 2 there would be no basis for concluding that litigation was not reasonably in prospect at the time that the Deloitte Reports were prepared.

(iii). furthermore there is other evidence in the case which supports the conclusion that Mr Breish and the LIA regarded, and that objectively it should be found as a fact that, litigation was reasonably in prospect. Although Mr Breish was not in a position to identify and provide details in his evidence the significant issues of concern or the actions which were recommended by Deloitte (because by doing so he would be revealing in detail the contents of the documents and thereby waiving – to the extent he had authority to bind the LIA – the privilege), it is reasonable to infer from what he says about the circumstances in which Deloitte was instructed and the recommendations they made that litigation was being considered and to be regarded as reasonably in prospect. The other evidence in the case shows the Plaintiff and Mr Abudher were publicly known to be under investigation for fraud at the time that Mr Breish says he instructed Deloitte and shortly before the delivery of the first report (see paragraphs 36 and 37 of Mr Breish's witness statement). Appleby submit that it is reasonable to infer that any investor confronted by news that a party managing large sums of the investor's money is a suspected fraudster will have in mind the prospect of litigation to protect its interests and to pursue claims and that in this case where there were "*significant concerns*" identified in relation to the LIA investments with the Plaintiff identified by Deloitte prior to compiling their October 2013 report the evidence establishes that litigation was, looking at the matter objectively, a very real prospect. Therefore the threshold for litigation privilege is in this case met and

exceeded.

(c). as regards the No Dominant Purpose point, Appleby submit that the evidence establishes that the Deloitte Reports (and the Deloitte Documents) were and involved a confidential communication between the LIA and Deloitte for the dominant purpose of use in litigation; that is, to seek or provide information or evidence to be used in, or in connection with, litigation in which the LIA would or may become a party:

(i). they note that Mr Breish's evidence in Breish 2 is that the sole or dominant purpose of the Deloitte Reports was collecting information for the purposes of prospective litigation and getting legal advice in relation to it. They reject the submission that in fact there were two separate purposes in this case and that since Mr Breish has failed to explain which was dominant the claim to litigation privilege fails. Appleby submit that there was only one relevant purpose in the present case, which was to collect information for the purposes of prospective litigation to protect the LIA's position as a result of the problems identified in relation to the Plaintiff and getting legal advice in relation to it.

(ii). Mr Breish's reference (in paragraph 4 of Breish 2) to Deloitte saying that the significant issues of concern would "*require urgent action in the Netherlands to protect LIA investments with [the Plaintiff] and to prepare for potential legal claims*" did not mean that in substance the communications between Deloitte and the LIA were for two different purposes.

(iii). Appleby submit that the evidence shows that there was a single inseparable purpose and they rely on the judgment of Oliver LJ in the Court of Appeal in England in *Re Highgrade Traders* [1984] BCLC 151 (at 173-174) for the proposition that where a report is designed to ascertain facts and put them before legal advisors that is not, without more, a genuine duality of purpose but a single wider purpose which attracts litigation privilege (which analysis they say applies in the present case).

(d). as regards the Waiver Point, Appleby submit that while the Defendants relied on evidence that certain issues were causing concern there was no reference to the content of the Deloitte Reports to prove that point. Those issues may or may not have been covered in the Deloitte Reports (the Plaintiff's suggestion that they were is said to be pure speculation). If they were (as to which no case is advanced) the fact that they were does not mean that proof of the existence of the concerns by oral testimony (that does not rely on the content of the report) amounts to revealing the content of the report. They also submit that the Plaintiff's case is not assisted by the repeated suggestions it makes that the Defendants have reduced their reliance on the Deloitte Documents – they never relied on them in the first place.

(e). as regards the approach the Court should take to the Plaintiff's application:

(A). Appleby submit that the Court's starting point should be to consider the affidavit evidence and the relevant jurisprudence on the extent to which it is conclusive. Appleby say that the relevant rules in this jurisdiction are not the same as those that currently apply in England and Wales under the Civil Procedure Rules (***CPR***) but follow the old Rules of the Supreme Court (***RSC***). Appleby rely on three English Court of Appeal authorities which considered the relevant provisions in the RSC (*Frankenstein v Gavin's Cycle Cleaning and Insurance Company* [1897] QB 62, *A.G. v Emerson* (1882) 10 QBD 191and *Brooks and another v Prescott* [1948] 1 All ER 907) and the statement and summary of the position as set out in the 1999 White Book as follows:

> *"As regards the claim for privilege, the only cases in which the affidavit can be controverted are those in which it can be seen from the whole affidavit or from the nature of the case or of the documents themselves, that the party making discovery has erroneously represented or misconceived their nature or effect (Att.-Gen. v. Emerson (1882) 10 Q.B.D. 191 at 198, 203, 204, CA; Roberts v. Oppenheim (1884) 26 Ch.D. 724; Frankenstein v. Gamn's Cycle Cleaning and Insurance Co. [1897] 2 Q.B. 62; Lyell v. Kennedy (No. 3) (1884) 27 Ch.D. 1 at 20-23; Brookes v. Prescott [1948] 1 All E.R. 907, CA). But the Court will not speculate upon such misrepresentation or misconception, and will accept the list, verified by affidavit, as conclusive unless it can see distinctly that the oath of the party cannot be relied upon (Roberts v. Oppenheim, above; see also Jones v. Andrew (1888) 58 L.T. 601). An application*

for a further and better list (as distinct from an application under r.7) should not normally be supported by an affidavit."

(B). Appleby also refer to a recent English decision, *Director of the SFO v Eurasian Natural Resources Corp Limited* [2017] 1 WLR 4205, which they say applied the principles set out in *West London Pipeline v Total* [2008] EWHC 1729 (Comm) (***West London Pipeline***) and they extract the following quotation from the judgment of Beatson J in *West London Pipeline*: "*inspection should not be undertaken unless either 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.*" They submit that this threshold is not satisfied in the present case.

(C). there is, Appleby submit, no sufficient basis for rejecting (or going behind) Mr Breish's evidence. The Defendants reject as unfounded the reasons relied on by Ms Bailes in her first affidavit:

(i). Appleby say that that permitting the Plaintiff to inspect the Deloitte Documents will not enable the Plaintiff to test the assertions that the Defendants' witnesses have made in evidence about those documents since none of the witnesses made any such assertions.

(ii). nor will inspecting the Deloitte Documents enable the Plaintiff to understand what Deloitte was told and thereby test the genuineness of the Defendants' concerns about the Plaintiff . Ms Bailes appears to proceed on the premise that the Deloitte Documents relate to what "*Deloitte was told*" (presumably meaning what Deloitte was told by the LIA about the Plaintiff) but she does not say what she bases this inference on and, Appleby say, that having regard to the nature of forensic investigations, and without revealing the contents of the reports, this would not appear, on an objective view, to be a sound inference to draw. Appleby also submit that since the Plaintiff's CEO and Chairman had accepted in cross

examinations that the LIA had serious concerns, which Appleby say were unsurprising in the circumstances, there appeared to little merit in pressing the challenge to the genuineness of the Defendants' concerns.

(iii). while the Defendants do not dispute Ms Bailes' claim that the Deloitte Documents are likely to be relevant to the Defendants' knowledge at the time they (and the LIA) took steps, and their intention in, purporting to remove the Plaintiff that only goes to relevance and does not assist the Plaintiff in establishing that inspection is necessary for disposing fairly of the matter or for saving costs. There is no cost saving to this exercise and the Plaintiff has not shown that the documents need to be produced to ensure a fair disposal. As to fair disposal, Appleby submit that the most that can be said is that if the Deloitte Documents do contain additional reasons to be concerned about the Plaintiff they will simply add to a considerable weight of existing evidence so that they are not necessary for a fair disposal. If, on the other hand, they actually exculpated the Plaintiff then they *might* help the Plaintiff but there is simply no reason to even think that they might do this.

(iv). Appleby reject the submission that the failure to identify the Deloitte Reports (or the other Deloitte Documents) in the original list of documents produced unfairness and prejudiced the ability of the Plaintiff's counsel properly to conduct the trial and that the Plaintiff was misled or could reasonably have misunderstood the position taken by the Defendants' witnesses as to the existence of the Deloitte Reports:

(1). under cross examination Mr Breish gave unequivocal evidence that Deloitte produced a written report (and Mr Benyezza gave evidence that criticism of the Plaintiff had started with Deloitte).

(2). Mr Hapgood was well aware of the existence, and the claim to privilege in respect, of written reports prepared by Deloitte and had the opportunity to challenge the privilege claim during the trial. Mr Hapgood had asked Mr Breish directly whether Deloitte had provided the LIA with a written report (to which Mr Breish responded "definitely yes") and then asked whether Mr Breish as the purported chairman of the LIA would have any objection to the report being disclosed to the Plaintiff. At that point Mr McMaster of Appleby interjected that it was not clear that Mr Breish could give a consent on behalf of the LIA and if an application for disclosure was to be made it needed to made properly because "*the report is privileged and covered by litigation [privilege*]." There then followed an exchange between Mr Hapgood and me as follows (see the transcript for day 5 of the trial at 81-82):

"*MR JUSTICE SEGAL*	*I think that if there is a request for [a] disclosure of a document, presumably it is in the list and privilege has been claimed, or is it not in the list?*
MR HAPGOOD	*I don't know, There are a number of documents which obviously exist which I believe have not been listed.*
.....	
MR MCMASTER	*It's not separately listed I think is the position. There are a number of documents from Deloittes.*
MR HAPGOOD	*Let's move on*
MR JUSTICE SEGAL	*If there is an issue about the document it ought to be dealt with separately and not in terms of dealing with the witness.*
MR HAPGOOD	*Yes*"

(3). the issue came up again on the last day of the trial when the following exchange took place:

"*MR JUSTICE SEGAL:*	*When it comes to critical documents like the Deloitte report, like the memorandum produced by the litigation.*
MR MCMASTER:	*Yes, those are privileged documents.*
MR JUSTICE SEGAL:	*Those are identified and privilege is claimed.*
MR MCMASTER:	*Yes. I'm not sure whether they've been separately identified in the list, but privilege has been claimed and if we wanted to, we could identify those for the purposes of doing that separately. My Lord, the position is, and we have made this point in correspondence --*
MR HAPGOOD:	*Those documents are not listed.*
MR MCMASTER:	*I have just said they are not listed and I have said that we can list them if we want to -- if we want to go down that route we can, but it doesn't change the reason why they are not in front of the court.*"

(f). Appleby submit that the burden of proof is on the inspecting party to show why he should have inspection and not on the disclosing party to show why he should not (citing Matthews and Malek, *Disclosure*, 5th edn (2017) at 11.01).

(g). furthermore they submit that the Court should give considerable weight to and not go behind Mr Breish's evidence in Breish 2, for the purpose of deciding on the claim to privilege and what orders to make under GCR O.24, r.11(2) and 14(2). They rely (in paragraph 39 and 40 of the Appleby Letter) on the following passage from the judgment of Jenkins LJ in the English Court of Appeal in *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 K.B. 134, 146:

> "*It is not open to doubt that under the RSC, Ord. 31, r. 19A (2), the court has power, in a proper case, to inspect documents where a claim of privilege is set up against a claim for inspection of documents by the opposite party.*

> *Birmingham and Midland Omnibus Company Ld. v. London and North Western By. Co. .. affords an illustration of a case in which the court did take that course, and, as it happened, having done so, held that the claim to privilege was well founded. But there is nothing in the rule, or in the authorities, to constrain the court to hold that, in every case where a claim to privilege is made and disputed, the party seeking production is entitled to come to the court and (as it were) demand as of right that the court should go behind the oath of the opposite party and itself inspect the documents. The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents."*
> [emphasis added]

The issues and approach to be taken by the Court

22. The key questions on this application are whether the Defendants have been able to establish that the Deloitte Documents are protected by litigation privilege and whether the Court should go behind the affidavit sworn by Mr Breish supporting the claim to privilege. If the Defendants can sustain the claim to litigation privilege then as a matter of law production cannot be ordered.

23. The burden of proof is on the party claiming privilege to establish it. Appleby cited paragraph 11.01 of Matthews and Malek, *Disclosure*, 5th edn (2017) to support their submission that the burden of proof is on the inspecting party to show why he should have inspection. But the burden of proof applicable to a claim and objection to inspection based on privilege is dealt with at paragraph 11.54 (and confirmed in *West London Pipeline* at [86(1)]).

24. The approach which the Court should adopt in considering a claim to privilege in these types of application was reviewed and summarised by Beatson J in *West London Pipeline* who identified the following principles (at [86]):

(a). 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.

(b). 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.

(c). 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:

(i). 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.

(ii) 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.

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

(d). 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 (three of which are relevant in the present context):

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

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

(iii). it may inspect the documents but 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 – an issue that does not arise in the present case). 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.

25. Beatson J also noted (at [53]) that affidavits claiming privilege should be specific enough to show something of the deponent's analysis of, in the case of a claim to litigation privilege, the purpose for which the documents were created. It is desirable that they should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect.

26. It seems to me that these principles and aspects of the decision are applicable in proceedings in this jurisdiction. Beatson J's formulation of the propositions dealing with if and when it is permissible for the Court to go behind an affidavit supporting the claim to privilege is based on pre-CPR authorities including *Frankenstein v Gavin's Cycle Cleaning and Insurance Company*, which as I have already explained is relied on by the Defendants and the editors of the 1999 White Book.

Litigation privilege – the law

27. The main requirements for establishing litigation privilege are not in dispute and it will suffice for me to refer to the summary of the position by Aikens J in *Winterthur Swiss Insurance Company v AG (Manchester) Ltd* [2006] EWHC 839 (Comm) (***Winterthur***) who said (see 83) that in considering whether material might be subject to litigation privilege three questions arise. These are:

> "*First, at the time that the relevant communications were created, was litigation contemplated? Secondly, were the communications created for the dominant purpose of obtaining legal advice for that litigation or in aid of that litigation? Thirdly, under the direction of which person or entity, objectively speaking, were those communications created.*"

28. But there are three points of principle that need to be dealt with at the outset:

(a). what needs to be established in order to satisfy the requirement that litigation is contemplated?

(b). is it necessary for the Defendants to establish that the contemplated litigation was against (i) the Plaintiff or (ii) a particular person or class of persons?

(c). what needs to be established in order to satisfy the requirement that the relevant communication was made with the dominant purpose of use in or obtaining advice about the anticipated litigation?

29. As regards the first point (the Litigation Not Likely Point):

(a). the authorities (supported by the textbooks) make it clear that the right approach is that litigation must be reasonably in prospect or reasonably anticipated. The privilege attaches to a communication and not to a document containing that communication so that the relevant time is when the communication is made, for example when the document is emailed (see Thanki et al, *The Law of Privilege*, 3rd edition (2018) at paragraph 3.50 (***Thanki***)). The litigation must be anticipated by a person, and the person who is key is either the maker of the communication or document or the person under whose direction it was produced, assuming where a company is involved that the person concerned has the requisite authority (see *Thanki* at paragraphs 3.51 and 3.105).

(b). the question whether litigation was reasonably in prospect or reasonably anticipated at the relevant time is a question of fact to be determined by objective criteria. The timing test is whether litigation is reasonably contemplated so that (as with the determination of purpose) the Court must look at the matter objectively and will not be swayed simply by references to the relevant person's own subjective state of mind (see *Thanki* at paragraph 3.51). Evidence that merely states that litigation was contemplated by that person is unlikely to be sufficient but the evidential threshold is not so high that it can only be satisfied by the party claiming privilege having to adduce evidence of the very matters over which privilege is claimed (see *West London Pipeline* at [53]).

(c). as regards what this means in any particular case, and the precise extent to which litigation must be anticipated, the test is notoriously difficult to express in words but a series of propositions is widely accepted. It is not sufficient if litigation is a mere possibility or a person has a general apprehension of future litigation but it is not necessary that the party has decided whether to commence legal proceedings.

(d). *Thanki* notes (at paragraph 3.56, citing *Westminster International BV v Dornoch Ltd* [2009] EWCA Civ 1323 and *Axa Seguros SA de CV v Allianz Insurance plc* [2011] EWHC 268 (Comm) (***Axa***)) that:

> "*Litigation may be reasonably in prospect even if the party's decision whether to commence proceedings depends on a report commissioned by that person and prepared by a third party and even if the chance of that report reaching a conclusion justifying litigation is at best evenly balanced.*"

(e). but the authors go on to comment that (at paragraph 3.57 and footnote 152):

> "*However everything turns on the facts in the particular case and it therefore hard to draw general principles from the authorities. In certain first instance decisions courts have reached a conclusion seemingly at odds with Dornoch and Axa holding that where a party commissions a third person to conduct an investigation into suspicions which the party has (or into allegations by a whistle-blower) that, if confirmed would lead to litigation there was no real reason to anticipate litigation unless and until those suspicions had been confirmed. [Fn 152 ..... However, if an allegation of wrongdoing is made [in a criminal context] a party may nevertheless reasonably anticipate criminal proceedings before they have positively discovered whether the allegation has any substance – or to put it another way it is unrealistic to expect a reasonable party always to conclude that a criminal charge is only a mere possibility simply because the party is not yet in possession of any evidence either way (for example a party might reasonably conclude that the prosecuting authority could have more information than it has).*

30. As regards the second point (the Target Point), the position is that "contemplated" litigation need not be the particular litigation in which the disclosure is being sought but may be other litigation involving different parties and subject matter. This point is made in Matthews and Malek, *Disclosure*, 5th edn (2017) at paragraph 11.43 (citing *Winterthur*):

> "*The modern test is simply when litigation is "reasonably in prospect" .. The test appears to be an objective one. <u>It should be noted that the "contemplated" litigation need not be the particular litigation in which the disclosure is being sought but may be other litigation involving different parties and subject matter.</u> Thus it was held that where intending personal injury claimants sought after the event insurance for legal costs and expenses in pursuing their claims communications between the would-be claimants and the insurers and brokers were made at a time when litigation was contemplated and could in principle be privileged even though the litigation which the privilege issue arose was between the insurers and their agents and the lawyers involved, rather than the personal injury litigation itself.*" [underlining added]

I would note that I do not accept Appleby's submission that the "once privileged always

privileged" principle assists them. That principle only applies and the privilege only attaches in a case in which a document is initially created at a time when litigation is reasonably anticipated – it remains privileged in subsequent or other proceedings. But if proceedings are not reasonably in prospect at the time of the document's creation there can be no privilege.

31. As regards the third point (the No Dominant Purpose Point), litigation privilege will only apply to communications made with the dominant purpose of use in or obtaining advice about actual or anticipated litigation. "*A dominant purpose has been described as the ruling, prevailing or most influential purpose – in other words a purpose which is of greater importance than any other.*" (*Thanki*, paragraph 3.90).

The evidence in support of the claim to privilege

32. It is then necessary to consider the challenge to the affidavit evidence in support of the claim to privilege and in particular whether I can be satisfied on the basis of the affidavit and the other evidence before me that the claim to privilege and the right to withhold inspection are established, and in particular whether it is reasonably certain:

(a). from the statements made by Mr Breish that he has erroneously represented or has misconceived the character of the Deloitte Documents, or

(b) from the other evidence before the Court that Breish 2 is incorrect or incomplete on the material points.

33. As regards Breish 2:

(a). Mr Breish does say that Deloitte were undertaking a number of work streams at the time that the Deloitte Reports were prepared and delivered so that the work that they were doing involved a number of different purposes and tasks.

(b). Mr Breish asserts that:

(i). he was the person who instructed Deloitte to prepare the Deloitte Reports.

(ii). the October 2013 report was prepared in consequence of and therefore to deal with *significant* issues of concern that related to the Plaintiff and which gave rise to the *urgent* need to prepare for *potential litigation*.

(iii). the October 2013 report recommended that lawyers be instructed to take *certain steps* in the Netherlands with regard to the investments being managed by the Plaintiff.

(iv). the January 2014 report was supplemental to the October 2013 report; gave further consideration to the issues dealt with by the October 2013 report; was sent to Enyo (Mr Breish does not say when it was sent – the Re-Amended List suggests it was not sent until April 2014 – nor does he say that the October 2013 report was sent to Enyo) and recommended that legal advice be taken in relation to *civil and criminal litigation in relation to Mr Abudher and the Plaintiff*.

(v). Mr Breish considers that both the October 2013 and January 2014 reports were prepared at a time when litigation in the Netherlands (not Cayman) was in prospect and for the sole or dominant purpose of collecting information for the purposes of that prospective litigation and obtaining legal advice in relation to it.

34. But there is no doubt that Breish 2 is very limited and short on detail. It fails to make reference to or exhibit any contemporary documents that explain and deal with precisely when, the basis on and purposes for which, Deloitte was instructed. It would have been preferable to provide, and ideally should have exhibited at least some contemporary documents providing, details of precisely when Deloitte was instructed and on what terms, who at Deloitte was involved and what was discussed with them and when, when and how Deloitte were working with Enyo, the extent to which litigation was discussed and under active consideration and what others at the LIA and its board were told. It seems to me that such further detail could have been provided without disclosing the content of the report in a way that would have resulted in a waiver of the privilege.

35. I note and give some weight (when considering the adequacy and completeness of Mr Breish's evidence) to the difficulties that Mr Breish faces because of the problems faced by the LIA (which I have mentioned above) and the resulting difficulties in obtaining access to the LIA's documents. This has no doubt made it difficult for Mr Breish to refresh his memory and obtain copies of the other contemporaneous documents that would enable him to provide the further detail that I have said is required to support his evidence and the claim. However, Mr Breish has not explained what steps he has taken to collect relevant documents, how he has obtained the documents he and the Defendants have in their possession or why it was not possible to obtain additional documents.

36. Further documents and details are available however in Mr Breish's witness statement and some of the documents exhibited thereto, or exhibited to the witness statements of other witnesses for the Defendants in the Proceedings. The fact that the application has been made after the trial in the Proceedings does mean that there is a good deal of further documentary evidence which has been put in evidence for the trial, although it turns out that the number of documents that are relevant to this application are relatively few (it would have assisted the Court if Mr Breish had in Breish 2 taken the trouble to go into further detail and identify all the documents filed in the evidence which are relevant to the claim to privilege - Appleby do refer to and rely on some of these other documents but it would have been preferable for Breish 2 to have done so, in so far as they are documents sent by or to or referring to Mr Breish).

37. When considering the further documents and evidence that has been referred to by Appleby I note in particular the letter dated 23 October 2013 from Enyo to the Plaintiff. Appleby say in their submissions that this letter was written one day after the October 2013 report had been sent to Enyo (on 22 October, see paragraph 17 of the submissions which cross-refers to paragraph 43 of the Appleby Letter). But, as Mr Hapgood and Mr Kennelly point out, there is nothing in the evidence to substantiate this. The Re-Amended List only refers to an email dated 10 April 2014 to Enyo forwarding the Deloitte Report of January 2014. Appleby say that the Re-Amended List only identified some of the recipients of the 22 October communication but there are no references to the 22 October communication in the evidence. Having said that, I consider that, in view of the dates of the October 2013 Deloitte report and the Enyo letter it is likely that the Enyo letter was written with knowledge of that report or of the work being undertaken by Deloitte. In any event, the Enyo letter of 23 October 2013 refers to Enyo

being instructed by the LIA both in relation to the Plaintiff's involvement with trades transacted on behalf of the LIA by Goldman Sachs *and* the Plaintiff's role as investment manager of the Funds. It requires the Plaintiff to provide "*any and all documents produced or held by you as a result of your engagement by [the LIA] in the roles described above*" and then lists eleven categories of documents which should be included (but the document request is expressed to be not limited to these categories). The categories include five categories that refer to Goldman Sachs but the others relate to the more general aspects of the Plaintiff's role as investment manager. The penultimate paragraph then contains the statement that:

> "*Please be aware that, as litigation is in contemplation, you are obliged to ensure that no relevant documentation is destroyed so please ensure that all routine document destruction policies are suspended and all potentially relevant material is collated and preserved.*"

38. This letter is then followed by an email dated 28 October 2013 from Enyo to the Plaintiff which refers to the 23 October letter and chases a response. The email goes on to say that:

> "*[The LIA has] a number of concerns in respect of investments made through [the Plaintiff]. The well-publicised issues concerning Ismael Abudher have highlighted those concerns.*
>
> *The amounts involved are very significant.*
>
> *I think it would be beneficial if we met to discuss this situation so as to ensure that our clients are properly informed of the position of [the Plaintiff] on the LIA investments and other connected issues. Such a meeting would improve the likelihood of a mutually acceptable and consensual resolution of any issues between our client and [the Plaintiff], and mitigate the need for our client to take more formal action to address its concerns...*"

39. Mr Hapgood and Mr Kennelly submit that the 23 October letter from Enyo did not refer or relate to potential litigation against the Plaintiff but only to the planned litigation against Goldman Sachs. They say that this is the correct interpretation both by reason of the terms of the 23 October letter itself and the subsequent correspondence between Enyo and the Plaintiff's solicitors (and others) which is in evidence in the proceedings. They invite the Court to consider the whole of the correspondence (which I have done).

40. I do not accept this submission. The 23 October letter, as I have explained, relates both to the Plaintiff's involvement in the Goldman Sachs transactions and its wider role as

investment manager of the Funds. The reference in the penultimate paragraph is unqualified (it would have been easy, and likely if it was the case that the only litigation in contemplation related to Goldman Sachs, for the reference to litigation and the need to preserve documents to be qualified by reference to Goldman Sachs) and cannot be given the narrow construction for which Mr Hapgood and Mr Kennelly contend. Furthermore the email of 28 October, which was sent shortly after the 23 October letter and refers to it, makes it clear that Enyo and the LIA are considering the need for litigation ("*more formal action*") with respect to the LIA's concerns, which concerns relate to the Plaintiff and are spelled out in the subsequent chasing letter from Enyo to the Plaintiff dated 5 November 2013 (which in my view can be used as evidence of the nature of the concerns which the LIA had and Enyo were investigating and which had been referenced in the 28 October letter written just a few days earlier). These were the concerns derived from the LIA's lack of (and the apparent failure of the Plaintiff to provide) information concerning the status and value of the investments (Enyo said that the the last monthly statement provided to the LIA was dated 31 May 2013 and the last quarterly report provided to the LIA was dated 1 June 2013) and from the well-publicised allegations of fraud relating to Mr Abudher, as well as the Plaintiff's failure to respond to (or acknowledge receipt of) Enyo's earlier correspondence.

41. The subsequent correspondence does show that the Plaintiff and its London solicitors Dechert LLP did enter into discussions, exchange some information and sought to cooperate with Enyo and that there was a particular focus on the upcoming Goldman Sachs litigation (indeed in a letter dated 14 November 2013 in which they requested a meeting with Mr Abudher Enyo confirmed that they were prepared not to discuss the LIA's investments and the press reports of the criminal investigations into his conduct to allow a discussion of the Goldman Sachs issues). But this correspondence does not, in my view, detract from the fact that the letter of 23 October and email of 28 October (combined with the 5 November letter) make it clear that the LIA was investigating its concerns and that litigation against the Plaintiff was under active consideration by Enyo and the LIA at that time. The concerns raised important and urgent issues regarding the status and security of the LIA's investments such that litigation to protect the LIA's position was a reasonable step to contemplate and prepare for. Furthermore, the subsequent correspondence indicates that Enyo's and the LIA's investigations were continuing and I see no reason for concluding that the LIA ceased to contemplate and prepare for litigation against the Plaintiff in the period up to the January 2014 report.

Furthermore, the litigation being considered included but went beyond proceedings to enforce the Plaintiff's obligations to deliver up documents to the Funds and the LIA.

42. As regards the other contemporaneous correspondence and evidence referred to by Mr Hapgood and Mr Kennelly (at least the correspondence and aspects of the evidence that seem to me to be most important) I would comment as follows:

(a). as regards the Enyo Letter, Mr Breish says in Breish 2 that to the extent that the letter suggests that litigation in the Netherlands was not in prospect it was wrong. Appleby admit that this letter gives the Plaintiff its "best point" but submit that the letter does not affect the assessment of the earlier position as at October 2013 nor should it undermine or cause the Court to disbelieve what Mr Breish says in Breish 2. I do not think that the Enyo Letter can be dismissed that easily. I accept Mr Hapgood and Mr Kennelly's submissions as to the need to give serious weight to a litigation solicitor's letter making representations about the prospect of litigation. It seems to me that what the Enyo Letter is saying is that no decision to bring proceedings at that time had been made. It indicates and implies that investigations are continuing and that if wrongdoing is established by those investigations then proceedings will be instituted. But it also implies that wrongdoing – at least wrongdoing sufficient to justify proceedings - had not at that time been established. It therefore is evidence of the status of the investigation and Enyo's view as the likelihood of litigation being required. But it obviously did not rule out litigation or express a view as to the likelihood of wrongdoing being discovered.

(b). this view of the position in December 2013 appears to be consistent with the LIA board minutes for the meeting held on 20 December 2013 (which according to Mr Benyezza was the first LIA board meeting at which the position of the Plaintiff was discussed) which record the fact that Enyo is to make a presentation on the "*Palladyne Portfolio*" and that "*we are still at the stage of studying the documentation of this investment and in contact with the attorney of [the Plaintiff] with regard to this matter.*" There is no reference to Deloitte in these minutes. However, Deloitte comes into the picture and is in attendance at the board meeting on 9 February 2014. They make a "*detailed*" presentation on the work they are doing in relation to the Plaintiff which is said

to include obtaining data relating to the Plaintiff's management fees and financial position and a statement of account and to reveal the Dutch investigation of Mr Abudher and to be "*still ongoing*." The minutes for this meeting also record that Mr Breish had said that "*the LIA wants to obtain financial information about the Portfolio before making [a decision about using] any other procedures .. *"

(c). Mr Baruni's witness statement confirms that Enyo was instructed to investigate the reporting and actions of the Plaintiff as investment manager in early October 2013 and that he was aware of the steps being taken by Enyo to obtain information and documents from the Plaintiff. It also confirms that he was "*highly*" concerned about the investments being managed by the Plaintiffs. But Mr Baruni does not mention Deloitte.

(d). Mr Benyezza does refer to the involvement and role of Deloitte in terms that reflect the account given in the minutes of the LIA board meetings of 20 December 2013 and 9 February 2014.

(e). Dr Jehani also does not refer to Deloitte. His evidence suggests that a structured process – at least a process involving the Libyan Africa Portfolio - for assessing the need for and merits of litigation against the Plaintiff only started at the beginning of 2014 and was continuing until the middle of that year (of course this does not mean that litigation was not actively being considered before then by Enyo and could have been accelerated had the need been established). Dr Jehani said as follows:

> "*By the time that [Mr Breish] took over as Chairman of the LIA which was around June 2013 there was already some discussion at board level about matters in which it was thought that legal proceedings were likely to be necessary. The Palladyne investments ... started to be mentioned by Mr Breish to the LIA board of trustees as matters where litigation was likely to be required. I believe that I began to learn of concerns about [the Plaintiff] at about the time I joined the LIA's UK office .. on 1 November 2013. .. A litigation committee was formed in early 2014 .. [whose] role was to study the issues relating to particular investments, consult with outside counsel and report back to Mr Breish and the LIA board ...In the period between January and May 2014 the litigation committee engaged with the LIA and the [Libyan Africa Portfolio's]respective counsel, [Enyo] and Hogan Lovells in relation to the [Plaintiff]. Hogan Lovells and Enyo both gave advice in relation to [the Plaintiff] which was reviewed by the litigation committee.*"

(e). Dr Gergab does refer to Deloitte. His evidence is consistent with the LIA board minutes and the proposition that Deloitte were performing a number of tasks which included investigating potential claims against third parties (including claims for "*mismanagement*") and that the work done by Deloitte would be used for the purpose of making and litigating those claims.

43. So what conclusions fall to be drawn from the other evidence before the Court, other that is than the evidence of Mr Breish, and to what extent does this other evidence make it reasonably certain that Mr Breish's evidence is incorrect or incomplete on material points? It appears to me that:

(a). by the time of the delivery to the LIA of the October 2013 Deloitte report the LIA had identified a series of issues affecting and serious concerns regarding the Plaintiff, the Plaintiff's position as investment manager of the Funds and the status and security of the investments; these issues were of a kind that if established would result in claims needing to be made and legal action being required against the Plaintiff in the absence of an agreed solution; these concerns had resulted in the LIA instructing specialist litigation solicitors; these solicitors were instructed to investigate the actions taken by the Plaintiff as investment manager of the Funds, to obtain copies of all documents in the possession of the Plaintiff and establish the status of the investments; the litigation solicitors were in the process of writing to the Plaintiff to require delivery up of such documents and confirming that litigation against the Plaintiff with respect to its role as investment manager was contemplated and that an urgent response was required.

(b). the investigation involving Enyo of possible claims against the Plaintiff was continuing into the first quarter of 2014. As at 23 December, Enyo confirmed to the Plaintiff that no decision to commence proceedings had been made and by implication that no evidence of wrongdoing sufficient to require proceedings had yet been identified (Enyo made a presentation to the LIA board on that day and the minutes state that the investigation is still continuing).

(c). Deloitte are first mentioned at the LIA board meeting on 9 February 2014 and the minutes record that the investigation of the Plaintiff is continuing and that

further information is needed before a decision on what action is to be taken. Deloitte are advising on a number of different matters (work-streams) relating to the LIA's assets and potential claims.

(d). there is no documentary or other evidence of the date on which Deloitte was instructed and its terms of engagement so there is no direct evidence that Deloitte was instructed to gather evidence and information and advise in connection with potential litigation.

44. But it seems to me that since the LIA board minutes for 9 February 2014 show that Deloitte was investigating the issues which had caused the LIA's concerns the inference can be drawn that they were investigating the facts relating to the potential claims against the Plaintiff. It also seems to me to be reasonable in all the circumstances to infer that their work product was produced for the purpose of being and was being shared with Enyo whose own investigation in relation to the Plaintiff was already underway and had been discussed at the previous board meeting on 20 December 2013. It would make no sense for Deloitte and Enyo to be working separately when the evidence shows that they were working on the same subject matter.

45. In these circumstances it seems to me that:

(a). while this other evidence is consistent with Mr Breish's evidence of Deloitte having been instructed to investigate possible claims against the Plaintiff (and to assist Enyo in such an investigation and possible litigation) it does suggest that the investigation was at a relatively early stage by 22/23 October 2013. There were specific concerns and issues that could result in claims and the seriousness for the LIA of the issues raised meant that it would be reasonable to conclude litigation would be contemplated as a real possibility. But the documents and evidence needed to substantiate the concerns were not yet available and were still in the course of being collected and reviewed. As at 23 December no evidence of wrongdoing on which a claim could be based had yet been found or at least substantiated. Furthermore the correspondence between Enyo and Dechert strongly suggests that information gathering by Enyo was not far advanced (see for example paragraph 9(c) of Enyo's letter dated 20 November 2013 in which Enyo is asking for further particulars about

the Dutch investigation, the allegations being made and against whom the allegations were being made). There is nothing in this other evidence to suggest that the position had changed by 14 January 2014.

(b). this other evidence is consistent with Mr Breish's evidence as to the nature of the work being done by Deloitte and the purpose for which it was being produced. While Deloitte was, as Mr Breish himself admits, conducting a series of work-streams including a valuation of the LIA's assets needed for purposes other than litigation against the Plaintiff and while there are no contemporaneous documents that evidence whether the Deloitte Reports covered only the investigation and issues relating to the Plaintiff or covered other work-streams as well, I see no reason from the other evidence to doubt that Deloitte's work on the issues referred to at the 9 February 2014 LIA board meeting was produced primarily to assist (and therefore for the dominant purpose of assisting) with the investigation of, to obtain legal advice on possible claims and with potential litigation against the Plaintiff. It seems reasonable to conclude that the Deloitte Reports were focused on the matters discussed at the 9 February board meeting. The Deloitte Reports were both, of course, produced before that date but the January 2014 report was produced only shortly before the 9 February meeting and it seems likely that the October 2013 report was a preliminary report to which the January 2014 report was supplemental. It therefore seems to me to be reasonable to accept Mr Breish's evidence as it relates to both of these reports on this aspect (that is, as the purpose for which they were produced).

46. Therefore it seems to me that, as regards the No Dominant Purpose Point, I should conclude that it is not appropriate to go behind Mr Breish's evidence. It is not reasonably certain, based on all the evidence and taking an objective view, that Mr Breish's account of the nature and purpose of the Deloitte Reports is incorrect or incomplete (incomplete that is in the sense of leaving gaps such when taken with the other evidence in the case I cannot form a view on whether to accept the claim for privilege). I recognise, as I have said, that Mr Breish's evidence is very limited and that some significant gaps in the evidence as a whole remain. But on balance it seems to me that there are insufficient grounds for going behind his affidavit evidence on this point.

47. But the position with respect to the Litigation Not Likely Point is different. It seems to me that Mr Breish has not provided sufficient and sufficiently specific evidence to satisfy the burden of proof on this point and the other evidence does not do so either:

(a). Mr Breish himself simply says in Breish 2 that the Deloitte Reports were prepared when "*litigation was in prospect.*" He does not elaborate or provide any account of the state of the investigation or the conditions that would need to be satisfied before proceedings would be launched. Nor does any of the other evidence.

(b). the letters from Enyo to the Plaintiff to which I have referred establish that litigation was contemplated and because of the seriousness of the issues and what was at stake for the LIA I accept that litigation was a real possibility depending on the outcome of the investigation being conducted by Enyo (and Deloitte). The direct contemporaneous evidence as to the state of play in the investigation during the relevant period is provided by the Enyo Letter (which suggests, as I have explained, that at the end of December 2013 there was no basis for any claims and it was possible that no basis for any claims would be found) and the LIA board minutes. These indicate that the investigation was continuing and the concerns and suspicions that the LIA had were still unresolved. The subsequent correspondence between Enyo and Dechert is evidence that efforts were being made and continuing to reach a consensual solution while the investigation continued but do not of themselves establish that litigation was no longer in contemplation.

(c). I have referred above to the passage in *Thanki* in which the authors point out that litigation may be reasonably in prospect even if the party's decision whether to commence proceedings depends on a report commissioned by that person and prepared by a third party and *even if the chance of that report reaching a conclusion justifying litigation is at best evenly balanced* although they also go on to note that some authorities hold that where a party commissions a third person to conduct an investigation into suspicions which the party has that, if confirmed would lead to litigation there was no real reason to anticipate litigation unless and until those suspicions had been confirmed.

(d). I also note that Appleby cite the judgment of Christopher Clarke J in *Axa* in which he said in this context that "*The fact that one or more conditions have to be fulfilled in order for a dispute to arise which requires the commencement of litigation in order to resolve it does not necessarily mean that litigation is only a possibility. Much may depend on what at the relevant time is the prospect that the conditions will be fulfilled.*"

(e). this is obviously not the application in which to seek to resolve the open questions in the authorities. If the authorities referred to in *Thanki* are right and the privilege is only available when the communication or document is produced at a time when the relevant suspicions are confirmed, then the privilege claim in this case must fail. In my view such an approach would be too narrow. It seems to me is that it is possible for a person reasonably to anticipate proceedings before they have positively discovered whether the allegations made have any substance in circumstances where it is reasonable to conclude that there is a realistic chance that the allegations will be substantiated or there is some other reasonable basis beyond the person's as yet unproven allegations for reaching the conclusion that litigation is reasonably in prospect and more than a mere possibility. The authors of *Thanki* give as an example of the latter case a situation in which it is reasonable to believe that criminal proceedings will be commenced because the prosecuting authority is likely to have more information. But even if that is the correct principle it does not assist the Defendants in the present case. Mr Breish has not provided any (nor is there any other) evidence of there being at the relevant time a realistic chance that the allegations against the Plaintiff will be substantiated or any other reason for concluding that as a practical matter litigation would be needed - beyond the unproven and still to be investigated concerns and suspicions that he and Mr Baruni held. The evidence as I have explained suggests that the investigation was at an early stage and that during the relevant period wrongdoing and the grounds for litigation had not been established and might not be established. I accept that the evidential threshold does not require the Defendants, even if they could do so, to make disclosure of the matters which the claim for privilege is designed to protect, namely the detail as to the lines of enquiry being followed by, evidence collected and facts found by Enyo and Deloitte at the relevant time. But it does seem to me that more than Mr Breish (and the other

witnesses of the Defendants) provided is needed to enable the Court to be satisfied that the conclusion that there was more than the mere possibility of litigation (it might have been possible to say that the actions being taken by the foreign regulators and authorities were an independent basis for concluding that in practice litigation was likely to result but this was not the basis on which the claim to privilege was based).

48. I therefore conclude that I am not satisfied on the basis of Breish 2 and the other evidence before me that the right to withhold inspection is established. I have reached this conclusion after carefully considering all the evidence and the written submissions and having regard to the approach and matters discussed in the extract set out above from the judgment of Beatson J in *West London Pipleline*.

49. I should mention briefly my conclusions on the Waiver Point. It seems to me to be clear that the Defendants have not relied on or deployed the Deloitte Reports in evidence at the trial and consequently there has been no waiver. Appleby on behalf of the Defendants have made it clear that they do not rely on the Deloitte Documents. Mr Breish only provides a brief and outline reference in his witness statement to the concerns flagged by Deloitte and these significantly overlapped with the issues identified by the newspaper reports and the LIAs own review of the activities of the Plaintiff (see Mr Baruni's witness statement). There does not seem to me be the level of reliance on the detail of the Deloitte Reports to give rise to a waiver (and loss of confidentiality) in respect of the whole reports (see *Thanki* paragraph 5.79, footnote 168). Nor does the repetition of the headings listing the concerns set out in the Defendants Sanctions Closings result in a waiver or loss of confidentiality.

Should I make an order for a further affidavit or inspection?

50. Having concluded that I am not satisfied on the basis of the affidavit and the other evidence before me that the right to withhold inspection is established, what option should I adopt? As I have noted above there are three main options:

(a). if I conclude that the Defendants cannot and will be unable to establish the claim to privilege and a legal right to withhold inspection and that the grounds set out in GCR O.24, r.11(2) are made out, I can order the Defendants to produce and give inspection of the Deloitte Documents.

(b) alternatively I may order a further affidavit to sworn and filed to deal with matters which the earlier affidavit evidence does not cover or on which it is unsatisfactory.

(c). or I may order inspection by the Court of the Deloitte Documents.

51. The Defendants have said that they would welcome an order requiring inspection by the Court. Appleby have, as I noted, challenged the submission of Mr Hapgood and Mr Kennelly that if the Court were to consider that inspection was necessary it would be appropriate for the inspection to be undertaken by another judge. It seems to me that Mr Hapgood and Mr Kennelly are right on this point. In *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2016] 1 WLR 992 Birss J ordered inspection and because he was the docketed judge for the case inspection was undertaken by another judge, Snowden J (see *Thanki* at paragraph 4.132 footnote 330).

52. Accordingly were I to order an inspection by the Court it would be necessary for the inspection to be dealt with by another FSD Judge. Such a course would allow the Court to make a further decision based on a review of the Deloitte Documents. I do not accept the submission made by Mr Hapgood and Mr Kennelly that there is no reason to believe that inspection by the Court will be helpful. It would allow a further assessment to be made as to the status of the investigation of the claims against the Plaintiff and it might assist in forming a better view of the Litigation Not Likely Point. But I accept that it is not possible to say at this stage how helpful an inspection by the Court would be. I also note and am mindful of the comments made by Beatson J in *West London Pipleline* and the other authorities about inspection by the Court being a last resort. It will certainly involve further delay and expense (and not save costs.

53. Requiring the Defendants to swear of a further affidavit might ensure that further information concerning the status of the investigation was provided and enable the Court to review the basis for the claim to privilege. It is possible that Mr Breish and the Defendants would be unable to provide more but it seems to me that it would be possible to supplement the account of the status of the investigation to allow a further review of the claim to privilege. But taking this course will also involve further delays and expense.

54. But in my view the key issue in deciding what order to make is whether inspection, even assuming that the Plaintiff would succeed in showing that the claim to privilege was bad after the filing of further affidavit or inspection by the Court, is necessary for disposing fairly of the Proceedings. I have carefully considered the submissions made by Mr Hapgood and Mr Kennelly on this issue but I prefer the position adopted by Appleby. It seems to me that while sight of the Deloitte Documents may assist the Plaintiff in at least some of the ways described by Mr Hapgood and Mr Kennelly it would not be fair or consistent with the overriding objective to permit the Plaintiff to insist on inspection at this stage in the Proceedings.

55. I consider that Appleby are right to say that Mr Hapgood was well aware of the existence, and the claim to privilege in respect, of written reports prepared by Deloitte, and had the opportunity to challenge the privilege claim, during the trial. The extract from the transcript set out above (together with the other extracts provided by Appleby in the Appleby Letter) validate these submissions. It may well be the case that Appleby and the Defendants should, when requested before the trial to provide copies of the communications with Deloitte, at least have provided the dates of the relevant Deloitte Reports (I do not comment on that issue in this judgment but may do so in the main judgment). But the failure to do so cannot be said to have prevented the Plaintiff, had it considered it important to do so, from pressing its claim for further details of the reports and challenging the claim to privilege before the trial commenced. But the Plaintiff decided not to do so. In any event, the Plaintiff had the opportunity to make its challenge during the trial. Of course, had it done so there would have been a serious question as to whether it would have been possible or appropriate to adjourn the trial to accommodate such an application or when such an application would otherwise have been dealt with. But the need for any issue or challenge to the privilege claim to be dealt with properly and by way of a suitable application was signaled clearly during the hearing. Nor can the fact that the Plaintiff did not have the dates of the Deloitte Reports and the other Deloitte Documents be said to have prejudiced in any material respect the ability of the Plaintiff's counsel to conduct the trial or the cross-examination of the Defendants' witnesses.

56. The application has been prompted by and is a response to inclusion of Paragraph 4 in the Re-Amended List. I understand the Plaintiff's concern that the Defendants were seeking to bolster their case after trial by identifying the dates of the written reports produced by Deloitte. But it is now clear that this is not the case. Appleby have made

it clear that the Defendants do not rely on the Deloitte Reports to prove their case. Furthermore, the fact that there were written reports was, as I have said, in evidence during the trial. The Re-Amended List simply provides the dates of two of the Deloitte Reports and the dates of three covering emails. It would have been open to Mr Hapgood to have asked how many reports had been produced and the dates on which they were produced. Had he done so, and had Mr McMaster objected to disclosure of this information (a position inconsistent with that clearly set out in paragraph 28 of the Appleby Letter) it would have been possible to deal with that issue during the hearing and require the Defendants' witnesses to respond. Ordering inspection of the whole of the Deloitte Documents at this stage in the Proceedings simply because the Defendants have filed the Re-Amended List which mentions the dates on which the written reports of Deloitte were issued and delivered, when the existence of written reports was known and the subject of cross-examination during the trial seems to me be disproportionate and inconsistent with the overriding objective. It is not necessary for disposing fairly of the Proceedings.

57. Allowing inspection at this stage would result in the Plaintiff's counsel reviewing the Deloitte Reports and considering what further steps would be required. It might be necessary to re-open the trial. I had asked Walkers, before the filing of the skeleton arguments, whether they were in a position to indicate what steps they would consider taking if I made an order for inspection and whether they would seek to re-open the trial. Entirely properly they indicated that they must reserve their position and decide what action was required only after reviewing the Deloitte Documents. Of course, a decision on whether to re-open the trial would be a separate and subsequent decision and the critical issue on this application is what is required to dispose fairly of the Proceedings. But it does seem to me that the Court is entitled to have regard to the likely consequences of making an order for inspection when considering what is fair and the application of the overriding objective.

58. Accordingly, I have concluded in the current circumstances I should dismiss the Plaintiff's application and not make an order requiring the swearing of a further affidavit to support the claim to privilege or for inspection of the Deloitte documents by the Court. I consider that even if the Plaintiff were able to show or the Court was to conclude following such further affidavit evidence or inspection that the claim to

privilege was not made out, it would not be necessary for fairly disposing of the Proceedings or for saving costs to order inspection of the Deloitte Documents.

The Hon. Mr Justice Segal
Judge of the Grand Court
2 August 2018