THE HIGH COURT

[2026] IEHC 397

[Record No. 2023/5454P]

BETWEEN

GLOBOFORCE GROUP PLC, TRADING AS WORKHUMAN

PLAINTIFF

AND

LUXEMBOURG INVESTMENT COMPANY 276 SARL, INTERMEDIATE CAPITAL GROUP PLC, FALCON VII INVESTMENT SARL, FALCON VII FINANCING SARL, BENOIT TURTESTE, DAVID LOMER, HADJ DJEMI, LUIGI BARTONE, BERNARD COADY AND SAM MCKELVEY

DEFENDANTS

JUDGMENT of Mr. Justice Michael Quinn delivered on the 18th day of June 2026

(Order 31 Inspection and Further Discovery)

PART ONE: BACKGROUND

1. The plaintiff is a provider of 'cloud based' employee recognition services, which enable its clients to recognise and reward employees. It has over 320 customers, covering more than 6 million employee users in 180 countries and a turnover exceeding over $1.1 billion. The first named defendant is a shareholder in the plaintiff. The other defendants are indirect investors and their officers.

2. The plaintiff claims that the defendants caused it to lose the opportunity to acquire another company in the same industry which would have been beneficial for the company and all its shareholders, to the point of being 'transformative'. It alleges that when the plaintiff

was negotiating with the shareholder of the target company, the defendants indicated that they were supportive of the acquisition, and yet when the negotiations reached a critical point they refused their consent, in a manoeuvre designed to advance only their own interests and to the cost and other detriment of the plaintiff. The plaintiff claims that the defendants perpetrated breaches of contract, conspiracy, intimidation, misrepresentation, and tortious interference with the plaintiff's contractual and business relationships. All these claims are denied.

3. This judgment relates to an application by the defendants challenging claims to privilege made by the plaintiff in respect of certain documents discovered, and seeking further and better discovery of other documents.

The plaintiff

4. The plaintiff is registered in Ireland and has joint headquarters in Dublin, Ireland and in Framingham, Massachusetts, USA.

5. The only defendant which directly holds shares in the plaintiff is the first named defendant which holds 10% of the shareholding.

6. The first defendant's shareholding is held on behalf of an investment fund ICG Investment Europe Fund VII SCSP ("Fund VII"). Fund VII is one of a number of investment funds managed by the second named defendant Intermediate Capital Group plc ("ICG").

7. 40.8% of the shares are held by a company called Falcon Bidco Limited

8. Falcon Bidco is a wholly owned subsidiary of Falcon Midco Limited, which in turn is a wholly-owned subsidiary of Falcon Topco Limited. I refer to these three companies as the 'Falcon Stack' or the 'Falcon Structure'. In Falcon Topco Limited 7% of the shareholding, carrying 75% of the voting rights, is held by Falcon VII Investment Sarl, the third named defendant, incorporated in Luxembourg ("Falcon VII"). Falcon VII and Falcon VII Financing Sarl, the fourth named defendant, are affiliates of the second named defendant

ICG. ICG and Falcon VII Financing SARL provided loans to Falcon VII for the purpose of its investment in the Falcon Stack.

9. In short, ICG holds its interests in the plaintiff as to 10% through the first defendant, a direct shareholder, and indirectly through the Falcon Stack, the lowest subsidiary in which Falcon Bidco holds 40.8% of the shares in the plaintiff.

10. 29.9% of the shares are held by another party, a group of companies known as the "Accomplice Group" comprising four companies (Atlas Venture Fund VI LP, Atlas Venture Fund VI GmbH & Co. KG, Atlas Venture Entrepreneurs Fund VI LP and Benchmark Europe I LP).

11. The balance of circa 18.6% of the shares are held by management of the plaintiff and by a diverse group of small investors.

12. The founder and Chief Executive Officer of the plaintiff is Mr. Eric Mosley.

13. The Chief Financial Officer is a Mr. Cromwell.

14. The chairman of the plaintiff, until his removal on 19 September 2023, was Mr. Barry Maloney.

15. On 20 September 2023 Mr. Moloney was replaced by Mr. Stephen Welch, nominated through the Falcon structure.

16. When the plaintiff was first incepted in 2004 the first defendant was not a shareholder. The initial shareholders and the plaintiff executed a Share Subscription and Shareholders Agreement on 18 August 2004. This is referred to as the Workhuman SHA.

17. When the first defendant invested in 2020, it executed a Deed of Adherence to the Workhuman SHA dated 1 March 2020. The parties to the Workhuman SHA now are the plaintiff company itself, the first named defendant (10%), Falcon Bidco (40.8%), the Accomplice Group (29.9%), and the diverse small shareholders including management (18.6%).

The defendants

18. The first defendant is the direct shareholder of 10% of the shares in the plaintiff.

19. The second defendant Intermediate Capital Group plc ("ICG") is the "umbrella" investment company which funded the acquisition of the first defendant's 10% shareholding in the plaintiff and the acquisition of the Falcon interests, comprising the 40.8% shareholding held by Falcon Bidco. Most of the investment made by ICG was advanced to the Falcon structure by way of inter-company debt.

20. The third and fourth named defendants are the companies which funded and controlled the ICG indirect investment through the Falcon structure, in which the lowest subsidiary was Falcon Bidco, a shareholder in the company. Falcon Bidco is not a defendant.

21. The fifth, sixth, seventh, eighth, ninth and tenth named defendants are all executives in the ICG group, and are members of the Investment Committee of ICG.

22. The ninth defendant Mr. Coady is the Managing Director of ICG.

23. In summary, the only defendant which is a direct shareholder in the plaintiff is the first defendant. The second third and fourth defendants are funders, both through equity and debt to the first defendant and to companies in the Falcon structure, which is the ultimate owner of shareholding in Falcon Bidco, the holder of 40.8% of the shares in the plaintiff.

PART TWO: PROJECT WHISKEY

24. In January 2021 Mr. Coady, the ninth defendant, was contacted by another company, also an internet based software services company providing employee recognition and rewards solutions, with a view to the possibility of a merger or an acquisition. Mr. Coady brought the opportunity to the chairman of the plaintiff Mr. Moloney.

25. The target company is referred to by the code name of "Achievers". Its shareholder is referred to as 'Silverlake'. The potential transaction was code named 'Whiskey'. It had a larger business than the plaintiff. It had more international offices and clients and

represented an opportunity for the plaintiff to expand, to increase its scale, to open and find new markets and increase its product offerings. It was considered by all concerned to open the prospect of increasing revenues and enhancing value to the benefit of all of the existing shareholders of the plaintiff.

26. Initial discussions took place but the transaction did not progress at that time.

27. In 2022 discussions between the plaintiff and Silverlake resumed and from September 2022 onwards extensive negotiations were had with Silverlake in relation to the acquisition, led by Mr. Maloney as chairman of the plaintiff.

28. Although the term "merger" was initially used it is described by the parties in this case as a potential acquisition.

29. On this application the precise detail of the proposed transaction was not put before the Court. The intended structure was described in the Amended Statement of Claim as an "all equity deal". This would generally mean that no cash consideration would be paid by the plaintiff to Silverlake. The consideration would be the issue of new shares in the plaintiff. Certain amendments would be required to the Workhuman SHA to implement the acquisition. This in turn would have required the consent of the first defendant and the approval of the Investment Committee of ICG.

30. The plaintiff claims that as the negotiations progressed Mr. Moloney kept Mr. Coady regularly appraised of the state of the negotiations. The plaintiff claims also that in his interactions with Mr. Maloney, Mr. Coady confirmed that ICG supported the transaction.

31. The plaintiff claims that in the course of their communications Mr. Coady, being authorised for ICG, represented to the plaintiff that ICG believed that the acquisition was value enhancing, wished the transaction to proceed and that ICG supported the plaintiff's efforts to progress and effect the transaction.

32. The plaintiff claims also that Mr. Coady represented to it that ICG foresaw no likely impediment to the formal approval of the transaction by ICG itself and that approval by ICG and implementation of the transaction would not be made conditional on the renegotiation of the manner in which ICG held its interests in the plaintiff.

33. The plaintiff claims that Mr. Coady in making these representations knew that the plaintiff and its officers would rely on them and incur time and money in advancing the acquisition.

34. The plaintiff claims that there were regular contacts and updates between Mr. Moloney and Mr. Coady during which the proposed terms of the acquisition were explained. It says that the representations as to ICG's readiness and willingness to proceed and approve the acquisition were express or, in the alternative, implied "from the communications, demeanour and attitude of Mr. Coady".

35. The plaintiff claims that in reliance on the truth and accuracy of these representations, the plaintiff, to the knowledge of the defendants, devoted managerial and financial resources to its negotiations with Silverlake.

The Accomplice Proposal

36. In a meeting between Mr. Coady and Mr. Moloney, on 7 February 2023, Mr. Coady raised a separate proposal concerning the possibility of buying out Accomplice. Mr. Moloney expressed an interest in ICG funding such a buyout and invited Mr. Coady to present his terms to the plaintiff's financial advisers Capnua Corporate Finance.

37. On 7 March 2023 Mr. McKelvey on behalf of ICG emailed Mr. Alan Dunne of Capnua outlining terms and potential structures to facilitate the Accomplice Proposal.

38. In this email Mr. McKelvey proposed that there would be established a new fund to represent the ICG interests namely ICG Fund Europe VIII ("Fund VIII"). ICG's 10% direct holding held by Luxco would be transferred to Fund VIII.

39. There would also be transferred to Fund VIII the existing debt and equity positions held through the Falcon structure. The proposed new model would confer on ICG, both in respect of its existing and its proposed further investment, senior debt, mezzanine debt and payment in kind facilities, all of which would rank ahead of other shareholders in the plaintiff.

40. The Accomplice Proposal did not progress any further. Discussions continued in relation to Project Whiskey.

Continuation of Project Whiskey

41. According to the plaintiff, by the end of March 2023 negotiations with Silverlake had reached a point where Heads of Terms were available in outline form, and a decision was required as to whether to move the transaction to the next stage of mutual due diligence. A meeting of the Investment Committee of ICG was scheduled for Monday 27 March 2023. In preparation for that meeting Mr. Moloney attended a meeting on Friday 24 March 2023 with members of ICG's Investment Committee to make a presentation on the terms of the proposed acquisition. The substance and outcome of that meeting is a matter of dispute in these proceedings. The plaintiff says that this was a constructive meeting and that at no point during that meeting were concerns raised by the ICG attendees as to the structure of the proposed acquisition or its implications for ICG.

42. The plaintiff says also that no negative sentiment was expressed by any of the ICG attendees in respect of any commercial or financial aspect of the proposed acquisition. In that meeting further information was requested as to the plaintiff's trading performance which was provided over the course of the weekend, such that it would be available before ICG's Investment Committee meeting on 27 March.

43. At close of business on 27 March 2023 Mr. McKelvey sent an email to the plaintiff. According to the plaintiff this email made it clear that ICG's approval of the

acquisition would be conditional on a fundamental alteration of the basis upon which ICG held its interests in the company. The plaintiff says that in this email ICG expressed the "need to reposition the majority of its current investment into a fixed return instrument with the company". This would be coupled with the requirement that the ICG investment be transferred from Fund VII to Fund VIII, similar to that proposed by ICG for the Accomplice Proposal. The plaintiff's description of this communication is that ICG was now stating, for the first time, that it was a condition of its proposed consent to the Whiskey acquisition that its investment, including existing investment, be granted a senior position in the plaintiff in priority to all other equity holders, including Silverlake, which would under the proposed acquisition have become a shareholder in the plaintiff.

44. Intense discussions took place over the course of the following two days. On Friday, 31 March 2023 Mr. Moloney emailed Mr. Coady stating that the plaintiff could not agree to ICG's conditions.

45. In this email Mr. Moloney stated that it was his understanding from the meeting of 24 March 2023 that ICG was ready to approve the transaction, consistent with representations previously made.

46. Mr. Moloney complained that he and the plaintiff had been led to believe that "your commitments that ICG would support the transaction were made in good faith and that ICG wholeheartedly supported the transaction". Mr. Moloney claimed that it was now apparent that ICG support was not genuine. He continued

> *"You must know given your attendance at board meetings and detailed knowledge of its business model, that the company cannot agree to these conditions. Furthermore the extortionate requirements that you are seeking to impose as a condition of your consent to the deal would result in ICG's stake in Workhuman being transformed from equity with the rights that were negotiated and agreed at the time of your investment,*

into a debt instrument ranking ahead of all other shareholders with returns that far exceed commercial terms that are available in the market for a debt of this nature. How can you think that this could possibly be acceptable to the other shareholders in Workhuman?".

47. The defendants say that because of the pricing and structure proposed for Project Whiskey their financial position was proposed to be detrimentally affected and the risk profile of its investment would be compromised. They say that this could only be ameliorated if the structure of investment was repositioned to provide for them a fixed return. In effect it submitted that only if that occurred, entailing a shift from a pure equity position to a senior debt position, or at least a position which ranked in priority to that of other parties to the SHA, would it agree to the transaction. When the plaintiff refused to agree to such a re-positioning or restructuring, the transaction did not proceed, since the consents of the first defendant and the Investment Committee of ICG were required. Silverlake was unwilling to progress the transaction without the approval of ICG. It is common case that an "all equity deal" could not be consummated without the agreement of ICG.

48. The Whiskey acquisition collapsed. A suggestion was made by counsel at the hearing of this application that it may not be 'gone forever' and that the plaintiff still hopes to make the acquisition.

PART THREE: THESE PROCEEDINGS

The plaintiffs' claims

49. The plaintiff makes the following claim (para. 52.4 of the Amended Statement of Claim)

"52.4. ICG well knew that the Company would not have proceeded or continued in negotiations to acquire Target if it were the case that ICG's approval of the transaction was contingent on the recasting of ICG's holdings to a debt or senior/preferred equity claim. ICG well knew that any position granted to it as a creditor and/or preferred

member would be unacceptable to and/or highly unpalatable to the Company's existing investors and members and/or Target Shareholder. In any event ICG wished to recast their equity investment to a debt or senior preferred equity claim and utilise the Acquisition as a means to drive that agenda."

"52.5. As such ICG well understood that its proposals would, in normal circumstances, be unacceptable to the Company and others. Despite this ICG contrived to create a situation where it might, at a critical juncture, exert maximum and unfair pressure to constrain the Company to yield to its unreasonable and unwarranted demands."

50. The plaintiff continues by claiming that ICG knew that in embarking on the acquisition the plaintiff would expose itself to significant costs in terms of management time and professional fees and reputational damage if the acquisition failed.

51. The claim continues: -

"52.7. Notwithstanding the assurances and encouragement given, ICG, and its relevant entities bodies and personnel at all times intended to seek to extract an illegitimate, unwarranted and improper advantage by duress and/or threatening to withhold its approval at a late point in the negotiation process when the Company was most vulnerable and exposed.

52.8. The threatened withholding of approval lacks any bona fide commercial basis connected to the nature of the transaction in question; rather its sole basis and motivation was the extraction of an unwarranted collateral benefit at the expense of other parties (including the other parties to the Workhuman SHA).

52.9. At no stage was any legitimate serious query raised by ICG in respect of the commercial benefits and desirability of the Acquisition. ICG's contrived attempts, which arose following the presentation to the members of ICG's IC (Investment Committee) of 24 March 2023 and Mr. McKelvey's email of 27 March 2023, to query

the adequacy of information provided and/or the desirability of the acquisition were patiently disingenuous and sought to provide a cover to the real dynamic, namely the attempt to extort or procure an unjustified and unwarranted benefit for ICG, its investors and its personnel."

52. Much reliance is placed by the plaintiff on clause 37 of the Workhuman SHA. That clause is headed "Further Assurance and Good Faith" and provides as follows:-

"Each party shall cooperate with the others and execute and deliver to the others such other instruments and documents and take such other actions as may be reasonably requested from time to time in order to carry out, evidence and confirm their rights and the intended purpose of this Agreement".

53. The following claims are made in relation to clause 37 in paras. 28 and 29 of the Amended Statement of Claim:-

"28. The true meaning and effect of clause 37 is that the parties owe each other a duty of good faith in respect of all matters touching upon the Agreement. In the alternative it is an implied term of the Workhuman SHA that the parties owe each other a duty of good faith in respect of all matters touching upon the agreement.

29. Further and in the alternative one of the purposes of the Workhuman SHA was to advance the interests of the Company and/or to prevent any shareholder profiting at the expense of the others. In the premises each shareholder was under a fiduciary duty to that effect."

54. The defendants deny that clause 37 has the meaning and effect intended for.

55. The plaintiff claims that the actions of the first defendant in threatening to withhold and ultimately withholding approval of the Whiskey acquisition were in breach of clause 37 of the Workhuman SHA and sought to advance ICG's interest at the expense of the other parties to the agreement and to frustrate its intended purpose.

56. The particulars of that alleged breach are recited as follows:-

"91.1. The actions of Luxco (and/or the actions of other defendants for and on its behalf) in threatening to withhold and withholding approval of the acquisition of target unless significant collateral advantages were conferred on it alone and/or on the investors in Funds VII and/or VIII are and were unreasonable and done in bad faith (or otherwise than in good faith).

91.2. Luxco, or persons on its behalf, have failed without any proper or legitimate reason to cooperate with the Company and/or the other parties to the Workhuman SHA as reasonably requested.

91.3. Luxco or persons on its behalf have failed without any proper or legitimate reason to take actions reasonably requested of it for the purposes of the Agreement."

57. The plaintiff alleges also that the defendants perpetrated wrongful inducement and procurement of breaches of contracts, intimidation and duress, and conspiracy. It is alleged that the conspiracy comprised the unlawful means of misrepresentations, breach of contract, intimidation, duress and breach of fiduciary duty.

58. The plaintiff claims that it has suffered the following heads of loss by reason of the failure to complete the acquisition (para. 102)

"102.1. Wasted managerial time and associated opportunity cost: To the ascertained

102.2. Wasted expense to include (but not limited to travel, legal fees, corporate advisory fees): To be ascertained

102.3. Loss of reputation and/or credibility with Target Shareholder associated with the company's failure to bring to fruition an acquisition of Target, for a second time: To be ascertained."

59. The plaintiff claims damages for breach of contract, procurement and/or inducement to breach of contract, conspiracy, intimidation, misrepresentation, tortious interference with

the plaintiff's contractual and business relationships, and exemplary and/or aggravated damages.

60. The plaintiff claims that at all material times it kept the defendants sufficiently informed of the status of the negotiations for the acquisition and that it provided all of the information necessary to enable the defendant on a timely basis to make informed decisions as to the transaction.

The Defence and Counterclaim

61. The defendants deny all the allegations.

62. They deny that clause 37 has the meaning or effect that the parties owe each other a duty of good faith or that it was an implied term of the SHA that the parties owe each other a duty of good faith or a fiduciary duty.

63. The defendants point to the provisions of clause 1.3(a) of the SHA which provides that clause headings do not affect the construction of the agreement.

64. The defendants say that the plaintiff and Mr. Moloney failed to furnish information to facilitate a timely evaluation of the proposed acquisition by the first defendant and Falcon VII.

65. The defendants plead (para. 63.1 of the Amended Defence and Counterclaim) that:

> *"Luxco 276 and Falcon VII were each, independently, entitled to scrutinise evaluate and decide upon the merits of the proposed acquisition with the benefit of the information rights and rights of consent provided for in the Falcon Agreements and the Workhuman Agreements. Luxco 276 and Falcon VII were fully entitled to accept or reject the proposed acquisition and to provide consent or not, acting in their respective interests."* (emphasis added).

66. The defendants say that the intended structure of the acquisition had the effect of altering the risk profile of their investment in the plaintiff. They say that they voiced their concerns to this effect at the meeting on 24 March 2023. They continue (para. 63.3.5)

> *"In circumstances where Luxco 276 and Falcon VII could not determine the proposed acquisition to be in their best interests (or as investors in the Plaintiff, in the best interests of the Plaintiff) due to a patent want of information, no question of a strategic decision to withhold consent for strategic gain arises".*

67. The defendants plead that they were supportive of exploring the proposed acquisition as a potential opportunity, but that they did not give or represent that they intended to give any contractual consent to the acquisition.

68. The defendants plead that their response to the terms of the proposed acquisition was a valid manner of protecting their own commercial interests as enshrined in the existing shareholding structure.

69. The defendants plead that although Mr. Coady engaged continuously with Mr. Moloney he at no time had the right to bind Luxco or any of the other defendants to the proposed acquisition.

70. The defendants counterclaim for alleged breaches of the Workhuman SHA and related side agreements. They say that in the period after April 2023 the plaintiff attempted to force what they describe as an "ICG Realisation Event" in breach of their rights. They claim also that the plaintiff failed to honour and perform numerous provisions of the Workhuman SHA relating to such matters as the provision of financial information and adherence to information rights.

71. The defendants counterclaim that the plaintiff acted in breach of undertakings and covenants contained in the SHA concerning the conduct of the company's business and that

the plaintiff refused to recognise Falcon's nominee to the board of directors of the company when the right of such nomination was exercised.

PART FOUR: DISCOVERY

The order for discovery

72. After the close of pleadings discovery requests were exchanged and applications were made to court for orders for discovery to be made by each of the parties. Arising from developments after the commencement of the case, including litigation in the High Court of England and Wales (see *Barry Maloney v. Falcon VII Investment SARL* [2025] EWHC 240 (Comm)), the terms of the order for discovery were varied. The order for discovery which is relevant to this application is the order of Sanfey J. made on 21 July 2025 requiring the plaintiff to make discovery of documents described in 19 categories. The categories so ordered and which are relevant or potentially relevant to the motion now before the Court are as follows (using the category numbers): –

(1) All documents generated between 1 September 2022 and 9 November 2023 evidencing the plaintiff's claims

(a) that the proposed acquisition would have significantly enhanced the scale and growth opportunities of both the plaintiff and the target on a merged basis, and

(b) that the proposed acquisition would have significantly increased the value of the plaintiff on a merged basis and separately the value of Luxco 276's holding and the indirect holding of Falcon VII.

Date Range: 1 September 2022 to 9 November 2023

(2) All documents evidencing or recording why the proposed acquisition did not progress.

Date Range: 1 September 2022 to 9 November 2023

(7) All documents which the Plaintiff intends to rely on at trial in respect of its claim that there is an implied term of good faith contained in the Workhuman SHA

Date Range: Not applicable

(9) All documents evidencing the extensive negotiations between Mr. Moloney or any agent on the Company's behalf and the Target Shareholder in relation to the Proposed Acquisition generated from 1 September 2022 to 9 November 2023. Date Range: 1 September 2022 to 9 November 2023

(10) All documents generated during the period from 1 September 2022 to 9 November 2023 evidencing consideration given by the Plaintiff to the amendments to the Workhuman SHA which might be required to effect the Proposed Acquisition.

Date range: 1 September 2022 to 9 November 2023

(11) All documents generated during the period from 1 September 2022 to 16 April 2023 evidencing the Plaintiffs claim that Mr. Moloney kept Mr. Coady apprised of the progress of the negotiations with the Target Shareholder and Target and its terms.

Date Range: 1 September 2022 to 16 April 2023

(12) All documents generated during the period from 1 September 2022 to 16 April 2023, evidencing the statements alleged to have been made by the Ninth Named Defendant, waving any rights of consent on the part of ICG to the Proposed Transaction.

Date Range: 1 September 2022 to 16 April 2023.

(17) All documents evidencing or recording the Plaintiff’s claim that Mr. Moloney is authorised by Falcon Bidco to act on its behalf in connection with the Workhuman

SHA, the Workhuman Articles or otherwise in any capacity in relation to the Plaintiff including consideration by the Plaintiff of notices sent to the Plaintiff on behalf of the Defendants or Falcon Bidco identifying breaches by Mr. Moloney of the Services Agreement, the Falcon SHA or the Falcon Articles. Date Range: 16 June 2023 to 30 September 2023

(22)(a) All documents evidencing

(i) the level of borrowing and/or debt financing the proposed ICG Realisation Event/Proposed Redemption would expose the Plaintiff to and evidencing any consideration by the Plaintiff of, or attempts by the Plaintiff to arrange or extend the term of debt financing to fund the proposed ICG Realisation Event or Proposed Redemption.

(ii) the prospect of committing the Plaintiff to substantial additional borrowings or borrowings for an extended term – (including, without prejudice to the generality of the foregoing, documents evidencing discussions with potential third party lenders such as Silicon Valley Bank and AIB Bank plc); and

(iii) any other options contemplated to facilitate in any way the proposed ICG Realisation Event/Proposed Redemption.

and the Plaintiff's consideration of (i) to (iii) above

Date Range: 1 September 2022 to 9 November 2023

(22)(b) Copies of any application made or offer received by the plaintiff for borrowing and/or debt financing including any drafts.

Date Range: 9 November 2023 to 1 May 2024

(23) All documents generated evidencing the Plaintiff's considerations of requests for information from any of the first to tenth Defendants relating to prospective additional

borrowing on the part of the Plaintiff arising in order to fund any Exit or Realisation Event.

Date Range: 1 January 2022 to 9 November 2023

(24) All documents generated during the period from 1 September 2022 to 9 November 2023 evidencing the claim that the Plaintiff's senior management team were "continuously kept apprised" of the negotiations with the Target and Target Shareholder and its terms, and in particular of the alleged representations made by Mr. Coady, including all recordings made by Mr. Moloney and Mr. Mosley, or any other person acting on behalf of the Plaintiff of calls and meetings with Mr. Coady or any of the First to Tenth Defendants without prejudice to the generality of the requirement for all types of Documents (as defined to be discovered).

Date range: 1 September 2022 to 9 November 2023

(25) All documents evidencing or recording the meeting with certain members of the Investment Committee of ICG on 24 March 2023 and/or Mr. Moloney and/or the Plaintiff's consideration of, approach to and/or preparation for the meeting and Mr. Moloney's alleged understanding that this meeting was a mere formality.

Date Range: N/A

73. The plaintiff's affidavit of discovery was sworn on 14 October 2025 by Mr. Nocholas Solis, who describes himself as the plaintiff's Senior Vice President and General Counsel. He is later said to be also the Company Secretary of the Plaintiff.

This Application

74. The defendants have applied for the following orders in relation to the plaintiff's discovery.

(1) An order pursuant to O. 31 r. 18 of the Rules of the Superior Courts and/or the inherent jurisdiction of the court for inspection of the documents contained in Appendix 1 to a letter from A&L Goodbody Solicitors to McCann FitzGerald Solicitors dated 4 December 2025 exhibited at Tab 5 to the Book of Exhibits to the defendant's grounding affidavit, over which the plaintiff has claimed legal professional privilege.

In this judgment I refer to that Appendix as Tab 5. It comprises 12 categories of documents in respect of which privilege claimed by the plaintiff is objected to by the defendants.

(2) Such further directions as are necessary to give effect to any order made pursuant to paragraph 1.

(3) An order pursuant to the inherent jurisdiction of the court directing the plaintiff to make further and better discovery on oath of all documents in its power or possession relating to the categories of documents ordered by the court on 21 July 2025 to be discovered by the plaintiff (in addition to the discovery made on oath by Mr. Solis on 14 October 2025) including without limitation

- *Category 10*
- *Category 22(b)*
- *Category 23*

This application is made by reference to the defendants' objections as to the paucity of documents discovered in these categories, having regard to the date ranges ordered to be discovered.

I refer to this challenge as the "missing documents/date ranges" objection.

(4) An order pursuant to the inherent jurisdiction of the court directing the plaintiff to swear a supplemental affidavit providing such clarifications and confirmations as

are necessary arising from matters addressed in correspondence between the parties and outlined in the affidavit of Hannah Shaw sworn on behalf of the defendants on the 17 February 2026.

(5) Further, or in the alternative, an order pursuant to Order 31, Rule 21 dismissing the plaintiff's claim for failure to make discovery in accordance with the order made on 21 July 2025.

75. The objections under para. 4 relate to such matters as an alleged failure to identify appropriate custodians and/or agents, the quality of search terms and quantity of documents reviewed, explanations required in respect of discovery of hard copy documents, certain complaints relating to contextual parent documents, and what are described as "unfiltered data gathered from certain custodians". Objections are also made regarding the content of the Second Schedule to the affidavit of discovery and miscellaneous other objections.

76. There are therefore three parts to the defendants' application namely:-

(a) The privilege claims, considered in Parts Five and Six below;

(b) The missing documents and date range objections, considered in Part Eight below; and

(c) Other issues, considered in Part Nine below.

PART FIVE: THE PRIVILEGE CLAIM

77. The application is grounded on an affidavit sworn by Hannah Shaw sworn 17 February 2026. Ms. Shaw is a partner in the firm of A&L Goodbody Solicitors acting for the defendants.

78. Ms. Shaw states that "*of most concern to the defendants is the approach which the plaintiff appears to have taken to its claims of legal professional privilege*". Ms. Shaw states that the dominant concern is that "legal advice and/or common interest privilege is being claimed without sufficient, or in some instances any, apparent justification."

79. Ms. Shaw continues:-

> *"14. Of particularly acute concern to the defendants is the plaintiffs claim of legal advice privilege over documents which certain of the defendants are, as shareholders or directors of companies, clearly entitled. The factual context of the privilege issues which arise is, in summary, as follows.* (emphasis added)
>
> *15. The first defendant, Luxco 276, is a 10% direct shareholder of the plaintiff. The ninth defendant, Barnard Coady, and the tenth defendant Mr. Sam McKelvey are directors of Falcon Bidco Limited which is the shareholder of the plaintiff that it is said by the plaintiff was in receipt of advice over which the plaintiff claims privilege. The third defendant, Falcon VII is an indirect shareholder in Falcon Bidco. Mr. Coady and Mr. McKelvey, as directors of Falcon Bidco have a clear entitlement to the advice obtained by Falcon Bidco as does Falcon VII, its indirect shareholder. Luxco 276 has a clear entitlement, as a direct shareholder of the plaintiff to sight of the legal advice obtained by the plaintiff concerning the proposed acquisition that is pleaded by the plaintiff was being negotiated for the benefit of the plaintiff's shareholders, including Luxco 276 and in respect of which it is alleged that Luxco 276 made representations and further representations (which are denied). This applies insofar as the legal advice was not for the dominant purpose of litigation.*
>
> *16. Insofar as the plaintiff has claimed privilege relating to documents that may have been the subject of litigation privilege for proceedings in England, involving Mr. Moloney and Falcon VII, it is entirely unclear how the plaintiff is in a position to make such a claim in circumstances where it was not a party to those proceedings which have in any event been finally determined."* (emphasis added)

80. The phrases I have underlined reveal that the defendants' objections are predominantly grounded in a 'status based' shareholder rule, being a proposition that a company cannot

rely on legal advice privilege as against a shareholder. Submissions were made also in support of a variation of this 'status based' shareholder rule, relying on a claim that certain defendants enjoyed a joint or common interest in legal advice obtained by the plaintiff.

The role and status of Falcon Bidco Limited

81. Ms. Shaw referred to correspondence exchanged between A&L Goodbody and the plaintiff's solicitors McCann Fitzgerald. In particular reference was made to an assertion that McCann Fitzgerald had been engaged by Mr. Moloney, Chairman of the plaintiff, "*purportedly on behalf of Falcon Bidco Limited to review the non-disclosure agreement (NDA) relating to the proposed transaction*."

82. In the context of the negotiations with the target shareholder, Silverlake, a non-disclosure agreement was executed between Silverlake and Falcon Bidco. Advice was obtained from McCann Fitzgerald in connection with the entry into the NDA. Queries were raised by A&L Goodbody as to the circumstances in which Falcon Bidco and not the plaintiff had been the party to the NDA. In response, McCann Fitzgerald stated, with respect to the review by that firm of the NDA entered into by Falcon Bidco, "*this mandate from our client is the basis upon which privilege is claimed over H01106. While the non-disclosure agreement could have been entered into by our client itself, it was entered into by Falcon Bidco through Barry Maloney's mandate from our client. If our client is incorrect in its approach to privilege in this instance, the document is in any event covered by common interest privilege*".

83. The position of Falcon Bidco as a party to the NDA was addressed in a replying affidavit sworn on 4 March 2026 by Paula Fearon, a partner in the firm of McCann Fitzgerald.

84. Ms. Fearon explained the position regarding Falcon Bidco as follows

> "*9.3 The ninth and tenth defendants (Messrs Coady and McKelvey) were/are directors of Falcon Bidco Limited (Falcon Bidco) a shareholder of the plaintiff. In*

relation to the proposed transaction between the plaintiff and Achievers, a non-disclosure agreement ('NDA') was entered into on 8 October 2022 by Falcon Bidco (through Mr. Moloney's mandate from the plaintiff) rather than being entered into by the plaintiff. The reasons why the NDA was entered into by Falcon Bidco are all set out in paragraphs 9.4 to 9.6 below. Neither the ninth or tenth defendant was a director of Falcon Bidco at the time the NDA was entered into and the tenth defendant is no longer a director of that company. Notwithstanding this, the defendants suggest that because the ninth and tenth defendants were/are directors of Falcon Bidco, all 10 defendants are entitled to access documents suggested by them to be Falcon Bidco's privileged documents. I do not believe that the defendants claim in this regard has a legal basis, but in any event and much more significantly, none of the privileged documents to which the defendants seek access, by virtue of the positions held by the ninth and tenth defendants, contain legal advice provided to Falcon Bidco, they all contain legal advice to the plaintiff." (emphasis added)

85. Ms. Fearon continues by explaining that because of the need for confidentiality in the negotiations with the target shareholder, Mr. Moloney, the plaintiff's chairman, together with Alan Dunne of Capnua, financial advisers to the plaintiff and Ben Gaffikin, a partner in McCann FitzGerald, engaged on behalf of the plaintiff with Silverlake. She swore that her firm's mandate from the plaintiff is the basis upon which privilege is claimed over documents which comprise legal advice provided to the plaintiff by McCann FitzGerald. She continues "while the NDA could have been entered into by the plaintiff itself, it was entered into by Falcon Bidco through Barry Maloney's mandate from the plaintiff".

86. Ms. Fearon continues at para. 9.6:-

"*Contrary to what is alleged in A&L Goodbody's letter of 4 December 2025 and in the affidavit of Ms. Shaw, the negotiations with Silverlake in relation to the proposed acquisition were not conducted on behalf of Falcon Bidco. The negotiations were at all times, conducted on behalf of the plaintiff and the plaintiff is entitled to assert privilege over legal advice received in this context as it has done*."

87. The averment that negotiations with Silverlake were conducted not on behalf of Falcon Bidco but on behalf of the plaintiff was not contradicted.

The First Defendant

88. The fundamental submission made, and underpinning Ms. Shaw's affidavit at para. 15 is that the first defendant Luxco as a direct shareholder of the plaintiff has a "clear entitlement" to the advice obtained by the plaintiff. It is also submitted that the ninth defendant Mr. Coady and the tenth defendant Mr. McKelvey in their capacity as directors of Falcon Bidco Limited, also being a shareholder of the plaintiff have a "clear entitlement" to the advice obtained by Falcon Bidco.

89. The first question which I am required to decide is whether, as Ms. Shaw claims, the first named defendant has, as a direct shareholder, a right to obtain sight of the legal advice obtained by the plaintiff.

The Shareholder Rule in Ireland

90. The defendants submit that as a matter of Irish law the shareholders of a company are *prima facie* entitled to the production of legal advice provided to the company. They do not claim that this rule overrides valid litigation privilege.[1] They claim that it overrides legal advice

[1] Litigation privilege protects from disclosure the contents of legal advice obtained for the dominant purpose of prosecuting or defending legal proceedings and documents containing or evidencing such legal advice which have come into existence after legal proceedings were contemplated or commenced. It extends to documents, created for the purpose of giving or obtaining and collecting evidence to be used in the proceedings. The term "Litigation privilege" extends also to documents containing or evidencing the contents of without prejudice negotiations of the matter in dispute.

privilege.[2] They submit that the relationship is "one of a group of recognised joint interest relationships". In support for this proposition the defendants quote from *McGrath on Evidence* (3rd Ed., Round Hall, 2020), where the authors stated the following:

> *"10 – 262 The extent to which a company can assert privilege against a shareholder largely turns on the extent to which can be said that there was a joint interest between the company and the shareholder. As a matter of English law, it is well established that the shareholders of a company are prima facie entitled to the production of legal advice provided to the company. This rule derives from trust law; where the company obtained legal advice and pays for it out of the funds of a company, a shareholder has a right to see that advice. There are, however, two established exceptions to this general rule. First it does not apply where there is hostile litigation proceeding between the company and the shareholder. Second it does not apply where, from the nature of the relations between the parties, it was reasonably to be contemplated the litigation would arise. These general principles were considered and applied in Carlo Tassara Assets Management SA v. Eire Composites Teoranta [2016] IEHC 103. .... Haughton J. held that legal advice obtained by a company for the purpose of procuring that company to take certain actions – even if it is anticipated that those actions might give rise to litigation – is advice which in principle a shareholder who claims that such actions are unlawful should be entitled to discover. He accepted, however, that from the point in time at which litigation is reasonably contemplated, legal advice sought and obtained by the company attracts legal professional privilege".*

91. In *The Law of Companies* (4th Ed., Bloomsbury, 2016) Dr. Courtney considers the same English case law and refers to the rule as a "disclosure rule". He puts the matter thus:-

[2] Legal advice privilege attaches to all communications between a client and its lawyer containing confidential legal advice, and to documents containing or evidencing such legal evidence.

"46.071 Ordinarily legal professional privilege entitles a legal entity that has received legal advice to refuse to disclose that advice to any other legal entity. It is, however, a well-established rule of practice, in the case of companies, that as stated by Harman J. in Re Hydrosan Limited: 'there is no doubt that matters passing between solicitors to a company and a company are prima facie entitled to be produced to all shareholders of the company'. This is the so-called disclosure rule. The basis of this rule is trustee law."

92. The defendants rely heavily on the judgment in *Carlo Tassara*.

Jardine Strategic

93. In *Carlo Tassara* Haughton J. noted the "*absence of a clear-cut Irish case law on the point*" and was referred to extensive case law of the courts of England and Wales on what became known as the "Shareholder Rule" and a passage from *Privilege* by Colin Passmore (2nd ed., Sweet and Maxwell, 2004). Before I consider the decision in *Carlo Tassara* it is informative to consider the English case law cited and relied on in that decision in support of the Shareholder Rule as it had developed in English law and which has, since *Carlo Tassara*, been overturned by the decision of the Privy Council in *Jardine Strategic Limited v. Oasis Investments II Master Fund Limited and Others* [2025] AC 1558, [2025] UK PC 34. This judgment of the Privy Council bears extensive quoting, as will appear in my conclusion on the subject.

94. In *Jardine,* the Privy Council traced the shareholder rule back to a decision of Chitty J. in *Gourand v. Edison Gower Bell Telephone Co. of Europe* [1887] 57 LJ CH 498. The Privy Council quotes from the reasoning in that judgment as follows

"*a party cannot resist production of documents which have been obtained by means of payment from the monies belonging to the party applying for their production. I think that that is the general principle, and one which, to my mind, applies as between a*

shareholder and the directors who manage his property, when the documents are paid for out of his property". (emphasis added)

95. The Privy Council continued:-

"31. The Gourand case was expressly decided on the basis that there was a true analogy with the Trustee Rule, as between a company and its shareholders, on the basis that the shareholders could be said to be the beneficial owners of the company's property, so as to have paid for the legal advice of which they were seeking disclosure, even though the company was a separate entity, and because the directors could therefore be said to be trustees for the shareholders. But whatever may have been the thinking to that effect among some judges and lawyers in the late nineteenth century, it has been recognised for at least 100 years that this is not so. A company is both the legal and beneficial owner of its property, as was trenchantly stated by Lord Halsbury LC in Salomon v. A Salomon & Company Limited [1897] AC 22."

96. The Privy Council traced the adoption of the shareholder rule originating in *Gourand* even after the judgment in *Salomon*. It examines the judgment in *CAS (Nominees) Limited v. Nottingham Forest plc* [2001] 1 All ER 954 (later relied on in *Carlo Tassara*).

97. In *CAS Nominees*, the petitioner, being a shareholder, alleged that the structuring of a transaction whereby new investment would be made in return for options enabling the investors to acquire majority control was unfairly prejudicial to its interests. The petitioner applied for disclosure of documents comprising legal advice in connection with the transaction on the basis of the 'shareholder rule'. Evans-Lambe J. granted the application for disclosure, stating:

"…*the rule is based on principles of trust law, an analogy being drawn between the position of directors as fiduciaries and trustees. As the authorities show directors, though not properly described as trustees of the assets of the company within their*

charge, nonetheless owe fiduciary duties to their shareholders which prevent them from applying those assets save for the purpose of the company." (emphasis added).

98. Later, the learned judge concluded:

"*…I can see no reason why the objecting shareholders should not be entitled to see the advice…"*

99. The Privy Council in *Jardine* decided that the judge in *CAS* was wrong to draw what is described as the *"then outdated parallel between companies and trusts by saying that company directors owe fiduciary duties to their shareholders. As already noted directors owe those fiduciary duties to the company and not to their shareholders*".

100. The Privy Council considered the evolution of the rule and described it as deriving originally from a concept of trustee and beneficiary, criticising it on the basis that the relationship between shareholders and a company is not one of beneficiary and trustee but that of two separate and independent legal entities, neither acting as agent or trustee for the other.

101. The Privy Council then considered cases concerning joint interest privilege, noting that submissions before it focused on the concept that shareholders had a joint interest with the company in the legal advice obtained by the company for their ultimate benefit, in an attempt to shift away from reliance on the "trustee" basis, which was emerging to be incompatible with *Salomon*.

102. *Jardine* concerned a challenge by a group of shareholders to a valuation attributed to their shares which were being cancelled pursuant to a mechanism for amalgamation set out in the Companies Act 1981 (Bermuda). The objecting shareholders applied for inspection of legal advice which had been given to the company in the context of its decisions as to the value to be offered to dissenting shareholders for shares being cancelled. The company had

asserted that the advice was covered by legal advice privilege. The shareholders invoked the "shareholder rule".

103. At first instance ([2023] SC (Bda) 8 Civ) the Chief Justice of Bermuda applied the shareholder rule, describing it as follows:-

> *"As the cases reviewed above demonstrate, it is established under English law that a company may not claim privilege against its shareholders. The rule was originally based upon the proprietary interests of the shareholder in the property of the company expended on obtaining legal advice. The justification of the rule has changed to the discharge of the fiduciary duties owed by a director to the shareholders (Evans – Lombe J. in CAS (Nominees) Limited v. Nottingham Forest plc [2001] 1 All ER 954) and the existence of a joint interest in the subject matter of the communication".*

104. The Court of Appeal of Bermuda ([2024] CA (Bda) 7 Civ) upheld the decision of the Chief Justice, finding that the shareholder rule was now "*based on joint interest privilege and not on nineteenth century case law*".

105. In the Court of Appeal Kawaley JA said:-

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

106. Kawaley JA. rejected the status based rule:

> *"(a) It unreasonably restricts the freedom of companies to access the protection of legal professional advice, save when litigation is in contemplation;*

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

(c) It presumes that the company – shareholder commercial relationship translates into a commonality of interests whenever the company seeks legal advice, when the real commercial and legal relationship may be entirely different." (para. 158)

107. Kawaley JA. concluded by stating the following:-

"A shareholder has standing to assert a joint interest in legal advice a company has received. This is because there will potentially be various contexts in which a joint interest will arise not because of any single overarching principle which applies in all cases without further analysis. Whether or not a shareholders joint interest will be recognised by a court depends on the legal and financial circumstances of the proceedings in which the joint interest claim is advanced." (Para. 174)

108. The Privy Council allowed the appeal. It identified the first issue arising on the appeal as being a question of whether the Court of Appeal erred in concluding that the plaintiff shareholders have a joint interest in legal advice received by the company relating to the determination of the fair value of their shares for the purpose of the amalgamation mechanism.

109. The Privy Council concluded that the shareholder rule had no place in the laws of Bermuda or in England and Wales:-

"80. The Board is satisfied that the shareholder rule forms no part of the law of Bermuda, and that it ought not to continue to be recognised in England and Wales either. Its only two advantages were its ancient lineage and its creation of a bright line. But the board considers that its disadvantages easily outweighed those two advantages. The first is that its original justification was proprietary, but this basis for the rule is wholly inconsistent with the proper analysis of a registered company as a

legal person separate from its members such that the members have no proprietary interest in the funds of the company used to pay for the advice. The proprietary basis for the rule was not supported by counsel for the respondents and has not for some time been supported either in reported cases or academic writings as a valid justification for the refusal to extend to companies a fundamental right to seek and receive legal advice in confidence.

81. Nonetheless the Board agrees with Nugee J. (as he then was) in Sharp v. Blank [2015] EWHC 2681 (CH) that the original justification for the rule was the proprietary basis, not joint interest. The latter has been prayed in aid by those seeking to explain the continued existence of the shareholder rule in light of the collapse of its original justification. In the Board's opinion, and this is its second main disadvantage, it cannot sensibly justify an automatic status based denial of legal professional privilege between every company and all its shareholders. The reasons for this will become apparent in the conclusions expressed below about the second and third asserted versions of the denial of privilege as against shareholders. In short it cannot sensibly be said that there is always a community of interest between every company and its shareholders, either as a class or a fortiori individually.

82. The status based automatic shareholder rule is therefore now, and in truth has always been, a rule without justification. Like the emperor wearing no clothes in the folktale, it is time to recognise and declare that the rule is altogether unclothed.

83. Turning to the second basis for denying privilege to Jardine Strategic (now the Company), namely joint interest privilege, the central thrust of the submissions of Mr. Mark Howard KC for the respondents was not that joint interest privilege would automatically apply to support every claim for production of relevant documents by a shareholder against a company. Rather he submitted that the company shareholder

relationship was an established type of relationship where joint interest generally existed, like that of trustee and beneficiary, principal and agent and as between partners, joint venturers and certain insurance relationships. Although there might be exceptions where the interests between shareholder and company were insufficiently aligned at the time of the obtaining of the legal advice, this case was not one of them.

84. The Board has already made it clear that this is not the occasion for a general review of what has become to be known as joint interest privilege. The only matter which requires to be decided is whether the company shareholder relationship falls within that supposed general principle. For the reasons which follow, the Board considers that it does not. When the company shareholder relationship is looked at squarely on its own, it is clear that there is no, or at least no sufficient, analogy with those other relationships to justify its inclusion within the joint interest family of relationships.

85. Mr. Howard's best point was that there is force in the proposition that for as long as a company is solvent, its interests as a separate legal person are, in very general sense, frequently aligned with those of its shareholders. What is good for the company's business is, he says, usually good for shareholder value….

86. But this is a serious oversimplification. It first assumes, wrongly, that the interests of the shareholders themselves are always aligned amongst themselves. In reality particularly in a large company, the interests of different classes of shareholders may diverge. Even within a single class, there may be real differences and outlook between, for example those who wish to maximise dividend return and those who would prefer long-term capital growth. Further as the present case vividly demonstrates, there may be sharply divided views (presumably based upon differing perceptions of their best interests) between shareholders in the same class supporting, and opposing, a

particular step such as a merger or an amalgamation. Shareholders are simply not a homogenous block with a single shared interest which may coincide with, or diverge from, the interests of the company. Even in a small family owned company there may be sharp differences in view between different generations as to the best way forward for the company."

87. Yet further, even a solvent company has stakeholders, other than just its shareholders whose interests have to be taken into account, such as its workforce. And the maintenance of solvency may depend upon keeping happy the company's principle providers of finance and working capital, whose perceptions as to the best choice for the company to make between competing business objectives may be quite different from, and generally more cautious than, those of its shareholders.

88. The directors of a large modern sophisticated company have the constant and difficult task of finding their way to a reliable perception of their company's best interests while paying appropriate attention to the interests and wishes of their many different classes of stakeholders, when making decisions, large and small, about the management and direction of the company's business. Many of those decisions will need, or at least benefit from, candid, confidential, legal advice.

89. A broadly based exception from legal advice privilege as between company and shareholders, founded upon a supposedly joint interest between them would fall foul of all the three objections rightly identified by Kawaley JA in the Court of Appeal and quoted above. It would discourage companies from obtaining candid legal advice in confidence. It would ignore the separate personality of the company and it would wrongly assume a simple coincidence of interests contrary to the typical commercial reality.

90. The board also agrees with Kawaley JA that it is material to bear in mind that the relationship between a company and its shareholders is essentially contractual, and that the terms of that relationship typically (as in this case) greatly restrict what a shareholder is entitled to see of, or to be told about, the company's documents: see the bylaw set out at paragraph 18, above.[3]

90. It is accepted by the parties that this would prevent a shareholder from demanding sight of the company's legal advice in any situation outside the context of a discovery exercise conducted in the course of later hostile litigation between them. While of course the desirability that court proceedings should get at the truth means the relevant documents have to be disclosed to a party with no other right to see them, production is normally subject to legal professional privilege. So it is strange that an exception to that same privilege can be mounted on the basis of a special relationship (company and shareholder) where the express contractual terms of that relationship point clearly in the opposite direction.

91. There are numerous authorities, the main examples of which have been cited above, in which the company shareholder relationship is included within the growing family of relationships qualifying for what is now called joint interest privilege. But the foregoing survey of those cases (most of which are not themselves about the company shareholder relationship) shows that this inclusion has been made almost an unthinking habit, based upon Gouraud [1887] 57 LJ CH 498 and Woodhouse [1914] 30 TLR 559,

[3] The bylaw of the company in the case of *Jardine Strategic* referred to in this paragraph is bylaw 132 (a) which provides as follows "accounting records sufficient to show and explain the company's transactions and otherwise complying with the statutes shall be kept at the head office, or at such other place as the directors think fit and shall always be open to inspection by the directors provided that such records as are required by the statute shall also be kept at the office. Subject as aforesaid no member of the company or other person shall have any right of inspecting any account or book or document of the company except as conferred by statute or ordered by a court of competent jurisdiction or authorised by the directors". This court was not referred to any provisions of the Articles of the plaintiff or the SHA corresponding to byelaw 132(a) in *Jardine*. The amended defence and counterclaim quotes extensively from information covenants in clause 4 of the SHA. These provisions may assume importance at trial, but they were not invoked on the discovery application.

both of which adopt the discredited proprietary basis for doing so. It has not been based on any in-depth analysis of whether that inclusion is really merited. In the Board's view the company shareholder relationship should now be removed from that family. The dictum in Dawson – Damer [2020] CH 746 to the contrary quoted above should not be regarded as good law.

92. There remains the much narrower, more nuanced, basis for occasionally depriving a company of legal professional privilege in litigation with its shareholders, namely that advanced by Kawaley JA in the Court of Appeal. That approach would regard the existence of the relationship as only a threshold to entry upon the question whether the shareholder can demonstrate a sufficient joint interest in the obtaining and receiving of the advice, on the particular facts of the case. The board is unable to accept, Kawaley JA's formulation, still less his conclusion that it applies to disentitle the company to legal professional privilege on the facts of this case.

93. The approach adopted by Kawaley JA requires an open textured assessment to be made as to whether the interests had been joint in the particular circumstances. The very uncertainty whether in relation to a particular matter for decision, there was or was not the coincidence of interests between company and shareholders sufficient to engage the exception from privilege would make it all but impossible for directors to know, when deciding whether or not to take legal advice, whether the advice once received would be privileged from production to shareholders in the event of subsequent litigation between them. In order for privilege to deliver its intended objective there must be reasonable certainty as to whether it will or will not apply on a particular occasion for the taking of legal advice. A general rule that privilege would not be available, subject to fact sensitive exceptions, would be even worse. Directors would

just have to make a general assumption that they could not obtain legal advice in confidence.

110. The Board continued by observing in para. 94 that "the need for certainty as to whether legal advice will be privileged or not demands a bright line, otherwise it will fail to serve the objective of encouraging the taking of legal advice."

111. The Board quoted from an observation made by Kawaley JA. in the Court of Appeal in the following terms "whether or not a shareholders joint interest will be recognised by a court depends on the legal and factual circumstances of the proceedings in which the joint interest claim is advanced."

112. The Board continued:

"*96. The insuperable problem with that approach is that the directors need to know with reasonable certainty whether confidence can be maintained in the legal advice at the time when a decision is made whether or not to seek it. At that time (by definition) litigation with shareholders is neither threatened nor contemplated. But how can the directors, when they decide whether or not to seek legal advice, know what (if any) litigation with shareholders may later ensue, and therefore what may be the legal and factual circumstances of the later proceedings?*

97. The board would therefore respectfully reject Kawaley JA's alternative, more nuanced test. While it might lead to fewer cases where a shareholder could override the company's claim to privilege than the joint interest privilege test which has already been rejected, it nonetheless suffers from an unacceptable uncertainty in its application.

98. Any attempt to apply either of the two tests advanced by the respondents to the facts of the present case illustrates the sea of uncertainty to which either of them would give rise."

113. Finally on this question the board had the following to say:

"101. *The fact that such divergent submissions can be made about whether there was or was not a qualifying joint interest in the subject matter of the legal advice clearly demonstrates how unsatisfactory and uncertain such an inevitably multifactorial test for the availability of legal advice privilege is bound to be, and therefore how unsuitable it is, at least in the corporate context, as marking the boundary of a fundamental right to seek legal advice in confidence*."

Willers v. Joyce direction: Laws of England and Wales

114. *Jardine* concerned the laws of Bermuda. It entailed also an examination of the state of the laws of England and Wales. Therefore, the Privy Council issued a direction (known by reference to the case of *Willers v. Joyce (No. 2)* [2018] AC 843) to the effect that its decision in *Jardine* should be regarded by courts in England and Wales as abrogating the shareholder rule for the purpose of litigation in those courts. The necessity for such a direction was identified in *Willers* arising from a number of cases in which there was potential for differences between decisions of the Privy Council and decisions of the Supreme Court or decisions of other courts of England and Wales. The Privy Council explained the decision in the context of this case by referring to the fact that the nearest to a binding decision of the English Court of Appeal on the shareholder rule was *Woodhouse Limited v. Woodhouse* [1914] 30 TLR 559 which they stated was often cited as the leading authority on the shareholder rule. The Privy Council declared that its decision should be regarded by courts in England and Wales as abrogating the shareholder rule for the purpose of litigation in those courts.

115. The Privy Council quoted from judgment of Lush J. in *Woodhouse* where he stated "where a company obtained legal advice in the common interest and paid for it out of the common fund, undoubtedly the shareholder would have a right to see it". The Privy Council held that *Woodhouse* was wrongly decided.

116. I shall return later to the implications of the *Jardine* decision for the present case. It is useful at this point to summarise the effect of that judgment on the shareholder rule.

117. Firstly, the 'shareholder rule' originated with the decision of Chitty J. in *Gouraud*, which was decided on the basis that there was an analogy between the relationship of company and shareholder and the relationship between beneficiaries and a trustee, and that the shareholders could be said to be the beneficial owners of the property of the company. That proposition cannot survive the rule in *Salomon v. A Salomon & Co. Limited* [1897] AC 22. A company has a legal personality distinct from its shareholders. It is the legal and beneficial owner of its property.

118. Secondly, there is no parallel between the relationships of beneficiary and trustee and shareholders and a company.

119. Thirdly, *CAS (Nominees) Ltd v. Nottingham Forest plc* [2001] 1 All ER 954 was wrongly decided.

120. Fourthly, the status based automatic shareholder rule is a rule without justification.

121. Fifthly, the relationship of company and shareholder does not fall within the family of relationships to which the principle of joint interest privilege applies.

Carlo Tassara Assets Management SA v. Eire Composites Teoranta and Others [2016] IEHC 103

122. In this case the plaintiff (or its predecessor) lent to the defendant company a sum of €2 million by way of loan note and subscribed for shares in an amount of €3.3 million. An investment scheme was proposed by the directors, which provided for the following steps:

1. The conversion of the plaintiff's loan note into ordinary shares; and
2. The exercise by the company of a 'drag along' option to compulsorily acquire the plaintiff's 47% shareholding and transfer 100% of the shares to a new investor, who would pay €50,000 for the shares and invest €250,000 in the company.

The plaintiff objected to the scheme. The company disputed that it had validly acquired its shareholding. The plaintiff issued a plenary action seeking declarations that the loan notes had been validly assigned to it, and that it was a validly registered shareholder, and declarations to reverse the legal effects of the loan note conversion and exercise of the 'drag along' option. It also claimed damages for conspiracy, breach of duty (including breach of fiduciary duty) and for intentional interference with its contracted relations.

123. In making discovery, the defendants claimed legal advice privilege and litigation privilege over documents said to comprise advice as to the implementation of the scheme. The plaintiffs objected to the claims of privilege, relying in part on the shareholder rule.

124. Haughton J. noted that "in the absence of a clear-cut Irish case law on this point" the plaintiff relied on *CAS (Nominees) Ltd and Others v. Nottingham Forest plc and Others* [2001] 1 All ER 954. He quoted from Evans-Lombe J.

> "*...I can see no reason why the objecting shareholders should not be entitled to see the advice and guidance being given to the company's board at the time those transactions were embarked upon in proceedings in which the company itself only appears as a defendant in a nominal capacity so as to be bound by any order which the Court makes."*

125. In *CAS*, the court had relied on a passage from *Woodhouse & Co Limited v. Woodhouse* [1914] 30 TLR 559 in which the court had stated that whether the shareholder was a plaintiff or a defendant in litigation with the company was immaterial but "*the principle was that if people had a common interest in property, an opinion having regard to that property, paid out of the common fund i.e. the company's money or trust fund, was the common property of the shareholder cestui que trust. But where the parties were sundered by litigation such an opinion obtained by one of them was privileged"*.

126. The first assumption made in this quoted piece, namely, that shareholders had a common interest with the company in legal advice obtained by recourse to company property, has since been declared by the Privy Council in *Jardine* to be erroneous. In doing so it cited the rule in *Salomon*, a rule long established and invariably and properly applied in Irish law.

127. Haughton J. noted that the *Carlo Tassara* case was comparable to an oppression case such as *CAS*, but the *Carlo Tassara* plaintiff had initiated a plenary action because there was a dispute as to whether the plaintiff, not being a registered shareholder at the time of the proceedings, was entitled to invoke s. 205 (the predecessor of s. 212 of the Companies Act 2014). He considered that were it not for the fact that the plaintiff was not a registered shareholder at the time of the events giving rise to the proceedings, the proceedings would have been initiated as an oppression action pursuant to s. 205. This observation by the court was relied on heavily by counsel for the plaintiffs in this plenary case to distinguish *Carlo Tassara.* I do not consider that to be a valid distinction. Haughton J. later identified that the relief sought in the proceedings before him was "*damages for conspiracy, breach of contract, breach of duty (including breach of fiduciary duty) and for intentional interference with the plaintiff's contractual relation*". Those reliefs mirror substantially the reliefs sought in these proceedings. Significantly, in this case oppression of shareholders is not alleged in the claim or the counterclaim. Nor does it matter that in these proceedings the company is the plaintiff and a defendant to counterclaims, whereas in *Carlo Tassara* the company was the defendant.

128. Having reviewed the authorities Haughton J. said the following:

> "*28. ...it seems to me that legal advice obtained by a company for the purpose of procuring that company to take certain actions – even if it is anticipated that those actions might give rise to litigation – is advice which in principle a shareholder who claims that such actions are unlawful as constituting oppression should be entitled to*

discover. The reason for this that is most logical seems to be best articulated in the passage quoted above from Privilege (this being a reference to the Second Edition of the textbook *Privilege* by Colin Passmore (Sweet and Maxwell, 2004) See para. 136 below) *by reference to 'joint interest' – such a shareholder has a joint interest with the company, the directors and management, in obtaining such legal advice. Whether, following receipt of that advice, the company decides to take those actions, or decides against taking such actions, and whether or not it follows the advice given, may or may not ultimately be that relevant, but in principle the shareholder or director should be entitled to see that advice when the 'certain actions' of the company become the subject matter of 'oppression' or comparable litigation.*

29. It follows from this that legal advice to a company that cannot be said to have been sought in the 'joint interest' of shareholders may still attract legal professional privilege.

30. It also follows that generally legal advice sought after the company has taken the 'certain actions that are in dispute', at a point in time when proceedings are in contemplation, is less likely to be of joint interest and more likely to be sought for benefit of one side to the dispute. If the reality is that the legal advice is sought at that point in time for the purpose of anticipated litigation, and the dominant purpose is the pursuit or possible defence of such litigation, or the legal advice arises in the context of discussion or negotiation to compromise or avoid the occurrence of litigation, the legal advice will attract legal professional privilege.

31. So, for example, legal, valuation or accounting advice sought and given to the company in advance of the alleged decision or agreement to convert the Loan Note, even if given in anticipation of litigation arising if a particular decision is taken or agreement is reached by the company, would be discoverable because any shareholder

who later claims to be aggrieved may be said to have had an interest – jointly with other shareholders, directors and company management – in the seeking and obtaining of that advice.

32. On the other hand, in the present case soon after the contested agreement is alleged to have been reached – at meetings in late December, 2013 – battle lines were drawn and litigation became probable. From early in 2014 the legal advice sought and obtained by the company, or other likely parties to the litigation, attracts legal professional privilege. In my view this applies even if the legal steps required to formally implement the contested agreement are taken at a later date - as appears to have happened here because the Loan Note conversion and Drag Along transfer of shares were not completed or formalised until August/September of 2014. In my view the hostilities that led directly and ineluctably to the litigation are already evident in February, 2014. To adopt the wording used in Woodhouse, 'But where the parties were sundered by litigation such an opinion obtained by one of them was privileged'.

33. In reaching this conclusion I am mindful of the consistent judicial policy that there needs to be confidence in the application of legal professional privilege to lawyers/client advice. As Lord Nicholls warned in Re Derby Magistrates Court at p. 700:-

> *'If the boundary of the new incursion into the hither privileged area is not principled and clear, that confidence cannot exist'.*"

129. Haughton J. quoted with approval following passage from the judgment of Finlay CJ in *Smurfit Paribas Bank Ltd v. AAB Export Finance Ltd* [1991] IR 469 at p. 478; –

"Where a person seeks or obtains legal advice there are good reasons to believe that he necessarily enters the area of potential litigation. The necessity to obtain legal advice would in broad terms appear to envisage the possibility of a legal challenge or

query as to the correctness or effectiveness of some step which a person is contemplating. Whether such query or challenge develops or not, it is clear that a person is then entering the area of possible litigation. Having regard to those considerations I accept that where it is established that a communication was made between a person and his lawyer acting for him as a lawyer for the purpose of obtaining from such lawyer legal advice, whether at the initiation of the client or the lawyer, that communication made on such an occasion should in general be privileged or exempt from disclosure, except with the consent of the client."

130. Haughton J. concluded by stating that he believed that "these authorities justify a cautious approach to any extension or erosion of the established circumstances in which legal profession privilege may be claimed."

131. Having identified the principles quoted above Haughton J. then made his determination in respect of the documents over which privilege was claimed and objection taken by the plaintiffs. The only document in respect of which the claim of privilege was rejected by reference to the shareholder rule was one email between the company's solicitor and its general manager, which, according to the defendants' affidavit of discovery related to an alleged agreement by the plaintiff to convert its loan note into ordinary shares.

132. In respect of other emails the court upheld a claim of privilege which was not the privilege of the company but the privilege of a different party, being the named personal defendants. He found that certain emails and draft letters were covered by legal privilege in favour of parties other than the company and "*do not come within the scope of the CAS or 'joint interest' exception*." The privilege claim for other documents was upheld on the grounds of litigation privilege.

133. Privilege was upheld for a series of emails regarding a possible negotiation of settlement of the litigation.

134. Another claim of privilege was rejected not by reference to the shareholder rule but because the email concerned was an email attaching a letter issued *inter partes*.

135. Although the privilege claim was rejected by reference to the shareholder rule in relation to only one single email, the judgment is now relied on by the defendants in support of the shareholder rule.

Re Brock Delappe Limited [2023] IEHC 318

136. These were oppression proceedings pursuant to section 212 of the Companies Act 2014.

137. Sanfey J. quoted from para. 28 of the judgment of Haughton J. in *Carlo Tassara*, where Haughton J. had stated "*it seems to me that legal advice obtained by a company for the purpose of procuring that company to take certain actions – even if it is anticipated that those actions might give rise to litigation, – is advice which in principle a shareholder claims that such actions are unlawful as constituting oppression should be entitled to discover*".

138. Sanfey J. continues by referring to submissions by the applicant, based on *Carlo Tassara* that as a shareholder he is entitled to see documentation which contains legal advice rendered to the company, and a submission made in that case that neither legal advice privilege or litigation privilege can be deployed to preclude his access.

139. In his conclusions Sanfey J. adopts the principle quoted from the judgment of Haughton J. when he states that in respect of advices obtained by the company prior to the contemplation of legal proceedings "*Mr. Delappe, as a director and shareholder of the company, was entitled to access the advice given to the company in the email".* (Para. 162)

140. *Brock Delappe* of course predated *Jardine*. There appears to have been no debate in *Brock Delappe* about joint interest or reference to any of the authorities or commentary considered in *Carlo Tassara*.

141. I am not persuaded that the passing reference in *Brock Delappe* to the judgment in *Carlo Tassara* advances the defendants proposition in support of a shareholder rule.

Passmore on Privilege

142. In para. 28 of *Carlo Tassara* Haughton J. stated that the logic which impressed him was the logic described by Passmore in the Second Edition of his book on Privilege (2006) where the author states the following:

> "*6.009 Similar consequences follow where a third party can establish a common or joint interest in the subject matter of a privileged communication which has been made in the course of a client-lawyer relationship to which he is not a party. If a joint interest can be established, then the third party will have a right of access in litigation with the joint interest holder to his privileged communications with his lawyer, as well as to the right to assert privilege over such communications, as against others, once he has obtained access to them*." (emphasis added)

143. The words underlined by me show that Mr. Passmore was not in this paragraph, which was relied on in *Carlo Tassara*, stating a shareholder rule. He went no further than positing that if a joint interest can be established, the third party will have a right of access. He says nothing there about how such a joint interest can be established, much less that it is established on the basis of a shareholder company relationship.

144. There was presented to me the Fifth Edition of Passmore (2024), in which the author puts the position differently:

> "*Similar consequences ought to follow with respect to the treatment of a privileged communication where a joint interest is established in the subject matter of that communication, even though one only of the parties to the joint interest may have instructed a lawyer to advise him; the absence of a joint retainer, even if there could have been one, being irrelevant to the existence of the joint interest. Once a joint*

interest is established, then all the parties to that joint interest will have a right of access in litigation between them to each other's privileged communications relating to the subject matter of the joint interest, so long as the communications occurred while that interest subsisted; in addition all will be entitled to assert privilege over those communications as against persons not party to the joint interest, once they have obtained access to them…" (emphasis added)

145. This paragraph appears in Mr. Passmore's introduction to "Joint and Common Interests" under the heading "*Identifying Joint Interest Relationships*". Again, it says nothing of a shareholder rule, to which he turns later. At para. 6.025 he discusses a range of what he describes as "Recognised Joint Interest Relationships", as follows:

"*…the more common of these joint interest relationships are those between a trustee (including personal representatives under a will) and beneficiary, a company and its shareholders, and a formal partnership entity and its individual partners*". (emphasis added)

Mr. Passmore examines each of these relationships in more detail. He considers relationships of trustees and beneficiaries, "companies and corporations" and partners and partnerships. He also considers circumstances in which a joint interest can arise out of "commercial relationships".

146. When considering joint interest privilege in the context of companies and corporations the author states the following:

"[6.052] As with the position in relation to the beneficiary and trustee relationship, there is long-standing case law demonstrating that shareholders in a company have rights of access to the company's privileged information. These rights are limited to situations where the shareholders are in dispute with the company and then only to the extent both that such information is relevant to their dispute and that it came into

existence when their interests were aligned, in effect before the dispute between them arose. While there is also some reference in the case law to the shareholders' entitlement to access arising because, for example, privilege legal advice is paid for out of company funds, this does not have the same importance as the equivalent position when paid out of trust funds. This point is examined explicitly below. As will be seen, while the case-law is long-standing, the High Court in 2023 questioned its legitimacy and suggested the time is ripe for detailed appellate review. This is likely to happen in late 2024 or early 2025, as will be explained." (emphasis added)

147. The case law referenced by Mr. Passmore includes the early cases of *Gouraud*, *Woodhouse*, and *CAS*.

148. Passmore refers to more recent cases in which the shareholder principle was questioned, including *Various Claimants v. G4S plc* [2023] EWHC 2863, where the court noted that the shareholder rule arose from case law which "rested on shaky foundations", the rule having emerged before *Salomon v. Salomon*. Importantly, the author then noted the first instance decision of the Chief Justice of Bermuda, in *Jardine*, later overturned by the Privy Council. The author concludes by observing that the Judge in *G4S*, Michael Green J. had recognised that appellate consideration of the ongoing legitimacy and scope of the shareholder access principle is "now needed".

149. This appellate consideration had not taken place by the time the Fifth Edition of Passmore was published.

150. The question received comprehensive examination by the Privy Council in *Jardine* and a clear answer given, namely that the so-called shareholder rule has no valid foundation. Neither *CAS* nor *Woodhouse*, relied on in *Carlo Tassara*, have survived *Jardine*. The limited extract from the Second Edition of Passmore quoted to Haughton J. was overtaken by his Fifth Edition, which portended *Jardine*.

151. On a close reading of these passages it is clear that Mr. Passmore did not in the paragraph of his Second Edition quoted by Haughton J. declare a shareholder rule. Instead, in the quoted passage he was simply stating a principle that "*where a third party can establish a common or joint interest in the subject matter of a privileged communication*" he may then have a right of access to that material on the basis of joint interest privilege. It emerges from the remainder of Mr. Passmore's chapter on this subject in his Fifth Edition that the existence of a joint interest must still be established on the facts of any given case. Mr. Passmore also observed that the foundations of the shareholder rule were laid in a series of cases, the first of which predates *Salomon*, and all of which then remained for consideration by an appellate court.

152. The Privy Council has clearly declared that the company shareholder relationship has no place in the 'family' of relationships which establish a joint interest in otherwise privileged legal advice.

153. Finally, it is clear from para. 28 of the judgment of Haughton J. that he was not taking as read a rule that the mere existence of the relationship of shareholder and company itself established a joint interest in the company's legal advice privilege. In para. 29 he said:

> "*It follows from this that legal advice to a company that cannot be said to have been sought in the 'joint interest' of shareholders may still attract legal professional privilege*."

Worldport

154. The defendants have urged this Court to treat *Carlo Tassara* as authority for the shareholder rule in Ireland, having regard to the decision of Clarke J. in *Re Worldport Ireland Limited (in liquidation) and the Companies Act* [2005] IEHC 189. In that judgment Clarke J. had the following to say on the subject of stare decisis and judicial precedent:

"*It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. Huddersfield Police Authority v Watson [1947] K.B. 842 at 848, Re Howard's Will Trusts, Leven & Bradley [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered*." (emphasis added)

155. This description of circumstances must encompass a case where a prior decision by a judge of this court, as Haughton J. was when deciding *Carlo Tassara*, was informed by a body of case law in another jurisdiction which has been examined at the highest appellate level in that jurisdiction, and there found to be unsound. This is such a case.

156. *Carlo Tassara* is not a case decided, as Clarke J. put it in *Worldport*, without "*a review of significant relevant authority*". It is nonetheless a case decided in the absence of Irish case

law on the point, by reference to English authorities cited to the court (*CAS* and *Woodhouse*) and commentary by Mr. Passmore (2nd edition) which expose a shareholder rule as it was then understood by those judges and that author to be the law of England and Wales, a rule which the Privy Council in 2025 found to be without foundation.

157. In *Jardine* the Privy Council held that the "status-based" shareholder rule is a rule without justification, stating "*like the emperor wearing no clothes in the folktale, it is time to recognise and declare that the rule is altogether unclothed*". The Privy Council rejected also a version of the shareholder rule founded upon a supposed joint interest between a company and its shareholders. It held that the company shareholder relationship has no place in the family of relationships which qualify as establishing a joint interest privilege.

158. This Court is of course not bound by *Jardine*. But I am not prepared to treat *Carlo Tassar*a as authority for a shareholder rule, in any formulation, without regard to the analysis of the Privy Council in *Jardine*.

159. The logic of the judgment of the Privy Council is compelling and in my view should be followed. A significant factor of *Jardine*, apparently not argued in *Carlo Tassara*, is the finding by the Privy Council that the shareholder rule is inconsistent with the rule in *Salomon*. A company is a legal entity separate and distinct from its shareholders. Shareholders have a proprietary interest in the shares and rights attaching to the shares, namely the right to receive dividends when declared and paid, the right to participate in distributions in a solvent winding up, the right to receive notice of, attend and vote at meetings of shareholders or classes of shareholders to which they are a member. Rights to information are typically covered by the constitution of the company and any relevant shareholder agreement. Assets of the company, including not only land, goods, money, and services but also legal advice obtained by the company are the property

of the company. The shareholders benefit from the value of such assets through their interest in the shares. They are not joint owners or beneficial owners of those assets.

160. Of course shareholders have a vital commercial and economic interest in the fortunes of the company, but that does not translate into a legally recognised common or joint interest in confidential legal advice obtained by the company itself, being a separate entity.

161. Like any other legal entity, a company is entitled, in its own right to take legal advice in relation to the conduct of its business. That means advice in relation to day-to-day activities and more fundamental transactions of the company, such as a merger or acquisition. Such advice may extend to matters such as the legal structure of the transaction and any legal risks or other implications for the company itself.

162. A company acts by its board of directors and management. They are the persons entitled to seek and obtain such advice and support as they deem necessary to serve and protect the interests of the company. Of course the shareholders have an interest, enjoyed through the rights attaching to their shares, in the value of the company. But the interests of the company as a whole do not always coincide with the interests of every individual shareholder or the interests of separate groups of shareholders, of which there are many in this case.

163. Certain types of transaction may require authorisation by resolution of shareholders or may under a shareholders agreement or otherwise require the approval of certain shareholders or groups of shareholders. In deciding whether to approve or consent to any such transaction, shareholders make their own decisions, informed by such information or advice as they determine they require. Shareholders are entitled to act in their own interests provided they do not act unlawfully, as the plaintiff in this case alleges.

164. When it comes to engagement between a company and its shareholders and decisions taken from time to time by the respective parties or groups thereof, each is entitled to obtain its

own legal advice and to maintain its own privilege in respect of that advice. Unless waived, that privilege remains the privilege of the party obtaining the advice. Waiver is not the basis of the defendants' application in this case, save in respect of two particular groups of documents (see below paras. 202-204 (Group Four) and 208-214 below (Group Six)).

165. If they consider doing so to be in the interests of the company, the board of directors may, on occasion, decide to share with shareholders or others advice which they have obtained, either waiving privilege generally or more likely sharing such advice on terms which protect the privilege or limit it to those with whom it has been shared, thereby establishing, typically by a formal agreement, a joint privilege.

166. I do not go as far as to say that there can never be circumstances in which a shareholder is entitled to inspect legal advice obtained by the company which otherwise attracts privilege. Waiver is perhaps the most obvious and likely example. But the relationship of shareholder and company *simpliciter*, each being distinct legal persons as found in *Salomon*, does not establish such a right.

167. There is no status-based shareholder rule and no common or joint interest arising by virtue of the shareholding.

A nuanced approach to the shareholder rule

168. The Privy Council went so far as to reject a nuanced version of the rule expressed by Kawaley JA in the Court of Appeal of Bermuda. That was the version which says that the status of shareholder confers only the *locus standi* to invoke the rule, and that the circumstances of every case should be examined to determine if a joint interest arises.

169. In doing so, the Privy Council cautioned against expanding the family of "joint interests" by reference to specific findings of fact in individual cases, particularly having regard to the potential uncertainty doing so would create for the board of directors of any company seeking to obtain legal advice for the benefit of the company. This policy commends itself

for the following reasons (a) it is consistent with the cautious approach of respecting the established principle of legal advice privilege endorsed by Haughton J. in *Carlo Tassara* itself and (b) it is consistent with the rule in *Salomon* that the company is a separate legal personality independent of its shareholders.

170. Therefore it is with caution that I approach the next interesting submission made by the defendants, by reference to clause 37 of the SHA.

Clause 37

171. The defendants submit that a duty of good faith arises by virtue of clause 37 of the shareholder agreement. The following paragraphs of the amended Statement of Claim are relevant:

> "*27. Clause 37 of the Workhuman SHA is headed 'Further Assurance and Good Faith' and provides as follows:*
>
> > *'Each party shall cooperate with the others and execute and deliver to the others such other instruments and documents and take such other actions as may be reasonably requested from time to time in order to carry out, evidence and confirm their rights and the intended purpose of this agreement.'*
>
> *28. The true meaning and effect of clause 37 is that the parties owe each other a duty of good faith in respect of all matters touching upon the Agreement. In the alternative it is an implied term of the Workhuman SHA that the parties owe each other a duty of good faith in respect of all matters touching upon the Agreement.*
>
> *29. Further and in the alternative, one of the purposes of the Workhuman SHA was to advance the interests of the Company and/or to prevent any shareholder profiting at the expense of the others. In the premises each shareholder was under a fiduciary duty to that effect".*

172. The defendants deny the plea of a duty of good faith or a fiduciary duty. No submissions were made to me on this application as to the merits of this plea or by reference to the case law on the subject. Nor would it be appropriate for me to determine such a claim on this application.

173. While the defendants deny the existence of such duties they submit that because the plaintiff has pleaded a duty of good faith and a fiduciary duty I must treat its claim to privilege in light of that plea.

174. Even taking this plea at its height no authority was cited for a proposition that where a duty of good faith is owed it carries with it the consequence that a party to such a relationship cannot take confidential legal advice in the conduct of its business, including its conduct towards the party to whom the duty is said to be owed, without the confidence that such advice will remain confidential and privileged. There may be cases – and I say nothing as to whether this is such a case – where, for the very purpose of ensuring that a party is acting lawfully and in compliance with duties it owes it is appropriate and necessary to take legal advice. The policy underlying the principle of legal advice privilege would be undermined if in taking such advice the party concerned had no such confidence, or worse still, as the Privy Council postulated, may decide not to take legal advice at all, and this potentially to the detriment of all parties including the party to whom a duty of good faith is owed.

175. In the extensive examination by Passmore in his Fifth Edition of the several categories of joint interest, he considered a range of relationships such as trustee and beneficiary, partners, shareholder and company (identified even by Passmore himself in the Fifth Edition to be in a state of flux pending the appeal in *Jardine*) and other commercial relationships such as that of an insured and an insurer. No reference is made to the possibility of a joint interest in legal advice deriving from the existence of a duty of good faith or a fiduciary duty.

176. Finally, at para. 63.1 of the Amended Defence and Counterclaim, the defendants plead that Luxco 276 and Falcon VII were "*each, independently, entitled to scrutinise, evaluate and decide upon the merits of the proposed acquisition with the benefit of the information rights and rights of consent provided for in the Falcon agreements and the Workhuman agreements. Luxco 276 and Falcon VII were fully entitled to accept or reject the proposed acquisition and to provide consent or not, acting in their respective interests*". This contradicts the joint interest proposition.

177. The defendants plead that they enjoy rights and interests which, on their case, were being impaired by the structure and terms of the proposed transaction. They claim that their response to those terms was a legitimate protection of their own distinct interests, again in contradiction to the joint interest proposition.

Conclusions on the shareholder rule

178. At paras. 117-121 I have summarised the status of the shareholder rule after *Jardine*. In *Carlo Tassara* the court, noting the absence of Irish authority on this point, was informed by a line of English case law which is overturned by *Jardine*. Although not bound by the judgment of the Privy Council, I find its logic compelling, and the *Worldport* principle, properly understood, allows the court to follow *Jardine*, which I shall do. This leads to the following conclusions relating to this case.

179. Firstly, the defendants do not have a right, by virtue of the direct shareholding of the first defendant or the indirect shareholding of the other defendants, to inspect documents evidencing legal advice obtained by the plaintiff, including legal advice obtained in connection with the proposed acquisition of Achievers, and in respect of which the plaintiff asserts legal advice privilege, unless the plaintiff has waived such privilege.

180. Secondly, the directors of companies which are direct or indirect shareholders in the plaintiff do not have the right to inspect legal advice obtained by the plaintiff, unless the plaintiff has waived its legal advice privilege.

181. Thirdly, a joint interest in legal advice obtained by the plaintiff does not arise from either

(a) The relationship of shareholder and company; or

(b) The asserted duty of good faith.

182. A decision to respect and protect the privilege of the company taking legal advice may have limiting implications for the ability of the party asserting the privilege to deploy or rely on the substance of the advice when seeking at a trial of the action to stand over its actions. I am not required to determine such a question on this application.

183. This finding informs my conclusions on most of the Groups of documents at issue in this application. There are twelve such groups. They were pursued at the hearing with varying degrees of vigour. Only one, Group Eleven, was abandoned. Therefore, it is necessary to consider each group.

PART SIX: THE 'OBJECTED GROUPS'

184. Many of the submissions introduced fact-based variations on the theme of the shareholder rule. But the underlying proposition relied on by the defendant was that a shareholder is entitled as of right to access legal advice obtained by the company, or that a joint interest in that advice derives from an alleged duty of good faith. For the reasons stated in Part Five, I have rejected both of these propositions.

185. The objection of the defendants pursuant to the shareholder rule relates only to certain documents which comprise legal advice. Legal advice privilege attaches to material which constitutes or refers to a communication between a lawyer and a client in the course of the professional lawyer client relationship and which is confidential.

186. It is not claimed by the defendants that the shareholder rule would override any otherwise valid claim of litigation privilege, Litigation privilege attaches to documents which contain or evidence legal advice generated for the dominant purpose of preparing for litigation. It is accepted by the defendants that such privilege can attach to documents which come into existence at any time after litigation between the parties is contemplated. A number of objections in relation to the claims to litigation privilege arise in this case to which I return later.

187. The plaintiff's Affidavit as to Documents was sworn on 14 October 2025 by Mr. Nicholas A. Solis, who describes himself as the Senior Vice President, and General Counsel of the plaintiff. He makes the usual averment that he has been authorised to make the affidavit on behalf of the plaintiff "from a review of the Plaintiff's books and records and from facts within my own knowledge save where otherwise appears and where so otherwise appearing I believe those facts to be true."

188. Mr. Solis explained the manner in which items were listed in the Second Part of the First Schedule on the grounds that they were subject to privilege. The privilege status of each of the documents listed in the Second Part was identified in the "privilege type field" describing the privilege claim as Legal Advice Privilege, Litigation Privilege, Common Interest Privilege or Without Prejudice Privilege. Some of these categories were said to overlap.

189. Mr. Solis explained the basis upon which certain documents in the First Schedule First Part were redacted, whether by reference to privilege, relevance or commercial sensitivity, or on the basis that they contained personal data which is irrelevant to the categories to be discovered.

190. Mr. Solis made the usual averment (para. 40) that he understood the obligation on a party making discovery.

191. The court was not invited to read the contested documents. Therefore, I rely on the description in Tab 5 exhibited to Ms. Shaw's affidavit and the plaintiff's response to the objections. Tab 5 is a summary of the descriptions and objections stated in correspondence between the parties.

Group One: 3 documents: emails from Alan Dunne to McCann FitzGerald dated 8 March 2023

192. These are emails from Mr. Alan Dunne of Capnua to McCann FitzGerald Solicitors, each being advisers to the plaintiff, dated 8 March 2023 in relation to the terms of the Whiskey offer. The plaintiff asserted legal advice privilege over an email forwarding an email chain between the target shareholder (Silverlake) and Mr. Moloney and Mr. Dunne regarding the proposed transaction.

193. The defendant's submission is that the negotiations were being conducted on behalf of Falcon Bidco and states that McCann FitGerald were advising Falcon Bidco. They enquired as to the basis upon which the plaintiff was refusing to produce these documents to Falcon VII Investments and Mr. Coady who it is said were respectively an indirect shareholder and director of Falcon Bidco.

194. In Ms. Shaw's affidavit she stated the following:-

> "*The first defendant Luxco 276 is a 10% direct shareholder of the plaintiff. The ninth defendant Bernard Coady and the tenth defendant Sam McKelvey are directors of Falcon Bidco which is the shareholder of the plaintiff that it is said by the plaintiff was in receipt of advice over which the plaintiff claims privilege. The third defendant Falcon VII, is an indirect shareholder in Falcon Bidco. Mr Coady and Mr. McKelvey, as directors of Falcon Bidco have a clear entitlement to the advice obtained by Falcon Bidco as does Falcon VII, it's indirect shareholder. Luxco 276 has a clear entitlement, as a direct shareholder of the plaintiff to sight of the legal advice obtained by the plaintiff concerning the proposed acquisition, that it is pleaded by the plaintiff was*

being negotiated for the benefit of the plaintiff shareholders including Luxco 276 and in respect of which it is alleged that Luxco 276 made representations and further representations (which are denied). This applies insofar as the legal advice was not for the dominant purpose of litigation."

195. Later Ms. Shaw emphasises that the first named defendant is a direct shareholder of the plaintiff, and that Mr. Coady and Mr. McKelvey the ninth and tenth defendants were directors of Falcon Bidco (which is not a defendant) and that Falcon VII Investments, (the third defendant) is an indirect shareholder of Falcon Bidco.

196. In Ms. Fearon's affidavit, from which I have quoted earlier (see paras. 84-86) she verifies that the advice given by McCann FitzGerald was not given to Falcon Bidco, but to the plaintiff itself. She continued: "*the negotiations were at all times conducted on behalf of the plaintiff and the plaintiff is entitled to assert privilege over legal advice received in this context as it has done*."

197. The averment that the advice given by McCann FitzGerald was not to any entity other than the plaintiff was not contradicted. I therefore accept that advice contained in these emails was legal advice only to the plaintiff and it is the plaintiff's privilege which is under challenge in their application.

198. Neither the direct shareholder, the first defendant, the indirect investors or the defendnats who are directors of shareholder companies, are entitled to override the plaintiff's privilege in this advice.

Group Two: 3 documents: email McCann FitzGerald to Alan Dunne dated 23 March 2023 and attachments

199. The claim of privilege is stated to be on the basis that these documents comprise legal advice to the plaintiff in connection with the negotiations for the proposed transaction.

200. The defendant's objection to this claim is that the negotiations were being conducted on behalf of Falcon Bidco and predated the commencement of the dispute. For the reasons

described above in relation to Group One the plaintiff is entitled to maintain its privilege in respect of these documents.

Group Three: 1 document: internal email in McCann FitzGerald Solicitors dated 8 April 2023 forwarding emails between the target shareholder and Mr. Dunne

201. The defendants complained that none of these documents or the attachments to an internal email of McCann Fitzgerald had been included in the discovery. This was corrected by the plaintiff in its verification that the documents comprised confidential legal advice privilege. The privilege claim is valid.

Group Four: 54 documents being email chains from McCann FitzGerald to Silverlake representatives dated 10 May 2023

202. The privilege narrative refers to these emails as "confidential communication from McCann FitzGerald to a third party relaying legal advice in respect of which the third party shares a common interest with Globoforce".

203. The plaintiff says that after the events of March 2023 negotiations continued between the plaintiff and the target shareholder. This was at a time when certain "without prejudice" negotiations were taking place between the parties. The plaintiff says that it was still hoping that the issues between the plaintiff and the defendants could be resolved so that the proposed acquisition could proceed. As part of these negotiations it was necessary to share with Silverlake certain updates and information about the dispute between the plaintiff and the defendants, including at times sharing legal advice received by the plaintiff. The plaintiff says that this privileged information was shared with Silverlake confidentially and for the purposes of facilitating and advancing those negotiations, thereby creating the basis of a common interest between the plaintiff and Silverlake, being a common interest in the resolution of the dispute with the defendants.

204. These communications postdate the outbreak of hostilities between the parties and are clearly privileged in the plaintiff's hands. The process of sharing them confidentially with

Silverlake in the context of an effort to resolve all matters was a valid basis for a common interest privilege between the plaintiff and Silverlake, and did not constitute a waiver.

Group Five: 22 documents: emails between Mr. Moloney and company executives including emails discussing the retention of anti-trust counsel for the proposed transaction. Date 30 May 2023

205. The plaintiff asserts privilege on the basis that this material is "confidential internal Globoforce email considering/discussing legal advice received from Globoforce's legal advisers on preliminary regulatory work".

206. The first defendant claims that as a shareholder it is entitled to inspect this advice.

207. Legal advice to the plaintiff relating to anti-trust or competition law is privileged and not overridden by the defendants' status of shareholder.

Group Six: 1 email from McCann FitzGerald to Pallas enclosing correspondence from A&L Goodbody of 7 June 2023

208. Messrs Pallas Partners LLP are Mr. Moloney's legal advisers.

209. The privilege narrative provided by the plaintiff for this item recites that these communications relate to

> "*confidential communication from McCann FitzGerald LLP to Globoforce and/or its advisers advising on correspondence from ALG; confidential communication from McCann FitzGerald to Globoforce and/or its advisers for the dominant purpose of the Proceedings; confidential communication from McCann FitzGerald LLP to a third party relaying legal advice in respect of which the third party shares a common interest with Globoforce.*

210. In September 2023 Mr. Moloney issued legal proceedings in the High Court of England and Wales against a number of parties. These proceedings arose from events which occurred after 31 March 2023. Neither the detail of these events or of the proceedings were opened to this court, save that the court was informed that they related to matters in dispute by reference to the Falcon Structure, governed by agreements submitting disputes to the

jurisdiction of the Courts of England and Wales. The plaintiff was not a party to those proceedings but claims that certain of the issues in those proceedings were relevant to the plaintiff and its dispute with the defendants. The plaintiffs claim also that certain of the issues in dispute between the defendants and the plaintiff were relevant to Mr. Moloney in his dispute in the UK. They continue "*from time to time in the lead up to and after the UK proceedings had been issued, Mr. Moloney's lawyers and this firm, on behalf of the plaintiff shared information including at times privileged legal advice with each other and with the consent of our respective clients. This sharing of information was at all times subject to a duty of confidentiality and was limited to those issues in which our clients shared a common interest. To formalise the existing course of dealings a common interest protocol was entered into on 9 October 2023*".

211. The defendants object to this claim of common interest privilege. They say firstly that the plaintiff was not a party to the proceedings in the UK. Secondly those proceedings have been finally determined.

212. At the very latest from the end of March 2023 contentious issues arose as between the plaintiff and the defendants which gave rise to these proceedings. Ms. Fearon explains that Mr. Moloney shared with the plaintiff certain documents relating to the proceedings in the UK over which he claimed litigation privilege and that he did so on the basis that the plaintiff and Mr. Moloney shared a common interest in relation to those matters. The defendants questioned how the plaintiff could now rely on this privilege in circumstances where the English proceedings were disposed of before the affidavit of Discovery was sworn, citing *UCC v. ESB* [2014] 2 IR 525, [2014] IEHC 135 per Finlay Geoghegan J. They also submit that these communications constituted waiver of privilege.

213. Although a common interest protocol was only entered into between Mr. Moloney's solicitors and the plaintiff's solicitors as late as 9 October 2023, it seems to me that in

circumstances where the matters which are in dispute in these proceedings had become contentious and litigation was contemplated by the end of March 2023, it was appropriate for each of the plaintiff and Mr. Moloney to retain their respective legal advisers in each jurisdiction and that they be authorised to consult with each other and share otherwise confidential information and privileged legal advice. I do not find that the sharing of confidential legal advice between them constitutes a waiver of privilege.

214. In *UCC v. ESB* the court held that privilege does not endure indefinitely. That case concerned claims of privilege reliant on the privileged status of documents in prior litigation, long since determined. In this case, the English proceedings between Mr. Maloney and Falcon entities commenced in 2023 and were determined in 2025, at a time when the issues in these proceedings had become contentious. The fact of the determination of those proceedings does not have the effect that the plaintiff can now disregard its obligations of confidentiality in respect of otherwise privileged documents shared with it.

Group Seven: 2 documents: email exchange between Mr. Moloney and Silverlake on 16 July 2023

215. This is an email chain between Mr. Moloney and Silverlake enclosing a letter from Pallas which is said to assert litigation and common interest privilege. The plaintiff's privilege narrative states "Confidential communication from Globoforce to a third party for the dominant purpose of the proceedings in respect of which the third-party shares a common interest with Globoforce".

216. The plaintiff states that these communications formed part of a series of communications between the plaintiff and Silverlake at a time when the dispute had arisen between the plaintiff and the defendants, and when the plaintiff was continuing its efforts to progress the acquisition, which warranted sharing legal advice with Silverlake.

217. The plaintiff is entitled to maintain privilege in respect of these communications.

Group Eight: 2 documents comprising emails from McCann FitzGerald to Mr. Dunne and Mr. Moloney including a draft Pallas letter dated 27 July 2023

218. The privilege narrative is "Confidential communication from a third-party to Globoforce for the dominant purpose of the proceedings in respect of which the third party shares a common interest with Globoforce".

219. The plaintiff repeats its assertion that communications between McCann FitzGerald and the plaintiff and which comprise such matters as the legal advice of Messrs Pallas to Mr. Moloney, evidenced in the form of the draft Pallas letter, were again part of an ongoing process by which the plaintiff and Mr. Moloney shared confidential legal advice, having a common interest in connection with the matters in dispute with the defendants. The privilege claim is valid.

Group Nine: 79 documents relating to the Whiskey transaction negotiations

220. There are described as draft Project Whiskey term sheets and/or emails in relation to the negotiation of same and/or enclosing same dated between 8 November 2022 and 22 March 2023. The defendants say that they pre-date the dispute between the parties. The privilege narrative describes these documents as "confidential draft term sheets" prepared by McCann Fitzgerald and emails enclosing the draft term sheets described as confidential communications from McCann Fitzgerald to the plaintiff and its other advisers advising on Project Whiskey.

221. The defendants object to this claim on the basis that they state that negotiations were being conducted on behalf of Falcon Bidco, a direct shareholder of the plaintiff.

222. I have considered earlier the evidence, uncontradicted, to the effect that McCann FitzGerald was advising the plaintiff and not Falcon Bidco. Neither the direct nor indirect shareholder of the plaintiff have a right to inspect those documents. This privilege claim stands.

Group Ten: 2 documents comprising advices re ICG Equity Investment

223. This group comprises a McCann FitzGerald email dated 17 January 2023 entitled "ICG equity investment" and attachment described as "Falcon – ICG equity investment – ICG rights".

224. The defendants state their presumption that these documents evidence consideration by the plaintiffs of amendments to the SHA required to effect the proposed acquisition. They claim that the first defendant, as a direct shareholder in the plaintiff, is entitled to inspect such advice. That claim relies on application of the shareholder rule which I have rejected.

Group Eleven: 3 attendance notes

225. The defendants did not pursue their objections in relation to these documents.

Group Twelve: 7 documents regarding the Whiskey restructuring

226. These documents are dated between 21 and 22 April 2023 and are mainly titled "Project Whiskey Restructuring" and "Whiskey Term Sheet Markup".

227. The privilege narrative states "Confidential draft document prepared by McCann FitzGerald LLP; confidential draft document prepared by McCann FitzGerald for the dominant purpose of the Proceedings."

228. The plaintiff asserts that these documents were "under negotiation on a without prejudice basis between our clients and your clients, via their UK legal advisers".

229. This appears to be a claim of privilege by reference to communications exchanged in the context of without prejudice negotiations. I heard no evidence as to what negotiations were taking place between 21 and 22 April 2023 but it is clear that by this time the dispute which gave rise to these proceedings had been articulated, at the latest in Mr. Moloney's email of 31 March 2023. The plaintiff is entitled to maintain privilege in respect of these legal advices.

PART SEVEN: PAUCITY OF DOCUMENTS DATE RANGES (NOTICE OF MOTION PARAGRAPH 3)

230. In para. 3 of the Notice of Motion the defendants seek an order directing the plaintiff to make further and better discovery of documents within three particular categories of the discovery, categories 10, 22(b) and 23.

231. The approach of the court to such an application is informed by the leading decision of the High Court in *Sterling Winthrop Group Limited v. Farbenfabriken Bayer* [1967] IR 98 (Kenny J.), more recently applied and followed by the Court of Appeal in *Hireservices E and Hireservices I Limited v. An Post* [2020] IECA 120 (judgment of Murray J.).

232. In *Sterling Winthrop* Kenny J. reviewed all the authorities and summarised the principles as follows:

> "*Such an order will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession relevant to the action which have not been disclosed by the first affidavit. The court will, however, order a further affidavit of documents when it is established:*
>
> *(a) from the pleadings,*
>
> *(b) from the affidavit of discovery already filed,*
>
> *(c) from the documents referred to in the affidavit of discovery or*
>
> *(d) from an admission by the party who was made the affidavit of discovery,*
>
> *that the party against whom the order is sought has other documents in his possession relating to the issues in the action which have not been disclosed by the first affidavit. The court will also order a further affidavit when there are grounds, derived from the documents discovered, for suspecting that there are other relevant documents in the possession of the party who has made the affidavit or where there are reasonable grounds for believing that the person making the affidavit of discovery has*

misunderstood the issues in the case and has, in consequence, omitted documents from it."

233. In his conclusion Kenny J. stated "*the court should not order a further affidavit of documents unless it has been shown that there are other relevant documents in the possession of the defendants or that the person making the affidavits has misunderstood the issues in the action or that his view that the documents are not relevant is wrong*."

234. In *Hireservices* (op cit), Murray J. added the following:-

"*An order of this kind will not be made when the application is based solely on an affidavit alleging that the other party has documents in his possession that ought to have been, but were not, disclosed in the first affidavit of discovery (citing Sterling Winthrop) it is a matter for the party seeking the order to establish that there has been a default so as to raise 'a reasonable suspicion that the party who had already made an affidavit had other documents relating to the matters in question in his possession (Lyell v. Kennedy (No. 3) [1884] 27 CHD 1, 20). Where the party seeks to do this by evidence the evidence should be that of a person with knowledge of the facts deposed to (Victoria Hall Management Limited and Others v. Cox and Others [2019] IEHC 639 at paras. 97 and 99, affirmed on other grounds [2020] IECA 79). In this regard hearsay evidence should not be admitted as of course but only where this is unavoidable for genuine and identified reasons of urgency, or difficulty in procuring direct evidence (Togliattiazot v. Eurotoaz Limited [2019] IEHC 342 at para. 16)*."

Category Ten: All documents generated during the period from 1 September 2022 to 9 November 2023 evidencing consideration given by the plaintiff to the amendments to the Workhuman SHA which might be required to effect the proposed transaction

Date range: 1 September 2022 to 9 November 2023

235. The defendants' complaint is that only one document was discovered, by reference to this category, being a Deed of Amendment to the Workhuman SHA dated 26 March 2021. The

defendants invoke the plaintiff's plea that the proposed acquisition "would have been transformative for the business of the plaintiff" and say, correctly, that certain amendments to the SHA would be required to reflect certain of the intended terms of the acquisition.

236. The Deed of Amendment dated 26 March 202, being somewhat historic, cannot constitute of itself any evidence of "consideration of the amendments required or consents from the shareholders which will be required" for the purpose of the intended transaction. The defendants claim that there must be certain documents in existence in which the necessity for amendment was considered and discussed by the plaintiff.

237. The plaintiff's response is that in making discovery it listed each document discovered only once, although certain documents may also be responsive to another category or categories. That is common practice. They make the point, correctly, that there is no obligation on them in making discovery to identify every category under which a particular document being discovered might be listed and could not reasonably be expected to do so. The plaintiffs also point to the fact that in the First Schedule Second Part, listing documents in respect of which privilege is claimed, 49 documents were listed in response to category 10. This is entirely credible, since it is likely that any consideration by the plaintiff of amendments which would be required to the SHA, would entail legal advice. It is therefore not surprising that more such documents would appear in the First Schedule Second Part than in the First Part.

238. It is remarkable that the plaintiffs never identified any other category in which documents which would fall within category 10 have been discovered. They say that an exercise of tracing any of the other categories in which such a document would have been discovered is unduly burdensome.

239. It cannot be beyond the resources of the plaintiff to simply state any other categories in which documents falling within category 10 may also have been included. The objection that this is unduly burdensome is unconvincing.

240. More serious is the plaintiff's objection that there is no obligation to list all the categories in which such documents may appear. That is a generally correct statement of prevailing practice. But where only one document is discovered without a claim of privilege, and 49 are discovered in the privileged section, I am persuaded that this is a case where the plaintiff should be required to state on affidavit any other categories in which document, relevant to Category 10 appear. The affidavit should be sworn not by the plaintiff's solicitor but by the original deponent Mr. Solis or other person having like authority on behalf of the plaintiff itself.

Category 22(b): Copies of any application made or offer received by the Plaintiff for borrowing and/or debt financing, including any drafts.

241. Although the issue still in dispute relates only to category 22(b), it is pertinent to recount all of category 22, including 22(a), which is important background to the objection in relation to category 22(b).

242. 22(a): All documents evidencing:

(i) the levels of borrowing and/or debt financing the proposed ICG Realisation Event/Proposed Redemption would expose the Plaintiff to and evidencing any consideration by the Plaintiff of, or attempts by the Plaintiff to arrange or extend the term of debt financing to fund the proposed ICG Realisation Event or Proposed Redemption;

(ii) the prospect of committing the Plaintiff to substantial additional borrowings or borrowings for an extended term (including, without prejudice to the generality of the foregoing, documents evidencing discussions with potential third-party lenders such as Silicon Valley Bank and AIB Pank plc); and

(iii) any other options contemplated to facilitate in any way the proposed ICG Realisation Events/Proposed Redemption.

and the Plaintiff's consideration of (i) to (iii) 3 above.

Date range for category 22(a)(i) to (iii): 1 September 2022 to 9 November 2023

Category 22(b) date range: 9 November 2023 to 1 May 2024.

243. 9 November 2023 is the date on which these proceedings were issued.

244. No document was discovered under Category 22(b).

245. The defendants say that documents discovered under category 22(a) establish that the plaintiff was involved in lending discussions with two named banks, Silicon Valley Bank and AIB Bank and that these discussions were active as lately as 6 November 2023. Ms. Shaw swears: "*it is difficult to believe that these discussions/consideration simply stopped dead on 9 November 2023 and no further draft offers/updated versions of the lending offers proffered by these Banks were circulating post 9 November 2023*".

246. The defendants requested of the plaintiff confirmation that all custodians' documents for the period 9 November 2023 to 1 May 2024 were reviewed for the purpose of discovery of category 22(b).

247. By letter dated 16 January 2026 McCann FitzGerald confirmed that the plaintiff complied with its obligation and stated that "our client has fully complied with its obligations to discover documents relevant to category 22(b) including by engaging with the appropriate custodians and their records".

248. In Ms. Shaw's grounding affidavit she complains that nowhere in the correspondence did the plaintiff confirm that the review for the period from 9 November 2023 to 1 May 2024 included a review of all relevant custodians' document. In fact that confirmation is provided in the McCann Fitzgerald letter of 16 January 2026, although not in the very words in which Messrs Goodbody requested it.

249. In her replying affidavit Ms. Fearon states the following (para. 13(d))

> "*In relation to category 22 specifically, this subcategory was very heavily negotiated and is very limited in scope to specific documents, i.e. any application made or offer received by the plaintiff for borrowing and/or debt financing between 9 November 2023 and 1 May 2024, including any drafts. This subcategory is the only one that covers the extended period from 9 November 2023 to 1 May 2024. No documents within that date range fall within category 22(b). In our letter of 4 December 2025 to A&L Goodbody we confirmed that the plaintiff has complied in full with its discovery obligation and I confirm now that the plaintiff conducted appropriate enquiries to identify any and all documents that fall within the scope of category 22(b). The fact that there are no such documents is not indicative of an error or omission in the plaintiff's discovery. The plaintiff is required to list all relevant documents it holds, it is not required to explain why relevant documents do not exist*". (emphasis added)

250. In essence the complaint made by the defendants is that they do not believe the averment that no documents within category 22(b) were available in the date range 9 November 2023 to 1 May 2024, notwithstanding the confirmation both in the McCann Fitzgerald letter of 16 January 2026 that the plaintiff had engaged with all appropriate custodians and their records, and the averments of Ms. Fearon in her replying affidavit.

251. It is understandable that the defendants would express surprise at the absence of documents within category 22(b) after 9 November 2023. Nonetheless the application does not meet the *Sterling Winthrop* test and I am not persuaded that there are grounds to conclude that there are documents in this category which have been omitted or that the plaintiff has misunderstood the issues.

Category 23: all documents generated evidencing the Plaintiff's consideration of requests for information from any of the first to tenth Defendants relating to prospective additional borrowing on the part of the Plaintiff arising in order to fund any Exit or Realisation Event

Date Range: 1 January 2022 to 9 November 2023

252. The defendants' complaint is that only five documents were expressly in response to the category. All those five documents relate to the consideration of one request for information made by the tenth defendant Mr. McKelvey to Mr. Moloney and Mr. Dunne on 26 July 2023 and the corresponding response received on 11 August 2023. The defendants say that there is no disclosure of any documents considering earlier requests for such information, and they refer to the existence of a letter from Messrs A&L Goodbody to the plaintiff on 20 June 2023. The plaintiff does not directly address that point at all, and – whilst the court is reluctant to and should not speculate on this – the absence of any document relevant to a consideration of the A&L Goodbody letter of 20 June 2023 is significant and requires a direct response and explanation.

253. The response of the plaintiff is that it has complied with its obligations to discover all such documents, including by engaging with appropriate custodians. The plaintiffs also repeat the comment that it was under no obligation to list each document under more than one category. Having made that point about its obligations, the plaintiff does not then say whether there are any other documents relevant to category 23 which have been listed under any other categories. As with category 10 it seems to me that it is proportionate and realistic and ought to be within the resources of the plaintiff to perform a search to identify whether documents relevant to category 23 appear under any other categories and if so which categories. If there is no such duplication in relation to this category that can simply be stated. An affidavit so verifying and confirming the result of the search for documents evidencing any consideration of the A&L Goodbody letter of 20 June 2023 should be sworn and I shall so order.

254. The affidavit should be made, not by the plaintiff's solicitor, but by Mr. Solis or another person with like authority for the plaintiff.

PART EIGHT: OTHER OBJECTIONS: NOTICE OF MOTION: PARAGRAPH 4

255. In para. 4 of the notice of motion the defendants seek the following "*an order pursuant to the inherent jurisdiction of this Honourable Court directing the plaintiff to swear a supplemental affidavit providing such clarifications or confirmations as are necessary arising from the matters addressed in correspondence between the parties and outlined in the affidavit of Hannah Shaw sworn herein*." In the affidavit of Ms. Shaw seven distinct objections are made.

256. At the hearing counsel for the defendants stated that although queries raised by A&L Goodbody on behalf of the defendants had been responded to by McCann FitzGerald, the defendants maintain their objection that the responses received are unsatisfactory. In some instances they say that where McCann Fitzgerald address the objection, the necessary confirmation ought to be provided by an affidavit sworn by Mr. Solis, and that statements and correspondence from the plaintiff's solicitors or the affidavit of Ms. Fearon of McCann FitzGerald do not suffice.

257. The plaintiff submitted that the threshold for ordering a further affidavit of discovery, being the tests identified in *Sterling Winthrop*, had not been met. It submitted that in respect of each of the complaints made satisfactory responses had been stated in the correspondence by McCann FitzGerald or in the replying affidavit of Ms. Fearon.

258. The plaintiff submits that it is established practice in such matters that an open confirmation, either in correspondence or in a sworn affidavit, by the solicitor on record is sufficient to address queries as to the adequacy of discovery or as to the methods applied to comply with discovery obligations. It submits that an intolerable burden would be

imposed if every query as to methodology of discovery and steps taken to comply with obligations, calls for a sworn affidavit by the party itself or an officer of such a party.

259. There is force in this submission, and it is the general practice of the court to resolve such matters having received and considered confirmations, on affidavit or otherwise, from the solicitor on record. However, there can be particular issues of substance which can only be verified by the deponent of the affidavit of discovery, or a person with like authority. Examples are verifications required as to the exact scope of the collections of documents from custodians, and the decisions made and the process, as appears from my conclusion in para. 309 below, regarding the search for hard copy documents.

260. The parties having made their submissions on this general question of 'practice', only very limited submissions were made in relation to each of the seven items complained of. Only one of the complaints made by the defendants under this heading was abandoned, leaving the court to consider the correspondence and affidavits.

The affidavit of discovery

261. Mr. Solis describes in detail the process which was undertaken to comply with the obligations pursuant to the order for discovery made by this Court (Sanfey J.) on 21 July 2025 in respect of 18 categories of documents.

262. Mr. Solis describes the search undertaken for documentation falling within the ambit of the discovery and states that the plaintiff obtained assistance throughout the process from its solicitors McCann Fitzgerald and had the material reviewed by that firm.

263. Mr. Solis states the following in relation to the scoping and identification and collection of documents at 4:

> "*4. Documents were obtained and collected (using keywords and date filters where appropriate) from the following sources:*

(a) electronic systems operated by the Plaintiff, including its document management system, Microsoft Teams, laptops, external hard drives and emails of relevant custodians; and

(b) mobile phones and iPads of relevant custodians.

5. As part of this exercise documents were obtained from custodians and former custodians in the Plaintiff including employees and board members who were identified by the Plaintiff as holding potentially relevant data pursuant to the Discovery Order.

6. The Plaintiff's Solicitors wrote, on behalf of the Plaintiff, to all agents and advisers of the Plaintiff who it was determined might potentially have relevant documents and receive potentially relevant documents for review.

7. Potentially relevant documents were also collected from the Plaintiff's Solicitors, as legal advisers to the Plaintiff. All of the documentation referred to at paragraphs 4, 5 and 6 (above) are referred to collectively as the 'Data Sources'". (emphasis added)

264. Mr. Solis then describes the process of the discovery review, by the use of an e-discovery review platform called RelativityOne, maintained by the Plaintiff's solicitors.

265. Mr. Solis says that where a forensic collection of text messages was carried out the text message conversations were split on the processing of the data into documents consisting of messages exchanged within a 24 hour period.

266. There then follows a description of the process of review, by the use of continuous active learning technology ("CAL"). He continues "*a multi-strand approach was adopted by the Plaintiff's Solicitors in respect of the CAL Review DataSet to identify all potentially relevant documents to the Discovery Categories within the power possession or procurement of the Plaintiff for review. This included the application of detailed keyword search terms and date filters, following which CAL was employed*".

267. Mr. Solis describes the CAL process in more detail, and the work done by members of the 'Review Team'. CAL was not used for the review of non-text searchable documents, audio files or screenshots of text messages, which were instead subjected to what was described as a "linear review dataset".

268. Mr. Solis described the process known as an "Elusion Test" which was applied to estimate the accuracy and completeness of the relevant document set from time to time. This test involves senior reviewers reviewing random samples on unreviewed documents which Relativity had ranked low ranking in terms of relevance.

269. Mr. Solis then described the system of quality control checks for relevance, category, privilege and redaction. In this system the solicitor team reviewed with the plaintiff samples of documents deemed potentially relevant at "first pass". At this stage further quality control checks were conducted on samples of documents which had previously been "tagged" not relevant.

270. Mr. Solis described in para. 19 a process relating to what he described as a review of "unfiltered data from certain custodians".

271. In para. 19 Mr. Solis said the following: –

> "*19. During the collection process, the Plaintiff's Solicitors received unfiltered data from certain custodians. This unfiltered data was received strictly on the basis and understanding that it would be held by the Plaintiff's Solicitors and not made accessible to the plaintiff, and the Plaintiff's Solicitors would conduct a triage of the unfiltered data to identify any documents held by those custodians otherwise than on behalf of the Plaintiff. All documents which were deemed as not being held on behalf of the Plaintiff had been tagged during the review as 'Misfile: NonRelated Documents/To Be Removed' ('Misfiles') on the Platform. I say and believe that the Misfiles have been locked down*

to the Plaintiff's Solicitors Platform Administrators. The Plaintiff does not have and has never had access to the Misfiles on the Platform."

272. The question of 'unfiltered data' and 'Mis-files' is controversial and is considered at para. 311-314 below.

273. The affidavit describes steps taken to avoid unnecessary proliferation of documents, correspondence, attachments, pleadings, and affidavits which are not relevant or duplicates.

274. All documents comprised within the CAL review dataset and the linear review dataset were reviewed to identify documents relevant to the discovery categories and whether such documents were privileged. Mr. Solis says that throughout the discovery review exercise he and other officers of the plaintiff and the plaintiff's agents and advisers engaged with the Plaintiff's Solicitors to deal with factual and contextual queries.

275. Mr. Solis then described the manner in which the listings contained in the first and second part of the first schedule were prepared, by reference to at least one category of discovery in each case and with appropriate sequence identifier numbers and steps taken to avoid unnecessary duplication. He described also the manner in which attachments to emails were included and how what are described as "families" of emails being parent emails and "child attachments" were listed.

276. The affidavit of Ms. Shaw grounding this application was sworn on 17 February 2006. Ms. Shaw exhibits correspondence exchanged between the parties and repeats, under seven headings, objections made in that correspondence.

277. A replying affidavit was sworn on behalf the plaintiff by Ms. Fearon on 4 March 2026. Ms. Fearon refers again to the correspondence previously exchanged and makes a number of additional averments in relation to points made by Ms. Shaw.

278. I consider each of the objections below. The recurring theme is the defendant's objection that responses to queries raised are either unsatisfactory or call for a supplemental affidavit

to be sworn on behalf of the plaintiff by Mr. Solis or another person on behalf of the plaintiff, not being the plaintiff's solicitors.

279. I refer to these issues by reference to the sub-categories identified in Ms. Shaw's affidavit.

4A: Failure to identify custodians and/or agents

280. In its letter of 12 November 2025 A&L Goodbody complained that Mr. Solis in his para. 4 identifies documents obtained and collated from various sources including "emails of relevant custodians" and "mobile phones and iPads of relevant custodians". At para. 5 Mr. Solis avers that "documents were obtained from custodians and former custodians in Workhuman including employees and board members who were identified by the plaintiff as holding potentially relevant data". Messrs Goodbody complain that Mr. Solis fails to identify the custodians in his affidavit and in the First Schedule First Part of the affidavit of discovery. They request that the plaintiff identify the custodian and non-custodian data sources in the same way that had been done in the defendants' affidavit of discovery and request confirmation that documents were collected from each of the current and former directors of the company.

281. On 4 December 2025 McCann FitzGerald replied naming the 17 custodians, which they stated included the plaintiff's agents and advisers which were identified as custodians/data sources. The named custodians include a number of directors and executives of the plaintiff together with its advisers Capnua, McCann FitzGerald and Goodwin Law. In reply on this subject (2 January 2026) A&L Goodbody request an explanation as to why the list of custodians did not include HMP Secretarial Limited, which A&L Goodbody stated was the Company Secretary of the plaintiff.

282. In their letter on 16 January 2026 McCann FitzGerald explained that HMP Secretarial Limited is not the Company Secretary, but the Assistant Company Secretary appointed pursuant to s. 129 of the Companies Act 2014. They explained that Mr. Solis is the

Company Secretary of the plaintiff and that he was a custodian for the purposes of the discovery. The letter further confirms that in his position as company secretary Mr. Solis holds all records required to be held by a company secretary and that these were collected as part of the plaintiff's discovery exercise.

283. On 5 February 2026 A&L Goodbody replied complaining that McCann FitzGerald had failed to clarify if any enquiry had been made of HMP Secretarial Limited or its servants or agents as to whether it has within its possession or power or procurement any records falling within the categories ordered and agreed to be discovered.

284. Ms. Shaw in her affidavit, having exhibited this correspondence repeats the complaint that the plaintiff has not clarified if any enquiry was made directly of HMP Secretarial Limited and repeated the submission that the plaintiff should swear a further affidavit of discovery identifying and confirming on oath the custodians whose documents were collected the date ranges for these collections.

285. Ms. Fearon in her replying affidavit of 4 March 2026 states that the plaintiff has provided precisely the same information regarding custodians to the defendants as the defendants provided to the plaintiff, namely a list of custodians and data sources. She continues: "the defendants have not provided any information regarding the date ranges linked to each custodian, whether documents were collected from each custodian listed or the reasons why any custodians or data sources were included or excluded".

286. The plaintiffs have identified in the correspondence the names of all of the custodians of whom enquiries were made and have explained satisfactorily the reason why HMP Secretarial Limited, the Assistant Secretary, was not the subject of a separate set of enquiries. I accept the confirmation that Mr. Solis, himself being the Company Secretary was the person responsible for retention and possession and maintenance of such records as the Company Secretary is required to maintain.

287. Having considered the correspondence and the explanations provided by McCann FitzGerald I am not persuaded that the *Sterling Winthrop* test is met.

4B: Search terms and quantity of documents reviewed

288. In their letter of 12 November 2025 A&L Goodbody referred to Mr. Solis's description of the manner in which keywords search terms and date filters were applied to data prior to the application of CAL. They object that Mr. Solis failed to identify keyword search terms and/or date filters applied to the datasets of documents in advance of the review. Nor, does he identify how many documents were reviewed in total in the PRQ ("Prioritised Review Queue") or otherwise.

289. Messrs Goodbody have applied for an order requiring that the plaintiff swear a further affidavit of discovery identifying and/or confirming the following:

> "(a) The keywords and/or search terms applied to the data collected before PRQ review and non PRQ review/ linear review respectively.
>
> (b) The date filters applied to the data collected before PRQ review and non PRQ review/linear review respectively.
>
> (c) How many documents remained for review after the application of search terms pre-the application of CA/PRQ.
>
> (d) How many non PRQ/linear review dataset documents were reviewed; and
>
> (e) The quantity of documents reviewed at first and second pass".

290. In the reply of 4 December 2025 McCann FitzGerald protested that there was no evidence that the search terms used by the plaintiff had failed to identify documents which ought to have been discovered. Notwithstanding this, and having made this protest, McCann FitzGerald attached an Appendix 1 to their reply which identified search terms and date filters used.

291. Appendix 1 is an extensive list of keywords, for a date range 1 September 2022 to 9 November 2023 which were provided for the "global search". The term "global search" was clarified in later correspondence to be the search applying to all categories of discovery.

292. The Appendix also provided details of particular search terms and date filters provided for discovery category 8, limited to a period of 1 January 2021 to 31 December 2021, in accordance with the order for discovery.

293. In respect of category 23, for a defined date range of 1 January 2022 to 9 November 2023, a separate set of search terms and date filters were applied.

294. McCann FitzGerald clarified that the global search, comprising all of the search terms and date filters, was undertaken for the period 1 September 2022 to 9 November 2023.

295. The defendants complain that the failure to identify which search terms were applied to which categories made it impossible to interrogate the adequacy of the discovery made by the plaintiff.

296. The explanation provided in the correspondence by the plaintiff and its description of the search terms applied for the "global searches" is an adequate description of the search terms. I am not persuaded that the failure to identify which such terms were applied to each separate category renders the discovery inadequate or the explanations inadequate, or rendered it impossible for the defendant to "interrogate the adequacy of the discovery made."

297. There is no basis warranting an order for a supplemental affidavit of discovery in respect of this subject.

298. This is a classic instance of an issue which ought to be addressed by parties before affidavits of discovery are sworn and exchanged.

4C: Hard copy documents

299. In their letter of 12 November 2005 A&L Goodbody noted that the plaintiff's affidavit of discovery made no reference to the collection of hard copy documents. They requested confirmation as to whether any potential hard copy document sources were identified and/or collected and requested that this be addressed in a supplemental affidavit of discovery.

300. McCann FitzGerald replied on 4 December 2025: "*3.1 Hard copy document sources were considered as part of our client's document mapping exercise. However, following the carrying out of custodian interviews and the completion of custodian questionnaires, it was confirmed that there was no requirement for a collection of hard copy materials*."

301. In Ms. Fearon's replying affidavit of 4 March 2026 she refers to the reply made on 4 December 2025 and states her view that "there is no need for the plaintiff to swear a supplemental affidavit of discovery to explain the nonexistence (as opposed to the non-discovery) of certain documents."

302. The defendants persist with their submission that this is a matter which ought to be addressed by the plaintiff itself on affidavit.

303. The plaintiffs submit that this is yet another instance in which the court should be willing to accept the averment of the solicitor on record for the plaintiff, and the confirmations given in the plaintiff's solicitors letter of 4 December 2025.

304. The affidavit of discovery sworn by Mr. Solis describes the process by which sources of data were obtained and collected (see paras. 261-265 above). In paras. 4, 5, 6 and 7 he refers to documents having been obtained and collected (using keywords and date filters where appropriate) from the following sources: –

> "4. (a) electronic systems operated by the plaintiff, including its document management system, Microsoft Teams, laptops, external hard drives and emails of relevant custodians and (b) mobile phones and iPads of relevant custodians.

5. As part of this exercise, documents were obtained from custodians and former custodians in the plaintiff including employees and board members." (emphasis added)

305. The words underlined reveal that it was only as part of the exercise of electronic searches that documents were collected from custodians. Mr. Solis makes no reference to hard copy sources.

306. The confirmation given by McCann FitzGerald in its para. 3.1 of the letter of 4 December 2005 is understandable. It illustrates that consideration was given to the question of whether any searches of hard document documents retained by custodians should be undertaken and a decision made "that there was no requirement for a collection of hard copy materials". Yet Mr. Solis in his affidavit refers to the exercise of obtaining and collating documents only through the electronic systems and devices.

307. Mr. Solis states that documents were collected "as part of the exercise". The exercise described is the exercise of obtaining and collecting documents from only electronic systems (para. 4 of his affidavit). He refers also to the Plaintiffs Solicitors having written to agents and advisers of the plaintiff. However in his description of the "exercise" performed within the plaintiff, no reference is made to the consideration of review of hardcopy documents.

308. The plaintiff was in the business of providing "cloud-based employee recognition services". In the years relevant to this discovery it is unlikely that there are documents relevant to the matters at issue in the case which are not to be located by the electronic searches undertaken by the plaintiff and described by Mr. Solis. However that is not the test. The obligation in making discovery is to establish in the first instance all sources of documents, both hardcopy documents and electronically stored communications and documents.

309. The explanation given by McCann FitzGerald that there was no requirement for a collection of hardcopy materials following "*the carrying out of custodian interviews and the completion of custodian questionnaires*" is frank. However Mr. Solis makes no reference to this exercise, or to a decision made that there was no requirement for the collection of any hard copy materials. That was a substantive and important decision which engages the obligations of both the plaintiff and its solicitors and goes to the question of Mr. Solis' understanding of the plaintiff's obligations, a question not answered by the standard averment in his para. 40. Of course the substance of interviews with custodians and the process of deciding that collection of hard documents was not required, attract litigation privilege, but the omission in Mr. Solis' affidavit of any reference to this important decision is stark and is not cured by the concise description in the letter of 4 December 2025 written in response to the defendants' objections. I shall direct that a supplemental affidavit of discovery be sworn by him, providing an explanation of this decision and a description of the process by which it was made.

4D: Contextual Parent Documents

310. The defendants had raised a query concerning what they characterised as a failure to address fully the status of parent emails and providing context to attachments to emails. This matter was resolved when the defendants accepted a clarification provided by the plaintiffs regarding the status and relevance of certain "parent" emails.

4E: Unfiltered data gathered from certain custodian

311. The defendants raised an objection in relation to the description in para. 19 of Mr. Solis' discovery affidavit of the treatment of "unfiltered date from certain custodians". (See para. 271 above).

312. The defendants requested the identity of the custodians from whom such "unfiltered data" was received and how the data was collected and dealt with.

313. McCann FitzGerald confirmed in their letter 4 December 2005 that the triage process described in para. 19 of Mr. Solis's affidavit consisted of a manual review of unfiltered data by senior lawyers on the review team to identify what documents were held on behalf of the plaintiff.

314. Although the identity of the source of the 'unfiltered data' was not provided, it is clear from Mr. Solis' affidavit that care was being taken to establish if any of this data was relevant and to respect the privacy of persons who, although described as custodians, were not holding documents on behalf of the plaintiff. This is a curious set of circumstances but it does not warrant a further affidavit.

4F: Second Schedule

315. In his para. 38 Mr. Solis makes the usual averment to the following effect:

> "*The plaintiff may have had, but does not now have in its possession, power or procurement the documents relating to the matters in question in these proceedings set forth in the Second Schedule hereto which may have been relevant to or contain matters relevant to the discovery categories. Taking into account factors such as the passage of time, possible corruption or deletion of data and available technology, one can never guarantee that every piece of electronic data created by or on behalf of the plaintiff is currently retrievable*."

316. The Second Schedule itself contains the usual phrases "*all documents formerly in the power possession or procurement of the plaintiff relating to the matters in question in these proceedings which have been lost, discarded, mislaid, destroyed or otherwise disposed of from time to time in the ordinary course of business including but not limited to…*". The schedule then refers to two items. Firstly, one voicemail left by Mr. McKelvey on 27 March 2023 to Mr. Dunne. It refers then to no. 2:

"*Text messages from the mobile phone of Nicholas Solis sent/received within the relevant period which no longer exist on Mr. Solis's mobile phone. Mr. Solis believes the messages no longer exist following the replacement of his mobile phone following malfunction in or around 6 December 2023*."

317. The defendants requested confirmation of two matters. Firstly whether this averment was made in respect of all texts on Mr. Solis' phone during the relevant period and secondly what efforts were made, if any, to collect any backup data in respect of this mobile phone.

318. McCann FitzGerald confirmed, firstly, that the averment related to all messages on Mr. Solis' phone. Secondly, they stated: "the potentially relevant messages were available and collected from other devices so there was no requirement to take any further steps in relation to Mr. Solis' phone".

319. This matter is addressed in Ms. Fearon's replying affidavit of 4 March 2026 where she states the following:

"*20. Mr. Solis is the General Counsel of the Plaintiff and the deponent of the Plaintiff's Discovery Affidavit. As such Mr. Solis was very closely involved in the plaintiff's discovery process and fully understands the plaintiff's discovery obligations. I held a number of custodian interviews with Mr. Solis during which we discussed all of his potentially relevant data sources, including text messages. Mr. Solis confirmed that he had exchanged a very limited number of potentially relevant text messages <u>with two other custodians</u>. We collected text messages from the phones of those two custodians and verified that they included text exchanges with Mr. Solis. We also listed text messages from Mr. Solis' phone in the second schedule of the Plaintiff's Discovery Affidavit.*

21. The inference by the Defendants and by Ms. Shaw that the plaintiffs should have made efforts to retrieve text messages from a phone that malfunctioned and was

replaced over two years ago is unreasonable given the potential costs involved and unwarranted given the information provided to the Defendants in the Plaintiff's Discovery Affidavit and in subsequent correspondence". (emphasis added)

320. I have limited sympathy for the suggestion that a retrieval exercise would be costly. However, the critical averment in Ms. Fearon's affidavit is her confirmation that in the course of the discovery exercise two of the other custodians were identified as persons exchanging relevant text messages with Mr. Solis and that data of those two other custodians had been assembled and included. This is a clear description and no supplemental affidavit is warranted on this subject.

4G: Mr. Moloney's text messages

321. The defendants raised two separate queries in relation to Mr. Moloney's text messages. The first related to the form in which the relevant text messages were made available, only some being in original form. An explanation was provided by McCann Fitzgerald on that subject which was not challenged by the defendants.

322. The second objection is that a number of the text messages identified in the discovery appeared to have been sent by a Mr. "Brian Maloney".

323. In response the plaintiffs confirmed, both in correspondence and Ms. Fearon's replying affidavit that messages labelled "Brian Maloney" and included in the discovery were messages sent and received by Mr. Barry Maloney. Three different phone numbers were used by Mr. Moloney and all three of these were in his power possession and procurement. Mr. Moloney is one of the 17 custodians identified in McCann Fitzgerald's letter of 4 December 2025. This issue is satisfactorily addressed by the general averment in the affidavit of Mr. Solis that all relevant devices of those custodians were searched when gathering data. No further affidavit is required in relation to the subject.

PART NINE: CONCLUSION AND ORDERS

324. In relation to the reliefs sought in paras. 1 and 2 of the Notice of Motion there will be an order refusing inspection of the documents identified by the defendants in Appendix 1 to the letter from A&L Goodbody to McCann FitzGerald dated 4 December 2025. (See Parts Five and Six above).

325. In relation to para. 3 of the Notice of Motion there will be an order directing the making of a further affidavit by Mr. Solis (or another person holding like authority on behalf of the plaintiff), to provide the further information and verification identified at paras. 240 and 253 of this judgment namely (See Part Seven):

(a) Identification of the categories of documents of discovery in the order for discovery which include documents also responsive to Category 10. (Para. 240)

(b) Identification of the categories of documents of discovery in the order for discovery which includes documents also responsive to Category 23. (Para. 253)

(c) Confirming the results of searches relating to documents evidencing consideration by the plaintiff of its response to the letter from A&L Goodbody to the plaintiff dated 20 June 2023. (Para. 253)

326. In relation to para. 4 of the Notice of Motion there will be an order directing the making of a further affidavit by Mr. Solis (or another person holding like authority on behalf of the plaintiff) providing the clarification and explanation identified in para. 309 of this judgment, namely an explanation of the decision that there was no requirement for collection of hard copy documents and a description of the process by which that decision was made. (See Part Eight).

327. The application for an order dismissing the plaintiff's claim for failure to make discovery in accordance with the Order for Discovery made on 21 July 2025 will be dismissed.

328. The matter will be listed before the court on 1 July 2026 at 10:30am for any submissions on the form of order and as to costs.