



Neutral Citation Number: [2024] EWHC 480 (Comm)

Case No: CL-2019-000118

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 05/03/2024

Before :

MR JUSTICE JACOBS

Between :

**THE PUBLIC INSTITUTION FOR SOCIAL
SECURITY**

Claimant

- and -

MUNA AL-RAJAAN AL-WAZZAN
(in her capacity as representative of the estate of Mr
Fahad Maziad Rajaan Al Rajaan (deceased)) &
OTHERS

Defendants

(Disclosure Issues)

Stuart Ritchie KC, Anna Dilnot KC, Christopher Burdin, Mark Belshaw (instructed by
Stewarts Law LLP) for the Claimant
Tom Weisselberg KC and Kendrah Potts (instructed by PCB Byrne LLP) for the 1st & 2nd
Defendants
Joe Smouha KC, James Collins KC, Freddie Onslow (instructed by Willkie Farr &
Gallagher (UK) LLP) for the 15th – 18th Defendants
Amy Rogers and Harry Stratton (instructed by Allen & Overy LLP and Shearman &
Sterling (London) LLP) for the 30th Defendant
Philip Edey KC and Tim Benham-Mirando (instructed by Fladgate LLP) for the 41st
Defendant

Hearing dates: 23rd – 25th January 2024

Approved Judgment

This judgment was handed down remotely at 10.00am on Tuesday 5th March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives

(see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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MR JUSTICE JACOBS

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A: Introduction

1. The background to the allegations in these proceedings can be found in a number of previous judgments, including:
 - (1) my 2019 judgment whereby the Claimant (“PIFSS”) obtained freezing and proprietary relief against Mr Al Rajaan (then the First Defendant): [2019] EWHC 2886 (Comm); and
 - (2) Henshaw J’s 2023 judgment in relation to materials generated in the context of investigations and proceedings in Switzerland: [2023] EWHC 1065 (Comm).
2. It is therefore unnecessary to rehearse the background at length. In summary, PIFSS operates the State of Kuwait’s social security and pension scheme. Mr Al Rajaan was its former Director General from 1984 to 2014. He is now deceased, and his estate is now the First Defendant (or “D1”). The estate is represented by his widow, the Second Defendant (or “D2”).
3. The claim in these proceedings is for relief in respect of alleged unlawful payments by various financial institutions and intermediaries of unauthorised secret commissions procured by Mr Al Rajaan. PIFSS alleges that the secret commissions were paid over a period of approximately 20 years, between 1995 and around 2015. The amount of money paid is believed to exceed US\$874 million.
4. There have been a large number of Case Management Conferences (or “CMCs”), and the present judgment concerns disclosure issues which were argued over the best part of 3 days at the CMC known as CMC 6. A substantial disclosure exercise has taken place, pursuant to orders made at previous CMCs. It was anticipated that the parties might be making applications for further disclosure, and such applications were the main item on the agenda for CMC 6. In the event, it was not possible to deal with all of the parties’ applications, some of which will now be determined at later CMCs.
5. The principal application, which occupied the majority of the hearing time, was made by a group of Defendants known as the “Man Defendants” (or “Man”) against PIFSS. The principal issue raised by that application concerned the question of whether PIFSS should be required to disclose documents which are not currently in its possession, but which are in the hands of various third parties, both governmental and non-governmental. The resolution of that issue depends principally upon whether or not PIFSS has practical control over those documents. The argument was advanced by Mr Smouha KC for Man, and was supported (at least in large part) by Mr Weisselberg KC for D1 and D2. Mr Weisselberg also made proposals as to possible alternative (more limited) orders in the event that the court was not persuaded, at the present stage, that PIFSS had practical control over the documents of the various third parties. The application was resisted by Mr Ritchie KC on behalf of PIFSS. I shall refer to this application as the “Man application”.

6. A separate application was made by the 30th Defendant (“EFG”) in relation to alleged deficiencies concerning PIFSS’ disclosure. EFG’s argument was presented by Ms Rogers, and responded to by Ms Dilnot KC for PIFSS. This application was much more confined than the Man application, and essentially raised questions as to whether PIFSS had done enough to locate certain documents from particular custodians, and whether further searches (including extending key word searches) should be carried out.
7. The other applications argued at the hearing were made by PIFSS against (i) Man, and (ii) the 41st Defendant (“Pensée”). Again, these were relatively confined applications where the question was whether those defendants should be carrying out additional searches beyond those already carried out. The arguments were presented by Ms Dilnot KC for PIFSS; Mr Collins KC for Man; and Mr Edey KC for Pensée.
8. I shall deal first and in most detail with the Man application. The central question on that application was whether PIFSS had practical control over documents of various different third party entities or organisations. These third parties fall into two broad groups, namely entities or organisations which were (i) non-governmental and (ii) governmental. The applications in relation to the former concerned documents of the accountancy/consulting firms KPMG and Ernst and Young (“EY”), and a subsidiary of PIFSS called Wafra Investment Advisory Group Inc (“WAFRA”). Applications concerning documents of a forensic accountancy firm, Evelyn Partners (formerly Smith and Williamson) were not in the event pursued. The applications in relation to Kuwaiti government entities concerned documents of the Kuwait Department of Legal Advice and Legislation (“DLAL”), the Kuwait Attorney General (“KAG”) and the Kuwait Public Prosecutor (“KPP”), the Kuwait State Audit Bureau and Kuwait parliamentarians. By the end of the hearing, however, it was accepted on all sides that (for present purposes) there was no material distinction between the KAG and the KPP.
9. I start by identifying the relevant legal principles in Section B and the relevant factual background in Section C. I then summarise the parties’ arguments in Section D. My discussion and conclusions are in Section E. Section F addresses the EFG application, and Section G addresses PIFSS’ applications.

B: Legal principles

B1: The overall framework

10. The overall framework for all of the parties’ applications is Practice Direction 57AD. Orders for extended disclosure have previously been made, and the court’s powers in relation to alleged failures to comply adequately with an order for extended disclosure are contained in paragraph 17:

“17.1 Where there has been or may have been a failure adequately to comply with an order for Extended Disclosure the court may make such further orders as may be appropriate, including an order requiring a party to—

- (1) serve a further, or revised, Disclosure Certificate;

- (2) undertake further steps, including further or more extended searches, to ensure compliance with an order for Extended Disclosure;
- (3) provide a further or improved Extended Disclosure List of Documents;
- (4) produce documents; or
- (5) make a witness statement explaining any matter relating to disclosure.

17.2 The party applying for an order under paragraph 17.1 must satisfy the court that making an order is reasonable and proportionate (as defined in paragraph 6.4).”

11. Paragraph 17.2 refers to the need for the court to be satisfied that making an order is reasonable and proportionate as defined in paragraph 6.4. Paragraph 6.4 provides:

“6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

- (1) the nature and complexity of the issues in the proceedings;
- (2) the importance of the case, including any non-monetary relief sought;
- (3) the likelihood of documents existing that will have probative value in supporting or undermining a party’s claim or defence;
- (4) the number of documents involved;
- (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
- (6) the financial position of each party; and
- (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.”

12. There are also powers under paragraph 18 for the court to make an additional order for disclosure, where the applicant must satisfy the court that a variation of the order is necessary for the just disposal of the proceedings, and also that it is reasonable and proportionate.

13. The Practice Direction also requires each party or its representative to sign a disclosure certificate. This certificate confirms that, to the best of the knowledge and belief of the person signing the document, disclosure has been carried out

appropriately. It also confirms the knowledge of that person that contempt of court proceedings may result from the signature of a disclosure certificate which is false and made without an honest belief in the truth of its contents.

14. In *Sheeran v Chokri* [2021] EWHC 3553 (Ch), Meade J approached paragraph 17 as requiring a 2-stage process. First, the applicant must show that there has been, or may have been, a failure to comply with an existing disclosure order; and secondly, the applicant must show that the further order sought was reasonable and proportionate. This reflects the wording of paragraph 17.
15. In paragraphs [5] and [6] of his judgment, Meade J referred to the need for the court to have more than just a general suspicion that there may have been a shortcoming in relation to disclosure. There was a need for “some basis for going behind the process which has been carried out. Speculation is not enough. Something is needed to show that there is a likelihood (as opposed to a possibility) of further documents existing”.
16. Building upon this statement of Meade J, Mr Edey (for the Pensée Foundation) submitted that “likely” in paragraph 17.1 requires an applicant to show that it was “more likely than not” that further documents would exist: in other words, a balance of probabilities test was to be applied. I disagree. The word “likely” does often mean “more likely than not” in a balance of probabilities sense. But it can also, in context, mean “may” or “may well”, so as to denote something that is a real possibility: see *Re H Minors* [1996] AC 563 at 584F-G (Lord Nicholls); *Wallis v Bristol Water* [2009] EWHC 3432 (Admin) at [18].
17. I consider that “likely”, in paragraph 17, should be interpreted in this latter way. The word “likely”, and its derivatives, are used with some frequency in Practice Direction 57AD. For example, paragraph 6.4 refers to the need to consider, when deciding whether or not to order extended disclosure, “the likelihood of documents existing that will have probative value in supporting or undermining a party’s claim or defence”. It would be very difficult for judges, in the context of disclosure arguments which arise at the first CMC – or indeed subsequently – to form a view as to whether a particular order will “more likely than not” produce probative documents. In practice, this is not the test applied. Where there is a dispute as to the scope of disclosure to be carried out, the court naturally asks itself whether the proposed exercise “may well” produce probative documents, in the sense of there being a real possibility that a search will produce relevant and probative documents. In *Sheeran*, the judge ordered disclosure even though he considered that the searches would produce a “nil return”: see paragraphs [13], [17], and [19]. I do not consider that he actually applied a test of “more likely than not”, and in my view his ex tempore judgment should not be read as laying down such a rule.
18. There are also two other areas where the case-law provides some assistance on the overall approach to the present application.
19. First, the decision of Marcus Smith J in *Agents’ Mutual Ltd v Gascoigne Halman Ltd* [2019] EWHC 3104 (Ch) provides some guidance in the context of a party seeking additional key word searches (at paragraph [13]):

“Two points are made by Ms Farrell. The first is that the searches were too narrow to ensure the capture of all relevant

documents. This essentially misunderstands the purpose of keyword parameters. The whole point of keywords is to reduce an unmanageable universe of documents to one susceptible of a manual search. In this case, the keyword and date parameters reduced an unmanageable 2 million documents to a manageable 30,000. Were relevant documents missed? Some may have been. But that is not the question. The question is whether a reasonable and proportionate search has been undertaken. Part of that process is reducing the unmanageable document universe to a universe that can be (in this case) manually reviewed through an electronic process. The issue is as Morgan J described it in *Digicel (St Lucia) Ltd v. Cable & Wireless plc*, [2008] EWHC 2522 (Ch) at [80]:

“If one were to adopt the ‘leave no stone unturned’ approach to disclosure then one would be more ready to add keywords to those originally used by the defendants. However, it will usually be wrong in principle to adopt that approach and, in my judgment, it would be wrong to adopt that approach in the circumstances of this case. One therefore has to consider the proportionality of adding an additional keyword. For that purpose one has to form some sort of view as to the possible benefit to the claimants of adding the keyword and the possible burden to the defendants of doing so. The burden to the defendants will principally consist of the burden of manually reviewing a large number of irrelevant documents.”

20. Secondly, the decision of Beatson J in *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) provides valuable guidance as to the circumstances in which the court will be willing to “go behind” affidavit evidence submitted by a party. In the context of privilege, he identified a limited number of situations in which the court would go behind the evidence of the deponent:

“86. It is possible to distil the following propositions from the authorities on challenges to claims to privilege:-

(1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* (2007) 11-46, and paragraph [50] above. A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party’s legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client’s cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: *Bank Austria Akt v Price Waterhouse; Sumitomo Corp v Credit Lyonnais Rouse Ltd* (per Andrew Smith J).

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

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

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority*.

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharane* (the Chief Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per A L Smith LJ.

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

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

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

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

(c) It may inspect the documents: see CPR 31.19(6) and the discussion in *National Westminster Bank plc v Rabo Bank Nederland* and *Atos Consulting Ltd v Avis plc* (No. 2). Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there

is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

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

21. This case was decided prior to the introduction of Practice Direction 57AD. However, I do not consider that this makes any material difference. Indeed, in the context of disclosure, there is now an onus on a party not only to provide accurate evidence in a witness statement, but also to sign the disclosure certificate in the terms set out above. The specific context of Beatson J's judgment was privilege, but I consider that his general approach remains applicable when the issue concerns a different aspect of disclosure. This accords with the views expressed in *Hollander: Documentary Evidence* 14th edition, paragraph 11-21:

“Discovery affidavits are no longer made under the CPR. But the new procedure is not in this regard different in substance, because the client will be obliged to verify the search, and compliance with his disclosure obligations in circumstances in which a false verification may lead to sanctions in contempt or the action being struck out. In *West London Pipeline and Storage*, the court was considering whether to require a party to produce documents in relation to which a disputed claim for privilege was made. The position was in one sense rather more straightforward: if the court is not satisfied on the evidence or affidavit provided, it should hold that the party claiming privilege has not satisfied the burden of proof and order disclosure. So the problem is much less acute than where a party is verifying disclosure and insisting that disclosure is adequate but the court is not so satisfied. Here, the court is limited in its weaponry in dealing with the person who fails to give disclosure but insists that he has done. At the interlocutory stage, the court will not order cross-examination and the verification is for practical purposes conclusive. If the person who verified the disclosure gives evidence, he can be cross-examined on the disclosure and his verification. But if he does

not give evidence, it seems the other party may be in no better position at trial. The CPR has not taken the opportunity to deal with the problem specifically.”

B2: Control

22. A large number of recent cases have considered arguments where a party has sought disclosure of documents which are in the hands of third parties, and which are alleged to be disclosable by the opposing party because they are under its control. Those cases include: *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm) (Males J); *Pipia v BGEO Group Ltd* [2020] EWHC 402 (Comm) (Andrew Baker J); *Berkeley Square Holdings Ltd and others v Lancer Property Asset Management Ltd and others* [2021] EWHC 849 (Ch) (Mr Robin Vos); *Various Airfinance Leasing Companies and anor v Saudi Arabian Airlines Corpn* [2021] EWHC 2904 (Comm) (Mr Peter MacDonald Eggers KC); *Republic of Mozambique v Credit Suisse International and others* [2022] EWHC 3054 (Comm) (Robin Knowles J); *Loreley Financing (Jersey) No. 30 Ltd v Credit Suisse Securities (Europe) Ltd and others* [2023] EWHC 548 (Comm) (Cockerill J).
23. The relevant principles were not substantially in dispute. I consider that they are well summarised by Mr MacDonald Eggers in paragraph [21] of *Various Airfinance* as follows (omitting internal citations):

“Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of a party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access... However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement...”
24. That paragraph was also cited by Cockerill J in *Loreley*, where Cockerill J said (at [13] – [14]) that the authorities justified the conclusion that there was a “degree of stringency required”, and (referring to *Ardila*) that caution was needed and the issue was not to be elided with practical control in the sense of there being an expectation of complying with a request.
25. In a passage from *Ardila*, cited in a number of the subsequent cases, Males J said as follows:

“[10] It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access...

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

[14] Fourth, however, a party may have sufficient practical control in the sense which the *Schlumberger* and *North Shore* cases [*North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWCA Civ 11] indicate, if there is evidence of the parent already having had unfettered access to the subsidiary's documents or if there is material from which the court can conclude that there is some understanding or arrangement by which the parent has the right to achieve such access.”

26. Males J also said that evidence that a subsidiary would in practice comply with a request from a parent for documents, and evidence of compliance in the past, in response to specific requests, did not amount to evidence of control:

“It is merely the evidence of the normal relationship that one would expect between a parent and subsidiary without the particular features of the *Schlumberger* or *North Shore* cases. Such co-operation as there may have been in the past as to compliance with specific requests, for example production of certain of the licences in issue, does not, in my judgment, amount to evidence that ENRC has the necessary control in the sense which the cases show is necessary over Bamin's documents. It does not indicate that ENRC would be entitled to send its solicitors into Bamin's premises and to insist on searching Bamin's computers, applying the kind of word search terms and insisting on production of the computers of various individuals which would be necessary in order to enable that to be done. There is no evidence as far as I can see that that has happened so far, as distinct from specific documents being provided in response to a specific request.”

However, as Andrew Baker J said in *Pipia* at [19], It is important not to read too much into this latter quotation: there could be control even if there was no wholesale access to documents in the manner described by Males J.

27. I was also referred to the summary of Mr Robin Vos in *Berkeley Square* at paragraph [46], where the judge referred to the authorities, and said:

“Drawing all of these threads together, the following points can be made in determining whether documents held by one person are under the control of another where there is no legally enforceable right to access the documents:

i) The relationship between the parties is irrelevant. It does not depend on there being control over the holder of the documents in some looser sense, such as a parent and subsidiary relationship;

ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;

iii) The arrangement may be general in that it applies to all documents held by the third party or it could be limited to a particular class or category of documents. A limitation such as an ability to withhold confidential or commercially sensitive documents will not prevent the existence of such an arrangement;

iv) The existence of the arrangement or understanding may be inferred from the surrounding circumstances. Evidence of past access to documents in the same proceedings is a highly relevant factor;

v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them;

vi) the arrangement or understanding must not be limited to a specific request but should be more general in its nature.”

28. I consider that this too, with one qualification, is a useful summary of the principles which have emerged from the case law. The qualification is that (as Mr Ritchie submitted) it is not accurate to say in (i) that the relationship between the parties is “irrelevant”. It would be correct to say (as illustrated by the example of parent and subsidiary) that the nature of the relationship is not determinative. However, the nature of the relationship (if any) between the parties (i.e. the party to the litigation, and the third party whose documents are alleged to be under the former’s control) may well be relevant. For example, it is relevant that the nature of the relationship

between PIFSS and KPMG (and indeed EY) is that of client and independent professional adviser.

29. In the context of the present case, it is also relevant to consider the relationship, if any, between the various governmental bodies or entities whose documents are alleged to be under PIFSS' control. As described below, I accept PIFSS' submission that there are a number of different Kuwaiti governmental bodies or entities, each carrying out a different function, albeit that in certain respects they may be working to achieve related goals or co-operating. That relationship may be relevant to the question of practical control. Indeed, as Cockerill J indicated in *Loreley* paragraph [32], it is relevant, when considering whether an inference of practical control can be drawn, to look at whether it is "paradigmatic" or "conventional", in the context of the particular relationship, for such control to exist.
30. The starting point for the principles identified in these various authorities is the judgment of Lord Diplock in *Lonrho v Shell* [1980] 1 WLR 627, where it was held that documents held by the subsidiaries of Shell and BP were not within the power of the parent companies. Lord Diplock dealt as follows with an argument that the consent of subsidiaries could be obtained:

"in the context of the phrase 'possession, custody or power' the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in Order 24 to compel a party to a cause or matter to take steps that will enable him to acquire one in the future...

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

31. Andrew Baker J in *Pipia* at [36] referred to the possibility that an inference of control might, in appropriate circumstances, be drawn from a failure of a parent to make sensible requests of its subsidiary. However, there appears to be no case where such an inference has actually been drawn by reason of a failure to make a request, whether in the context of parent and subsidiary or otherwise. I do not myself see how a failure to make a request could, on its own, justify the drawing of such an inference. Otherwise, there would be nothing left of Lord Diplock's important point that a party is not required to seek consent of third parties. Indeed, on behalf of Man, Mr Smouha accepted that an inference of control could not, without more, be drawn from a failure to make a request. I accept, however, that if other factors are present, and are sufficiently strong, the absence of a sensible request might assist in the drawing of an inference of control.
32. One issue ventilated in the arguments is whether it was for the applicants to establish (albeit on the basis of an inference) the practical control which they alleged, or whether it was for PIFSS to disprove it. I see nothing in the authorities which casts the onus of disproving practical control on the party who disputes that documents are within its practical control. Furthermore, under paragraph 17 of Practice Direction 57AD, it must be for the applicant to show that there has or may have been a failure adequately to comply with an order for extended disclosure.
33. Ultimately, however, on an interlocutory application such as the present, the question is whether (as Cockerill J put it in *Loreley* at [32]), the balance of the evidence favours the conclusion that there is practical control. I again accept, as the applicants submitted, that it is open to the court – for example in a case where the existing evidence is unsatisfactory or insufficient to form a fair view on the question of practical control – to require one or both parties to provide further evidence in order for the issue to be resolved: see e.g. *Republic of Mozambique* at [78(9)].

B3: The court's jurisdiction to require a party to make requests of third parties

34. The decision in *Various Airfinance* also decides another point which is relevant to some aspects of the way in which the disclosure application was advanced, in particular by Mr Weisselberg on behalf of D1 and D2.
35. One issue in *Various Airfinance* was whether, in circumstances where a party did not have control over third party documents, the court could order the party nevertheless to make a request to the third party for the production of such documents by way of an order that it should exercise "best endeavours" to obtain the documents. Mr MacDonald Eggers decided, after a full review of the authorities, that the court could not do so: see paragraphs [47] – [59], concluding that the court had no jurisdiction to make an order requiring a party to exercise best endeavours to obtain or request a third party to produce documents for disclosure which are not already in the party's control.
36. As a matter of judicial comity, I should follow the decision of another judge of first instance, unless I am convinced that the judgment is wrong: *Police Authority for Huddersfield v Watson* [1947] 1 KB 842, 848; *Willers v Joyce* [2016] UKSC 44 at [9]; *Bilta (UK) Ltd (in liquidation) and others v Tradition Financial Services Ltd* [2023] EWCA Civ 112 at [106]. None of the parties submitted that, on this issue, the decision in *Various Airfinance* was wrong, let alone clearly wrong, and I therefore see no

reason not to follow it. (In *Republic of Mozambique*, Robin Knowles J (at [66]) disagreed with *Various Airfinance* on a different point, whilst at the same time paying tribute to the judgment.)

C: Factual background

37. The principal evidence concerning the Man application, and in particular the issue of practical control, was contained in lengthy witness statements of Mr Peter Burrell (4th witness statement) for Man and Mr Nicholas Haworth (6th witness statement) for PIFSS. Mr Burrell is a partner in Willkie Farr & Gallagher (UK) LLP, and Mr Haworth is a partner of Stewarts Law LLP.
38. Mr Burrell's 52-page witness statement covered a period beginning in 1994-1997, and addressed developments over the following 25 years or thereabouts. This included the background to various sets of legal proceedings in Kuwait, Switzerland and England. In his oral submissions in relation to the "control" argument, Mr Smouha emphasised the importance of looking at the broad sweep of events, with a large number of different entities and organisations, and indeed some individuals, taking steps over many years to investigate Mr Al Rajaan's alleged wrongdoing.
39. The description of the events in this section is a summary of what I consider to be the most important features of the facts and events in the light of the focus of the parties' arguments at the hearing.

The organisations and entities involved

40. Mr Haworth gave evidence as to the nature of the various Kuwaiti government entities which featured in the various applications. I did not understand there to be any significant challenge to his factual description of the parties and entities involved, or indeed his evidence as to what had happened as a matter of fact. Generally speaking and as described in Section B1 above, the court does not go behind evidence which has been given on affidavit (or nowadays on witness statement) in the context of disclosure applications, although there are circumstances when the court is willing to do so. In any event, the argument of Man and D1/D2 was essentially directed at the conclusions which should be drawn from the relevant facts, rather than making a challenge to the facts themselves, albeit that Man did point out areas where (as they alleged) Mr Haworth's evidence was deficient in failing to provide a sufficient explanation of certain matters. My description of the relevant government entities is therefore principally based on Mr Haworth's evidence.
41. PIFSS has a legal independent personality, pursuant to Article 3 of Law 61 of 1976 which established PIFSS. It operates its own budget, its own investment activities and is subject to its own governance framework. It operates with functional and legal independence to administer the social security and pension system of Kuwait and performs that role with autonomy, pursuant to Article 133 of the Kuwaiti Constitution. PIFSS has the power to bring and defend proceedings in its own name.
42. The Chairman of PIFSS' board of directors is the Minister of Finance, and financial deficits in its funds are ultimately addressed by the Public Treasury. However, Mr Haworth's evidence was that this connection to the State of Kuwait does not connote that it thereby has control over documents held by other state agencies.

43. The Kuwait Attorney General or KAG performs the role of state prosecutor in Kuwait. PIFSS and the KAG are distinct entities. PIFSS has no control over KAG's personnel or its operations nor (on Mr Haworth's evidence) any right to inspect its personnel's documents. Thus, Mr Haworth said that there was no basis upon which PIFSS could include individuals from KAG as custodians for the purpose of calling for, searching for or reviewing their documents concerning its investigations or criminal proceedings.
44. Although there was reference in some of the materials to the Kuwaiti Public Prosecutor or "KPP", it was ultimately common ground (consistent with Mr Haworth's evidence) that there was no material distinction between the KPP and the KAG. Indeed, Mr Burrell's evidence was that the role of the KAG and the Kuwait Public Prosecutor are essentially one and the same.
45. The Department of Legal Advice and Legislation or "DLAL" was and is PIFSS' legal representative. Mr Burrell's evidence (which in this respect appeared to be common ground) was that the DLAL is effectively the Kuwaiti government legal department. It was formed pursuant to Law No. 12 of 1960 amongst other things to ensure coherence from a legal perspective across various governmental departments. It functions under the Kuwaiti Council of Ministers. As outlined in Law No. 12 of 1960, one of its primary responsibilities is to defend the interests of the Kuwaiti government in legal disputes, both internationally and domestically. It represents government entities acting as civil claimants in the Kuwaiti criminal courts.
46. On 19 January 2015, the Council of Ministers of Kuwait issued a resolution (No. 95) instructing the Department of Legal Advice and Legislation in the State of Kuwait to pursue all legal actions in relation to suspicions which had at that time been made public concerning the conduct of Mr Al Rajaan in respect of his role at PIFSS and to refer them to the investigating authorities inside and outside Kuwait in order to investigate and subsequently bring claims in court. DLAL was appointed to represent PIFSS on 12 March 2015. Mr Haworth's evidence was that PIFSS' control of documents held by DLAL is limited to those exchanged or received pursuant to that mandate. His witness statement describes various steps taken to investigate DLAL's documents. These steps included, for example, a review of email communications on PIFSS' systems between DLAL and the assigned point of contact at PIFSS, and interrogation of DLAL's communications on behalf of PIFSS with third parties.
47. The Kuwait State Audit Bureau is a distinct supervisory body of the State of Kuwait. It carries out reviews of various entities within its supervisory remit, as part of Kuwait's system of public funds protection. It produces annual reports which are publicly available. PIFSS falls within the State Audit Bureau's supervisory remit and, accordingly, the State Audit Bureau has the right to make requests for information from PIFSS to facilitate its supervisory role. PIFSS has no control over the State Audit Bureau's personnel or its operations or right to inspect its personnel's documents. Mr Haworth's evidence was that there is no basis upon which PIFSS could include individuals from the State Audit Bureau as custodians for the purposes of calling for, searching or reviewing their documents. Man's arguments did not focus to any significant extent upon the Kuwait State Audit Bureau: Man's principal focus was on the KAG and the DLAL.

48. Kuwait's Parliament has a number of committees. Mr Haworth's evidence was that PIFSS has no control over Parliament or its committees and has no right to inspect documents held by Parliamentarians. He said that there is therefore no basis on which PIFSS could include individuals from Parliament or its committees as custodians for the purpose of calling for, searching, or reviewing their documents. Man's arguments did not in the end focus on Parliament or its committees, although D1 and D2 did seek certain orders in that regard.
49. It will be apparent from the above description that each of the different Kuwaiti governmental entities, and in particular PIFSS, KAG and DLAL, had a different function. In simple terms, the position was as follows. PIFSS' function was to administer the state social security and pension system. There was nothing to suggest that its function was, for example, to conduct public prosecutions or to give legal advice to other state entities. The conduct of public prosecutions was one of the functions of the KAG. The function of the DLAL was to provide legal advice. These different roles were also apparent from the way in which matters developed in relation to proceedings in Kuwait, Switzerland and England as summarised below.
50. There were various passages in Mr Burrell's witness statement, and in the skeleton arguments of both Man and D1 and D2, which seemed to advance a case of "control" based on a broad proposition that the court is here concerned with various emanations of the State of Kuwait, and that any distinctions between the various state entities were irrelevant. In the event, however, Mr Smouha for Man made it clear that Man's case did not rely upon a case akin to piercing the corporate veil.
51. To the extent that any such case was advanced, on behalf of Man or D1 and D2, I unhesitatingly reject it. The present proceedings are brought by PIFSS, which has an existence independent of the State of Kuwait. These proceedings are not brought by the State of Kuwait. Indeed, the distinction between PIFSS and the State of Kuwait was a point forcefully made by D1 and D2 in the application which culminated in the judgment of Henshaw J referred to above. Henshaw J rejected an argument by D1 and D2 to resist disclosure in these proceedings of Swiss materials which were in their possession. However, he considered it appropriate to include a limited potential caveat. He held that measures should be put in place, at least for the time being, to "avoid the risk of the documents in question being transmitted onwards to the State of Kuwait": see paragraphs [10] and [161].

Events prior to 2007/2008

52. Mr Burrell's evidence traced the history of various concerns expressed about Mr Al Rajaan, or allegations made in relation to his conduct, back to the 1990s. However, I do not consider it necessary to summarise those matters here. They will no doubt be relied upon at the trial in relation to arguments on contributory fault and limitation which are advanced by Man and other defendants. However, there is nothing that suggests any significant involvement on the part of the principal entities, in particular the KAG and DLAL, on whom the present application was focused.

2007-2008

53. The first material involvement of any of the relevant third parties was in 2007. As described by Mr Burrell, express public allegations that Mr Al Rajaan had received

commissions were made by a member of the National Assembly in July 2006. It appears that this later led to the appointment of KPMG in early 2008 to carry out an investigation. PIFSS has disclosed a number of documents concerning the work of KPMG, and its disclosure has or will include certain documents which have been supplied by KPMG pursuant to requests made as part of the disclosure process. There is an issue as to whether PIFSS should be required to give further disclosure of KPMG materials.

54. There was then a significant event in 2008, when various issues about Mr Al Rajaan were raised by a PIFSS board member, Dr Al Rashed (sometimes referred to in the papers as Dr Al Rasheed). On 25 September 2008, having not been satisfied with responses which he had received, Dr Al Rashed then made a complaint to the KAG (i.e. the Kuwait Public Prosecutor). A criminal investigation by the KAG then began in October 2008, albeit that it was not for some years thereafter that criminal proceedings in Kuwait were commenced against Mr Al Rajaan. When they were commenced, it was with the benefit of materials obtained from Switzerland following a request by the State of Kuwait for Mutual Legal Assistance (“MLA”), as described below.

2011: the MLA request and subsequent Swiss proceedings

55. Mr Burrell’s evidence was that the investigations into Mr Al Rajaan by the Kuwaiti authorities culminated in the request for MLA being sent to the Swiss authorities on 14 June 2011. As Mr Smouha’s submissions recognised, the MLA request was made on behalf of the State of Kuwait, not PIFSS. For that purpose, a power of attorney was given to a Swiss lawyer, Phillippe Neyroud of Poncet Turretini Amaudruz Neyroud and partners. The power of attorney, dated 14 June 2011, was signed by Mr Faisal Al-Sarawi, who described himself as the head of DLAL.
56. The MLA and the power of attorney reflect the different functions to which I have referred. The criminal investigation had been carried out by the KAG. The relevant party for an MLA request is the State of Kuwait. The person who signed the power of attorney on behalf of the State was the head of DLAL, whose function is to give legal advice. There is nothing to suggest that PIFSS itself was somehow involved in the MLA request process. Indeed, Mr Burrell’s evidence indicates that at this time, in 2011, Mr Al Rajaan was still in post at PIFSS. He in fact remained in post until retirement in 2014, with a relatively short period of suspension in 2012. Furthermore, Mr Haworth’s evidence was that PIFSS was not a party to that mutual assistance process, and that it had no control over documents created by the KAG through that process or any communications exchanged with the Swiss authorities prior to delivery of the documentary evidence from the Swiss authorities in response to the State of Kuwait’s request. There is no reason to doubt that evidence.
57. The MLA request did not bear fruit immediately. As Mr Haworth explains, between June 2011 and December 2014, Mr Al Rajaan and his wife fought unsuccessfully to prevent the release of evidence by the Swiss authorities. PIFSS had no involvement in that dispute, and it had no access at that time to any documents which the Swiss authorities may have gathered either in acting upon the State of Kuwait’s MLA request or in the context of its own domestic investigations.

58. The MLA request ultimately bore fruit in early 2015. In January and April 2015, the Swiss authorities provided the State of Kuwait with documents relating to the Mirabaud scheme (one of the schemes in issue in these proceedings) in response to the first MLA request. Copies of those documents were given to PIFSS, which has disclosed them as part of its disclosure in the present proceedings.
59. The position as at late 2014, therefore, was that PIFSS had not received any significant volume of documents, or indeed any documents, emanating from the criminal investigation started by the KAG and which had then resulted in the MLA request. There is nothing, as far as I can see, in Mr Burrell's evidence which identifies or alleges that any documents were being passed from KAG to PIFSS during the 6-year period between the commencement of investigations in October 2008 and the provision of documents in early 2015. This is, in my view, a relevant matter which negates Man's case that there was a "free flow of information" between KAG and PIFSS.
60. In the meantime, there were other developments in Switzerland. (A convenient summary of these and later developments is contained in Henshaw J's judgment, paragraphs [13] – [31].) The most significant development in the period prior to 2015 was that, on 1 May 2012, the Swiss Office of Attorney General (or "OAG") commenced a criminal investigation against Mr Al Rajaan on suspicion of money laundering.

2015

61. There were many developments in 2015, and for present purposes the most significant seem to me to be the following.
62. (1) As previously described, the MLA request resulted in the provision of various documents in early 2015 to the State of Kuwait, and these were then passed to PIFSS.
63. (2) PIFSS sought to intervene as a plaintiff in the criminal investigation which was being carried out by the Swiss OAG. I was referred during the hearing to a decision of the Swiss Public Prosecutor's Office dated 2 September 2016, and this gives a full summary of developments subsequent to PIFSS' original application to intervene, which was made on 12 May 2015. The application was originally made, on behalf of PIFSS, by two Swiss lawyers (Mr Jacquemoud and Mr Stanislas). In December 2015, they were joined by two other Swiss lawyers, including Mr Neyroud. It was in May 2016 that PIFSS was in fact joined as a plaintiff in those criminal proceedings.
64. (3) As previously described, DLAL was appointed in early 2015 to represent PIFSS for the purposes of pursuing legal actions relating to Mr Al Rajaan. Mr Haworth's evidence explains that a number of other firms or individuals were appointed to represent PIFSS in close proximity to the appointment of DLAL. Stewarts were instructed in May 2015. Mr Neyroud was also instructed in early 2015, as described below. A firm of forensic accounts, Smith and Williamson (now Evelyn Partners or "Evelyn") was also appointed. Man's disclosure application was also, at least originally, directed at the documents of Evelyn, although in the event that application was not pursued and there was no focus on Evelyn during the hearing. In addition, the involvement of EY, who carried out a governance review, was pursuant to an appointment made in 2015. It was also in 2015 that PIFSS' subsidiary, WAFRA,

carried out certain investigatory work. The documents of both EY and WAFRA were sought as part of Man's application.

65. (4) Mr Neyroud was retained to act on PIFSS' behalf in February 2015. I was referred to a power of attorney which was provided to the Swiss authorities in May 2015, and this refers to Mr Neyroud acting in relation to Banque Pictet SA and related entities. It does not seem to go any wider than that. I shall, however, proceed on the basis that Mr Neyroud's retainer may have been wider – as indicated by the fact that Mr Neyroud later acted in relation to PIFSS' application to join as a plaintiff in the Swiss criminal proceedings. PIFSS has not disclosed the actual retainer of Mr Neyroud. I was told during the hearing that there was no written retainer in 2015, but that there was a privileged retainer document of September 2023 which evidenced and confirmed a retainer between Mr Neyroud's firm and PIFSS.
66. (5) Mr Neyroud produced two reports in 2015, essentially summarising the MLA materials, which were addressed to the DLAL. These two reports were, at some stage during the Kuwaiti criminal proceedings (as to which see below), provided to Mr Al Rajaan, and they have been disclosed by him as part of his disclosure in the present proceedings. They have not, however, been disclosed by PIFSS, and there is an argument as to privilege to which I refer below in Section E8.
67. (6) In the course of 2015 and 2016, some further documents (i.e. beyond those resulting from the MLA request) were shared by KAG with PIFSS. Mr Haworth describes these as having been shared "under legal professional privilege (which PIFSS does not waive) to facilitate co-operation in international criminal proceedings". These documents were, however, very limited in number, and had largely been disclosed by D1 in any event. He says that they are either not responsive to the Disclosure List of Issues or "DLOI" which applies in these proceedings, or provide no further relevant content beyond the similar subject matter material contained in D1's disclosure. Mr Haworth described these documents as having been provided by KAG "ad hoc, on occasion and in its discretion, in 2015 and 2016". He said that PIFSS "does not have access to KAG's document management or other systems, and there has at no time been any right of access to or any systematic access by PIFSS to information held by the KAG".
68. (7) Criminal proceedings were commenced in Kuwait in (according to Mr Burrell's evidence) 2015, and these culminated in a conviction in 2016 (according to Mr Burrell) or 2017 (according to Mr Haworth) in relation to Mr Al Rajaan's option trading carried out in the 1990's. There is a later, and more relevant, conviction in 2019 concerning the Mirabaud scheme.
69. (8) In 2015, the KAG issued a letter of request for MLA from the United Kingdom. This culminated in a judgment of the Court of Appeal concerning the restraint of a number of D1 and D2's assets. Certain documents relating to the application have been disclosed by Mr Al Rajaan. Mr Haworth's evidence is that PIFSS was not a party to or otherwise involved in the UK criminal proceedings. It did not receive witness evidence, to which Mr Burrell referred in his witness statement, other than via D1's disclosure.

Events after 2015

70. There have of course been many developments subsequent to 2015. For present purposes, those which seem to me to be important, or which featured significantly in the parties' arguments, were the following.
71. (1) In 2016, as referred to above, the Swiss Public Prosecutor issued a decision on various issues that had arisen in relation to PIFSS' access to the Swiss criminal file. Man placed reliance upon one aspect of this decision. One of the objections raised by Mr Al Rajaan, in relation to PIFSS' access to the file, concerned the fact that Mr Neyroud represented both the State of Kuwait and PIFSS. The relevant part of the decision was as follows:

“4. Dual mandate of Ms Neyroud and Ms Aubert

The fact that Mr. Neyroud represents both the State of Kuwait and the PIFSS is seen as particularly problematic by the defendants, in case of access to the PIFSS file. This dual representation is in fact merely the embodiment, in Switzerland, of the close relationship between the State of Kuwait and PIFSS. On this point, it is necessary to follow the defendants on the fact that the PIFSS cannot be considered as an entity separate from the State of Kuwait, or even a semi-State entity. In view of its functioning and aims, the PIFSS is clearly a State entity in its own right, notwithstanding its independent legal personality and the latitude it may enjoy in the management of its affairs.

...

It must therefore be noted that the defence of the interests of the State of Kuwait and the defence of the interests of PIFSS are closely linked and that it is to be expected that PIFSS will regularly report on the Swiss procedure to the State of Kuwait, especially since the present decision does not contain any restrictions in this regard. The dual constitution of Ms Neyroud and Ms Aubert is therefore not liable to create any particular prejudice to the participants in the proceedings. A clear conflict of interest between the State of Kuwait and PIFSS, which according to case law (ATF 141 IV 257 c. 2.2) would require the intervention of the OAG, is also not apparent.

Accordingly, there is no obstacle in principle to Mr Neyroud and Mr Aubert representing both PIFSS and the State of Kuwait. However, the organisation of the representation must be adjusted in order to meet the criteria laid down in art. 127 para. 2 CCP.”

72. (2) In either 2016 (according to Mr Burrell) or 2017 (according to Mr Haworth), Mr Al Rajaan was criminally convicted in Kuwait in relation to the options trading which he had carried out in the 1990's. The more significant conviction, in the context of the present case, was in 2019. It related to the Mirabaud scheme. An issue arises, addressed in Section E2 below, as to whether PIFSS became a plaintiff (or victim)

within the context of those proceedings, thereby potentially entitling PIFSS to receive documents concerning those proceedings including the criminal file.

73. (3) There was no evidence of the receipt of any documents by PIFSS from the KAG subsequent to those received in 2015 and 2016 and described in the evidence of Mr Haworth. In his submissions, Mr Ritchie said that the evidence indicated that no document had been provided to PIFSS by another Kuwaiti agency since 2016. In paragraph 101 of his witness statement, Mr Burrell (wrongly) states that the Swiss Court had stated that there would be a free flow of information between the State of Kuwait and PIFSS. This was a reference to the decision of the Public Prosecutor set out above. In fact, the Public Prosecutor does not state that there would be a free flow of information. The only example which Mr Burrell gave of the “free flow” of information was the provision of documents in 2015; i.e. the documents sent in response to the MLA request. Mr Burrell did also refer (in paragraph 129) to MLA material having been provided again in 2022.

D: Control: the parties’ arguments

74. The principal focus of Mr Smouha’s oral submissions concerned governmental organisations, and specifically documents held by the KAG and DLAL. There was far less focus on documents of the Kuwait State Audit Bureau, and none on the documents of Kuwait parliamentarians. In relation to non-governmental organisations, the application concerned: (i) KPMG; (ii) EY; and (iii) WAFRA.

Man’s argument

75. Mr Smouha’s essential submissions can be summarised as follows.
76. Whilst it was necessary to look at each third party separately, the question of control depended upon consideration of all the facts. On the basis of the evidence as a whole, PIFSS had practical access to the documents sought so as to amount to control within the meaning of that term established on the authorities. There was a progressive involvement and interaction of the various entities. These interactions were not just bilateral between PIFSS and each entity, but were multilateral: the various state entities with PIFSS and with multiple parts of the Kuwaiti State, both directly and indirectly. On the facts, there was a complex of interactions, which complexity was enhanced by there being dual representation by DLAL (a Kuwait State entity) and by a Swiss lawyer, Mr Neyroud (through his firm Poncet Turretini Amaudruz Neyroud and Assiaquen), who was acting for both PIFSS and the KAG/KPP.
77. The various interactions were with the object of pursuing claims, criminal and civil, including for the benefit of PIFSS. Where it was expedient for PIFSS to have information that had been obtained, PIFSS would have it. In practice, however, it might not actually be necessary to provide it to PIFSS, because the various entities that were doing the necessary work, directly or indirectly, were doing so on behalf of PIFSS or at least for its benefit.
78. It was appropriate to consider control in the present case by going back to the position in 2008, when a criminal investigation by the KAG into Mr Al Rajaan had started. Across the extended period starting at that point in time, the evidence suggests that

PIFSS would have been able to obtain documents just by asking for them. That was apparent from the fact that, subsequently, various documents were indeed provided.

79. There were 5 matters which established that there was practical access sufficient for the court to find control, or at least prima facie evidence of control subject to a showing of evidence to the contrary. These 5 matters showed control irrespective of any inference: inference was, as Mr Smouha submitted, the cream on the cake. The specific matters were:
- (1) There was evidence that, over an extended period of time, a number of entities were involved in investigating the wrongdoings of Mr Al Rajaan with the same objective: to obtain information, including information for the benefit of PIFSS.
 - (2) Documents had in fact been passed from those entities to PIFSS, the litigating party.
 - (3) There was no evidence that documents were passed on a restricted basis. The flow of information, and of investigatory activity across different state entities, on behalf of PIFSS or for its benefit, was (on the basis of Mr Haworth's sketchy evidence) "ad hoc and not organised". It was not done on a basis that "PIFSS would not be given the information or the benefits of the investigation". There were no carefully erected information barriers: it was messier than that.
 - (4) There was no evidence of any refusal by third parties to provide documents, or that there would be a refusal.
 - (5) There is no evidence from the entities themselves, in particular that there would be a refusal to provide documents in response to a request. Nor is there any evidence of any limitations on the arrangements between PIFSS and those entities as to how matters would go forward, or that information would not be made available.
80. These matters were sufficient to establish practical access amounting to control. It was only after considering those matters that one would ask the question: has a demand or request been made now, and if not why not. In his reply submissions (and contrary to the emphasis placed on the point in opening), Mr Smouha accepted that the failure to ask was not the most important point. Nevertheless, it was a further point.
81. The key point, however, was that documents had been provided in the past, and the court could readily conclude, as a working assumption, that the arrangement continued. This was not simply on the basis that documents had been received in the past. The receipt of documents had to be seen in the context of all that was being done, by PIFSS and other parties, in relation to the investigation and other steps being taken in relation to Mr Al Rajaan, and the overall purpose for which they were acting.
82. Mr Smouha made it clear that Man was not seeking to establish practical access on the basis that PIFSS and the other entities were all state entities, and in that sense there was a legal connection between them. He made it clear in his opening that Man

was not advancing a “piercing the quasi corporate veil point as between different state entities and departments of government”.

83. Mr Smouha drew attention, at various stages of his submissions, to alleged deficiencies in the evidence provided by Mr Haworth on behalf of PIFSS. The most important point was that Mr Haworth had failed to explain the basis upon which documents were actually received at the time when documents were actually provided. Mr Haworth was not in a position to say what discussions there may have been between particular individuals at PIFSS and other Kuwaiti entities as to the circumstances in which documents might be asked for, or things would be done. Indeed, the evidence generally referred to “PIFSS”, but without referring to particular individuals.
84. Specifically, there was an absence of evidence in relation to the dual representation by Mr Neyroud, the Swiss lawyer acting for the KAG and PIFSS, and no evidence that the lawyers were asked to create information barriers in relation to that representation. In the absence of positive evidence as to the basis upon which Mr Neyroud was acting, the natural inference would be that PIFSS would have access to the information that the Swiss lawyers were obtaining; and that going forward there would not be information barriers between the KAG and PIFSS.
85. Although the main focus of Mr Smouha’s submissions was the documents of the governmental entities, he submitted that a similar approach to control should be taken in relation to documents of non-governmental parties, such as KPMG. It was, he submitted, important to look chronologically across all parties, and not simply to focus on a particular party. KPMG was one of a number of parties doing investigatory work for the purposes of establishing what the position was in relation to alleged wrongdoing by Mr Al Rajaan. This was for the benefit of PIFSS, even if not exclusively for their benefit. Some documents were provided to PIFSS, and others may have been kept by the entities doing the investigatory work, which was continuing. There was, therefore, what Mr Smouha submitted was an “overlay” in terms of the involvement of multiple entities in the investigation. It was therefore essential, when considering practical control, to look across all the entities, across the position chronologically, and to consider how they became progressively involved and what they were doing in terms of the investigation. On that approach, practical control was “the same across the board”. The engagement of KPMG, for example, was not a single event which occurred out of context, and it should not be divorced from the fact that they were one of many entities involved in a joined-up investigation of the allegations against Mr Al Rajaan for the benefit of PIFSS.

D1 and D2’s argument

86. On behalf of the First and Second Defendants (“D1 and D2”), Mr Weisselberg KC broadly supported the arguments advanced by Mr Smouha. He also advanced an alternative submission, in the event that the court was not satisfied as to PIFSS’ practical control on the present evidence. He submitted that, in that event, PIFSS should provide further information, in a witness statement, as to the circumstances in which documents had previously been provided. The present evidence was unsatisfactory, and did not engage with points which had previously been made in correspondence by the solicitors for D1 and D2.

PIFSS' argument

87. Mr Ritchie made a number of overarching points, prior to addressing the position of each particular third party whose documents were sought from PIFSS.
88. It was necessary to look at each third party separately, applying the relevant test in the authorities. The case could not be approached on the basis of "one size fits all". A globalised approach could not be taken.
89. Nor can the case be approached by reasoning backwards from alleged gaps in disclosure. Disclosure was process-driven by reference to appropriate searches and was set by the universe of the material that PIFSS actually controlled. There were very good reasons why PIFSS has the universe of documents which it actually has, and does not control other documents. There were different agencies, including different emanations of the state, with different roles and different functions. The documents controlled by each of those entities will reflect those different functions. There was, here, no relevant agency relationship between PIFSS and any of the third parties whose documents were sought. There was therefore nothing which had gone wrong with the disclosure process, and this had been fully explained in Mr Haworth's witness statement.
90. It was correct that some documents had been provided by the KAG to PIFSS. But (leaving aside the MLA documents) the documents so provided were a limited number provided in 2015 and 2016. The fact that documents were only provided on an ad hoc basis, and only during a relatively limited time frame, was consistent with a lack of control; not with control.
91. There was in fact a total lack of evidence which supported the application. In cases where control was established, it would be easy to fashion a workable order to give effect to that control. In the present case, however, Man's proposed order would require PIFSS effectively to take control of documents of various bodies, such as the KAG and KPMG, in order to make the disclosure which Man sought. That could not in practice be done.
92. The inference of control which Man invited the court to draw is not just speculative, but also inherently improbable. Each government entity had its own role and function, and the actions that each took were what you would expect. For example, one would expect DLAL to be advising a number of state entities, and there was no reason to infer that there was a free-for-all with all entities having access to the documents of all the others.
93. In summary, there was nothing which demonstrated control, and nothing which indicated that anything had gone wrong with the disclosure process. Mr Ritchie then addressed the position of each of the advisers, and to a large extent his detailed submissions are reflected in my conclusions below.

E: Control - discussion

E1: General

94. I start with some general matters which apply across the application as a whole, but particularly with reference to the meat of Man's application which concerns the documents of the KAG and DLAL.
95. I agree with Mr Ritchie's submission that it is necessary to look separately at each third party entity whose documents are alleged to be under PIFSS' control. In my view, that is the only practical and sensible way to apply the test which is identified in the case law. A globalised approach is not in my view justified by the fact that, as here, different entities were involved, at different times and in different contexts, in considering aspects of Mr Al Rajaan's wrongdoing. I do not see how a conclusion that there is (or is not) practical control over the documents of one entity can be carried over as a conclusion when considering the position of another entity. By way of example, the question of control in relation to KPMG and EY involves, at least to some extent, looking at their terms of engagement. My conclusion (below) that PIFSS has no relevant practical control over their documents does not in my view say anything about whether there is practical control over – for example – the documents of the KAG, which was not a professional service company and where there were no terms of engagement. In *Loreley*, Cockerill J said that a degree of stringency is required when considering practical control, and in my view this does require a proper analysis of the position of PIFSS vis a vis each third party.
96. I am also unpersuaded by Mr Smouha's argument as to the significance, in the context of control, of the existence of a number of different entities which were looking at aspects of Mr Al Rajaan's wrongdoing. That was indeed the case. But there is no obvious reason why the approach to control should be any different depending on the number of entities involved in different aspects of an investigation, even if there is a common element to the matters being investigated.
97. I consider that the key question in the present case is whether there is "practical" rather than legal control of the third party documents which Man seeks. Mr Smouha in his submissions did, on occasion (in particular in the context of KPMG) refer to agency, and the principle that a principal is entitled to documents created by an agent during the course of its agency. However, I did not consider that there was any basis for saying that the relationship between (for example) PIFSS and KPMG, or PIFSS and EY, was one of principal and agent. Nor is there any basis for an argument that the KAG was in some way the agent of PIFSS. The KAG is the Kuwait public prosecutor. It was not in any sense conducting its criminal investigation and criminal proceedings as the agent of PIFSS, and I did not understand the contrary to be suggested.
98. I can see that an agency argument might arise in the context of the relationship between PIFSS and its legal advisers, DLAL and Mr Neyroud. However, this would only potentially give rise to disclosure of non-privileged documents (if any) which were obtained or created by those advisers in the course of their mandate from PIFSS. Man's application was, however, not principally aimed at those documents, and indeed Mr Haworth's evidence indicated that relevant investigations of documents held by DLAL and Mr Neyroud, within the scope of their mandate, had been undertaken. Man's application was really directed at obtaining the documents which were obtained or created by those advisers in the course of their mandate and work for the KAG. I do not see how an agency argument can be advanced in that context, and indeed the case advanced in relation to those documents was one of practical control.

99. I accept Mr Smouha’s point that, when considering the question of practical control, it may – depending upon the relationship between PIFSS and a relevant third party – be appropriate to look at the picture over a number of years in relation to that third party. That would not be the case, for example, in relation to KPMG, which carried out a relatively confined assignment pursuant to their engagement in 2008. However, a broader sweep is appropriate when considering the position of practical control in the context of PIFSS and the KAG.
100. As will be apparent from my conclusions below, I did not think that this provided any assistance to Mr Smouha’s argument, and in fact it was a point against him. The relevant period to which he invited consideration, in the context of the KAG, started in 2008, when Dr Al Rashed made his complaint to the KAG and the criminal investigation started. However, the striking feature of the evidence is, in my view, the infrequency with which PIFSS received documents from the KAG over the period starting in 2008. Thus, there is no evidence of any documents being given by the KAG to PIFSS during the period from the start of the investigation in October 2008 for a period exceeding 6 years. In early 2015, documents obtained through the MLA process were passed to PIFSS. These were, plainly, important documents, but this was not the start of what Mr Smouha described as a “free flow of information”. Apart from the MLA documents passed on at that time, the only evidence of documents subsequently being passed by the KAG to PIFSS was the “very limited in number” documents which were given (on PIFSS’ case under legal professional privilege) in 2015 and 2016. There is then, on the evidence, a period (to date) of some 7 years during which time there is no evidence of further documentation being provided. During much of that time, PIFSS has been engaged (since 2019) in the present litigation with Mr Al Rajaan and other defendants, and it is clear that the most important source of further information and documentation, for the purposes of PIFSS’ claim, has nothing to do with the KAG. Rather, PIFSS has had access, as a result of its status as a victim in the Swiss criminal proceedings, to important Swiss materials.
101. I agree with Mr Ritchie’s argument that it is relevant, and in my view important, to consider the different functions and roles of the third parties whose documents are alleged to be under PIFSS’ practical control. Where an argument about practical control is advanced, it is relevant to consider whether – given the relationship between the parties – one might sensibly expect the litigating party to have practical control over the documents of the relevant third party. Mr Ritchie expressed this idea in terms of “inherent probabilities”. In *Loreley*, Cockerill J expressed a similar idea by referring to whether it is “paradigmatic” for such control to exist, or “conventional” for such control to exist. In the present case, given the roles and functions of most of the various third parties, it would in my view be rather strange to suppose that PIFSS would have practical control over the third party’s documents. For example, one would not ordinarily expect PIFSS to have practical control over all of KPMG or EY’s working papers, and indeed Mr Smouha was inclined to accept that the working papers of those professional service firms were not within PIFSS’ practical control, at least if they contained original work. In my view, similarly, one would not expect PIFSS, as the state entity responsible for administering social security and pensions, to have practical control over the documents of the KAG, the public prosecutor; a fact borne out by the infrequency with which documents were provided to PIFSS over the period 2008 to date. Again, where one has an entity such as DLAL, which is

providing legal advice to different government entities, it would be surprising if it were to be the case that one entity (here PIFSS) would have practical control over the documents of other entities advised by DLAL, and in particular of the KAG. Thus, it is in my view not surprising that Mr Haworth is able to say, as he does at various points in his witness statement, that PIFSS does not have access to or control over the documents which are being sought.

102. Mr Smouha, in his submissions, emphasised the importance of the court having, at trial, as complete a documentary picture as possible. It is of course the case that the court attaches considerable importance to contemporaneous documents. However, that does not provide a reason for taking a broad, sweeping approach to the question of disclosure, by a party to litigation, of documents of third parties, and in particular the issue of practical control: I agree with Cockerill J that a degree of stringency is required. If documents are not under the control of the party to litigation, then procedures exist for obtaining third party documents, including from parties outside the jurisdiction. Thus, it is possible for letters of request to be made – and indeed two letters of request have been made in these proceedings. Whilst that procedure may be somewhat cumbersome, it has the advantage of enabling the court to exercise a degree of control over the documentation to be sought from third parties outside the jurisdiction. I consider it highly desirable in the present litigation, for the court to exercise that degree of control.

103. In the light of these general considerations, I turn to each of the relevant third parties.

E2: KAG

104. I do not consider that there is anything in the evidence which begins to justify a conclusion that PIFSS has, or may have, practical control over the documents of the public prosecutor, the KAG. Mr Haworth's evidence is that it does not, and that evidence is consistent with the inherent probabilities, the respective roles and functions of PIFSS and the KAG, and the evidence as to how matters developed over the years. I did not consider that any of the matters to which Mr Smouha referred showed, contrary to Mr Haworth's evidence, that there was a standing or continuing practical arrangement between PIFSS and the KAG whereby the latter allowed PIFSS access to its documents.

105. This is not a case where Man could point to some document which gave PIFSS an entitlement to documents. Man's case ultimately depended upon persuading the court to draw an inference of practical control from various matters. Although Mr Smouha referred to 5 matters in support of the conclusion that there was practical control, the argument depended (in my view), very much upon his central point that the KAG had provided PIFSS with documents in the past. However, I do not consider that that is sufficient (even in conjunction with Mr Smouha's other points) to justify a conclusion that there is practical control. In *Ardila*, Males J said (in the context of parent and subsidiary companies) that co-operation in the past as to compliance with specific requests does not amount to evidence that a parent has the necessary control. In the present case, there has been a degree of co-operation in the past. However, a degree of co-operation cannot in my view be translated into practical control. There has been no pattern of ongoing co-operation, or evidence of a free flow of information. The relevant co-operation between PIFSS and the KAG, in terms of the provision of documents, took place in 2015 – 2016. Prior to that time, there had been 7 years

where there is no evidence of documents being provided. A further 7 years has passed since that time, without any clear evidence of further documents being provided.

106. Mr Smouha, and Mr Weisselberg, sought to make much of the fact that there was (as Mr Smouha described it) dual representation by lawyers acting for both the KAG and PIFSS: i.e. DLAL and Mr Neyroud. Thus, the criminal investigation by the KAG led to the State of Kuwait's MLA request, and in that context the State (and thus the KAG) was being advised by both DLAL and Mr Neyroud. Similarly, PIFSS engaged DLAL and Mr Neyroud in 2015.
107. I did not consider these points provided any material support for the case of practical control. The mere fact that two parties have engaged a common lawyer does not mean one of the parties thereby obtains practical control over the documents of the other. I was referred to no authority which suggests that that was the case. The engagement of a common solicitor may, in many if not most cases, mean that documents shared between the clients are protected by common interest privilege. However, that is a long way from showing practical control by one party of the documents of the other party.
108. Furthermore, the argument on dual representation fails to pay any regard to the timing of the instruction and the work on which the lawyers were engaged. The MLA request was made in June 2011, and this is when Mr Neyroud was instructed by the State of Kuwait and the power of attorney was provided to him by the head of DLAL. There then followed a period of 3 ½ years during which Mr Al Rajaan sought to oppose the request. PIFSS played no part in what was happening in Switzerland, and was not involved in the MLA request and dispute, and did not receive any documents. Indeed, for much of that time, Mr Al Rajaan was still in post at PIFSS.
109. It appears, from the September 2016 decision of the Public Prosecutor, that the disputes relating to the MLA were resolved by December 2014. The decision states that the "principle of granting assistance to Kuwait was confirmed by the Federal Court (judgment ... of 8 December 2014)". That is consistent with the fact that the first tranche of documents was provided to the State of Kuwait in January 2015. Mr Burrell's evidence was that this tranche was sent to the KAG on 13 January 2015. This was before Mr Neyroud was instructed by PIFSS from February 2015. Accordingly, both the nature of the MLA request (an application by the State of Kuwait not PIFSS), and the timing of its resolution (December 2014 with documents being provided on 13 January, prior to Mr Neyroud's engagement by PIFSS) show that this is not a case where there was anything in the nature of a joint retainer by the KAG and PIFSS (and, to be fair, Mr Smouha accepted that there was not).
110. The evidence also indicates that when PIFSS did engage Mr Neyroud in February 2015, this was not in order to progress the State of Kuwait's MLA application. PIFSS had played no part in that application over the previous 3 ½ years, and the application had already been determined. It is true that a further tranche of documents was provided under the MLA process in April 2015 subsequent to Mr Neyroud's engagement, but there is nothing to suggest that this had anything to do with the fact that he had been engaged by PIFSS. Furthermore, the evidence indicates that the MLA request, in so far as it concerned the State of Kuwait's request for documents, had no continuing vitality after April 2015. The Public Prosecutor's decision of September 2016 states that: "As it concerned the provision of evidence, the mutual

assistance procedure ended with the sending of the last batch of execution documents in April 2015”.

111. In addition to the evidence that Mr Neyroud’s engagement by PIFSS was not concerned with the MLA request, there is some positive evidence as to what he was doing on behalf of PIFSS. By December 2015, he had been identified to the Public Prosecutor as acting on behalf of PIFSS in relation to the application (which was made in May 2015) to be joined as a plaintiff in the Swiss criminal process. The September 2016 decision of the Public Prosecutor was concerned with various arguments to the effect that PIFSS should not have access to the criminal file; arguments which were in fact rejected. There is nothing in the decision which suggests that the State of Kuwait, or indeed the KAG, played any part in matters with which the Public Prosecutor was dealing: the OAG was essentially dealing with the dispute between PIFSS and Mr Al Rajaan over access to the file following the ultimately successful application by PIFSS to be joined as a plaintiff.
112. In the course of argument, Mr Ritchie referred to the two Swiss processes – (i) the MLA request by the State of Kuwait, and (ii) PIFSS being joined as a plaintiff to the ongoing Swiss criminal investigation/ proceedings – as running in parallel. In my view, that is an accurate description, and indeed the Public Prosecutor uses the same expression. I see nothing in the evidence, and indeed no logical reason, why the existence of these two processes running in parallel should mean that PIFSS had practical control of the documents of the KAG. Indeed, the two processes did not really run in parallel for very long, since the MLA procedure (in so far as it concerned the provision of evidence) had ended in April 2015.
113. Mr Burrell in his witness statement, and Mr Smouha in argument, placed reliance on the way in which the Public Prosecutor addressed the issue of the “dual mandate” (quoted above). The Public Prosecutor was not there addressing an argument, as I am, to the effect that PIFSS had practical control of the KAG’s documents. Furthermore, his decision goes no further than saying that it was to be expected that “PIFSS will regularly report on the Swiss procedure to the State of Kuwait”. That is a very long way from saying that the KAG’s documents are practically controlled by PIFSS. His ultimate decision on this point was only that there was no conflict between the State of Kuwait and PIFSS, and that there was no obstacle to Mr Neyroud representing both PIFSS and the State of Kuwait.
114. Mr Smouha, in his argument, relied on the fact that PIFSS had not disclosed Mr Neyroud’s retainer. I did not consider that this took the argument on practical control anywhere. One would not expect a retainer between PIFSS and its Swiss lawyer to say anything about whether PIFSS would have practical control of the documents of the KAG, which would not have been a party to that retainer. As it transpired, Mr Ritchie explained that there is in fact no document in 2015 which contained Mr Neyroud’s retainer.
115. I have focused hitherto on the position of Mr Neyroud, which is where much of Mr Smouha’s argument was directed. There is also, however, the position of DLAL. The evidence indicates that DLAL, as one would expect of an entity with its function, gave legal advice and assistance both to KAG and to PIFSS. There is nothing to suggest that DLAL was giving any advice to PIFSS, in relation to matters concerning Mr Al Rajaan, prior to its appointment in 2015. Prior to that time, DLAL appears to

have had some involvement in advising the KAG, or the State of Kuwait, in relation to MLA. Subsequent to its appointment by PIFSS in 2015, it has played a significant advisory role in relation to PIFSS' legal actions concerning Mr Al Rajaan, including the present proceedings. At the same time, no doubt, it has been advising the KAG and the State of Kuwait on other matters, including matters relating to Mr Al Rajaan. I do not see how any of this produces the result, contrary to Mr Haworth's evidence, that PIFSS has practical control over the documents of the KAG. Indeed, one of the surprising features of Man's argument is that it posits an entitlement, on PIFSS' part, to documents all the way back to 2008, in circumstances where DLAL was not engaged by PIFSS until March 2015.

116. Nor is a case to that effect bolstered by Mr Smouha's speculative assertion that DLAL (or indeed Mr Neyroud) may not have put in place appropriate "Chinese walls" in relation to DLAL's different clients. Even assuming that such walls were necessary, and even assuming that DLAL or Mr Neyroud failed properly to put them in place, that does not in my view provide PIFSS with practical control over the documents of clients of DLAL who, on this assumption, should have been afforded the protection of Chinese walls. I return to aspects of the case concerning DLAL in Section E3 below.
117. Accordingly, generally and specifically in relation to the KAG, I accept the submissions of Mr Ritchie as summarised above. I consider that the argument that PIFSS has practical control of relevant KAG documents has no firm foundation at all, and is contrary to the clear evidence of Mr Haworth, the inherent probabilities, and the way the course of events has in fact taken place. There is in my view no room for the application of an inference of practical control by reason of the fact that PIFSS has not asked the KAG for access to its documents. Mr Smouha described this point as the cream on the cake, but in my view (for the reasons given) there is in reality no cake.
118. I also do not consider, in the light of these conclusions, that it is necessary or appropriate to require PIFSS to provide further witness evidence in relation to these matters, as proposed by Mr Weisselberg as his alternative submission. There is in my view no reason to go behind the evidence of Mr Haworth, subject to the point which I now address.
119. I have considered whether it would be appropriate to require further evidence in relation to PIFSS' position in the Kuwaiti criminal proceedings against Mr Al Rajaan, and specifically whether or not PIFSS' acquired rights, as a plaintiff or victim in those proceedings, to the criminal file. This was an issue addressed at the very start of these proceedings, in a witness statement of Mr Al Moghawi (a senior legal adviser at DLAL) made in connection with PIFSS' application for permission to serve out. Paragraph 26 of that witness statement, dated 19 June 2019, suggested that PIFSS had in fact become a plaintiff in those proceedings, although it is fair to say that paragraph 25 tends to indicate that PIFSS had not yet done so. Mr Bhaskaran of Stewarts then made his second witness statement on 3 July 2019, also in relation to service out. This stated that PIFSS did not pursue any civil remedy in the criminal proceedings, where a decision had very recently been made.
120. The position as stated in paragraph 36 of Mr Haworth's witness statement is as follows:

“As regards PIFSS’s participation in the Kuwaiti criminal process, PIFSS asked to be a private plaintiff but this did not proceed and PIFSS did not participate or take any active role in the Kuwaiti criminal process. Accordingly, it did not receive the volumes of documents which the Defendants appear to speculate that PIFSS must have received. PIFSS did not receive copies of the criminal files relevant to those proceedings.”

121. When I asked Mr Ritchie about this issue, he acknowledged that Mr Al Moghawi’s witness statement could be read as indicating that PIFSS had become a plaintiff (or victim), albeit that it had not made a claim within those proceedings. Mr Ritchie said, consistent with Mr Haworth’s evidence, that his clear instructions were that PIFSS had not become a victim: a request had been made, it was not pursued, no civil claim was ever quantified, and PIFSS did not receive any documents through that process. In view of the clear evidence in Mr Haworth’s witness statement, as confirmed by Mr Ritchie, I do not consider it appropriate to order any further evidence to be provided on this issue. I would, however, expect PIFSS to review paragraph 36 of Mr Haworth’s statement, and the statements made by Mr Ritchie on Day 3/143 – 144 in order to ensure that they are accurate. Mr Smouha suggested that PIFSS’ failure to become a plaintiff in the Kuwait criminal proceedings gave rise to an inference that this was a way of avoiding giving disclosure. I see no basis for drawing that inference, and I did not consider that Mr Burrell’s witness statement gave advance notice that such a point was to be advanced.
122. Therefore, I dismiss all applications in so far as they concern the issue of PIFSS’ alleged control of the KAG’s documents.

E3: DLAL

123. The issue of control in relation to DLAL is not quite the same as in relation to the KAG. That is because DLAL was appointed to represent PIFSS (in March 2015), and Mr Haworth accepts in his witness statement that PIFSS does have some control in relation to DLAL’s documents. He explains that PIFSS’ control of the documents of DLAL is limited to those exchanged or received pursuant to that mandate.
124. There are essentially two questions which arise in the context of the applications in so far as they concern DLAL’s documents. First, have the applicants established that PIFSS has practical control of documents beyond those exchanged or received pursuant to the mandate? Secondly, if PIFSS’ control is limited in the way that Mr Haworth states, has PIFSS carried out appropriate searches of DLAL’s documents which are acknowledged to be within PIFSS’ control?
125. The argument for Man and D1 and D2 was principally directed at the first point, since the purpose of the application was to obtain the documents of the KAG. I have discussed the direct route in Section E2 above. The present argument would provide an indirect route to the KAG’s documents, via documents held by DLAL who advised them. In my view, if the direct route is not available (as I have concluded in Section E2 above), the case cannot be improved by seeking the same or similar documents through the indirect route. If (as I have concluded) PIFSS does not have practical control of the KAG’s documents, that conclusion must apply equally to documents which the KAG holds itself (e.g. in its offices or on its servers) or documents which

are held by DLAL because they have been exchanged or received pursuant to its mandate from the KAG. I did not consider that there were any features of the argument which meant that there was a stronger case in relation to DLAL's documents held for the KAG, than there was in relation to the KAG itself. In fact, I did not understand either Mr Smouha or Mr Weisselberg to suggest that a claim for the KAG's documents held by DLAL could succeed in circumstances where the practical control argument failed in relation to the KAG itself. Indeed, in his oral argument, Mr Smouha said that the "same control arguments apply". Those are the arguments that I have rejected.

126. Accordingly, for these reasons, along with those set out in Sections E1 and E2 above, the applicants have failed to show that PIFSS has or may have practical control of documents beyond those exchanged or received pursuant to the mandate which was given to DLAL by PIFSS.
127. The second question is whether PIFSS has carried out appropriate searches of DLAL's documents which were acknowledged to be within PIFSS' control. The issue which arises here (as it does in relation to various other applications addressed in Sections F and G below) is whether the court should exercise one of the range of powers under CPR PD 57AD paragraph 17, the terms of which are set out in Section B1 above.
128. Mr Haworth's witness statement explains the steps which have been taken in relation to documents which DLAL has exchanged or received pursuant to its mandate. In paragraphs 73 – 75, Mr Haworth states:

"73. Stewarts has conducted detailed investigations of DLAL's documents which has involved a review of correspondence exchanged between DLAL and PIFSS, as well as DLAL's communications with third parties. Without waiving privilege, the steps carried out can be summarised as follows:

73.1. A review of email communications on PIFSS's systems between DLAL and the assigned point of contact at PIFSS (i.e. the email inboxes of Dr Ayman Al Baloushi and Ms Noor Al Fares) was conducted. These lawyer/client communications are privileged.

73.2. Stewarts has made enquiries of DLAL and has similarly interrogated DLAL's communications on behalf of PIFSS with third parties. Where potentially responsive communications were identified, they were reviewed. Those communications were either not, on review, responsive to the DLOI or were privileged.

73.3. We satisfied ourselves, based on information provided by DLAL, of the existence of documents held by DLAL, pursuant to its role for the KAG, which PIFSS did not have and was not entitled to review or inspect.

73.4. Investigations, supervised by Stewarts, have also been carried out of documents held by DLAL on behalf of PIFSS.

74. As explained above, Stewarts was instructed to act for PIFSS in May 2015, shortly after DLAL's appointment as PIFSS's representative. Stewarts has contemporaneous knowledge of DLAL's work for PIFSS and with that knowledge it was able to supervise the review of DLAL's documents in a properly informed way.

75. In light of the above, I consider that the relief sought by the Man Defendants, has already been carried out and no further action is required. I confirm that PIFSS has no right to access documents held by the DLAL pursuant to any role for the KAG.”

129. In his oral submissions, Mr Ritchie explained that paragraph 73.4 essentially concerned any document that was not an e-mail or a letter. It could therefore be (for example) a document brought into being for privileged purposes, or a contemporaneous document, or an attachment to an e-mail. He also emphasised the point made in paragraph 74: there had been some 9 years of interaction between DLAL and Stewarts, which enabled the latter properly to inform itself as to what was required. He made the further point that many of the defendants in the present proceedings will have had overseas lawyers advising them. He suggested that it was unlikely that any of those parties would, in relation to the documents held by their overseas lawyers, have done anything beyond the work that Stewarts had done in relation to DLAL.
130. Mr Smouha criticised paragraph 73 of Mr Haworth's statement as being “cryptic”. I do not agree that it is cryptic, although I do accept that paragraph 73.4 benefited from the further explanation which Mr Ritchie gave in his submissions.
131. Mr Smouha's principal point, however, was that the searches that had been carried out were inadequate, because they had not taken into account what he described as the “dual representation” of both PIFSS and the KAG. He therefore submitted that Mr Haworth could not properly be satisfied of the existence of “documents held by DLAL, pursuant to its role for the KAG, which PIFSS did not have and was not entitled to review or inspect”. It seemed to me, however, that this was really another way of putting the “control” argument which I have rejected.
132. I also consider that the concept of “dual representation” is not a helpful expression, and can be misleading. It is correct that DLAL were instructed by both PIFSS and the KAG. However, there is nothing which indicates that there was anything in the nature of a joint retainer. The appointment of DLAL to act for PIFSS was (on Mr Haworth's evidence) made in March 2015 pursuant to a decision of the Council of Ministers in Kuwait dated 19 January 2015. There is nothing to suggest that the appointment by PIFSS in March 2015 was also an appointment to act for the KAG. In fact, it appears that DLAL had been acting for the KAG for some considerable time prior to January 2015, in relation to the Kuwaiti criminal process which then led to the MLA request. Subsequent to January 2015, DLAL continued to act for the KAG: the MLA request to the United Kingdom is a good example, and no doubt there were others (for

example the Kuwaiti criminal proceedings which culminated in the June 2019 conviction). However, there is nothing to suggest that, when DLAL was acting for the KAG on those matters, PIFSS was also its client on those matters, or that there was a free flow of information. In fact, the evidence is to the contrary: PIFSS did not receive the UK MLA materials, and did not receive the Kuwaiti criminal file.

133. I therefore reject the “dual representation” argument as a reason for concluding that, in the words of paragraph 17 of the Practice Direction, there has been or may have been a failure by PIFSS adequately to comply with the order for extended disclosure.
134. Furthermore, I have not been persuaded that, in relation to DLAL’s documents, there has been or may have been any failure adequately to comply with the order for extended disclosure. Nor have I been persuaded that it would be reasonable and proportionate to make any further orders pursuant to that paragraph. I see no reason to criticise the adequacy of the steps which have been taken by Stewarts in relation to DLAL’s documents. In the context of the engagement of overseas lawyers by a party to litigation, it is obvious that the vast majority of the documents exchanged or received pursuant to their mandate are likely to be privileged. There may be cases where it will nevertheless be reasonable and proportionate to require a litigating party to take further steps in relation to the documents of its foreign lawyers. I have not been persuaded that such is the case here. Indeed, the wide-ranging order sought by Man (“PIFSS shall search and review documents held by the Kuwaiti Department of Legal Advice and Legislation for the purpose of giving disclosure in the proceedings”) is not focused, pays no regard to the work that has been done, and is not reasonable and proportionate. Neither Mr Smouha nor Mr Weisselberg suggested that, in relation to the documents of overseas lawyers, their clients had done a disclosure exercise which was more extensive than that carried out by Stewarts.
135. Accordingly, I reject the applications in so far as they concern the documents of DLAL.

E4: Kuwait State Audit Bureau

136. Man seeks an order that PIFSS request certain reports from the Kuwait State Audit Bureau. In its written argument, Man submitted that PIFSS was “clearly best placed of the parties to do so”. This aspect of Man’s application was addressed only briefly by Mr Smouha in his oral submissions, the gist being that this was a relatively easy thing for PIFSS to do and that they were “looking for some constructive assistance from PIFSS to get these”.
137. Mr Haworth’s evidence was that the Kuwait State Audit Bureau was a distinct supervisory body of the State of Kuwait. PIFSS had no control over the State Audit Bureau’s personnel or its operations or right to inspect its personnel’s documents. There was no basis upon which PIFSS could include individuals from the State Audit Bureau as custodians for the purpose of calling for, searching or reviewing their documents. However, PIFSS had conducted a search for State Audit Bureau reports in its control, both on its electronic systems and in its hard copy repositories, and had made disclosure of those responsive to the DLOI.
138. I did not consider that there was any basis for a conclusion that PIFSS had practical control of reports of the Kuwait State Audit Bureau. Mr Smouha suggested that it was

to be inferred that PIFSS had an entitlement to get from the State Audit Bureau reports which concerned PIFSS. It did not seem to me that there was any factual basis for that inference. Indeed, since the reports are (on PIFSS' evidence) publicly available, it is unlikely ever to have been necessary for PIFSS and the State Audit Bureau to have made a standing arrangement whereby PIFSS was to be allowed access to the State Audit Bureau's documents.

139. In the absence of any case of control, the court has no jurisdiction to require PIFSS to make requests of third parties such as the State Audit Bureau: see *Various Airfinance* discussed in Section B3 above. The fact that it might be relatively easy for PIFSS to do so does not mean that the court should order them to do so.
140. I therefore reject this aspect of the application.

E5: Parliamentary Committees and related orders sought by D1 and D2

141. D1 and D2 seek an order in the following terms:

“PIFSS shall within 14 days provide a witness statement containing a detailed description of PIFSS's access to documents held by (i) Kuwaiti Parliamentary Committees (“the Committees”) and (ii) the Kuwaiti State Audit Bureau (“SAB”), which shall include representatives of each Committee) that have investigated Mr Al Rajaan. The witness statement shall include (i) a description of how documents are accessed by/shared with PIFSS, including whether PIFSS has access (whether to see and/or receive copies) to documents held by the Committees or SAB (including any legal basis for PIFSS's position), how often PIFSS has made requests for documents and the response from the Committee or SAB, including how the Committee or SAB exercises any “discretion” to share documents, (ii) the types of documents made available by the Committee or SAB, (iii) the volume of documents that have been withheld pursuant to the common interest privilege claim.”

142. This proposed order therefore concerns, in addition to the State Audit Bureau, Kuwaiti Parliamentary Committees. Mr Haworth's evidence is that PIFSS has searched for, reviewed, and disclosed all communications in response to Parliamentary enquires within its control. This has resulted in disclosure by PIFSS of a substantial volume of documents which the defendants have, according to their interests, referred to extensively in their evidence and correspondence. PIFSS has no control over Parliament or its committees and has no right to inspect documents held by Parliamentarians. There is no basis upon which PIFSS could include individuals from Parliament or its committees as custodians for the purpose of calling for, searching or reviewing their documents.
143. I did not consider that there was any basis for a conclusion that PIFSS had practical control of documents held by Parliamentarians, including Parliamentary committees. Indeed, I did not understand Mr Weisselberg to contend otherwise, and he did not identify any evidence which would enable me to reach a conclusion that there was

such practical control. In his oral submissions, he accepted that there was insufficient evidence to reflect a finding of control in relation to both Parliamentarians and the State Audit Bureau.

144. The proposed order, as it seems to me, aims to obtain evidence in support of a case of practical control which D1 and D2 are presently unable to advance. I do not consider that there is any justification for making such an order. On the evidence of Mr Haworth, the position is that PIFSS has complied with its disclosure obligations by searching for and disclosing communications in response to Parliamentary enquiries. There is nothing which suggests that there has been or may have been a failure by PIFSS adequately to comply with the order for extended disclosure, and therefore there is no basis for any further orders pursuant to CPR PD 57AD paragraph 17.
145. In so far as paragraph 3 of D1 and D2's proposed order is aimed at documents of the Kuwait State Audit Bureau, the application fails for similar reasons as well as the reasons set out in Section E4 above.
146. Paragraph 4 of D1 and D2's proposed order covers much of the same ground, as far as Parliamentary Committees and the Kuwait State Audit Bureau are concerned, and also extends the subject matter of the witness statement to the KAG and DLAL. I have already addressed the substance of this proposed order. In summary, I have not been persuaded that PIFSS has practical control over documents of any of the (as D1 and D2 describe them) relevant agencies, nor that there has or may have been a failure adequately to comply with an order for extended disclosure. I do not consider that there is any justification for the order that is sought.

E6: KPMG

147. Man's proposed order in relation to KPMG is as follows:

“PIFSS shall:

7.1 search for and disclose documents held by KPMG by 1 March 2024, to include the following documents: (i) the documents provided to Stewarts by KPMG in the week commencing 11 December 2023; (ii) any notes of interviews conducted by KPMG during the course of their investigation; (iii) any documents by KPMG received from third parties during the course of their investigation; and (iv) correspondence between KPMG and PIFSS relating to KPMG's terms of engagement; and

7.2 make all reasonable attempts to contact Doctors Sartawi, Al Obaidan and Al Kandari for the purposes of disclosing documents held by those individuals.”

148. One of the points that Mr Ritchie made about this proposed order (and indeed many of the similar orders which Man sought) was that it was impossible to see how it could be complied with. The order required PIFSS to “search for and disclose documents held by KPMG”. Were such an order to be made, PIFSS would have to comply with it, and would risk the imposition of a sanction if it were to fail to do so.

He submitted that where there was a fact pattern which justified a conclusion that a third party's documents were under the control of a litigant, it would usually be relatively easy for the court to fashion an order which could be complied with. Where, however, the court could not see how the order could realistically be complied with, then that was a point that tended to demonstrate that the documents sought were not under the control of the litigant, here PIFSS. I agree with this submission, and in my view it is illustrated by the position in relation to KPMG.

149. Were the court to order PIFSS to search for and disclose KPMG's documents, I do not understand what, in practice, PIFSS could do. KPMG were engaged in 2008 pursuant to an engagement letter dated 2 January 2008. The letter incorporated KPMG's General Terms of Business. There is nothing in the letter, or the terms of business, which creates an agency relationship between PIFSS and KPMG. Rather, as Stewarts had explained in correspondence, and Mr Haworth reiterated in his witness statement, the relationship between PIFSS and KPMG was one of client and professional adviser. There is nothing in the engagement letter which provides that PIFSS is to have access to or practical control of KPMG's documents. That would not be expected in the context of a relationship between a client and an accountancy/consulting firm such as KPMG, and so it is not surprising that it is not there. In fact, the standard terms of business make it clear, in my view, that KPMG's documents are not PIFSS' documents. Clause 9 provides as follows:

“We shall retain ownership of the copyright and all other intellectual property rights in the product of the Services, whether oral or tangible, and ownership of our working papers. You shall acquire ownership of any product of the Services in its tangible form on payment of our Charges for any such product. For the purposes of delivering services to you or other clients, we and other KPMG Persons shall be entitled to use, develop or share with each other knowledge, experience and skills of general application gained through performing the Services.

The Services shall be delivered on the basis that you shall not quote our name or reproduce our logo in any form or medium without our prior written consent.”

150. I did not understand Mr Smouha ultimately to press an argument that all of KPMG's documents relating to this engagement were documents over which PIFSS had legal or practical control. In so far as such an argument was advanced, I reject it as inconsistent with the nature of the relationship between PIFSS and KPMG as client and professional adviser (as to which, see the *Faraday* case discussed in Section E8 below), as well as the specific terms of the engagement letter. There is also nothing in the dealings between PIFSS and KPMG which gives rise to any suggestion of practical control. In fact, in the context of the disclosure exercise, PIFSS had asked, in October 2023, KPMG to provide documents held pursuant to its retainer. In December 2023, KPMG had provided a USB stick containing various documents, but not including its working papers. PIFSS' skeleton argument made it clear that those documents would be disclosed, and in my view it is not necessary to have an order to that effect.

151. Mr Smouha did argue, however, that the notes of interviews conducted by KPMG during the course of their investigation would not form part of their working papers. I am unable to see why that should be so. If KPMG, as part of their work, decide to interview certain individuals, and take notes (or even a transcript) of their interviews, those would seem to me to be part of their working papers. Under both the general law (see Section E8 below), and the engagement letter, these are the documents of KPMG, not PIFSS.
152. Accordingly, I do not consider that there is any basis for the substance of the order sought by Man under paragraph 7.1 of its proposed order.
153. The second part of the order sought by Man (paragraph 7.2) proposes that PIFSS should make all reasonable attempts to contact certain individuals. These are three members of the committee which considered proposals for the professional services which subsequently were provided by KPMG. The individuals were not PIFSS employees or directors, and Mr Haworth's evidence is that PIFSS did not have control over their documents, in so far as they do not exist at PIFSS in either hard copy or electronic form. I did not understand Man to contend otherwise, and I was not referred to any materials which suggested that PIFSS had legal or practical control over the documents of these individuals. Indeed, the draft order which requests that PIFSS makes reasonable attempts to contact those individuals rather acknowledges that lack of control.
154. Since, for reasons already given (see *Various Airfinance*), the court's jurisdiction depends upon documents being in the control of the party against whom an order is sought, there is no basis for the order sought under paragraph 7.2 of Man's proposed order.

E7: EY

155. EY were instructed in January 2015 to carry out a governance review. A lengthy report was produced, and this (amongst other materials) has been disclosed.
156. As far as control is concerned, I reach the same conclusion as I have reached in relation to KPMG. The relationship was again client and professional adviser, and there is nothing which would entitle – as Man's order seeks – PIFSS to “search for and disclose relevant documents held by Ernst and Young”. The terms of EY's engagement are not identical to those of KPMG, but there is nothing in those terms which gives PIFSS any legal or practical control of EY's documents.
157. On the contrary, clause 3 makes it clear that the relationship between the parties is not one of agency, and that EY is an independent contractor. Although the terms envisage that PIFSS will receive a report, they are very restrictive as to the use which PIFSS can make of the report. Clauses 12 - 15 contain restrictions on PIFSS' disclosure and use of the report:

“12. You may not disclose a Report (or any portion or summary of a Report) externally (including to your affiliates), or refer to us or to any other EY Firm in connection with the Services, except:

- (a) to your lawyers (subject to these disclosure restrictions), who may review it only in connection with advice relating to the Services,
- (b) to the extent, and for the purposes required by law (and you will promptly notify us of such legal requirement to be extent you are permitted to do so),
- (c) to other persons (including your affiliates) with our prior written consent, who have executed an access letter substantially in the form of **Appendix C**, who may use it only as we have specified in our consent, or
- (d) to the extent it contains Tax Advice, as set forth in **Section 13**.

If you are permitted to disclose a Report (or a portion thereof), you shall not alter, edit or modify it from the form we provided.

An “**affiliate**” of an entity (for the purposes of this Agreement) shall mean an entity or individual that controls, is controlled by, or is under common control with, the first entity, and “**control**” mean the ability to direct the policies or operations of an entity, whether by contract, ownership or equity interest, or otherwise.

13. You may disclose to anyone a Report (or any portion thereof) solely to the extent that it relates to tax matters, including tax advice, tax opinions, tax returns, or the tax treatment or tax structure of any transaction to which the Services relate (“**Tax Advice**”). With the exception of tax authorities, you shall inform those to whom you disclose Tax Advice that they may not rely on it for any purpose without our prior written consent.

14. You may incorporate into documents that you intend to use our summaries, calculations or tables based on Client Information contained in a Report, but not our recommendations, conclusions or findings. You must assume sole responsibility for the contents of those documents and you must not externally refer to us or any other EY Firm in connection with them.

15. You may not rely on any draft Report. We shall not be required to update any final Report for circumstances of which we become aware, or events occurring, after its delivery.”

158. Clauses 23 and 24 then provide as follows:

“23. We may use data, software, designs, utilities, tools, models, systems and other methodologies and know-how (“**Materials**”) in performing the Services. Notwithstanding the

delivery of any Reports, we retain all intellectual property rights in the Materials (including any improvements or knowledge developed while performing the Services), and in any working papers compiled in connection with the Services (but not Client Information reflected in them).

24. Upon payment for the Services, you may use any Materials included in the Reports, as well as the Reports themselves as permitted by this Agreement.”

159. The effect of the agreement as a whole is therefore to give PIFSS only very limited rights in relation to the report itself, and the “Materials” in the report. The existence of such limited rights in the report itself is, as Mr Ritchie submitted, inconsistent with the idea that PIFSS has any, let alone extensive, rights in relation to EY’s working papers and other documents. Man’s written and oral argument did not, in my view, address or grapple with the points which PIFSS had made in relation to the effect of the engagement letter, and its inconsistency with any suggestion that PIFSS had legal or practical control of EY’s documents.
160. Accordingly, it is not appropriate to make orders sought on the basis of PIFSS’ alleged control of EY’s documents.

E8: WAFRA

161. WAFRA is a US-based investment manager which is a wholly owned subsidiary of PIFSS. PIFSS retained WAFRA in February 2015 to conduct commercial advisory services in relation to certain of PIFSS investments, including a review of PIFSS’ commercial terms with investment managers. The work was spread over three projects which commenced between May 2015 and February 2017.
162. The work was carried out pursuant to a signed agreement pursuant to which WAFRA would provide “Consulting and Advisory Services” in return for certain fees. In relation to the issue of control, Mr Haworth’s evidence is that PIFSS does not have control over WAFRA’s documents, save to the extent that documents constitute finished work product and were produced pursuant to services provided by WAFRA to PIFSS. He says that PIFSS does not have a right to call for WAFRA’s internal communications or working papers.
163. Man’s principal application in relation to WAFRA was for disclosure by PIFSS of WAFRA’s documents which comprised “communications and interview notes whilst undertaking the investigation”.
164. It is not appropriate to make this proposed order. The relationship between PIFSS and WAFRA under the Consulting and Advisory Services agreement is a relationship of client and professional adviser/service provider. There is no reason why such a relationship cannot exist between parent and subsidiary. There is nothing in the agreement which creates a relationship of principal and agent.
165. Man submitted in its skeleton argument that the terms of engagement “do not support the assertion that PIFSS is only entitled to final work product”. It is true that the terms of engagement are not as detailed and restrictive as those of KPMG and EY.

However, as Mr Ritchie correctly submitted, it is for Man to show that, pursuant to the terms of engagement, PIFSS is entitled to receive WAFRA's working papers, which is essentially the subject-matter of the request for "communications and interview notes whilst undertaking the investigation". This proposition is supported by *Leicestershire CC v Michael Faraday* [1941] 2 KB 205. Whilst this is now an old case, the basic principle which it establishes – namely that the working papers of a professional belong to the professional and not the client – is one which is well-known and firmly established. MacKinnon LJ in that case rejected an argument that the contract gave Leicestershire CC a right to the working papers of the professional, a rating valuer. He continued at 215:

"If there is nothing in the contract on which the plaintiffs can rely to establish that they are right in saying that these pieces of paper are their property, by what rule of law otherwise can they assert that that is so? I know of none. Some reference has been made to, and reliance placed on, one or two cases which were cited by Mr. Macaskie, such as *Lady Beresford v. Driver* (1) and *Gibbon v. Pease* (2), but I think that those cases are radically different from the present case, as being concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over, but the present case is emphatically not one of principal and agent. It is a case of the relations between a client and a professional man to whom the client resorts for advice. I think it would be entirely wrong to extend to such a relation what may be the legal result of the quite different relation of principal and agent. These pieces of paper, as it seems to me, cannot be shown to be in any sense the, property of the plaintiffs, any more, as I suggested to Mr. Macaskie during the argument, than his solicitor client or his lay client could assert that his notes of the argument he addressed to us could be claimed to be delivered up by him when the case is over either to the solicitor or to the lay client. They are documents which he has prepared for his own assistance in carrying out his expert work, not documents brought into existence by an agent on behalf of his principal, and, therefore, they cannot be said to be the property of the principal."

166. Man also submitted that even if there was no such right, PIFSS can and should be ordered to ask WAFRA for the documents, and relied on the decision of Turner J in *BES Commercial Electricity Ltd v Cheshire West and Chester BC* [2020] EWHC 701 (QB). However, as Mr MacDonald Eggers correctly said in *Various Airfinance*, that was a case where the documents were within the litigating party's control. In those circumstances, there is no difficulty in making an order that the party should ask for the documents. As previously discussed, *Various Airfinance* establishes that this cannot be translated into an order where there is no such control.

167. Man also relied upon the fact that, as Mr Haworth explains in his witness statement, WAFRA have recently provided certain documents to PIFSS pursuant to a request which PIFSS made. As I understand it, such documents, where responsive to the DLOI and non-privileged, either have been or will be disclosed. Contrary to Man's submission, I do not consider that the provision of documents in response to a specific request made in the context of the present litigation provides evidence of a relevant practice which demonstrates control; see Males J in *Ardila* discussed above.
168. There has also been a claim for privilege in relation to certain WAFRA documents. Mr Haworth explains in his statement that privilege is claimed over communications with WAFRA and other documents involving WAFRA created for the dominant purpose of this litigation or created for the dominant purpose of other potential litigation involving PIFSS' investments. Man's skeleton acknowledges that such a claim is not controversial as a matter of principle. However, Man says that this requires more explanation, in particular as to the date from which PIFSS claim that litigation privilege arises, and as to the date of the relevant WAFRA/PIFSS correspondence over which privilege is claimed. Man seeks the provision of a witness statement identifying those matters.
169. I do not consider that it is appropriate to make such an order. The decision in *West London Pipeline* shows that it is not routine for the court to make further orders in relation to claims for privilege, simply because a party would wish to have more information. There are circumstances in which the court will do so, when the court is concerned that (as Mr Ritchie summarised it) something has gone wrong or may have gone wrong. It is, regrettably in my view, becoming increasingly common for parties, at CMCs, to apply for orders for further information as to aspects of the disclosure work carried out by an opposing party, essentially in order to check that it had done that work properly. I do not consider that the court should be burdened with such requests. It is different if a party can show that something has gone wrong in the disclosure process and to make an application on that basis. I said this in a ruling in a CMC (in a different case) a few months ago in relation to a request for further information as to the basis upon which a disclosure statement had been signed:

“It does seem to me that if a responsible partner of a firm of solicitors has signed a disclosure statement that one should proceed on the basis that he has done so properly, not least because of his signature that he is aware that proceedings for contempt of court can be brought if he signs a false statement.

The courts normally proceed on the basis that responsible partners in solicitors firms make statements which are to the best of their knowledge true and I see no reason why I should take a different approach here. The proposed order seeks to interrogate those responsible for the disclosure process by way of providing details of those who have contributed to it. Whilst it may be that in some cases a court might be so concerned as to the approach to disclosure that some further orders might be made with a view to enabling the parties and the court to understand what has happened, this would be an exceptional course. Ordinarily, the statement of a responsible partner would not be sufficient to satisfy the court, and there is nothing in the

terms of the standard form disclosure statement which indicates that further interrogation or particulars are required as to the matters which contributed to the partner's decision that the disclosure statement could be signed.”

170. I consider that I would need a good reason to make the order that Man has proposed (and similar orders have been proposed by D1 and D2 in different contexts), and I do not consider that there is any good reason here. PIFSS' approach to privilege in relation to WAFRA's documents is set out in Mr Haworth's statement, and has been explained in PIFSS' skeleton argument and Mr Ritchie's submissions. In summary, there is no claim for privilege in relation to work carried out by WAFRA as a service provider for PIFSS, but there is a claim in respect of “documents from 2015 onwards where the dominant purpose was contemplated litigation against (at least) Mr Al Rajaan”. There is nothing which suggests to me that something has, arguably, gone wrong with PIFSS' approach to privilege in this regard. Given the engagement of DLAL, Stewarts and forensic accountants in 2015, it would be most surprising if there were a realistic challenge to a claim for litigation privilege starting in 2015.
171. Finally in relation to WAFRA, D1 and D2 seek an order which will reflect a paragraph in Mr Haworth's witness statement as to enquiries which PIFSS would be making. It suffices to say that I do not consider that such an order is necessary or appropriate. If it were to transpire that there is a significant delay in PIFSS providing an update pursuant to those enquiries, then an order might possibly be appropriate.

E9: Other orders sought by Man or D1 and D2

172. It is convenient at this stage to address other orders sought by Man and D1 and D2 and which are not covered by the above.
173. Man seeks an order under paragraph 3 of its proposed draft in relation to documents which evidence recoveries made against the assets of the late Mr Al Rajaan. A similar order is sought by D1 and D2. This order was principally directed at documents of the KAG concerning possible recoveries in confiscation proceedings relating to criminal proceedings against Mr Al Rajaan. That aspect of the application fails, because such documents are not within PIFSS' control. However, as I indicated to Mr Ritchie at the hearing, I considered that PIFSS should carry out a reasonable search to locate any documents which it holds relating not only to recoveries which it has made, but also as to whether the KAG (or the State of Kuwait) has made any such recoveries. I did not understand this to be controversial. It is not clear to me that an order is actually required. But if it is, then an order along the lines of paragraph 3 would be appropriate, with the omission of any reference to documents in the possession of the KAG or the KPP.
174. Man seek an order under paragraph 4 of its proposed draft as follows:
- “4. PIFSS shall by 1 March 2024:
- 4.1 produce all communications with the KAG / the KPP and / or any documents provided by the KAG / the KPP to PIFSS which have been separately disclosed by D1/D2 and which were originally withheld by PIFSS on the grounds of privilege;

4.2 re-review the privilege claimed in relation to all communications with the KAG / the KPP and / or any documents provided by the KAG / the KPP to PIFSS, for the purpose of producing all documents over which privilege can no longer be claimed.”

175. The origin of this proposed order is the disclosure by D1 of certain documents which were disclosed to Mr Al Rajaan in the course of one or more of the criminal proceedings against him, but which have not been disclosed by PIFSS. It is apparent that at least some of these documents, such as two reports written by Mr Neyroud, had been given to PIFSS. Man asks the question: why have the documents not been disclosed by PIFSS? PIFSS’ answer to that question, as explained in Mr Haworth’s witness statement, and in Mr Ritchie’s written and oral submissions, is that there is privilege in relation to documents which were provided by the KAG to PIFSS in 2015 and 2016, and that privilege has not been lost by reason of the disclosure of some documents by the KAG to Mr Al Rajaan in the course of the criminal proceedings.
176. It is not necessary to describe in detail the basis of PIFSS’ claim for privilege, or the argument as to why confidentiality in the documents was not lost. This is because Mr Smouha indicated that these issues were not for determination at the present stage. His written and oral argument did not therefore address the arguments which Mr Ritchie advanced.
177. I do not consider it appropriate to make an order in the terms of paragraph 4 at this stage. Paragraph 4 seems to me to depend, largely if not exclusively, on Man showing that PIFSS’ privilege/confidentiality arguments are ill-founded. If that issue is debated and resolved in Man’s favour, then it may be that some order reflecting some or all of paragraph 4 may perhaps be appropriate. However, I cannot anticipate that result. I am certainly not persuaded that an order in the terms of paragraph 4 is necessary at the present stage in order to enable the contours of the argument to be identified. PIFSS’ case has been explained by Mr Ritchie in his written and oral submissions, including reference to authority relied upon. If Man disputes that case, and consider it sufficiently important to ventilate it further, then it can do so and I will resolve the argument.
178. Paragraph 5 of Man’s proposed order seeks an order in relation to certain documents which have been withheld on grounds other than privilege. This, again, has been explained in Mr Haworth’s evidence, and in Mr Ritchie’s written and oral argument. It relates to certain documents which are subject to international law restrictions against use in these proceedings pursuant to the 2003 UN Convention Against Corruption and the 2000 UN Convention Against Transnational Organised Crime. I do not consider that any order is required at this stage. PIFSS has sought permission to review this material for the purposes of disclosure and, if permission is granted, will disclose any responsive documents. An order is not necessary at this stage. It may be that any issue will be resolved by the grant of permission by the appropriate authorities. If it is not resolved, the issue can be raised at a later CMC.
179. Man also sought an order, under paragraph 6 of its proposed draft, for disclosure of documents of the Kuwait Investment Authority. Reference was made in that regard to paragraphs 26 and 27 of Mr Burrell’s witness statement. Those paragraphs did not in fact refer to the Kuwait Investment Authority, and I did not consider that there was

any evidence which would support a conclusion that the documents of that body were under the legal or practical control of PIFSS.

180. Man also sought, under the same paragraph, an order for disclosure of the written conclusions of the Technical Committee in relation to the options trading in 1995 to 1997 (including those referred to in the Al Rashed complaint). Ms Dilnot accepted, in her oral argument, that this particular point had not been covered in Mr Haworth's evidence. However, she said that appropriate searches had been carried out and no such document had been located. However, in any event, PIFSS was willing to carry out further keyword searches of its documents, and had proposed these to Man. I did not understand Man to be contending that there was a different argument, relating to control, concerning this "Technical Committee", to those which I have already considered. In those circumstances, Ms Dilnot's suggestion of further keyword searches, to be agreed between the parties, is in my view the appropriate way to proceed.

F: EFG's application

F1: Documents of PIFSS' non-executive directors

EFG's application and argument

181. EFG's principal application concerned documents sent to, by or referring to PIFSS' non-executive board members. It was common ground that non-executive board members made up the entirety of the board from time to time, other than the Director General, namely Mr Al Rajaan himself. The applications were rooted in the fact that PIFSS' searches of its own electronic documents had not identified a single disclosable e-mail sent to or from any of those individuals. This too was common ground, and EFG submitted that this was very surprising. Against that backdrop, EFG submitted that something had clearly gone wrong with PIFSS' approach to disclosure. It therefore sought precise explanations of the requests PIFSS has made to its former board members. This would assist EFG in any decision to formulate a focused request for third party disclosure (e.g. using the letter of request procedure) from the non-executives themselves. EFG also submitted that further keyword searches should be carried out.
182. EFG submitted that the documents sought were responsive to the DLOI (the disclosure list of issues). As with the application made by Man, they said that PIFSS' knowledge of or suspicions as to Mr Al Rajaan's corruption, including his receipt of secret commissions on investments, and the steps PIFSS took or failed to take in the face of the allegations against him, were critical issues for trial. As with Man, no point on relevance/responsiveness was taken by PIFSS.
183. EFG submitted that the various allegations which were made over the years must have been discussed repeatedly, both between PIFSS' directors, and between them and PIFSS' employees. Any competent and reputable institution faced with repeated and mounting public allegations that its most senior manager was corrupt would take extensive steps to protect its position. Its board would have been in close and regular contact, including by e-mail, assessing what steps were appropriate, and how to proceed, and it would investigate. Internal messages exchanged between directors, and between them and PIFSS' employees including by e-mail, are likely to cast

considerable light on the knowledge and motivations of the board members. As Ms Rogers put it in her oral submissions, EFG would in due course submit that PIFSS' successive boards were asleep at the wheel. Although the evidence indicated that PIFSS had made requests to its former non-executive directors, this had produced desultory results. PIFSS' searches of its own documents had resulted in only 1,500 e-mails, and some important e-mails – which have emerged from other sources – have not been located and disclosed.

184. Accordingly, PIFSS should provide a precise explanation as to what the relevant Chairmen and other board members had been invited to search for and provide, as to document repositories, date ranges and so forth. It would be simplest in this regard for PIFSS to provide copies of its correspondence with the directors, redacted if necessary to remove text over which PIFSS asserts privilege. But if PIFSS was not willing to provide such documents, EFG sought an explanation as to the requests which had been made of Dr Al Rashed and the other non-executive directors, as well as a specific explanation from Dr Al Rashed as to why he had not provided a copy of his September 2008 criminal complaint against Mr Al Rajaan.
185. In addition, EFG sought an order that PIFSS should apply the following terms as additional stand-alone search terms in English and Arabic translation as appropriate: (a) First name; (b) Surname; (c) E-mail address (insofar as known to PIFSS); and (d) Telephone number (insofar as known to PIFSS). By way of illustration, if any director had the first name Mohammed (or a variation), that should be used as a search term. This was preferable to what Ms Rogers said was PIFSS' current approach, which had been to use a search term which included all the names of the particular individual: a full name formulation might capture documents where the full name had been used, for example attendance at a meeting. But it would not capture less formal references. However, EFG recognised that its approach might produce an unmanageable number of documents, and accordingly its proposed order acknowledged that there should be “exclusionary terms to be agreed to ensure proportionality”; in other words, the search of “Mohammed” would have an appropriate “connector” to other words which could be agreed between the parties. Although PIFSS had carried out various searches based on keywords, those existing key words would not or would not necessarily capture all relevant exchanges. Issues as to Mr Al Rajaan's conduct were plainly sensitive. And although searches had been carried out using the words “Al Rajaan”, and other words, there was the possibility that communications may not refer to Mr Al Rajaan by name at all, or to the other keywords in PIFSS' existing list. EFG's solicitors would therefore ask Stewarts to remove terms that produce excessive responses and to agree qualifying or exclusionary terms.

PIFSS' evidence and argument

186. PIFSS submitted that the proposed orders were not appropriate. Mr Haworth's evidence showed that a reasonable and proportionate disclosure process had been carried out.
187. Mr Haworth's evidence on the present issue in his sixth witness statement was in summary as follows. At the relevant time, all of the members of PIFSS' board, and its Investment Committee, were non-executives (apart from Mr Al Rajaan). None of them had offices at PIFSS or any presence on PIFSS' IT systems. Those individuals could not therefore be made “custodians” for the purposes of the disclosure exercise.

Mr Haworth did not understand EFG to be alleging that PIFSS had control over the documents of non-executive directors. But the position was that, as a matter of Kuwaiti law, directors were not entitled to retain originals or copies of official documents received by them in the course of their directorship. A number of the directors from whom PIFSS had requested documents had made the point that they were not allowed to retain documents.

188. Nevertheless, and irrespective of whether there was a legal right to obtain such documents, PIFSS had taken reasonable and practical steps to obtain documents, and to continue to chase. PIFSS had sought to make enquiries of 66 board members to ascertain whether they hold any paper or electronic documents. If they did hold documents, they were requested to identify and return them. As at December 2023, 39 had responded, 17 were deceased or could not be located, and PIFSS was continuing to seek responses from the remaining 10 directors who had not yet responded. 5 directors had delivered up documents to PIFSS, and these had been reviewed for the purposes of disclosure. Mr Haworth explained that the letters requesting documents had included requests for details of electronic documents held, including confirmation as to where documents (both electronic and hard copy) were held relating to their time as directors of PIFSS. PIFSS purposely had not sought to place any restrictions on the types of documents requested from directors. PIFSS had made and is continuing to make further attempts to contact directors who had not responded.
189. As far as keyword searches are concerned, PIFSS had not only used each director's full name, it had also used a broader version of the name in the format first name within 5 words of surname. It had further run keyword searches of the surnames of certain directors in isolation. EFG's proposal for wider search terms would produce an unmanageable number of documents. For example, a search using directors' first names, which include very common names in Kuwait, would produce over 140,000 documents for review. Similarly, Al Sabah is a surname not only of some of the directors, but a number of PIFSS' employees. A search of that name would produce over 94,000 documents for review. A search based on telephone numbers or email addresses would be unlikely to be fruitful. It was not clear how PIFSS could now obtain details of phone numbers used many years ago, or e-mail addresses, and there was no evidence of e-mail use by the directors.
190. Mr Haworth's statement also addressed the steps taken specifically in relation to Dr Al Rashed. As with the other directors, his documents were not under PIFSS' control. However, Stewarts had specifically discussed the request for documents with Dr Al Rashed in order to understand what documents he may hold, and a limited number of documents were identified, which had been reviewed and disclosed where relevant. In relation to Dr Al Rashed, however, PIFSS was agreeable to carrying out certain additional keyword searches.
191. PIFSS made a number of proposals in order to advance matters. In a letter dated 24 January 2024 (the day of Ms Rogers' submissions), Stewarts said:
- “PIFSS's position remains that there is no evidence that directors communicated by email. However, and without prejudice to this, we consider that the most direct and likely profitable route to obtaining any such material, if it exists, would be for PIFSS to write to the directors who served at

PIFSS during a period when electronic communications could have been used and ask them specifically to confirm whether they have in their possession, including on their personal mobile phones or email accounts, any communications with any other director or directors of PIFSS which relate to Mr Al Rajaan, including any text messages or other form of instant messages. If so, PIFSS would request that such directors voluntarily provide copies of such communications to PIFSS.

We propose that directors who served at PIFSS at any time between 1 January 2004 and 31 December 2014 be contacted. They would be directors with potentially relevant contemporaneous knowledge, and who conceivably could have used electronic communications. We do not consider it realistic that directors who left PIFSS prior to 1 January 2004 would have communicated electronically or would realistically have retained any such communications.”

192. In addition, in the course of her oral submissions, Ms Dilnot said that PIFSS would be willing to consider further keyword searches of its documents, if more confined search terms and connectors were proposed by EFG and this produced a manageable number of documents. She also proposed that PIFSS should speak again to Dr Al Rashed.
193. Ms Dilnot’s principal submission, however, was that PIFSS had carried out its disclosure obligations properly. Appropriate searches had been carried out. The absence of e-mail communications involving directors was unsurprising, given that the non-executive directors did not have e-mail accounts at PIFSS and the fact that e-mail was not in significant use at PIFSS for much of the relevant period.

Discussion

194. I deal first with EFG’s application in so far as it concerns the documents of the non-executive directors. I did not understand EFG to submit that their documents were under PIFSS’ control, whether legal or practical. Indeed, there was no evidence to contradict Mr Haworth’s evidence that they were not. In those circumstances, and for reasons previously discussed, I do not have jurisdiction to make orders which require PIFSS to take further steps in relation to documents which they do not control. There has been no failure, in regard to these documents, to comply with the order for extended disclosure, and therefore no order is appropriate under paragraph 17 of Practice Direction 57AD.
195. Even if I had that jurisdiction, I was not persuaded that there had been any failure by PIFSS to take reasonable and proportionate steps to obtain documents from the non-executive directors including Dr Al Rashed. It seemed to me that such steps had indeed been taken, albeit this does not appear to have resulted in the production by the directors of large volumes of documents. I also consider that PIFSS’ proposal, in Stewarts’ letter dated 24 January 2024, is a sensible one, and I would expect (but do not order) such steps to be carried out. Ms Rogers in her oral argument suggested that the request should be expanded so as to include documents that the directors “hold with other political figures, other Kuwaiti individuals, whoever it might be”. It

seemed to me that this would potentially impose quite a significant search burden on the non-executive directors, and might indeed discourage them from searching at all. However, I will leave it to Stewarts to consider, with its client, whether to widen their proposal in the manner proposed by Ms Rogers, and I make no order in that regard. As indicated above, Ms Dilnot also proposed that Stewarts should speak again to Dr Al Rashed. That proposal is also sensible, and I again expect, but do not order, this to be done.

196. I was also unpersuaded by EFG’s argument that it needed further information from PIFSS in order to decide how to approach former directors itself, or to apply for letters of request. Mr Haworth has explained in his evidence the substance of the approach to the former directors, and Stewarts’ letter contains a proposal as to a further approach which could be made. If EFG wishes to make its own approach, or apply for a letter of request or similar order, I see no reason why it has insufficient information to allow it to do so.
197. As far as keyword search terms to be applied, it seemed to me that PIFSS had carried out a reasonable and proportionate search for responsive documents. I could not conclude that the absence of the e-mail communications, which allegedly should exist on EFG’s case, reflected a failure in the disclosure process. Rather, there were other explanations, as identified in Mr Haworth’s evidence and Ms Dilnot’s submissions: for example, the fact that the non-executive directors did not have e-mail accounts on PIFSS’ systems; the period with which this case is concerned, including periods when e-mail was not in common use; the evidence that PIFSS only began to introduce electronic systems in 2004, and that it was still paper-based until around 2014; the likelihood that many of these directors were not young and tech-savvy. Whilst PIFSS may not have used the search terms now proposed by EFG, its searches had used a variety of other search terms, including variations of Al Rajaan and Al Rashed. The fact that those searches had not borne fruit, in terms of harvesting e-mails from directors, provided support for the alternative explanations (i.e. alternative to the argument that something had gone badly wrong) which were advanced by PIFSS. In short, I was not persuaded of the first stage of the requirements under paragraph 17 of Practice Direction 57AD; i.e. that there had been, or may have been, a failure adequately to comply with an order for extended disclosure.
198. I was also not satisfied that EFG’s proposed order would be reasonable and proportionate. The proposed order does not identify the “exclusionary terms to ensure proportionality”, and therefore I would essentially be ordering the parties to cooperate on agreeing further search terms. It is clear that the proposed search terms, without exclusionary terms, would be far too wide and would throw up far too many irrelevant documents. However, Ms Dilnot made it clear that PIFSS would be open to agreeing further search terms, which could then be run by Evelyn Partners in order to see whether it produces a manageable number of documents for review. It seems to me that this is a sensible suggestion, and I would expect PIFSS to adhere to it notwithstanding my conclusion in the previous paragraph. It is not, however, appropriate or necessary to make an order in that regard.

F2: EFG’s other applications

199. The only other aspect of EFG’s application addressed in Ms Rogers’ oral submissions was a proposed order requiring PIFSS to provide further information as to what

efforts had been made to obtain documents held by relevant Ministers or Ministries relevant to, principally, Mr Al Rajaan's suspension and re-appointment in 2012. Again, it was not suggested by EFG in this context that the documents of the various Ministers or Ministries were under the control of PIFSS. Accordingly, I reach the same conclusion as I have done in relation to the documents of other third parties. There has been no failure to comply with the order for extended disclosure, and therefore no further order is appropriate under paragraph 17 of Practice Direction 57AD.

200. EFG's written submissions also included a point in relation to additional keywords concerning the EY governance review. This point is to be addressed a later hearing.

G: Applications by PIFSS

G1: Application against the Man Defendants

201. The principal issue on PIFSS' application against Man is whether Man should add Mr Andreas Ritzi as a custodian. This is a much more confined issue than those considered in previous sections, and I do not consider it necessary to rehearse the parties' arguments in detail. In preparing this judgment, I have re-read all of the arguments, and relevant evidence, including short written submissions sent by the parties subsequent to the hearing. In my view, Mr Ritzi should be added as a custodian for the following reasons.
202. One of the pleaded investments, where alleged unlawful commissions were paid, was the RMF Multi Style Fund. The RMF Investment Group ("RMF") was acquired by Man in May 2002. It was a Swiss fund provider. Prior to its acquisition by Man, PIFSS had invested in a number of RMF products provided by RMF. The relationship between PIFSS and RMF was handled by Mr Ritzi as the relationship manager. In the course of Ms Dilnot's submissions, she referred me to various documents which showed that Mr Ritzi had a continuing role, subsequent to the acquisition, in dealing with PIFSS. For example, there is an e-mail exchange between Mr Ritzi and Mr Massad of Man (an existing custodian, and also separately a defendant to the proceedings) in January 2003. Mr Massad was there addressing the question of how PIFSS was to be approached, in circumstances where (post-takeover) Mr Ritzi was not the only Man person with a responsibility for or relationship with PIFSS. In his e-mail dated 29 January 2002, Mr Massad told Mr Ritzi: "Any future proposal for PIFSS will require very close co-ordination between you, me and [Mr Woernle]".
203. The pleaded RMF Multi Style Fund investment was in fact sold to PIFSS around a year later. One would expect that, consistent with Mr Massad's 2002 e-mail, there would have been close co-ordination with Mr Ritzi in relation to the sale of that investment. It did not seem to me that the existing disclosure exercise, extensive though it has been, was sufficient to enable Man to say with confidence that Mr Ritzi did not in fact have any involvement in the sale of that investment. I consider it reasonably possible, based on his prior role as relationship manager at RMF, his direct relationship with PIFSS post-acquisition, and Mr Massad's 2002 email, that Mr Ritzi would have had an involvement in relation to such matters as the pricing, marketing/advertising, and selling of the investment to PIFSS. It is indeed likely to be the case that, as Man said in its submissions and in the correspondence from Willkie Farr (and indeed as PIFSS had pleaded) Mr Massad had a key role as well. However,

that does not exclude the reasonable possibility that Mr Ritzi also had a key role. Other documents referred to in Ms Dilnot's submissions show Mr Ritzi's knowledge of the level of fees charged by Mr El Ghazzi (an intermediary between Mr Massad and PIFSS through whom secret commissions were allegedly paid to Mr Al Rajaan), and the relative level of fees charged in relation to products in which Mr El Ghazzi was involved as compared to fees for other products, and more generally in relation to the pricing of products sold to PIFSS. The documents of Mr Ritzi are therefore potentially responsive to a number of issues in the DLOI.

204. I therefore consider that Mr Ritzi should be added as a custodian. I accept that this will entail expense, but I consider that in the context of the present case it is reasonable and proportionate to require a search of his documents to be carried out. The parties' submissions addressed, relatively briefly, the question of the keywords to be used in relation to the searches of his documents (as well as the possibility that further search terms should be added in relation to documents which have already been harvested). In accordance with Ms Dilnot's submission, I consider it appropriate, however, to require the parties to correspond and seek to agree upon search terms. I will resolve any issue if the parties are unable to agree.

G2: Pensée Foundation

205. Issues 42 and 43 on the DLOI are those which directly concern the Pensée Foundation. They are as follows:

“42. I. In what circumstances, for what reason or purpose and for whose benefit, pursuant to what arrangements reached as a result of which communications (whether written or otherwise), were the Pensée Foundation and an account at Deltec in its name: (a) established; and (b) subsequently used?

II. Under whose control with whose and what knowledge and on whose instructions or on whose advice was the Pensée Foundation (a) established and; (b) subsequently operated?

Relevant to the above are:

a) What communications leading to what agreements or arrangements took place between which individuals in connection with: (i) the establishment and subsequent operation and use of the Pensée Foundation and the execution of all associated documentation; (ii) any agreement or arrangement whereby Mr. Nasrallah would act as nominee for and on behalf of Mr. Al Rajaan in relation to the Pensée Foundation; (iii) the Pensée Foundation's banking arrangements; and (iv) the funds to be received by the Pensée Foundation?

b) Was there a meeting in or around June 2013 between Mr Nasrallah, Mr Jean Chalopin, Mr Al Rajaan and Mr Amouzegar in Paris at the George V Hotel at which the arrangements for the setting up of the Pensée Foundation and its bank account

with Deltec in the Bahamas were agreed? What arrangements were agreed and in what circumstances?

c) Did Mr Nasrallah draft a handwritten agreement (dated 20 June 2013)?

d) The respective roles of Mr. Nasrallah, Mr. Al Rajaan and Mr. Amouzegar in connection with the Pensée Foundation.

43. On whose instructions (both entity and individual) and with whose knowledge were payments made into the Pensée Foundation's account, and what was the form and content of those instructions (written or otherwise)?

What was the source of the funds paid into that bank account and what understanding did any individual acting for the Pensée Foundation have of the source and nature of the payments based on what, if any, enquiry?"

206. Issue 42 refers to "Deltec". This is a reference to Deltec Bank & Trust Ltd, whose head office is in Nassau, Bahamas. Deltec acted as the "Foundation Agent" of Pensée. In October 2022, Pensée's solicitors (Fladgate) indicated that they would include as custodians "all individuals who acted for Deltec in its capacity as Foundation Agent of the Pensée Foundation (including those whose roles included regulatory compliance and conduct AML [anti-money laundering] and source of funds checks)". A substantial disclosure exercise has been conducted by Pensée, which has involved gathering a large number of documents from various custodians at Deltec. No issue arises as to control: whether legally or practically, Pensée has been able to obtain Deltec's documents.
207. The first question which arises is whether three additional custodians should be added: Ms Shonel Clarke, an employee in Deltec's Client & Fiduciary Services division; Ms Marcia Adderley, Senior Vice President and subsequently Head of Client Services at Deltec; and Ms Marie Cargill, former General Counsel at Deltec. These three individuals would come within the above description in Fladgate's October 2022 letter, although Fladgate had always made it clear that it was unwilling to collect and disclose the documents of Ms Cargill, not least because many of those documents would be privileged.
208. It seems to me that Ms Clarke should be added as a custodian, and that it can be said that she is a fairly obvious custodian. Her role was that of Client Relationship Manager, albeit that Pensée contends that this description tends somewhat to overstate her importance. Nevertheless, she was the relationship manager not only for Pensée, but also two other companies, Fyne Properties Ltd and Lulienne Ltd. The significance of those companies is that one of the pleaded transfers of funds, on which PIFSS relies (albeit not directly in relation to the claim against Pensée) followed a route from a company called Chulani to Fyne to Lulienne and then to an account in the name of Ms Al Wazzan, D2. The companies are also significant, as further discussed below, because Pensée accepts that these were companies which acted on the instructions of and for the benefit of Mr Al Rajaan.

209. The principal argument against inclusion of Ms Clarke is that there has been an extensive gathering of documents from a large number of other custodians, such that there is no real possibility or likelihood that Ms Clarke will have documents which have not already been disclosed. This was particularly the case in the light of the fact that there were other more senior people involved in the relationship, and their documents have been searched.
210. Ms Dilnot submits however, that since Ms Clarke did have direct dealings with Mr Al Rajaan, and since her position was relationship manager, there was a real possibility that Ms Clarke would have documents which were not disclosed via other custodians. I agree with that submission, and I consider it reasonable and proportionate to require her documents to be obtained and searched for disclosure purposes.
211. I do not, however, consider that it would be reasonable and proportionate to add the other two custodians. As far as Ms Adderley is concerned, the evidence does show that (at a relatively late stage, in 2018 and 2019) she was involved in various compliance issues which are potentially of importance. However, she was by no means the main compliance person, and the existing custodians already include a number of senior persons who were concerned with compliance. As far as Ms Cargill is concerned, I consider that in the light of the number of existing custodians, and the addition of Ms Clarke, it is not reasonable and proportionate to add Ms Cargill. A large number of her documents are likely to be privileged, and it is also relevant that she joined relatively late in the day.
212. The second issue which arises is whether there should be additional search terms. Based upon the transfer of funds via Fyne and Lulienne to Ms Al Wazzan's account, PIFSS seeks to add Lulienne (and various derivatives) as well as the account number 1300714 of Ms Al Wazzan's account. Pensée has already used "Fyne Properties" as a search term, but resists now being required to add either of the additional terms, neither of which were originally requested as search terms by PIFSS.
213. I consider that the search term Lulienne (and its derivatives) should be used for the purposes of a search across Ms Clarke's documents. It may be, however, that appropriate connectors are required in order to limit the documents for review, and this is a matter that should be discussed between the solicitors. I also consider that Lulienne (and its derivatives), again perhaps with appropriate connectors, should be used as a search term on the documents which have already been harvested by Pensée using the existing search terms. In other words, Pensée is not required to conduct a new exercise, using these search terms, on all of the underlying documents originally obtained from Deltec.
214. In my view, it is important to disclose documents relating to Lulienne (as well as Fyne, which have already been disclosed), because there is a key issue (reflected in issues 42 and 43) as to whether or not Pensée was operated for the benefit of Mr Al Rajaan and on his instructions. Pensée denies that that was the case. Deltec was, however, acting in relation to all three entities (Pensée, Fyne and Lulienne), and Pensée accepts that both Fyne and Lulienne were operated for the benefit of Mr Al Rajaan and on his instructions. As I understand it, it is contended by Pensée that it, Pensée, was different, but PIFSS contends otherwise. Ms Clarke was, as I have said, the relationship manager for all three entities. Disclosure of documents concerning Lulienne (in addition to those already disclosed in relation to Fyne) will enable the

court to see whether there were any material differences between the way in which Fyne and Lulienne were being operated by Deltec and the way in which Pensée was being operated. If there are material differences, that may support Pensée's case that it was indeed different. If there are no material differences, then that may support PIFSS' case.

215. I do not, however, consider it reasonable and proportionate to require a search based on Ms Al Wazzan's account number. As Mr Edey indicated, this would be likely to produce a large volume of spreadsheets with that number on it. This is not really what PIFSS is interested in. Furthermore, if searches are carried out using Lulienne and its derivatives, that is likely to reveal any relevant documents showing the transfer of funds from Lulienne to Ms Al Wazzan's account.
216. Accordingly, to the extent set out above, PIFSS' application succeeds, but not otherwise.