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Civil Appeal No. 37 - 53 & 37A- 54A of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION (COMMERCIAL COURT)
BEFORE THE HON. CHIEF JUSTICE
CASE NUMBER 2022: Nos. 37-53
Nos. 37A-54A

IN THE MATTER OF JARDINE STRATEGIC HOLDINGS LIMITED

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

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL IAN KAWALEY

- -

Between:

OASIS INVESTMENTS II MASTER FUND LTD AND OTHERS
(Civil Appeal No. 37 - 53)

Appellants

-v-

JARDINE STRATEGIC HOLDINGS LIMITED
JARDINE STRATEGIC LIMITED

Respondents

JARDINE STRATEGIC HOLDINGS LIMITED

JARDINE STRATEGIC LIMITED

(Civil Appeal Nos. 37A-54A of 2023)

Appellants

-v-

OASIS INVESTMENTS II MASTER FUND LTD AND OTHERS

Respondents

Discovery Whether documents of subsidiary within the possession custody or power of the parent company - whether legally enforceable right to obtain inspection of another's documents existed - existence of arrangement or understanding whereby a right to inspect the documents of another established. Scope of privilege - joint interest privilege - relationship between company and shareholder - date on which hostile litigation within the reasonable contemplation of the parties

Mark Howard KC, Mark Chudleigh, Laura Williamson and David Thom of Kennedys Chudleigh Limited, Matthew Watson of Carey Olsen Bermuda Limited, Lilla Zuill of Zuill & Co and Delroy Duncan KC and Ryan Hawthorne of Trott and Duncan Limited for the Appellants in the first appeal

Martin Moore KC and John Wasty of Appleby (Bermuda) Limited for the Respondents in the first appeal

Hearing date(s): 4, 5 & 6 December 2023
Date of Ruling: 5 March 2024

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APPROVED JUDGMENT

BELL, JA:

1. With very large sums of money at stake, it is no surprise that the litigation arising from the amalgamation of Jardine Strategic Holdings Limited ("the Company") and JMH Bermuda Limited should have generated a considerable number of applications to the courts of Bermuda. Even before there has been a trial on the real issue, which is the amount which shareholders were entitled to receive for each share in the Company which they held on the date of the amalgamation, there have been no less than five judgments delivered by the Chief Justice, and one delivered by this Court, on which leave to appeal to the Privy Council has been sought and granted.

2. This appeal is concerned with the ambit of discovery, and in broad terms covers two areas of dispute. The first is the extent to which it can be said that the Company has an obligation to give discovery in relation to certain documents, described by Mark Howard KC for the Appellants ("the Appellants" or "the Dissenting Shareholders"), as financial and strategic documents, belonging to various companies within the Jardine group of companies ("the Group"), referred to as the Principal Group Companies, on the basis that such documents are within the Company's possession, custody or power ("PCP"); the second relates to the assertion of the Company's claim to privilege. The Chief Justice dealt with these issues in his judgment dated 14 February 2023 ("the Judgment").

Background

3. The relevant background is set out in the various judgments of the Chief Justice, as well as in the judgment of this Court dated 24 March 2023. For convenience, I would set out paragraphs 2 to 8 of this Court's judgment, which are in the following terms:

> "2. The particular amalgamation in this case concerns Jardine Strategic Limited ("the Company") which is a subsidiary company within the Jardine Matheson group of companies ("the Group") of which the parent company is Jardine Matheson Holdings Limited ("Jardine Matheson"). The Company is the product of an amalgamation ("the Amalgamation"), between Jardine Strategic Holdings Limited ("Jardine Strategic") and JMH Bermuda Limited ("JMH Bermuda"). Following amalgamation, those two companies continued as the Company. Prior to the Amalgamation Jardine Matheson held, directly or indirectly, 84.9% of the shares in Jardine Strategic.
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> 3. The purpose of the transaction, according to the Company, was to simplify the structure of the Group. The planned simplification involved, first, the acquisition by Jardine Matheson, for cash, of the approximately 15% of the issued share capital of Jardine Strategic that it did not already own, and, secondly, the subsequent cancellation by

Jardine Matheson of Jardine Strategic's almost 59% shareholding in it. These proceedings concern only the first step in the process.

4. On 8 March 2021, Jardine Strategic and Jardine Matheson announced ("the Announcement") that the former had agreed with the latter's proposal for a recommended cash acquisition of the 15% of the former's share capital that the latter and its subsidiaries did not already own. The Announcement explained that the acquisition would be implemented by way of an amalgamation under the Act, that a general meeting of Jardine Strategic would be implemented by way of an amalgamation under the Act, that a general meeting of Jardine Strategic would be convened to consider and vote on the Amalgamation, and that shareholders in Jardine Strategic would be entitled to receive US$33 in cash for each ordinary share held, explaining how the acquisition price represented a premium of different percentages when compared with the share price on the Singapore Stock Exchange (one of the three exchanges on which the Company's shares were traded) over various recent periods.

5. The Announcement carried on to explain that because a number of the directors on Jardine Strategic's board were also directors of Jardine Matheson, Jardine Strategic had established a transaction committee comprising directors who were not also directors of Jardine Matheson. Finally, the Announcement pointed out that because the Amalgamation required the approval of at least 75% of the votes cast by shareholders in Jardine Strategic, and because Jardine Matheson had undertaken to Jardine Strategic that it would vote (and would procure that its subsidiaries would vote) in favour of the resolution, the requisite approval was certain to be secured.

6. On 17 March 2021, Jardine Strategic's board gave notice ("the Notice") to its shareholders pursuant to section 106(2) of the Act of a special general meeting to be held on 12 April 2021 to consider and, if

> thought fit, pass a resolution approving the Amalgamation. The Notice confirmed that for the purposes of section 106(2)(b) of the Act the fair value of the shares had been determined by Jardine Strategic to be $33 per share
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> 7. In the period following the Announcement, and more particularly following the Notice, a number of funds acquired interests in Jardine Strategic's shares at an average price, according to the Company, of US$33.66.
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> 8. At the meeting of 12 April 2021, the resolution approving the Amalgamation was passed. Then on 14 April 2021 the steps necessary to complete the Amalgamation having been effected, the Amalgamation became effective, and Jardine Strategic and JMH Bermuda continued as the Company."

4. It can be seen from the above paragraphs that the Company valued the shares to be acquired pursuant to the amalgamation at $33 per share, and that following the announcement of the proposed amalgamation the Dissenting Shareholders acquired shares in the Company at an average price of $33.66 per share. The total amount to be paid to acquire the minority shares was said to have been $5.5 billion. Since the net asset value per share of the Company as at 31 December 2020 was said to have been $58.22, Mr Howard stated early on in his submissions that the Dissenting Shareholders had been "short-changed to the tune of almost a billion dollars". I confess that I do not follow the arithmetic, but one does get the broad point.

5. The Dissenting Shareholders had instructed Mark Bezant of FTI Consulting as their valuation expert, and he wrote a letter dated 14 November 2022 to the attorneys instructing him, in which he explained in detail why he felt that he needed certain documents relating to the Principal Group Companies in order for him to prepare a report giving his expert opinion as to the fair value of the Company as at 12 April 2021. He explained that holding companies such as the Company were routinely valued on a "sum of the parts" basis, and that what such a valuation required was an

assessment of the Company's interests in the Principal Group Companies, and consideration of the relationship between the sum of these values and the overall value of the Company. He then set out details of the requests he had made and his view of the inadequacy of the responses he had received to those requests, and made specific reference to the reason for non-disclosure as he understood it, namely that the disclosure which had been given did not include documents of the Principal Group Companies.

The PCP Discovery Issue – the law

6. Against that necessarily brief background, let me turn to the legal principles at play in this case. The Chief Justice set out the relevant legal principles at paragraph 21 of the Judgment, referring to the provisions of Order 24 of the Rules of the Supreme Court 1985 ("RSC"), which provides that after the close of pleadings in an action begun by writ there shall be discovery of the documents which are or have been in the relevant party's possession custody or power, relating to matters in question in the action. It was common ground that the question which arose on the application was whether the material sought by Mr Bezant held by the Principal Group Companies was or had been within the power of the Company.

7. The Chief Justice began by referring to the seminal authority of *Lonrho Ltd v Shell Petroleum Co Ltd and another* [1980] 1 WLR 627, in which Lord Diplock delivered the judgment of the House of Lords. In that case, discovery had been sought for the purposes of an arbitration in which Lonrho sought damages from Shell and BP (as defined in the judgment) and a number of their subsidiaries in Southern Africa, including Rhodesia, for the losses it alleged had occurred by reason of the defendants' alleged conspiracy to supply oil to Rhodesia in breach of the United Nations order imposing sanctions following Rhodesia's unilateral declaration of independence ("UDI"). It was a matter of public knowledge that oil continued to reach Rhodesia by other routes, which had the effect of prolonging UDI and preventing the use of a pipeline owned by Lonrho. The proceedings were concerned with the question whether the subsidiaries' documents were within the "power" of Shell or BP severally or Shell and BP jointly. There was in effect in South Africa and Rhodesia a law which

made it a criminal offence for the board of a subsidiary company to disclose the company's documents to Shell or BP. Shell and BP did in fact make enquiry of the boards of the subsidiary companies whether they were prepared to disclose their documents, of which Lonrho had sought discovery, and the boards refused on the grounds that to do so would be a criminal offence, and that in any event it would not be in the best interests of the companies to do so.

8. Lord Diplock expressed the view that the expression "power" must mean that the person on whom there was a duty to provide a list of documents had a presently enforceable legal right to obtain from whoever actually held the document, inspection of it without the need to obtain the consent of anyone else. And in relation to a subsidiary of Shell incorporated in the United Kingdom, but resident in Moçambique, Lord Diplock said this at page 636, F to H:

> "For the reasons already indicated Shell Moçambique's documents are not in my opinion within the "power" of either of Shell or B.P. within the meaning of R.S.C., Ord. 24. They could only be brought within their power either (1) by their taking steps to alter the articles of association of Consolidated and procuring Consolidated through its own board of directors to take steps to alter the articles of association of Shell Moçambique, which Order 24 does not require them to do; or (2) by obtaining the voluntary consent of the board of Shell Moçambique to let them take copies of the documents. It may well be that such consent could be obtained; but Shell and B.P. are not required by Order 24 to seek it, any more than a natural person is obligated 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."

9. Following his references to *Lonrho*, the Chief Justice turned to a number of more recent cases from the United Kingdom, Bermuda and the Cayman Islands, before summarising the relevant principles at paragraph 60 of the Judgment. I will set out

the names of those cases, since the Chief Justice referred to a number of them when setting out those principles. They were *Schlumberger Holdings Limited v Electromagnetic Geoservices AS* [2008] EWHC 56, *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] EWHC Civ 11, *Ardila Investments NV v ENRC NV* [2015] EWHC 3761, *Roman Pipia v BGEO Group Limited* [2020] EWHC 402 (Comm), *Berkeley Square Holdings Limited v Lancer Property Asset Management* [2021] EWHC 849, *Wong v Grand View PTC* [2020] SC (Bda) 57 Comm, *Ivanishvili v Credit Suisse* [2021] SC (Bda) SC 81, *Re Abudawood* (unreported, Cayman Islands, 27 July 2022) and *Constantin Medien AG v Ecclestone* [2013] EWHC 2676 (Ch). The Chief Justice also referred to *Hollander on Documentary Evidence (14th Ed).*

10. Mr. Howard said that most of what the Chief Justice had set out was unexceptional, though in relation to paragraph 60(1) of the Judgment (where the Chief Justice had said that the word "power" meant a presently enforceable legal right (per *Lonrho*)), Mr. Howard submitted that an understanding or arrangement short of a presently enforceable right could be sufficient. In paragraph 60(5), the Chief Justice had said that "in an exceptional case, documents of third parties may be within the "practical control" of the relevant party notwithstanding that they had no presently enforceable right to obtain such documents". The Chief Justice carried on to refer to the situation where there was an existing arrangement or understanding, the effect of which was that the party from whom disclosure was sought had in practice free or unfettered access to the documents of the third party, citing *Ardlia* and *Hollander*. But Mr. Howard said that this might or might not be right, depending whether the judge meant by this that it was only in an exceptional case (meaning that there had to be very special circumstances). If that is what he meant, then there would be no basis for the statement.

11. Next was the Chief Justice's statement at paragraph 60(6) of the Judgment, that a party from whom disclosure is sought may not have free or unfettered access to the documents of a third party if that party has provided access for a particular limited purpose, citing *Ardila, Berkeley Square, Constantin Medien* and *Pipia*. Mr. Howard said that in relation to this statement of principle it was not clear what the Chief Justice had in mind. It seems to me that he was doing no more than setting out the principles

to be derived from the cases to which he had referred.

12. Then he came to the Chief Justice's seventh statement of principle, that the arrangement or understanding could be inferred (*North Shore, Ardila, Pipia* and *Berkeley Square*) and that such an inference may be drawn if there was repeat behaviour sufficient to imply a promise to meet future requests (*Pipia*), something which required a review of all the relevant circumstances. Mr. Howard submitted that there could be something short of a legal obligation to provide a document which could fall within an "arrangement or understanding". He conceded that the dividing line between the two could be thin, but said that what one had to apply was a real world analysis and look at the evidence as a whole.

13. The eighth of the Chief Justice's statements of principle was that it was not necessary to show that there was an arrangement or understanding that the relevant party would have access to the entirety of the documents of the relevant third party. It was sufficient if the arrangement or understanding was for free or unfettered access to defined material (*Pipia*).

14. Then came the ninth statement, that there was no material distinction between the RSC in Bermuda and the CPR provisions in England. Mr Howard submitted that it was now accepted that there was no material distinction. The tenth was concerned with the burden being on the applicant, and the eleventh was that the court would only reject affidavit evidence which had not been tested in cross-examination where it was manifestly incredible. Mr. Howard submitted that there was a distinction to be drawn between factual and opinion evidence, and in this regard referred to the evidence of Mr Parr (then Group general counsel) in relation to whether or not an understanding or arrangement could be inferred from all the evidence. He submitted that Mr. Parr's evidence was opinion evidence, so that the Chief Justice's statement concerning its potential rejection did not apply.

15. The Chief Justice then turned in the Judgment to consider the evidence relied upon by the Dissenting Shareholders in support of their contention that the Company had practical control over the documents in question. The evidence related to board

documents, audit materials, the financial database, agreements entered into by the Company, their position at a directions hearing, and requests made of the Group for the purposes of this litigation.

16. But before turning to the evidence, Mr. Howard asked the Court to consider two points; the first was the extent to which it was only in an exceptional case that one could have an understanding or arrangement, and the second was what was meant by the question of free or unfettered access. And in relation to the question of exceptionality he referred to the Company's submission that the conventional *Lonrho* analysis applied unless the particular company's documents had already been searched or the third party had promised to make those documents available. That statement, he submitted, was not correct and was irreconcilable with the authorities. In support of this contention, Mr. Howard went first to *Ardila,* and having looked at the judgment of Males J, referred to the situation where repeated requests had been made and complied with. The question of when an arrangement or understanding arose was, he said, a fact driven one. In *Ardila*, the evidence provided was in the form of an affidavit from the group general counsel, whose evidence was found by the judge to amount to no more than an expectation that a request would be complied with because it was in the subsidiary's own commercial interests to do so, and represented evidence of the normal relationship between a parent and a subsidiary without the particular features of the *Schlumberger* or *North Shore* cases. I pause to refer to Mr. Howard's submission that Mr Parr's evidence was opinion evidence. The judge in *Ardila* considered the nature of the general counsel's evidence, concluding that it went no further than showing evidence of the normal relationship between parent and subsidiary. But he did not exclude the general counsel's evidence on the basis that it was opinion evidence.

17. Mr. Howard next turned to *Pipia*, a judgment of Andrew Baker J. The judge in that case referred to *Ardila* and *Schlumberger*, commenting that it was not hard to envisage the possibility that repeat behaviour could be sufficient to imply a promise that there was a standing consent to meet future requests. And the third case Mr Howard referred to was *Berkeley Square*, a judgment of Mr Robin Vos sitting as a Chancery Division judge, where the judge found the reference to "free or unfettered

access to documents" to be unhelpful because "such terms could lead to confusion as to whether, in order to have control of documents held by another, there must be an arrangement which allows a party to access the documents by whatever means they see fit", which was not the case. One needed to look at all the relevant circumstances to determine whether there was in fact the understanding or arrangement was established.

18. Next, Mr. Howard came to *Abudawood*, a judgment of Kawaley J in the Cayman Islands. The case concerned the obligation to give discovery of documents belonging to a subsidiary, and the judge reviewed those same cases as Mr. Howard had taken this Court to. He then went to the evidence and noted that there was no credible evidence that the parent company did have any legally enforceable right of access to its subsidiaries' documents, and declined to order the application for specific discovery. Mr. Howard stressed the difference between the facts of that case, where there was virtually no evidence as to how things worked internally within the group in that case, in contrast, he submitted, to the instant case.

The evidence in this case

19. The evidence on which Mr. Howard relied covered the terms of reference of the audit committees, approved by the relevant companies, the similar risk management provisions, the agreement ("the Evercore Agreement") made with Evercore Partners International LLP ("Evercore"), the implementation agreement, by which the amalgamation was to be implemented ("the Implementation Agreement") and the manner in which board material was distributed within the Group, and the inferences to be drawn from that process.

20. First, Mr. Howard stressed that since the appeal was by way of re-hearing, this Court was as well placed as the Chief Justice to decide matters. He referred to the Group structural chart which had been relied upon before the Chief Justice; this showed that in relation to Zhongsheng Group Holdings Limited, one of the Principal Group Companies, the Company's holding was only 20%. Mr Howard described this company as being an outlier in terms of there not being a controlling interest, but

maintained that the existence of a controlling interest was not the relevant question, which was whether there was or was not the same type of arrangement or understanding as existed with the other Principal Group Companies.

21. In looking at the corporate structure of the Group, Mr. Howard referred to the general management agreement made between the Company and Jardine Matheson Limited ("JML"), pursuant to which JML agreed to act as general manager of the Company and other companies within the Group. He referred particularly to the fact that the Company's submissions made the point that clause 4 of this agreement did not provide a right for the Company to receive documents owned by the subsidiaries. Mr. Howard submitted that the clause operated the opposite way to the way in which the Company was suggesting.

22. Mr. Howard also noted the manner in which board meetings of the two principal holding companies (Jardine Matheson Holdings Limited ("JMHL") and the Company) operated, with quarterly board meetings operating in tandem, and the Company's directors being provided with the same board papers as provided to other companies within the Group. Mr. Howard referred to the terms of reference of the audit committees of both companies which had been approved by their boards, and were in identical terms. He submitted that the provision at clause 3.5.4 (to "ensure that the internal audit function had full, free and unrestricted access to all group activities, records, property and personnel and receive such professional advice necessary to fulfil its agreed objectives") provided clear evidence that the board of the Company considered that it had the power to require the rest of the Group companies to provide any records which the audit committee might want. Because the document was published on the Group website, it represented a statement to the world regarding the board's belief that it could access the documents of other Group companies. Mr. Howard referred to the manner in which Mr. Parr had addressed the issue in his sixth affidavit, where he said that the Appellants had misunderstood the nature of the audit process, the targeted purpose for which audits were conducted, and the separation of the audit process between Group companies. Particularly, Mr Parr had made the point that requests for access would extend only to the relevant audit file. Mr. Howard said that Mr. Parr had failed to address the audit terms of reference,

which was the real issue. And he then submitted that the Chief Justice had missed the point in his comments at paragraphs 86 and 87 of the Judgment. And in paragraph 90, the Chief Justice had accepted Mr Parr's evidence that the representation letter provided was an entirely standard requirement for any company undergoing an audit, and was a representation in relation to the past. Mr. Howard submitted that the Chief Justice's finding was based on a confusion insofar as the representation was about what had happened in the past, which was inconsistent with the very terms of the representation.

23. Mr. Howard then turned to the Group Audit and Risk Management function, known by the acronym GARM, which he described as having a similar provision for access to documents belonging to other Group companies as the audit committee terms of reference. The Chief Justice considered the significance of the GARM at paragraphs 91 to 96. In this regard he referred to what Mr Parr had said in relation to the limitations on GARM's ability to access documents being circumscribed by its express terms of reference. Mr Howard submitted that Mr. Parr had not disputed the critical point that the GARM terms of reference established that the Company had felt able to confer on GARM the full, free and unrestricted access he had referred to. And in response to Kawaley JA's suggestion that it might be possible to have an arrangement entered into for a limited purpose, Mr Howard responded that if you were given power over a document in terms of access to it, you could not say that you had access for the purpose of conducting your business, but not for discovery purposes. As Mr Howard put it, once you have access, that access is actually access to the entirety of the documents; the understanding or arrangement was actually unrestricted, and the way that he put it was that you could actually access whatever documents you wanted for whatever purpose suited you. And he submitted that Mr. Parr's evidence was unsatisfactory and deficient insofar as it simply denied the existence of an understanding or arrangement. There was no evidence that the board thought its ability to grant the authority was limited in some respect.

24. Mr. Howard next referred to the Evercore Agreement, considered by the Chief Justice at paragraphs 101 to 105, pursuant to which Evercore had agreed with the Company, represented by the transaction committee ("the Transaction Committee"),

comprising those directors who did not have a conflict in relation to the proposed amalgamation project, to act as financial advisors in relation to the transaction. Mr. Howard went through the pertinent clauses of the agreement. Clause 5.1, which gave Evercore access to any information or documents which it required to perform its services, was, Mr Howard submitted, consistent and only consistent with an arrangement or understanding of the type previously discussed. Insofar as the agreement contained standard terms, a point made by Mr. Parr, he said the point was that the Company's board had felt able to agree Evercore's terms without modification. The reality was that the terms of the Evercore Agreement contradicted Mr Parr's description of what they achieved, and Mr. Howard noted that the Chief Justice had at paragraph 101 of the Judgment agreed with the Appellants' submissions as to the effect of the Evercore Agreement, while at paragraph 105 he had found that those provisions, standing alone, did not establish the agreement or understanding for which the Appellants contended, although they might be said to constitute an expectation. Mr Howard described the Chief Justice's reasoning as being somewhat difficult to follow, and said that it was inconsistent with the terms of the agreement.

25. The last Implementation Agreement on which Mr Howard relied was the Implementation Agreement made between the Company and JMHL in relation to the implementation of the amalgamation ("the Implementation Agreement"), which the Chief Justice addressed at paragraphs 105 to 106. Clause 7.6 of that Implementation Agreement covered the provision of information relating to the Company itself, the Group and its directors. Mr Howard described Mr Parr's evidence (that these were boilerplate clauses) as being "very thin". The Chief Justice viewed the terms of this Implementation Agreement as comparable to the Evercore Agreement, in terms of failing to establish that there was an arrangement or understanding between the Company and the Principal Group Companies to provide to the Company free or unfettered access to the documents of the latter (paragraph 109 of the Judgment). Mr Howard maintained that this finding was inconsistent with the terms of the Implementation Agreement which showed that the Company had always considered that it had the power over the financial and strategic documents which Mr Bezant sought.

26. Mr. Howard then turned to the board material. By way of example only he referred to a paper on Mandarin Oriental (one of the Principal Group Companies) in the form of a management report, containing a wealth of detailed information, going up the corporate chain. He described these reports as constituting the type of repeat behaviour which Baker J had had in mind in *Pipia*, leading to an inference that documents would be provided on request. He referred to Mr Parr's evidence that the board packs had been prepared by the Principal Group Companies themselves and not by the Company. Mr Howard described that as right, but said that the relevant question was whether there was an arrangement or understanding that the internal documents would have been provided if requested by the Company. He also made the point as to what the position would have been if anybody had asked for more information or documents. The Chief Justice had accepted (at paragraph 73 of the Judgment) the evidence of Mr. Parr, and specifically that this provision of management information reflected the ordinary and commonplace flow of information in any corporate group. Mr. Howard submitted that one would need to know more about the group to draw anything from such a statement.

27. In response to Kawaley JA's question as to whether it would have been possible for the Company and the subsidiaries to exclude the discovery obligations, on the basis that the right to review the particular documents was for audit purposes only, Mr. Howard responded by saying that the question to be answered was which documents you had power over, and if you did have power over them, then an obligation to disclose arose. He cautioned that the particular manner in which the Company operated was not necessarily the manner in which other conglomerates might operate – no doubt the same point as made earlier, that the exercise necessary to determine whether an arrangement or understanding existed was a fact driven one.

28. Mr. Howard then referred to a number of documents which demonstrated how companies within the Group were the subject of requests for information for budget purposes. One was an email sent by one Kelly Kong to various subsidiaries within the Group, requiring very substantial levels of information from the Principal Group Companies. The Chief Justice addressed this at paragraphs 78 to 79. Mr Parr had indicated in his affidavit evidence that Kelly Kong was someone working in Group

finance and that the email and attached document were sent on behalf of JMHL and not on behalf of the Company. Mr Howard found that odd, and suggested that Ms Kong must have been acting on behalf of the Company as well as JMHL. But that contention is not supported by any evidence. The Chief Justice had said at paragraph 76 of the Judgment that the Principal Group Companies were not supplying any of their underlying documents to the Company. This statement, said Mr. Howard, was factually incorrect, and he referred to the Mandarin Oriental management report referred to above, which was clearly a Mandarin Oriental document, and a similar report from Dairy Farm (as defined), which similarly appeared to be a Dairy Farm document, rather than information extracted from such a document.

29. The Chief Justice had referred in paragraph 77 of the Judgment (in the context of the normal relationship between parent and subsidiary) to Lord Denning's judgment in the Court of Appeal in *Lonrho*, when accepting Mr Parr's evidence regarding the usual reporting arrangements between such companies. The way that Mr. Howard put it was that Lord Denning in his judgment was talking about something completely different to what could be seen in this case, when compared with the usual position of a subsidiary providing audited accounts up the chain. And in relation to the provision of information for a limited purpose, Mr. Howard submitted that there was no evidence that the documents to which he referred the Court were in fact being provided for a limited purpose.

30. Mr. Howard referred to other documents, and drawing the strands together he submitted that there was repeat behaviour of material being provided, that the Company was able to decide what information it wanted to receive, and that there was no sensible basis for distinguishing between the provision of information and the provision of documents. And lastly, he said that this all had to be looked at in the context of the express representations that the Company had made as to its ability to access documents. In answer to a question from the President, Mr Howard said one had to consider what documents were relevant for the valuation exercise, and that one had to avoid getting "drawn down the line". And in relation to the audited financial statements for 2020, which had been produced by Mr Parr (albeit with a reservation as to not waiving privilege) in response to a specific discovery request, Mr Howard

asked why, if the Company could obtain these documents for the purpose of a directions hearing, which is what it did, was it said that it couldn't obtain them for the purposes of a trial? It was cherry picking to produce the 2020 accounts, but to say that those for 2016 through 2019 were not within the Company's PCP. The Chief Justice had accepted Mr Parr's statement (that the 2020 accounts were sought from the relevant entities for the specific and limited purpose of being referred to and exhibited in his third affidavit and that the fact that such a request was made did not suggest the existence of the alleged agreement or understanding) at face value, but the Company's position was, submitted Mr Howard, wholly artificial.

31. Mr. Howard referred to those parts of Mr Parr's evidence where he had denied the existence of an arrangement or understanding whereby the Company had access to its subsidiaries' documents, and maintained that to say that the documents were under the control of the various subsidiaries' boards was to ask the wrong question; the correct question to be asked was in relation to the existence or otherwise of an arrangement or understanding. Next, Mr Howard referred to the Company's argument that the understanding or arrangement for which the Appellants contended defied commercial logic. To accept that argument would, he said, ignore a mountain of evidence. And as to the other arguments that the Company had put forward as to the existence of an arrangement or understanding, Mr Howard said that he was not concerned with the other subsidiaries, only the Principal Group Companies, and he relied upon the evidence that had been put before the Court. In summary, the Chief Justice had set the bar too high and had ignored the material which the Appellants had put before the court.

32. In reply on the PCP issue, Mr Moore KC for the Company started by referring to the Group structure, with JMHL at the top of the structural chart and the Company (Jardine Strategic Holdings Limited) sitting below it as an intermediate holding company, and he referred to various of the subsidiaries. The point of referring to this was to ask why would a listed company, with external shareholders, in some of which the Company had a direct or indirect minority interest, give the Company access to its documents? The corporate formalities, he said, were not only observed but had to be observed because of the existence of external public shareholders, at many points

throughout the Group. His second overarching point was that the Company was an intermediate and subordinate company, as the Chief Justice had found it to be, and it was clear that its structural subordination to JMHL was "hard wired" into the Company's constitution. And he made the point that this was how the Transaction Committee had explained the position in its circular to shareholders, in terms of saying that, given the fact that JMHL effectively controlled the Company, there was no realistic prospect that there would be any equivalent opportunity for all the independent shareholders of the Company to sell their investment in the Company in full, at a premium of the level represented by the acquisition price, to an alternative buyer.

33. The reason Mr. Moore stressed the position of the Company within the Group structure was, he said, because as an intermediate holding company, the Company was not "in the driving seat" and its requests for information were much more limited than if it had been in the driving seat as the principal holding company. And he referred to the manner in which JMHL operated, based on the affidavit evidence of Mr Parr, and the fact that operational management of each of the Principal Group Companies was carried out by the relevant operating company and not by JMHL or the Company. Mr Parr took issue with the assertion made by Mr Chudleigh (in his sixth affidavit), sworn on behalf of the Dissenting Shareholders, that there was no distinction between the roles of JMHL and the Company within the Group, and that the two companies operated in tandem, with no distinction drawn internally between the two, something which Mr Parr dealt with in his sixth affidavit.

34. The position, he said, was just as one would expect it to be for a holding company and its relationship with the companies beneath it, as indeed it was for the Company in its role as an intermediate holding company. Any large conglomerate would have a central function, whether it was through a corporate vehicle or not. But the question of operational independence was important, as was the need to ensure that purposeful oversight did not turn into interference with management. In this regard, Mr Moore referred to the manner in which the Chief Justice had dealt with this aspect of matters between paragraphs 34 to 40 of his directions judgment of 12 November 2021, where he had set out the relevant parts of Mr Parr's affidavit evidence as to the nature of the

Group's structure. At paragraph 76 of that judgment the Chief Justice had adopted Mr Parr's description of the Group's structure as a series of pyramids within a larger overall pyramid, with JMHL at the top. Mr Moore gave as an example of one such pyramid the case of Mandarin Oriental as the holding company of the Mandarin Oriental group. And he stressed that the question to be answered was whether the Principal Group Companies had consented to giving copies of their documents to, in this case, the Company.

35. Mr. Moore noted that for this Court to be satisfied that an arrangement or understanding existed as sought by the Appellants, there had to be a bilateral arrangement, and he referred to the fact that in the cases on which the Appellants relied in which an arrangement had been found to exist, that arrangement stemmed from and was for the purposes of litigation. And in terms of repeat behaviour there were just two examples, going back to 2016.

36. The next overarching point that Mr Moore made was that disclosure was about documents, not about information flows. And he advised that where information flowed up the corporate chain and was contained in documents in the possession of the Company that had been disclosed. These were documents created and compiled by the subsidiary from its own source material. But it was, he said, an impermissible leap in logic to say that because a holding company expected to be informed about an issue and for that routinely to be contained in a document, that it was entitled to access the source materials from which that document was created or compiled. And Mr Moore referred to the manner in which the Chief Justice had addressed the issue as being "expert-led".

37. Mr. Moore then turned to how the discovery process had operated, referring to Mr. Bezant's requests, and giving examples of the breadth of some of his requests, one of which sought "spreadsheets or any other data sources/documents underlying the budget and the projections contained therein" and another which sought "Excel spreadsheets, source data and underlying documents for the Company's net asset value". Mr Moore said that the Company had dealt carefully and assiduously with each of Mr Bezant's requests, and that some 2,890 documents of very focused

disclosure had been given, including 379 spreadsheets with multiple tabs of detailed financial data. He said there had been no criticism of the Company's compliance, and nor could there be; the criticism concerned the question of practical power, which he described as misconceived. And he referred to the proceedings taken by the Dissenting Shareholders in New York and Delaware (which had failed) and the issue of subpoenas in this jurisdiction, which were the subject of challenge.

38. Mr. Moore next referred to Mr Howard's statement that $33 per share represented a significant discount to the $58.77 market value basis of the net assets. He described this as being a "mathematical derivation", which derived a value of the unlisted subsidiaries of JMHL by taking the market capitalisation of JMHL less the market capitalisation of the Company. This derivation, which involved no discounting, moved without reference to the performance of the underlying unlisted businesses. This was not, he said, a reliable basis for market analysts to use, and they did not use it. In answer to a question from the President as to the point of such an exercise, derived as it was from the market price of the shares of JMHL and the Company, he said that it was a metric that had been used in the past, and while consideration had been given to changing it, he referred to the Company's response to Mr Bezant's second information request. That response was that this had been a longstanding disclosure by the Company, not a conventional NAV or book value, which had originated at a time when the Company was markedly different in nature, comprising largely minority investments in listed companies. The practice nevertheless continued for reasons of custom and continuity. In the Company's responses, it explained that the market value basis net asset metric ("MVBNA") was not a conventional NAV or book value, and was not comparable to the conventional analysts' "sum of the parts" approach. It gave the history and explained how, as the Group's structure changed, anomalies inherent in the calculation had become more pronounced. The Company explained how the implied valuations incorporated in the MVBNA and the valuations produced by analysts had diverged to a significant degree, and concluded by saying that the MVBNA eventually diverged widely from any normal accounting measure or externally recognised view of value. The explanation previously given by the Company put into context Mr Howard's assertion that the merger price was at a substantial discount to the Company's own NAV, mentioned at paragraph 4 above.

39. Mr. Moore then addressed the test to be applied by this Court on hearing the appeal. He relied upon the case of *Assicurazioni Generali SpA v Arab Insurance Group* [2002] EWCA Civ 1642 as giving support for the approach which he said this Court should take, namely to give a generous ambit to the Chief Justice's findings and only to intervene if the Court is convinced that the Chief Justice was plainly wrong or took into account things he should not have or failed to take into account things which he should have, or misdirected himself on the law. Mr Moore pointed out that the Chief Justice was being asked to draw an inference that the alleged agreement existed by reference to an evaluation of undisputed primary facts. His second point was that this was a directions order at an interlocutory hearing, and it was, he said, important that such hearings did not get "elevated to the main event". And the facts set out in Mr Parr's affidavit evidence were not contested. Mr Moore referred to *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, and the factors set out in the Company's skeleton argument, and pointed to the way in which the Chief Justice had dealt with the issue at paragraph 119 of the Judgment. The Appellants were asking this Court to say that the Chief Justice should have summarily rejected both the detail and substance of Mr Parr's evidence on the basis of inferences which they invited the Chief Justice to draw from certain documents.

40. Mr. Moore then referred to "the shifting nature" of the case the Company had to meet. Mr Chudleigh's second affidavit had sought disclosure on the basis that the Company had PCP over all of the documents of the Principal Group Companies. Mr Moore said that if Mr Parr had been responding to Mr Howard's submissions rather than Mr Chudleigh's affidavit, he might have been able to say more. By the time of the hearing below, the Dissenting Shareholders were saying not that the arrangement or understanding extended to all documents, but only those of the sort requested by Mr Bezant. And this "morphed again" into financial and strategic documents of the sort requested by Mr Bezant. There was, Mr Moore submitted, no basis on which to infer the existence of any such arrangement or understanding; it was inherently unlikely that there would be a bilateral arrangement or understanding for access to an ill-defined subset of the Principal Group Companies' documents; his third point was that it was perfectly clear that the Appellants had decided that their original request

represented overreach, and so needed to be trimmed down; and finally, Mr Parr had addressed the arrangement or understanding which the Appellants had actually alleged in their evidence.

41. Mr. Moore then turned to the law on PCP, which he described as not being controversial, referring to paragraph 60 of the Judgment, and identified the questions of "in an exceptional case" and "free or unfettered access" as the issues where he and Mr Howard parted company. He started with *Lonrho*, describing the decision as a very clear statement of principle. He referred to the "difficult territory" reached in determining where practical control started and finished, in cases where the courts had accepted that a presently enforceable legal right was not a requirement for a document to be within a person's power.

42. Mr. Moore next turned to *Ardila*, which he said was the first English case properly to analyse what was meant by control. He referred to the passage where the judge had asked the question what would happen when there had been past cooperation and consent, and there was no reason to suppose that that position might change, and had said that in his judgment the evidence in that case established that the documents were and had been within the control of the claimant. *Lonrho* made it clear that there might be circumstances in which practical control could be derived where there were exceptional circumstances.

43. Mr. Moore then addressed the "free or unfettered access" question, and said that where access had been given for a particular purpose, such as audit, you do not have unfettered access. And he referred to Mr Howard's criticism that the Chief Justice had focused on exceptionality when the test he applied in paragraph 119 of the Judgment made no reference to exceptionality, and could not be faulted. And Mr Moore maintained that those cases where the *Lonrho* principle had been "stepped aside" were extremely unusual, where things had happened within the litigation which made it easier to infer the existence of an arrangement or understanding in that context rather than in the context of day-to-day operations.

44. Mr Moore then turned to the evidence, and Mr Parr's statement at paragraph 11 of his

fifth affidavit, where he denied the existence of the alleged agreement or understanding. As well as being Group general counsel, Mr Parr had been a director of some of the Principal Group Companies. His evidence was given by someone who knew the position, and was fundamentally inconsistent with the case that Mr Howard sought to construct on the basis of inference. Mr Parr's evidence was not opinion evidence, but evidence as to how the operations of the Group were conducted. There was no reason to reject that evidence.

45. And Mr Moore said that the arrangement or understanding argued for by the Appellants made no sense from the perspective of listed companies with their own independent shareholders and operational management. It would, he said be "a remarkably weird arrangement or understanding" for any of the Principal Group Companies to enter into; and also odd that such an arrangement was said to apply to the Principal Group Companies and not to the other thousand or so companies within the Group, a position the Appellants took as "a targeted and proportionate approach". And his final point was that this was not a group in which relationships between various companies were left unspoken. That could hardly be the case when there were external shareholders throughout the Group. The Company's relationship with the management company was governed by a clear and comprehensive agreement and it would be bizarre in those circumstances to leave a right of free access to documents undocumented. The only conclusion which could be drawn from the lack of any written agreement was that such a right did not exist.

46. In terms of further detail Mr Moore referred to the Evercore and Implementation Agreements. He noted the similarity of the Appellants' argument with the argument made in *Ardila*, which the judge in that case had rejected. The Evercore Agreement contained standard terms and conditions, not individually negotiated ones; if the Company (through the Transaction Committee) wanted Evercore to do the job, it had to sign up to their standard terms and conditions. Clause 5 of the Evercore Agreement made the provision for access to which Mr Howard had referred in the terms contained in paragraph 24 above. Mr Moore submitted that the first part of the clause dealt with access to people, and as to the second part, while it did deal with information and documents, it did so without reference to any obligation to provide

information or documents of associated companies. And he posited the position where, in relation to a subsidiary ten steps down the chain from a Principal Group Company, if Evercore asked for a document belonging to that subsidiary which the Company did not have, there could be no obligation on the Company to take steps to secure the document; the clause was intended to be limited to documents which the Company actually had, which was the reasonable interpretation of the clause.

47. The Implementation Agreement, submitted Mr Moore, was no better. The clause was aimed at documents required for the circular or otherwise for the implementation of the acquisition, and contained no reference to obtaining documents, and did not suggest that the Company had access to the documents of its subsidiaries. As Mr Parr explained in his fifth affidavit (paragraph 47), this was a boilerplate clause for an agreement of this kind, and that seems to have been accepted by Mr Chudleigh in his sixth affidavit at paragraph 82.

48. Mr Moore then turned to the points made by Mr Howard on the audit process and GARM. He started by referring to the matters which those committees considered, commenting that it was difficult to understand why the Appellants would think that the documents an auditor would be interested in would include the financial and strategic documents of the sort Mr Bezant was seeking. Each of the companies within the Group had a contractual relationship with its own auditor, and would provide access to the documents needed by that auditor. If an issue arose in the consolidation process at the Company's level, the document would be made available by the relevant company to PwC, because if they did not, they would not get the clean audit desired. That was how audits of group companies worked the world over.

49. And in relation to GARM, that body performed its work in accordance with the audit plans approved by the relevant audit committees. He noted that in *Lonrho* in the Court of Appeal, Lord Denning had referred to the fact that in relation to group accounts, what the parent company requested would no doubt be automatically complied with by the subsidiary, and that (as here) the parent company would probably have the same auditors as its subsidiaries. And that statement by Lord Denning was made in the context of a finding that just because a parent company owned all the shares of

the subsidiary did not mean that the parent had immediate power over the subsidiary's documents.

50. Mr Moore went back to the Chief Justice's finding at paragraph 86 of the Judgment, to the effect that there was nothing in the terms of reference of the audit committee which provided any evidence in relation to the arrangement or understanding for which the Appellants contended from the perspective of the Principal Group Companies. Even if the Chief Justice had been wrong on his finding, the wider right of access for which the Appellants contended could not be inferred from the terms of reference of the audit committee. And in regard to the Chief Justice's finding in relation to the representation letter (at paragraph 90 of the Judgment) the reality was that the representation letter was provided in respect of the consolidated financial statements of all the subsidiaries; it was a representation as to a single set of accounts. In relation to board papers the Chief Justice was entitled to make the findings he did on the basis of Mr Parr's evidence. And in relation to reportage, there was no repeat behaviour of compliance with requests. There were just two examples of documents being provided in response to requests from the Company, and that had been in 2016. So there was no repeat behaviour of compliance with requests.

51. In relation to the Kelly Kong email, Mr Moore referred to the manner in which the Company had dealt with this in its submissions. And that position had been accepted by the Chief Justice at paragraph 79 of the Judgment, namely that the email in question had been sent on behalf of JMHL.

52. Mr Moore then addressed the fact that Mr Howard had referred to Zhongsheng, a subsidiary of Jardine Motors, in which the minority interest was as low as 20%. It could not possibly be the case that the Company was entitled to access its documents, and Mr Moore suggested that Zhongsheng had been included only because it had been referred to in the minutes of a JMHL board meeting, and that there had been no real analysis of the position.

53. Mr Moore then turned to the extent of the disclosure which had been sought, with reference to Mr Parr's third affidavit, and particularly the table set out in paragraph

79 of that affidavit, which showed that in respect of the companies identified (almost all Principal Group Companies, although not all of that grouping), there were no less than 5,290 monthly reports produced which the Appellants had sought.

54. Mr Moore sought to draw the threads together, describing the Appellants' case as being based on unjustified assertion, the avoidance of facts which were awkward for them, elision and non sequitur. Assertion he had dealt with previously; as to the awkward facts, he started with the Company's role as an intermediate holding company, the terms of reference of the audit committee, and those other matters previously canvassed. The point he made was that all were based on the clear and uncontroverted factual evidence which Mr Parr had given about the workings of the Group. As to elision, he said that the Appellants had constantly elided JMHL and the Company, and gave the examples to which he had previously referred. As to non sequiturs, Mr Moore referred first to reportage where a subsidiary produced reports from its own material or selected its own documents, and the Appellants had submitted that JMHL was therefore entitled to request the source documents; that simply did not follow, and was still less the case for the Company. The next was the Appellants' reliance on the audit terms of reference, the strained interpretation of the Evercore and Implementation Agreements and the representation letter. Mr Moore submitted that it was extraordinary that the Appellants were asking this Court to draw inferences contrary to Mr Parr's evidence. The next of the non sequiturs related to the free and unfettered nature of the access granted. Even if it were thought that the Company did have access for a purpose, that access was restricted by reference to the purpose and therefore fettered. And even if the Principal Group Companies had volunteered documents in the past, we now knew what their position was, in relation to the subpoenas. Finally, Mr Moore concluded his submissions by saying that it would be extraordinary if, in a group as well governed as this one, where material matters are documented, an arrangement as wide-ranging and extravagant as the one for which the Appellants contend could not be found in any document.

55. In reply, Mr Howard started with the relationship between JMHL and the Company, and the fact that each was the major shareholder in the other. He said that it was Mr Moore who was attaching significance to the Company's position as an intermediate

holding company, and the Company was not simply a company which sat below JMHL, but was also the majority owner of JMHL, something he described as having been deliberately set up that way. And the reality was that the two did operate in tandem.

56. Mr Howard then turned to the standard of review on a re-hearing. In a case such as this, at an interlocutory stage where there has been no assessment of witnesses, an appellate court should, he said, be willing to form an independent opinion upon the proper inferences to be drawn from the specific or primary facts. The Appellants were seeking to draw inferences from a variety of documents and pieces of evidence. So this Court was in just as good a position as the Chief Justice to determine what inferences should be drawn from the material.

57. Mr Howard then focused on the Appellants' criticism of the Chief Justice's approach, with particular reference to exceptionality. While the Chief Justice had referred to *Ardila* and *Hollander* on this issue (paragraph 60(5) of the Judgment), Mr Howard referred to *Pipia*, which demonstrated two ways in which a party might have power over a third party's documents; one because he has a legal right, and the other because there is some understanding or arrangement to that effect. The judge should, he said, have simply approached the evidence asking whether there was an understanding or arrangement, and not to have approached it on the premise that this would be something wholly exceptional. Just pausing for a moment, it seems to me that the Chief Justice at paragraph 60(5) was doing no more than saying that where there was an understanding or arrangement, that would take matters outside the normal position as in *Lonrho*, where a parent company did not have control over the documents of its subsidiary. It seems to me that altogether too much weight has been placed by Mr Howard on the use by the Chief Justice of the word "exceptional".

58. Mr Howard then criticised the Chief Justice for not having stood back and asked himself what he should take from each of the pieces of evidence the Appellants had relied upon – namely, the audit and GARM terms of reference and the Evercore Agreement. This exercise is to be distinguished from the Chief Justice's statement at paragraph 119 of the Judgment, to the effect that he had considered the totality of the

evidence.

59. Mr Howard next criticised Mr Parr's statement in his fifth affidavit, at paragraph 11, where he denied the existence of the alleged agreement or understanding, pointing out that Mr Parr knew about the audit and GARM terms of reference at a time when the Appellants did not. And he criticised what Mr Parr had said on the subject in paragraphs 55 to 58 of his sixth affidavit, and repeated the points made previously in relation to the terms of reference of the audit committee, those in relation to GARM, and the terms of the Evercore Agreement. All this led up, he said, to the Company's board considering that they had power over the documents of their subsidiaries.

60. Mr Howard then addressed the position in relation to the understanding or agreement post the merger, noting that Mr Parr had not put in evidence to say that if the Court found there to have been an understanding or arrangement, the Company had gone back to its subsidiaries, and that they now said that they were not prepared to honour the previous position. He did, however, refer to the letter which JMHL had sent confirming that it would comply with any order the Court might make by giving access to the Company.

61. Mr Howard's next point was that there was no evidence that the Company's board thought that the power it had to grant access to Evercore had a limited purpose. He suggested that in relation to the audit committee, GARM and Evercore, the board itself understood that it was able to grant access for whatever purpose it thought fit. Even if the access in relation to the audit documents was qualified by reference to the audit function, in relation to Evercore, the documents were required in order to perform the valuation, the exercise with which these proceedings are concerned.

62. Mr Howard then raised the question as to whether the cases which came after *Lonrho*, *Schlumberger*, *North Shore*, *Ardila* and *Pipia* were somehow inconsistent with *Lonrho*, such that this Court should decline to follow them and simply apply the *Lonrho* test. He relied upon the fact that Lord Diplock had referred to the "very particular factual situation" in *Lonrho* (page 632). But those comments were made in the context of the interlocutory nature of the appeal, and what was unusual was that

leave should have been given to the House of Lords in such a case. In *North Shore*, Toulson LJ had referred to the tension between different passages from Lord Diplock's speech, and Mr Howard said that it would be a rather odd conclusion if you could access the subsidiary's documents as much as you liked, and were then able to say you weren't required to disclose them. Ultimately, the Court had to decide whether there was an understanding or arrangement. And if there was such, he noted that there was no evidence from a subsidiary to say that it had been the case that there was an understanding or arrangement, but that it was no longer prepared to honour that arrangement. And in response to questions from the Court, Mr Howard said it was artificial to draw a distinction between having an obligation to disclose documents which had been provided (albeit for a limited purpose) by the subsidiary, and not being able to call for that type of document when the document had not been produced in response to a request.

63. Finally, Mr Moore addressed the letter from JMHL (referred to at paragraph 60 above), and referred to the correspondence which had led to that letter being produced, written to ensure that the second leg of the transaction could proceed without interruption.

Findings with regard to PCP – the law

64. Let me start with the law, and in this regard Mr Howard accepted that most of what the Chief Justice had said was unexceptional. Where the Chief Justice's statements (made at paragraph 60 of the Judgment) were the subject of criticism from Mr Howard, the points he made were finely nuanced. The reality is that the starting point is *Lonrho*, and the principle that in the context of discovery pursuant to Order 24 rule 1 of the RSC, the word "power" means a presently enforceable legal right to obtain from whoever actually holds a document inspection of it without the need to obtain the consent of anyone else. But as found in *Ardila* (following *Schlumberger* and *North Shore* - see paragraph 14 of Males J's judgment), if there is evidence of a parent already having had unfettered access to the subsidiary's documents, or 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, that will

suffice. While Mr Howard criticised the Chief Justice's use of the word "exceptional" in paragraph 60(5) of the Judgment, I think that the Chief Justice meant no more than to take the position beyond the class of case where there is no more than an expectation that access to documents will be given.

65. Mr Howard also criticised the Chief Justice's use of the words "particular limited purpose" in paragraph 60(6). But the question to be decided is, as Mr Howard conceded it could be, a thin one. The reality seems to me to be as submitted by Mr Moore, that the exercise to be considered is a fact-driven one. And in this regard, one must be mindful of the nature of the re-hearing exercise to be conducted by this Court. As Mr Moore submitted, the Court should give a generous ambit to the Chief Justice's findings, and be conscious that the judge was being asked to draw an inference from an evaluation of undisputed facts. I would reject Mr Howard's submission that Mr Parr was giving opinion evidence, in relation to Group affairs. He was giving evidence of the knowledge which he had gained in his role as the Group general counsel, of matters which were clearly within his personal experience. He may on occasion have referred to wider and more general matters, based on his previous experience dealing with the organisation of conglomerates, gained when he was in private practice, but when he was referring to the Jardine Group and the manner in which it operated, he was giving evidence of fact on the basis of his knowledge, acquired as general counsel. And, unsurprisingly, there was no countervailing evidence which sought to challenge what Mr Parr had said.

66. So I reject the criticism that the Chief Justice erred in his statements of the relevant legal principles, and would now turn to consider the evidence, bearing in mind the comments made in the preceding paragraph.

Findings with regard to the PCP - evidence

67. The evidence to be considered started with the terms of reference of the audit and risk management functions within the Group, all part of what Mr Howard referred to as the two companies, JMHL and the Company, operating in tandem. But it goes without saying that the interconnecting shareholdings do make the position complex, and it

seems to me important to bear in mind Mr Parr's evidence, placing JMHL at the top of the corporate structure chart, and the Company being below JMHL in the role of an intermediate holding company, with the companies below that operating as separate pyramids within one large pyramid. I do not find it at all surprising that JMHL and the Company should have had their meetings at the same time, with common board papers. To do otherwise would have been uneconomic. And the points made by Mr Howard regarding the access to Group activities, records etc seem to me to be exactly what one would expect in a group where consolidated financial statements are required. As Lord Denning said in *Lonrho,* one would expect the parent company and its subsidiaries to have the same auditors, just as one would expect the subsidiaries to hand over their accounts "at once", to use Lord Denning's words, in order to make up group accounts. Lord Denning described that as being "all part of the ordinary working of business". And he rejected an argument based on lifting the corporate veil. I venture to suggest that if Mr Howard's argument had been raised in the Court of Appeal in *Lonrho,* it would have been similarly rejected. It does seem to me that there is an important distinction to be drawn between requiring access to documents for the purpose of a consolidated audit, and the ability to access the documents of a subsidiary for the purposes of contested litigation.

68. The position in relation to GARM, with terms of reference similar to those of the audit committee, should, logically, be dealt with in the same manner as those of the audit committee. Mr Howard submitted, in answer to Kawaley JA's question regarding the purpose for which access might be given, that once you have access that access extends to the entirety of the document. That seems to me to be to elide the access with the purpose and context for which it was given.

69. Mr Howard then addressed the Evercore Agreement, pursuant to which the Transaction Committee had engaged Evercore to advise it in relation to the proposed transaction. Mr Howard had relied particularly on clause 5 of that agreement, pursuant to which the Company had agreed to give Evercore access to, inter alia, documents of the subsidiaries, which it might need to perform its services. Mr Parr had referred to the fact that the clause in question was part of Evercore's standard terms, and provided no support for the existence of the alleged agreement or understanding. Mr

Howard said that the fact that the clause was a standard form simply gave rise to a "So what?" question. The Company had felt able to give access to Evercore of the very types of documents which Mr Bezant had sought.

70. Mr Howard referred to the manner in which the Chief Justice had dealt with the point at paragraphs 101 to 105 of the Judgment. The Chief Justice had accepted that it was clear from the agreement that the Transaction Committee considered that the Company had very wide access to the documents held by the subsidiaries, but did not view the provisions as establishing that there was in existence the necessary arrangement or understanding. He accepted that the Company had an expectation that the Principal Group Companies would provide the relevant documents, but noted that there was no evidence from the Principal Group Companies in relation to this issue at all, and neither was there any evidence that they had been asked to provide documents pursuant to the Evercore Agreement, or that they had in fact provided either information or documents to either the Company or to Evercore.

71. Mr Howard found the Chief Justice's reasoning difficult to follow, and suggested that his statement that there was simply an expectation was inconsistent with the terms of the agreement. It seems to me that the Chief Justice was perfectly entitled to deal with the Evercore Agreement as he did, given the absence of relevant evidence.

72. The Implementation Agreement was (and was found by the Chief Justice to be) very similar to the Evercore Agreement, insofar as it gave broad access to documents of subsidiaries to the Company. But again, the Chief Justice held that it fell within the category of establishing an expectation, rather than an arrangement or understanding. For the same reasons as exist in relation to the Evercore Agreement, I would take the same view.

73. Mr Howard had then turned to the board material. He submitted that what Mr Parr had said about the flow of information within the Group, insofar as it was consistent with the practice in other company groups, was opinion evidence. As I have said, I do not agree. But Mr Howard said that Mr Parr's statement did not actually tell you very much in relation to the existence of an arrangement or understanding. The Chief

Justice dealt with board material at paragraphs 71 to 80 of the Judgment. He accepted Mr Parr's evidence that the board papers had been prepared by the Principal Group Companies themselves, based on their own internal books and records. And he regarded the provision of management information to the boards of the Company and JMHL as reflecting the ordinary and commonplace flow of information in any corporate group. He stressed the distinction between information and documentation, and rejected in terms the submission that merely because the Company and JMHL were receiving information in the board packs, it followed that they were able to exercise free or unfettered access to the underlying documents of the Principal Group Companies (paragraph 76 of the Judgment). I would agree.

74. The Chief Justice accepted the evidence of Mr Parr in relation to the Kelly Kong email, and said that it did not assist the Appellants in establishing the existence of an arrangement or understanding. The position was no different in relation to the other examples of reports or information provided to the Company or JMHL by the Principal Group Companies. Again, I would agree.

75. Finally, the Chief Justice accepted Mr. Moore's submissions based on Mr Parr's evidence, set out between paragraphs 111 and 131 of the Judgment, relating to the Company's alleged change of position at the directions hearing. I would not repeat those findings, but for the avoidance of doubt, I agree with them. It follows that I would dismiss the Appellants' appeal in relation to PCP.

Privilege

76. The Company appealed against the Chief Justice's findings in regard to privilege, which the Company had asserted it was entitled to maintain. The Dissenting Shareholders argued that this claim was misconceived because the relationship of shareholder and company, and the joint interest arising therefrom, led to the conclusion that no such right existed. The Chief Justice's findings were: first, that it was established under English law that a company could not claim privilege against its shareholders (paragraph 143 of the Judgment); secondly, that in relation to the disputed issue of whether the rule applied to past shareholders, the relevant issue was

whether the documents were created during the period of the relationship with a shareholder which gave rise to joint interest privilege since subsequent shareholders were entitled to be treated as the successors in title to past shareholders (paragraph 154). In this regard the Chief Justice accepted the argument for the Dissenting Shareholders that the relevant issue was whether the documents were created during the period of the relationship, and that privilege did not disappear when the shareholder ceased to be a shareholder; thirdly, that the exception to the joint privilege rule based on the prospect of hostile litigation being established applied, since the Company and/or the Transaction Committee contemplated proceedings being taken under section 106 of the Companies Act 1981 by the time the Transaction Committee was established on 19 February 2021 (paragraph 169); and fourthly, on the question whether the English rule should be imported into Bermuda law, the appropriate court to consider that issue was this Court (paragraph 185).

77. Mr Moore referred to the rule whereby a shareholder can see privileged advice given to a company as "the company/shareholder rule", and noted that the rule had not been applied in any decision in this jurisdiction. If this Court were to find for the Company and accept that the company/shareholder rule should not form part of Bermuda law that would be an end of the matter. If this Court did not so find, then it was critical that the basis for the rule be identified; it could either be based on present status as a shareholder or joint interest. If the former, it could not apply to the Dissenting Shareholders, who had not been shareholders since 14 April 2021, when the amalgamation became effective. If based on joint interest (and Mr Moore noted that none of the English cases had characterised or justified it on that basis), then the joint interest only arose in relation to advice taken during the Dissenting Shareholders' period of membership. None of the Dissenting Shareholders had been shareholders before the amalgamation was announced, so that if the company/shareholder rule did apply, it only did so in relation to advice taken during the period of a person's membership. And Mr Moore noted that the register of members did not disclose the names of any long-term shareholders as plaintiffs in these proceedings. The Appellants as plaintiffs in these proceedings in relying on the successor in title principle were seeking an extension to the erosion of the fundamental privilege. They were seeking to elide the status of shareholder with a joint interest which arose before

they became a shareholder. The question to be answered was in relation to the scope of the exception. The Chief Justice had applied the test for litigation privilege when it had been common ground that that was not the test. The final point was that the Chief Justice had misapplied the exception by finding that litigation had not been in reasonable contemplation until 19 February 2021, when the Transaction Committee had been set up.

78. Mr Moore referred to the origin of legal professional privilege as an important substantive right, citing authority, and reminding the Court of the importance of the right.

79. Mr Moore then moved to the Dissenting Shareholders' adverse interests to those of the Company, well before 12 April 2021, when the amalgamation was approved by the shareholders. He referred to an email from one Francesco Ciardi of Elliott Advisors (UK) Ltd dated 11 March 2021, sent in response to a series of emails from United First Partners, who were, as Mr Moore put it "drumming up business for a dissenter pile-in". This was described by Mr Moore as a vivid illustration that the interests of those buying shares in the Company were inimical to those of the Company. Far from being aligned, their interests were either that the transaction failed or that they successfully litigated against the Company to achieve the highest possible price. Mr Moore was not praying these documents in aid of the reasonable contemplation argument, but to demonstrate that the interests of the Dissenting Shareholders and the Company were not aligned.

80. He then referred to the Appellants' skeleton argument (part of which rehearsed the discount to net asset value argument), and reminded the Court that it could not draw adverse inferences from an assertion of privilege, and that the directors owed their duties to the Company, not to its shareholders. He did not accept the proposition contended for by the Appellants that shareholders pursuing a derivative action on behalf of a company have a joint interest with the company in legal advice obtained in relation to the administration of the company. The derivative action analogy was not a case of joint interest.

81. Mr Moore then turned to the question whether the company/shareholder rule was sound in law, saying that the Company's position was that it was ripe for review at an appellate level. He referred to *Hollander on Documentary Evidence*, which described the basis for the rule as being "distinctly dubious", since it had been established in the 19th century before cases such as *Saloman v Saloman* [1895 -99] All ER Rep 33 and *Macaura v Northern Assurance Co Ltd* [1925] AC 619 had been decided. Once a clear separation between the company and its shareholders had been established, the law should have changed course, but did not. And as noted in *Hollander*, it was a curiosity that outside litigation, no shareholder had the right to access the privileged documents of the company, and there was no modern recorded case of any shareholder successfully obtaining such access other than in the course of disclosure in litigation against the company.

82. And while Mr Moore referred to the Chief Justice's recognition of the dubiousness of the rule in *Medlands (PTC) Limited v Commissioner of Police* [2020] SC (Bda) 20 Civ, 51, the Chief Justice based his decision in that case on the fact that the rule did not apply because the aggrieved party in the case was not a shareholder in the relevant company.

83. The next case was *Re G4S plc* [2023] EWHC 2863 (Ch), a judgment of Michael Green J. The rule had been vigorously attacked by counsel, but while the judge had doubts as to the justification for the rule, he took the view that it would take a higher court to say that the principle did not exist or should be got rid of. Three further propositions from *G4S* were that there was no authority which had extended the rule to non-registered shareholders, that the rule should only apply to someone who was a shareholder at the time the document came into existence, and that if different claimants were shareholders at different times, the documents they could see were different. And the Chief Justice, according to Mr Moore, must have been of the view that the joint interests of a company and its shareholders could not be the correct basis for the rule, because of the manner in which he had dealt with the issue between paragraphs 170 and 185 of the Judgment.

84. Mr Moore did refer to the case of *Woodhouse v Woodhouse* [1914] 30 TLR 559, for

the purpose of showing that the case was per incuriam, because Phillimore LJ had failed to follow the decision in *Saloman*, which meant in turn that Harman J's reliance on *Woodhouse* in the case of *Re Hydrosan* [1991] BCLC 418 was misplaced. Mr Moore mentioned a number of more recent cases which had cited *Woodhouse,* directly or indirectly, and submitted that because of the unsound basis upon which *Woodhouse* had been decided, this Court could consider the matter from first principles. He referred to the possible bases for the rule, starting with a proprietary interest, then by analogy with trusts, and then a joint interest based on the quasi-proprietary interests as owners of the company. None of them, he said, passed scrutiny.

85. On the proprietary interest point, he referred to *Macaura*, which he said demonstrated the strictness of the rule. I will just refer to the fact that timber lost in a fire had been insured in the claimant shareholder's name, not the company's. An arbitrator held that the claimant had no insurable interest. In the House of Lords, Lord Buckmaster said in terms that no shareholder had any right to any item of property owned by the company, since he had no legal or equitable interest therein. So far as the trusts analogy was concerned, that was drawn at a time when the basis for the rule in the trusts sphere was thought to be the proprietary beneficial interest in the trust's assets, which took one back to *Macaura*. So the analogy was no longer a good one, but there was a further problem arising from *Schmidt v Rosewood Trust Ltd* [2003] 2AC 709, where the Privy Council held that although a beneficiary's right to seek disclosure of trust documents could be described as a proprietary right, it was best approached as an aspect of the court's inherent jurisdiction to supervise, and, if necessary to intervene in, the administration of trusts.

86. Mr Moore dismissed the case of *CAS (Nominees) Ltd v Nottingham Forest plc* [2002] BCC 145, as the Chief Justice had done at paragraphs 174 and 175 of the Judgment. That left joint interest. Before dealing with that, Mr Moore reviewed the pre *Saloman* case of *Gouraud v Edison Telephone Co* [1888] 57 LJ CH 499. Mr Moore suggested, in my view rightly, that Chitty J would not have decided the case as he did had he had the foresight to know what the result would have been in *Saloman*.

87. Mr Moore then referred to the manner in which the Chief Justice had dealt with the question in paragraphs 142 and 143 of the Judgment, with reference to *Thanki: The Law of Privilege (3rd edition)*. The Chief Justice reviewed a number of the English cases (including those criticised by Mr Moore), and concluded that the justification for the rule in England had changed from the proprietary interest of the shareholder in the property of the company to the discharge of the fiduciary duties owed by a director to the shareholders, per *CAS*, and the existence of a joint interest in the subject matter of the communication, per *Thanki*.

88. Mr Moore next mentioned this Court's decision in *Wang v Grand View Private Trust Co Ltd* [2021] Bda LR 29 at [179] to [183]. He commented that while *Wang* made the point that the categories of joint interest are not closed, it was not clear how one decides when a common interest arises. And in regard to *Thanki* on the subject, Mr Moore said that in the light of *Schmidt v Rosewood* and the modern rationale for the rule in the trust sphere, it might be doubted that the relationship is properly one of joint interest at all. And in relation to *Thanki's* second category, a parent company and its wholly owned subsidiary, Mr Moore submitted that if the relationship of shareholder and company gave rise to joint interests, the size of the shareholder's stake in the company must be irrelevant. And he made criticisms of the other categories mentioned in *Thanki*, concluding that Mr Thanki's book was not a good source for the existence of the rule.

89. Mr Moore then drew the Court's attention to an article written by Professor Dame Sarah Worthington for The Company Lawyer in 2021, entitled "Shares and shareholders: property, power and entitlement". As Mr Moore commented, this was a very powerful analysis, underlining the point that shareholders do not own the company as a 'thing' in a legal sense; that is just a shorthand or colloquialism, and shareholders in fact own shares in the capital of the company. But as a matter of law the ownership argument did not run. The management of a company is under the control of the directors, and the shareholders do not individually or collectively control the running of the company in any conventional sense. He also explained why neither derivative actions nor the reflective loss principle assisted the Appellants.

90. Mr Moore next referred in passing to the case of *BTI 2014 LLC v Sequana SA and others* [2022] 3WLR 709, where the Supreme Court held that there was not a free-standing duty owed to creditors, but that it was all part of the directors' duties owed to the company. The Supreme Court recognised in *Sequana* that shareholders had an economic stake in the company, but rejected the notion that they had any proprietary interest in its assets. And it would, he said, be extraordinary if the rule could be extended so that creditors could get to see the advice given to the company on the basis of joint interest. He referred to by-law 132(A), which precluded shareholders' inspection of company documents except as conferred by statute or ordered by a court or authorised by the directors. So, in broad terms, a shareholder was effectively in the same position as anyone else.

91. Mr Moore referred to the argument for the Appellants which relied on two cases. The first was *Commercial Union Asssurance Co plc v Mander* [1996] 2 Lloyd's Rep 647, where reliance had been placed on a reference in that case to *Charman v Guardian Royal Exchange Assurance plc* [1992] 2 Lloyd's Rep 607, a reinsurance case which contained a follow settlements clause, and which was, submitted Mr Moore, a world away from a contractual relationship which denied access to any documents. The second case was *Dawson-Damer v Taylor Wessing LLP* [2020] Ch 746, which, Mr Moore submitted, was dealing with a completely different question, namely whether the right of inspection was part of substantive rather than procedural law.

92. His next point was that it could not be right that the law should be that the entitlement to see documents varied according to, for instance, the issue of new shares when the right had to exist at the time when the advice was taken. And when one bought shares on a public market, people were not thinking whether those shares had rights attached to them relating to the ability to see the company's advice. Mr Moore referred to the fact that the company/shareholder rule had been rejected in Canada (per *Ziegler Estate v Green Acres (Pine Lake) Ltd* [2008] AJ No 1081) and the United States (per *Garner v Wolfinbarger* [1970] USCA5 1339). The Canadian case placed emphasis on the fact that *Gourard* had been decided pre *Saloman,* and the US case made only a passing reference to *Gouraud,* and a first instance judgment in the case of *Dennis & Sons v West Norfolk Farmers' Manure and Chemical Co-op* [1943] Ch 220, which

had itself placed reliance on *Gouraud*.

93. Mr Moore's final point on ground 1 was to place reliance on the speech of Lord Sumption in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, and the emphasis on the nature of a company, of a share, and the relationship between a company and the shareholders. He submitted that the rule that a shareholder could see in litigation, and only in litigation, the advice given to the company relevant to the dispute between the company and the shareholders "had defied gravity for too long" and this Court should lead where the UK would surely follow.

94. Mr Moore then turned to ground 2A, that if, contrary to the Company's primary case, this Court ruled against the Company on the existence of the rule, that rule would not apply as between the Company and its former members. Once you cease to be a member, the company is entitled to claim privilege against that person in the usual way. He said that there was no case in the last 100 years or so, since *Gouraud*, where the rule had been applied to allow a former member to see the company's privileged legal advice in litigation. The second reason he said that status was the appropriate delineating principle was that it removed the problem caused by successors in title. His third reason was that the delineation of the rule as being conditioned by a person's status as member was most consistent with the original justification of the rule. The fourth reason was that the intrusion on the company's fundamental right to privilege would be enormous, an ever-expanding pool, as shares were traded.

95. Mr Moore made the point that where a company relies upon the merger price and the robustness of the process, legal advice can make no difference to valuation. The robustness of the process in this case was evident from the Evercore report and the interactions of the Transaction Committee with Evercore. And he reminded the Court that if one chose not to waive privilege, no adverse inference could be drawn.

96. Mr Moore then moved to ground 2B, that as an alternative to 2A, if the rule were to apply, that would be so only as to documents created during the period of membership. The Chief Justice had accepted (paragraph 154) that there was a distinction to be drawn between documents created during a relationship which gave

rise to joint interest privilege, and whether a new shareholder was entitled to see documents created during the period before he became a shareholder, finding that the relevant issue was whether the documents were created during the period of the relationship.

97. Mr Moore submitted that there were several difficulties with that approach, starting with the fact that there is no case which extends this species of privilege to successors in title in this context. There could be no justification for allowing a person to acquire a share in a listed company in order to see advice germane to a dispute that person was having with the company. He mentioned the case of *Crescent Farm Sports v Sterling Offices* [1972] Ch 553, in which there had been a conveyance of land between purchaser and sub-purchaser in 1959 which provided that if the sub-purchaser wanted to sell any of the land it first had to be offered to the purchaser. In 1965, the sub-purchaser contracted to sell to a third party. In 1966, the sub-purchaser's solicitors advised that they were taking counsel's opinion. The sale of part of the land to the third party proceeded, and the purchasers asked for production of counsel's opinion. Goff J held that the documents being privileged in the hands of the sub-purchasers were privileged also in the hands of the third party, there being sufficient nexus between the advice and the asset. Mr Moore then gave the example of an institutional shareholder, A, holding 100 million shares, who took some advice about those shares. Two years later he sold those shares to shareholder B. On the principle argued for below, shareholder B would be entitled to see that advice, even when neither party had given any thought to it. So, he submitted, for the successor in title principle to apply there needed to be a rather closer nexus than simply purchasing a share in the open market.

98. Mr Moore referred to the case of *Winterthur Swiss Insurance Company v AG (Manchester) Ltd (In Liquidation)* [2006] EWHC 839 (Comm), a complicated case on the facts. Mr Moore described it as a straightforward application of the successor in title on a single retainer and that, absent the single retainer, the successor in title would not get to see privileged documents without a waiver. (This does seem to me to be the opposite of what Aikens J was saying at paragraph 130 of *Winterthur*). The authorities did not provide the support that Mr Hollander had persuaded the Chief

Justice that they had. The reason why the successor in title argument did not work was that one was considering identified real people with the interest transferring to another real person, and not a conceptualised or abstract notion of a body of shareholders. *Winterthur* is authority that outside of the single or joint retainer cases, waiver is required, and none is to be found in this case. And if the successor in title principle is intended to operate in this context to assign any entitlement to see the Company's privileged legal advice in litigation, then it must follow that upon ceasing to hold any shares, a former shareholder loses those entitlements. As Mr Moore said, you can't have it both ways.

99. And he referred to the case of *Surface Technology plc v Young* [2002] FSR 387, in which case a claimant who had purchased the business and assets, including IP rights of Ultraseal International Ltd, from one of the defendants, sought to restrain that defendant's former solicitors from acting for that defendant and its co-defendants. The claimant argued that as Ultraseal's successor in title, it alone was entitled to the benefit of privilege attaching to the advice given by those solicitors to Ultraseal. Pumfrey J held that the claimant was entitled to assert its legal professional privilege as against the defendants in respect of all matters on which the solicitors had been solely instructed by Ultraseal.

100. Mr Moore's next case was *St John's Trust Company (PVT) Ltd v Watlington and others* [2015] SC (Bda) 447. This was a judgment of the Chief Justice in a case where legal advice privilege had passed from a former trustee to the new trustee. The new trustee was the successor in title to the privileged legal advice, and the question for the court was whether the new trustee could claim privilege against the former trustee in litigation between them. The court found that only the new trustee had a right to claim privilege and in principle that was a right that could be invoked against the former trustee. If one was going down the successor in title principle, one had to accept that the predecessor in title has lost any entitlement to see the legal advice. And referring to Mr Howard's comment that the point was one of 'transcendent artificiality', Mr Moore relied upon the distinction between a legal interest in a share and a beneficial one, relying on the statement of Lord Collins in *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921, [37].

101. Mr Moore referred to the distinction to be drawn between litigation privilege and legal advice privilege, and submitted that there was no logical basis for using litigation privilege as a filter for the exception, if the legal advice was obtained at a time when the interests of the company and the shareholder had diverged. And in this regard Mr Moore noted that the Chief Justice had expressed concern that a company proposing a transaction such as this, which would inevitably result in hostile litigation, would be hampered by being unable to consult legal advisers or to settle upon a robust process for itself assessing the merger terms as well as value.

102. Mr Moore finally turned to the date from which litigation was in the reasonable contemplation of the parties. He said that the Chief Justice had asked him when the Company said that litigation was reasonably contemplated, and his response was that at the latest it was when the Transaction Committee had been established. And in regard to the evidence on that issue, Mr Moore said that the Chief Justice had taken the entirely pragmatic view that it was a certainty that an amalgamation proposed in this case was highly likely to result in appraisal proceedings. He submitted that what the Chief Justice should have done was not to put any date on it. The Appellants had appealed asking for an order that litigation was not in reasonable contemplation before 12 April. That position was, he said, unsustainable. In relation to the Company's appeal, all that this Court had to do was to discharge that part of the consequential order that said litigation was first reasonably in contemplation from 19 February; when the Court sets out the basis for its decision, the Company and its legal advisers would apply that guidance to the facts as they see them and give disclosure accordingly. Mr Moore rejected the suggestion that the more sensible date was the date of the announcement, and said that once the Transaction Committee was appointed, it was clear that there was a transaction to be done. But he confirmed that the date on which the Transaction Committee had been formed had not been in the public domain at the time of its formation. And in relation to the concern expressed by the Court that in the absence of setting a date the dispute on the issue would remain, Mr Moore regarded that as being inevitable in view of the way in which the issue had developed.

103. In reply, Mr Howard described the issue (whether the Company can assert legal advice privilege against its shareholders) as being relevant to the issues in dispute, which was the determination of the fair value of the shares. And he started by saying that both the shareholders and the Company clearly had a shared or common interest in establishing the correct figure, pointing out that the advice should be available both to the parties and to the court. He accepted, of course, that insofar as the Company has taken legal advice directed at the dispute in the litigation, i.e. once a hostile litigation situation has arisen, that was different and fell within the normal position regarding legal advice. Contrary to the Company's submissions, there was nothing dubious about any of the authorities or the application of joint interest privilege to the relationship between a company and its shareholders. The analogy between company and shareholder and trustee and beneficiary (the way in which the older cases founded the basis for the rule) was not a necessary element of the modern approach, although it did provide an additional or alternative basis for the principle, as can be seen from the judgment of Nugee J in *Sharp v Blank*. The principle had been applied and reaffirmed on numerous occasions over the past 100 plus years, and had been referred to repeatedly without any apparent concern as to its validity.

104. Turning to the Company's arguments, Mr Howard pointed out that the advice of which disclosure was sought was given before the Dissenting Shareholders' shares were cancelled. The fact that the relationship had now changed was completely irrelevant. What mattered was that the advice was not privileged as against the shareholder prior to his share being cancelled. Insofar as was needed, the Dissenting Shareholders were standing in the shoes of the shareholder who was a shareholder at the time the advice was obtained. And referring to the cross appeal, he said that 19 February was too early for the Chief Justice to "bring down the guillotine".

105. Mr. Howard said that Mr Thanki's book afforded a very helpful text explaining how the law worked, such that where parties have a joint interest at the time when the subject matter of the communication came into existence, legal advice privilege cannot be asserted. That, he said, could be clearly seen from the *Dawson-Damer* case. While that was a trust case, the Court of Appeal referred to the fact that the joint interest principle had been recognised in contexts other than trusts, and the fact that

the principle applied as between a shareholder and the company was especially important, and should not be regarded as an aspect of company law, but an emanation of a wider principle of procedure. And he referred to the different types of case where the joint interest privilege had arisen, such as commercial joint ventures, or the relationship between reinsurer and reinsured. In *Winterthur*, Aikens J had referred to the fact that courts refused to be prescriptive about the circumstances in which the two parties would have a sufficient common interest, saying that the issue had to be decided on the facts of the individual case. But that exercise did not arise in the case of company and shareholder, where the position was well established.

106. The next case on which Mr Howard relied was *James-Bowen v Commissioner of Police of the Metropolis* [2018] 1 WLR 4021, a Supreme Court case concerning the existence of a duty owed by the Commissioner of Police towards police officers when conducting litigation involving complaints against them. The judgment of Lord Lloyd-Jones, with whom the other members of the court agreed, referred to the company/shareholder situation as to joint interest privilege, effectively taking it as read.

107. Then Mr Howard referred to this Court's decision in the *Wang* case, where the President had referred to the different cases where joint interest privilege arose, endorsing the approach taken in *Thanki*, which included the company/shareholder example. And Mr Howard referred to the company law position pursuant to which it could be said that shareholders, through their share ownership, could be regarded as owning the company – see *Palmer's Company Law*. And in regard to Professor Worthington's article, on which Mr Moore relied, he said that its purpose as an academic article was to influence law reform, and it did not affect the analysis the Appellants had put forward. Unless and until there comes a time at which the company and the shareholders are in dispute, the legitimate interests of the shareholders and the company are entirely aligned. The interest is that the appropriate fair value of the shares is determined.

108. Mr Howard next referred to *Sequana*, and Lord Reed's speech in which, considering the impact in the UK of section 172 of the Companies Act 2006, he noted that while

the duties of directors were owed to the company, the shareholders were the intended beneficiaries of that duty, and to that extent the common law approach of shareholder primacy had been carried forward into the 2006 Act. That is important bearing in mind that Bermuda does not have the equivalent legislation.

109. Mr Howard next turned to the decision of Kawaley J in *Re 58.com,* and addressed what the Company had said in answer to the judge's judgment. First, the point about the company and its shareholders having separate legal personalities was true, but irrelevant. That was the position in many of the examples where joint interest privilege arose. The second point, that some shareholders had different interests to others, also missed the point; all had a shared common interest with the company in advice concerning the administration of the company's affairs. The third was that under the bye-laws, shareholders had limited rights of access to documents. That was recognised but regarded as irrelevant in *Dawson-Damer* and *CU v Mander*.

110. On the question of the need to be a shareholder at the date on which the advice was taken, Mr Howard suggested that in the case of a share being acquired after advice had first been sought, there was a joint interest because the advice in question was still current and active. So the debate which the Company had sought to introduce actually fell away. In every case where an issue arose about disclosure, it was in the context of litigation, so the parties were already in an adversarial relationship. What mattered was whether the shareholders and the company had a shared or common interest when they were shareholders.

111. Mr Howard then turned back to *Sharp v Blank,* and the judgment of Nugee J. The judge was obviously aware of the *Saloman* principle, but recognised the reality of the situation, that although shareholders do not own the assets of the company, indirectly they are paying for the advice because it comes out of the assets of the company in which ultimately they are interested. Once the position is properly analysed it is clear that the principle of joint interest of shareholders in the advice obtained by a company is good law in England, and it is inconceivable that the Supreme Court would seek to reverse this, not least because it is not based on some fundamental misunderstanding of the position that started late in the 19th century; in modern law it is based upon an

analysis of joint interest. The position in Bermuda is that it should follow not only the position in England, but the position as recognised by this Court in *Wang*, and two first instance decisions – that of Kawaley J in *Daniel v Exxon Services (Bermuda) Ltd* [2011] Bda LR 54, and Hargun CJ in *Medlands*.

112. As to the position in Canada, the Chief Justice referred to the Bermuda cases referenced above, and regarded himself as bound by *Wang*, such that the position in Bermuda could only change in consequence of a decision of this Court. But in any event, the Canadian case of *McKinlay Transport Ltd v Motor Transport Industrial Relations Bureau of Ontario (Inc)*, 3 WDCP (2d) 478, decided by Master Peterson, was based on the reasoning in *Gouraud* and not on the joint interest of the company and its shareholders.

113. Mr Howard next turned to *G4S*, where Michael Green J had given an *ex tempore* judgment, for understandable reasons; he commented that the judge had not had the benefit of the full submissions that this Court has had, and the position had not been properly analysed.

114. Mr Howard then addressed the Company's ground 2A that joint privilege fell away because the Company had compulsorily acquired the shares of the Dissenting Shareholders. Cases such as *Mander* made it clear that a subsequent change in the relationship is quite irrelevant. It would, he said, be truly remarkable if the proposition was correct and the Company was able to assert privilege against the Appellants, when it had previously been unable to do so in respect of plainly relevant evidence, now that the parties are involved in the valuation exercise – as Kawaley J pointed out in *58.com.*

115. In relation to ground 2B, that the Company can assert privilege because the shareholders were not members at the time when the advice was taken, Mr Howard submitted that the joint interest which existed between a company and its shareholders was the same whether those shareholders were the nominees on record or the beneficial owners of the shares. If that was wrong, the long-term shareholders all became registered shareholders, as did other shareholders who acquired their shares

prior to the cancellation date. And the joint interest extended not just to advice in the future but also to advice obtained in the past. Even if that were wrong, as I would think it to be, the second answer is that given by the Chief Justice at paragraph 154 of the Judgment, that the right is one that attaches to the shares and which passes with the transfer of the shares.

116. Mr Howard then referred to that part of the judgment in the *Travelers* case which referred to *Winterthur*, relied on by the Company, pointing out that this case concerned the assignment of specific causes of action, so that the assignment to Winterthur only carried with it what was specifically assigned to them. In relation to subsequently allotted shares, the problem created by that situation did not arise on the facts of this case.

117. So Mr Howard submitted that ground 2B failed, which took one to the third ground and the cross-appeal. The third ground of appeal is concerned with the exception to the rule where communications contain advice sought or received in connection with contemplated proceedings and for the dominant purpose of conducting such proceedings. Mr Howard started with the case of *Arrow Trading v Edwardian Group plc and others* [2004] EWHC 1309 (Ch), and the statement of principle made by Blackburne J at paragraph 24 of his judgment, in the following terms:

> "The company, through Mr. Collings, opposes the application and does so on two grounds: first relevance and second privilege. I can dispose immediately of the privilege point. It is well established by authority that a shareholder in the company is entitled to disclosure of all documents obtained by the company in the course of the company's administration, including advice by solicitors to the company about its affairs, but not where the advice relates to hostile proceedings between the company and its shareholders: see *Re Hydrosan Ltd* [1991] *BCC 19* and *CAS (Nominees) Ltd v Nottingham Forest plc* [2002] *BCC 145*. The essential distinction is between advice to the company in connection with the administration of its affairs on behalf of all of its shareholders, and advice to the company

> in defence of an action, actual, threatened or in contemplation, by a shareholder against the company."

118. The Chief Justice had referred to the above extract at paragraph 162 of the Judgment. Mr Howard next referred to the Chief Justice's finding at paragraph 167 that the present litigation was in the Company's contemplation by the time the Transaction Committee was established on 19 February 2021. He pointed out that the Chief Justice had recorded the Appellants' suggested date of 12 April 2021 at paragraph 159 of the Judgment, and that it was impossible to have an earlier date without the Company having supported its position by evidence, and neither did the date of 19 February make any sense. He said it was surprising that at a time when the Company was appointing a committee to consider the terms of the proposed acquisition, and before that committee had even begun to deliberate as to what the terms of fair value would be, the Company should have formed the view that litigation was not merely possible, but reasonably in prospect. There was no 'sabre-rattling' correspondence from shareholders, and the documents to which the Court had been referred by Mr Moore had not been shared with the Company. And while the Chief Justice had said it was virtually inevitable that there would be appraisal actions by shareholders on the basis that 78% of shareholders had acquired their shares after the first announcement of the proposed amalgamation, the date of that announcement was 8 March. It was simply overstating the position to say that once you start going down the amalgamation route, litigation was inevitable. Battle lines were in fact drawn, he suggested, by 12 April, but if the Court were to reject that date, one would have to select a date between 8 March, when the Dissenting Shareholders started to acquire shares, and 17 March, when the Company gave notice of the meeting to consider the amalgamation to be held on 12 April 2021.

119. Mr Howard then referred to the privilege log issue and the formal order signed by the Chief Justice on 21 April 2023. He said that while there was a sensible reason to require the Company to provide a privilege log, there was no sensible reason why there should be a 'tit-for-tat' order against the Dissenting Shareholders. The Chief Justice gave no reason for having made this order against them, and there was no sensible reason for an order affecting over 80 plaintiffs which would generate cost

without any utility.

120. In reply, Mr Moore made the point that the rule the Court was being asked to apply was one of general application, to be applied to all companies, large and small, so that reliance on the particular facts of this case was not relevant. He referred to the judgment of Lord Reed in *Sequana*, and said that what the joint interest amounted to was simply the economic interest of a shareholder.

121. Mr Moore turned to the relevant date upon which litigation was reasonably in prospect, saying that the Chief Justice's comments at paragraph 167 of the Judgment were unfairly criticised by Mr Howard; what he was saying was that the fear of litigation had been validated by subsequent events. And he pointed out that the Chief Justice had gone on to refer to the position in the Cayman Islands in relation to recent amalgamations there involving Hong Kong based companies. The way that Mr Moore put it was to say that you don't go to the trouble of setting up a transaction committee unless you think there is a reasonable prospect of there being an amalgamation, and if you are confident that, at some price, a deal will be done, then the necessary links in the chain have been established. When it was suggested from the bench that there could have been evidence given which would provide the basis for such a finding, Mr Moore came back to his previous submission that the Chief Justice should not have put a date on when litigation was within reasonable contemplation – see paragraph 102 above. And when asked how the issue would be dealt with if the Court did not fix a date, Mr Moore's response was that this Court would advise as to the relevant principles to be applied, and it would be apparent from the documents when produced. If either side was not satisfied that the other side had properly applied the principles, the matter could be adjudicated, on the basis of proper evidence.

122. And lastly, on the privilege log, Mr Moore said that this was a case management decision by the Chief Justice, made on the basis that it had become clear during the December 2022 hearing that the plaintiffs had been redacting and withholding documents on an inappropriate basis, and gave the transcript reference, which certainly showed the Chief Justice questioning why certain documents had been disclosed, and certain other documents had not.

123. In reply on the cross-appeal, Mr Howard said that on the timing issue, the Company had had an opportunity to put in evidence and had chosen not to do so. The Dissenting Shareholders had suggested 12 April as the date, and the Company had then suggested 19 February, simply by way of assertion. The Company's skeleton argument effectively acknowledged that they sought a privilege log from the Dissenting Shareholders on a tit-for-tat basis. It was a bad argument and should have been rejected by the Chief Justice.

Finding on joint interest privilege – the existence of the English rule as a matter of Bermuda law

124. Strictly speaking, Mr Moore was correct to say that the company/shareholder rule had not been applied in any decision in this jurisdiction, but as appears from Mr Howard's submissions at paragraph 107 above, this Court had clearly operated on the basis that the rule did exist in Bermuda in *Wang*, and there were also two first instance decisions in this jurisdiction referring to it, *Daniel v Exxon* in 2011 per Kawaley J, and *Medlands* per Hargun CJ in 2020. It has to be said that the reference in *Daniel* was made effectively in passing, but in *Medlands*, the Chief Justice had concluded that the rule could not apply to Mr Tamine, who was not a shareholder in the relevant company, and while the Chief Justice had referred to the criticism made on the basis that the principle was established in England in the 19th century, before *Saloman*, he had previously referred to the passage in *Arrow Trading* which is set out in paragraph 118 above. If Hargun CJ had thought that the English rule should not be applied in Bermuda, he might be expected to have made some reference to the issue.

125. And the reference made by Clarke P in *Wang* was made in the context of explaining how widely the joint interest privilege net could be cast, and was made in unequivocal terms. Again, one might think that if Clarke P had doubted whether the English rule should be imported into Bermuda, he might at least have made some reference to the issue. And while I note the position taken by the Company in its skeleton argument concerning the importation of the English rule into Bermuda law, that Clarke P's observations in *Wang* were *obiter*, they are nonetheless significant.

126. The Chief Justice clearly took the same view in paragraph 184 of the Judgment, after he had quoted from *Wang* in paragraph 183. He said that it appeared from the passage quoted that Clarke P had been content to summarise the passage from *Thanki* as representing Bermuda law without any apparent reservation. In fact, Clarke P did refer to *Thanki* for the statement concerning the need for a joint interest in the subject matter of the communication, but when it came to the examples, he did not quote from *Thanki*, but expressed those examples in his own words.

127. Mr Moore had referred to the email from one of the Dissenting Shareholders as an illustration of the differing interests of those shareholders and the Company. That argument, it seems to me, goes more to the timing issue than the underlying principle. Clearly, there came a point at which the interests of company and shareholders were no longer aligned, but that is not to say that the position was always so. So the email in question may have relevance to fixing the date when the rule could no longer apply because litigation was by then in the parties' contemplation, but that is a different issue.

128. As to the statements made in *Hollander* regarding the rule being ripe for review, *Hollander* was looking at the position separately from the right which exists in the course of litigation. But we are concerned with the litigation position, so arguments based on the fact that *Gouraud* should not have survived *Saloman* do not arise. The Court is considering the right in a litigation context, which means that the right is based on joint interest privilege, and not on 19th century case law. And that means that there is no need to scrutinise many of the cases to which Mr Moore referred. I would refer to *Prest v Petrodel*, while noting that that case was primarily concerned with the issue of ancillary relief in matrimonial proceedings, and the separate existence of a corporate entity owned by the husband, so that issues of piercing the corporate veil arose. The case does not provide support for Mr Moore's submission that the rule (that a shareholder could see advice given to the company in litigation and only in litigation) had "defied gravity for too long" and that this Court should lead where the UK would surely follow.

129. Suffice to say that I accept the arguments put forward by Mr Howard as to the ambit of joint interest privilege, and would hold that joint interest privilege applies in this case to the legal advice secured by the Company, relating to appraising the fair value of the shares, subject of course to the further arguments put forward by the Company in relation to the position of former shareholders, and those who subsequently became shareholders.

130. I would therefore dismiss the first ground contended for by the Company, and would hold that the rule relating to joint interest privilege applicable in Bermuda operates so as to prevent the Company asserting privilege against its shareholders in relation to that advice.

Finding on privilege – ground 2A, whether the joint interest privilege rule is applicable against a company's former members

131. The Company's ground of appeal 2A asserted that the claim to joint interest privilege, if any existed, applies only to existing members, and was lost if the particular shareholder ceased to be a member, as of course happened when the amalgamation was completed. The Chief Justice had dealt with this argument at paragraph 154 of the Judgment, concluding that the relevant issue was whether the documents in question were created during the period of a relationship which gives rise to joint interest privilege, per *Hollander*. If they were, the privilege did not disappear when the shareholder ceased to be a shareholder. The claim to joint interest privilege was not lost. Mr Howard had referred the Court to *Mander* and *58.com. Thanki* quotes from *Mander*, where Moore-Bick J, as he then was, said (at 648) that the person seeking disclosure "must be able to establish a right to obtain access to (the confidential documents) by reason of a common interest in their subject matter **which existed at the time the advice was sought or the documents were obtained**" (emphasis added). That was part of a passage quoted by the Supreme Court in *James-Bowen*.

132. And in *58.com*, Kawaley J quoted paragraph 154 of the Judgment, with emphasis added, and adopted the Chief Justice's "persuasive analysis" on the point. I respectfully agree, and it follows that the Company's appeal on this sub-ground falls to be dismissed.

Finding on privilege – ground 2B, whether applicable to documents created only during the period of membership

133. The Company's ground 2B argument was that a member was not entitled to see documents which were created during the period before he became a shareholder. This was also dealt with by the Chief Justice at paragraph 154 of the Judgment, where he held that shareholders were entitled to be treated as successors in title of prior shareholders for the purposes of legal professional privilege, citing *Hollander*, *Travelers*, *Surface Technology*, *Winterthur*, *Crescent Farm* and *St John's Trust.*

134. Mr Howard's point, that the joint interest which existed between a company and its shareholders was the same whether those shareholders were the beneficial owners of the shares, or whether they were held through nominees, seems to me to be an obvious one. What matters is the interest, not the legal mechanics of how the shares were in fact held. And that point is in addition to the basis referred to in paragraph 154, where the Chief Justice found the privilege should be regarded as an incident of a property right, and available to a successor in title.

135. Again, I would agree, and would hold that for the reasons submitted by Mr Howard and those contained in the Judgment, ground 2B should be dismissed.

Finding on privilege – ground 3, the scope of the rule and the "hostile litigation within reasonable contemplation" exception

136. Ground 3 is concerned with the scope of the exception to the rule, and the Chief Justice's finding at paragraph 169 that legal advice sought and received on or after 19 February 2021 fell within the exception to the general rule and is privileged as against the Dissenting Shareholders. In my view, it is clear from *Arrow Trading*, that the real

question is that of the date that litigation was in the reasonable contemplation of the parties.

137. As can be seen from the recitation of the competing arguments, the Company's position was that at the latest the appropriate date was when the Transaction Committee was established on 19 February 2021, but that it was not necessary for this Court to settle on a particular date; it could set out the applicable principles, by which the parties could then be guided. Given the manner in which this litigation has been fought to date, it seems to me that Mr Moore's suggestion that no date be fixed is effectively an invitation to incur further costs, and in my view it makes much more sense, if it can be done, to fix a date and achieve certainty.

138. Although the Transaction Committee was formed on 19 February 2021, the likelihood is that appreciable work would have been done on the proposed amalgamation beforehand, not least because the Evercore Agreement was entered into on 22 February 2021, a Monday, after the formation of the Transaction Committee on the previous Friday. But it does not seem to me that the formation of the Transaction Committee could realistically be the appropriate date, not least because Mr Moore confirmed that the date of the formation of the Transaction Committee had not been in the public domain (see paragraph 102 above). The second reality was that share purchases on a large scale did not commence until immediately after the announcement of the proposed transaction on 8 March 2021. The document to which Mr Moore had referred as "drumming up business for a dissenter pile-in" (see paragraph 79) was dated 11 March 2021, and referred to the fact that while the Company's shares had traded historically at a level of $10 million per day, since the announcement they had traded at an average of $150 million per day. That much increased level of activity would indicate to any sophisticated businessman that the purchases were being made by arbitrageurs with a view to extracting a higher price than had been offered, if necessary by litigation.

139. It does not seem to me that there is any logic in the Appellants' suggested date of 12 April 2021, and of course their fall-back position was a date between 8 March, when the Dissenting Shareholders had started to acquire shares, and 17 March, when the

Company gave notice of the meeting to consider the amalgamation, to be held on 12 April 2021.

140. The Chief Justice had referred in paragraph 156 to the fact that approximately 78% of the Dissenting Shareholders had acquired their shares after the first announcement of the amalgamation, and in paragraph 167 to the virtual inevitability of litigation by reason of the surge in share buying after the first announcement. But, surprisingly, he did not adopt the date of the announcement as the appropriate date. He accepted Mr Moore's suggested date of 19 February 2021 without explaining how this was the appropriate date, in the absence of evidence that the Company then had litigation in contemplation, and particularly when the formation of the Transaction Committee was not in the public domain.

141. In the circumstances, I would hold that litigation was in fact within the Company's contemplation immediately after the announcement of the proposed transaction on 8 March. Given that by 11 March, the date of Mr Ciardi's email, trading volume had already risen dramatically, I would fix the date as 8 March 2021, and not a day or so later. Accordingly, I would allow the Dissenting Shareholders' appeal to that extent.

Finding re: the privilege log

142. As indicated in paragraph 122 above, the transcript shows that the Chief Justice questioned counsel for the Dissenting Shareholders regarding their failure to make appropriate disclosure on 16 December 2022. The Chief Justice asked Mr Hollander KC, then appearing for the Dissenting Shareholders, what was the rationale for disclosure, when documents which should have been disclosed were not, and some which had been disclosed were not relevant. In any event, I would need to be persuaded that it would be appropriate to overturn the Chief Justice's order on what is, as Mr Moore said, a case management matter. The Chief Justice clearly had a basis for making the order that he did, and I would not interfere with it. It follows that the Appellants' cross-appeal on this issue is dismissed.

Summary and costs

143. I would therefore dismiss the Appellants' appeal on PCP, dismiss ground 1, 2A and 2B of the Company's appeal, and in relation to ground 3, would change the date on which litigation was in the reasonable contemplation of the parties from 19 February 2021 to 8 March 2021. And I would dismiss the Appellants' cross-appeal in relation to the privilege log ordered by the Chief Justice. As to costs, in the absence of submissions made within 21 days, I would order that the Company should have its costs on the PCP issue, the Appellants should have their costs on the privilege issue with the exception of the fixing of the date by which litigation between the parties was in reasonable contemplation, in respect of which I would make no order as to costs, on the basis that my finding differs from the primary positions on both sides. Finally, I would order that the Company should have its costs on the privilege log issue.

KAWALEY, JA:

144. I concur with the Judgment of Bell JA and agree for the reasons he has given that:

(a) the Dissenters' appeal in relation to the PCP issue should be dismissed;

(b) the Company's appeal in relation to the existence of the joint interest privilege in the context of the relationship should be dismissed;

(c) the Company's appeal in relation to the application of the joint interest privilege rule in favour of former members and/or to documents created before the relevant period of membership should be dismissed;

(d) the Company's appeal in relation to the application of the joint interest privilege rule should be dismissed;

(e) the Dissenters' appeal in relation to the earliest date when litigation privilege could be claimed by the Company should be allowed, to the extent that the appropriate date was the date when the proposed amalgamation was announced (8 March 2021); and

(f) the Dissenters' cross-appeal in relation to the privilege log issue should be dismissed.

145. As for the existence of the joint interest privilege rule in the company/shareholder context, this Court has received the benefit of full argument on what appears to me to have been an unprecedented scale. While I agree that the Company's submissions should be rejected in their widest compass, I consider that there was sufficient force to many of the points advanced by Mr Moore KC to justify an attempt to clarify the true scope of the rule. I accordingly set out my own views on this issue below.

Joint interest privilege: introductory

146. The common law process whereby many important legal principles are determined in the context of adjudicating actual disputes based on adversarial argument results in flexible, practical and user-friendly justice, particularly in the commercial law domain. These valuable benefits are sometimes achieved at the expense of conceptual clarity. The rule that there is, or can be, a joint interest between a shareholder and a company in legal advice received by the company in relation to the administration of its business affairs is illustrative of this proposition. No less illustrative were the contrasting approaches adopted by counsel in the present case in advancing their respective arguments against and in favour of the existence of the joint interest privilege rule:

(a) Mr Moore KC (for the Company, the Appellant in relation to the Privilege Appeal) commended analytical rigour and conceptual clarity to the Court;

(b) Mr Howard KC commended a less technical and more purposive analytical approach to the question.

147. A synthesis of both approaches is merited in adjudicating a point that turns in large part on an analysis of judicial decisions which can only properly be analysed with analytical rigour and conceptual clarity if one adopts a purposive, context-sensitive approach to interpreting those decisions. Adopting such an approach leads to the following conclusions:

(a) the current English common law position is that the relationship between a company and its shareholders is such as to confer standing on a shareholder to claim a joint interest in any legal advice a company obtains in relation to its general business affairs. Whether such a claim is recognised as legally enforceable depends on the circumstances of each case;

(b) the relevant rule has been recognised in England for over 130 years, albeit that the precise basis for and scope of the rule has evolved. The Bermuda common law rule is essentially the same as the English common law position;

(c) the applicant will generally be required to demonstrate that the advice was received in circumstances which directly engaged the shareholder's legal or commercial rights in a way which was reasonably discernible at the time. Any joint interest a shareholder succeeds in establishing will nonetheless still be potentially overridden if the company is able to show that litigation privilege attaches to the relevant legal advice;

(d) where joint interest privilege is asserted in the context of adversarial civil proceedings, the applicant will have to establish not just that the relevant advice is subject to joint interest privilege, but also that the advice is relevant to the issues in controversy and that production is "*necessary*". Where the claim is made by a shareholder pursuing a

statutory remedy, the statutory regime will potentially be relevant to the existence of the asserted joint interest;

(e) while 'absolutist' formulations of the rule may justify doubts about its continuing existence or validity, the modern scope of the rule is far more contextual and flexible than summary formulations of the principle (on superficial analysis) suggest;

(f) there is no basis for doubting, as Chief Justice Hargun correctly found, that a joint interest was created in relation to legal advice received by the Company which is relevant to appraising the fair value of the Dissenters' shares;

(g) for these reasons I agree that the Company's 'Privilege Appeal' must be dismissed.

The true contents and scope of the rule

148. The Company's submission that the distant historical origins of the rule are no longer sustainable was something of a 'straw man' argument. The notion that shareholders have a proprietary interest in a company's assets, first posited before the now trite principles of separate corporate personality had been established in *Saloman-v-Saloman* [1897] AC 22, is no longer the basis for the modern common law rule.

149. However, in my judgment Mr Moore KC was broadly right to contend that it is impossible to identify any clear or convincing basis for the joint interest rule as it appertains to <u>any</u> legal advice received by a company about its general business activities. This assumes, however, that the rule is an absolute one which merely requires a shareholder to establish their status as such to be able to access any company legal advice.

150. One valid basis for doubting the existence of such a rule is the fact that the legal rights between shareholders and a company are primarily governed by what is sometimes described as a statutory contract. Section 16 of the Companies Act 1981 provides:

> "***16. Effect of memorandum and bye-laws***
> *Subject to this Act the memorandum of association when registered and the bye-laws when approved shall bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the bye-laws.*

151. Where the bye-laws of a company expressly deny shareholders the right to inspect the company's books and records, as commonly occurs, it is difficult to see how it can be contended that a joint interest automatically arises as between shareholder and company in relation to <u>any</u> legal advice the company receives about its business affairs. As Mr Moore KC put it: "*So the notion of a single undivided interest shared by the company and the body of shareholders alike is an illusion; it does not reflect the much more complex realities.*"[1] I was therefore unable to entirely accept the Dissenters' primary submission that the rule had been settled for 135 years and should be confirmed by this Court, if it was contended that the rule exists in broad inflexible terms. However, the suggestion that the existing rule runs a coach and horses through fundamental notions of privilege in the company law context was also a serious overstatement of the legal position in the real legal world.

152. Mr Howard KC pivotally countered that fundamental to a correct legal analysis was understanding that the law of privilege was part of a body of procedural rules, not a facet of substantive company law at all. Attempts to enforce joint interest privilege typically arose in the context of civil litigation. When one considers the litigation context in which privilege disputes are typically raised and adjudicated, it immediately becomes apparent that the rule as applied in practice is far more nuanced than it initially appears to be on a superficial analysis of often brief articulations of

[1] Transcript Day 3 page 12, line 20-23.

the joint interest privilege rule as it applies to shareholders and companies. The English Court of Appeal (Floyd, Newey and Arnold LJJ) in *Dawson-Damer-v-Taylor Wessing LLP* [2020] EWCA Civ 352, a trust case, observed:

"*45. Secondly, it is significant that 'joint privilege' has been recognised in contexts other than trusts. The fact that it applies as between shareholder and company is especially important. As Mr Taube accepted in submissions, the fact that a company engaged in litigation with a shareholder must disclose documents which, as against third parties, would attract LPP cannot be explained as merely a reflection of a right which a shareholder would have anyway. Absent litigation, a shareholder's rights to access any company documents, let alone those within the scope of LPP, are extremely limited (compare e.g. R v Masters and Wardens of the Merchant Tailors (1831) 2 B & Ad 115). That strongly suggests that the 'joint privilege' which has long been held to exist between shareholder and company should not be regarded as an aspect of company law. It is more plausibly seen as one emanation of a wider principle of procedure to the effect that 'privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence' (to use the formulation in Thanki, 'The Law of Privilege' – see paragraph 26 above).*" [Emphasis added]

153. These observations are instructive both as regards the characterisation of the rule and its scope. It is, on reflection, obvious that the law of privilege forms part of the law of evidence and falls into what the common law world generally categorises as procedural rather than substantive law. These tentative observations helpfully explain why there has in the past been some confusion as to the juristic basis of the law relating to joint privilege in the company-shareholder context. In part this is probably because, in the common law world, attention tends to focus on practical results; legal rules are often articulated in deliberately broad and flexible terms with the courts trusted to add flesh to the skeletal conceptual rules in the laboratory of real-life cases. The need to consider what the legal basis of privilege is in the abstract, beyond the parameters of a contested application for discovery or production, will rarely be a primary concern to a common law judge or lawyer. It is usually self-evident that what

the Court must decide is whether the applicant has a right to compel production or whether the respondent has a right to object on the grounds of privilege.

154. Whether joint privilege exists, in such circumstances, is far from an 'unruly horse'. The critical analysis will almost invariably be whether, having regard to the particular purpose for which the legal advice was obtained and the particular legal purpose in relation to which the applicant seeks to deploy it, the respective parties' interest in the advice may fairly be said to be a joint or common one. The scope of the rule understood in this way is flexible and not a rigid status-based rule at all.

155. Order 24 of the Rules of the Supreme Court 1985 empowers the Court to order general or specific discovery. In the present case at least, the question which arises is whether or not the Court's statutory jurisdiction, considered in light of the common law rules relating to privilege, permits an order for discovery or production to be made. Whenever a shareholder asserts a joint interest in any privilege upon which a company relies, whether a joint interest exists or not ought properly to be analysed in the context of the relevant litigation in which the joint interest claim arises. Even if one begins with an assumption that there is a general rule that shareholders have a joint interest in any legal advice received by the company does exist, which in my view is not a justified starting assumption, a contested application can only properly be resolved based on the factual and legal context of each specific case. Order 24 provides: [Emphasis added]

"***24/13 Production to be ordered only if necessary, etc.***

13 (1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

(2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the

Court may inspect the document for the purpose of deciding whether the claim or objection is valid."

156. The Rules provide a procedural basis for requiring parties to litigation to disclose documents and to assert objections grounded on, *inter alia*, privilege. Mr Moore KC rightly contended without reference to authority that privilege is equivalent to a fundamental right which the Court cannot override on grounds of convenience. The most well-known judicial exposition on the importance of legal professional privilege is found in the speech of Lord Taylor in *R-v-Derbyshire Magistrates' Court, ex parte B* [1995] UKHL 18; [1996] AC 487, with which all four other Law Lords fully concurred. After reviewing the history of the law of legal professional privilege (considering both civil and criminal cases), he concluded:

"*56. I may end with two more recent affirmations of the general principle. In Hobbs v. Hobbs [1960] P. 112, 116-117, Stevenson J. said:*
'Privilege has a sound basis in common sense. It exists for the purpose of ensuring that there shall be complete and unqualified confidence in the mind of a client when he goes to his solicitor, or when he goes to his counsel, that that which he there divulges will never be disclosed to anybody else. It is only if the client feels safe in making a clean breast of his troubles to his advisers that litigation and the business of the law can be carried on satisfactorily . . . There is an abundance of authority in support of the proposition that once legal professional privilege attaches to a document . . . that privilege attaches for all time and in all circumstances."

57. In Balabel v. Air India [1988] Ch. 317, the basic principle justifying legal professional privilege was again said to be that a client should be able to obtain legal advice in confidence.

58. The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be

revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests." [Emphasis added]

157. More recently, Lord Sumption in *R (on the application of Prudential plc)-v- Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185[2] stated:

"*131. ...Legal professional privilege is a creation of the common law, whose ordinary incidents are wholly defined by the common law. In principle, therefore, it is for the courts of common law to define the extent of the privilege. The characterisation of privilege as a fundamental human right at common law makes it particularly important that the courts should be able to perform this function. Fundamental rights should not be left to depend on capricious distinctions unrelated to the legal policy which makes them fundamental.*"

158. When the core principles underpinning the privilege principle are understood, it is easy to understand why the law requires that any joint interest must exist at the date when the advice is obtained. The academic and judicial support for this requirement is set out at paragraphs 146-150 of Chief Justice Hargun's Judgment in this matter. Either the lawyer must be instructed on a joint basis or, if one person obtains legal advice for themselves alone, they must notionally be capable of apprehending that an identifiable individual (or class of individuals) will be capable of asserting a claim to joint interest privilege. The traditional way in which this rule has been formulated makes this temporal requirement easy to meet. Whenever a company seeks legal advice about its affairs, it should be deemed to know that by virtue of the relationship it enjoys with its shareholders, the company and its shareholders (or an identifiable class of them) will at least potentially share a joint interest in the privilege attaching

[2] This passage is quoted by Bankim Thanki QC, Chloe Carpenter QC, Nik Yeo and Rebecca Loveridge, '*Privilege*' at page 411 of William Day and Sarah Worthington (eds.) '*Challenging Private Law: Lord Sumption on the Supreme Court*' (Hart Publishing: Oxford, 2020).

to the relevant advice. But the proposition that a joint interest arises automatically and without more from the status of shareholder is impossible to justify in principled terms in the face of the powerful arguments advanced by Mr Moore KC. Any such absolutist rule is in my judgment untenable for the following three main reasons:

(a) it unreasonably restricts the freedom of companies to access the protection of legal professional privilege, save when litigation is in contemplation;

(b) it implicitly ignores the separate legal personality of the company from its shareholders; and

(c) it presumes that the company-shareholder commercial relationship translates into a commonality of interests whenever the company seeks legal advice, when the real commercial and legal relationship may be entirely different.

159. This may well be why the Canadian courts have disavowed the general or absolutist articulation of the shareholder-company joint interest privilege rule altogether. As Elizabeth A. Hughes J (as she then was) observed in *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552:

"*[47] Ultimately, the Canadian jurisprudence eschews the notion that shareholders are privy to privileged communications between a corporation and its solicitor(s). It does so on the basis that such a finding would impede both a corporation and its solicitor(s)' ability to function properly; to express and discuss legal opinions freely and openly.*"

160. There is no suggestion that the Canadian courts have decided that a shareholder may not assert a joint interest in legal advice obtained by a company. The holding appears to be merely that the status of shareholder is not enough, without more, to justify a finding that joint interest exists. I find that modern English case law, properly understood, does not provide any coherent basis for an unqualified status-based rule.

Nor am I able to accept the proposition advanced by Mr Howard KC that any such broad status-based rule is supported by the more general requirement for companies to have regard to the interests of shareholders, or more precisely, that although directors' duties are essentially owed to the company, the shareholders are intended to be the beneficiaries of these duties: *BTI 2014 LLC-v-Sequana SA* [2022] UKSC 25 (per Lord Reed at paragraph 65). In fact, the English courts which have recently directly considered the company, shareholder iteration of the joint interest privilege rule have not actually applied the status-based rule in its purported unqualified form. A significant impediment to conceptual clarity derives from the fact that in the context of most civil litigation, courts are required to address two discrete issues which can accidentally obscure the true legal analysis:

(a) whether joint interest privilege exists by virtue of the relationship of company and shareholder (a question of law); and

(b) whether disclosure should be ordered taking into account the factual circumstances of the case (a question of procedural discretion).

161. Firstly, we were not referred to any modern case where an unqualified status-based joint interest privilege claim was actually upheld as an operative part of a judicial decision. For instance, in *Sharp-v-Blank* [2015] EWHC 2681 (Ch), Nugee J observed:

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

162. The pure status-based rule was apparently acknowledged to exist as a "*general rule*". But Nugee J disposed of the application on the grounds that the relevant advice was protected by litigation privilege, and so the finding that a joint interest existed was not an operative part of the decision. In other words, the general rule, while found to exist, was not actually applied in favour of the joint interest claimant.

163. More instructive is *CAS (Nominees) Limited-v-Nottingham Forest PLC* [2001] 1 All ER 954. Evans-Lombe J did uphold joint interest privilege in unfair prejudice petition proceedings applying the following legal principles:

> "*17…As the authorities show the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show directors though not properly described as trustees of the assets of the company within their charge, nonetheless owe fiduciary duties to the shareholders which prevent them from applying those assets save for the purpose of the company. Directors are subject to the same duty to shareholders regardless of the size of the company concerned.*"

164. Again, the modern version of the status-based rule was found to apply. But although the joint privilege claim of the shareholders was upheld, this was very far removed from what I would consider to be an application of the rule in an absolutist form. The advice in question was sought in relation to transactions which were said to have been carried out in breach of duties for which there was a specific statutory remedy. The pivotal findings were, in effect, that the joint interest arose most directly out of the fact that the petitioners had a statutory right to impugn the transactions to which the advice related. Evans-Lombe J concluded:

> "*19. <u>It follows, in my judgment, that the documents in the four classifications which I have set out, and which are the subject of this part of the application, were not documents which were protected from disclosure by legal professional privilege. They were documents which were created or which were added to by lawyers or others for the purpose</u>*

of procuring the company to take certain actions, albeit it was anticipated that those actions might give rise to litigation in which a challenge would be mounted to their propriety by the present petitioners. In the present case the company has procured the issue of a substantial number of the shares of its subsidiary to Mr Doughty and given him an option to acquire further shares which would render the company a minority shareholder in that subsidiary. It is alleged amongst other matters that the issue of those shares and the granting of the option were at a discount on the true value of the shares at the relevant time as demonstrated by their market price. It is also alleged that the shareholders of the company in general meeting were induced to vote in favour of this transaction as a result of a misleading circular. I say nothing as to whether any of those allegations are justified. I can see powerful contrary arguments. However I can see no reason why the objecting shareholders should not be entitled to see the advice and guidance being given to the company's board at the time these transactions were embarked upon in proceedings in which the company itself only appears as a defendant in a nominal capacity so as to be bound by any order which the Court makes." [Emphasis added]

165. It might be said that the relevant analysis took place in deciding whether discovery should be ordered under the Rules, after a first stage summary finding had already been made that the requisite joint interest existed. This would not be a fair reading of the inquiry being made. The conclusion that "*I can see no reason why the objecting shareholders should not be entitled to see the advice and guidance being given to the company's board at the time these transactions were embarked upon*" is recording a finding that in the relevant circumstances a joint interest in the advice existed. If the standing of shareholder was enough to create the joint interest, no further analysis of the circumstances in which the advice was obtained by the company would have been needed. In substance, therefore, the English High Court in *CAS (Nominees) Limited* was only willing to uphold the joint privilege claim after analysing (1) the circumstances in which the advice was obtained and (2) the nature of the shareholders' interest in the subject-matter of the relevant advice. In deciding whether privilege could be claimed against a shareholder or not, the Court did not rely merely

on the bare fact that the joint interest claim was being asserted by a shareholder. The latter decision provides helpful persuasive guidance as to what the true parameters of the joint interest privilege rule in the company-shareholder context ought now to be understood to be.

166. Accordingly, while there is certainly room for doubt about what the operational scope of the current English version of the shareholder joint interest privilege rule is today, in my judgment the preponderance of persuasive authority on the issue, carefully read, supports the following conclusion. When the generally applicable requirements for joint interest privilege are met in relation to advice received by a company which a shareholder seeks to inspect by way of an application for discovery, the company will not be permitted to assert privilege against the applicant shareholder. The clearest support for this conclusion can be found in the English Court of Appeal's judgment in *Dawson-Damer-v-Taylor Wessing LLP* [2020] EWCA Civ 352(at paragraph 45) in which the rule was described, albeit merely for illustrative purposes in a trust case, in the following instructive terms:

> "*…the 'joint privilege' which has long been held to exist between shareholder and company … is more plausibly seen as one emanation of a wider principle of procedure to the effect that 'privilege cannot be claimed in circumstances where the parties to the relationship have a joint interest in the subject matter of the communication at the time that it comes into existence'…*"

167. Mr Moore KC relied heavily on doubts expressed by Michael Green J in *Various Claimants-v-G4S PLC* [2023] EWHC 2863 (Ch) about the conceptual validity of the rule. Analysis in that case (1) focused on the foundations of the rule (which seems to have been assumed to be status-based in character), and (2) did not receive the benefit of full argument. Green J stated:

> "*2. This judgment is concerned with a specific application brought by the Claimants in relation to the Defendant's claim to withhold certain documents on the grounds of privilege. The Claimants say that the documents are*

covered by what they call the 'shareholder principle', by which they mean that a company cannot claim privilege as against its own shareholders save where the documents came into existence in contemplation or for the dominant purpose of proceedings between the company and its shareholders….

29… This basis might also be open to attack now as there is no 'common fund', as such, to which shareholders are entitled and, as I have said, the analogy with trustees and beneficiaries is not a particularly strong one. But, as I also said, it has been recognised - for example in a case such as Re Hydrosan Limited [1991] BCC 19 by Mr Justice Harman and in Sharp v Blank itself, and many other authorities - and even in Hollander on Documentary Evidence, where it is said that the rule is so well established that it is now probably for the Supreme Court to overturn it.
30. I, therefore, as a lowly first instance judge, and even though I have my doubts as to the justification now for such a principle, cannot say, particularly after the short argument I have had at this CMC, that the principle does not exist or should be got rid of. I think that would require a higher court to say that." [Emphasis added]

168. Finally, I have myself, also sitting as "*a lowly first instance judge*", already construed the English rule as being far narrower than the way it is often summarily referred to might suggest. In *Re 58.com*, Grand Court of the Cayman Islands, FSD 275 of 2020 (MRHCJ) (unreported), having had the benefit of full argument (albeit not as full as in the present appeal), I held:

"*69… I accept the proposition that a shareholder's right of access to a company's documents exists independently of what is relevant in the context of litigation and reject the Dissenters' counsel's attempt to characterise joint privilege as a right of access to all documents relating to the business of a company. The scope of a shareholder's information rights will be dependent in part upon the company's articles and, in the case of a listed company, will be defined by the applicable listing rules. The existence of any joint interest a*

shareholder potentially has in any advice received by the company will essentially depend upon the advice being relevant to an issue in the relevant proceedings." [Emphasis added]

169. Of course, whether a joint interest in legal advice is found to exist or not is necessarily a distinct question from whether or not discovery will be ordered on, *inter alia*, relevance grounds. In the specific context of appraisal proceedings, however, whether the legal advice is relevant to a potential fair value appraisal proceeding and whether it is considered to be relevant in the context of an actual appraisal proceeding will ordinarily be closely connected questions. Having considered the state of law by reference to persuasive authorities, one can now consider the Bermudian law position.

170. The most authoritative Bermudian decision on the joint interest privilege rule in a company context did not (in terms of the operative part of the decision) consider the company-director example of the joint interest privilege rule either. This was because the case concerned a company retaining lawyers to draft a power of attorney which an emeritus officer executed. However, the approach to the generic joint interest privilege issue is illuminating. In *Wang-v-Grand View Private Trust Company* [2021] CA (Bda) 3 Civ (12 April 2021), Shade Subair Williams JA (Acting) opined as follows in this Court's leading Judgment:

"*112. It seems to me that it is the joint interest which the parties have in the subject matter of the relevant material and instructions which will either reflect, give rise to, or evidence a relationship which creates a right to disclosure of legally privileged material by the party other than the one who retains the lawyers; so long as the joint interest subsists at the time when the communications and privileged materials are made. As Mr Justice Moore-Bick said in Commercial Union, what is to be established is that there is 'a right to obtain access ... by reason of a common interest in their subject matter'. Whilst the application of concepts of 'joint interest' and 'subject matter' may be difficult to apply, these are the concepts that have featured in legal texts and decided cases.*"

171. Her Ladyship correctly found that at first instance I had wrongly applied the narrower 'joint instruction' test rather than the more flexible 'joint interest' test in a case where it was not necessary to establish that a joint instruction had occurred. The just cited judicial statements as to what the legal requirements for establishing a joint interest privilege claim are helpfully illustrate the sort of analysis which I consider should apply to any assessment of the existence of joint interest privilege, including in the company-shareholder context. Sir Christopher Clarke P, concurring, acknowledged the difficulty of navigating this area of the legal seas:

"*135. In considering whether a claim to joint interest privilege arises we find ourselves in a somewhat poorly charted sea. It is necessary, in this context, to distinguish between a number of different concepts, namely (a) joint retainer, which is not here alleged; (b) joint interest privilege; (c) common interest privilege; and (d) interest in a general sense, which does not fall within (b) or (c)*…."

172. The existence of the company-shareholder status-based joint interest privilege rule was confirmed by the President in the following terms:

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

140 <u>In each of these cases the relationship is such that B is properly held to be entitled as against A to access to the privileged material</u>. Sometimes the relationship is in the nature of a shared enterprise (partners and joint venturers). Sometimes the relationship is one of ownership, as in the case of

shareholders. Sometimes the relationship is one of contractual obligation. Sometimes the relationship is one where A holds assets for, and owes duties to B, as in the case of a trustee.

141 Even in cases of the type referred to in the previous paragraph the question whether joint privilege may in fact be asserted will depend on the circumstances. If the subject matter comes into existence after a dispute has arisen between the parties, it may well not be caught by joint privilege." [Emphasis added]

173. These observations define the joint interest privilege rule as a context-specific rule rather than an inflexible status-based rule, consistently with the observations of the English Court of Appeal in *Dawson-Damer*. The quoted passages from the President's Judgment in *Wang* clearly confirm that Bermudian law and English law are essentially the same in relation to this topic. It admittedly suggests that (1) a status-based joint interest rule for shareholders exists, but (2) sagely points out that a qualifying relationship will not necessarily be dispositive: "*whether joint privilege may in fact be asserted will depend on the circumstances*". This is a far more accurate way of expressing what Mr Howard KC aptly categorised as a rule forming part of procedural rather than substantive law.

174. Seizing the opportunity to directly consider what the contents and scope of the rule are, I would prefer to express the rule from the viewpoint of the shareholder claiming a joint interest rather than from the viewpoint of the company wishing to assert privilege. A shareholder has standing to assert a joint interest in legal advice a company has received. This is because there will potentially be various contexts in which a joint interest will arise, not because of any single overarching principle which applies in all cases without further analysis. Whether or not a shareholder's joint interest will be recognised by a court depends on the legal and factual circumstances of the proceedings in which the joint interest claim is advanced. As Mr Moore KC rightly contended, the proposition that corporate constitutional and other legal considerations do not fall to be taken into account, when deciding whether a joint interest exists, simply makes no sense.

175. In the present case, the shareholder's joint interest privilege claim is being asserted in proceedings under section 106 of the Companies Act 1981. This section pertinently provides:

"*(6) Any shareholder who did not vote in favour of the amalgamation or merger and who is not satisfied that he has been offered fair value for his shares may within one month of the giving of the notice referred to in subsection (2) apply to the Court to appraise the fair value of his shares.*"

176. Whatever categories of legal advice companies whose bye-laws limit rights of access to documents would not expect to be subject to a joint interest privilege claim, advice relevant to the fair value of shares in any future section 106 proceeding should not be one of them. From the initial issuance of the relevant shares such advice should be discernible as potentially subject to a joint interest claim. The statutory appraisal regime itself is the basis of the joint interest, because dissenters and companies alike have a common interest in the Court effectively and fairly adjudicating the appraisal process. The statutory purpose would be undermined if companies could unilaterally assert or waive privilege to serve their sole commercial interests. Whether or not any advice is sufficiently material and relevant to the question of fair value will invariably form part of the discovery application. In some cases perhaps, whether the advice is sufficiently material and relevant for production to be "necessary" under Order 24 of the Rules of the Supreme Court will in a practical sense be dispositive of the prior question of whether the joint interest was created at the time the advice was sought. Strictly of course, whether a joint interest in privilege arises when advice is received by a company is an entirely separate question from whether the relevant advice is materially relevant to an issue in subsequent proceedings. Advice potentially relevant to the fair value of a company's shares in the event of a merger or an amalgamation ought generally to be identifiable before (as well as after) amalgamation or merger plans are afoot. It is fundamental that when the advice is sought by the company on a unilateral basis it should actually or constructively be aware that a joint interest privilege with all, or a defined class of, shareholders is actually (or at least potentially) being created.

177. In any event, it ought not to be necessary to formulate any rule of evidence in more than general terms. The common law is built on a series of general and easily digestible conceptual principles, leaving the theoretical rough edges to be smoothed out on the floor of the litigation workshop. The merits of each joint privilege claim, therefore, fall to be determined having regard to the circumstances of each case. Shareholders by virtue of their status as such have the right to claim joint interest privilege in legal advice which a company has received about its business affairs, but the ability to enforce this contingent right is not dependent solely on the assertion of shareholder status. A joint interest is only likely to be found to have existed when the generally applicable requirements for the creation of a joint interest (see *Wang* at paragraph 112, per Subair Williams JA (Acting)) are satisfied. The application of the general requirements will usually be shaped by the legal and factual circumstances in which the relevant discovery application is made.

178. Building on Sir Christopher Clarke P's lucid and concise *obiter dicta* in *Wang-v-Grand View Private Trust Company* [2021] CA (Bda) 3 Civ, I would summarise my own views as to what "*circumstances*" are likely to be most relevant to whether or not a shareholder can assert a joint interest privilege claim against a company in relation to legal advice it has obtained as follows. In my judgment:

(a) the mere relationship of shareholder and company only potentially gives rise to a joint interest in any legal advice a company obtains which is not protected by litigation privilege. Contexts may, perhaps, arise in which it is self-evident that the fact that the applicant is a shareholder of the respondent company is enough to establish the claim;

(b) a company seeking legal advice will be deemed to know that its shareholders possess the standing to assert a joint interest privilege in the advice by virtue of their status in relation to the company;

(c) in what circumstances will a joint interest likely arise? The advice will generally have to have been obtained by the company in respect of a matter which engages the interests of one or more shareholders in a direct way which is reasonably discernible when the relevant legal advice is received;

(d) advice in relation to the merits of any matters or transactions which potentially engage the rights of shareholders in some specific way will generally attract joint interest privilege. Advice relevant to the fair value of shares in the event of an amalgamation or merger would potentially qualify because of the rights conferred by section 106 of the Companies Act. So too would legal advice in relation to any transaction which a shareholder could potentially challenge as being in breach of the company's constitution or the Companies Act;

(e) advice in relation to how a company should defend proceedings which are not yet in contemplation, but are merely possible, or indeed in relation to a vast array of 'administrative' matters which have no direct impact on shareholder rights would not ordinarily be likely to attract joint interest privilege; and

(f) what the company's articles or bye-laws provide about access to information may often be relevant to the analysis of whether joint privilege exists although this is unlikely to be dispositive in relation to statutory claims, cases of fraud or claims analogous to fraud.

Conclusion

179. The Supreme Court was required to decide whether the Company could assert privilege against the Dissenters as a question of legal principle. Narinder Hargun CJ concluded (a) the English rule on joint privilege prevented a company from asserting privilege against a shareholder (subject to litigation privilege), (b) this Court had affirmed that the English rule formed part of Bermuda law, and (c) it was not for the

Supreme Court to revisit the rule. For these additional reasons, I agree with Bell JA that his conclusions on points (a) and (b) were in substance correct. Under Bermuda law, the relationship between a company and its shareholders is such as to potentially engage the application of the joint interest privilege rule. However the application of the rule will depend on the circumstances of each case. It will require an analysis of the nature of the legal advice received by the company and the factual and legal grounds upon which it is contended that a joint interest arose. In the present case that analysis establishes that the requisite joint interest privilege existed (subject to the claim to litigation privilege).

CLARKE, P:

180. I agree with both judgments.

181. In relation to the PCP issue, Males J in *Ardila* drew a line between an expectation or understanding that a subsidiary will in practice comply with a request (which does not amount to PCP) and an understanding or arrangement from which a right of free access in practice can be inferred (which does). The line could be said to be fine but determinative; and the circumstances in which the latter understanding – amounting to a standing consent or what amounts to a non-contractual promise - applies are likely to be the exception rather than the norm.

182. These circumstances are not, in my judgment, established in the present case, particularly in the light of: (a) the affidavit evidence of Mr Parr, the Group General Counsel; (b) the absence of any clear evidence that the Principal Group Companies recognised any right of the Company to free or unfettered access to their documents or that they provided such access in accordance with any such right and; (c) the unlikelihood of the Principal Group Companies in a group such as the present (with "*a series of pyramids within a larger overall pyramid*", as described by Mr Parr in the manner summarised at [127] of the Chief Justice's judgment, with subsidiaries with many external and independent shareholders), reaching an undocumented arrangement or understanding of the relevant kind with an intermediate holding company such as the Company.

183. As to the issue of privilege, I decline to declare that the principle of joint interest privilege is, so far as it relates to companies and shareholders, inapplicable in Bermuda. Insofar as an entitlement to see privileged material was once based on the notion that the shareholder had some form of interest in the property of the company that foundation has collapsed. But the joint interest principle, applicable to defeat what would otherwise be a successful claim to legal advice privilege, has a firm foundation in the recognition by the courts that the shareholder and the company may have a joint interest in the subject matter of the relevant communications, in like manner as a joint interest in communications may arise in the case of other relationships: see those summarised at 6.09 of *Thanki* and by me at [139] of *Wong*.

184. Whether such a joint interest exists depends on the circumstances of each individual case. I would accept that the joint interest principle does not extend to give the shareholder an absolute right to access any company legal advice whatever, and would respectfully endorse the observations of Kawaley JA on the limits of the right.

185. But in the present case the shareholders had a clear joint interest in relation to any advice bearing on the appropriate figure to be offered for the shares that were to be compulsorily acquired.

186. In order for joint privilege to arise the joint interest must arise at the time when the relevant advice is obtained/of the relevant communication: see *BBGP Managing GenEral Partner Ltd v Bacock and Brown GenEral Partners* [2010] EQHC 2176 (Ch) approving *Thanki* at 6.12; *CIA Baraca de Panama S.A. v George Wimpey & Co. Ltd* [1980} Lloyd's Law Reports 598; but it does not disappear when the shareholder ceases to be a shareholder and new shareholders are entitled to be treated as successors in title to the interest of their predecessors.

187. But any entitlement to disclosure of documents will cease in relation to documents which came into existence after section 106 litigation between the Company and shareholders was in contemplation and which falls within the scope of litigation privilege.

188. As to the earliest date when litigation privilege could be claimed by the company I agree that it should be regarded as 8 March 2021 when the proposed amalgamation was announced.