



Case Nos: HQ12X05106, HQ13X00672,
HQ12X05082, HQ13X00414

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

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

Date: 26 July 2013

Before :

MR JUSTICE EDER

- (1) ROBERT TCHENGUIZ
(2) R20 LIMITED

Claimants in HQ12X05106 and HQ13X00672

- (1) RAWLINSON AND HUNTER TRUSTEES SA
(2) VINCOS LIMITED
(3) EURO INVESTMENTS OVERSEAS INC
(4) VINCENT TCHENGUIZ
(5) AMORA INVESTMENTS LIMITED

Claimants/Applicants in HQ12X05082 and HQ13X00414

- and -

DIRECTOR OF THE SERIOUS FRAUD OFFICE

Defendant to all claims

- and -

- (1) MR STEPHEN JOHN AKERS
(2) MR MARK MCDONALD

Respondents

Ms Rosalind Phelps and Mr James Duffy (instructed by **Stephenson Harwood LLP**) for the
VT Claimants

Mr Joe Smouha QC, Mr Alex Bailin QC and Ms Alison Macdonald (instructed by
Shearman & Sterling (London) LLP) for the **RT Claimants**

Mr Dominic Dowley QC, Mr James Eadie QC and Mr Simon Colton (instructed by
Slaughter and May) for the **Defendant**

Mr William Trower QC and Mr David Allison (instructed by **Chadbourne & Parke
(London) LLP**) for the **Third Party Respondents** (Joint Liquidators of **Oscatello Investments
Limited** (in liquidation))

Hearing dates: 10 and 11 July 2013

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE EDER – NON PARTY DISCLOSURE

Mr Justice Eder:

Introduction

1. The background to these present proceedings is to be found in the judgment of the Divisional Court in judicial review proceedings with Claim Nos CO/4236/2011 and CO/4468/2011 (the “JR Proceedings”) delivered on 31 July 2012 with the reference [2012] EWHC 2254 (Admin) (the “DC Judgment”). Those proceedings concerned the business interests of two individuals i.e. Robert Tchenguiz (“RT”) and Vincent Tchenguiz (“VT”) and the companies and trusts through which their businesses are carried on in relation to what was and is said to be the unlawful entry, search and seizures by or at the instigation of the defendant (“SFO”) at certain premises in London as well as the arrests and investigations connected to this. In broad terms, there are two groups of claimants i.e. those referred to as the R&H or VT Claimants and those referred to as the RT Claimants. In summary, they say that the searches, arrest and investigation and the publicity surrounding them had a disastrous effect on their business interests causing very extensive financial losses and reputational harm; and they now seek damages in these proceedings in the total sum of approximately £300 million. The substantive hearing of that claim is now scheduled to take place in 2014.

The present application

2. This judgment deals with the VT claimants’ application under CPR 31.17 for third party disclosure from Stephen Akers and Mark McDonald, the liquidators of Oscatello Investments Limited (“the Joint Liquidators” and “Oscatello” respectively).
3. In particular, disclosure is sought of 5 specific documents (the “Reports”) which were prepared by a firm of accountants i.e. Grant Thornton (“GT”) on the instructions of the Joint Liquidators, who are also partners/directors of GT. These Reports were shown to the SFO by GT, but not permitted to be copied by the SFO. Thus, although the GT reports played what the claimants submit was a key role in the Information placed before HHJ Worsley by the SFO in March 2011 in support of the orders then sought by the SFO (the “Information”) and obtaining of the warrants, these will not be disclosed by the SFO in the present proceedings.
4. There is no similar formal application by the RT claimants but Mr Trower QC expressly agreed that no separate formal application was necessary. In effect, therefore, this application should be treated as an application on behalf of all claimants.
5. The application is opposed by the Joint Liquidators on three main grounds i.e. (i) necessity/relevance; (ii) litigation privilege; and (iii) discretion. In support of such opposition (in particular with regard to the claim for litigation privilege), the Joint Liquidators rely upon a statement dated 5 July 2013 of Mr John Verrill, a solicitor, licensed insolvency practitioner and partner in the firm of Chadbourne & Parke (London) LLP (“CP”). I deal below with each of these points in turn but it is convenient to summarise at the outset the role of the Joint Liquidators and the relevant background to the present application.

The Joint Liquidators

6. The facts relating to the appointment of the Joint Liquidators and their conduct of the liquidation are set out in Mr Verrill's statement. Certain of such facts are or may be in issue but without prejudice to any such possible dispute in the future, it is convenient to adopt for present purposes the brief summary set out in Mr Trower's skeleton argument which was as follows.
7. The Joint Liquidators act as liquidators of Oscatello and a number of additional companies registered in the British Virgin Islands (together the "Oscatello Companies").
8. The Oscatello Companies formed part of a complex group of companies including their subsidiary undertakings which, at all material times (following a restructuring of the group in late 2007) were ultimately controlled by Investec Trust (Guernsey) Limited ("Investec") and Bayeux Trustees Limited (together with Investec, the "TDT Trustees") in their capacity as joint trustees of the Tchenguiz Discretionary Trust (the "TDT").
9. The main beneficiaries of the TDT were Robert Tchenguiz ("RT") and his children and remoter issue. The TDT was settled on 26 March 2007 by a declaration of trust made by, among others, Investec in its capacity as trustee of the Tchenguiz Family Trust ("TFT"), pursuant to a power to settle new trusts contained in the TFT instrument. The beneficiaries of the TFT include RT and his brother VT.
10. The Oscatello Companies performed two main roles: (i) they held positions by way of direct equity/debt investments; and (ii) they participated in large-scale derivatives and futures trading. Investment decisions were made by the TDT Trustees in conjunction with or at the direction of R20 Limited ("R20"). From around the date of the inception of the TDT in March 2007, R20 advised the TDT and the companies held under its umbrella (including the Oscatello Companies) on their general commercial and investment strategies. RT is a director of R20.
11. In around late 2007, the Oscatello Companies were restructured. A framework agreement providing the basis for the continued operation of the Oscatello Companies was concluded with, among others, the Icelandic bank Kaupthing hf ("Kaupthing"). Kaupthing and certain of its subsidiaries agreed to continue to fund the Oscatello Companies' operations by way of an overdraft facility and other forms of lending, secured over shares in the Oscatello Companies. That funding was used principally for the purposes of purchasing and servicing equity and debt instruments in the form of contracts for differences and credit default swaps.
12. The amount of funding provided by Kaupthing to the Oscatello Companies increased rapidly throughout 2008, largely as a consequence of a need to meet margin calls as asset values deteriorated. By the end of 2008, Kaupthing had collapsed and the Oscatello Companies could no longer meet their obligations.
13. On 10 December 2008, Mr Akers and Mr McDonald were appointed as joint receivers over the shares of the Oscatello Companies.

14. On 18 August 2009, Mr Akers and Mr McDonald were appointed as joint liquidators of a number of the Ocatello Companies.
15. On 16 February 2010, Mr Akers and Mr McDonald were appointed as joint liquidators of Ocatello.
16. The appointment of Mr Akers and Mr McDonald as liquidators has been recognised in England and Wales by order of this court dated 31 March 2010 made pursuant to the terms of the Cross Border Insolvency Regulations 2006. Their appointment as liquidators has also been recognised in Guernsey by order of the Royal Court of Guernsey dated 21 April 2011.
17. The Joint Liquidators estimate that the shortfall in the assets of the Ocatello Companies to meet the claims of its creditors is in excess of £1,950,000,000.
18. The liquidation of the Ocatello Companies has been exceptionally complex. There has been worldwide litigation, including complex and hard fought proceedings in London, the Isle of Man, Guernsey and the British Virgin Islands. The Ocatello Companies have frequently found themselves on the other side of litigation to parties associated with RT and VT. One example is provided by the proceedings pending before the Royal Court of Guernsey. The Guernsey proceedings concern a claim by the TDT Trustees against Ocatello and others seeking to challenge the terms and enforceability of intra-group lending by the Ocatello Companies. RT is a protector of the TDT and gave oral evidence to the Guernsey Court.
19. According to Mr Verrill, it is likely that there will be further litigation between the Ocatello Companies and parties associated with VT and RT. In this regard:
 - i) the Joint Liquidators continue actively to consider the commencement of proceedings against a large number of parties (including those associated with RT and VT) in order to recover assets or to receive compensation in respect of assets of the Ocatello Companies which appear to have been misapplied; and
 - ii) the solicitors to the VT Claimants have indicated that they are contemplating claims against the Joint Liquidators arising from the criminal proceedings brought by the SFO. The solicitors to the VT Claimants have made a number of very serious allegations, including an allegation that the Joint Liquidators provided misleading and inaccurate information to the SFO for the purpose of damaging VT and the TFT and forcing the settlement of civil actions on unfavourable terms. The alleged losses sustained by the TFT are said to amount to in excess of £2.5 billion.

Background

20. The relevant background to the present application was summarised in Ms Phelps' skeleton argument. For present purposes, it is convenient to adopt that summary subject to certain additions/amendments in the light of certain points made by Mr Trower.
21. The starting point is the Information. This referred extensively to the reports prepared by GT – for example, para 59 (referring to an “*in depth analysis of Ocatello*”

Investments Limited” done by GT); para 76: “*Grant Thornton, who have been appointed by the Resolution Committee of Kaupthing Bank in the [sic] Iceland, have carried out extensive financial forensic analysis of this complex structure which was put forward by Robert TCHENGUIZ as collateral for the substantial borrowing from Kaupthing. A number of Reports have been prepared by Grant Thornton detailing their findings and these have been reviewed by the SFO.*”; and para 125: “*Grant Thornton has been appointed by the Resolution Committee in Iceland in order to analyse the Kaupthing lending to Tchenguiz connected companies and to consider potential offences and potential defendants.*”

22. In the course of the JR proceedings, after the SFO had conceded that the warrants concerning VT should be quashed, the SFO (via the Treasury Solicitors “TSols”) wrote a detailed letter to the JR claimants dated 21 February 2012 relating to the errors in the Information. The letter stated that the investigation into VT had been triggered by a telephone call from GT on 9 September 2010, following which the SFO were permitted to view draft reports prepared by GT. It was obvious from that letter that detailed notes had been taken of the material provided by GT and viewed by the SFO.
23. In March 2012, well before the substantive JR hearing, the solicitors representing the JR claimants wrote to the solicitors for GT (Simmons & Simmons), enclosing a copy of TSols’ letter of 21 February 2012. The letter was copied to Mr Akers and stated that the substantive JR hearing was listed to start on 22 May 2012. The letter highlighted the concerns about the role played by GT in providing information to the SFO. The letter asked for copies of any documents shown to the SFO, and specifically asked GT (at para 43) to explain the basis for any assertion that the reports were privileged, including the identity of the person or persons on whose behalf the rights were being asserted. The letter ended by pointing out (in para 111) that it was intended to provide GT with an adequate opportunity to consider the concerns and to provide an answer to them before the substantive hearing and that the option of joining the proceedings as an interested party was available. It was also made clear that the correspondence would be placed before the court, as in the event happened.
24. In response, Simmons & Simmons for GT refused to provide the documents, on the basis, inter alia, that the information provided by GT to the SFO was information which GT received or prepared during the course of activities carried out on behalf of its client, the Resolution Committee of Kaupthing; and that information was confidential as a matter of Icelandic law and GT could not answer the questions raised without breaching professional rules of confidentiality. GT (via Simmons & Simmons) also declined to play any part in the substantive JR proceedings, which drew some criticism from the Divisional Court, as set out below. No mention was made by Simmons & Simmons in the letter of legal professional privilege, or of any alleged interest of the Joint Liquidators in the GT reports. The close involvement of GT was subsequently explained in more depth in a detailed witness statement submitted by Mr Brinkworth of the SFO.

Mr Brinkworth’s statement

25. Meanwhile, at a directions hearing on 22 February 2012, the SFO was ordered to serve evidence relating to the matters set out in the 21 February 2012 letter, essentially in order to explain the SFO’s position. In his statement served on 30 April

2012, Mr Brinkworth said in terms (para 8) that: *“In this overview I have referred almost exclusively to Reports prepared by [GT], the firm appointed as joint liquidators by Kaupthing hf’s (Khf’s) Resolution Committee following the bank’s collapse, and the SFO during the course of its investigation. These Reports provide a useful (and fair) summary of the basis of the core allegations within the Information, and particularly those relating to Pennyrock.”*

26. Mr Brinkworth’s statement went on to refer (as had the 21 February 2012 letter) to a number of GT reports which the SFO were permitted to view but not to copy apparently on the ground that they were privileged: see paras 26, 31 and 36. As set out in more detail below, detailed notes taken from a number of the Reports sought in this application were exhibited to Mr Brinkworth’s statement and referred to in open court during the course of the JR hearing. The DC Judgment recorded the reliance placed on GT by the SFO and in particular the following:

“It is now clear that the basis of much of what was said to be suspected criminality was based on information provided by Grant Thornton and to a lesser extent Weil, Gotshal and Manges. The Information disclosed that Grant Thornton had been appointed by the Resolution Committee to analyse the lending by Kaupthing and the entities connected with VT and RT. The Information disclosed the involvement of Grant Thornton in the allegations made against RT and in respect of Oscatello and the litigation against Oscatello to which we have referred at paragraph 30. (para 94)

...

This is a case where it appears that the SFO relied very heavily on the work and conclusions of Grant Thornton ...” (para 96)

The Divisional Court commented on the lack of co-operation of GT:

“195. However, as we have set out at paragraphs 43-44 above, these allegations rest upon what the SFO were told by Grant Thornton on and after 9 September 2010. We only have the notes of the meeting and not the copy of the report of Grant Thornton. They declined in answer to a request from VT to make available the evidence on which such serious allegations were advanced to the SFO. We therefore do not know the basis of Grant Thornton’s opinion on the valuation carried out by Oliver Wyman or their opinion on the acceptance of that valuation in the audited accounts. Certainly the allegation (which we have set out at paragraph 43) made by Grant Thornton to the SFO that VT may have misled the auditors as to the period on which the actuarial valuation was made was unfounded, the entire basis of valuation is recorded in note 7 to the accounts. Nor do we know the basis of the contention of Grant Thornton and the Resolution Committee that Kaupthing had not conducted due diligence.

196. Lord Goldsmith severely criticised this conduct of Grant Thornton, having put them on notice on 15 March 2012 and invited them to become a party to the proceedings and to state whether the allegations were maintained. Grant Thornton acknowledged the receipt of this notice in a letter written by their solicitors on 9 May 2012. They stated that they would not become a party, they had not been served with the proceedings and were not in a position to provide information because of the confidentiality provisions of Icelandic law, the Code of Ethics of the Institute of Chartered Accountants and legal professional privilege. They contended that no criticism should be made of their conduct, as the SFO had accepted that the misstatements to the judge were its fault. Lord Goldsmith made clear that the fact that the allegations were still being maintained was continuing to have an adverse effect on the interests of TFT and VT and preventing TFT from repaying the Pennyrock loan.

197. We do not consider that it is for us to comment on the conduct of Grant Thornton, save to say that it is unfortunate that the court does not know the basis for the criticism of the actuarial valuation and the audited accounts. It is perhaps difficult to understand how provisions of Icelandic law or the Code of Ethics of the Institute of Chartered Accountants or legal professional privilege could have permitted Grant Thornton to assist the SFO, after service of a s.2 notice, in making allegations of criminal conduct against RT and VT in relation to the valuation and the accounts, but not to be in a position to assist this court by providing the basis for those two specific allegations when VT and RT challenged by way of judicial review the case made against VT and RT by the SFO who had relied on Grant Thornton's views on those two specific allegations. From the observations we have made in paragraph 195, the provision of information would have been of assistance to the court.”

27. Following the DC Judgment, the VT Claimants renewed their requests for disclosure of the reports prepared by GT from Simmons & Simmons by letter dated 31 August 2012.
28. On 20 September 2012, Skadden Arps acting on behalf of the Joint Liquidators wrote to the Divisional Court with copies to various parties including the VT Claimants' solicitors, Stephenson Harwood. The letter related to the then pending application to use documents from the JR proceedings for the purposes of other proceedings. The letter stated that such application was likely to relate to information and/or documents which belong to Oscatello and which were confidential and/or privileged. It asked that a copy of the application be provided, so that Oscatello could consider whether to intervene.

29. In the event, an order was subsequently made by the court dated 19 November 2012 which provided that Mr Brinkworth's statement and exhibits be deemed to be in the public domain.
30. The VT Claimants again renewed their disclosure requests of the Reports on 13 February 2013. Notwithstanding extensive correspondence dating back to March 2012, there was, Ms Phelps submitted, no suggestion at this stage that the reports shown by GT to the SFO were prepared for anyone other than Kaupthing acting through its Resolution committee ('ResCom'): see (i) Mr Brinkworth's statement; (ii) the Simmons & Simmons letter referred to in paragraph 24 above, which referred in terms to the information being provided to the SFO on behalf of GT's client, Kaupthing; and (iii) para 4 of the DC Judgment where it was stated:
- "... in the account of the factual background we refer to Grant Thornton's reports. Grant Thornton and Weil, Gotshal and Manges were appointed on the collapse of Kaupthing by the group responsible for its affairs known as the Resolution Committee to seek to recover funds for the creditors. Their reports formed an important basis for the SFO's investigation, as we shall explain."*
31. On 15 March 2013, CP wrote to say that it had "recently" been instructed by the Joint Liquidators of Ocatello. They asked for time to consider the "ownership and control" of certain of the Reports in order to determine the scope of any litigation privilege attaching. Their further letter of 26 March 2013 described the 5 Reports the subject of this application and confirmed that they had been shown to the SFO. It was asserted that the Reports were covered by litigation privilege - a point which had not been taken by Simmons & Simmons during the JR itself. (As I understand, it was only in the letter from Skadden Apps dated 20 September 2012 referred to above that any question of privilege had previously been suggested.)
32. By letter dated 28 June 2013, Stephenson Harwood invited CP to explain properly the basis for the assertion that the Reports were privileged, but it was not until the service of Mr Verrill's statement that any proper attempt was made to do this (beyond the bare assertions of the 26 March 2013 letter). This claim is considered further below.
33. In the meantime, other GT reports referred to in Mr Brinkworth's statement were disclosed by Simmons & Simmons (letter 13 March 2013), who stated that Kaupthing (i.e. the successor to ResCom, the Winding Up Committee) considered the reports to be confidential but that, contrary to what Simmons & Simmons had previously asserted, Icelandic law would permit their disclosure. No point was taken in relation to privilege.
34. The RT Claimants also sought disclosure of the Reports in correspondence (letters 21 June 2013 and 2 July 2013).

The 5 Reports

35. The 5 Reports which are the subject of the present application are now described in paragraph 29 of Mr Verrill's statement as follows:

- i) A draft report dated 23 August 2010 drafted in the context of proceedings brought in Guernsey against members of the Oscatello group of companies (“First Draft Guernsey Report”).
 - ii) A draft report dated 21 December 2010, together with exhibits, considering the broader implications of the Guernsey Application for the Oscatello group of companies (“Second Draft Guernsey Report”).
 - iii) A draft memorandum dated 17 September 2010 on the formation and trading of the Oscatello group of companies (“Draft Oscatello Memorandum”).
 - iv) A draft report dated 25 October 2010, considering the circumstances surrounding the entry into certain contracts for difference and credit default swaps by Roxinda Limited a member of the Oscatello group of companies (“Draft Roxinda Memorandum”).
 - v) A draft report dated 22 December 2010 considering the role and involvement of R20 and its employees and/or directors in the Oscatello structure and, in particular, their role in transactions entered into by the Oscatello group of companies (“Draft R20 Report”).
36. Paragraph 29 of Mr Verrill’s statement also seeks to explain the basis upon which these Reports were “commissioned”. This is crucial to the present argument advanced by the Joint Liquidators that all 5 Reports attract litigation privilege; and it is therefore convenient to set out verbatim what Mr Verrill says in that paragraph:

“29. The reports commissioned by the Joint Liquidators include the Reports which form the subject of the VT Claimants’ Application. I summarise the content of each of the Reports below. I am providing, as noted above, this summary of the general subject matter of the Reports in order to assist the Court in determining whether litigation privilege attaches to them and in no manner is this intended to be a waiver or partial waiver of privilege in the Reports:

(1) the Joint Liquidators commissioned a draft report dated 23 August 2010, in order to assist the Joint Liquidators in formulating their response to the Guernsey Proceedings and to enable their Guernsey solicitors to provide instructions to counsel (“the First Draft Guernsey Report”). The First Draft Guernsey Report was included in instructions sent to Guernsey counsel on 15 November 2010. The recovery available to Oscatello in the Guernsey Proceedings, put forward by Investec, was materially different depending on a number of scenarios. The First Draft Guernsey Report was prepared entirely to enable the Joint Liquidators and their legal advisors to respond to the varying scenarios and to prepare a Defence and Counterclaim quantifying the amounts claimed. Specifically it was to identify all inter-company balances that should be reversed and to calculate the effect of the these balances/reversals on dividends to creditors;

- (2) *the Joint Liquidators commissioned a draft report dated 21 December 2010, following a meeting with Counsel on 30 November 2010, the dominant purpose of which was to enable the Joint Liquidators to consider with Counsel the broader implications of the Guernsey Proceedings for the Oscatello Companies (“the Second Draft Guernsey Report”). In particular, the Second Draft Guernsey Report was produced following a request by the Joint Liquidators’ Guernsey counsel for a memorandum regarding the inter-company loans to assist Counsel in providing advice regarding litigation strategy. As stated in paragraph [26], the report was produced to help establish (a) how the original debts due from TFT arose, (b) whether these debts were properly described as loans, and if so, what the terms of the loans were, (c) the terms under which the debts due to Oscatello’s subsidiary companies were novated to the TDT, as at 24 August 2007, and whether the debts were properly described as loans and if so, what the terms of the loans were, and (d) clarification as to the terms under which the debts due to Oscatello’s subsidiaries were transferred from TDT to Oscatello as at 21 December 2007 and whether the debts were accurately described as loans, and if so, what the terms of the loans were. The report took the form of a summary and analysis of information obtained from the books and records of the Oscatello Companies. The report enabled the Joint Liquidators’ solicitors to fully understand the accounting treatment of the loan transactions to enable them to advise on strategy for the litigation proceedings in Guernsey. The Second Draft Guernsey report was sent to Guernsey counsel on or around 21 December 2010;*
- (3) *the Joint Liquidators commissioned a draft memorandum dated 17 September 2010 on the formation and trading history of the Oscatello Companies (“the Draft Oscatello Memorandum”). The Draft Oscatello Memorandum was commissioned for the dominant purpose of enabling the Joint Liquidators to obtain information and legal advice in connection with litigation which was, and remains, contemplated against various potential defendants. In particular, it addresses, among other things, various transactions which the Joint Liquidators consider unusual or irregular and identifies potential causes of action as well as the defendants to possible claims. The memorandum was produced to assist the Joint Liquidators in assessing the potential claims against other parties by Oscatello, and its related subsidiaries. It highlighted unusual and irregular transactions, specifically the Framework and Overdraft agreements, the position of other lenders in the Oscatello Group, a number of share transactions and CDS transactions and breaches of covenants and the validity of Framework*

agreement. The report went on to highlight the potential defendants to any claim made in respect of the above findings, these potential defendants include parties to the SFO proceedings HQ12XO5082 and HQ13XO0414. On or around 17 September 2010 the Oscatello Report was provided to the Liquidators legal advisors in London for the purposes of obtaining advice and formulating draft particulars of claim;

- (4) the Joint Liquidators commissioned a draft memorandum dated 25 October 2010 considering the circumstances surrounding the entry into certain contracts for difference and credit default swaps by Roxinda Limited (“Roxinda”), a member of the Oscatello Companies (“the Draft Roxinda Memorandum”). The Draft Roxinda Memorandum was commissioned for the dominant purpose of assisting the Joint Liquidators in connection with obtaining information and legal advice in connection with litigation which was, and remains, contemplated against various potential defendants. In particular, it addresses, among other things, the circumstances surrounding the entry into certain contracts for differences and credit default swaps by Roxinda, at a time when it is believed Roxinda was insolvent, it also seeks to identify civil recovery opportunities. On or around 22 September 2011 the Draft Roxinda Report was provided to counsel in London for the purposes of obtaining advice and formulating draft particulars of claim; and*
- (5) Following a meeting with Counsel on 30 November 2010, the Joint Liquidators commissioned a draft memorandum dated 22 December 2010 providing details of the individuals from R20 who were involved in the transactions referred to in the Oscatello Report (“the Draft R20 Report”). The Draft R20 Report was commissioned to brief Counsel and in order to assist the Joint Liquidators in obtaining information and advice in connection with litigation which was, and remains, contemplated against various potential defendants. In particular, the Draft R20 report was commissioned following a request from the Joint Liquidators’ Counsel to enable him to advise on potential claims against various possible defendants identified in the Oscatello Report. The purpose of this report was to supplement the Oscatello Report and to set out the evidence needed to demonstrate which individuals from R20 were potentially involved with irregular and unusual transactions. On or around 22 December 2010 the R20 Report was provided to counsel in London for the purposes of obtaining advice and formulating draft particulars of claim.”*

37. As I say, this explanation provides the foundation for the Joint Liquidators’ claim for litigation privilege. I consider this below but it is convenient to deal first with the related questions of necessity, relevance and discretion.

Necessity/Relevance/Discretion

38. CPR 31.17(3) provides as follows:

“(3) *The court may make an order under this rule only where –*

- (a) *the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and*
- (b) *disclosure is necessary in order to dispose fairly of the claim or to save costs.”*

39. As submitted by Mr Trower, there are three requirements that must be met for the court to grant an order for disclosure under CPR Part 31.17(3) viz:

- i) the court must be satisfied that the documents are “*likely*” to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings;
- ii) the court must be satisfied that disclosure is “*necessary*”; and
- iii) the court must be satisfied that the case is an appropriate one for the exercise of its discretion.

40. In considering these matters, Mr Trower made plain that whilst the Joint Liquidators and their legal advisors have a general understanding of the issues raised by the present proceedings, they do not have the heightened understanding of the issues that the court will have through its case management of the proceedings; and that accordingly although they are not in a position to make detailed submissions on these matters, the Joint Liquidators wished to draw attention to the following points when the court is considering whether the jurisdictional gateways are satisfied in respect of each of the Reports. These points are as follows.

41. First, Mr Trower submitted that the court must be satisfied that the Reports are documents that are not merely (potentially) relevant to the issues in the present proceedings but are “*likely*” to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and that this is, in effect, a much higher test than the one which applies with regard to ordinary disclosure *inter partes*. In that context, Mr Trower submitted that it was the Joint Liquidators’ understanding that VT’s arrest was based solely on the basis of his participation in a transaction referred to by the SFO as “the Pennyrock loan”, pursuant to which it was alleged that VT and RT obtained loan facilities from Kaupthing through substantial material and fraudulent misrepresentations; that only two of the Reports make references to the Pennyrock loan viz the Draft Oscatello Memorandum and the Draft R20 Report; and that, moreover, such references are very minor when seen in the context of the Reports as a whole.

42. Second, Mr Trower submitted that the court must also be satisfied that disclosure of the Reports is “*necessary*” to dispose fairly of the claim or to save costs. In that context, Mr Trower submitted that the court may decide that it is not necessary to

order disclosure of the Reports in circumstances where the SFO relied not on the Reports but on their notes, in support of the criminal prosecution; that paragraph 9 of Mr Brinkworth's statement makes it clear that he does not suggest that any of the errors in the Information relied upon in the criminal proceedings derive from the documents shown to the SFO by third parties such as Grant Thornton; and that it seems that two draft reports, specifically on the Pennyrock Loan prepared by Grant Thornton for Kaupthing dated 17 September 2010 and 26 October 2010 (and exhibits thereto), and shown to the SFO, have already been disclosed to the VT Claimants.

43. Third, Mr Trower submitted that even if the requirements of CPR Part 31.17 are otherwise satisfied, the court must be satisfied that the case is an appropriate one for the exercise of its discretion to order disclosure when weighing up competing public interests: Disclosure, *Matthews and Malek*, at para 4.64. In that context, Mr Trower submitted that two such competing interests arise for consideration in the present case viz:
- i) The public interest in facilitating the success of investigations by the preservation the confidentiality of the Reports. In this regard:
 - a) The Reports were shown to the SFO in response to the service of a notice pursuant to s2 of the Criminal Justice Act 1987 requiring the provision of information and the production of documents. The court should ensure that any loss of confidentiality is restricted to the criminal proceedings alone.
 - b) The court should, as observed by Neill LJ in *Wallace Smith Trust v Deloitte Haskins & Sells* [1997] 1 WLR 257, give careful consideration to questions of confidentiality when considering whether to order the disclosure of information provided to the SFO pursuant to the exercise of its powers under the Criminal Justice Act 1987. Similar observations were made by Scott Baker LJ in *Frankson v Home Office* [2003] 1 WLR 1952, at [13]-[17] when considering a request for disclosure pursuant to CPR 31.17 in civil proceedings of interviews given under caution to the police.
 - ii) There is a strong public interest in restricting disclosure and preserving confidentiality where the document was produced for the dominant purpose of litigation which is being conducted or which is contemplated by a liquidator in accordance with his duties as an officer of the court in the interests of an insolvent estate. This public interest is particularly strong where the document addresses pending or contemplated litigation against the very parties who seek disclosure in another context. In this regard:
 - a) The First and Second Guernsey Reports were commissioned by the Joint Liquidators for the sole or dominant purpose of enabling the Joint Liquidators to respond to the Guernsey proceedings and, in particular, to enable their Guernsey solicitors and Counsel to prepare a Defence and Counterclaim in the Guernsey proceedings and advise on litigation strategy. The Guernsey litigation remains pending before the Royal Court of Guernsey and entities associated with RT and VT are on the other side of the Guernsey litigation. Accordingly, even if the court

were otherwise to consider that privilege in the Reports had been lost, there are strong reasons for refusing to order the disclosure of the Reports.

- b) The Draft Oscatello Memorandum, the Draft Roxinda Memorandum and the Draft R20 Report were commissioned by the Joint Liquidators for the dominant purpose of obtaining legal advice in connection with litigation which was, and remains, contemplated against various potential defendants (including entities associated with VT and RT). Accordingly, even if the court were otherwise to consider that privilege in the Reports had been lost, there are strong reasons for refusing to order the disclosure of the Reports.
 - iii) This public interest is all the more significant in circumstances where the party seeking disclosure is threatening claims adverse to the insolvent estate for whose benefit the documents have been produced. The solicitors to the VT Claimants have made very serious allegations against the Joint Liquidators in relation to the assistance provided to the SFO, including an allegation that the Joint Liquidators provided misleading and inaccurate information to the SFO for the purpose of damaging VT and the TFT and forcing the settlement of civil actions on unfavourable terms. The VT Claimants have alleged that the TFT has sustained losses in excess of £2.5 billion and have threatened to bring a claim against the Joint Liquidators. Accordingly, even if the court were otherwise to consider that privilege in the Reports had been lost, there are strong reasons for refusing to order the disclosure of the Reports.
 - iv) Finally, if the court were otherwise minded to order disclosure, it is suggested that the very fact that there are complex proceedings involving the same parties which are pending or contemplated means that it would be appropriate for the court to make explicit provision for the non-use of the Reports in any other proceedings and the destruction of the Reports following the conclusion of the proceedings brought against the SFO.
44. I accept the broad thrust of these submissions to the extent that they relate to the court's approach to the present application and the general considerations which the court should consider before deciding to make any order for disclosure. I also bear well in mind the importance of not pre-judging any issue which the court will ultimately have to determine in the course of the present proceedings.
45. However, bearing all these considerations in mind, I am quite sure that, subject to the question of litigation privilege, the requirements of CPR Part 31.17 are satisfied and that the case is an appropriate one for the exercise of its discretion. In summary, this is for the reasons as summarised in paragraphs 27-28 of Ms Phelps' skeleton argument which I accept viz:
- i) Self-evidently, the conduct of the investigation, including in particular the actions, knowledge and state of mind of the SFO in obtaining the warrant and continuing the investigation are at the heart of the present case. As set out above, some or all of the GT reports shown to the SFO played a central role in the investigation, and the preparation of the Information. Mr Brinkworth's overview of the investigation referred '*almost exclusively*' to the GT reports,

including express reference to at least 4 out of the 5 Reports at issue here. The Divisional Court also plainly felt that they were relevant to the JR proceedings. Given that the SFO did not make facsimile copies, the Reports themselves will not be disclosed by the SFO in the present proceedings.

- ii) Overall the Reports are likely to support the VT Claimants' case and/or harm that of the SFO because:
 - a) They form a very important part of the information shown to, and taken into account by, the SFO in the core decisions at issue in these proceedings. As the Divisional Court noted, the SFO did not engage its own independent expert to analyse the relevant issues and allegations but relied very heavily on GT (who, the court found were not independent but had an interest in the civil proceedings brought by the TFT against Kaupthing – see paras 94-96 of the DC Judgment).
 - b) Although the SFO took some notes of certain of the Reports, they did not copy them out verbatim, and disclosure from the Joint Liquidators is the only way in which the court will have a complete picture of what the SFO investigators saw at the time.
 - c) Further, the VT Claimants make specific allegations in their Particulars of Claim arising from the very fact that the SFO uncritically accepted the GT input despite the fact that GT were obviously lacking in impartiality: see the Particulars of Claim at paras. 99.2, 116.3-116.8. The information actually seen by the SFO, as well as the notes taken, are plainly relevant to the VT Claimants' case in this regard.
 - d) The SFO also relies in its Defence on the information provided to it by GT; see for example para. 7(2) where the SFO alleges that it had regard to information from GT and was entitled to do so (although it remains neutral as to whether there was any culpability in the part played by GT). The material actually provided by GT and seen by the SFO is plainly relevant to this allegation, as well.

46. Thus, it is my conclusion that it is in principle necessary and appropriate to make an order against the Joint Liquidators for disclosure of all 5 Reports subject (i) to any special order with regard to confidentiality and use of such Reports (as to which I would hope the parties will be able to agree an appropriate draft form of wording for my approval); and (ii) litigation privilege.

Litigation Privilege

47. Under this head, two main issues arose. First, there is the threshold question viz whether the documents are properly the subject of a claim for litigation privilege. Second, on the assumption that the claim for litigation privilege is *prima facie* made out, whether such privilege has been “lost” by virtue of the fact that the documents (or at least the information contained in such documents) are no longer “confidential” but, on the contrary, are now in the “public domain”.

48. As to the first question, Ms Phelps submitted that the applicable principles were as follows:
- i) Advice given by accountants does not attract legal advice privilege: *R (Prudential plc) v Special Commissioner of Income Tax* [2013] 2 WLR 325. Accordingly the Joint Liquidators have to satisfy the court that the test for litigation privilege is made out.
 - ii) For a communication to be subject to litigation privilege it must have been made with the dominant purpose of being used in aid of or obtaining legal advice from a lawyer about actual or anticipated litigation: *Thanki, The Law of Privilege* (2nd ed) (“*Thanki*”) paras 6.68 ff and the cases there cited.
 - iii) Where litigation has not been commenced at the time of the communication, it has to be ‘reasonably in prospect’; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility: *United States of America v Philip Morris & British American Tobacco* [2004] EWCA Civ 330 at paras 67-68; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19] – [20] (Etherton L.J.).
 - iv) The burden of proof is on the party claiming privilege to establish that the dominant purpose test is satisfied: *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258, para. [50]. A mere claim in evidence before the court that the document was for a particular purpose will not be decisive: *Neilson v Laugharne* [1981] QB 736, 645 (Lord Denning), 750 (Oliver LJ). The Court will look at ‘purpose’ from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose: *Thanki* para 3.75 and the cases cited at footnotes 187 and 188.
 - v) The evidence in support of a claim for litigation privilege ought to be given by the individual responsible for the creation of the document and whose motivation and state of mind is in issue. Without this it will be more difficult, and may be impossible, to satisfy the requirements for litigation privilege: *Westminster International v Dornoch Ltd*, above, paras. 21-22.
 - vi) Evidence from that person must be specific enough to show something of the deponent’s analysis of the purpose for which the documents were created, and should refer to such contemporary material as it is possible to do without disclosing the privileged material: *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258, para. [53]
49. I accept those submissions apart from the proposition as formulated in sub-paragraph (v) which seems to me at least arguably to go beyond what is stated in *Dornoch*.
50. Further, Ms Phelps submitted (and I accept) that the court should look at the present claims to privilege with “anxious scrutiny” for two main reasons viz:
- i) The alleged interest of the Joint Liquidators (as distinct from Kaupthing as GT’s client) in the Reports has only recently emerged. Further, the privilege points were not raised by Simmons & Simmons before the Divisional Court

and were not taken by Kaupthing (who have permitted disclosure of other apparently similar GT reports without mention of privilege).

- ii) The Joint Liquidators are not neutral third parties but a partner and director of GT (as the purported 'client' of GT), at least one of whom (Mr Akers) was personally involved in direct liaison with the SFO concerning the Tchenguiz investigation. These parties are seeking to withhold relevant GT reports in circumstances where GT and the SFO have been subjected to criticism by the Divisional Court as to the circumstances in which GT provided information to the SFO. It is also the case that the VT Claimants make substantial criticisms about GT both in this litigation, and in the original Commercial Court Claim. It is the latter which, the VT Claimants allege, triggered GT to 'tip off' the SFO in September 2009.

- 51. In support of the claim for privilege, Mr Trower submitted that litigation privilege will attach to a document where the document was produced for the dominant purpose of obtaining information or advice in connection with pending or contemplated litigation, or of conducting or aiding in the conduct of, such litigation: see *Waugh v British Railways Board* [1980] AC 521, at 542G-544C *per* Lord Edmund-Davies; that the evidence contained in paragraph 29 of the Mr Verrill's statement as I have quoted above establishes that the documents were indeed produced for such "dominant purpose"; and that accordingly the documents were and are the subject of litigation privilege. Further, Mr Trower submitted that if the documents are so privileged then, subject to any loss or waiver of privilege, the privilege cannot be overridden by any other public interest. The latter proposition was not in dispute and is one which I readily accept. However, the main issue in this context was whether the evidence contained in Mr Verrill's statement is sufficient to justify the claim to litigation privilege in relation to one or more of the Reports. In my view, it is not for the reasons set out below.
- 52. First, as submitted by Ms Phelps, it is important to bear in mind that Mr Verrill is not the individual who was involved in producing any of the Reports; nor was he involved in relation to the instructions given at the time to order such production. However, as submitted by Mr Trower, that is not necessarily fatal. Notwithstanding the observations made in the cases referred to by Ms Phelps, I see no reason in principle why someone in the position of Mr Verrill (who is, in his capacity as a solicitor, an officer of the court) should not give evidence as to the provenance and purpose for which a document is produced on information and belief. However, if that is done, I accept that it is entirely proper and justifiable to subject such evidence *a fortiori* to "anxious scrutiny" in particular because of the difficulties in going behind that evidence. I did not understand Mr Trower to disagree with that approach although he submitted that if I was not satisfied with the evidence as it stood, I could and should in effect adjourn the matter to permit cross-examination of Mr Verrill or to allow the Joint Liquidators to put in further evidence. I do not accept that submission at least in the circumstances of the present case. The Joint Liquidators have had ample notice of this application and I see no reason why they should be given what would in effect be a second bite at the cherry. That does not seem to me to be consistent with the overriding objective.
- 53. Second, it is perhaps an obvious point - but one worth emphasising in the present context - that the mere fact that a document is produced for the purpose of obtaining

information or advice in connection with pending or contemplated litigation, or of conducting or aiding in the conduct of such litigation, is not sufficient to found a claim for litigation privilege. It is only if such purpose is one which can properly be characterised as the “dominant purpose” that such claim for litigation privilege can properly be sustained. So much is manifest from *Waugh*. Inevitably, difficulties arise where documents are produced for a dual purpose. Further, I recognise that such difficulties are or may be particularly acute where documents come into existence, as in the present case, on the instructions of liquidators who are under statutory duties with regard (so far as possible) to the orderly collection of assets and settlement of liabilities. In the first instance at least, the proper performance of such duties may require the liquidators to obtain information simply to identify what (if any) assets or liabilities exist or perhaps what legal proceedings might *possibly* be brought against any third parties. Ultimately, once obtained, such information may well be important to enable liquidators to decide what if any legal proceedings might *possibly* be pursued; and, further down the line, such information may *in fact* be used for or in connection with pending or contemplated litigation or of conducting or aiding in the conduct of such litigation. However, unless such documents were originally produced for the “dominant purpose” as stated above, they cannot, in my view, be the subject of a proper claim for litigation privilege.

54. Some at least of these difficulties were the focus of the decision of Millett J in *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583. Although that decision was reversed in a later case on another point, the observations of the learned Judge at pp590c – 591a are, in my view, particularly relevant in the present context:

*“The board of BCCI, the auditors, and the regulatory authorities all needed to know what was the true financial position of BCCI, and this required an investigation in order to establish the facts. If BCCI itself or its controlling shareholders did not set an investigation in motion, it was feared that the regulatory authorities would. BCCI's financial position depended, in part at least, on the recoverability of the problem loans and that might require legal advice as to the prospects of success if resort had to be made to legal proceedings. But just as in *Waugh v British Railways Board* the board needed to establish the facts whether or not litigation ensued, so the board of BCCI, the auditors and the controlling shareholders needed to establish BCCI's financial position whether or not recovery proceedings were necessary.*

*Given that the dominant purpose of the investigation was to establish the facts necessary to enable BCCI's financial position to be determined, documents brought into existence in the course of the investigation did not in my judgment attract legal professional privilege merely because legal advice might be necessary in order fully to evaluate the financial implications of the facts. The obtaining of legal advice is not an end in itself. To attract privilege it must be for the purpose of actual or contemplated proceedings. In *Re Highgrade Traders Ltd* a claim to privilege was raised in respect of reports obtained by insurers who were suspicious of the circumstances*

attending a fire on the premises of their insured. Oliver LJ said ([1984] BCLC 151 at 173):

'What, then, was the purpose of the reports? The learned judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the inquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow.'

In the present case it was necessary to determine the extent to which the problem loans were recoverable, in order to establish BCCI's financial position and to decide whether recovery proceedings should be taken. But the two purpose were quite independent of each other. There was nothing of merely academic interest in the former; it was of vital concern not only to BCCI, but also to the controlling shareholders, the auditors, and the regulatory authorities. I am satisfied that this was the dominant purpose of the investigation, and was quite independent of the possible need to take recovery proceedings, and that accordingly the documents in question do not attract legal professional privilege.” (emphasis added)

55. This passage is, in my view, important because it illustrates the relatively high threshold imposed by the “dominant purpose” test; and serves to emphasise that if, for example, documents are produced to determine the extent to which “problem loans” are recoverable in order to establish the financial position of a company, such exercise is quite independent of the possible need to take recovery proceedings and will not (at least on that basis) attract litigation privilege. However, I fully recognise that each case must turn on its own facts, the essential question in each case being whether, with regard to particular documents or classes of documents, the party claiming the privilege can satisfy the “dominant purpose” test.
56. Bearing these considerations in mind, I turn to consider Mr Verrill’s evidence as quoted above with regard to each of the Reports.

First Draft Guernsey Report

57. This draft Report is dealt with in paragraph 29(1) of Mr Verrill’s statement. The first thing to note is that the date referred to is the date of the Report itself; Mr Verrill does not state when this report was “commissioned” although it would seem that the Report must have been prepared after the commencement of the Guernsey Proceedings. However, Mr Verrill does not in terms say explicitly that this document

was produced for the dominant purpose of obtaining information or advice in connection with pending or contemplated litigation, or of conducting or aiding in the conduct of, such litigation. Rather what he says in relevant respect is that the Report was “commissioned” in order to “assist” the Joint Liquidators in formulating their response to the Guernsey Proceedings; that the recovery available to Ocatello was materially different depending on a number of scenarios; and that it was prepared “entirely” to enable the Joint Liquidators and their legal advisors to respond to varying scenarios and to prepare a Defence and Counterclaim. I recognise that the last reference comes closest to satisfying the dominant purpose test. However, the reference to responding to “varying scenarios” is somewhat equivocal; and the use of the conjunctive “and” suggests a dual purpose i.e. the Report was prepared for the purpose of responding to the varying scenarios and preparing a Defence and Counterclaim. Moreover, the final sentence of this paragraph then goes on to state: “Specifically [this Report] was to identify all inter-company balances that should be reversed and to calculate the effect of these balances/reversals on dividends to creditors”. To my mind, it is difficult if not impossible to understand how this last sentence fits in with the earlier part of this sub-paragraph. Further, if that last sentence is correct, it seems to me that such exercise is one which the Joint Liquidators were bound to carry out in any event and, echoing the words of Millett J in *Price Waterhouse v BCCI*, it is an exercise which would be “independent” of the possible need to take recovery proceedings. On that basis, I am not satisfied that the dominant purpose test is satisfied in respect of this draft Report. Finally, I do not consider that the fact the Report was subsequently sent to Guernsey counsel on 15 November 2010 changes the position. Not only is this almost 3 months after the date of the Report but such fact cannot have the effect of creating litigation privilege if such privilege did not exist when the Report was originally produced.

Second Draft Guernsey Report

58. This draft Report is dealt with in paragraph 29(2) of Mr Verrill’s statement. Again, I note that he does not state when it was “commissioned” although he does say that it was commissioned following a meeting with Counsel on 30 November 2010; and it must have been produced shortly thereafter because Mr Verrill states that it was sent to Guernsey counsel on or around 21 December 2010. Thus, the report was plainly prepared after the commencement of the Guernsey Proceedings. Here, Mr Verrill’s language is different from what he says in relation to the First Draft Guernsey Report. In particular, he states explicitly that this Report was commissioned for the “*dominant purpose ... to enable the Joint Liquidators to consider with Counsel the broader implications of the Guernsey Proceedings for the Ocatello Companies.*” Even this, however, is somewhat vague. What, might one ask, are the “broader implications” here referred to? If this is intended to refer to the financial consequences of the various possible outcomes of the Guernsey Proceedings then I am extremely doubtful that this would give rise to litigation privilege. Mr Verrill then states that this draft Report was produced “... *following a request by the Joint Liquidators counsel for a memorandum regarding the inter-company loans to assist Counsel in producing advice regarding litigation strategy.*” Mr Verrill then goes on to explain in some detail that the draft Report was produced to “*help establish*” certain matters; and took the form of “... *a summary and analysis of information obtained from the books and records of the Ocatello Companies*”. I am prepared to accept that the production of this summary and analysis of Ocatello’s books and records was important even

perhaps essential for the purpose of deciding litigation strategy in the Guernsey Proceedings. However, it seems to me that it does not necessarily follow that this satisfies the “dominant purpose” test. Again, it seems to me that the last sentence of this paragraph in Mr Verrill’s statement is important: “*The report enabled the Joint Liquidators’ solicitors to fully understand the accounting treatment of the loan transactions to enable them to advise on strategy for the litigation proceedings in Guernsey.*” If, as this sentence would appear to suggest, such draft Report was necessary in order for the Joint Liquidators’ solicitors to understand the accounting treatment of the loan transactions, then it seems to me difficult to see how the dominant purpose test is satisfied even if, as Mr Verrill also states, this was to enable the solicitors to advise on strategy for the litigation. If such document did not exist already, it also seems to me difficult to understand how the Joint Liquidators could perform their basic statutory duties. For all these reasons, I am not satisfied that the dominant purpose test is satisfied in respect of this draft Report.

Draft Oscatello Memorandum

59. This draft Memorandum is dealt with in paragraph 29(3) of Mr Verrill’s statement. It is important to note that the explanation given as to the purpose for which it was produced is very different from either of the first two draft reports viz it has nothing to do with the Guernsey Proceedings nor any other then existing proceedings. Rather, Mr Verrill states that it was commissioned “... *on the formation and trading history of the Oscatello Companies*”. Again, although Mr Verrill gives the date of the draft Memorandum, it is noteworthy that he does not state the date when it was actually “commissioned”. He then goes on to state that it was commissioned for the dominant purpose of enabling the Joint Liquidators “... *to obtain information and advice in connection with litigation which was, and remains, contemplated against various potential defendants*”. Although the magic words “dominant purpose” are used, it seems to me significant that there were no relevant extant proceedings at that stage and although he does indeed say that litigation “... *was, and remains contemplated ...*”, such statement is, to my mind, entirely vague and lacks specificity. For example, Mr Verrill states that such litigation was and remains contemplated “... *against potential defendants...*” but does not specify who such potential defendants might be. On the contrary, Mr Verrill goes on to state that the draft Memorandum addresses, among other things, various transactions which the Joint Liquidators consider unusual or irregular and “... *identifies potential causes of action as well as the defendants to possible claims*” (emphasis added). Although it is true that Mr Verrill then states that the draft Memorandum highlighted a number of what are said to be “*unusual and irregular*” specific transactions and potential defendants, such language – in particular the reference to “*potential*” causes of action and “*possible claims*” – seems to me to fall far short of the necessary threshold as referred to in the cases cited above i.e. *United States of America v Philip Morris & British American Tobacco* [2004] EWCA Civ 330 at paras 67-68; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19] – [20] (Etherton LJ). Mr Trower emphasised that the fact that this draft Memorandum was, as stated by Mr Verrill, provided to the Joint Liquidators’ legal advisors in London for the purpose of obtaining advice and formulating draft particulars of claim on 17 September (i.e. on the same date of the draft Memorandum) supports the claim for litigation privilege. In broad terms, that may well be so. However, it seems to me that the critical question is what was the purpose for which the draft Memorandum was originally produced rather than its

actual use. For that reason, the fact that the draft Memorandum was provided to the Joint Liquidators' legal advisors is not, in my view, determinative. Moreover, it seems to me plain and obvious that the fact that the draft Memorandum was provided to the legal advisors does not mean that litigation was "reasonably in prospect" rather than a mere possibility at that stage (if that is the relevant stage). In that context, Ms Phelps relied on the fact that even now – almost 3 years after the date of the first Report – no proceedings have been initiated. I do not consider that such fact is necessarily determinative; but I agree that it points strongly against any suggestion that litigation was reasonably in prospect when this draft Memorandum was produced.

60. For all these reasons, I am not satisfied that the dominant purpose test is satisfied in respect of this draft Report.

Draft Roxinda Memorandum

61. This draft Memorandum is dealt with in paragraph 29(4) of Mr Verrill's statement. Although Mr Verrill again uses the magic words – "*dominant purpose*" – I would make similar comments to those in respect of the draft Oscatello Memorandum which I have just set out above and need not repeat. It is true that although Mr Verrill explains that this draft Memorandum addresses the circumstances surrounding the entry into certain contracts and also seeks to identify what are described as "civil recovery opportunities", it seems to me that this language again falls short of the necessary threshold of litigation having to be reasonably in prospect. Further, I should note that Ms Phelps relied on the fact that, according to Mr Verrill, although this Memorandum is dated 25 October 2010, it was not provided to counsel in London until almost a year later i.e. 22 September 2011; and I agree that this further supports the conclusion which I have reached i.e. that the dominant purpose test is not satisfied in respect of this draft Memorandum.

Draft R20 Report

62. This draft Report is dealt with in paragraph 29(5) of Mr Verrill's statement. I originally considered that the explanation provided there by Mr Verrill in relation to the production of this draft Report set out the strongest case for litigation privilege. In particular, it is noteworthy that Mr Verrill's evidence is that such draft Report was commissioned at a later stage i.e. following a meeting (on 30 November 2010) with - and a specific request by - the Joint Liquidators' counsel for a document providing details of the individuals from R20 who were involved in the transactions referred to in the Oscatello Report (which I understand to refer to the Draft Oscatello Memorandum); and it was provided shortly thereafter on 22 December 2010 to counsel "... *for the purposes of obtaining advice and formulating draft particulars of claim*". However, again, it seems to me that Mr Verrill's statement falls short of establishing that there was even at this stage any relevant litigation which was "reasonably in prospect" as opposed to a mere possibility. Thus, Mr Verrill states that this draft Report was commissioned "... *to enable [Counsel] to advise on potential claims against various possible defendants identified in the Oscatello Report ...*" (emphasis added). Again, it seems to me that this conclusion is fortified by the fact, as submitted by Ms Phelps, that even now (i.e. some 2½ years later), no litigation has been instituted.

63. For all these reasons, it is my conclusion that the dominant purpose test has not been satisfied in respect of this draft Report.

Loss of Confidentiality

64. Ms Phelps submitted that, at least with regard to three of the Reports i.e. the First Draft Guernsey Report, the Oscatello Memorandum and the draft R20 Report, even if such Reports were initially the subject of litigation privilege, nevertheless such privilege was lost. In essence, this was, she submitted, because there had been a loss of confidentiality in respect of such Reports and that the information contained in them was now in the public domain.
65. Given my conclusions as stated above, this point does not arise for decision. However, both Ms Phelps and Mr Trower addressed me on the point and I propose to deal with it briefly.
66. First, at the risk of repetition, it is convenient to summarise the factual foundation of Ms Phelps' submission viz. that as appears from Mr Brinkworth's statement, copies of these three Reports were shown to the SFO; detailed notes of such Reports were taken by the SFO; such notes were then exhibited to Mr Brinkworth's statement, adduced in evidence in open court during the JR hearing before the Divisional Court and referred to extensively both in argument and in the DC Judgment; and the Divisional Court made a specific order that all of the exhibits to Mr Brinkworth's statement including specifically these notes were in the "public domain". These matters were not in dispute.
67. Second, it is important to emphasise the limited nature of the argument. In particular, Ms Phelps did not suggest that there had been any specific waiver as such. Nor did she suggest that there had been any "collateral waiver". This is relevant because, relying upon Mr Verrill's statement, Mr Trower submitted that the disclosure of the information contained in the three Reports referred to above had, in effect, been made without the authority of the Joint Liquidators. In particular, Mr Trower submitted that the position was, in summary, as follows:
- i) the SFO inspected the Reports in response to the service of a notice pursuant to section 2 of the Criminal Justice Act 1987 requiring the provision of information and the production of documents;
 - ii) the SFO's investigators who attended Grant Thornton's offices were informed that the Reports were legally privileged documents;
 - iii) the SFO investigators were further informed that they were not permitted to take copies of the Reports;
 - iv) each of the Reports, at the foot of each page, contains a statement that the document is "*Strictly privileged, private and confidential*";
 - v) the Joint Liquidators did not authorise the SFO investigators to take notes from the Reports and were not aware that the SFO had taken any notes, let alone verbatim notes, until they reviewed the witness statement of Mr Brinkworth filed in the judicial review proceedings;

- vi) the Joint Liquidators did not authorise the SFO to publish the notes taken from the Reports in open Court whether as part of the judicial review proceedings or otherwise; and
 - vii) the Joint Liquidators believed that the SFO reviewed the Reports in order to assist with developing lines of enquiry in their investigations.
68. The “no authority point” was hotly disputed on the part of the claimants. However, Ms Phelps submitted that, in any event, the cat was now out of the bag; and that, at least so far as the argument concerning loss of confidentiality is concerned, it matters not whether such escape was with or without the authority of the Joint Liquidators. That was also a matter of dispute but, for present purposes, I am prepared to assume in favour of the claimants that that proposition is correct; and that on this basis it is unnecessary to resolve the “no authority point”.
69. Third, as to the applicable principles, Mr Trower submitted in summary as follows:
- i) It is well established that a limited waiver of privilege does not necessarily cause the privilege to be lost – “*it must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it*”: see *B v Auckland District Law Society* [2003] 2 AC 736, per Lord Millett, at [68].
 - ii) Where a document has been disclosed to a limited number of third parties (in this case officers of the SFO) the question is whether the circumstances are such that there has been an express or implied preservation of the overall confidentiality as against the rest of the world: see *Thanki* at para 5.13.
 - iii) Cases such as *Gotha City v Sotheby’s* [1998] 1 WLR 114, at 122B-F and *NRG v Bacon & Woodrow* [1995] 1 All ER 976 demonstrate that confidentiality, and therefore privilege, will be maintained where the circumstances in which the communications were made lead to the inference that the information was intended to be confidential.
 - iv) In applying these principles, the courts have taken a generous view in circumstances where copies of privileged reports have been made available to prosecuting authorities, see e.g. *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113, where the plaintiff in a civil action had provided copies of privileged documents produced for the purpose of the civil action to the police who were investigating the defendants’ conduct. A prosecution followed, in the course of which some of the privileged documents provided to the police were disclosed to the defendants under the Attorney-General’s Guidelines on Disclosure of Information and further privileged documents were ordered to be provided to the defendants by the judge at the criminal trial. Following the acquittal of the defendants, the plaintiff sought an order that the defendants deliver up to them all the privileged material and an order restraining the defendants from making any use of the privileged materials in the civil action or any other legal proceedings between the parties. The defendants resisted the application, contending that the waiver of privilege in

favour of the police and the production of documents at the criminal trial amounted to a loss of privilege which could be relied on by the defendant for the purposes of the civil proceedings. The Court of Appeal granted the relief sought by the plaintiff. Neill LJ stated as follows (at 1121D-1122B):

“..it is clear that the plaintiff made the documents available for a limited purpose only, namely to assist in the conduct first of a criminal investigation and then of a criminal trial. This action of the plaintiff, looked at objectively as it must be, cannot be construed as a waiver of any rights available to them in the present civil action for the purpose of which the privilege exists.

...

In my judgment the action of the plaintiff in making documents available for the purpose of the criminal trial did not constitute a waiver of the privilege to which it was entitled in the present civil proceedings. Its action...was in accordance with its duty to assist in the conduct of the criminal proceedings, and could not properly be construed as an express or implied waiver of its rights in its own civil litigation. Indeed, it would in my view be contrary to public policy if the plaintiff's action in making the documents available in the criminal proceedings had the effect of automatically removing the cloak of privilege which would otherwise be available to it in the civil litigation for which the cloak was designed.”

- v) Accordingly, the *British Coal* case demonstrates that disclosure of privileged materials to the criminal justice authorities (even where those materials are then disclosed to a defendant to criminal proceedings), will not result in a more general loss of privilege. Moreover, it should be noted that whereas the plaintiff in *British Coal* consented to the use of the privileged material in the criminal proceedings, no such consent was given by the Joint Liquidators in the present case.
- vi) The principle that the disclosure of privileged materials to the criminal justice authorities will not result in a more general loss of privilege is hardly surprising as a contrary conclusion would amount to a strong disincentive for those with relevant knowledge to assist the criminal justice authorities in circumstances where those authorities could not use their compulsory powers of disclosure to obtain such information, since those powers do not cover the disclosure of privileged information. There is an important public interest in facilitating the success of investigations by an assurance of confidentiality and the preservation of privilege.
- vii) It would therefore be a surprising conclusion if the provision of documentation to the SFO in response to the service of a notice pursuant to s2 of the Criminal Justice Act 1987 were to lead to a loss of privilege. Any loss of confidentiality must be seen as restricted to the criminal proceedings alone.

- viii) The Court has taken a similar approach in relation to the confidentiality of documents produced pursuant to a request by the Bank of England under the provisions of the Banking Act 1987: see *Re Galileo Group Ltd* [1999] Ch 100.
70. Ms Phelps submitted, in effect, that although such submissions may be relevant in the context of “waiver” of privilege, they are not relevant here where the issue is one of loss of confidentiality. In support of that submission, Ms Phelps submitted in summary as follows:
- i) It is a pre-condition to any claim for privilege that the documents in question are confidential: See *per* Lord Scott in *Three Rivers District Council v Governor and Company of the Bank of England* [2005] 1 AC 610, para 24 and *BBGP Managing General Partner Limited v Babcock & Brown Global Partners* [2011] 2 WLR 496, paras 45-50 (*per* Norris J).
 - ii) Analytically therefore, confidentiality is a separate issue to that of loss or waiver of privilege: see *Thanki* para 5.04 “*Confidentiality does not by itself enable privilege to be claimed, but if it is not confidential there can be no question of legal professional privilege arising or being maintained*”: *Thanki*, para. 1.27.
 - iii) While it is sometimes possible to maintain privilege where documents have been disclosed to a third party for a limited purpose, this is impossible once the information which is sought to be protected has been referred to in open court. Once this has occurred, the information in question is in the public domain and will no longer be capable of protection by privilege: see: *Thanki* paras. 5.11 – 5.12; *Passmore on Privilege* para. 7.027 – 7.049, especially at paras. 7.034-7.037; *Great Atlantic Insurance Co. v Home Insurance Co* [1981] 1 WLR 529; and *Gotha City v Sotheby’s* [1998] 1 WLR 114, where the following passage from *Style & Hollander on Documentary Evidence* was cited with approval at (p118-119):

“If the document is read out on the television news or in open court then confidentiality is lost once and for all. No further question of privilege arises. But it is important to bear in mind that it is possible for a document to cease to be confidential as between some parties and not others. If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of those friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world.”
71. For present purposes, I am prepared to assume in favour of the claimants that these propositions are correct. However, as submitted by Mr Trower, it seems to me that even on the assumption that there was a loss of confidentiality in respect of the information contained in the notes as exhibited to Mr Brinkworth’s statement, it does not necessarily follow that there was or is a loss of confidentiality in the three Reports themselves. In that context, Ms Phelps submitted that the material reproduced in the notes taken by the SFO investigators and exhibited to Mr Brinkworth’s statement is

very detailed and appears to amount to a “*substantial proportion*” of the Reports in question; that this is, in effect, confirmed by Mr Verrill himself when he refers in paragraph 33 of his statement to the notes as “*handwritten verbatim notes which amounts to copying*”; that there is no reason to think that the relevant Reports have not been substantially reproduced; and that therefore privilege in these Reports themselves cannot, therefore, be maintained. Further, Ms Phelps sought to rely in particular upon a passage in *Passmore*, p322 fn 68 and the case there cited from New Zealand, *Chandris Lines v Wilson & Horton* [1981] 2 NZLR 600.

72. I am unable to accept the thrust of these submissions. As to *Chandris*, it seems to me that, as submitted by Mr Trower, that case is distinguishable as it concerned a waiver of privilege by the person entitled to assert it. Here, as I have stated, Ms Phelps has expressly disavowed any reliance on “waiver” or “collateral waiver” but advanced the claimants’ case on the basis simply of loss of confidentiality. In that context, even on the assumption that the relevant Reports have been “substantially reproduced” in the notes, it seems to me that the only relevant loss of confidentiality which has occurred is in respect of the information actually set out in the notes taken by the SFO and exhibited to Mr Brinkworth’s statement – no more, no less. However, the Reports themselves are not in the public domain; and in my judgment, it follows that there has been no loss of confidentiality in such Reports.
73. It might be thought that this conclusion rests on a fine distinction which has no merit. However, it seems to me necessarily to follow from the limited nature of the argument advanced by Ms Phelps which is based simply on alleged loss of confidentiality and not on any waiver or collateral waiver.
74. Be all this as it may, I should repeat that the arguments relating to loss of confidentiality are, in my judgment, irrelevant given my earlier conclusion that the Joint Liquidators’ claim to assert litigation privilege in respect of the 5 Reports fails.

Conclusion

75. For these reasons, it is my conclusion that the Joint Liquidators’ claim to assert litigation privilege in respect of the 5 Reports fails. Counsel are accordingly requested to seek to agree a draft order together (including any specific terms with regard to confidentiality and use of the Reports as referred to above, costs and any other consequential matters). Failing agreement, I will deal with any outstanding issues.