Neutral Citation Number: [2024] EWHC 1422 (Comm)

Case No: CL-2020-000748

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

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

Date: 07/06/2024

Before :

Dame Clare Moulder DBE

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Between :

(1) FIESTA HOTELS AND RESORTS SL
(2) RESIDENCIAL MARINA SL
(3) RESIDENCIAL ES VIVE SA
(4) DOMINICAN ENTERTAINMENT (LUXEMBOURG) SARL
Claimants/First Respondents

and

SARANAC PARTNERS LIMITED
Second Respondent

and

(1) DEUTSCHE BANK AG
(2) DEUTSCHE BANK AG, LONDON BRANCH
Defendants/Applicants

- -
- -

EDWARD LEVEY KC and MAX EVANS (Instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) appeared on behalf of the Claimants/First Respondents
PATRICK DUNN-WALSH (Instructed by **Proskauer Rose (UK) LLP**) appeared on behalf of the Second Respondent
ALEXANDER POLLEY KC and HENRY HOSKINS (Instructed by **Herbert Smith Freehills LLP**) appeared on behalf of the Defendants/Applicants

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Approved Judgment

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(Official Shorthand Writers to the Court)

1. **DAME CLARE MOULDER DBE:** This is the judgment of the court on the application by the defendants ("Deutsche Bank") dated 22 April 2022, for, firstly, additional disclosure from the claimants pursuant to paragraph 18 of Practice Direction 57AD (the "Application for Further Disclosure"), in the alternative third party disclosure from Saranac Partners Limited ("Saranac") (the "Third Party Disclosure Application").

2. By the draft order Deutsche Bank seek an order that the claimants or Saranac should search for and give disclosure of all audio recordings and calls, including conference calls, between representatives of the claimants and representatives of Saranac between 1 January 2018 and 31 March 2020 (the "Saranac Recordings"). I note that Deutsche Bank no longer seek to qualify the order sought by the words "*relevant to one or more Issues for Disclosure identified in Section 1 of the Disclosure Review Document*".

Evidence

3. In support of the application, I have the first witness statement dated 22 April 2024 of Mr John Corrie, partner at Herbert Smith Freehills LLP ("HSF"), on behalf of Deutsche Bank, and his fourth witness statement dated 31 May 2024.

4. In response I have the seventh witness statement of Mr Leo Kitchen, partner in the firm of Quinn Emanuel Urquhart & Sullivan UK LLP ("QE"), for the claimants, dated 24 May 2024.

5. For Saranac I have the witness statement of Mr Steven Baker, a partner at Proskauer Rose (UK) LLP ("Proskauer"), dated 24 May 2024 and a witness statement from Mr Gurvinder Bains, head of technology at Saranac dated 24 May 2024.

Background

6. I need not go into the detailed background of these proceedings. Suffice it to say that they arise out of a trading relationship between the claimants, known as Palladium Hotel Group (PHG), and Deutsche Bank. The relationship began in late 2012 when Deutsche Bank marketed to the claimants a set of transactions referred to in these proceedings as the Haven transactions which were entered into by three of the claimants in January 2013 and subsequently, between 2014 and 2019, Deutsche Bank sold to the claimants a large number of derivative transactions (the "Transactions").

7. The claim form was issued in November 2020, and the original Particulars of Claim were served in September 2021.

8. Claims in negligence advanced by the claimants have since been amended to introduce allegations of fraud. In summary the claimants allege that Deutsche Bank fraudulently, alternatively negligently, misled them in relation to its fees for the Haven Transactions. Secondly, the claimants allege that Deutsche Bank fraudulently, alternatively

negligently, misled and/or acted in breach of duty to them regarding its fees in connection with restructurings of the Transactions (the "Restructurings").

9. The claimants allege that Deutsche Bank, amongst other things, made a number of express and/or implied representations relating to the impact and/or the effect of the Restructurings which were relied upon by the claimants until August 2018.

10. There is a third allegation in relation to the fourth claimant which is not relevant to these applications.

Relevant law

11. For the purposes of the Application for Further Disclosure the relevant provisions now relied upon by Deutsche Bank are paragraph 18 of the Practice Direction 57AD:

> "*18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.*
>
> *18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4)*
>
> *18.3 ...*".

12. Paragraph 6.4 provides:

> "*In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—*
>
> *(1) the nature and complexity of the issues in the proceedings;*
>
> *(2) the importance of the case, including any non-monetary relief sought;*
>
> *(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;*
>
> *(4) the number of documents involved;*
>
> *(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);*

(6) the financial position of each party; and

(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

13. In relation to the Third Party Disclosure Application, the application is made pursuant to CPR 31.17 which provides (so far as material):

"*(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.*

(2) The application must be supported by evidence.

(3) The court may make an order under this rule only where—

(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.
...".

Application for Further Disclosure

14. In relation to the Application for Further Disclosure, the first issue is whether PHG has practical control over the Saranac Recordings.

15. It was Deutsche Bank's position before the Court today that, in the light of the explanation given in the witness statement of Mr Baker, Deutsche Bank no longer contends that PHG had legal control, but Deutsche Bank contends that PHG has practical control over the Saranac Recordings. It appeared to be common ground that practical control suffices under PD 57AD, even absent a legally enforceable right of control.

16. Deutsche Bank relied on the decision of Robin Vos in *Berkeley Square Holdings & Ors v Lancer Property Asset Management Ltd & Ors* [2021] EWHC 849 (Ch). Deutsche Bank acknowledged that the principles in that case were applied in *The Public Institution for Social Security v Al-Wazzan* [2024] EWHC 480 (Comm) at [28], with the caveat that the nature of the relationship "*may be relevant but is not determinative*".

17. It was submitted for Deutsche Bank that the circumstances give rise to a clear inference that there is an arrangement or understanding that Saranac will search for relevant documents, or make them available to be searched by PHG, giving PHG practical control over the Saranac recordings. It was submitted that the previous provision of

documents on request is highly relevant especially where the provision is recent (unlike in *Al-Wazzan*).

18. There have been a number of recent authorities which have summarised the general principles referred to conveniently at paragraph 22 of *Al-Wazzan*.

19. I note from *Berkeley Square* at [46] that:

> "…
>
> *ii) There must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;*
> …
>
> *v) It is not necessary that there should be an understanding as to how the documents will be accessed. It is enough that there is an understanding that access will be permitted and that the third party will co-operate in providing the relevant documents or copies of them or access to them.*
> …"

20. I note however the qualification in *Al-Wazzan* at [23], referring to *Various Airfinance Leasing Companies and anor v Saudi Arabian Airlines Corpn [2021] EWHC 2904 (Comm),* that:

> "*Insofar as a document is in the physical possession of a third party, meaning a person who is not a party to the action, that document is in the control of a party to the action not only where the party has a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access… However, in order to establish that there is such a standing or continuing arrangement or even a specific, time-limited arrangement, whereby a third party allows a party to the action access to the document which the third party has in its possession, it is not generally sufficient to demonstrate that there is a close legal or commercial relationship between the party and third party, such as parent and subsidiary companies or employer and employee relationships; something more is required; there must be more specific and compelling evidence of such an arrangement*...". [emphasis added]

21. I also note the following passages from the judgment of Males J in *Ardila Investments NV v ENRC NV* [2015] EWHC 3761 (Comm) referred to at [25] of the judgment in *Al-Wazzan*:

> "*[10] It is apparent that what is required is an existing arrangement or understanding, the effect of which is that the party to the litigation from whom disclosure is sought has in practice free access to the documents of the third*

> *party, in that case the trustees. It appears that that does not need to be an arrangement which is legally binding. If it did, then there would be a legal right to possession of the documents, but it must nevertheless be an existing arrangement which, in practice, has the effect of conferring such access…*
>
> *[13] The position can, therefore, be summarised for present purposes in this way. First, it remains the position that a parent company does not merely by virtue of being a 100 parent have control over the documents of its subsidiaries. Second, an expectation that the subsidiary will in practice comply with requests made by the parent is not enough to amount to control. Third, in such circumstances, as Lord Diplock said in Lonrho, there is no obligation even to make the request, although it may, in some circumstances, be legitimate to draw inferences if the party to the litigation declines to make sensible requests. But that is a separate point.*" [emphasis added]

22. It is clear that for practical control to be established there must be evidence of an arrangement or understanding, or that the circumstances must allow the court to draw such an inference.

23. For the claimants it was submitted that the nature of the relationship may well be relevant and here it was a relationship of client and independent professional advisor as in *Al-Wazzan* at [28]:

> "28. *I consider that [paragraph 46 in Berkeley Square], with one qualification, is a useful summary of the principles which have emerged from the case law. The qualification is that (as Mr Ritchie submitted) it is not accurate to say in (i) that the relationship between the parties is "irrelevant". It would be correct to say (as illustrated by the example of parent and subsidiary) that the nature of the relationship is not determinative. However, the nature of the relationship (if any) between the parties (i.e. the party to the litigation, and the third party whose documents are alleged to be under the former's control) may well be relevant. For example, it is relevant that the nature of the relationship between PIFSS and KPMG (and indeed EY) is that of client and independent professional adviser.*" [emphasis added]

Evidence

24. The history of the provisions of the recordings to date is set out in the witness statement of Mr Baker. I note in particular paragraphs 24 and 25:

> "*24. Saranac has replied to numerous specific document requests by the parties since November 2023 on a voluntary basis and on the basis that the Claimants have agreed to meet its reasonable costs of doing so … For the reasons explained below, it does not consider that the Claimants or any one of them has a legal right to require any of the documents requested, but it has provided its assistance voluntarily, for the sake of being of assistance to the parties and to the Court.*

> *"25. Insofar as Corrie 1 suggests (at §35.2) that Saranac's co-operation with PHG suggests that it was compelled to supply Saranac Recordings to PHG, this is incorrect. Saranac did not resist or refuse the requests made because it was seeking to assist PHG and, by extension, Deutsche Bank. It does not at all follow from Saranac's decision to assist, in a spirit of co-operation, that it was, somehow, tacitly agreeing that it was compelled to provide the same, and nor was this suggested by QE on behalf of PHG. Further, I was clear in correspondence with QE that the assistance provided by Saranac was without prejudice to Saranac's rights, which were expressly reserved, and that recordings were provided "in the spirit of cooperation" ...".* [emphasis added]

25. It was submitted for Deutsche Bank that Mr Baker confirmed that Saranac "*has, to date, complied in full with all requests*", that it "*did not resist or refuse those requests*", has been "*highly cooperative*" and has "*not withheld*" any documents.

26. However, in my view, the selective quotes from the witness statements of Mr Baker need to be read in context. I note in particular paragraphs 27 to 30 of Mr Baker's witness statement:

> "*27 In summary, therefore, Saranac has been highly co-operative; whilst it considers it is under no obligation at all to conduct the searches it has conducted, it has been willing to do so in order to assist the parties and the Court. For the avoidance of doubt, it has not withheld documents identified, save, in relation to the recordings described at paragraph 2626(1) above, for recordings that were either 'failed calls' that were not picked up or calls received by a receptionist/personal assistant.*
>
> *28. As a professional services and relationship-based business, Saranac's approach to requests from current or former clients for documents (outside formal data subject access requests) is to give careful consideration to each request and, where there is no legal obligation to provide the information sought as here, to consider whether it is able to comply on a voluntary basis.*
>
> *29. Factors that Saranac will take into account include the scope and specificity of the request, the extent of any search needed and the availability and accessibility of the data, confidential information of other clients (former and current), confidential information relating to its own business, personal data of natural persons, including its own employees (former and current) and any other competing demands on internal resources.*
>
> *30. While there is no default position, or presumption in favour of provision or otherwise, Saranac is usually keen to engage positively wherever possible, just as it has done in relation to requests in these proceedings.*" [emphasis added]

27. It was submitted for Deutsche Bank that PHG relied on the fact that Saranac instructed its lawyers, Proskauer, to review the Saranac Recordings for relevance, and initially

objected to providing certain other documents, but that the initial objections evaporated when PHG did not agree with them, and that this was an indication that PHG has practical control.

28. In my view, the fact that Saranac initially instructed Proskauer to review the documents indicates that it did not regard the claimants as having a right of access, and there was no agreement or understanding for access. As was submitted for the claimants, the approach which Saranac took in employing its lawyers was close to a "*shadow*" non-party disclosure application. The view taken by the claimants can be seen in the correspondence between QE and HSF:

> "*Contrary to paragraph 6 of your letter, it was proper for Saranac's counsel to review Saranac's documents for relevance. This is a non-party disclosure situation. In such situations, the default is that the non-party (or its counsel) reviews its own documents for relevance, and discloses only relevant documents. Should you consider, by reference to authority, that another situation should obtain in these circumstances, please explain*." (Second letter of 26 February 2024)

29. The fact that Saranac subsequently allowed the claimants to have additional recordings without further review does not change the inference that Saranac was providing the recordings voluntarily, and regarding the process as equivalent to a third party disclosure application. The subsequent absence of review merely reflects the fact that Saranac subsequently took the view that they were not best placed to determine the relevance.

30. It was submitted for Deutsche that the "*practical reality*" is that Saranac was willing to provide the Saranac Recordings, and it is unsurprising that an advisor would agree to provide its client with the Saranac Recordings.

31. In my view, the willingness of Saranac to co-operate with PHG as its client was subject to the limitations set out in the evidence of Mr Baker referred to above and, as the claimants submitted, it thereby potentially sought to avoid the need to go to court. This is not the same as having an arrangement or understanding that the claimants could access the Recordings.

32. The cooperation was clearly on terms that it was through its lawyers and with its costs being paid. I refer in particular to the email of Ms Johal, Saranac's Head of Legal, on 30 November 2023 which implicitly refers to the requirements of CPR31.17:

> "*..My understanding was that you may ask Saranac to extract and send to you the audio recordings (identified in my email of 17 November 2023), but that you have not yet done so. In your letter dated 26 October 2023, you mentioned that you had received certain requests from HSF regarding the existence of documents which may potentially be relevant to the Proceedings between your client and DB, HSF's client, and which may be in Saranac's possession and/or control.*

> *However, it is not clear from that letter why any documents in Saranac's possession and/or control are relevant.*
>
> *If in fact you or HSF intend to request documents from Saranac, including audio recordings, please can you (or HSF) provide an explanation of the relevance of such documents to either party's pleaded case in the Proceedings and how such disclosure is necessary in order to dispose fairly of the claim or save costs. It would also be helpful if you could at the same time provide us with copies of the core pleadings in the Proceedings. We will then be able to review the documents in the context of such an explanation and a review of those pleadings.*
>
> *You will appreciate that at this stage we can only provide you with an indicative estimate of our overall costs of addressing any request for disclosure, including the costs of Proskauer who would as I have mentioned provide us with appropriate support. On that broad brush basis, we estimate such costs could be about £15,000-20,000, but they may be lower depending upon the explanation which you or HSF provide. We would expect the costs we reasonably incur addressing any request to be covered by your client or DB.*" [emphasis added]

33. Further, the correspondence shows that the Saranac Recordings were being provided on a voluntary basis, and this was the approach that was reflected in the correspondence between the lawyers for the claimants and Deutsche Bank.

34. I note in particular the correspondence at page 679, 683 and 724 of the application bundle and the fact that subsequently Deutsche Bank took the view that if there was no cooperation on a voluntary basis, a court application might be brought:

> HSF to QE 2 October 2023: "*...To the extent these are not already in your clients' possession, please liaise with Saranac to provide all call recordings of discussions between your clients and Saranac relevant to the Proceedings, particularly but not exclusively regarding the Transactions. In this respect, please confirm that you will write to Saranac to obtain these recordings and your clients will review these recordings and disclose any relevant documents to our client as soon as practicable…".*
>
> QE to HSF 26 October 2023*: "…2. Paragraphs 19 to 22 of your letter request disclosure of recordings of discussions between our clients and Saranac, as referred to by Saranac's Terms of Business.*
>
> *3. If such recordings exist, and as is clear from those terms, they were to be made by and for Saranac, not our clients. Those terms do not mention our clients either being required to, or opting to, record their telephone calls, and as far as we are aware (having made appropriate enquiries of our clients) they did not do so. Accordingly, no such recordings are in our clients' possession or control.*

> *4. Consequently, our clients are under no obligation to disclose said recordings, or to "liaise with Saranac" to obtain them, as you suggest.*
>
> *5. Notwithstanding that they are under no obligation to do so, and in the interest of cooperation only, our clients have today written to Saranac, requesting that they confirm whether any such recordings exist. We shall update you once we have received Saranac's response (which we have requested be provided within 7 days)…".* [emphasis added]
>
> HSF to QE 24 November 2023*: "…5. If your clients' position is that they will not ask Saranac to provide a copy of these documents, please explain, in detail, the basis upon which your clients refuse to do so. Any such explanation should include a description of your and your clients' understanding of the likelihood of these documents, and in particular the Saranac Recordings, being relevant to the dispute between our clients.*
>
> *6. In the context of the request set out above, we note your clients previously expressed the position that they do not have an enforceable legal right to request documents from Saranac. Whether this is correct or not (and our client is not in a position to make this assessment), your clients' position plainly disregards the reality that your clients have, or had, a close working relationship with Saranac such that they could, at least, ask Saranac to provide copies of these documents on a voluntary basis. Your clients' failure to do so to date remains unexplained, and, on any reasonable basis, inexplicable.*
>
> *7. The documents referred to in this letter are relevant to the dispute between our respective clients. Correspondence between the parties, and apparently between your clients and Saranac, has not led to any tangible progress in this respect. To the extent your clients do not confirm that they will seek voluntary disclosure of these documents from Saranac, our client will take appropriate steps to obtain them, including by way of application to Court. Our client's rights, including but not limited to its right to recover the costs of an application to Court, are reserved.*" [Emphasis added]

35. It was submitted for Deutsche Bank that Mr Baker had not disputed in his evidence that PHG has practical control, rather, he said:

> "*Saranac takes no position, at least at this stage*".

It was submitted for Deutsche Bank that there is therefore no evidence from Saranac to rebut the natural inference arising from the circumstances referred to above that PHG does have practical control.

36. In my view it is understandable that Saranac did not feel it necessary to address in its evidence the argument of practical control, which is clearly relevant to the application

against the claimants but not of direct relevance to Saranac's response to the Third Party Disclosure Application.

37. Nevertheless, in the Saranac evidence (as referred to above) there is clear evidence as to the circumstances in which the recordings were made available, and thus to the extent to which it could be said there was practical control.

38. In the context of responding to the Third Party Disclosure Application against it, I note that Saranac have raised practical objections to further recordings being searched for as well as that the conversations will contain irrelevant material. That, in my view, does not suggest an understanding or arrangement to allow the claimants access.

Conclusion on control

39. In my view, having regard to the principles stated in the authorities, but noting that each case is fact-specific, there was no arrangement or understanding in this case that the claimants should have access to the Saranac Recordings.

40. There was no relationship, other than that of client and professional advisor, from which to infer any arrangement or understanding. Saranac is an independent, private investment office, serving high net worth individuals and families. Its task and its role is to provide advice to its clients.

41. Saranac were co-operative, but that cannot be said to have resulted in the creation of an arrangement or understanding that the claimants had a right to access the Saranac Recordings in the sense of being able to exercise practical control. Saranac made it clear that their rights were expressly reserved and the Saranac Recordings were provided in the spirit of cooperation. Saranac were not prepared to give unfettered access.

42. For all these reasons, as discussed above, I therefore find that the claimants do not have practical control over the Saranac Recordings.

Reasonable and proportionate

43. Accordingly, it is not necessary for me to consider whether the test in paragraph 18.2 is satisfied. However, if I were wrong on the issue of control, I would have refused the Application for Further Disclosure as not reasonable and proportionate.

44. I note that originally the Application for Further Disclosure was made under both paragraphs 17 and 18 of the Practice Direction, but that only paragraph 18 was pursued orally. Pursuant to paragraph 18, there are two limbs to the test: the court must be satisfied that the further order for disclosure is "*necessary for the just disposal of the proceedings"* and is "*reasonable and proportionate*", having regard to the factors which are set out in paragraph 6.4 of the Practice Direction.

45. Looking at those factors in paragraph 6.4, I accept that this is a complex case, that it is an important case, with a very significant amount at stake. However, the court is also required to consider "*the likelihood of documents existing that will have probative value in supporting or undermining a party's' claim or defence"*, the number of documents involved, and the ease and expense of searching for and retrieval of any particular document.

46. As to the likelihood of documents existing that will have probative value in supporting or undermining a parties' claim or defence, Deutsche Bank submitted that the documents are clearly relevant, and submitted that this had been conceded in correspondence. Deutsche Bank stressed that the issue of sophistication on the part of the claimants was an important component of the case.

47. It was submitted for Deutsche Bank that the Saranac Recordings would also be relevant to other issues in the DRD such as issues of causation, and to the financial position of the claimants (paragraph 44 of the Particulars of Claim).

48. It was accepted for Deutsche Bank that the misrepresentations that were alleged were only until August 2018 but it was submitted for Deutsche Bank that they are still relevant to the earlier period and that "*unguarded*" audio recordings of calls could be "*pivotal*". Deutsche Bank submitted that for example a transcript which has been disclosed (a call between Salvador Ortiz and Maria Jose Porta on 2 August 2018) shows that PHG was aware of the fees implicit in a transaction, and thus it should be able to get other documents on this key point.

49. It was submitted for Deutsche Bank that some documents which have already been disclosed are clearly relevant to the issue of sophistication and the documents sought may be relevant to other issues such as causation and the financial position of the claimants. However, the order which is now sought for further disclosure is, in effect, concerned with the balance of the documents which have not yet been disclosed. Relevance is not enough to satisfy the test under the Practice Direction. There must be a likelihood of those documents existing which have probative value. In this regard I take into account the process which has already been undertaken and which is described in Mr Kitchen's witness statement.

50. The process commenced in November 2023, when QE provided Saranac with the numbers of all the claimant representatives listed in the Joint Disclosure Review Document. This is described as the most expansive list of telephone numbers of the claimants' representatives that QE had at that time. The witness evidence (Kitchen paragraph 33) is that Saranac located the recordings that were then requested and searched for the calls across the call recording platforms available to it across the full period. The further searches are set out in paragraph 49 of Mr Kitchen's witness statement.

51. The overall process is summarised at paragraph 68 of Mr Kitchen's witness statement:

> "*68.1 First, Saranac has searched for all calls across the relevant period (1 January 2018 to 31 March 2020), involving any of the numbers of the Claimants' key representatives (per paragraph 33 above).*
>
> *68.2 Second, QE has searched for all calendar invites across the relevant period, including the word "*Saranac*". Saranac has searched for calls evidenced by the located invites (per paragraphs 49.2 and 53 above).*
>
> *68.3 Third, Saranac has searched for all calls across the relevant period, involving two conference call numbers that the Claimants may have sometimes used to contact Saranac (per paragraph 49.3 and 52 above)*
>
> *68.4 Fourth, Saranac has searched for all calls HSF claimed to have identified in their letter of 21 February 2024, and their second letter of 14 March 2024 (per paragraphs 49.1, 49.5 and 53 above).*
>
> *68.5 Fifth, QE has searched the relevant period for all WhatsApp communications involving the numbers of Ms Porta and Mr Savinas. Saranac has in turn searched for all calls evidenced by the located WhatsApps (per paragraphs 49.4, 53 and 58)*"

52. Having regard to the searches that have already been carried out, I am not persuaded that the further order sought can be said to reasonable and proportionate. The KYC compliance matters and purely administrative conversations are not, in my view, likely to have probative value. Although there may be other calls which are relevant to the issue of sophistication, the likelihood has to be weighed against the searches already carried out. The fact that documents which are relevant and may have probative value have already been identified does not, in light of the nature of the searches already carried out (and described in the evidence referred to above) establish a likelihood that further calls with probative value will be identified. I am not persuaded that on the evidence before the court, that the likelihood of documents existing which have probative value in relation to the other issues has been established.

53. I also have regard to the evidence of Mr Bains. It seems to me that there is the very practical issue on the evidence, which has ramifications in terms of time and costs, as to how further searches for calls could be proportionately carried out over and above the searches which Saranac have already made. The submission for Deutsche Bank that Saranac could be ordered to seek information on calls made from a third party telecom provider goes beyond searches for documents that are within its control and beyond the scope of the current application for disclosure of the Saranac Recordings.

54. In order for an order to be made under the Practice Direction paragraph 18.2, the court also has to be satisfied that an order is necessary for the just disposal of the proceedings. There is an overlap with the issues referred to above as to whether in the light of the searches already conducted, documents exist which are relevant to the issues in this case. I also note in relation to the time periods that Saranac only became

involved in 2018. This does, in my view, affect the potential relevance of the documents. Although it may be relevant to the period around 2018, it is difficult to see that it will be relevant to the earlier periods which date back as early as 2013 and 2014.

55. For these reasons, had it been necessary to decide the further issue of whether or not the order should be made under paragraph 18, I would have dismissed the Application for Further Disclosure on the basis that Deutsche Bank has not satisfied the court that the order is necessary for the just disposal of the proceedings or that it is reasonable and proportionate in the circumstances, but in any event the Application for Further Disclosure fails on the issue of control.

Third Party Disclosure Application

56. Turning to the Third Party Disclosure Application, I note that Saranac expressed itself to be a neutral party, and stated that, in principle, it did not object to being ordered to conduct a reasonable search; however, it raised questions with the court as to whether or not the order sought did in fact comply with CPR 31.17.

57. Subparagraph (3) of CPR 31.17 states:

> "*The court may make an order under this rule only where—*
>
> *(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and*
>
> *(b) disclosure is necessary in order to dispose fairly of the claim or to save costs.*" [emphasis added]

58. It was common ground that third party disclosure is the exception and not the rule and that the word "*likely*" in this context means "*may well*" (Three Rivers (No 4) [2003] 1WLR 210 per Chadwick LJ at 32).

59. Counsel for Saranac submitted that where disclosure of a class of documents is sought, each document in the class must satisfy the threshold condition of CPR 31.17(3): *Three Rivers (No. 4)* at [38]:

> "(i) *CPR 31.17 gives no power to order a non-party to disclose documents which do not meet the threshold condition in paragraph (a) of sub-rule (3); and (ii) that cannot be circumvented by including documents which do not meet that threshold condition in a class which also includes documents which do meet that condition."*
>
> *...there is no objection to an order for disclosure of a class of documents provided that the court is satisfied that all the documents in the class do meet the*

> *threshold condition. In particular, if the court is satisfied that all the documents in the class (viewed individually and as members of the class) do meet that condition - in the sense that there are no documents within the class which cannot be said to be "likely to support ... or adversely affect" - then it is immaterial that some of the documents in the class will turn out, in the event, not to support the case of the applicant or adversely affect the case of one of the other parties*."

60. Counsel for Saranac also referred the court to the commentary in *Hollander on Documentary Evidence* (Fourteenth edition) at 3-13, in relation to the proposition that each document in the class must satisfy the threshold requirement:

> "*The jurisdiction to give non-party disclosure is very limited. But what the Court of Appeal has done is to pay lip service to a narrow construction, recognising the limitations in the jurisdiction, but in each of the two leading cases apply the rule in a way which walks all over the restrictions and treats it as though it was a provision of great width. It would have been easy to treat Novartis as a decision on its own facts. But by endorsing the approach taken in Novartis in a case which in many ways was an even wider application of the jurisdiction in Three Rivers, the Court of Appeal have made it impossible to argue that Novartis should be sidelined. In Novartis the problem of the irrelevant documents was overcome by stating that documents which the patent agent thought were irrelevant might nevertheless be relevant for the purpose of putting other documents in their context. This does not appear to have been a statement justified by anything in the evidence (indeed it might be thought to be contrary to the evidence). It appears to have been a fact-specific comment, which was picked up by Chadwick LJ in Three Rivers (No.4) and developed into a statement of principle. As the CPR provides for more limited disclosure than before as between the parties to litigation, it would surely be anomalous if there was different approach as against non-parties? Equally, it would be anomalous for a non-party to be under an obligation to give disclosure which is more extensive than that required to be given by the parties to litigation.*
>
> *But the effect of these decisions does seem to be that the burden is, at least on occasion, likely to be wider. The principles set out in Novartis and Three Rivers require the applicant to demonstrate that each individual document within a class is likely to be relevant. The somewhat generous approach taken by the court in each case to the factual determination does not bind any future court. It will certainly be possible to distinguish these two decisions wherever the collection of documents cannot be described as homogeneous, in the sense of dealing with the same subject-matter, or where it is clear that some of the documents sought are unlikely to be relevant*." [emphasis added]

61. It was submitted for Saranac that there will inevitably be numerous recordings amongst the Saranac Recordings that cannot assist Deutsche Bank, or adversely PHG, and therefore do not satisfy the test in subparagraph (3)(a). Saranac referred to the witness statement of Mr Baker at paragraph 40:

> "*…I understand from Ms Sharon Johal, Saranac's Head of Legal that Saranac provided advice to PHG in relation to numerous matters, some of which had nothing at all to do with Deutsche Bank, or to do with derivative trading. Further, I understand from Ms Johal that some of the conversations comprising the Saranac Recordings will be purely administrative matters; for example, "KYC" compliance matters. Finally, from the review undertaken by Saranac described at 26(1) above, a number of the recordings do not record substantive conversations, but merely involve 'failed' calls, or calls between Saranac and PHG receptionists/secretaries.*" [emphasis added]

62. It was submitted for Saranac that the range of services provided by Saranac were listed by Mr Corrie in his first witness statement: Strategy (Planning, governance and oversight), Investments (Allocation and deployment of capital), Financing (Access to diverse sources of capital) and Corporate Advisory.

63. It was submitted for Deutsche Bank that the test is whether each document in the class "*may well*" be relevant: that test can be met even if it is likely that some will turn out not to be. Failed calls are de minimis and can be put aside. Calls addressing KYC issues or trades with other banks are likely to (may well) be relevant to the issue of sophistication or to issues such as the claimants' financial position.

64. It was submitted for Deutsche Bank that in *Parker v Skyfire Insurance* [2024] EWHC 1060(KB) Dias J did not express any concern that non-party disclosure of audio recordings should be refused because the category might include some calls with no individual intrinsic relevance.

65. It seems to me that the issue in this case is not the degree of likelihood and whether the documents "*may well*" support Deutsche Bank's case but whether all the documents sought can be said to be relevant at all. Whilst it may be the case that the conversations that relate to failed calls or calls between receptionists and secretaries may be disregarded as de minimis, in my view it is doubtful whether those calls which are said to relate to administrative matters, including KYC compliance matters, satisfy the test. More significantly I cannot see that calls which do not relate to derivatives trading at all satisfy the test that the documents may well support/adversely affect Deutsche Bank's case. It seems to me that on the evidence, Saranac's role in relation to PHG clearly went beyond advice in relation to derivatives trading and extended to a number of other matters. *Skyfire* does not provide authority for the proposition that where the class of documents includes documents that are irrelevant to the issues, disclosure can nevertheless be ordered under CPR 31.17. In my view this is the exception identified in *Three Rivers*:

> "*if the court is satisfied that all the documents in the class (viewed individually and as members of the class) do meet that condition - in the sense that there are no documents within the class which cannot be said to be "likely to support … or adversely affect" - then it is immaterial that some of the documents in the class will turn out, in the event, not to support the case of the applicant or adversely affect the case of one of the other parties*".

66. In my view Deutsche Bank has not demonstrated that the relevant test (that the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties) has been met. For the reasons discussed above, I reject the submission that the Saranac Recordings can be regarded as a class of documents which should be available as a whole.

67. Turning to the requirement in subparagraph 3(b) (disclosure is necessary in order to dispose fairly of the claim) the considerations here reflect the earlier observations in relation to the Application for Further Disclosure against the claimants.

68. The main phone numbers, if not all the phone numbers, have already been identified and disclosure made. Extensive searches, in my view, have already been made, for calls across the relevant period.

69. Deutsche Bank submitted that there should be more, pointing to the number of recordings that have been disclosed. It seems to me that no support can be derived from a purely numerical analysis in light of the approach that has been taken to identify the relevant numbers and the dates of the calls.

70. Even if both limbs were satisfied, the court has a discretion, having regard to all the circumstances, and in this case it seems to me there is the very practical issue on the evidence, which has ramifications in terms of time and cost, as to how further searches could be proportionately carried out over and above those searches which it is clear Saranac has already done.

71. In all the circumstances, therefore, I am not satisfied that the test for third party disclosure in subparagraph (3) of CPR 31.17 has been met and, even if it were, I would exercise the court's discretion and decline to make the order sought.

72. The Third Party Disclosure Application is therefore refused.