Neutral Citation Number: [2024] CA (Bda) 10 Civ

Civil Appeals No. 15, 16 and 17 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION (COMMERCIAL COURT)
BEFORE THE HON. JUSTICE SHADE SUBAIR WILLIAMS
CASE NUMBER 2017: No. 295
CASE NUMBER 2020: No. 89

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE

JUSTICE OF APPEAL GEOFFREY BELL

and

JUSTICE OF APPEAL IAN KAWALEY

CIVIL APPEAL No. 15 of 2023

BETWEEN:

TERRA LAW LIMITED

Appellant

and

MEXICO INFRASTRUCTURE FINANCE LLC

Respondent

CIVIL APPEAL No. 16 of 2023

BETWEEN

MEXICO INFRASTRUCTURE FINANCE LLC

Appellant

and

(1) TERRA LAW LIMITED
(2) THE CORPORATION OF HAMILTON

Respondent

CIVIL APPEAL No. 17 of 2023

BETWEEN

THE CORPORATION OF HAMILTON

Appellant

and

MEXICO INFRASTRUCTURE FINANCE LLC

Respondent

IN COURT:

Appearances:

Mr. Keith Robinson and Mr. Oliver MacKay of Carey Olsen Bermuda Limited on behalf of Mexico Infrastructure Finance LLC
Mr. Charles Hollander KC of counsel and Mr. Changez Khan of Marshall Diel & Myers Limited on behalf of the Corporation of Hamilton
Mr. Michael Pooles KC of counsel and Ms. Laura Williamson of Kennedys Chudleigh Limited on behalf of Terra Law Limited

Hearing date(s): 20-21 March 2024
Draft Judgment circulated: 20 April 2024
Date of Judgment: [ ] May 2024

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Joint interest privilege-waiver of privilege-relevance test in context of professional negligence claim-standard of review for discovery orders made by trial judge

APPROVED JUDGMENT

KAWALEY JA

Introductory

1. The present appeals arise from interlocutory discovery orders made in relation to three applications which were made in two related actions and heard together. Mexico Infrastructure Finance LLC ("MIF") is the Plaintiff in both actions. The Corporation of Hamilton ("COH") is the Defendant in the first action, and Terra Law Limited ("Terra") is the Defendant in the second action.

2. The relevant applications were heard by Mrs Justice Shade Subair Williams on 28-29 March 2022, 1 June 2022 and 11 January 2023. They were disposed of by Orders made pursuant to a Ruling delivered on 27 March 2023. The impugned decisions were made in relation to the following Summonses which, listed chronologically, may be summarised as follows:

   (a) the disposition of Terra's Summons dated 1 December 2020 in Civil Jurisdiction 89/2020 (the "MIF/Terra Action") seeking specific discovery against MIF, which the Judge granted in part on the primary basis that privilege had been waived by MIF;

   (b) the refusal in part of Terra's said Summons by way of the decision that MIF did not have to disclose documents relating to its communications with Stewart Title Insurance Company and Fidelity National Title Insurance Company (the "Title Insurance Documents");

   (c) the disposition of MIF's Summons dated 12 January 2021 seeking specific discovery against Terra in the same action, which the Judge granted on the primary basis that MIF had validly established a joint interest privilege claim in relation to advice given by Terra to COH; and

(d) the disposition of COH's Summons dated 29 June 2021 in Civil Jurisdiction 295/2017 (the "MIF/COH Action") in which the Judge granted COH leave to serve Interrogatories.

3. MIF appeals against the first and fourth decisions, and Terra and COH appeal against the second and third decisions respectively. The Judge herself granted leave to appeal on 6 June 2023 to all three of the Appellants and Notices of Appeal were filed on 12 June 2023. In each case, the central controversy is how the law relating to waiver of privilege and joint interest privilege apply to the particular factual matrix of the present case. For my part, the law of discovery is often far easier to articulate through pat recitations of the relevant legal principles. In contrast, it is frequently more difficult to grapple with how those principles ought properly to be applied in any particular case. Three areas of factual inquiry are critical in the present case:

   (a) the nature of the commercial relationship between the parties which gave rise to the discovery disputes;

   (b) the nature of the main disputes at issue in the various proceedings; and

   (c) the nature of the specific discovery disputes viewed in the context of the parties' commercial relationship and the issues in controversy in the present proceedings.

4. The various appeals will be considered below in the order in which they were considered by this Court in oral argument: (1) COH's joint interest privilege appeal, (2) MIF's waiver of privilege appeal, (3) MIF's Interrogatories appeal, and (4) Terra's Title Insurance Documents appeal.

The commercial relationship between the parties

5. In brief, MIF lent money to Par-la-Ville Hotel and Residences Ltd ("PLV") for the construction of a hotel in Hamilton and COH guaranteed the loan to PLV and provided a mortgage as security for the loan. As part of the legal formalities relating to the financial transaction, COH's attorneys, Terra, were required to issue a legal opinion to MIF confirming their client had the capacity to enter into the guarantee. The background is helpfully described in the Supreme Court Judgment (at paragraphs 7-16) as follows:

   "***Relevant Background***:

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

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

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

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

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

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

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

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

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

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

6. As a matter of preliminary, high-level analysis, it seems apparent that this was in part a fairly standard commercial relationship in which MIF's commercial interests were the usual interests of a creditor or lender. It wished to enjoy the opportunity to earn interest through advancing financing to a borrower while maximising its recovery prospects through obtaining the Mortgage and the Guarantee. When a guarantor or mortgagor provides security for another party's loan, that is usually because their commercial interests are allied in some material way with those of the borrower. An atypical feature of the commercial context is the involvement of COH, a statutory body established for public rather than private purposes.

7. When Governments or other public bodies provide support for private sector developments, it is usually because the private developer is perceived to be facilitating some public policy goal. In short, to my mind the interests of MIF and COH appear at first blush to be adverse, because in the enforcement context the secured creditor's most obvious interest would be in enforcing the security while the debtor's most obvious interest would be in retaining its property.

8. How is this picture altered by the fact that Terra, COH's attorneys, provided a capacity opinion to MIF? My starting assumption would be that it is very common for lawyers acting in relation to a transaction involving a Bermudian borrower or guarantor in relation to a loan being made by a foreign lender to be requested to provide an opinion to the lender as to their client's capacity to enter into the transaction. The purpose of such an opinion would presumably be to minimise the lender's risks, in a cross-border transaction. My preliminary view is that this does not alter the fact that in general terms the commercial interests of the counterparties may be viewed as adverse, or not aligned, as regards the overall transaction.

The main disputes at issue in the present proceedings

9. The MIF/COH Action raises the same *ultra vires* arguments in relation to the Mortgage that COH prevailed on in relation to the Guarantee. However, further claims are advanced by MIF which were summarised as follows in the Supreme Court Judgment (at paragraphs 19-23):

> *"19.MIF's pleaded case against the COH goes further than the single question of the validity of the Mortgage. MIF's case is that the COH represented to MIF that it had the capacity to enter into the Mortgage and that it wrongly and negligently represented to MIF that it had the capacity to enter into the Guarantee. In its Amended Statement of Claim ('A/SOC') of 28 January 2020, the Plaintiff referred to these representations as 'Capacity Statements'.*
>
> *20.On MIF's pleaded case, one of the Capacity Statements made by the COH was a July 2014 legal opinion from COH's then attorneys, TERRA (the 'Final Terra Opinion'). MIF asserted [9]: '...Terra had been retained to advise the Defendant in respect of the Loan Agreement, the Guarantee and the Mortgage.' MIF pleaded that it had an agreement with the COH that it, MIF, would be entitled to rely upon the Final Terra Opinion as to the question of the COH's capacity to enter into the Guarantee and the Mortgage. At paragraph 11 of the A/SOC MIF pleaded:*
>
> > *'The Defendant knew or ought to have known that the Plaintiff would rely upon the Capacity Statements in agreeing to enter into the Loan Agreement and accepting the Guarantee and the Mortgage as security for [the] Plaintiff's US$18,000,000 loan to PLV. The Defendant did so rely upon these statements; such reliance was reasonable in all circumstances.'*
>
> *21.In its pleadings, the COH denied that the Final Terra Opinion contained Capacity Statements and further denied that MIF was entitled to rely on the Final Terra Opinion. In its Amended Defence and Counterclaim ('A/D&C') the COH stated [11]:*
>
> > *'...Without prejudice to the generality of the foregoing denial, it is specifically denied that the Plaintiff was entitled to rely on the opinion of Terra and the Defendant puts the Plaintiff to strict proof thereof. The Defendant will also aver that, prior to the Terra opinion dated 9 July 2014, the Plaintiff through its attorneys, Conyers Dill & Pearman Limited ('Conyers'), had seen and reviewed draft opinions by Terra and was aware of the concerns Terra had as to the capacity of the Defendant. The Plaintiff relied on the advice of its attorneys, Conyers, and not any representations by the Defendant.'*
>
> *22.The position taken by the COH is that even if the Capacity Statements had been made, any such statements would have been unauthorised given the ultra vires nature of the undertaking. The Defendant also pleaded in its A/D&C that any such*

statements which became terms of a contractual agreement could not be the subject of an action in tort and that the Defendant could not be liable in tort for acts committed ultra vires.

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

10. As regards the MIF/Terra Action, the claim was in negligence and was described by Subair Williams J as follows (at paragraphs 26-31, 36-44):

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

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

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

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

30.On fresh instructions given on 2 May 2013, the COH directly sought a second legal opinion from Mr. Charles Flint KC in relation to the COH's powers to issue the Mortgage and the Guarantee. This opinion was provided on 10 May 2013 ("the 2013 CF Opinion"). On the Plaintiff's pleadings, the COH's first instructions to TERRA came on the same day that the 2013 CF Opinion surfaced. The Plaintiff avers that also on 10 May 2013, TERRA was emailed a copy of the COH's 2 May 2013 instructions to Mr. Flint KC. On TERRA's pleadings, it is said that in the 2013

CF Opinion there is a conclusion that the COH did not have the power to issue the Guarantee and that it "probably" did not have the power to enter into the Mortgage either.

31. Following a 13 May 2013 telephone conference with Mr. Flint KC and others, Mr. Flint KC provided a further note of advice to the COH ('the CF Advice Note'). In the CF Advice Note, Mr Flint KC maintained that section 23(1)(f) of the 1923 Act did not confer on the COH a general power to enter into transactions on the mere supposition of Ministerial approval. TERRA admitted in their pleaded case that the 2013 CF Opinion and the CF Advice Note concerned matters on which it, TERRA, was asked to opine and that TERRA was aware of the detail contained in both documents…

36.There is no dispute on the facts that TERRA never provided MIF or CDP with a copy of any of the written opinions or advice from Mr. Flint KC. To this TERRA says that it was under no obligation to share those documents and points out that the privilege in these documents belongs to the COH. TERRA also put the Plaintiff to strict proof that it never received these documents at any material time from any other party, adding that MIF had ample opportunity in any event to take its own advice from CDP and/or a London KC.

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

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

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

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

> *'... ...I understand that a conference call is scheduled at 11 EST/12 AST to discuss the outstanding issues. In advance of that meeting I attach a mark up of your firm's opinion. You will appreciate that the provision of an enforceable mortgage is fundamental to lend. In addition, during the conference call on Monday, Robert Osterwalder was very clear that the requirement to provide a redacted version of the London QC's opinion in*

> *respect of the Corporation's power to enter into the mortgage would only be dropped if Terra were able to provide a robust opinion confirming the same. The qualifications that have been included are not therefore acceptable.*
>
> *We can of course discuss this during this morning's call.'*
>
> *40.In 2014, two draft versions of the Final Terra Opinion were sequentially produced. Ms. Helen Forrest of TERRA emailed the earlier draft of 14 May 2014 to the CDP team under a cover message inviting CDP's review and commentary. The following day, on 15 May 2014, Mr. David Cooke of CDP replied:*
>
> > *'...I am attaching comments on the draft opinion, the most substantive of which just seek to ensure that the various opinions cover all of the Loan Documents to which the Corporation is a party. Please note that this has not yet been reviewed by our clients, and therefore remains subject to any comments that they may have..."*
>
> *41.The marked-up date on the second draft of the earlier two versions of the Final Terra Opinion is 10 June 2014 and the Final Terra Opinion is dated 9 July 2014.*
>
> *42.The historical development of the Final Terra Opinion is of importance to the Plaintiff whose case is that TERRA owed it a duty to exercise the care and skill expected of reasonably competent attorneys. The Plaintiff contends that TERRA breached this duty in that the Final Terra Opinion, particularly in its failure to qualify the statements therein, was inconsistent with the conclusions that any reasonably competent lawyer practising law in Bermuda could have drawn. Defending its position, TERRA says otherwise, highlighting that other reputable law firms, including CDP on the face of it, formed similar views.*
>
> *43. The parties also diverge on their respective pleaded cases on the extent to which TERRA qualified its opinion on the COH's ability to enter into the Guarantee and the Mortgage. The extent to which MIF did and could have reasonably relied on the Final Terra Opinion is also disputed. That said, TERRA does accept that the Final Terra Opinion expressly permitted the Plaintiff to rely on it.*
>
> *44.It is also TERRA's case that MIF has acted abusively by running two opposing positions between the Mortgage Proceedings against the COH and these proceedings against TERRA. To that end, TERRA has underscored that MIF's underlying position in the Mortgage Proceedings is that the Mortgage is valid as a matter of law.*"

11. That summary adequately describes the nature of the claim brought by MIF against Terra for negligent misstatements in the Terra Final Opinion in relation to COH's capacity to enter into the Guarantee and the Mortgage. That claim is most directly relevant to

determining the waiver of privilege, joint privilege and the Title Insurance Documents issues. The Statement of Claim contained the following pivotal averments:

> *"31. But for the Final Terra Opinion, the Plaintiff would not have entered into the Loan Agreement or the Mortgage...*
>
> *41. In the premises the Defendant expressly assumed and owed a duty of care to the Plaintiff in providing the Final Terra Opinion. The Defendant knew that the Plaintiff would rely upon the Final Terra Opinion when deciding (as it did) to enter into the Loan Agreement and the Mortgage and to accept the Guarantee as security for the repayment of the loan. It was reasonable in all the circumstances for the Plaintiff to rely exclusively upon the Final Terra Opinion in respect of, inter alia, the capacity of the Corporation to enter into the Guarantee and Mortgage, and it did so rely..."* [Emphasis added]

12. In its Amended Defence, Terra averred as follows:

> *"41...(d) It is denied that the Plaintiff relied on the Final Terra Opinion, whether exclusively or at all. The Plaintiff was aware of the risk that the Corporation may not have the power to enter into the Guarantee and/or the Mortgage, as expressly set out in the draft Terra Opinion, and knew that this risk remained even after the Final Terra Opinion. It is for this reason that title insurance was secured before money under the Loan Agreement could be disbursed. The Plaintiff advised the title insurers, Fidelity, of the risk that the Corporation might not have the power to enter into the Guarantee or the Mortgage, notwithstanding the Final Terra Opinion. Only after receiving unequivocal advice from Trott and Duncan Limited (undated, but believed to have been received by Fidelity after the date of the Final Terra Opinion) did Fidelity provided the title insurance required by the Plaintiff. Only once the insurance was in place could the loan amount be drawn down...*
>
> *43C. If, which is denied, the Defendant was negligent in providing the Final Terra Opinion, it is averred that the Plaintiff contributed to any loss that it suffered by its own negligence...."*

13. In the Amended Reply to Defence, MIF avers (at paragraph 2) that its attorneys made it clear through a 12 June 2013 email to Terra that a "*robust opinion confirming*" COH's power to lend was required because "*the provision of an enforceable mortgage is fundamental to my client's decision to lend*". It is further averred:

> *"4. In so far as the Defendant alleges in its Amended Defence that the Plaintiff did rely, or ought to have relied, either on the advice of Conyers or a 'London QC' as to the capacity of the Corporation to enter into the Guarantee or Mortgage, the Defendant knew that it was expressly agreed with the Corporation that the legal advice upon which the Plaintiff was entitled to rely as to the capacity of the Corporation was the advice provided by the Defendant and no other law firm or lawyer. The Plaintiff did so rely exclusively upon the Final Terra Opinion, and that reliance was reasonable.*
>
> *5. In so far as it is alleged in its Amended Defence that the Plaintiff either did rely, or ought to have relied, on the advice provided by Trott and Duncan Limited to Fidelity National Title Insurance Company, the Guarantee and Mortgage were executed on 9 July 2014 in reliance upon the Final Terra Opinion and held in escrow until a satisfactory title insurance policy was issued. The advice provided by Trott and Duncan Limited to Fidelity National Title Insurance Company was not provided until 14 August 2014…"*

14. In MIF's Amended Statement of Claim in the Mortgage Proceedings against COH, it is critically averred:

> *"9. Amongst the Capacity Statements was the opinion of the Defendant's attorneys, Terra Law Limited ('Terra'). Terra had been retained to advise the Defendant in respect of the Loan Agreement, the Guarantee and the Mortgage. It was agreed that the Plaintiff would be able to rely upon the opinion of Terra, the Defendant's servant or agent, as to the Defendant's capacity to enter into the Guarantee and the Mortgage."*

15. In its Amended Defence and Counterclaim, paragraph 9 is essentially denied by COH. There is considerable overlap between the issues joined in the Terra Proceedings and the Mortgage Proceedings about the extent to which MIF was entitled to (and did) place reliance on the Final Terra Opinion. However, it is only in the MIF/Terra Action that exclusive reliance on the Final Terra Opinion is alleged.

16. As a matter of initial impression:

    (a) these averments in the pleadings suggest the potential relevance to Terra's defence of what other legal advice MIF received about the capacity issue (or at least whether MIF received other advice on this matter);

    (b) the averments do appear to potentially support the decision to grant COH leave to serve Interrogatories in relation to the issue of whether MIF did indeed rely "exclusively" on the Final Terra Opinion;

(c) the pleadings also appear to suggest that the Title Insurance Documents are relevant to the reliance issue, as between MIF and Terra; and

(d) they provide no obvious support for a joint interest privilege relationship; on the contrary, they appear to be inconsistent with such a relationship.

The joint interest privilege issue

The Judge's decision

17. The Judge dealt with the joint privilege quite fully (at paragraphs 45-56) in her Ruling. The legal principles she cited with approval were set out in the following passages:

> *"51. However, Mr. Robinson submitted that MIF is entitled to assert joint interest privilege, relying on the Court of Appeal's decision in Wang and Wong v Grand View Private Trust Company Ltd [2021] Bda LR 29 where the legal principles on joint interest privilege were examined and the below passages from Thanki on The Law of Privilege (Third Edition) ('Thanki') [§6.07-6.08] and [§6.16] were approved:*
>
> > *'6.07*
> > *Joint privilege can also arise where, even though party A and party B have not jointly retained a lawyer (and only one of them is party to the relevant lawyer-client relationship), they have a joint interest in the subject matter of the communication. The defining characteristic of this aspect of joint privilege is that the joint interest must [foot note 22: omitted] exist at the time that the communication comes into existence. So joint privilege will only arise in respect of a document created during the period when the joint interest subsists; in other words, the documents must have come into being for the furtherance of the joint purpose or interest... ...*
> >
> > *6.08*
> > *If a joint interest exists then the same principles as those set out above in relation to joint retainers will generally apply. Accordingly, neither party can assert privilege as against the other in respect of communications coming into existence at the time the joint interest subsisted; hence, each party to the relationship can obtain disclosure of the other's (otherwise privileged) documents so far as they concern the joint purpose or interest [footnote 24: omitted]. However, both parties are entitled to maintain privilege as against the rest of the world. As with a joint retainer, the privilege is not lost simply because the parties subsequently fall out. Given the extent to which the existence of a joint interest might fetter the actual*

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

6.16
Insufficient joint interests or a divergence of joint interests *As stated above, in order for a joint privilege to arise the joint interest must exist at the time that the communication comes into existence. If the parties subsequently fall out and sue one another, neither of them can claim privilege as against the other in respect of any documents that are caught by the joint privilege, as the original joint interest is not destroyed by a subsequent disagreement between the parties. However, any documentation that comes into existence after a dispute arises between the parties, and thus at a time when the joint interest no longer subsists (and therefore outside the joint interest), will not be caught by the joint privilege... ...'*

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

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

53. The bottom line is that there must be a sufficient interest and a joint interest in the purpose of instructing an attorney in order for the entitlement to arise. So, the purpose of the retainer is paramount. It is on these factors that the Court of Appeal distinguished the concept of joint interest privilege from joint retainer in Wong v Grand View. Referring to Kawaley AJ's ruling, I (sitting as an Acting Justice of Appeal) said [para 99] and [paras 103-105]:

'I agree with the learned Assistant Justice Kawaley that "the assessment of whether joint interest privilege exists requires an analysis of both the subject-matter of the retainer and the relationship between the parties". However, relying on R (Ford)-v-Financial Services Authority, Kawaley AJ found that the purpose of the retainer is not the key criterion in and of itself.

Effectively, the learned judge found, as a matter of principle, that the purpose of the retainer is subordinate, in terms of importance, to the legal relationship between the parties asserting joint interest privilege and the parties directly privy to the retainer agreement.

...

Kawaley AJ applied Burnett J's criteria which (whether or not intended) could be said to apply more readily to the question of a joint retainer, rather than joint interest privilege...

It was contemplated by Burnett J in R (Ford) v Financial Services that an instructed attorney will not always perceive the full scope of potential conflicts which arise between parties to a joint retainer. Similarly, I would observe that it will also sometimes be the case that an attorney, for one reason or another, is either unaware or unappreciative of the full extent to which there is a joint interest in the instructions they receive and the advice and documents they prepare. The perspective of the attorney in these regards, may therefore be irrelevant, depending on the circumstances.

Mr. Wilson QC raised during his oral submissions the importance of distinguishing between the meaning of 'interest' and 'benefit'. I would caution against distinguishing between these terms so categorically. For example, the term "benefit" would apply to divesting Mr. YT Wang of his assets so long as that is in fact what he wanted. Under those circumstances, it may be said that the disposal of his assets was for his benefit. (See Bowstead & Reynolds on Agency (Twenty-First Edition, 2018) [3-010] where 'benefit' and 'interest' are used interchangeably.) In any event, the critical question is whether the facts and circumstances give rise to a joint interest with the retainer party."

18. Her critical findings were expressed in the following terms:

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

55. So, in my judgment, MIF and the COH did indeed have a joint interest in the purpose of instructing TERRA to provide the Final Terra

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

19. Paragraph 2 of the 27 March 2023 Order provided as follows:

> "*2. MIF and COH shared a joint interest privilege, such that MIF is entitled to the discovery it seeks in relation to Terra's decision to remove the qualification appearing in the penultimate paragraph of the Draft Terra Opinion from the Final Terra Opinion.*"

COH's submissions

20. COH's main ground of appeal was that the Learned Judge was wrong to find that joint interest privilege attached to the relevant legal advice because she failed to properly analyse the nature of the relationship between the parties. Properly analysed, the relationship was not analogous to any of the relationships previously held to give rise to joint interest privilege. This ground was developed in COH's Skeleton Argument and through oral submissions.

21. Mr Hollander KC firstly took the Court through the various documents he contended were relevant to this ground of appeal, noting that no evidence was filed in relation to the joint interest privilege issue in the Court below. The following pertinent points were made:

    - on 10 May 2013, Mr Charles Flint KC provided a (further) opinion to COH on its capacity to provide a guarantee and mortgage;
    - on 21 May 2013, Terra initially advised that COH could not provide the mortgage;
    - on 10 June 2013 Terra provided a draft, qualified opinion in relation to COH's capacity to provide the mortgage;
    - MIF's Bermudian attorneys, Conyers, marked-up the qualified Terra draft opinion and by email dated 12 June 2013 to Terra said that the requirement for a redacted copy of the London QC's capacity opinion confirming COH's power would only be dropped "*if Terra were able to provide a robust opinion confirming the same*";

- the Municipalities Act 1923 was amended in October 2013 in what the Judge described (at paragraph 13 of the Ruling) as an apparent "*effort to legitimise the Guarantee*";

- on 23 April 2014, the COH approved a Commitment Letter in relation to the proposed guarantee;

- on 14 May 2014, Terra provided a draft unqualified opinion to the attorneys of MIF and PLV, which was marked up by Conyers and returned the following day, subject to their client's comments. The comments "*were designed to ensure that the various opinions cover all of the Loan Documents*";

- the Guarantee was approved by the House of Assembly on 13 June 2014 and by the Senate on 25 June 2014;

- the Final Terra Opinion was issued to MIF on 9 July 2014.

22. It was submitted that the record demonstrated that MIF, COH and PLV were counterparties and that the Final Terra Opinion was essentially the product of commercial negotiations in relation to the relevant lending and security to be provided by COH. Having regard to when it was finalised, it made little sense to view advice given by Terra before then to COH as embraced by joint privilege. Furthermore, Terra were COH's attorneys while MIF had its own Bermudian and Florida counsel. MIF's interests lay in maximising COH's liability; COH's interests lay in minimising their liability. Their interests were not in practical terms aligned, despite a shared interest in "getting the deal done". In referring to the authorities, Mr Hollander KC submitted, *inter alia*:

    (a) the terms "joint interest" and "common interest" tended to be used interchangeably;

    (b) since the 1990s, there were fewer cases in England and Wales of common interest privilege, because the development of the concept of implied waiver had reduced the need to rely on the common or joint interest principle;

    (c) the relationship between the parties in the present case did not fall into any of the recognised categories of relationship which give rise to a joint interest in legal advice received. Such examples included:

        (i) joint venture relationships: *CIA Barca-v-George Wimpey & Co. Ltd* [1980] 1 Lloyd's LR 598; Thanki, '*The Law of Privilege*', Third edition, paragraph 6.14;

(ii) the creditor and guarantor under a guarantee in relation to a claim by the creditor to recover assets from a third party which would limit the liability under the guarantee: *Formica Ltd.-v-Secretary of State Acting by the Export Credits Guarantee Department* [1995] 1 Lloyd's LR 692 at 701;

(iii) insurer and reinsurer by virtue of a 'follow the settlements' clause: *Commercial Union Assurance Co. PLC-v-Mander* [1996] 2 Lloyd's LR 640 at 645-646;

(iv) potential donees preparing a power of attorney to be executed by the donor in relation to his personal estate in favour of his son: *Wang and Wong-v-Grand View Private Trust Co. Ltd.* [2021] Bda LR 29, at paragraphs 137-147 (this was said to be the most important case in this jurisdiction); and

(v) "*something more than a shared interest... is required before common interest privilege can be used as a sword in the manner proposed here*": *James-Bowen-v-Commissioner of Police of the Metropolis* [2018] 1 WLR 4021 at paragraph 42.

23. Terra's counsel did not orally address the Court but supported COH's appeal on this issue. The following significant submissions were set out in Terra's Skeleton Argument:

> "*22. That transaction self-evidently involved a process of negotiation whereby, in the context of the statutory provisions prevailing at the relevant time, Conyers on behalf of MIF set out what MIF required and Terra, on behalf of the Corporation, set out what it was prepared to provide. This is a fundamental and indisputable description of the purposes for which the attorneys in question were instructed. It is also fundamental to the way in which the parties were interested in the process that they were each separately represented at all times. It was a demand by MIF, to which the Corporation consented, that the Corporation's attorneys should provide an acceptable opinion which would be released to MIF, but it is clear from the process by which that came about that it was part of the negotiation which took place between two opposing parties.*
>
> *23... This case is not a case of a shared entitlement; it is a case of contractual counterparties reaching a position at which they are both prepared to contract.*

24... This was quintessentially an occasion of competing interests."

MIF's submissions

24. Mr Robinson did not contest the general legal principles arrayed against him in his oral submissions to the Court. He did not strictly need to do so as there was no criticism made of the Learned Judge's articulation of the governing legal principles. Against this background, Mr Robinson rightly focussed on how the Judge had applied the relevant principles to the factual matrix of the present case, identifying the following passage in her Ruling as critically relevant and correct:

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

25. The only ground of appeal pursued in oral argument by COH was that the Learned Judge was wrong to find that the relationship between MIF and COH in relation to the issuance of the Final Terra Opinion attracted joint interest privilege. MIF's counsel pivotally submitted in their Skeleton Argument:

> "*48. The classes of relationship are not closed but the relationship between MIF and COH had characteristics of a joint venture relationship, albeit the COH would not receive immediate financial benefit from the Bridging Loan provided by MIF pursuant to the Loan Agreement. In accordance with Wang and Wong (at [86]), it is submitted that it is sufficient that a relationship is "analogous or comparable" to a relationship that gives rise to a duty to disclose. MIF and COH cooperated in a commercial deal where MIF would provide funding to PLV and COH provided security. In the analogous relationship of a joint venture, the partners do not necessarily have the same interests – the fact is that both COH and MIF had an interest (in the success of the venture for which the opinion and associated communications were produced). Both parties' interests depended on the advice and opinion of Terra...*
>
> *57. The Loan Agreement included as a condition precedent that Terra would provide the opinion. That was the purpose for which Terra was instructed. Each*

of MIF and COH agreed to the terms of the credit agreement, which was the key contract for this part of the project for PLV to develop the hotel. It was part of the deal that both MIF and COH were party to and pursuing. Each of the parties therefore had an interest in the purpose for which Terra was instructed: at least part of each party's interest in the opinion being provided was in seeing the loan transaction complete (see Wang and Wong at [91]).

58. The Loan Agreement itself also identifies each party's respective financial interests in that. These are identified in clause 4 of the Loan Agreement. Clause 4.2(a) provides that MIF would be paid fees for disbursing the loan into escrow and clause 4.2 (b) provides that COH would be paid $900,000 upon the closing of the permanent loan (which itself depended on the provision of the Bridging Loan by MIF). Each of MIF and COH therefore stood to earn a significant payment and therefore had a financial interest in the Terra opinion being finalised, as it was a condition precedent in the credit agreement. The same Terra advice that is sought here would therefore affect the rights and interests of both MIF and COH (see Wang and Wong at [102]) and each would have a right to share in the fruits developed by pursuing it (see and Wang and Wong at [91] and Love v Fawcett & Northam [2011] EWHC 1686 (Ch) at [19]]). Whilst MIF's financial interest would be realised at an earlier stage of the transaction, each had the same interest in seeing the Terra opinion finalised – that is the subject matter of the communications ordered by the Learned Judge to be disclosed.

59. MIF and COH had a joint interest in the developer (PLV) utilising the bridge finance to attract additional finance with the ultimate goal of completing the Project. COH also had an interest in seeing the Project happen in the City of Hamilton, for whose interests it is custodian such that it entered into a Guarantee and a Mortgage by which it mortgaged a piece of land in the city. Terra pleads that COH made representations about the benefits to Hamilton in its Defence, at paragraph 27(b). The 'fruits developed' here were in the ability for the parties to the Project transaction to progress the Project to the next stage

60. The requirement for the documents to have been created in furtherance of a joint purpose is satisfied. The purpose was to complete the transaction and the provision of a robust opinion was a necessary ingredient of furthering that purpose. The joint interests of COH and MIF subsisted throughout the time that the documents in question would have been produced (See Thanki at 6.07, cited in Wang and Wong at [77]). The documents to be produced are limited to those communications and drafts in Terra's possession that were created between the Draft Terra Opinion and the Final Terra Opinion – the time period of 7 May 2013 to 9 July 2014..."

26. This framing of the nature of the joint interest which was said to have existed was clearly accepted by Subair Williams J. In oral argument, Mr Robinson met the argument that the

joint interest was only created when the Final Terra Opinion was delivered by contending that it would be unrealistic to view the facts in this way. This was, potentially, a powerful argument. The relationship relied upon was clearly formed, on MIF's case, once its Bermuda attorneys indicated that MIF would require a "*robust opinion*" from Terra.

27. In the course of argument, I put to Mr Robinson that there were likely many commercial transactions where Bermudian lawyers issued capacity opinions to counterparties who were not their clients, hardly imagining that they were in a joint interest privilege context. He appeared to agree that such opinions were not uncommon but contended that what made the present relationship unusual was the involvement of a public body in the form of COH. I found it difficult to immediately see how the public or private character of a guarantor whose lawyer provides a capacity opinion to a lender sheds light on the relationship between guarantor and lender for privilege purposes.

Findings: the legal test for joint interest privilege

28. Because the law of privilege has largely developed in response to specific issues arising in particular litigation, it is especially difficult to identify generally applicable statements of principle which can easily be applied. Subair Williams J nonetheless provided a particularly lucid summary of the legal test, in the context of the present case, in the following passage in her Ruling which has already been set out above:

> "*52. In Wong v Grand View [para 91], the Court of Appeal distilled the key elements of joint interest privilege from the judgment of Morgan J in Gary Love v Robert Fawcett and Northam Worldwide [2011] EWHC 1686 (Ch):*
>
> > *'What may be taken as the relevant high points of Morgan J's reasoning in Love v Fawcett & Northam is threefold: (i) In the assessment of a claim to joint interest privilege, the Court will focus on the purpose for which the attorneys in question were instructed and the way in which the parties concerned were or were not interested in that purpose; (ii) the sufficiency of the claimant's interest in the purpose of the instructions may be determined by the presence of a strong prima facie case of entitlement to a share in the fruits developed by the furtherance of that purpose; and (iii) joint interest privilege is founded and dependent on joint interests, not competing interests.'"*

29. The quoted passage was taken from her own Judgment in *Wang and Wong-v-Grand View PTC* [2021] CA (Bda) 3 Civ (12 April 2021). In effect, the legal test identifies the questions to be asked when seeking to ascertain whether joint interest privilege arises rather than providing the answers. Accordingly, the critical forensic exercise is the application of the legal test to the circumstances of the case at hand with a view to deciding whether or not a relationship or context gives rise to a common or joint interest in legal advice. How the

threadbare legal test as to the nature of joint interest privilege should be applied is accordingly the most important lesson to be drawn from the authorities. The threefold test adopted by the Judge in the present case is particularly apposite as the relationship of the parties does not clearly fall within any of the recognised categories of relationship which give rise to joint interest privilege. Whether joint interest privilege exists in relation to the instruction of Terra by COH to proffer a capacity opinion to MIF accordingly requires an examination of the following matters of mixed fact and law:

(a) the purpose of the capacity opinion and the parties' respective interests in it;

(b) whether the claimant has a strong *prima facie* entitlement to the fruits of the purpose;

(c) whether the interests of MIF and COH are joint as opposed to competing.

30. This practical legal test can only be properly applied with the legal underpinnings of the law of privilege kept clearly in mind. Privilege is a fundamental right designed to ensure that natural and artificial persons can consult their lawyers freely in the confidence that their consultations will not be disclosed otherwise than to persons whom they knew (or ought to have known), when consulting their lawyer, shared a joint interest in the fruits of the relevant legal advice. It flows from these legal policy imperatives that where one party has instructed a lawyer to provide advice, the joint interest privilege claimant must bear the burden of clearly demonstrating their right of access to the relevant advice.

31. The need for this overarching principle to be borne in mind when evaluating the merits of any claim to privilege is supported by a case referred to by Mr Pooles KC when addressing the waiver issue. In *B-v-Auckland District Law Society* [2003] 2 AC 736, Lord Millett observed:

> "*37. An authoritative exposition of the rationale of legal professional privilege is to be found in the speech of Lord Taylor of Gosforth CJ in R v Derby Magistrates' Court Ex p B [1996] 1 AC 487, with whom the rest of the House agreed. Lord Taylor CJ described it in these words, at pp 507 and 508:*
>
> > *'The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case.*

> *It is a fundamental condition on which the administration of justice as a whole rests. ... [It] is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors.'...*
>
> *54. If the lawyer is to be able to give his client an absolute and unqualified assurance that what he tells him will not be disclosed without his consent in any circumstances, the assurance must follow and not precede the undertaking of any balancing exercise.* "[Emphasis added]

32. The underlined passage was one of the reasons why Lord Millett concluded that the law should not require the court to carry out a backward-looking balancing exercise of competing policy considerations for and against privilege. These observations, more broadly, also help to explain the practical importance of the rule that for a joint interest to be enforceable, it must have existed at the date when the relevant advice was sought and/or received. It would be antithetical to the fundamental purpose of legal privilege if a person were to 'bare their breast' to the lawyer in circumstances where the lawyer and their client reasonably believed the communications were solely privileged, only for a court to subsequently determine that in fact a third party had a valid joint interest claim. It is through this policy lens that evidence said to support a claim to joint interest privilege must be viewed in the present case.

Findings: merits of COH's joint interest privilege appeal

33. The first issue to be evaluated was the purpose of the Final Terra Opinion and the parties' interests in it. This was a difficult question, as the Judge herself appears to have recognised. She noted (at paragraph 35 of her Ruling) that in an earlier appeal relating to the Guarantee, Bell JA observed that he "*found it surprising that MIF appears not to have relied upon advice from its own attorneys (and perhaps the point should be spelled out that MIF was represented by Bermuda attorneys in relation to this transaction), which I indicated would accord with my understanding of general practice in regard to transactions such as this one*": *Mexico Infrastructure Finance Limited-v-Corporation of Hamilton* [2017] CA (Bda) 11 Civ (at paragraph 48).

34. My own, less than crystal clear understanding of the relevant local practice, admittedly shaped by experience somewhat more recent than that of Bell JA, is that it is not unusual for one party's lawyer to provide a capacity opinion to a party who is not their client. My own superficial research suggests that, in Australia at least, this practice is an emergent one, potentially problematic and an area in relation to which clear legal rules have yet to develop: '"*Across-the-table opinions*"', Banking & Financial Services Law Association, March 2016 (https://bfsla.org/opinions/).

35. Whatever the practice may be, the absence of any previous decisions concerning joint interest privilege in a particular commercial relationship gives rise to a need for a cautious judicial approach for two reasons. Firstly, when one is looking back to the time when the advice was given (in this case, nearly 10 years ago), the joint interest claim can only validly be upheld if the relevant parties ought to have apprehended the potential claim all those years ago. Secondly, if the decision in the present case may have implications for other similar transactions, there is a need for added caution about a decision which might have unintended consequences for other market actors.

36. There is no material dispute about what the purpose of the Terra Final Opinion was (controversy focussed on the extent of reliance MIF placed on it). It was part of the consideration provided by COH, linked to the Mortgage, as security for the loans being made to PLV. It is also common ground that Terra were at all material times COH's lawyers; there is no suggestion that they were jointly instructed by COH and MIF at any point. Instead, MIF contends that the relationship was equivalent to a joint venture.

37. The contemporaneous correspondence comprehensively undermines MIF's analysis. As Mr Hollander KC submitted, it reveals a course of negotiations between counterparties, not communications between parties pursuing a joint venture. COH's capacity was a controversial issue, Terra was not initially willing to provide an unqualified opinion, Conyers made it clear that the absence of an unqualified opinion would be a 'deal-breaker' and the Final Terra Opinion was ultimately provided and the Mortgage was ultimately granted.

38. Did MIF have an immediate entitlement to the fruits of the Final Terra Opinion? This question has no significant application to the present case. The advice was not about the merits of litigation in which MIF and COH had a common interest in the sums to be recovered from the delinquent borrower. Nor did the advice relate to a development in which MIF and COH were both financially interested. It had no "fruits" in the sense contemplated by Morgan J in *Gary Love v Robert Fawcett and Northam Worldwide* [2011] EWHC 1686 (Ch) where he held:

> "19…*First, although the precise entitlement of Mr Love as against Northam is very much in dispute, I consider at this interlocutory stage that Mr Love has a strong prima facie case of entitlement to a share in the fruits of the development, so that his case for an entitlement to a share in the fruits of the development gives him an interest in the fruits of the development for present purposes. Secondly, the proposed letting and the proposed sale of the reversion were for the purpose of realising the fruits of the development. Thirdly, Mr Love was involved day to day in dealing with those matters and instructing the solicitors on behalf of Northam. Fourthly, the burden of the solicitor's charges were expected to fall on Mr Love. Fifthly, although the precise line drawn by the authorities between cases of joint interest and other cases is not made wholly clear, I find that the facts of this case place this case on the side of the line where I should recognise the existence of a*

joint interest of Mr Love and Northam in relation to instructing the solicitor in respect of the letting and the sale of the development."

39. Did MIF and COH have joint as opposed to competing interests? As I have already noted above, at first blush it seems obvious that MIF and COH had conflicting legal and commercial interests in relation to the Mortgage. MIF wished to generate interest income through lending money to PLV, but only if its recovery rights were protected as fully as possible to reduce its downside risks if a default in repayment occurred. Looking forward to the eventuality of default (which in fact, all too soon, spectacularly occurred), MIF's commercial and legal interests obviously lay in enforcing the mortgage while COH's corresponding interests obviously lay in preserving the property it had provided as security for MIF's loan. The Judge's critical finding was as follows:

> "54... *At the point in time when TERRA was instructed to prepare the Final Terra Opinion, MIF's ultimate interest in the purpose of those instructions was to obtain confirmation that it could proceed with the loan. At that point in time, it is evident that the COH were equally interested in MIF proceeding with the loan which it, the COH, was prepared to secure by way of both the Guarantee and the Mortgage.*"

40. In my judgment, that finding reflects a misapplication of the legal test as regards what constitutes a joint interest in two main respects. Firstly, and more broadly, it fails to have regard to the competing legal and commercial interests which were held by the counterparties as lender and mortgagor respectively. The Final Terra Opinion was in legal terms entirely linked to the Mortgage; the parties' respective interests in the Opinion fall to be defined by reference to that instrument. The shared interest in the loan being granted was entirely incidental and peripheral to the relevant legal advice. It is the sort of shared interest which exists in relation to a myriad of commercial transactions where parties with competing interests would never dream that their communications with their own lawyers were subject to a joint interest privilege claim.

41. The circumstances in which the Final Terra Opinion was issued by COH's attorneys to the separately represented MIF were described by Bell JA in *Mexico Infrastructure Finance Limited-v-Corporation of Hamilton* [2017] CA (Bda) 11 Civ (at paragraph 48) as "*surprising*". On any view, the joint interest privilege issue took the Court into what Clarke P described in *Wang and Wong-v-Grand View PTC* [2021] CA (Bda) 3 Civ (at paragraph 135) as a "*somewhat poorly charted sea*". Compelling evidence would have been required to justify the conclusion that communications between a proposed mortgagor and its attorneys in the course of negotiations with a proposed lender which was separately represented took place in pursuit of a common interest in the requisite legal sense. I find it impossible to conclude that at the material time COH and Terra knew or ought to have known that the counterparty in the negotiations (MIF) had a joint interest in the legal advice

being given by Terra to its client in relation to its negotiating position. The factual matrix here was in stark contrast with that in *Wang and Wong* where, as far as the human actors are concerned, the former employees of the co-founder of a corporate group instructed lawyers to prepare a document to be executed by their former 'boss' in relation to his personal affairs.

42. Secondly, and more technically, the critical holding was that a joint interest existed "*[a]t the point in time when TERRA was instructed to prepare the Final Terra Opinion*". Mr Robinson astutely recognised that this finding was inconsistent with the Order which was sought and made. Communications between COH and Terra in relation to the removal of the qualification, which appeared in their 10 June 2013 draft opinion and was absent from the Final Terra Opinion dated 9 July 2014 (and indeed the 14 May 2014 draft opinion), necessarily cover a long span of time before Terra was actually instructed to prepare the Final Terra Opinion. Even if a joint interest was created when the instructions to remove the qualification were given, this would not embrace communications between Terra and COH between 10 June 2013 and the unidentified date when instructions were ultimately given (presumably between 14 May 2013 and 9 July 2014) for the Final Terra Opinion to be issued. The Order actually made by the Supreme Court was that "*MIF is entitled to the discovery it seeks in relation to Terra's decision to remove the qualification appearing in the penultimate paragraph of the Draft Terra Opinion from the Final Terra Opinion*". The relevant request (set out in Annex 1 to MIF's 12 January 2021 Summons in the MIF/Terra Action) was for correspondence, etc., in relation to:

> "*i. whether or not the CoH had the power to enter into the Guarantee or the Mortgage; ii. whether the Guarantee and Mortgage were valid and binding as against the CoH...*"

43. This request clearly sought disclosure of a broader range of documents than the Judge ultimately held was covered by joint interest privilege.

44. In summary, in my judgment there was no sufficient legal or factual basis for finding that a joint interest was shared by MIF and COH in relation to how Terra came to remove the qualification in its 14 May 2013 draft opinion from the Final Opinion issued on 9 July 2014. For these reasons I would allow COH's appeal.

The waiver of privilege issue

The Judge's findings

45. The Judge fairly viewed Terra's case on waiver as being based on the essential premise that the nature of MIF's case, that it had relied exclusively on the Terra Final Opinion, was such as to waive the privilege that otherwise attached to any legal advice it received in relation to that opinion. The Affidavit of Nicola Hennessy sworn in support of Terra's Summons identified five issues to be determined in the MIF/Terra Action, including (a)

the extent to which MIF actually relied upon the Final Terra Opinion, and (b) the advice MIF received from other legal advisors. The Judge summarised the submissions on waiver (at paragraph 66) as follows:

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

46. The Judge then referred to Mr Chudleigh's submissions on the broad relevance test for discovery articulated in *Compagnie Financiere du Pacifique-v-Peruvian Guano* (1882) QBD 55, before referring to Mr Robinson's submissions as to why waiver did not apply (at paragraph 69). The case MIF's counsel is said to have relied upon is *Paragon Finance Plc and others-v-Freshfields* [1999] 1 WLR 1183. The following observations of Lord Bingham CJ (as he then was, at page 1188) were set out in the Ruling:

> "*When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound. This is an implication of law, the rationale of which is plain. A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it. He cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence. But, since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware.*
>
> *Thus, on the present facts, by bringing these proceedings the plaintiffs impliedly waived any claim to legal professional privilege in relation to confidential communications between them and Freshfields concerning the transactions*

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

47. The cited passage contains both a statement of the principles governing when waiver is likely to occur and an application of those principles to the case before the Court of Appeal of England and Wales. In the Supreme Court Judgment in this case, the Judge (at paragraphs 70-71) began by addressing the merits before recording the following somewhat cursory statement of the governing principles:

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

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

MIF's submissions on the waiver issue

48. MIF's Notice of Appeal contained two main grounds which can be distilled down into the following essential propositions:

    (a) the Learned Judge was wrong in law to hold that the mere fact that a party was influenced by other advice which was relevant to a professional negligence claim was sufficient to waive privilege in relation to such advice;

    (b) further and alternatively the Judge was wrong to apply this Court's decision in *Thyssen-Bornemisza* [1998] Bda LR 11 which was either distinguishable or no longer good law.

49. A third ground complained that the decision to grant COH leave to serve interrogatories was wrong in law, a complaint which will be considered separately below in the context of the MIF/COH Action in which the relevant application was made.

50. MIF relied pivotally on the English legal position on waiver as set out in *Paragon Finance Plc and Others v. Freshfields* [1999] 1 WLR 1183, at 1193 and in *Farm Assist Limited (In Liquidation) v Secretary of State for Environment Food & Rural Affairs* [2009] PNLR 16 at [11]-[38]. It was submitted that this Court's wider application of the waiver principle in *Thyssen-Bornemisza-v-Thyssen-Bornemisza* [1998] Bda LR 11 should be viewed as limited to its facts or treated as having been overruled by the later English authorities.

51. In oral argument, Mr Robinson forcefully argued that the later English cases demonstrated that the doctrine of implied waiver was not available on flexible, policy-driven grounds. The earlier *Thyssen* case pivotally turned on a finding that it was unconscionable for the plaintiff to advance a case of undue influence based on presumed undue influence in circumstances where the burden lay on the defendant to show that the impugned settlement was vitiated by undue influence and the claim to privilege had the effect of depriving the defendant of the ability to demonstrate that the plaintiff had in fact received independent legal advice in relation to the impugned transaction. It was submitted that assuming this decision to be right in its factual and legal matrices, the present case was different. MIF bore the burden throughout of establishing its claims.

Terra's submissions on the waiver issue

52. Mr Pooles KC most broadly submitted that implied waiver should be regarded as a "soft-edged" principle by reference to a passage in *Paragon Finance-v-Freshfields* [1999] 1 WLR 1183 at page 1192F. He accepted, however, that the *Thyssen* case had adopted the more fluid fairness principle which was applied in some Commonwealth countries, but had now been rejected in England. However, he referred the Court to the following observations of the Privy Council in *B-v- Aukland District Law Society* [2003] 2 AC 736: *Farm Assist Limited (In Liquidation) v Secretary of State for Environment Food & Rural Affairs* [2009] PNLR 16

> "*55. Their Lordships do not overlook the fact that a different approach has been adopted in Canada, where the Courts do conduct a balancing exercise by reference to the facts of the particular case. The common law is no longer monolithic, and it was open to the New Zealand Court of Appeal to make a deliberate policy decision to depart from the English approach on the ground that it is not appropriate to conditions in New Zealand. Had it done so, their Lordships would have respected its decision. But it did not. All the members of the Court of Appeal considered that they were applying established principles of English law. Their Lordships respectfully consider that the majority misunderstood them.*" [Emphasis added]

53. Terra's counsel further argued that although this was not a retainer case, it was analogous to such a case. However, the best support he could find for the proposition that this was enough to engage the implied waiver principle were the following observations of Lord Bingham in *Paragon* (at page 1192F), remarks which were relied upon by the Judge at paragraph 72 of her Ruling. All Lord Bingham's remarks did was to acknowledge the possibility that implied waiver might arise in relation to advice given by lawyers other than the lawyer being sued. The caveat still assumed that the implied waiver would arise in the context of a claim brought by a plaintiff against a solicitor who the plaintiff had previously retained:

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

54. The most illuminating observation made by Mr Pooles KC was that there was a tension between the broad approach MIF espoused in relation to joint interest privilege and the narrow approach it contended for in relation to implied waiver. He suggested that the Court might find it difficult to adopt such an inconsistent view of the law. I found this observation illuminating because it helped to reveal how, in relation to interlocutory applications in particular, adversarial argument may sometimes be an impediment rather than an aid to legal clarity.

Findings: the legal requirements for waiver

55. This part of the appeal requires this Court to at least consider, if not decide, whether the strict limitations imposed on the doctrine of implied waiver under English law reflect the position under Bermudian law. The current English law position clearly is that implied waiver is only recognised as arising when the plaintiff sues its former lawyers and is deemed to have waived the right to assert privilege against such attorneys: *Paragon Finance-v-Freshfields* [1999] 1 WLR 1183; *B-v-Auckland District Law Society* [2003] 2 AC 736; *Farm Assist Limited (In Liquidation) v Secretary of State for Environment Food & Rural Affairs* [2009] PNLR 16. Required to choose between this approach and the more flexible interests of justice approach adopted by this Court in Thyssen-*Bornemisza* [1998] Bda LR 11, the Judge attempted to reconcile both principles.

56. Generations of Bermudian lawyers have regarded it as trite that the common law of Bermuda corresponds to that of England and Wales save where those principles have been modified by local statute law or local circumstances, or ought to be treated as having been so modified. Mr Pooles KC shied away from directly inviting this Court to depart from the English approach, adopting the somewhat ambiguous stance of contending:

    (a) that the circumstances of this case were analogous to that of a client suing its former solicitor as in *Paragon*; and

    (b) that the Judge correctly followed the approach in *Thyssen-Bornemisza.*

57. Before considering the application of the relevant principles to the facts of the present case, it is necessary to consider what the general position is as a matter of Bermudian law. Apart from this Court's decision in *Thyssen*, no basis for this Court declining to follow the English common law approach to waiver of privilege was advanced. I cannot readily identify any obvious arguments in favour of Bermuda ploughing its own jurisprudential furrow in this regard. The overarching policy question is whether or not legal professional privilege is, or should be, recognised as a fundamental feature of our legal system, as it is in England and Wales. This Court implicitly, if not explicitly, confirmed that Bermuda law is aligned with the English law of privilege when dealing with joint interest privilege in a different context in *Re Jardine Strategic Holdings Limited* [2024] CA (Bda) 7 Civ (March 2024). Accordingly, subject to considering the implications of the *Thyssen* case, I find that implied waiver is ordinarily limited to the specific context of a client suing a former lawyer.

58. One potential legal basis for modifying the common law approach to waiver would be where the application of the common law would interfere with entrenched fundamental rights. However, the starting assumption would have to be that legal advice privilege rights are fortified by the privacy provisions of section 7 of the Bermuda Constitution, although such rights could admittedly be overridden by ordinary legislation based on a qualifying countervailing public interest. When legal advice privilege is invoked in the course of civil litigation, it is possible to view the assertion of a claim to legal advice privilege as being

similarly grounded in the claimant's fair hearing rights. It is generally recognised that fair hearing rights are entitled to generous protection, save that they cannot be exercised by one litigant in a way which is inconsistent with a legitimate exercise of such fair hearing rights. By way of illustration, Popplewell J (as he then was) in *JSC JTA Bank-v-Ablyazov* [2014] EWHC 2788 (Comm) considering the iniquity exception to privilege observed:

> "*97. Privilege in communications with lawyers also potentially engages the right to a fair trial under Article 6, because the European Court of Human Rights has held that the concept of a fair trial consists of various elements which include the rights of the defence, equality of arms, the right of access to the courts, and the right of access to lawyers in civil and criminal proceedings, all of which may be infringed if lawyers are unable to carry out their task of advising, defending and representing their clients satisfactorily as a consequence of the invasion of privilege: see* ***Ordre des Barreaux*** *at [31]-[32]. But here it seems self-evident that Article 6 rights cannot be invoked to protect communications in furtherance of a purpose which is the very opposite of securing a fair trial, namely the perversion of the course of justice by concealment, perjury and the defiance of court orders.*" [Emphasis added]

59. Sections 6 and 7 of the Bermuda Constitution are substantially derived from articles 6 and 8 of the European Convention on Human Rights (incorporated into UK domestic law by the Human Rights Act 1998 (UK)). It seems reasonable to assume that the post-1998 English cases in relation to implied waiver of privilege have developed in a way which tacitly builds upon the conception that legal professional privilege is a fundamental right which can only be compromised in exceptional circumstances. Once litigation and legal advice privilege are understood to be an inherent part of litigants' fundamental fair hearing and privacy rights, respectively, it becomes obvious that exceptional circumstances will be required to justify the conclusion that the assertion of privilege is inconsistent with the fair hearing segment of fundamental rights.

60. My consideration of these points not addressed in the course of argument has in no way altered the conclusions I would in any event have reached based on the authorities canvassed by counsel. These overarching legal policy considerations merely provide a helpful conceptual backdrop for both (1) understanding the strictness of the English common law approach to waiver of privilege, and (2) evaluating the effect which should be given to Thyssen-*Bornemisza-v-Thyssen-Bornemisza* [1998] Bda LR 11 today.

61. Against this background, I have no difficulty in concluding that *Thyssen-Bornemisza* was correctly decided and that the legal basis of the decision, properly understood, is equally valid today. As Mr Robinson correctly submitted, the core principle which this case stands for is closely connected to its factual and legal matrix. Because the presumption of undue influence was brought into play by the claim the plaintiff had chosen to bring, his reliance on privilege made it impossible for the defendant to contest the claim by obtaining

discovery of the legal advice the plaintiff had received. This was described as "*unconscionable*" not, in my judgment, in an abstract, moral or equitable sense, but because the assertion of privilege in that context fundamentally undermined the possibility of a fair trial.

62. In summary, implied waiver will in most cases only arise where the plaintiff has chosen to sue his former lawyer and has placed their relationship in issue in civil proceedings. However, in any other case where privilege is used in a way which would undermine the possibility of a fair trial to a substantial extent, implied waiver may potentially be found to have occurred. The iniquity exception is probably the most clearcut potential basis for extending the implied waiver principle beyond its usual parameters.

Findings: the merits of MIF's grounds of appeal on the waiver issue

63. Having regard to the grounds on which I have rejected the notion that the relationship between the parties created a joint interest shared by COH and MIF in the advice Terra gave to its sole client, I am bound to reject the submission that the relationship between Terra and MIF was analogous to that of a solicitor and client. There is simply no evidential basis for drawing such an analogy. The impugned decision cannot accordingly be supported by reference to the ordinary common law rule which limits implied waiver to claims brought by former clients against their lawyers.

64. It remains to consider whether the Learned Judge correctly applied this Court's decision in *Thyssen-Bornemisza,* which provided a potential alternative basis for upholding Terra's implied waiver submissions. It is helpful to return to her key findings on this issue:

> "72. *I accept that the test for determining whether there is an implied waiver of legal professional privilege is not limited to the broader issue of justice and fairness. What is pivotal is whether those communications passing between MIF and CDP were so interwoven into the question of reliance and causation of damage and loss by TERRA that the Court could not plausibly determine these relevant issues without first examining what, if any, advice MIF also received from CDP on the matters which were the subject of the Final Terra Opinion and prior to the entering of the loan transactions. So this case is nearer to the category of cases envisaged by Bingham CJ when he contrasted the facts of Paragon Finance Plc and Others v Freshfields from those applicable to his following statement [1192-F]:*
>
> > '*...We would not wish to exclude the possibility that there may be factual situations in which a plaintiff who sues his solicitor may be taken to have impliedly waived privilege in respect of written legal advice from other lawyers which he agreed to that solicitor seeing for the purposes of the matter on which he was currently seeking advice from him.*' ..

> *80. In Thyssen-Bornemisza v Thyssen-Bornemisza the Court of Appeal ultimately focused on whether the withholding of the sought-after privileged material would effectively obstruct the Court from properly adjudicating the relevant matters in issue. The exercise of identifying those issues is non-discriminatory between the issues raised by the Plaintiff in proving its case or by the Defendant in carving out its defence. As Dillon LJ put it in Lillicrap v Nalder & Son [1993] 1 WLR 94 (and cited by the Court of Appeal in Thyssen-Bornemisza v Thyssen-Bornemisza):*
>
> *'...the waiver must go far enough, not merely to enable the plaintiff to establish his cause of action, but to enable the defendant to establish a defence to the cause of action if he has one.'*
>
> *81. In the present case, I do not see how the Defendant would be reasonably able to challenge MIF on the issues relevant to its defence, namely the question of reliance and causation, without TERRA's access to any material in the Plaintiff's possession which may show that MIF received independent legal advice on the very same factual matters which are the subject of this litigation prior to its execution of the loan transactions resulting in loss and damage. It seems to me that the question of MIF's independent legal advice on the lawfulness of the Guarantee and the Mortgage is not only relevant to the Defence case but is so essential to the question of causation that the Plaintiff must be taken to have implicitly waived its entitlement to legal professional privilege in relation to any legal advice it received on the lawfulness of the Guarantee and the Mortgage prior to entering into those transactions."*

65. Firstly, the Judge was correct to reject the proposition that broad notions of justice and fairness were sufficient to give rise to implied waiver of privilege. Secondly, she was also correct to appreciate that Lord Bingham's *obiter dicta* in *Paragon* did not provide a coherent basis for finding that implied waiver of privilege had occurred. Thirdly, Subair Willams J was also correct to find that this Court's decision in *Thyssen* provided the only potential justification for escaping the strictures of the general English common law rule. However the test she actually applied was broader than the principle applied in *Thyssen* based on the mere fact that:

> *"...the Court could not plausibly determine these relevant issues without first examining what, if any, advice MIF also received from CDP on the matters which were the subject of the Final Terra Opinion and prior to the entering of the loan transactions... It seems to me that the question of MIF's independent legal advice on the lawfulness of the Guarantee and the Mortgage is not only relevant to the*

Defence case but is so essential to the question of causation that the Plaintiff must be taken to have implicitly waived its entitlement to legal professional privilege..."

66. As Mr Robinson rightly pointed out, Terra was not subjected to any significant unfairness because, unlike in *Thyssen*, MIF as the Plaintiff bore the entire burden of proof. If "*the question of MIF's independent legal advice* [was] *essential to the question of causation*", as the Judge believed, this would only result in serious prejudice to MIF, who would not be able to establish an essential element of its case without voluntarily waiving privilege. In *Thyssen*, allowing the plaintiff to assert its privilege claim was only "*unconscionable*" because the defendant would have been seriously prejudiced by being deprived of probably the only realistic means of displacing the presumption of undue influence.

67. In substance, in a mirror image of the approach adopted by the Court in relation to joint interest privilege was adopted on the waiver issue. The importance of legal professional privilege as a fundamental right was given too little emphasis and general principles of trial fairness were given too much weight. The way the cross-applications on privilege were argued did not help to clarify the legal position. In the first instance, MIF was vigorously contending for COH's privilege rights to be narrowly construed; in the second instance, Terra was vigorously contending for MIF's privilege rights to be narrowly construed. All this interlocutory legal jousting, taking place on the deck of a ship in a "*poorly charted* [legal] *sea*", only served to obscure the route ahead.

68. For these reasons, I find that MIF's appeal on the implied waiver ground is allowed and the Judge's decision must be set aside.

The leave to COH to serve Interrogatories issue

The Judge's decision

69. The Judge dealt with COH's application for leave to serve Interrogatories at paragraphs 83-92 of her Ruling. She summarised the governing legal principles as follows (at paragraphs 83-85):

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

'26/1 Discovery by interrogatories
1(1) A party to any cause or matter may apply to the Court for an order-

(a) giving him leave to serve on any other party interrogatories relating to any matter in question between the applicant and that other party in the cause or matter, and

(b) requiring that other party to answer the interrogatories on affidavit within such period as may be specified in the order.

(2) A copy of the proposed interrogatories must be served with the summons, or the notice under Order 25, rule 7, by which the application for such leave is made.

(3) On the hearing of an application under this rule, the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs; and in deciding whether to give leave the Court shall take into account any offer made by the party to be interrogated to give particulars or to make admissions or to produce documents relating to any matter in question.

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

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

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

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

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

70. The reasons for granting leave to serve some but not all of the proposed interrogatories were concisely but clearly expressed:

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

87. Questions 3 and 4 provide as follows:

'...

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

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

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

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

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

MIF's submissions

71. MIF's grounds of appeal may be summarised as follows. Leave to serve Interrogatories was not necessary for the fair disposal of the action within Order 26 rule 1(3) because MIF did not need to prove exclusive reliance on Terra's advice. At first blush, this appeal appeared to lack conviction. In oral argument Mr Robinson advanced an additional point and referred to a supplementary authority ('*Matthews and Malek*', paragraph 13-14) which did call for some evaluation. It was contended, as I understood it, that answering the question set out in Interrogatory 4 as to whether advice was provided by any particular firm on a specific topic constituted an impermissible request for privileged material. In their supplementary written submissions, MIF's counsel argued (after citing *Financial Services Compensation Scheme-v-Abbey National Treasury Services, plc* [2007] EWHC 2868 (Ch) and *Brown-v-Bennett* (No 3) , The Times, 4 January 2002):

> "*13. In the case of the question sought by Interrogatory Four to be answered by MIF, the precise scope of legal advice provided is included in the question and as such answering the question would necessarily reveal the subject matter of any advice given.*"

COH's submissions

72. Mr Hollander KC responded to this appeal with two short points. Firstly, Order 26 rule 1(3) conferred on the Judge discretion to determine what was "*necessary for the fair disposal*" of the case. MIF had failed to identify any error of principle in the decision made. Secondly, it was disputed that revealing the fact of having received advice on a topic invaded MIF's privilege. COH's counsel referred the Court to *Lorely Financing (Jersey) No 30 Ltd-v-Credit Suisse Securities (Europe) Ltd* [2023] 1 WLR 1425. Replying to MIF's supplementary submissions, Mr Hollander KC argued that *Financial Services Financial Compensation Scheme* was a decision on a different point and the actual decision in *Brown-v-Bennett* supported COH's case on this point.

Findings: merits of grounds of appeal

73. There is no dispute as to the governing legal principles under Order 26 rule 1, nor any suggestion that the Learned Judge misunderstood them. Paragraph (3) of the rule provides that "*the Court shall give leave as to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs*". In my judgment it was open to the Judge to conclude that the relevant questions were "*necessary...for disposing fairly of the matter*".

74. I summarily reject MIF's complaint that this decision was not open to the Judge to reach because the Plaintiff does not have to prove exclusive reliance. This means that the appeal

in respect of Interrogatory 3 must be dismissed. The claim to privilege must be considered in relation to Interrogatory 4.

75. The question in this case interrogates whether advice was received by MIF from "*CD&P or any other law firm... on the legal capacity of the Defendant to grant a guarantee or provide property as security*". The objection in this case is that answering this question would reveal the topic on which advice was sought and given, even if it did not reveal what the advice was.

76. My instinctive initial response was that whether or not advice was received on a particular matter, particularly a transaction which it is common ground was actually consummated, sheds no light whatsoever on what that advice was, and is not protected by privilege. However, my provisional view that this ground of appeal should summarily be dismissed shifted on a careful re-reading of the supplementary authority which Mr Robinson provided after the hearing. A superficial reading suggests that the principle the case supports is clearly distinguishable because the principle was expressed in a different factual matrix. On one view however, the principle articulated applies with equal force to the circumstances of the present case.

77. David Richards J (as he then was) in *Financial Services Financial Compensation Scheme Ltd-v-Abbey National Treasury Services, Plc* [2007] EWHC 2868 was required to decide whether or not certain correspondence between a litigant and their lawyers was privileged. His pivotal finding was that the nature of such communications was that they were in principle privileged; it mattered not that the contents of the advice, if any, were not revealed by the documents in question:

> "*11. Turning to the individual passages for which privilege is claimed, I start with questions 6 and 7 and the answers to them. Mr Caird states that questions 6 and 7 'identify the narrow questions on which the legal department has advised' and goes on to state that, when read with their answers, questions 6 and 7 reveal the substance of the legal advice given. In my judgment, the first of these grounds justifies the claim to privilege. The privilege attaches equally to communications by the client to the lawyer as to communications from the lawyer to the client: see the passage cited above from Three Rivers DC v Bank of England (No.5). If a client writes to his lawyer in terms asking for advice on a particular question, the communication is privileged, whether or not any advice is then given. Likewise, any internal record of the advice requested is privileged. If the narrow questions identified in questions 6 and 7 were posed by FSCS to its legal department, those questions record the substance of that request. Alternatively, if a more general request for advice was made to the legal department, which in turn identified the narrow question, or questions which need to be addressed, the questions record that part of the advice given by the legal department which again is privileged.*" [Emphasis added]

78. MIF submits that it matters not that discovery is not being sought in the present case of documents evidencing communications between MIF and its attorneys. The principle that such communications are privileged, even if no legal advice was even received in response thereto, is clearly engaged by Interrogatory 4. This is because the relevant question seeks to interrogate communications between MIF and its attorneys and to inquire whether or not legal advice was received in relation to a particular issue. In *Lorely Financing (Jersey) No 30 Ltd-v-Credit Suisse Securities (Europe) Ltd* [2023] 1 WLR 1425, upon which Mr Hollander KC relied, it was held that information about what individual employees of a party were authorised to communicate with solicitors was not (in the circumstances of that case) automatically privileged. Males LJ most pertinently observed:

> "*54. In the light of these principles, and in agreement with the judge, I would reject Loreley's claim to privilege for the material concealed by Redaction 6. As I have indicated, the claim is advanced solely on the ground that the identity of those giving instructions on behalf of Loreley is inherently privileged. It is not suggested that disclosure of these individuals' identity will reveal the content of any advice sought or given in relation to this litigation, or that the material redacted will disclose any information apart from the identity of the individuals to whom RPC would report and from whom it would take instructions. Without more, that information is not covered by litigation privilege.*" [Emphasis added]

79. Unlike in *Lorely*, the essence of MIF's complaint in relation to this appeal is that Interrogatory 4 seeks to ascertain "*the content of any advice sought or given*" in relation to the COH capacity issue. *Brown-v-Bennett* (No 3), The Times, 4 January 2002 does not assist COH either. The ratio of the judgment of Neuberger J (as he then was) in that case was that counsel could be asked whether he had seen certain documents because the relevant documents were not themselves privileged. Not without some difficulty, I find that it is clear that Interrogatory 4 was impermissible because it sought to require MIF to reveal whether it had sought advice on a particular legal issue. Even the fact that such communications occurred is privileged. I reach this conclusion primarily on the basis of arguments that were not advanced as fully before the Judge.

80. MIF's Interrogatories appeal is allowed in relation to Question 4. Since there will be no answer to Interrogatory 4, it follows that Interrogatories 5i and 5ii will not fall to be answered either.

The Title Insurance Documents issue

The Judge's decision

81. The Judge dealt with this issue as follows in her Ruling:

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

Terra's submissions

82. Terra's grounds of appeal may be summarised as follows. The Judge erred in finding that the Title Insurance Documents were not relevant to the issues in the action having regard to their obvious relevance to the question of the extent of reliance MIF placed on the Final Terra Opinion.

83. The following arguments were set out in Terra's Skeleton Argument:

> "30. *Terra's appeal in this regard turns solely upon the documents relating to the Plaintiff's attempts to secure title insurance. The Court will be well aware that, in the original draft report, Terra had expressly referred to a need for title protection insurance. Whilst that reference was excluded from the final opinion, Terra specifically relies upon the fact that MIF clearly considered that such insurance was necessary. Indeed, MIF first sought title insurance from Stewart Title Insurance Company ("Stewart") and, when Stewart refused to provide cover without an exclusion in the event that the Corporation lacked capacity to enter into the mortgage and/or the guarantee, MIF sought (and obtained) insurance from Fidelity National Title Insurance Company ("Fidelity").*
>
> *31. MIF has disclosed certain of the correspondence between itself and Stewart / Fidelity, but not its entirety. The Learned Judge concluded that she could not see how 'the details of the background to the plaintiff's securing of title insurance is relevant to the issues in these proceedings'. With respect, any statement made to insurers by MIF as a proposer in respect of such cover is likely to reflect both MIF's approach to the transaction as a whole and its assessment of the risk thereof, both of which are likely to shed considerable light upon both MIF's reason for obtaining the Terra Opinion, and its disposition to place any reliance upon it, let alone the complete reliance asserted in the pleadings. This is positively highlighted by the change of insurer. This is a very short point but, with respect to the Learned Judge, one to which she gave*

inadequate consideration. The relevance of this material demanded an order for discovery.

84. Mr Pooles KC in oral argument aptly described the point as a short one. The complaint raised an error of law. Title insurance had been part of the transaction and was relevant to both reliance and causation.

MIF's submissions

85. Mr Robinson in oral argument was unable to add any flesh to the bare bones of the assertion that these documents were not relevant to the negligence claim based on the Final Terra Opinion. The point was articulated in MIF's Skeleton Argument as follows:

> "*MIF's claim is in negligent misstatement. The question of reliance in that context goes to the establishment of a duty of care. Terra admits it had a duty of care to MIF. If a party obtains insurance for a risk that does not absolve a tortfeasor of their duty of care. MIF cannot have been said under any circumstances to have 'relied' on its insurance as that term is understood in the context of negligent misstatement. Insurers do not provide advice on capacity. In any case the title insurance was contractually to be obtained subsequent to the relevant negligent advice given by Terra (clause 3(b) of the Loan Agreement).*"

Findings: merits of grounds of appeal

86. This short point was not an entirely straightforward one for legal minds not steeped in the law of negligence to easily process. Mr Pooles KC somewhat dismissively rebuffed my query from the Bench as to whether the Title Insurance Documents were relevant to quantum; no they were not, as a matter of principle, he responded. The following matters are particularly pertinent to the analysis:

    (a) in paragraph 68 of her Ruling, the Learned Judge set out the broad relevance test famously articulated by Brett LJ in *Compagnie Financiere du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55 ("*...every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences...*");

(b) the following cogent articulation of how issues of reliance and causation are generally relevant in similar claims was set out in paragraph 40 of Terra's Skeleton Argument filed in the Supreme Court:

"As with any transaction where it is alleged that a party relied on a particular representation, it will be important to examine the totality of evidence relating to the transaction in order to ascertain the true extent of the representee's reliance (if any) on the representation in question and the causative effect (if any) of the representation. For example, it will be important to establish the extent to which the representee recognised the risks inherent in the proposed transaction and to examine the steps it took to address such risks.... Likewise, where the representee suffers a loss, it will be necessary for the representee to establish a causal connection between the alleged misrepresentation and the loss, which will require an investigation into the true cause of the loss by reference to contemporaneous documents...";

(c) the same Skeleton explained the Title Insurance Documents' relevance in part in the following terms:

"43...communications between MIF and Stewart, Fidelity and/or any insurance broker and MIF's attempts to procure insurance to protect it from the same risk that was the subject of the Final Terra Opinion, are plainly relevant to matters in question in the Terra Proceedings. MIF's insistence on title insurance is plainly relevant to the question of the extent to which it relied on the Final Terra Opinion, if at all, and communications between MIF and Stewart, Fidelity, and/or any insurance broker plainly satisfy the Peruvian Guano test...";

(d) causation is an important issue because of Terra's contributory negligence defence which brings into play the extent to which MIF was aware of the risk that COH might not have capacity to enter into the transactions.

87. In contrast, MIF's submissions on this issue before the Supreme Court were entirely lacking in substance in terms of challenging the relevance of the documents sought. Three points were advanced (at paragraphs 20-22):

(a) it was common ground that MIF had concerns about COH's capacity, so this issue was not in dispute;

(b) issue was joined with Terra's contention that the fact that title insurance had to be in place before the funds were released was indicative of a lack of reliance on the Final Terra Opinion; and

(c) the discovery sought (communications of MIF with insurance brokers) was not necessary for the fair disposal of the matter and would not advance Terra's case.

88. These arguments were not responsive to the specific discovery application in the sense that they distorted the boundaries of both the broad relevance test and the limited role of the necessity requirements of Order 24 rule 8. Mr Robinson did not have the temerity to rehearse these arguments before this Court.

89. In my judgment the Judge erred in law in concluding that the Title Insurance Documents were not relevant and need not be disclosed. Accordingly, I would allow Terra's appeal on this issue.

Summary

90. In summary I would dispose of the four appeals as follows:

(a) I would allow COH's appeal against paragraph 2(a) of the Supreme Court's 27 March 2023 Order and the finding that COH and MIF shared a joint interest privilege. Paragraph 2(a) of the said Order should be set aside. I would order instead that MIF is not entitled to discovery in relation to why the qualification was removed from the draft Terra Opinion because the parties did not share a joint interest privilege;

(b) I would allow MIF's appeal against paragraph 1(a) of the Supreme Court's 27 March 2023 Order and the finding that MIF implicitly waived its right to claim privilege in respect of any independent legal advice it received in relation to the Guarantee and the Mortgage before it executed the loan documents. Paragraph 1(a) of the said Order should be set aside. I would order instead that MIF did not implicitly waive its right to claim privilege through advancing its case of reliance on the Final Terra Opinion;

(c) I would allow MIF's appeal against paragraph 3(a) of the Supreme Court's 27 March 2023 Order in respect of Questions 4, 5i and 5ii but dismiss the appeal in relation to Question 3;

(d) I would allow Terra's appeal against paragraph 1(c) of the Supreme Court's 27 March 2023 Order which dismissed Terra's application for specific discovery of the Title Insurance Documents on the grounds of irrelevance. I would order instead that Terra's said application should be granted.

BELL, JA

91. I agree.

CLARKE, P

92. I, also, agree.

93. In relation to the question of joint interest privilege I would add a few words of my own. The essence of the judge's judgment in respect of joint interest is to be found in the following paragraphs:

> "*54. In this case, the purpose of TERRA's instructions to prepare a legal opinion was to provide MIF with the assurance it sought to confirm the COH's legal entitlement to offer the Guarantee and to mortgage the Car Park as security for the loan. At the point in time when TERRA was instructed to prepare the Final Terra Opinion, MIF's ultimate interest in the purpose of those instructions was to obtain confirmation that it could proceed with the loan. At that point in time, it is evident that the COH were equally interested in MIF proceeding with the loan which it, the COH, was prepared to secure by way of both the Guarantee and the Mortgage.*
>
> *55. So, in my judgment, MIF and the COH did indeed have a joint interest in the purpose of instructing TERRA to provide the Final Terra Opinion at the time during which those instructions were first given. The fact that MIF and the COH now find themselves in adversarial litigation about the validity of the Mortgage does not destroy the original joint interest they shared in the purpose of instructing TERRA to provide the Final Terra Opinion. Also, it matters not that TERRA was not jointly retained by MIF and the COH, and it matters not that MIF had its own attorneys whose advice they may or may not have sought or relied on in relation to the same subject-matter.*
>
> *56. For these reasons, I find that MIF is entitled to the discovery of the documents it seeks on its summons in relation to "the Defendant's decision to remove the qualification appearing in the penultimate paragraph of the Draft Terra Opinion from the Final Terra Opinion.*"

94. I have no doubt that both MIF and COH were interested in a general sense in completing the transaction whereby MIF lent $18 million to PLV, secured (as it was thought) by the Guarantee and Mortgage given by COH. But the fact that they were both so interested does not mean that MIF and COH enjoyed a joint interest privilege in advice given to COH so that COH cannot maintain any claim to privilege in relation to that advice as against MIF. The joint interest must be such that it gives rise to a right to obtain access to what would otherwise be privileged documents.

95. There are a number of reasons why, in my judgment, such a joint interest privilege does not exist.

96. First, while both parties wished to complete the transaction, they were counterparties on opposite sides. There was no joint retainer or anything like it. Nor was there any sort of relationship between them. Terra were the attorneys for COH. CDP (and a firm of Miami lawyers) were the attorneys for MIF. The respective lawyers were each looking after the interests of their own clients and, presumably, drafting with a view to securing for their clients the best result possible, which would not be the same as the best position possible for the counterparty. Thus, in relation to the making of the agreement, the interests of the parties were not aligned. MIF's interest was in being paid under the loan, obtaining the best obtainable interest rate, and enjoying first class security, against which enforcement could, if necessary, be made. COH's interest was in the project, and in paying the lowest possible rate. Further, if PLV failed to pay, MIF would be claiming against COH under the Guarantee and the Mortgage. The interest of MIF would be to enforce the liability and of COH to refute it.

97. These positions remained from the beginning of the negotiations about the Terra Law Legal Opinion, starting with the provision of the Draft Opinion on June 10, 2013, until the final version was provided and the relevant agreements were made on July 9, 2014. It is not wholly easy to see from the judge's judgment when it was that she thought that the joint interest incepted. In her Ruling, it would appear to be from the date when Terra was instructed to prepare the Final Terra Opinion. But the order which she made plainly extended over a wider period, possibly from June 10, 2013.

98. Counterparties are not usually to be taken to have a joint interest privilege (presumably, if it exists, working either way). Nor does it seem to me that the fact that there were communications between CDP and Terra as to what CDP, on behalf of MIF, wanted Terra Law's advice to include or exclude creates some such privilege. This was part of the negotiation as to what was required by MIF from the opinion if the deal was to be done. It does not seem to me any different in principle to negotiations about the contents of the Guarantee or the Mortgage that COH was to provide. Nor does the position seem to me altered by the fact that the Terra Law opinion (commissioned by COH) was addressed to the Lender, which had requested that it be provided with it.

99. Second, the present circumstances have not, so far as I am aware, ever been held to give rise to joint interest privilege. I do not find this surprising. As I said in *Wang* at [138], such a privilege may arise in several different circumstances. It may arise from proprietorial relationships (company and shareholders, parent and subsidiary, trustee and beneficiary) or from particular contractual relationships (partners, principal and agent) or from certain contractual arrangements. Typically these are where there is a sharing of liabilities or assets as in the case of insured and reinsurer, where there is a follow the settlements clause (*Commercial Union v Mander* [1996] 2 Lloyd's Rep 640), or where there is a joint venture.

100. It is important not to use the concept of joint venture too loosely. In one sense every commercial contract is a joint venture of a kind. But what is needed under this heading is some sharing of profits or losses or liabilities, which means that the parties have a joint interest in those very items. As was said in *Wang*, and referred to by the judge at [52], one of the key elements of joint interest privilege which could be distilled from the judgment of Morgan J in *Gary Love v Robert Fawcett and Northern Worldwide* [2011] EWHC 1686 (Ch), was that the "*sufficiency of the claimants' interest in the purpose of the instructions may be determined by the presence of a strong prima facie case of entitlement to a share in the fruits developed by the furtherance of that purpose*". Another element was that "*joint interest privilege is founded and dependent on joint interests, not competing interests*".

101. Examples of such a joint venture may be found in the case of *CIA Barca v Wimpey* [1980] I Lloyd's Rep 598; and in *Formica Ltd v Secretary of State* [1995] I Lloyd's Rep 692, where both parties (creditor and guarantor) had an interest in recovering the outstanding indebtedness of a debtor, and a contractual obligation of the plaintiffs to provide documents was not construed as limited to documents which were not privileged, on account of that interest.

102. I would also refer, with approval, to the observations of Warren J in *Yughanns v Elfic Pty Ltd* in the Supreme Court of Victoria, [2000] 1 VR 92, 104 cited in '*Thanki on the Law of Privilege*' at 6.14 where he said:

> "*A joint venture is in the nature of a partnership in some respects. It involves the sharing of profits and the division of responsibilities within a relationship. The nature of the arrangement of a joint venture also involves special characteristics of trust and good faith analogous to that of a trust. If privilege does not attach to communications against a person having a joint interest where the relationship is one of partnership or trust then logically the attachment cannot arise where the relationship constitutes a joint venture. Where a joint venture exists the joint venturers have duties and obligations towards one another of a contractual and fiduciary type. It is the nature of the joint-venture relationship that gives rise to the right of each joint adventurer to obtain access to documents that are otherwise privileged against the world.*"

103. None of the circumstances to which I have referred, giving rise to a joint interest privilege, are applicable here.

104. Thirdly, whilst the concept of joint interest privilege is relatively recently established and the boundaries of it are not necessarily closed, it seems to me important to keep the principle within its proper confines, as illustrated by the cases to which I refer, and the case of *Wang* itself. The doctrine represents an inroad into the client's entitlement to privilege which is not lightly to be inferred.

105. Lastly, Mr Robinson accepted that he could not say that there was a joint interest in all cases where the lawyer for one party gave an opinion to another party. But he relied in this case on the fact that COH was a public authority; that the development was for the benefit of Hamilton; that COH wanted to see the hotel developed; and that COH was prepared to give a guarantee and a mortgage; such that this was not a straightforward commercial deal. Further, the Terra Opinion was given at MIF's request. However, it does not seem to me that any of those facts affects the analysis to which I have referred above.