In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2017 No: 295

BETWEEN:

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiff

And

THE CORPORATION OF HAMILTON

Defendant

In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2020 No: 89

BETWEEN:

MEXICO INFRASTRUCTURE FINANCE LLC

Plaintiff

And

TERRA LAW LIMITED

Defendant

RULING

Dates of Hearings:	28 March 2022, 29 March 2022, 1 June 2022, 11 January 2023
Date of Judgment:	27 March 2023
Plaintiff:	Mr. Keith Robinson / Mr. Kyle Masters / Mr. Oliver MacKay (Carey Olsen Bermuda Limited)
Defendant (COH):	Mr. Mark Diel / Mr. Saul Dismont (Marshall Diel & Myers Limited)
Defendant (TERRA)	Mr. Mark Chudleigh / Ms. Laura Williamson (Kennedys Chudleigh Limited)

Cross applications for specific discovery– RSC Order 24 Court's powers to order specific discovery – Legal Professional Privilege- Joint Interest Privilege – Implicit Waiver of Legal Professional Privilege - Application for Leave to serve Interrogatories - Guiding Legal Principles – Reliance and Causation in Claims for Negligence

RULING of Shade Subair Williams J

Introduction

1. In the case of Mexico Infrastructure Finance LLC ("MIF") v Corporation of Hamilton ("the COH") (Case No. 295/2017) this Court is concerned with a summons dated 29 June 2021 for leave to serve interrogatories on the Plaintiff.

2. (A 30 June 2021 summons for specific discovery under RSC Order 24/3(2) and Order 24/7 was filed by MIF against the COH. However, upon the consent of the parties, on 31 May 2022 I adjourned the summons *sine die* and reserved costs.)

3. In the case of MIF v Terra Law Limited ("TERRA") (Case No. 89/2020) cross-applications for specific discovery pursuant to RSC Order 24/7 were filed and heard before me at the same hearing as the application in respect of the interrogatories.

4. The joint hearing proceeded in accordance with the case management orders I made in answer to a 30 June 2021 summons filed by TERRA seeking a consolidated hearing for the trial of these two separate actions. By an Order of this Court made on 8 July 2021, I directed that the cross-applications for specific discovery, together with COH's application for interrogatories, would be heard together at a joint hearing.

5. During the 1 June 2022 hearing, MIF introduced new grounds (joint interest privilege) in support of its application for specific discovery against TERRA in respect of information and material over which TERRA claimed the COH had a right of legal professional privilege. The COH was given leave by this Court to be heard as an interested party to the application and competing submissions were heard from the COH, TERRA and MIF on the subject of joint interest privilege on 11 January 2023.

6. At the close of the hearing of these three applications, I reserved my ruling so to provide this written decision with reasons.

Relevant Background:

7. The following summary is uncontroversial between the parties and is, in substance, largely borrowed from various previous Court rulings.

8. On 11 April 2012 the COH and Par-La-Ville Hotel and Residences Ltd ("PLV") entered into an agreement with one another to build and develop a five-star hotel complex on the site of the Par-La-Ville car park in the City of Hamilton ("the Car Park") for its grand opening on 31 August 2016. This never came to pass.

9. The plan was for the Plaintiff, MIF, to extend a bridging loan in the sum of $18,000,000 to PLV for it to meet the projected cost of borrowing monies to the tune of $350,000,000 for the funding of the palatial resort. This loan was to be secured by the COH.

10. Historically, the COH derived its status as a legal person and powers to make rules, orders, by-laws, statutes and ordinances under the St George's and Hamilton Act 1793 ("the 1793 Act"). A significant portion of the 1793 Act was repealed by the Municipalities Act 1923 ("the 1923 Act") which remains in force today. There was never an express power contained in the 1923 Act which permitted the COH to offer itself up as a guarantor. This opened up the question as to whether such a power was statutorily implied.

11. Under section 23(1)(f) of the 1923 Act, the COH is empowered to levy rates on valuation units in the City of Hamilton for municipal purposes of an "extraordinary nature" as the Minister may approve in any particular case. Section 37(1) of the 1923 Act had the effect of limiting the COH's borrowing powers.

12. By letter dated 10 July 2013, the Minister informed the Mayor that the Attorney-General's Chambers had considered the 1923 Act and concluded that it did not permit the Corporation to use its assets for the benefit of third party financing. On this basis, the Minister declined the approval required under section 23(1)(f), rendering the issue of any guarantee *ultra vires*.

13. In what broadly appeared to be an effort to legitimise the Guarantee under the law, the Legislature amended the 1923 Act in October 2013 by passing the Municipalities Amendment Act 2013 ("the 2013 Amendment Act"). Section 14 of the 2013 Amendment Act required the approval of Cabinet and the Legislature to validate certain agreements and dispositions. A draft copy of the Guarantee was subsequently submitted and approved by the House of Assembly on 13 June 2014 and by the Senate on 25 June 2014.

14. So, on 9 July 2014 the COH secured MIF's $18,000,000 loan to PLV in the form of (1) a guarantee ("the Guarantee") and (2) a mortgage deed of 4 August 2014 conveying the COH's freehold interest in the Car Park ("the Mortgage"). Additionally, MIF obtained title insurance coverage from Fidelity National Title Insurance Company ("Fidelity") to protect against the risk of loss of the $18,000,000 loan.

15. PLV defaulted on the loan which matured on 30 December 2014. Consequently, judgment was entered against PLV for the principal loan amount and PLV became the subject of winding-up proceedings.

16. The Plaintiff endeavoured to recover the proceeds of the loan through enforcement of the Guarantee against the COH. It is a matter of record that in May 2015 a Court of concurrent jurisdiction entered summary judgment against the COH in favour of the Plaintiff in the form of a Consent Order. However, fresh proceedings were subsequently commenced by the COH giving way to litigation about the validity of the Guarantee. At the close of those proceedings the Honourable Mr. Justice Stephen Hellman ruled that the grant of the Guarantee was indeed *ultra vires*. This decision was upheld by the Bermuda Court of Appeal and the Judicial Committee of the Privy Council[1]. Those proceedings may be termed the "Guarantee Proceedings".

Background and the Pleaded Case between MIF and the COH (Case No. 295 of 2017)

17. This action, commenced by a Generally Endorsed Writ of Summons amended on 28 January 2020, is being referred to as the "Mortgage Proceedings". In these Mortgage Proceedings, the Plaintiff is in pursuit of declarations from this Court stating, *inter alia*, that the Mortgage is valid and binding and that the Plaintiff has good equitable title to the Car Park, notwithstanding the demise of any hope for enforcement of the Guarantee.

18. The COH claim that the Mortgage is *ultra vires* for the same reasons that the Guarantee was found to be so. The Defendant points to the Privy Council's findings that the Guarantee was

[1] Lord Sumption and Lord Lloyd-Jones dissented. See Mexico Infrastructure LLC v The Corporation of Hamilton [2019] UKPC 2

purposed to assist PLV, the developer, in obtaining funding for the development of the lavish project, so to enable PLV to obtain credit. These purposes did not qualify under the governing legislation as municipal purposes. On those arguments, the COH says that the Mortgage, too, is *ultra vires*.

19. MIF's pleaded case against the COH goes further than the single question of the validity of the Mortgage. MIF's case is that the COH represented to MIF that it had the capacity to enter into the Mortgage and that it wrongly and negligently represented to MIF that it had the capacity to enter into the Guarantee. In its Amended Statement of Claim ("A/SOC") of 28 January 2020, the Plaintiff referred to these representations as "Capacity Statements".

20. On MIF's pleaded case, one of the Capacity Statements made by the COH was a July 2014 legal opinion from COH's then attorneys, TERRA (the "Final Terra Opinion"). MIF asserted [9]: "*...Terra had been retained to advise the Defendant in respect of the Loan Agreement, the Guarantee and the Mortgage.*" MIF pleaded that it had an agreement with the COH that it, MIF, would be entitled to rely upon the Final Terra Opinion as to the question of the COH's capacity to enter into the Guarantee and the Mortgage. At paragraph 11 of the A/SOC MIF pleaded:

"*The Defendant knew or ought to have known that the Plaintiff would rely upon the Capacity Statements in agreeing to enter into the Loan Agreement and accepting the Guarantee and the Mortgage as security for* [the] *Plaintiff's US$18,000,000 loan to PLV. The Defendant did so rely upon these statements; such reliance was reasonable in all circumstances.*"

21. In its pleadings, the COH denied that the Final Terra Opinion contained Capacity Statements and further denied that MIF was entitled to rely on the Final Terra Opinion. In its Amended Defence and Counterclaim ("A/D&C") the COH stated [11]:

"*...Without prejudice to the generality of the foregoing denial, it is specifically denied that the Plaintiff was entitled to rely on the opinion of Terra and the Defendant puts the Plaintiff to strict proof thereof. The Defendant will also aver that, prior to the Terra opinion dated 9 July 2014, the Plaintiff through its attorneys, Conyers Dill & Pearman Limited ("Conyers"), had seen and reviewed draft opinions by Terra and was aware of the concerns Terra had as to the capacity of the Defendant. The Plaintiff relied on the advice of its attorneys, Conyers, and not any representations by the Defendant.*"

22. The position taken by the COH is that even if the Capacity Statements[2] had been made, any such statements would have been unauthorised given the *ultra vires* nature of the undertaking.

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[2] The COH averred that paragraph 4 of the A/SOC was insufficiently particularized in respect of its pleading that the COH's made Capacity Statements. It was stated in the A/D&C that this assertion was denied pending provision of

The Defendant also pleaded in its A/D&C that any such statements which became terms of a contractual agreement could not be the subject of an action in tort and that the Defendant could not be liable in tort for acts committed *ultra vires*.

23. MIF, on the other hand, contends that it will be open to the Court to find that even if the Court holds that the Mortgage is not valid under the law, the COH is liable for negligent misstatements in respect of the Capacity Statements asserting that the COH was empowered to provide the Guarantee and the Mortgage.

24. At paragraph 13-14 of the A/SOC:

"*13. The Defendant owed the Plaintiff a duty of care in respect of the making of the Capacity Statements. The Capacity Statements, in so far as they related to the Guarantee, were wrong, were made negligently and in breach of this duty of care and were relied upon by the Plaintiff to its detriment.*

Particulars of Negligence

(a) Stating that the Defendant had the capacity to enter into the Guarantee when the Defendant knew, or ought to have known, that it had no such capacity since it had been advised of this fact by Charles Flint QC and Gerard Clarke of Blackstone Chambers by opinion dated 10 May 2013;

(b) Causing or permitting Terra to make incorrect and negligent statements as to the Defendant's capacity to enter into the Guarantee; and

(c) Failing, whether by itself, its servants or its agents, to exercise due care and attention in respect of the making of the Capacity Statements.

14. As a result of the matters set out above, the Plaintiff has suffered loss and damage. At the date hereof, it is not possible to quantify that loss and damage, and the Plaintiff will seek an inquiry as to damages."

25. On the COH's counterclaim, it is said that COH has paid out $254,289.37 to the Receivers appointed by the Plaintiff under Clause 4(a)(ii) of the Mortgage.

F&B Particulars. No notices of a request for F&B Particulars appear to have been filed up until the point of delivery of this Ruling.

Background and the Pleaded Case between MIF and TERRA (Case No. 89 of 2020)

26. Ancillary to the Mortgage Proceedings, MIF brought a claim against TERRA for professional negligence ("the Terra Proceedings"). The Terra Proceedings were commenced by a Generally Indorsed Writ of Summons filed on 13 February 2020. As foreshadowed by the Plaintiff's pleaded case in the Mortgage Proceedings, the Plaintiff claims in the Terra Proceedings that it relied on the negligent statements provided in the Final Terra Opinion, thereby causing loss and damage to MIF.

27. In the Plaintiff's Statement of Claim ("SOC") [41], MIF's pleaded case for breach of duty is that it was reasonable in all the circumstances for it, MIF, to have relied exclusively on the Final Terra Opinion in answer to the question of the COH's capacity to enter into the Guarantee and the Mortgage and that MIF did in fact exclusively rely on that legal opinion.

28. There is no dispute on the pleadings between MIF and TERRA that the COH was previously advised by law firm Trott & Duncan Limited ("T&D"). On the Plaintiff's assertions, the COH provided T&D with a 16 June 2006 opinion ("the 2006 CF Opinion") from Mr. Charles Flint KC of Blackstone Chambers in England. It is said that the 2006 CF Opinion addressed the question of the COH's powers, which covered its powers with respect to land under section 20 of the 1923 Act. That being the case, TERRA points out that the 2006 CF Opinion did not concern the project to develop the five-star hotel complex on the Car Park.

29. At some point on or close to 7 May 2013 T&D ceased to act for the COH.

30. On fresh instructions given on 2 May 2013, the COH directly sought a second legal opinion from Mr. Charles Flint KC in relation to the COH's powers to issue the Mortgage and the Guarantee. This opinion was provided on 10 May 2013 ("the 2013 CF Opinion"). On the Plaintiff's pleadings, the COH's first instructions to TERRA came on the same day that the 2013 CF Opinion surfaced. The Plaintiff avers that also on 10 May 2013, TERRA was emailed a copy of the COH's 2 May 2013 instructions to Mr. Flint KC. On TERRA's pleadings, it is said that in the 2013 CF Opinion there is a conclusion that the COH did not have the power to issue the Guarantee and that it "probably" did not have the power to enter into the Mortgage either.

31. Following a 13 May 2013 telephone conference with Mr. Flint KC and others, Mr. Flint KC provided a further note of advice to the COH ("the CF Advice Note"). In the CF Advice Note, Mr Flint KC maintained that section 23(1)(f) of the 1923 Act did not confer on the COH a general power to enter into transactions on the mere supposition of Ministerial approval. TERRA admitted in their pleaded case that the 2013 CF Opinion and the CF Advice Note

concerned matters on which it, TERRA, was asked to opine and that TERRA was aware of the detail contained in both documents.

32. During this period, Conyers Dill & Pearman ("CDP") was the law firm advising and representing MIF.

33. In my previous ruling in *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC Bda 10 Civ [8-11], I provided the following summary of this background:

"The COH instructed Mr. Charles Flint QC to provide a legal opinion on its powers to provide the security for the loan. Mr. Flint QC, by a written opinion dated 10 May 2013 (narrowly pre-dating the 2013 Amendment), advised that the COH were not so empowered and that section 23(1) of the Municipalities Act 1923 ("the 1923 Act") did not confer any general powers on the COH to provide financial assistance to a commercial developer.

Following the written advice of Mr. Flint QC, the COH instructed Bermuda law firm, Terra Law Limited ("Terra Law"), to provide a second legal opinion on its powers to execute the Guarantee. Having been disclosed with Mr. Flint QC's opinion, Terra Law, in a draft written opinion, advised that the COH had the power to mortgage its property pursuant to section 20(1)(b) of the 1923 Act if Ministerial approval were obtained. It further opined that the COH derived all of its powers from the statute which was vague and unclear.

Of note, Terra Law qualified its opinion by acknowledging that the possibility of challenge on the basis that the 1923 Act does not confer an express power to mortgage its land to support the borrowing of a third party. In the final part of the qualification, Terra Law states; "We submit, however that the Lender can be protected against such risk through the issuance of the Mortgagee Title Insurance by Stewart Title Insurance Company (required under clause 6.1(xii) of the Credit Agreement)."

At paragraph 15 of the judgment in the Court of Appeal proceedings it states; "As the learned judge noted, Mr. Flint could understandably be considered a more authoritative source of legal advice than Terra Law, and his opinion addressed the point in greater depth than that of the Bermuda law firm, which the judge commented, had addressed the point somewhat cursorily…"

34. In the 18 November 2016 judgment of Hellman J [42-44] the learned judge provided:

"42. The Act was amended by the 2013 Act, which came into force on 15th October 2013. The amendments were intended inter alia to facilitate the Corporation's role in the proposed hotel development. As noted above, the 2013 Act amended section 37 to include

express reference to a guarantee. It also amended section 20, which in its unamended form empowered the Corporation to lease its land, to require that any such lease agreement for a term exceeding 21 years, eg the lease of the Car Park, must be approved by the Cabinet and the Legislature. However none of the amendments addressed the concerns raised by Mr Flint as to section 23(1).

43. Nonetheless, the Corporation concluded that the amendments to the Act, combined with the aforesaid approvals given by the House of Assembly and the Senate, were sufficient to allay any concerns as to vires. On 9th July 2014 it proceeded to sign the Guarantee and Security. The Guarantee included an express representation that the Corporation possessed the power and authority to enter into and perform the obligations to which it gave rise.

44. Terra Law, in their capacity as the Corporation's attorneys, provided an opinion of even date to CD&P, in their capacity as MIF's attorneys, confirming that the Corporation had power to enter into the Guarantee and Security. The Court was not informed whether MIF instructed CD&P to advise independently on the point."

35. Delivering the leading judgment for the Court of Appeal, Bell JA also remarked on the MIF's assertion that it relied on the Final Terra Opinion [48]:

"*On the facts of this case, the high watermark for MIF seems to me to be the fact that, in failing to advance a defence of ultra vires in the proceedings which led to the making of the Consent Order, the Corporation had neither taken further advice from Mr Flint, nor disclosed Mr Flint's earlier advice to Mr Kessaram. But this, it seems to me, ignores the reality of the advice given by the Corporation's attorneys, Terra Law, to MIF's attorneys. I commented during the course of argument that I found it surprising that MIF appears not to have relied upon advice from its own attorneys (and perhaps the point should be spelled out that MIF was represented by Bermuda attorneys in relation to this transaction), which I indicated would accord with my understanding of general practice in regard to transactions such as this one. Be that as it may, the fact is that Terra Law had, as MIF was aware, referred at an earlier stage to there being at least a risk of the Guarantee being ultra vires. Further, as submitted for the Corporation, knowledge of the risks involved in transactions with local authorities was a matter well known in the marketplace. So if MIF chose to rely on the advice of Terra Law rather than advice from its own attorneys, one of the Island's pre-eminent firms, that is a significant factor to be weighed in the balance.*"

36. There is no dispute on the facts that TERRA never provided MIF or CDP with a copy of any of the written opinions or advice from Mr. Flint KC. To this TERRA says that it was under no obligation to share those documents and points out that the privilege in these documents

belongs to the COH. TERRA also put the Plaintiff to strict proof that it never received these documents at any material time from any other party, adding that MIF had ample opportunity in any event to take its own advice from CDP and/or a London KC.

37. It is also uncontroversial that the Plaintiff, through its CDP Counsel, communicated to TERRA that, absent the sharing of the advice from Mr. Flint KC, a robust legal opinion confirming the lawfulness of the Guarantee and the Mortgage endorsed with the provision of an enforceable mortgage was fundamental to MIF's willingness to lend.

38. On 10 June 2013 Mr. Sean Tucker of TERRA emailed a draft version of the Final Terra Opinion to Ms. Francesca Fox of CDP, Mr. Johann Oosthuizen of Wakefield Quin (for PLV), and to various representatives of the COH. In the cover message, Mr. Tucker wrote:

"*...Please find attached our draft Opinion. Please note that the Opinion is very much in draft form, as we have still not received any approval from Minister Fahy, and our final Opinion will be predicated on the content of any such approval.*"

39. On Wednesday 12 June 2013 Ms. Fox of CDP replied:

"*... ...I understand that a conference call is scheduled at 11 EST/12 AST to discuss the outstanding issues. In advance of that meeting I attach a mark up of your firm's opinion. You will appreciate that the provision of an enforceable mortgage is fundamental to lend. In addition, during the conference call on Monday, Robert Osterwalder was very clear that the requirement to provide a redacted version of the London QC's opinion in respect of the Corporation's power to enter into the mortgage would only be dropped if Terra were able to provide a robust opinion confirming the same. The qualifications that have been included are not therefore acceptable.*

We can of course discuss this during this morning's call."

40. In 2014, two draft versions of the Final Terra Opinion were sequentially produced. Ms. Helen Forrest of TERRA emailed the earlier draft of 14 May 2014 to the CDP team under a cover message inviting CDP's review and commentary. The following day, on 15 May 2014, Mr. David Cooke of CDP replied:

"*...I am attaching comments on the draft opinion, the most substantive of which just seek to ensure that the various opinions cover all of the Loan Documents to which the Corporation is a party. Please note that this has not yet been reviewed by our clients, and therefore remains subject to any comments that they may have...*"

41. The marked-up date on the second draft of the earlier two versions of the Final Terra Opinion is 10 June 2014 and the Final Terra Opinion is dated 9 July 2014.

42. The historical development of the Final Terra Opinion is of importance to the Plaintiff whose case is that TERRA owed it a duty to exercise the care and skill expected of reasonably competent attorneys. The Plaintiff contends that TERRA breached this duty in that the Final Terra Opinion, particularly in its failure to qualify the statements therein, was inconsistent with the conclusions that any reasonably competent lawyer practising law in Bermuda could have drawn. Defending its position, TERRA says otherwise, highlighting that other reputable law firms, including CDP on the face of it, formed similar views.

43. The parties also diverge on their respective pleaded cases on the extent to which TERRA qualified its opinion on the COH's ability to enter into the Guarantee and the Mortgage. The extent to which MIF did and could have reasonably relied on the Final Terra Opinion is also disputed. That said, TERRA does accept that the Final Terra Opinion expressly permitted the Plaintiff to rely on it.

44. It is also TERRA's case that MIF has acted abusively by running two opposing positions between the Mortgage Proceedings against the COH and these proceedings against TERRA. To that end, TERRA has underscored that MIF's underlying position in the Mortgage Proceedings is that the Mortgage is valid as a matter of law.

Decisions and Reasons: The Cross-Applications for Specific Discovery:

MIF's Application for Specific Discovery against TERRA (Case No. 89 of 2020)

45. Mr. Xavier Gonzalez-Sanfeliu is the Manager of MIF. In his affidavit evidence filed in support of MIF's application for specific discovery, he states that the Plaintiff would not have suffered the loss resulting from its $18,000,000 loan to PLV (the "Loan Agreement"), but for its reliance on the Final Terra Opinion.

46. The Plaintiff, therefore, considers the Final Terra Opinion to be central to its action against TERRA and now seeks, *inter alia*:

> "*Copies of all internal notes, memos, emails and other documents between and amongst those employees or agents of the Defendant responsible for advising the COH and for the development and issuing of the Draft Terra Opinion and the Final Terra Opinion relating to the Defendant's decision to remove the qualification appearing in the penultimate paragraph of the Draft Terra Opinion from the Final Terra Opinion*;"

and

"Correspondence and documents between the Defendant and the COH and its attorneys or representatives regarding the Defendant's decision to remove the qualification appearing in the penultimate paragraph of the Draft Terra Opinion from the Final Terra Opinion..."

47. The Plaintiff asserts its entitlement to this material on the grounds of joint interest privilege. MIF says that this right is supported by the fact that the Final Terra Opinion was produced at its own request, as evidenced by the face of the document which in its opening statements provides:

"At the date of this opinion letter, we are the Attorneys for the Corporation in connection with the above-noted matter.

We have been requested by the Lender to render this opinion..."

48. There is no dispute on the facts that CDP partook in providing mark-ups and edits to the earlier drafts of the Final Terra Opinion. It is also evident that the Final Terra Opinion was produced after CDP directly and expressly informed TERRA that MIF required TERRA to provide it with a robust opinion confirming the enforceability of the Mortgage as a pre-condition of the loan and MIF's agreement to withdraw its insistence on being provided with Mr. Flint KC's earlier advice.

49. The Plaintiff also points to the joint interest between it and the COH for the loan to materialise in aid of the development of the hotel project. Mr. Robinson for MIF submitted that the COH's interest in the plan is ascertainable on TERRA's pleaded case. He highlighted paragraph 27(b) of TERRA's Defence which provides:

"The Corporation represented to the Defendant that the Project included the provision of significant underground car-parking facilities, which would meet the demand for such facilities in the City of Hamilton. The Corporation also represented to the Defendant that the Project would provide significant benefit to the residents of the City of Hamilton. These representations as to the municipal purpose of the Project formed a material part of the Defendant's assessment of the Corporation's powers..."

50. TERRA filed affidavit evidence from Ms. Nicola Hennessy, a solicitor and associate in the London office of Kennedys LLP, affiliated with Kennedys Chudleigh Ltd. In her Second Affidavit, Ms Hennessy said:

"Of course, any privilege vesting in any relevant documents belong to the Corporation of Hamilton, the Defendant's former client. The Defendant does not therefore have any authority to waive the Corporation's privilege and it would be inappropriate (and a potential breach of the Defendant's duties to its former client) for the Defendant to make determinations as to whether the Corporation's privilege has been waived in respect of any documents that would otherwise enjoy that protection. If the Plaintiff insists on pursuing this request, then it will be necessary to have the Corporation participate in the determination of any issues of privilege."

51. However, Mr. Robinson submitted that MIF is entitled to assert joint interest privilege, relying on the Court of Appeal's decision in *Wang and Wong v Grand View Private Trust Company Ltd* [2021] Bda LR 29 where the legal principles on joint interest privilege were examined and the below passages from *Thanki on The Law of Privilege* (Third Edition) ("*Thanki*") [§6.07-6.08] and [§6.16] were approved:

"**6.07**

Joint privilege can also arise where, even though party A and party B have not jointly retained a lawyer (and only one of them is party to the relevant lawyer-client relationship), they have a joint interest in the subject matter of the communication. The defining characteristic of this aspect of joint privilege is that the joint interest must [foot note 22: omitted] *exist at the time that the communication comes into existence.*[3] *So joint privilege will only arise in respect of a document created during the period when the joint interest subsists; in other words, the documents must have come into being for the furtherance of the joint purpose or interest… …*

6.08

If a joint interest exists then the same principles as those set out above in relation to joint retainers will generally apply. Accordingly, neither party can assert privilege as against the other in respect of communications coming into existence at the time the joint interest subsisted; hence, each party to the relationship can obtain disclosure of the other's (otherwise privileged) documents so far as they concern the joint purpose or interest [footnote 24: omitted]. *However, both parties are entitled to maintain privilege as against the rest of the world.*[4] *As with a joint retainer, the privilege is not lost simply because the parties subsequently fall out.*

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[3] Foot note 23: *"See Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep 640, 646, 648. Moore-Bick J stated (at 648) that the interested party 'must be able to establish a right to obtain access to them by reason of a common interest in their subject matter which existed at the time the advice was sought or the documents were obtained'. Moore-Bick J clearly meant the time at which the documents were obtained by the interested party. See also R (Ford) v Financial Services Authority [2011] EWHC 2583 (Admin)...para 16 and Kousouros v O' Halloran [2014] EWHC 2294 (Ch)...paras 53-55)."*

[4] Foot note 25: *"Jenkyns v Bushby (1866) LR 2 Eq 547; Farrow Mortgage Services Pty Ltd v Webb (1996) 39 NSWLR 601, 608, Court of Appeal of New South Wales."*

Given the extent to which the existence of a joint interest might fetter the actual client's rights in relation to privileged advice, a joint interest ought not to be lightly inferred. Nor have the courts worked through all the consequences of the existence of a joint interest. The concept is less well developed or defined in the case law than joint retainer… …

6.16

Insufficient joint interests or a divergence of joint interests *As stated above, in order for a joint privilege to arise the joint interest must exist at the time that the communication comes into existence. If the parties subsequently fall out and sue one another, neither of them can claim privilege as against the other in respect of any documents that are caught by the joint privilege,[5] as the original joint interest is not destroyed by a subsequent disagreement between the parties.[6] However, any documentation that comes into existence after a dispute arises between the parties, and thus at a time when the joint interest no longer subsists (and therefore outside the joint interest), will not be caught by the joint privilege… …"*

52. In *Wong v Grand View* [para 91], the Court of Appeal distilled the key elements of joint interest privilege from the judgment of Morgan J in *Gary Love v Robert Fawcett and Northam Worldwide* [2011] EWHC 1686 (Ch):

> "*What may be taken as the relevant high points of Morgan J's reasoning in Love v Fawcett & Northam is threefold: (i) In the assessment of a claim to joint interest privilege, the Court will focus on the purpose for which the attorneys in question were instructed and the way in which the parties concerned were or were not interested in that purpose; (ii) the sufficiency of the claimant's interest in the purpose of the instructions may be determined by the presence of a strong prima facie case of entitlement to a share in the fruits developed by the furtherance of that purpose; and (iii) joint interest privilege is founded and dependent on joint interests, not competing interests.*"

53. The bottom line is that there must be a sufficient interest and a joint interest in the purpose of instructing an attorney in order for the entitlement to arise. So, the purpose of the retainer is

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[5] Footnote 48: "*CIA Barca de Panama SA v George Wimpey & Co Ltd [1980] 1 Lloyd's Rep 598, 615 (CA); Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep 640, 646.*"

[6] Footnote 49: "*This passage in the first edition of this work was approved by Norris J in BBGP Managing General Partner Limited v Babcock & Brown Global Partners [2010] EWHC 2176 (Ch), [2011] Ch 296, para 52. If the joint interest were destroyed by subsequent disagreement between the parties, the joint interest doctrine would be largely useless.*"

paramount. It is on these factors that the Court of Appeal distinguished the concept of joint interest privilege from joint retainer in *Wong v Grand View*. Referring to Kawaley AJ's ruling, I (sitting as an Acting Justice of Appeal) said [para 99] and [paras 103-105]:

> *"I agree with the learned Assistant Justice Kawaley that "the assessment of whether joint interest privilege exists requires an analysis of both the subject-matter of the retainer and the relationship between the parties". However, relying on R (Ford)-v-Financial Services Authority, Kawaley AJ found that the purpose of the retainer is not the key criterion in and of itself. Effectively, the learned judge found, as a matter of principle, that the purpose of the retainer is subordinate, in terms of importance, to the legal relationship between the parties asserting joint interest privilege and the parties directly privy to the retainer agreement.*
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> ...
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> *Kawaley AJ applied Burnett J's criteria which (whether or not intended) could be said to apply more readily to the question of a joint retainer, rather than joint interest privilege...*
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> *It was contemplated by Burnett J in R (Ford) v Financial Services that an instructed attorney will not always perceive the full scope of potential conflicts which arise between parties to a joint retainer. Similarly, I would observe that it will also sometimes be the case that an attorney, for one reason or another, is either unaware or unappreciative of the full extent to which there is a joint interest in the instructions they receive and the advice and documents they prepare. The perspective of the attorney in these regards, may therefore be irrelevant, depending on the circumstances.*
>
> *Mr. Wilson QC raised during his oral submissions the importance of distinguishing between the meaning of "interest" and "benefit". I would caution against distinguishing between these terms so categorically. For example, the term "benefit" would apply to divesting Mr. YT Wang of his assets so long as that is in fact what he wanted. Under those circumstances, it may be said that the disposal of his assets was for his benefit. (See Bowstead & Reynolds on Agency (Twenty-First Edition, 2018) [3-*

010] where "benefit" and "interest" are used interchangeably.) In any event, the critical question is whether the facts and circumstances give rise to a joint interest with the retainer party. "

54. In this case, the purpose of TERRA's instructions to prepare a legal opinion was to provide MIF with the assurance it sought to confirm the COH's legal entitlement to offer the Guarantee and to mortgage the Car Park as security for the loan. At the point in time when TERRA was instructed to prepare the Final Terra Opinion, MIF's ultimate interest in the purpose of those instructions was to obtain confirmation that it could proceed with the loan. At that point in time, it is evident that the COH were equally interested in MIF proceeding with the loan which it, the COH, was prepared to secure by way of both the Guarantee and the Mortgage.

55. So, in my judgment, MIF and the COH did indeed have a joint interest in the purpose of instructing TERRA to provide the Final Terra Opinion at the time during which those instructions were first given. The fact that MIF and the COH now find themselves in adversarial litigation about the validity of the Mortgage does not destroy the original joint interest they shared in the purpose of instructing TERRA to provide the Final Terra Opinion. Also, it matters not that TERRA was not jointly retained by MIF and the COH, and it matters not that MIF had its own attorneys whose advice they may or may not have sought or relied on in relation to the same subject-matter.

56. For these reasons, I find that MIF is entitled to the discovery of the documents it seeks on its summons in relation to "*the Defendant's decision to remove the qualification appearing in the penultimate paragraph of the Draft Terra Opinion from the Final Terra Opinion.*"

TERRA's Application for Specific Discovery against MIF (Case No. 89 of 2020)

57. TERRA's application for specific discovery arises, in part, out of MIF's claim to legal professional privilege as the basis for its objection to the production of documents. In the Plaintiff's List of Documents the following catch-all description is given to this pursued class of documents:

"*All documents (including documents, drafts of documents, extracts, copies of documents, letters, notes and other documents or communications, electronic or otherwise) created for the purpose of obtaining and/or giving legal advice, and all communications passing amongst the Plaintiff and its legal advisers for such purpose, and/or all documents which came into existence in contemplation of or in connection with litigation for the purpose of obtaining*

and/or giving legal advice or evidence, and all communications passing amongst the Plaintiff, its legal advisers and/or third parties (or any of them) for such purposes."

58. As a broader complaint, Mr. Chudleigh also complained that MIF's List of Documents consists of a mere total of 45 documents, a number far less than one would expect for litigation of this sort, he contended. By contrast, in TERRA's List of Documents there are 180 documents listed in addition to 816 pages of emails and 200 emails provided in electronic form.

59. Mr. Chudleigh added that MIF's List of Documents in the Mortgage Proceedings is inexplicably greater than the Plaintiff's List in these proceedings against TERRA. More so, there are also documents listed in these proceedings which do not form part of the discovery in the Mortgage Proceedings. TERRA also complained that MIF has not fully disclosed all of the affidavit evidence it has in its possession which originated from other Court proceedings related to these proceedings. The Defendant argued that the implied undertakings on confidentiality which would attach to some of that material should have been either canvassed between the parties or brought to the Court's attention in the form of an application. The Plaintiff, on the other hand, maintains that it has disclosed all of the relevant affidavit evidence in its possession custody or power.

60. In support of TERRA's summons, affidavit evidence sworn by Ms. Nicola Hennessy, a solicitor in the London office of Kennedys LLP, was filed. Ms. Hennessy pointed out the Plaintiff's non-disclosure of various classes of documents which were absent from its List of Documents. Providing examples, Ms. Hennessy envisaged the existence of pre-loan internal emails or documents setting out the Plaintiff's requirements and its position on the adequacy of the TERRA Opinion "*when reviewed in discussions without the involvement of lawyers*" in addition to other internal correspondence which would touch on the Plaintiff's commercial decision to proceed with the loan transaction. Ms Hennessy also queried the absence of any document and / or communication relevant to the Plaintiff's attempt to secure coverage with Stewart Title Insurance Company ("Stewart Title") and its subsequent securing of title insurance from Fidelity. Ms. Hennessy added that MIF's discovery should have also included its file on the loan and any documentation it has setting out its general approach to lending and risk.

61. Ms. Hennessy characterised the issues for determination as follows [8]:

(a) Whether, and if so to what extent, the Plaintiff in fact relied on the Final Terra Opinion;
(b) The advice received by the Plaintiff from other legal advisors, including Conyers and any English QC from whom the Plaintiff may have taken advice;
(c) Whether the Final Terra Opinion contained negligent statements;

(d) The Plaintiff's reasons for ensuring title insurance was in place before the loan money could be withdrawn from escrow;

(e) The amount of any loss or damage alleged to have been suffered as a result of the Defendant's alleged conduct."

62. Opposing TERRA's application, the Plaintiff filed evidence from Mr. Kyle Masters, a Senior Associate at Carey Olsen when his affidavit was sworn (now a Partner). Mr. Masters stated in his evidence that the Plaintiff does not accept that each of the matters listed by Ms. Hennessy are matters in question for the purpose of discovery. Mr. Masters also criticised TERRA for the large number of documents it disclosed, suggesting that this was a likely indicator that a significant portion of the material disclosed was irrelevant or duplicative.

63. Mr. Masters also rejected Ms. Hennessy's contention that MIF surely possessed a loan file and standard documents on MIF's general approach to extending commercial loans. Mr. Masters deposed that the details of the loan and the project were handled directly by Mr. Xavier Gonzalez-Sanfeliu as opposed to a board or investment committee and highlighted that the Plaintiff is a small company with a limited number of employees.

64. Addressing Ms. Hennessy's observations about the Plaintiff's non-disclosure of correspondence between it and Stewart Title and Fidelity, Mr. Masters pointed out that while some communications had in fact been disclosed, these communications are broadly irrelevant to the issues in question.

65. As far as it concerns TERRA's wide-net complaint that MIF's disclosure ought to have been more voluminous, I find that these are matters which may be better suited for cross-examination rather than specific discovery. I do not see how this Court can be properly positioned to direct MIF to produce specified and unspecified material which is asserted on MIF's affidavit evidence not to exist. As for the request for more material disclosing its communications with Stewart Title and Fidelity, I do not see how the details of the background to the Plaintiff's securing of title insurance is relevant to the issues in these proceedings centered on a claim of negligence against TERRA.

66. In relation to the Defendant's quest for discovery of correspondence between the Plaintiff and its legal advisors in respect of the Final Terra Opinion, Mr. Chudleigh argued that MIF's case against TERRA gives rise to an implicit waiver of MIF's right to assert legal professional privilege in respect of MIF's claim that it relied exclusively on the Final Terra Opinion. In making this claim, Mr. Chudleigh submitted that MIF has put in issue the question as to what advice it received from CDP and any other Counsel on the COH's ability to enter into the Mortgage and the Guarantee.

67. TERRA also complained that the Plaintiff failed to disclose documentation evidencing its loss, any accrued interest, recovery and mitigation of loss. In response, the Plaintiff says that the proceedings have not yet advanced to the stage where loss is in issue, particularly since an application for a split trial on the issue of liability and quantum of damages is pending.

68. Mr. Chudleigh cited *Compagnie Financiere du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55 as a leading authority for the general test on discovery. In that case, which was an appeal to the Queen's Bench Division from the decision of Pearson J sitting in the Divisional Court in England, Brett LJ stated [62]:

"...We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it is obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action...

The doctrine seems to me to go further than that and to go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may- not which must- either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences...".

69. Mr. Robinson relied on the English Court of Appeal decision in *Paragon Finance Plc and Others v Freshfields* [1999] 1 WLR 1183, a case in which the Defendants were the Plaintiffs' former solicitors for a series of mortgage securitisation transactions and the obtaining of insurance policies. The Plaintiffs, having unsuccessfully claimed under those policies, eventually retained new lawyers and sued the Defendants for negligence. At the discovery stage of the proceedings, the judge ordered for the Plaintiffs to disclose to the Defendants confidential communications between the Plaintiffs and its new solicitors. The Plaintiffs were successful in appealing this decision. The Court of Appeal held that the Plaintiffs' implied waiver of confidentiality of its communications with the Defendants did not extend to its communications with its new solicitors. Delivering the judgment of the Court, Lord Bingham of Cornhill C.J. stated [1188]:

"When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the Court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He

thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound. This is an implication of law, the rationale of which is plain. A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it. He cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence. But, since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware.

Thus, on the present facts, by bringing these proceedings the plaintiffs impliedly waived any claim to legal professional privilege in relation to confidential communications between them and Freshfields concerning the transactions briefly described above, up to the moment when Freshfields ceased to act. That is not in issue. The question is whether the plaintiffs have also impliedly waived any claim to legal professional privilege in relation to confidential communications between them and Slaughter and May relating to the pursuit and settlement of claims arising from those transactions. Approaching this question as one of pure principle, we conclude that they have not. The plaintiffs have not sued Slaughter and May. They have not invited the court to adjudicate on any question arising from their confidential relationship with Slaughter and May, and so have not brought that confidential relationship into the public domain. They have done nothing to release Slaughter and May from the obligation of confidence by which they are bound. They have chosen to subject their relationship with Freshfields to public scrutiny, but not their relationship with Slaughter and May. They are not seeking to pick and choose among the confidential communications passing between themselves and Slaughter and May: none of them is (so far) in the forensic arena. It is open to Freshfields, by way of defence, to rely on any communication passing between themselves and the plaintiffs; to hold that the plaintiffs have impliedly waived privilege in relation to confidential communications between themselves and Slaughter and May would be, not to enable Freshfields to rely on communications of which they are already aware, but to disclose to them communications of which they now have no knowledge. We consider that the plaintiffs are correct in submitting that the judge's conclusion is inconsistent with the principles which govern implied waiver of legal professional privilege.

70. The sequential formation of the Plaintiff's relationships with Slaughter and May and Freshfields is significant on the facts of the case in *Paragon Finance Plc and Others v Freshfields*. As Bingham CJ put it, none of the communications passing between the Plaintiffs

and Slaughter and May were in the forensic arena. This is simply because Slaughter and May's relationship with the Plaintiffs had not yet been established at the point in time when the impugned mortgage securitisation transactions and the insurance policies were first created and settled. So, it could not be said that the Plaintiff may have also relied on the advice from Slaughter and May which contributed to the causes for the Plaintiff's execution of the mortgage securitisation transactions and subsequent loss.

71. However, the same cannot be said for the facts of the present case. Firstly, MIF's relationship with CDP existed contemporaneously with MIF's communications with TERRA. Not only was CDP communicating with TERRA on behalf of MIF in furtherance of the preparation of the Final Terra Opinion, but CDP was very much actively involved in the editing process of the drafts which culminated in the Final Terra Opinion. Those are the same communications which gave rise to MIF's joint interest privilege in TERRA's instructions and preparation of the Final Terra Opinion. So, for the purpose of assessing the extent to which MIF relied on the Final TERRA Opinion, or whether it in fact relied on the Final TERRA Opinion at all, the Court would necessarily factor into its consideration any advice which MIF may have received from CDP on the same issue during the same timeframe leading up to the entering of the agreements for the Mortgage and the Guarantee.

72. I accept that the test for determining whether there is an implied waiver of legal professional privilege is not limited to the broader issue of justice and fairness. What is pivotal is whether those communications passing between MIF and CDP were so interwoven into the question of reliance and causation of damage and loss by TERRA that the Court could not plausibly determine these relevant issues without first examining what, if any, advice MIF also received from CDP on the matters which were the subject of the Final Terra Opinion and prior to the entering of the loan transactions. So this case is nearer to the category of cases envisaged by Bingham CJ when he contrasted the facts of *Paragon Finance Plc and Others v Freshfields* from those applicable to his following statement [1192-F]:

> "*...We would not wish to exclude the possibility that there may be factual situations in which a plaintiff who sues his solicitor may be taken to have impliedly waived privilege in respect of written legal advice from other lawyers which he agreed to that solicitor seeing for the purposes of the matter on which he was currently seeking advice from him.*"

73. Mr. Chudleigh submitted that the law of causation in cases involving negligent misstatement and misrepresentation is analogous to the legal issues of reliance and causation in this case. He referred this Court to an extract from Chitty on Contracts [7-036] [footnotes omitted]:

"*It is essential if the misrepresentation is to have legal effect that it should have operated on the mind of the representee. It follows that if the misrepresentation did not affect the*

representee's mind, because he was unaware that it had been made, or because he was not influenced by it, he has no remedy."

74. This Court's attention was also drawn to Sir Alan Huggins JA's judgment for the Court of Appeal in *Thyssen-Bornemisza v Thyssen-Bornemisza* [1998] Bda LR 11. That was a case founded on various causes of action, namely undue influence, abuse of confidence and misrepresentation, for which the Plaintiffs sought to set aside a trust which had been created by the First Plaintiff, Mr. Hans Heinrich Thyssen-Bornemisza ("the Baron"). L.R.T. Trustee (PVT.) Limited was the Second Plaintiff. The Baron's son, Mr. Georg Heinrich Thyssen-Bornemisza ("Georg"), was the first of three other Defendants.

75. The Baron was reported to be a man who had acquired massive capital and interests in multiple jurisdictions. His son, Georg, had a significant role in the administration of the Baron's empire. The Plaintiffs' case was that the Baron asked his son to draw up a "Continuity Trust" to give effect to his, the Baron's, wishes. However, the trust instrument that was executed did not have any such effect. In support of his own defence, the Baron's son averred that his father had the benefit of independent legal advice on which he, the Baron, relied prior to executing the trust document.

76. The Defendants sought declaratory and injunctive relief in support of their contention that the Plaintiffs had implicitly waived their legal professional privilege by bringing these claims before the Court. The Plaintiffs argued that it was not their underlying allegations or claims that opened the door to an implied waiver; rather, it was the defence case which did so by positively asserting the Plaintiffs' reliance on independent legal advice.

77. Ground J refused the Defendants' application asserting their entitlement to a declaration or injunction relating to the obtaining of evidence from the Baron's lawyers. However, the Defendants successfully appealed to the Court of Appeal where it was ordered that the Supreme Court action would be stayed unless the First Plaintiff informed the relevant legal advisors that his privilege and right of confidentiality had been waived in relation to the matters in issue.

78. The Court of Appeal reasoned [10/256]:

"*The vital question in the present case was whether the Judge was justified in extending the underlying principle to cover a case where it was said that, as a matter of pleading, the relationship between the First Plaintiff and his advisers was put in issue by the Defendants. In other words was it the Plaintiffs or the Defendants who "put the relationship in issue"? As Ground, J. said:*

"[the defendants'] argument is that what matters is whether, by commencing proceedings to set the transaction aside for undue influence, the Baron necessarily accepts that the question of the legal advice he received will have to be gone into by the Court in order to adjudicate that issue."

It was clear that Ground, J. accepted that argument and that his answer was that it was the Plaintiffs who put the legal advice in issue, for he said "there is no compulsion upon the Baron to litigate this issue, and he can preserve his confidence intact by choosing not to do so." It could only have been on that basis that he stated the equitable principle on which he based his decision as widely as he subsequently did."

79. Huggins JA continued [11/257-12/258] and [13/259]:

"It followed that our decision had to turn upon the question whether the action brought by the Baron did in truth open up the relationship between him and his advisers. If it did, then I thought that the same principle of fairness upon which Lillicrap was based could properly be extended to cover this case.

...

In my judgment the Defendants' argument should prevail. It would be unconscionable for the Plaintiff to rely upon the presumption and then to set up the privilege to prevent the Baron's legal advisers from revealing whether they had explained to him the effects of the trust document which he had been invited to execute."

80. In *Thyssen-Bornemisza v Thyssen-Bornemisza* the Court of Appeal ultimately focused on whether the withholding of the sought-after privileged material would effectively obstruct the Court from properly adjudicating the relevant matters in issue. The exercise of identifying those issues is non-discriminatory between the issues raised by the Plaintiff in proving its case or by the Defendant in carving out its defence. As Dillon LJ put it in *Lillicrap v Nalder & Son* [1993] 1 WLR 94 (and cited by the Court of Appeal in *Thyssen-Bornemisza v Thyssen-Bornemisza)*:

"...the waiver must go far enough, not merely to enable the plaintiff to establish his cause of action, but to enable the defendant to establish a defence to the cause of action if he has one."

81. In the present case, I do not see how the Defendant would be reasonably able to challenge MIF on the issues relevant to its defence, namely the question of reliance and causation, without TERRA's access to any material in the Plaintiff's possession which may show that MIF received independent legal advice on the very same factual matters which are the subject of this litigation prior to its execution of the loan transactions resulting in loss and damage. It seems to me that the question of MIF's independent legal advice on the lawfulness of the

Guarantee and the Mortgage is not only relevant to the Defence case but is so essential to the question of causation that the Plaintiff must be taken to have implicitly waived its entitlement to legal professional privilege in relation to any legal advice it received on the lawfulness of the Guarantee and the Mortgage prior to entering into those transactions.

82. For these reasons, I find in favour of TERRA's application for specific discovery on these points.

Decisions and Reasons: The COH's Application for leave to serve Interrogatories:

83. The relevant procedural rules governing an application for interrogatories is under Order 26 Rule 1 of the Rules of the Supreme Court which provides:

> *"26/1 Discovery by interrogatories*
>
> *1 (1) A party to any cause or matter may apply to the Court for an order—*
>
> *(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter, and*
>
> *(b) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.*
>
> *(2) A copy of the proposed interrogatories must be served with the summons, or the notice under Order 25, rule 7, by which the application for such leave is made.*
>
> *(3) On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the Court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.*

(4) A proposed interrogatory which does not relate to such a matter as is mentioned in paragraph (1) shall be disallowed notwithstanding that it might be admissible in oral cross-examination of a witness."

84. RSC O.26/1(3) requires a Court to grant leave on an application for interrogatories only to such extent as is necessary to fairly dispose of the action. As a matter of legal principle, interrogatories which relate to any matter in question are admissible. The case of *Marriott v Chamberlain* (1886) 17 QBD is cited in the 1999 White Book [26/4/7] where Lord Esher M.R. is quoted as follows:

"*the right to interrogate is not confined to the facts directly in issue, but extends to any facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue...*"

85. On the subject of "Fishing Interrogatories" it is stated [26/4/9]:

"*"Fishing Interrogatories"- it is often said, are inadmissible. This only means that interrogatories are not allowed which do not "relate to any matter in question in the cause or matter." It is an important function of interrogatories to gain information not within the knowledge of the party applying; but they should be confined to facts which there is some reason to think true, and interrogatories will not be allowed which are designed to prove a cause of action or defence not as yet pleaded (Hennesy v Wright (No. 2) (1890) 24 QBD 445, per Lord Esher at p.448, CA) or to establish a cause of action against a third person; or to obtain evidence for use in subsequent proceedings...*"

86. Some of the questions contained in the COH's Interrogatories probe for details about MIF's previous legal representation, access to and knowledge of legal advice on the Loan Agreement encompassing the Mortgage and the Guarantee. To the extent that those interrogatories call for confirmation of any advice MIF received on these financial arrangements prior to entering those loan transactions in order to establish the issue of reliance on the Capacity Statements and causation, the test under RSC O.26/1(3) for the granting of leave to serve interrogatories is satisfied.

87. Questions 3 and 4 provide as follows:

"...

3. On what date did the Plaintiff first receive, or become aware of the content of:

i. *The Opinions by Mr. Charles Flint QC dated 16 June 2006, 10 May 2013 and 24 March 2016.*
ii. *The Opinion note by Mr. Charles Flint QC dated 14 May 2013, and 29 April 2016*
iii. *The Opinion by Terra Law Limited ('Terra') dated 21 May 2013*
iv. *The Opinion by Terra, dated 10 June 2013, and the 'mark up' Opinions by Francesca Fox of Conyers Dill & Pearman ('CD&P').*
v. *The 12 June 2013 email from Ms Fox to Sean Tucker of Terra, indicating CD&P's dissatisfaction with the Terra Opinion dated 10 June 2013*
vi. *The Opinion by Terra, dated 9 July 2014*

4. *Prior to entering into the Financial Arrangement, did CD&P or any other law firm provide the Plaintiff, its agent or servant, with any advice or opinion on the legal capacity of the Defendant to grant a guarantee or provide property as security*[?]"

88. In my judgment, answers to Questions 3 and 4 are necessary for the fair disposal of MIF's claim that its exclusive reliance on the COH's capacity statements caused it damage and loss. Otherwise, the COH would be at a most unfair disadvantage in promoting its defence that causation is diminished or absent on the basis that MIF had the benefit of independent legal advice on the same subject matter prior to entering the loan transactions.

89. The same reasoning applies to Question 5i and 5ii which, in the event that the answer to question 4 is in the affirmative, seeks particulars of the name of the law firm and the date the advice was provided. So, leave should be granted in respect of that portion of Question 5.

90. However, the remaining questions do not qualify for leave of this Court. Question 1 of the Interrogatories is a question on whether the Plaintiff has ever been represented by the law firm King & Associates. There is no evidence or pleading before this Court which would suggest that the answer to this question would be directly or indirectly relevant to any fact in issue. In my judgment, this enquiry is exceedingly broad in scope and is consequently caught by the rule against using interrogatories to further a fishing expedition. Question 2 does not qualify for the necessity test for the fair disposal of the cause particularly because I have given leave in respect of Questions 4 and 5i-5ii. On that same basis, I would refuse leave on Questions 5iii and 5iv.

91. Leave is also refused on Question 6 which is an exploration into whether the Plaintiff is party to a tolling agreement with any law firm in relation to this matter. I do not see how it is necessary for this information to be disclosed in order for these proceedings to be fairly disposed of.

92. As for Questions 8 and 9, I reserve the Court's decision pending the stage at which costs is to be decided in these proceedings.

Conclusion

93. I have ruled in favour of TERRA's 1 December 2020 summons only to the extent that I have found that MIF has implicitly waived its entitlement to assert legal professional privilege in respect of any independent legal advice it received on the lawfulness of the Guarantee and the Mortgage prior to MIF's execution of those same loan transactions.

94. In so far as MIF's 12 January 2021 summons for specific discovery against TERRA is concerned, I find that MIF is entitled to assert joint interest privilege and is accordingly entitled to the discovery it seeks in respect of the Draft Terra Opinion and the Final Terra Opinion.

95. In the case of the COH's summons dated 29 June 2021 for leave to serve interrogatories on the Plaintiff, leave is granted for the COH to serve interrogatories on MIF in respect of Questions 3, 4, 5i and 5ii only. Replies to those interrogatories shall be on affidavit evidence to be served within 14 days of this Ruling. Leave is refused for the remainder of the questions, save that I reserve the Court's decision on Questions 8 and 9 pending the stage at which costs is to be decided.

96. By consent of the parties, I adjourn *sine die* MIF's 30 June 2021 summons for specific discovery against the COH and the costs of that summons application is reserved.

97. Any party wishing to be heard on the issue of costs shall file a Form 31D within 21 days of this Ruling.

Dated this 27th day of March 2023

HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT