Neutral Citation Number: [2021] EWHC 3390 (QB)

Case No: QB-2021-005792

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2021

Before :

SENIOR MASTER FONTAINE

- -

Between :

IN THE MATTER OF the Evidence (Proceedings in Other Jurisdictions Act) 1975

AND IN THE MATTER OF Part II of Part 34 of the Civil Procedural Rules 1998

AND IN THE MATTER OF a commercial proceeding now before the Ontario Superior Court of Justice Commercial List, entitled as follows:-

Court File No. CV-21-00655418-00CL

SAKAB SAUDI HOLDING COMPANY, ALPHA STAR AVIATION SERVICES COMPANY, ENMA AL ARED REAL ESTATE INVESTMENT AND DEVELOPMENT COMPANY, KAFA'AT BUSINESS SOLUTIONS COMPANY, SECURITY CONTROL COMPANY, ARMOUR SECURITY INDUSTRIAL MANUFACTURING COMPANY, SAUDI TECHNOLOGY & SECURITY COMPREHENSIVE CONTROL COMPANY, TECHNOLOGY CONTROL COMPANY, NEW DAWN CONTRACTING COMPANY, SKY PRIME INVESTMENT COMPANY

Applicants/Plaintiffs

-and-

SAAD KHALID S AL JABRI, DREAMS INTERNATIONAL ADVISORY SERVICES LTD, 1147848 B.C. LTD, NEW EAST (US) INC, NEW EAST 804 805 LLC, NEW EAST BACK BAY LLC, NEW EAST DC LLC, JAALIK CONTRACTING LTD, NADYAH SULAIMAN A AL JABBARI, KHALID SAAD KHALID AL JABRI, MOHAMMED SAAD KH AL JABRI, NAIF SAAD KH AL JABRI, SULAIMAN SAAD KHALID AL JABRI, HISSAH SAAD KH AL JABRI, SALEH SAAD KHALID AL JABRI, CANADIAN GROWTH INVESTMENTS LIMITED, GRYPHON SECURE INC, INFOSEC GLOBAL INC, QFIVE GLOBAL INVESTMENT INC, GOLDEN VALLEY

MANAGEMENT LTD, NEW SOUTH EAST PTE LTD, TEN LEAVES MANAGEMENT LTD., 2767143 ONTARIO INC. NAGY MOUSTAFA, HSBC TRUSTEE (C.I.) LIMITED in its capacity as Trustee of the Black Stallion Trust, HSBC PRIVATE BANKING NOMINEE 3 (JERSEY) LIMITED in its capacity as a Nominee Shareholder of Black Stallion Investments Limited, BLACK STALLION INVESTMENTS LIMITED, NEW EAST FAMILY FOUNDATION, NEW EAST INTERNATIONAL LIMITED, NEW SOUTH EAST ESTABLISHMENT, NCOM INC. and 2701644 ONTARIO INC.

Defendants

-and-

HSBC UK BANK PLC
ARAB NATIONAL BANK
ROYAL BANK OF SCOTLAND PLC
FARRER & CO LLP

Respondents

- -
- -

MR J. DHILLON QC and MR WOOD (instructed by Pinsent Masons LLP) on behalf of the Applicants/Plaintiffs.

MR M. PARKER QC and MISS LAHTI (instructed by Jenner & Block London LLP) on behalf of the First Defendant.

The remaining Defendants, and the Respondents did not attend and were not represented

Hearing dates: 23 July 2021

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Approved Judgment

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

.....

SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of an application by the Applicants dated 19 May 2021 seeking an order for disclosure from the Respondents in accordance with the letter of request dated 2 April 2021 issued by The Honourable Justice Cory A. Gilmore of the Ontario Superior Court of Justice in relation to the above named civil proceedings **HB 2190/2206**.

2. The following abbreviations are used in this judgment:

   i) The Application – the application by the Applicants dated 19 May 2021

   ii) The Applicants - companies incorporated in the KSA owned since 2018 by Tahakom Investment Company, a wholly-owned subsidiary of the Public Investment Fund of Saudi Arabia, Plaintiffs in the Canadian proceedings

   iii) Dr Al Jabri – Dr Saad Al Jabri, the First Defendant in the Canadian proceedings

   iv) HSBC – the First Respondent

   v) ANB – the Second Respondent

   vi) RBS - the Third Respondent

   vii) The Banks – HSBC, ANB and RBS

   viii) Farrers - the Fourth Respondent

   ix) The Respondents – HSBC, ANB, RBS and Farrers

   x) The Canadian court - the Ontario Superior Court of Justice

   xi) The Canadian proceedings - the civil proceedings in this matter in the Ontario Superior Court of Justice

   xii) The Canadian judge/ Justice Gilmore - The Honourable Justice Cory A. Gilmore of the Ontario Superior Court of Justice

   xiii) The LOR – the Letter of Request dated 2 April 2021 from the Ontario Superior Court of Justice

   xiv) KSA – the Kingdom of Saudi Arabia

   xv) PIF – the Public Investment Fund of Saudi Arabia

   xvi) Bin Nayef – Mohammed Bin Nayef, former Crown Prince of the Kingdom of Saudi Arabia

   xvii) Bin Salman – Mohammed Bin Salman, current Crown Prince of the Kingdom of Saudi Arabia

xviii) The Group Companies – a group of companies incorporated in the KSA which were established between 2008 and 2016, which include the Applicants

xix) The Deloitte Report – report dated 18 January 2021, produced by Neil Hargreaves of Deloitte, the forensic accountant instructed by the Applicants in the Canadian proceedings

3. References to documents before the court in the Electronic Hearing Bundle and Joint Authorities Bundle are referred to by reference to the page numbers on the documents and the electronic page numbers (which unfortunately differ) as follows: **HB page number on document/page number in electronic bundle** and **AB page number on document /page number in electronic bundle**.

4. A list of authorities referred to in this judgment is attached at Annex 1 to this judgment.

5. The following witness statements were before the court:
On behalf of the Applicants:

First and second witness statements of Mike Hawthorne dated 19 May 2021 **HB 9/17** and 19 July 2021 **HB 26/34** ("Hawthorne 1 and Hawthorne 2");

On behalf of the First Defendant:

First and second witness statements of Christian James Thomas Tuddenham dated 7 July 2021 **HB 38/46** and 12 July 2021 **HB 61/68** ("Tuddenham 1 and Tuddenham 2").

Factual background

6. The following summary is taken from the LOR and the witness statements. The Canadian proceedings were issued on 22 January 2021. The Applicants are companies incorporated in the KSA owned by Tahakom, a wholly-owned subsidiary of PIF. Dr Al Jabri is a former high ranking government minister in the KSA and former adviser to the former Crown Prince of the KSA, Bin Nayef. He fled the KSA shortly before Bin Nayef was replaced as Crown Prince by Bin Salman on 20 June 2017. Dr Al Jabri now resides in Toronto, Canada.

7. The Applicants allege in the Canadian proceedings that Dr Al Jabri and others orchestrated an international scheme to defraud the Applicants of at least SAR13 billion (USD 3.47 billion). Dr Al Jabri is alleged to have carried out the alleged fraud through the Group Companies ("the fraudulent scheme"), alleged to have commenced in 2008. Dr Al Jabri rejects the allegations advanced by the Applicants and denies any wrongdoing. At the time when the LOR was issued the Canadian proceedings were at an early stage and the Defendants, including Dr Al Jabri, were yet to file defences to the claims against them. The LOR records that the allegations made in the Canadian proceedings are factually complex and concern the actions of a number of Group Companies over several years. The heart of the claim relates to a large volume of purportedly illegitimate and historic financial transactions that are the subject of the Deloitte report, a 149 page report plus voluminous exhibits.

8. Dr Al Jabri's position is that the Canadian proceedings are not founded on any legitimate commercial grievance but that they are instead brought as part of politically motivated campaign of persecution by Bin Salman against Dr Al Jabri, his family members, friends and associates, including an attempted extrajudicial killing, in respect of which Dr Al Jabri has brought proceedings in the United States against Bin Salman and his agents: Tuddenham 1 para. 11 **HB 41/52.** Dr Al Jabri has filed a motion to stay the Canadian proceedings, which was to be heard on 21 October 2021.

9. The Canadian court made interim orders on 22 January and 1 February 2021, including a worldwide *Mareva* injunction against Dr Al Jabri in respect of his worldwide assets ("the *Mareva* Order") **HB 904-952/920-968** and a *Norwich Pharmacal* order against various third parties including a number in England and Wales, requiring the disclosure of certain categories of documents ("the *Norwich* Order") **HB 953-973/969-989**. Both those orders also request the judicial assistance of the appropriate courts of the United Kingdom (and of other countries in which other respondents were located) to give effect to those orders in their jurisdiction.

10. The *Norwich* Order was not directly enforceable outside Canada, and the Respondents refused to provide voluntary disclosure. Accordingly on 16 February 2021 the Applicants issued a Notice of Motion seeking various forms of relief, including the issue of a letter of request from the judge of the Canadian court to the English court for the production of documents from the named Respondents: Hawthorne 1 paras.8-11 **HB 11-12/19-20**.

11. Following a hearing on 19 February 2021 before the Honourable Justice Gilmore (who had granted both the *Mareva* and the *Norwich* Orders) and response to that motion by the Defendants' representatives, the LOR was issued on 11 March 2021, which attaches copies of the *Mareva* and *Norwich* Orders **HB 2190-2201/2206-2217**.

12. The Applicants in their Application seek an order for production of documents from the Respondents, which is opposed by Dr Al Jabri, save that he has no position in relation to documents sought from ANB relating to an account held by Majed Obaid S Almuzaini, nor to documents sought from RBS relating to a company called Clear Cell Group limited, as those accounts do not relate to him. A list of the documents sought in the Application from each Respondent is set out at Schedule D of the LOR **HB 2199-2200/2215-2216** and Appendix 1 of the draft order **HB 7-8/15-16** and is annexed to this judgment at Annex 2.

The Relevant Law

13. The power of this court to make an order pursuant to a letter of request from a foreign court derives from sections 1 and 2 of the Evidence (Proceedings in other Jurisdictions) Act 1975 ("the 1975 Act") and CPR 34.17. It may make such an order only if satisfied that:

    i) the application is made in pursuance of a request issued by and on behalf of the requesting court;

    ii) the evidence to which the application relates is to be obtained for the purposes of civil proceedings instituted before the requesting court (Section 1(a) and 1(b)).

14. There is no difficulty in Dr Al Jabri objecting to the making of the order sought by the Applicants, although he is not a respondent to the Application. While it is ordinarily a respondent witness who will be concerned to object to a letter of request, a non-respondent party to the underlying civil proceedings before the requesting court has *locus standi* to apply to set aside an order obtained *ex parte* under the 1975 Act: *Boeing Company v. PPG Industries Inc.* **AB 193/195.** There is therefore no reason why Dr Al Jabri should not make submissions and the Application is on notice to him, as requested by his solicitors.

15. Provided the jurisdictional threshold is satisfied, the court has a discretion as to whether, and if so, on what terms, to make an order under section 2 of the 1975 Act giving effect to a letter of request, including, under s. 2(2)(b), an order for the production of documents. There is no issue between the parties that the jurisdictional threshold is met in this case.

16. The starting point for this court when exercising its discretion in respect of a letter of request is set out in the dictum of Lord Denning MR in *Rio Tinto Zinc Corporation v Westinghouse Electric Corp*. at 560G – H:

> "It is our duty and our pleasure to do all we can to assist that court, just as we would expect the United States to help us in like circumstances. 'Do unto others as you would be done by'." **AB 14/16**

See also Kerr LJ in *In Re State of Norway's Application* at 470B:

> "…the Court should strive to give effect to the request of the foreign court unless it is driven to the clear conclusion that it cannot properly do so": **AB 158/160**

17. The Court of Appeal in *First American Corp.v Zayed* at 1165E-H, per Sir Richard Scott VC (with whom Auld and Schiemann LLJ. agreed) **AB 238/240** emphasised the importance of giving effect to letters of request in the context of an international fraud:

> *"…it is important that the courts of this country should, if they can properly do so, accede to letters of request issued by foreign courts seeking evidence for use in foreign litigation. This seems to me particularly to be so where the litigation arises out of a fraud practised on an international scale…*
>
> *The bank fraud that was B.C.C.I. crossed national boundaries and had widespread international ramifications and consequences. A civil action in any part of the world based upon an aspect of that fraud will be an action in respect of which there are likely to be individuals in many different countries who are potential witnesses with relevant evidence to give.*
>
> *The difficulties of collecting the relevant evidence so that it can be presented to the court that will be trying the action are likely to be very formidable. It is, in my judgment, in the interests of all countries who conduct their affairs in accordance with the rule of law to provide such proper assistance as they can in order to try and ensure that the international complexities attending actions such as that in aid of which these letters of request have been issued do not prevent a just result being*

reached. It is trite to say that to deal with international fraud international co-operation is needed. This applies, in my view, not only to governments and police forces but also to courts."

Summary of the Position of the Respondents

18. I am informed by the Applicants that none of the Respondents opposes the Application, and their positions are as follows:

(a) HSBC and RBS have positively indicated that they have no objection to the draft Order and remain neutral: Hawthorne1/54 **HB 24/32**.

(b) ANB, having accepted service of the Application, has provided no comments on the draft Order: Hawthorne1/54 **HB 24/32**.

(c) Farrers responded to the Application by way of their letter dated 5 May 2021 at **HB 3161-3163/3177-3179**. Their position is neutral, but they recorded some "*serious concerns*" about the scope of the draft Order which they considered appropriate to bring to the attention of this court (Hawthorne 1 paragraph 55 to 86) **HB 24/32**. The position is now as follows:

(1) Farrers stated that the request for disclosure of client accounting records "*in matters where Farrer[s]…acted for Al Jabri*" was wider in two material respects than the category under paragraph 19 of the *Norwich* application by the Applicants/Plaintiffs dated 19 May 2021 Order.

(2) Farrers noted that the draft Order potentially permitted the disclosure of privileged material and asked for confirmation that this permitted their client's privileged material to be redacted. Pinsent Masons, solicitors for the Applicants, replied and explained that it does **HB 3168-3169/3184-3185**, and following further correspondence Farrers have confirmed that they have no further concerns in this regard H**B 3172-3173/3188-3189** .

(3) Subject to drawing the court's attention to their "serious concerns" Farrers' position on the Application is neutral. Terms have been agreed with Farrers that they will provide disclosure within 28 days of any order of the court: Hawthorne 2 para 34 **HB 36/44**.

Summary of the Position of Dr Al Jabri

19. On behalf of Dr Al Jabri it is submitted that the Application should be refused on the following grounds:

i) in the circumstances of the case, in particular the manner in which the LOR was obtained, it cannot be assumed that the Canadian court has properly determined that the disclosure sought is relevant to the issues in the Canadian proceedings, and therefore it is appropriate for the English court to consider this issue and determine that disclosure is not relevant;

ii) the Application is an inappropriate "fishing expedition" because the documents are sought for investigatory purposes, which is not permitted under the 1975 Act;

iii) some of the requests for documents held by the Respondents are drafted far too broadly such that they are unjustified and oppressive and the relief sought by the Applicants should be refused under the court's discretion;

iv) even if the court does have power under the 1975 Act to order compliance with letters of request for wider purposes, s. 2(3) provides that the court shall not require any particular steps to be taken by way of obtaining evidence for the purposes of civil proceedings in England, so that an order for disclosure is not permitted if that disclosure would not have been permitted had the proceedings been in England.

20. I will deal separately with each of the grounds of opposition to the Application.

Relevance

Summary of Submissions on behalf of Dr Al Jabri

21. The background to the Canadian proceedings should be taken into account:

i) In relation to the alleged fraud claim against Dr Al Jabri, payments amounting to five per cent net profit were expressly authorised by the Royal Instruction dated 27 December 2007, which was signed by King Abdullah of Saudi Arabia, the King at the time, which was addressed to the Minister of Interior, at that time Prince Naif Bin Abdulaziz. The same Royal Instruction increased the level of funding that was to be provided by the state for anti-terrorist activities, to be managed by the then Minister Assistant for Security Affairs, Prince Mohammed Bin Nayef: see Alnowaiser affidavit 18.01.21 in the Canadian proceedings at para.110 **HB 802/818**. It is said that after Bin Salman came to power in June 2017, and ownership of the Group Companies was transferred to the PIF, chaired by Bin Salman, that allegations were made that this funding formed part of a fraudulent conspiracy used to dishonestly misappropriate funds of the Saudi Arabian state as part of an "anti-corruption" campaign led by Bin Salman: Tuddenham 1 para 11 **HB 41-42/52-52**.

ii) It is not alleged by the Applicants that Dr Al Jabri himself received USD 3.5 billion and the claims relating to the monies paid specifically to him, either directly or indirectly, are for a sum of around USD 480 million.

iii) Before the Canadian proceedings were commenced Dr Al Jabri had issued his own claim in the United States which sought relief against Bin Salman and his agents in relation to the attempted extra-judicial killing of Dr Al Jabri by Bin Salman. There is evidence in the affidavits served in the context of the Canadian proceedings of the rendition and torture of a number of Saudi Arabian individuals who are connected with this claim. This is by no means a straightforward case of dishonest misappropriation of state funds. It is Dr Al Jabri's case that these proceedings are part of a politically motivated campaign by Bin Salman against him and his family members.

22. The documents were not sought on the basis they were relevant to the issues for trial in the Canadian proceedings but pursuant to the Canadian court's *Norwich Pharmacal* jurisdiction so the issue of relevance was never considered by the judge in relation to the LOR. Further, the circumstances in which the Motion for the issue of a LOR was made also suggest that the judge did not in fact consider the issue of relevance but simply made the LOR order in the terms of the Applicants' draft order. Accordingly this court can and should consider the issue of relevance itself.

23. The statement of the foreign court in the LOR that the documents were relevant for trial is not conclusive, and it has to be seen in the particular context of this case. The issue of relevance was never considered by the Canadian judge because the documents were not sought on the basis they were relevant to the issues for trial in the Canadian proceedings but pursuant to the Canadian court's *Norwich Pharmacal* jurisdiction so the issue of relevance was never considered by the judge. Further there is no explanation in the Deloitte Report as to why the bank accounts identified in the report are of particular interest or why further information is required.

24. In support of this submission Tuddenham 1 paras. 20 to 38 **HB 46-51** identifies that the LOR seeks documents on a wider basis than the *Norwich* Order. The provisions of the *Norwich* Order that require disclosure from Farrers are limited to documents and information about property purchases whereas in the LOR they are significantly broader. It is said that none of the differences between the documents ordered by the *Norwich* Order and those requested in the LOR application were brought to the attention of the Canadian court.

25. Mr Tuddenham states that the Applicants specifically put their application for the LOR on the basis that it went no further than the relief already granted by the *Norwich* Order, and that the execution of the LOR was "*a mere technical formality*" **HB 1963/1979** to enable the disclosure sought by the *Norwich* Order to take effect in this jurisdiction, following production of letters from Pinsent Masons addressed to the Applicants stating that the *Mareva* and *Norwich* Orders were not directly enforceable in England and that the English courts would not give effect to them **HB 3130/3131.**

26. The second basis on which Dr Al Jabri contends that the Canadian judge did not consider the question of relevance is that the order for the issue of a LOR was made at the end of a hearing on 19 February 2021 the main purpose of which was to consider his application to set aside the *Mareva* Order. The Applicants had filed their application for a LOR 72 hours before that hearing and as part of a 1,100 page motion covering a number of matters. Although Dr Al Jabri's lawyers objected to this being heard at the end of the hearing day, the judge heard brief submissions from the Applicants on the matter: Tuddenham 1 para 29 and 35 to 37 **HB 48-51/59-62.** The Motion was then granted following a Ruling on the Motions on 11 March 2021 **HB 2032/2048** by Order of the same date **HB 2025/2041**.

27. It is submitted therefore that the basis for the judge granting the *Norwich* Order cannot justify a finding that the judge considered the issue of relevance in the context of evidence required for trial. The purpose of a *Norwich Pharmacal* order is *prima facie* investigatory and the threshold conditions for granting a *Norwich Pharmacal* order are an arguable case of wrongdoing, the disclosure must be necessary to enable the applicant to bring proceedings or seek other legitimate redress for the wrongdoing, and

the person against whom the order is sought must be involved in some way in the wrongdoing. These are different considerations from those for an order for the production of documents for trial. The purpose of a *Norwich Pharmacal* order is generally to identify a wrongdoer who is unknown to the applicant. It is apparent from the evidence of Tuddenham 1 that this was the basis on which the *Norwich* Order was granted.

28. Accordingly it is submitted that this court should itself consider whether the documents sought are relevant to the issues for trial. It is submitted that this is not a question of being disrespectful to the Canadian judge, but a question of this court having to satisfy its duty to ensure that the basic condition imposed by the statute is satisfied.

29. Mr Tuddenham makes comments on a number of particular bank statements exhibited to Hawthorne 1 in support of the application for disclosure pursuant to the LOR, to the effect that only two of the statements are in fact exhibited to the Deloitte Report, and that none of the exhibits to the Deloitte Report explain the request for documents from Citibank (in the *Norwich* Order), HSBC or ANB (in the order sought under the LOR), that none of the exhibits show payments into the HSBC or RBS accounts from the Group Companies, and the evidence relied upon does not justify the relief sought: Tuddenham 1 paras 45-49 **HB 53/64**.

Summary of submissions on behalf of the Applicants

30. The LOR expressly states that the Canadian court is satisfied that the requested documents will be admissible and relevant at the trial of the Canadian proceedings "*to establish the existence, nature and extent of the [Scheme]*" as well as being admissible and relevant for the purposes of policing compliance with the *Mareva* Order. The Canadian court is best placed to assess the relevance of the requested documents for the purposes of the Canadian proceedings and this court should defer to that assessment.

31. In any event, the Applicants have provided evidence that the documents requested are relevant to the issues in the Canadian proceedings: Hawthorne 1 paragraphs 18 to 53 **HB 13-23/21-29**. It is submitted that the production of documents requested is limited as required by s. 2(4)(b) of the 1975 Act to "*particular documents specified in the order*" likely to be in the Respondents' "*possession custody or power*", and do not constitute "*general discovery*", which it is clear from the authorities is not permitted by the 1975 Act: see notes in the White Book 2021 Vol I at 34.21.6 and 34.21.7.

32. The fact that the Canadian court considered the issue of relevance primarily in relation to the *Norwich* Order for the purposes of the tracing exercise does not mean that the documents are not also relevant to the issues for trial. Although the primary purpose of the Norwich Order was investigatory, documents can be relevant to issues in the case, and sought for an investigatory purpose but also be relevant for trial: see *First American* Sir Richard Scott VC at 237-238. Equally the fact that Deloitte have sought additional documents for its report is not inconsistent with the documents also being relevant to issues for trial.

33. The context of a claim for a mammoth international fraud is a relevant consideration: *First American* at 1165E-H.

34. The burden is on the First Defendant to satisfy the court that the Canadian court did not consider relevance: *Galas* per Morris J at [54]; and Dr Al Jabri has not satisfied that burden.

35. The fact that the LOR is in the same terms as the draft order provided by the Applicants does not mean this court can assume that the judge has not considered the issue independently. It is apparent that the judge read the Pinsent Masons letter dated 15 February 2021 ("the Pinsent Masons letter") as it is referred to in and exhibited to the LOR **HB 3130/3147**.

36. It would be inconsistent with international comity to challenge the finding of the Canadian judge and to ignore her express finding of relevance, when she is the judge who has had the most engagement with the case, has read a 550 page Complaint, been referred to thousands of pages of documents, heard several interlocutory Motions and has been provided with advice on English law requirements under the Hague Convention. There was a 4-week consideration before the judge handed down her judgment on 11 March 2021 after hearing oral argument and receiving written submissions. This was far from a "rubber stamping" exercise. Dr Al Jabri had the opportunity to contest the issue of relevance for trial at the hearing and did not do so; it would be wrong to allow him to do so in this court.

37. Even if the court came to the view that the Canadian court "*plainly did not consider relevance*" it is clear from the evidence that the documents sought are relevant. The claim is not limited to funds received from the Group Companies. The Applicants' case is that all assets owned by Al Jabri are tainted by the fraud. The claim is not confined to the fraudulent sums but seeks a tracing remedy and seeks an account of all his assets, property and bank accounts. Money laundering is one of the allegations in the claim. The claim asserts that there is nothing that Dr Al Jabri has that is not tainted by the fraud. In addition, a Receiver is also sought to be appointed over all of the assets held by Dr Al Jabri, and the court cannot determine whether a Receiver should be appointed over what is in the bank accounts in England and the Farrer client account unless it is determined at trial whether those are assets of Dr Al Jabri or not. The court should resist the suggestion of Dr Al Jabri to trawl through a relatively narrow compass of the evidence, which is a small subset of thousands of pages of documentary evidence and reports that were before the Canadian court. Whether the monies are innocent, as Dr Al Jabri contends, or whether the monies are subject to the fraud, that is an issue for trial, and that is why the Canadian judge was best-placed to decide whether the documents were relevant and she has decided they were.

Relevance - Discussion

38. Questions of relevance are generally a matter for the Requesting Court, as the court seised of the proceedings: *Westinghouse*, at 654F-G (Lord Keith) **AB 654/656**; *Re Asbestos Insurance Coverage Cases*, at 339G-340A (Lord Fraser) **AB 118/120** and *First American* at 1165B-C **AB 238/240**. The correct approach to relevance was summarised by Morris J. in *Galas v. Alere Inc* **AB 534/536**, at [53] by reference to the review of the authorities in *Aureus Currency Fund, L.P. v Credit Suisse Group AG* at [36]-[41] **AB 515/517**:

> "53. From these authorities the relevant principles can be stated as follows:
>
> i) As a general rule, the English court should rely on the requesting court's determination of the issue of relevance of the evidence sought to the issues for trial.
>
> ii) There are limited circumstances where the court can consider the relevance of the evidence sought.
>
> iii) If the requesting court has itself considered questions of relevance, then the English court should not embark upon a close examination of questions of relevance.
>
> iv) However, the English court may conclude that the intended witness should not be required to give evidence on a particular topic if two conditions are satisfied; (a) the requesting court has "plainly not considered the question of relevance"; (b) it is clear to the English court, even on a broad examination, that the evidence is not relevant."

39. The authorities have considered this question in a number of instances. In *Atlantica Holdings Inc v Sovereign Wealth Fund Fun Samruk-Kazyna JSC* Knowles J. considered the extent to which the English court should consider it appropriate to consider the relevance of the evidence sought, at [77] to [82] and concluded that:

> "79. In my judgment, the question whether the relevance of the topics for examination in the LOR has been properly considered on the merits by the requesting court is fact specific and should be determined by reference to the specific wording of the LOR in question, without any presumption one way or the other whether it will be shown that the question of relevance is for determination by the English court. This is consistent with Cockerill J.'s approach in *Allergan Inc v Amazon Medica*, at para 56, where she said that the English court should have regard to the "wording of the letter of request in each case.""
>
> ……
>
> "82. However,….if it is plain (and I emphasise, plain) that the requesting court has not considered relevance where it is clear, even on a broad examination, that the evidence is not relevant, then the English court should consider the question of relevance for itself: *CH (Ireland) Inc v Credit Suisse Canada* at para 15; *Allergan Inc v Amazon Medica*, at para 59."
>
> **AB 547-548/550-551**

40. In *Allergan Inc v Amazon Medica* at [56] to [59] **AB 493/495** Cockerill J. considered this question in slightly different circumstances, but her conclusions are to the same effect as Morris J, in *Galas*. See also *CH (Ireland) Inc v Credit Suisse Canada* at [15]

and [17]. I note that the circumstances of obtaining the LOR order in this case were very different from those in *Allergan*. The Motion here was on notice to the Defendants, albeit short notice, but the Canadian judge took the view that the notice was sufficient, and at a hearing with both parties present and represented. There was a letter from English solicitors addressed to the Canadian court explaining the approach of the English court to such requests. Lawyers for Dr Al Jabri did not make any submissions in respect of the LOR order, and they did not appeal against the order. The evidence does not state why submissions were not made on behalf of Dr Al Jabri, but in submissions the reasons appeared to be that his Canadian lawyers were unfamiliar with the approach of the English courts and had not had sufficient time between receiving the Motion and the hearing to obtain English law advice, and in any event had a number of other issues to prepare for at the hearing.

41. I do not consider that the manner in which the LOR motion came before the Canadian court (see paras 35 to 37 of Tuddenham 1 **HB 51/62**) assists this court. There were 3 days' notice to the Defendants and they were represented at court. There is evidence to the effect that they asked the judge to adjourn the Motion for the LOR but that was not acceded to. That was a decision for the Canadian court to make.

42. The Applicants' Motion returnable on 19 February 2021, which included the motion for a LOR to be issued, states at (kk) that:

> "The relevant foreign respondents from whom letters of request are sought possess documents material to the issues in the action that are expressly covered by the Norwich Order. Without those letters, the Plaintiffs have no way of ensuring that the foreign respondents will comply with the relief granted by the Norwich Order." **HB 1933/1949**

43. The Applicants' Factum dated 17 February 2021 (equivalent to a skeleton argument in this court) expressly stated at paragraphs 28 and 30 that the reason for the LOR was because they could not enforce the *Norwich* Order in the BVI, Guernsey and the UK. It states that:

> "28. The Plaintiffs are pursuing recognition and enforcement proceedings in various jurisdictions. The recognition and enforcement of the Norwich Order is critical to the Plaintiffs' ability, with help from Deloitte, to continue their tracing exercise and determine the full particulars of the Fraudulent Scheme….."
>
> "30. The basis for this relief has already been demonstrated; the Plaintiffs are only seeking this administrative step to conform with the requirements of the foreign courts, and give effect to the Orders already granted by this Court." **HB 1949/1965**

44. Also at paragraphs 78 and 79:

> "78. The evidence on this motion is that the Norwich Order will not be recognized and enforced unless this Court signs the specific Letters of Request included in the Plaintiffs' Motion Record. The Plaintiffs' foreign counsel has advised that the

> Letters of Request are in the proper form, and that the foreign courts will recognize the Norwich Order if the Letters of Request are issued.
>
> 79. As this Court has already requested the judicial assistance of the appropriate courts of those jurisdictions to give effect to the Norwich Order, the execution of the specific Letters of Request is a mere technical formality." **HB 1963/1979**

45. It is recorded in the order on the Motions before the Canadian court on 19 February 2021 that one of the Motions was:

> "(e) for the issuance of letters of request directed to the relevant judicial authorities of….the United Kingdom.….for judicial assistance compelling individuals and entities to comply with the interim Order granted *ex parte* on January 22, 2021 as extended on February 1, 2021 in the form of a *Norwich* order granting disclosure to the plaintiffs…" **HB 2026/2042**

46. In the recital to the judge's order dated 11 March 2021 at (e), in describing the motion it states:

> "for the issuance of letters of request…..compelling individuals and entities to comply with the …….Norwich order."
>
> **HB 2026/2042**

47. The judgment of Judge Gilmore on the Applicants' Motion at [4](c) recorded the Motion for LORs to be issued "for judicial assistance to compel authorities to comply with the January 22, 2021 *Norwich* Order," **HB 2034-2035/2050-2051.** At [83] she stated:

> "The Plaintiffs seek to continue the current Orders but cannot enforce them outside of Canada without letters of request to the relevant judicial authorities in other jurisdictions. The Plaintiffs have provided drafts of those letters of request for consideration by the court." **HB 2045/2061**

48. There is no commentary or discussion of the LOR Motion in the 29 page judgment. There is no reference in the judgment to the fact that the documents sought in the LOR Motion differed in some material respects from those ordered in the Norwich Order, nor any evidence that the judge considered the detail of those differences when making the LOR Order. The Pinsent Masons letter **HB 3131/3147** sets out the relevant law in the 1975 Act, and states that they considered that the draft LOR was in a form which the English court would approve, but does not make any reference to the differences between the documents ordered in the *Norwich* Order and those in the draft LOR.

49. The LOR also referred to and attached copies of the *Mareva* and *Norwich* Orders **HB 2194/2210**.

50. I note also that Farrers independently noted the reliance on the *Norwich* Order in their letter to Pinsent Masons dated 5 May 2021, commenting on Pinsent Masons' draft letter to the Canadian court which in final form is exhibited as Schedule C to the LOR:

> "The inference is clear: that not only will your draft meet the requirements of the English law and practice but also that it will reflect the terms of the relevant order pursuant to which the Canadian court makes its request, that is the "Norwich Order" (at Schedule B of the Letter of Request)." **HB 3162/3178**

51. The evidence thus supports the case of Dr Al Jabri that the enforcement of the *Norwich* Order against third parties out of the jurisdiction was the primary motivation of the Plaintiffs, and that was agreed to by the Canadian court in the granting of the Motion. The question is whether that is sufficient to displace the general presumption that this court adopts when considering letters of request that relevance is a matter for the requesting court, particularly in circumstances where the LOR states in terms that the evidence sought is required for trial. Alternatively, whether the consideration by the judge of relevance in respect of the *Norwich* Order is sufficient evidence of relevance to the issues for trial for the LOR to be accepted.

52. Although it is submitted by the Applicants that the differences between the documents ordered to be disclosed in the *Norwich* Order and those in the LOR are accounted for by the necessity for the documents sought to be compliant with the 1975 Act, the differences, in my view, cannot be explained simply on those grounds, as there are differences of substance, as explained in Tuddenham 1 at para. 33 **HB 50/61**. For example there is no reference to either ANB or HSBC in the *Norwich* Order. Citibank and RBS were named in the Norwich Order, but HSBC, ANB and RBS in the LOR. That has now been explained by the Applicants in their evidence at Hawthorne 2 para. 17 (1) **HB 30-31/38-39,** which explanation I accept. I also accept the explanation as to why the description of documents used in the LOR for the Banks was different from that in the *Norwich* Order in order to comply with the requirements of the 1975 Act, as the documents are described in much narrower categories and more specifically defined.

53. However, the provisions of the *Norwich* Order that require disclosure from Farrers are limited to documents and information about property purchases, whereas in the LOR they are significantly broader. Pinsent Masons say in their letter dated 10 May 2021 to Farrers **HB 3168-3169/3184-3185**, that they were "…*not obliged to seek a Letter of Request which used precisely the same form of words that had been used in the Norwich Order*". But if the rationale for obtaining the LOR was to enforce the terms of the *Norwich* Order, as it appears from the evidence to be the case, it behoves the Applicants to explain why there were differences in the disclosure sought in the LOR from the *Norwich* Order, and whether the differences were brought to the attention of the Canadian court. It is correct that the Pinsent Masons letter explained the provisions of the 1975 Act and stated their view that the LOR as drafted complied with the 1975 Act, but it does not mention the details of the differences between the documents described in the Norwich Order and those sought in the LOR, but simply states that:

> "The draft Letter of Request attached to this letter is in a form which we consider that the English Court would recognise and give effect to in its jurisdiction." **HB 3131/3147**

54. I will consider the issue of relevance separately in relation to the Banks and Farrers.

The Banks

55. Tuddenham 1 challenges the relevance of disclosure sought from HSBC and RBS, on grounds that the evidence does not demonstrate that any asset in respect of which the Plaintiffs might have a proprietary claim has been transferred to either the HSBC account or the RBS account: paras. 42-47 **HB 52-53/63-64,** and notes that the Plaintiffs being part of the Group Companies will presumably have access to their own bank statements which would show where and when payments were made by them: para. 49 **HB 53/64.**

56. The Court plainly did consider relevance in the *Norwich* Order, albeit in the context of an investigatory order rather than considering evidence required for trial. The authorities make it clear that a 'dual purpose' request e.g. for both investigative purposes and to obtain relevant evidence for trial, does not necessarily mean that the request will be refused: *State of Norway* at 481 **AB 169/171**. The judge concluded in the *Norwich* Order that the documents ordered to be produced by the banks were relevant to establishing existence, nature and extent of the alleged fraudulent scheme carried out by the Defendants and to the asset tracing exercise being carried out by Mr Hargreaves of Deloitte. Both these topics will, in my view, also be relevant to trial, as it is apparent from a reading of the relevant parts of the Complaint that a proprietary remedy is sought extending to all Dr Al Jabri's assets, not just to funds allegedly misappropriated or assets purchased with such funds: see Paragraph 37 above. The LOR order states in terms that documents ordered: "*will be admissible and relevant at trial to establish the existence, nature and extent of the Fraudulent Scheme and of the Plaintiffs' interest in such funds and any assets acquired with them*" (My emphasis). **HB 2194/2210.** In the face of that statement by the judge and the express reference to that requirement in the Pinsent Masons letter **HB 3131/3147** annexed to the LOR, I cannot conclude that her attention was not drawn to that requirement.

57. Mr Tuddenham comments on a number of particular bank statements exhibited to Hawthorne 1 to the effect that only two of the statements are in fact exhibited to the Deloitte Report, and that none of the exhibits to the Deloitte Report explain the request for documents from Citibank (in the *Norwich* order) HSBC or ANB (in the order sought under the LOR), and that none of the exhibits show payments into the HSBC or RBS accounts from the Group companies, and the evidence relied upon does not justify the relief sought: Tuddenham 1 paras 45-49 **HB 53/64**. In my judgment these detailed points challenging relevance should more appropriately have been made in the Canadian court to the judge who had oversight over the *Mareva* and *Norwich* Orders and the Motion heard on 19 February 2021. The evidence in Hawthorne 2 at paras. 17(2) and 17(5) not disputed on behalf of Dr Al Jabri, is that:

> "(2) Stockwoods, on behalf of Al Jabri, did not (a) raise with Gilmore J any of the points made in Mr Tuddenham's evidence about the differences between the Norwich Order and the Letter

> of Request or the relevance of the documents requested: (b) suggest to Gilmore J that the Plaintiffs' lawyers had misled the Court (as Mr Tuddenham seems to imply); and (c) suggest at that point that the Letter of Request Motion should be adjourned.
>
> "(5) Mr Tuddenham says that there was no substantive discussion or debate of the Letter of Request at the hearing on 1 April 2021. This is incorrect. The Plaintiffs' counsel made submissions and Gilmore J had the opportunity to ask any questions she might have had; she certainly did not prevent any discussion or debate of the Letter of Request. Al Jabri's counsel did not raise any substantive issues at the hearing which indicates that he did not have any. This is consistent with the fact that he did not seek leave to appeal Gilmore J's Ruling in this regard." **HB 31-32/39-40** "

58. In these circumstances, with regard to the documents sought from the Banks, I do not consider that it is appropriate to disregard the general approach that the issue of relevance is best considered by the judge dealing with the matter in the requesting court. It is clear that Judge Gilmore had dealt with a number of Motions in this matter and was very familiar with the case. She would have had ample opportunity in the course of her considerations of the case at the hearings for the *Mareva* Order and the *Norwich* Order to take a view as to the issues for trial. The order for disclosure she considered appropriate from the Banks in the *Norwich* Order was for much wider disclosure than that sought in the LOR, so it is reasonable to assume that even if the differences had been specifically pointed out to her in the Pinsent Masons' letter **HB 3130-3131/3146-3147,** that she would have approved the documents sought from the banks in the LOR Motion.

59. The position is summarised in *Galas* at [54] **AB 534/536**: see Paragraph 38 above. On the basis of that summary of the law, I cannot conclude in respect of the evidence sought from the Banks either that: (a) the requesting court has "plainly not considered the question of relevance"; or (b) "it is clear to the English court, even on a broad examination, that the evidence is not relevant." Accordingly I will not refuse the order sought against the banks on grounds of relevance.

Farrers

60. In Hawthorne 2 para. 19, the judgment of Justice Gilmore on the *Norwich* Motion is quoted, with Mr Hawthorne's conclusion at para. 20 being that: "*Gilmore J was plainly satisfied that the documents sought by the Norwich Order were relevant to the Canadian claim*." **HB 33/41**. That does not address whether she had considered the very much wider scope of the documents sought from Farrers in the LOR Motion, or whether she had considered that the documents were relevant to the issues for trial. In the *Norwich* Order the documents were specifically restricted to funds used to acquire properties held in the name of or on behalf of Dr Al Jabri or relating to the purchase or sale of a specific named property. There is no explanation provided in either the Applicants' Factum for the hearing on 19 February 2021, or the judge's order or her judgment, as to why the description of the documents sought had changed. There is no

mention of this significant difference from the documents sought in the *Norwich* Order in the Pinsent Masons letter **HB 3131/3147**.

61. I have concluded that the evidence outlined above supports the submission that the differences between the documents sought from Farrers in the *Norwich* order and those sought in the LOR was not made clear to the Canadian judge, and that the relevance of the much wider disclosure sought from Farrers in the LOR was not considered at the hearing on 19 February 2021. There thus seems to have been no reason why Justice Gilmore would have concluded that the issue of relevance would have to be considered afresh because different documents were being sought than those in the *Norwich* Order. I have therefore concluded that as the requesting court has not considered the issue of relevance in relation to this disclosure (in contrast to the different and narrower disclosure sought under the *Norwich* Order), that I should consider the issue of relevance myself in relation to the documents sought from Farrers.

62. The evidence purporting to explain the relevance of these documents is in Hawthorne 1 para 50 **HB 23/31** namely that the Applicants are in possession of statements for an account held by Dr Al Jabri at Al Awal Bank in the KSA for the period 30 July 2013 to 18 May 2020, which shows a debit on 24 December 2014 of SAR 32,031,856 (c US$8.53 million) which references a transfer to an account in the name of Farrers at Coutts Bank in the UK. Mr Hawthorne's evidence is that:

> "Given the amount involved, the Applicants believe it likely that this payment was for the purposes of acquiring real estate in England & Wales, or for some other investment purpose. The Applicants require information as to the use of these funds in order to complete their tracing analysis and claim a proprietary interest in any assets acquired with them."

63. Mr Hawthorne addressed this issue further at Hawthorne 2 para 25 as follows:

> "Although the Plaintiffs believed that the payment dated 24 December 2014 was likely used for the purposes of acquiring real property in England, it could also have been used for some other investment purpose. That of course is also the only payment from or to Farrers' client account on behalf of Al Jabri of which the Plaintiffs are currently aware; even if that payment was for the purposes of acquiring property, there may be subsequent payments which have no connection to acquisitions of property.… For all of these reasons the Letter of Request was therefore formulated so as to cover the client accounting records for Al Jabri from 24 December 2014 to present without being limited to acquisitions of property." **HB 34/42**

64. This evidence refers to only one transfer of funds on 24 December 2014, and it is not said that the funds emanated from the Group Companies or were intended for any of them. There is no adequate explanation why what appears to be virtually all of Farrers' non privileged documents in relation to Dr Al Jabri from 24 December 2014 to date (or earlier termination of the retainer) are relevant to the issues for trial. Mr Hawthorne's evidence makes it clear that the Plaintiffs do not know whether there are any records of

subsequent payments to Farrers' client account at Coutts that are relevant to the issues for trial.

65. The Applicants have not proposed any appropriate 'trimming' of or application of the "blue pencil" test to the draft order to meet the requirements of the 1975 Act, but I invite them to consider whether this is possible in such a way as to be within the limited discretion of the court in this regard; see *RTZ v Westinghouse* at 654 AB 108/110, *Re State of Norway* at 484 **AB 172/174** and *State of Minnesota v Philip Morris* at [18] **AB 214/216**. The alternative is to seek a further letter of request from the Canadian court and ensure that the issue of the relevance to issues for trial of the particular documents sought is brought to the attention of the judge.

Investigatory Purpose - Fishing Expedition

Summary of Submissions on behalf of Dr Al Jabri

66. It is submitted that the documents were expressly sought pursuant to the Canadian court's *Norwich Pharmacal* jurisdiction: see above under 'Relevance'. It is submitted that it is apparent from the affidavit filed in support of the *Norwich* Order and the Factum filed by the Applicants **HB 559/570** that the primary rationale for the application was to assist Deloitte to complete its forensic analysis and to "*trace the misappropriated funds*" and that the court's jurisdiction under the 1975 Act does not extend to production of documents for such investigatory purposes. Justice Gilmore's order of 22 January 2021 was explicitly put on the basis that it was for investigative purposes only and not on the basis that this evidence would be needed to prove the full extent of the fraudulent scheme at trial. At sub-para.(e) it is stated that that the purpose of the *Norwich* Order was that the documents "*were required in order to continue tracing the funds misappropriated from the plaintiffs and discover the full extent of the fraudulent scheme*". The *Norwich* Order sets out Justice Gilmore's reasoning in relation to the *Norwich Pharmacal* applications, and she considered that the test for relief on that basis was satisfied, but she did not consider the question of whether this was evidence that would be required to prove the Plaintiffs' case at trial. She did not give any individual consideration to the particular circumstances of each of the relevant third parties. At that stage it was something that had not even arisen for consideration. The request for letters of request was explicitly put on the basis that they were needed to ensure compliance with the *Norwich* Order which were themselves obviously investigative in nature and not concerned with evidence that would be required at trial. Secondly, the reference to "*documents material to the issues in this action*" is not a reference to the "*relevant to the issues to be determined at trial*": see paragraph kk of the LOR. A request for documents on the basis that they are "material to the issues in this action" could go much wider than "evidence required for trial" and plainly encompasses requests for documents that are sought for purely investigative purposes.

67. It is submitted that with regard to the Banks:

    i) The reason why RBS was identified by Deloitte as an institution of interest was simply because Deloitte had identified that Dr Al Jabri held an account with RBS in England. There was never any evidence that Deloitte had reason to believe that impugned funds had actually been transferred into this account, and the only evidence now produced is bank statements which show that monies

were paid by Dr Al Jabri from an account held by him in Saudi Arabia into the RBS account. Those bank statements show that such payments were made prior to 2008; before the alleged fraud was commenced, and that no payments were made from that bank account into the RBS account after 2008.

ii) The only evidence produced in relation to HSBC is a single bank statement which shows a balance of £41,000 held with HSBC between January and February 2013. There is no evidence that at any point impugned funds were paid into this bank account.

68. In relation to Farrers it is submitted that this was initially premised on the basis that impugned funds had been used by Dr Al Jabri to purchase a flat in Dolphin House. In has now been shown that Dr Al Jabri is not identified in Land Registry House and so the Applicants have abandoned this aspect of the justification for the relief, although that was the basis upon which the *Norwich* Order was sought and obtained in relation to Farrers. Even though there is evidence of a transfer of some $8million to Farrers there is no evidence that it was made from impugned funds.

69. It is submitted that this illustrates the obviously investigative nature of the evidence sought and the obvious nature of the current Application as a fishing expedition.

Summary of Submissions on behalf of the Applicants

70. It is submitted that this is not a case of fishing, where an applicant does not know whether they have got a case of fraud or not, but would like to find out what is in a defendant's bank accounts to see if there is a potential fraudulent claim. The nature of the fraud has been identified. If the other party denies that their assets form part of the alleged fraud that is an issue relevant to trial: see *Charman v Charman* at [39]. It is in dispute whether these accounts contain or did contain proceeds of fraud so this is one of the issues at trial and even if the accounts do not contain proceeds of fraud the documents relating to them will lead to relevant evidence for trial because there is a claim that goes well beyond the proceeds of the fraud.

Investigatory Purpose - Discussion

71. S. 2(3) of the 1975 Act states that:

> "An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence the purposes of civil proceedings in the court making the order…."

The English court has power to order that third parties provide documentary evidence under CPR 31.16. It is clear from the jurisprudence that this provision in the 1975 Act is aimed at preventing general pre-trial discovery or "train of enquiry" disclosure: see the Note at 34.21.5 in the White Book 2021 edn. Vol I.

The Banks

72. The documents ordered to be produced under the *Norwich* Order were primarily ordered for an investigatory purpose, (see evidence referred to at Paragraphs 41-49

above) but the range of the documents was cut down substantially in the LOR Order, to comply with the requirements of the 1975 Act. Having considered the Applicants' statement of case (Second Fresh as Amended Statement of Claim **HB 2605-2760/2621-2776**, a 155 page document setting out numerous detailed allegations of transfers of funds), and the evidence of the Deloitte Report **HB 618/629,B**I do not conclude that the documents sought from the Banks were requested in the LOR solely for an investigatory purpose. Although it is submitted that the judge was not referred to that part of Pinsent Masons' letter **HB 3130-3131/3146-3147**, which stated that in order to comply with the 1975 Act the documents must be relevant to trial rather than for investigatory purposes, the LOR order states in terms that documents ordered: "*will be admissible and relevant at trial to establish the existence, nature and extent of the Fraudulent Scheme and of the Plaintiffs' interest in such funds and any assets acquired with them*" (My emphasis) **HB 2194/2210.** In the face of that statement by the judge I cannot conclude that her attention was not drawn to that requirement, or that even if it was not, that she did not read it. She clearly regarded it as important to her decision as it was annexed to the LOR. In any event, I have concluded (under 'Relevance' above) that the documents sought from the Banks are relevant to the issues for trial, as well as for an investigatory purpose. Thus the documents requested cannot be regarded as part of a fishing expedition, in the way that term is commonly understood.

Farrers

73. Hawthorne 1 para 50 explains that the Applicants are in possession of statements for an account held by Dr Al Jabri at Al Awal Bank in the KSA for the period 30 July 2013 to 18 May 2020, which shows a debit on 24 December 2014 of SAR 32,031,856 (c US$8.53 million) which references a transfer to an account in the name of Farrers at Coutts Bank in the UK. His evidence is that:

> "Given the amount involved, the Applicants believe it likely that this payment was for the purposes of acquiring real estate in England & Wales, or for some other investment purpose. The Applicants require information as to the use of these funds in order to complete their tracing analysis and claim a proprietary interest in any assets acquired with them." **HB 23/31**

74. Following receipt of Tuddenham 1 where at paras 26 to 28 evidence was provided to demonstrate that the property referenced in the *Norwich* Order had no connection to Dr Al Jabri **HB 44-48/58-59**, Mr Hawthorne addressed this issue further at Hawthorne 2. Para. 24 explains that:

> "The request for Farrer & Co to disclose KYC materials was added, (a) for consistency with the bank disclosure, and (b) because KYC materials (for example address, bank accounts, and source of wealth details) is likely to assist the Plaintiffs in tracing the misappropriated funds." **HB 33/41**

75. And at para 25:

> "Although the Plaintiffs believe that the payment dated 24 December 2014 was likely used for the purposes of acquiring real property in England, it could also have been used for some

> other investment purpose. That of course is also the only payment from or to Farrer & Co's client account on behalf of Al Jabri of which the Plaintiffs are currently aware; even if that payment was for the purposes of acquiring property, there may be subsequent payments which have no connection to acquisitions of property.… For all of these reasons the Letter of Request was therefore formulated so as to cover the client accounting records for Al Jabri from 24 December 2014 to present without being limited to acquisitions of property." **HB 34/42**

76. This evidence appears to me to suggest an impermissible investigatory purpose and a "fishing expedition". It is also clear from this evidence that the Applicants do not know whether any relevant documents exist save for those relevant to the transfer identified.

77. The authorities also make it clear that the burden is on the applicant to establish that a document sought does exist: see *RTZ v Westinghouse* at 610, *Re Asbestos Insurance Coverage Cases* @ 338, *Refco Capital Markets v Credit Suisse* @ [36] and *Panayioutou v Sony Music Entertainment (UK) Ltd* at 153. Mr Hawthorne's evidence makes it clear that the Applicants do not know whether there are any records of subsequent payments to Farrers' client account at Coutts that are relevant to the issues for trial. The wording used in Schedule D also suggests that the Applicants do not know whether any of the documents described exist and that the purpose of the request is merely 'fishing' as described in *RTZ v Westinghouse*, rather than obtaining evidence for trial, and does not satisfy the burden of establishing that any document in the categories described exists, in my view. In *USA v Philip Morris* at [76] Moore-Bick J. (whose judgment was upheld by the Court of Appeal) stated that:

> "These authorities support the conclusion that the court should not make an order for the examination of a witness if it is satisfied that the letter of request is mainly of an investigatory character, even though it is satisfied that the witness may be able to give some relevant and admissible evidence, unless it is possible to exclude certain areas of the request without undue difficulty." **AB 279/281**

78. I note also the comments of Sir Richard Scott VC in *First American* at p 1166F, where he describes the fact that a judge of the foreign court has stated that the purpose of the examination is to obtain from the witness evidence that will be offered at trial as: "a fair starting point" but also states:

> "If other material justifies the inference that the intention is mainly of an investigatory character, I think the request would have to be refused." **AB 239/241**

79. In my judgment the evidence supports such an inference. With regard to the evidence in relation to the single payment identified, my comments under 'Relevance' at Paragraph 64 above also apply.

Documents too broadly drafted

Submissions on behalf of Dr Al Jabri

80. The relevant issue for trial is whether misappropriated funds were paid into and out of the Al Jabri RBS and HSBC accounts, and the source of funds paid into the accounts, but that only justifies the production of bank statements for the period after January 2008 when the fraud was allegedly committed, and not for bank statements prior to 2008 or the account opening form and mandate. Further the evidence does not show that any allegedly misappropriated funds were paid into the Al Jabri RBS account.

81. The request for the KYC documents for both the RBS and HSBC accounts cannot be justified because there is no issue as to Dr Al Jabri's identity nor his banking relationship with RBS or HSBC, and there has been no attempt to limit the information contained in the KYC files.

Applicants' Submissions

82. It is accepted that oppression is a well-established ground for refusing to accede to an application under the 1975 Act, but the relevant question is whether compliance would be oppressive to a respondent. The balance to be struck is between the legitimate requirements of the requesting court and the burden that those requirements may place on the intended witness, similar to the Court's approach to a domestic witness summons: *First American*, at 1166A **AB 239/241.**

83. The documents requested are limited as required by s. 2(4)(b) of the 1975 Act to "*particular documents specified in the order*" likely to be in the Respondents' "*possession custody or power*", and do not constitute "*general discovery*", which it is clear from the authorities is not permitted by the 1975 Act: see notes in the White Book 2021 Vol I at 34.21.6 and 34.21.7.

84. None of the Respondents has opposed the Application on the basis that compliance with the draft order would be oppressive for them. The Applicants are unaware of any authority in which this Court has refused a letter of request because a third party to the application contends that compliance would be oppressive for a respondent. Indeed, authority indicates that, where a defendant to the underlying action objects, but the relevant witnesses were not objecting to an order under the 1975 Act "*Considerations, therefore, of oppressive burdens on witnesses do not arise"*: *Land Rover North America Inc. v. Windh* at [10] (Treacy J.) **AB 322/324.**

85. No particulars of oppression are provided by Mr Tuddenham's evidence. The only suggestion that the draft order is unduly broad is made in relation to the requested documents from Farrers, but on the basis that they are "*very significantly broader*" than the documents at paragraph 19 of the Norwich Order: Tuddenham1/33(b) **[AB/6/50]**. Even if that contention is correct, it would not support an argument that compliance with the draft order would be oppressive for Farrers who have not suggested otherwise.

Documents too broadly drafted - Discussion

86. S. 2(4) of the 1975 Act states that:

> "An order under this section shall not require a person-
>
> (a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or
>
> (b) to produce any documents other than particular documents specified in the order as being documents appearing to the court making the order to be, or likely to be, in his possession, custody or power." (My emphasis). **AB 553/570**

87. See also the Notes in the White Book 2021 edn. Vol 1 at 34.21.6 and 34.21.7. In *The State of Minnesota v Philip Morris* at 176, **AB 214/216** Lord Woolf MR stated that when considering whether, and if so on what terms, to give effect to a letter of request, there is a balance to be struck between the interests of the requesting court and witnesses to be examined. This was confirmed in *First American* at 1165-6 **AB 238/240** where Sir Richard Scott VC. said:

> "….in deciding what response to make to a letter of request, the court should bear in mind the need to protect intended witnesses from an oppressive request. There is a balance to be struck in each case between the legitimate requirements of the foreign court and the burden those requirements may place on the intended witness. I agree with Ralph Gibson LJ in *In Re State of Norway's Application* [1987] 1 QB 433 433, 490 6F – G, that the balance is much the same as that which has to be struck if an application is made to set aside a subpoena. As Lord Denning MR said, in *Senior v Holdsworth, ex-parte Independent Television News Ltd [1976] QB 23, 30 5A*, a case in which a subpoena requiring the production of documents had been served: 'If the judge considers that the request is irrelevant, or fishing, or speculative, or oppressive, he should refuse it'. "

88. See also *United States of America v Philip Morris* per Brooke LJ at [17] **AB 285/287** cited in *MicroTechnologies LLC v Autonomy Inc and others* at [51] per Morris J. to the same effect.

89. The documents requested are listed at Schedule D to the LOR **HB 2199/2215.** I accept the submissions of the Applicants that no oppression to Mr Al Jabri is caused by the description of the documents as he is not being required to produce them and none of the Respondents has suggested that it would be onerous to produce the documents sought, relying on *Land Rover v Windh* at [10] and *First American*, quoted above.

90. I have concluded that the documents identified to be produced by the Banks (HSCS, ANB and RBS) do meet the requirements of s. 2 (4) of the 1975 Act. In *Re Asbestos Insurance Coverage Cases* @ 337H Lord Fraser said (referring to Lord Diplock's judgment in *Westinghouse* at p.635):

> "I do not think that by the words "separately described" Lord Diplock intended to rule out a compendious description of

documents provided that the exact document in each case is clearly indicated". **AB 116/118**

91. None of the Banks have suggested that production of the documents would be onerous. Pinsent Masons correctly advised that the documents ordered from financial institutions in the *Norwich* Order would not meet the strict requirements of the 1975 Act. The documents requested in the LOR are far more narrowly drafted, and list specific documents or categories of documents.

92. With regard to the documents sought from Farrers, these are separated into four categories, and I consider also meet the test in s.2 (4) of the 1975 Act for the same reasons as for the documents sought from the Banks. Although Farrers have expressed serious concerns about the "scope" of the draft order, this was expressly put on the basis that the intention behind the Motion for a LOR was to reflect the terms of the *Norwich* Order as well as meeting the requirements of English law and practice, and the draft order potentially "*extend[s] the scope of paragraph 19 of the Norwich order….in two material respects*" **HB 3161-3162/3177-3178** which are stated to be those which I have also identified. Farrers have not indicated that the description of the documents provides any difficulty in complying with any order that the court might make.

93. I do not therefore consider that there is any basis to refuse disclosure on the grounds that the documents are too broadly drafted or are oppressive.

S.2(3) of the 1975 Act

94. It is apparent from my consideration of the other heads of challenge to the order sought that I consider that s. 2(3) is satisfied in respect of the documents sought from the Banks, but not satisfied in respect of the documents sought from Farrers.

Other Matters referred to in the Evidence

95. I will consider briefly the other matters raised in the evidence submitted on behalf of Dr Al Jabri, as both parties have referred to these in submissions.

Whether the LOR is premature

96. It is correct that the LOR was made at an early stage in the Canadian proceedings, following on from the *Mareva* and *Norwich* Orders and before a defence was served, circumstances which would generally tend to support a submission that the documents were not ordered for the purpose of trial but as pre-trial discovery. Nevertheless, the Canadian judge has expressly stated in the LOR that the documents are relevant to issues for trial, and the description of the documents sought from the Banks cannot be described as general discovery, and I have found that the description complies with s. 2(4) (b) of the 1975 Act.

Alleged Political Motive for the Proceedings

97. This has been dealt with at some length in Mr Tuddenham's evidence. It has been relied on by Dr Al Jabri in the Canadian proceedings. Justice Gilmore set out the evidence in this regard in relation to the actions said to have been taken against Dr Al Jabri by

emanations of the state of the KSA: **HB 2028-2043/2054-2059** in her Ruling on Set Aside Motion **HB 2032-2060/2048-2076** on 19 February 2021 (which includes her decision to make the LOR). The Canadian court has therefore taken account of this issue but has concluded that the Applicants have demonstrated there is a prima facie good arguable commercial claim.

98. This issue is a matter for the court in which the proceedings are being dealt with. My role is to apply the law in this jurisdiction to the Application. This has not been relied on as a ground for refusing the Application on grounds of oppression, but in any event I would defer to the Canadian court if this were the case.

Disclosure Provided by Dr Al Jabri to date

99. The parties disagree as to whether Dr Al Jabri has provided sufficient assistance with disclosure to the Applicants. Dr Al Jabri refutes the Applicants' assertion that he has been unhelpful and says that the Applicants have already been provided with a significant volume of disclosure and in ancillary proceedings in the British Virgin Islands and Jersey. This is not an issue on which I can form a view and it is of no relevance to my decision on the Application.

Prevention of Access to Evidence

100. It is submitted that Dr Al Jabri has been hampered in his attempts to provide disclosure because he is unable to access key documents he left behind in the KSA and he has limited or no access to potential witnesses, documents or other information needed in order to prepare his defence in the Canadian proceedings. Evidence on behalf of Dr Al Jabri states that he is impeded in his ability to defend the action by the fact that many key documents, including financial records, are in the KSA and no longer within his control, and that key witnesses have disappeared or been detained by the authorities in the KSA or are subject to state secrecy laws. Again, these are matters that are before the Canadian court and have not been relevant to the decisions that I have made on the Application.

Conclusion in respect of the Application

101. The documents requested for production by the Banks will be ordered. No order will be made for production of documents by Farrers, for the reasons set out in this judgment. I mean no disrespect to Justice Gilmore or to the Canadian court in my refusal to make the order in respect of Farrers. I have simply concluded that the documents requested were entirely differently described and broader than ordered in the *Norwich* Order, and there was no reference to this difference in the evidence or submissions before the judge, nor in the Pinsent Masons letter, which she was entitled to rely on, and thus she had no reason to consider that the requirements of English law in relation to document production from Farrers were not met.

Annex 1

List of Authorities referred to in the judgment

Evidence (Proceedings in other Jurisdictions) Act 1975

Rio Tinto Zinc Corporation v Westinghouse Electric Corp. [1978] AC 547

Re Asbestos Insurance Coverage Cases [1985] 1 W.L.R. 331

In Re State of Norway's Application [1987] 1 QB 433

Boeing Company v. PPG Industries Inc. [1988] 3 All E.R. 839

The State of Minnesota v Philip Morris [1997] ILP 170

Panayioutou v Sony Music Entertainment (UK) Ltd [1994] Ch 142

First American Corp.v Zayed [1999]1 WLR 1154

Refco Capital Markets v Credit Suisse [2001] EWCA Civ. 1733

USA v Philip Morris [2004] 1 C.L.C. 811

CH (Ireland) Inc v Credit Suisse Canada [2004] EWHC 626 (QB)

Land Rover North America Inc. v. Windh [2005] EWHC 432 (QB)

Charman v Charman [2006] 1 WLR 1053

MicroTechnologies LLC v Autonomy Inc and others [2016] EWHC 3268 (QB)

Allergan Inc v Amazon Medica [2018] EWHC 307 (QB)

Aureus Currency Fund, L.P. v Credit Suisse Group AG [2018] EWHC 2255 (QB)

Galas v. Alere Inc [2018] EWHC 2366 (QB)

Atlantica Holdings Inc v Sovereign Wealth Fund Fun Samruk-Kazyna JSC [2019] 4 WLR 62

Annex 2

DOCUMENTS REQUESTED

Person	Document(s)
HSBC UK Bank plc	Know Your Client ("KYC") file for Dr Saad Khalid S Al Jabri ("Al Jabri"). Account opening form and mandate for account no 91832514, sort code 40-03-04 (the "HSBC Account"). Sheet numbers 1 to 34 of the HSBC Account statement (covering the period from 27 December 2007 or later opening of the account to 28 January 2013). Sheet numbers 36 and following of the HSBC Account statement (covering the period from 1 March 2013 to 31 December 2019 or the earlier closing of the account). Transaction records (in electronic form) for the HSBC Account for the periods (i) from 27 December 2007 or later opening of the account to 28 February 2013 and (ii) from 1 March 2013 to 3 1 December 2019 or earlier closing of the account.
Arab National Bank	KYC file for Mr. Majed Obaid S Almuzaini. Account opening form and mandate for account no. 54044030, sort code 40-51-79 (the "ANB Account") Transaction records (in electronic form) for the ANB Account for the period 27 April 2017 to present.
Royal Bank of Scotland Plc	KYC file for Al Jabri. Account opening form and mandate for account no. 00100385 ("Al Jabri RBS Account"). Transaction records (in electronic form) for the Al Jabri RBS Account for the periods (i) March 2004 to November 2007 and (ii) December 2007 to present. KYC file for Clear Cell Group Ltd. Account opening form and mandate for the account with IBAN GB14 RBOS 1663 0000 5761 43 ("Clear Cell RBS Account") Transaction records (in electronic form) for the Clear Cell RBS Account for the periods (i) January 2011 or later opening of the account to April 2014 and (ii) April 2014 to December 2016
Farrer & Co LLP	KYC file for Al Jabri.

The following client accounting records for Al Jabri (both as an individual client and, if appropriate, as a client in matters where Farrer & Co LLP acted for Al Jabri and others in the same engagement) for the period 24 December 2014 to present or earlier termination of his retainer.

(a) Client ledgers (including client name and matter description or descriptions);

(b) Daily client ledger account balance;

(c) Daily cash book;

redacted as appropriate for privilege and/or the confidentiality of clients of Farrer & Co LLP other than Al Jabri.

Bank statements for Coutts & Co account with IBAN GB62COUT1809101390252 for the period 24 December 2014 to present or earlier termination of Al Jabri's client relationship with Farrer & Co LLP, redacted to show only transactions corresponding to those recorded on Al Jabri's client ledger.