CMC Holdings Ltd v CMC Motors Group Ltd

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	19 November 2018
Neutral Citation:	[2018] JRC 211
Reported In:	[2018] JRC 211
Court:	Royal Court
Date:	19 November 2018

Text

[2018] JRC 211

Royal Court

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between:
CMC Holdings Limited
Plaintiffs
CMC Motors Group Limited
and
Martin Henry Forster
Defendants
RBC Trust Company (International) Limited
The Regent Trust Company Limited

And Between:
RBC Trust Company (International) Limited
Third Party Plaintiffs
The Regent Trust Company Limited
and
Jeremiah Kiereini
Third Party Defendants
Charles Mugane Njonjo
The estate of Jack Mordejay Benzimra
The estate of Prahlad Kalyanji Jani
Martin Henry Forster

And Between:
Martin Henry Forster
Third Party Plaintiff
and
RBC Trust Company (International) Limited
Third Party Defendants
The Regent Trust Company Limited.

Advocate S. C. Thomas **and Advocate** J. M. Sheedy **for the Plaintiffs**.

The First Defendant did not appear.

Advocate S. J. Alexander **for the Second and Third Defendants**.

Advocate N. G. A Pearmain **for** Mr Kiereini

Advocate D. S. Steenson **for** Mr Njonjo.

Authorities

CMC Holdings Limited and Anor v Forster and Ors [2018] JRC078.

CMC Holdings Limited and Anor v Forster & Ors [2017] JRC188

Arya Holdings Limited v Minories Finance Limited 1991/159

Pacific Investments Limited v Christensen and Seven Others [1997] JLR 170

In re Yaheeb Trust [2003] JLR 92

Royal Court Rules 2004, as amended

McCann v Bateman & Ors [2005] JRC 027B.

Republic of Brazil and Anor v Durant and Anor [2012] (1) JLR 41.

Re Esteem 2000/150

Café de Lecq Limited v R. A. Rossborough (Insurance brokers) [2011] JLR 182.

Companies —Reasons —re limited cross-examination of the First Defendant.

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THE MASTER:

Introduction:

1 This judgment represents my detailed written reasons for allowing limited cross-examination of the first defendant, Martin Forster, by the second and third defendants in relation to a renewed application by the plaintiffs to limit their discovery.

Background

2 These proceedings have been the subject of a number of previous judgments issued by the Royal Court and by me. The latest of these judgments is reported at *CMC Holdings Limited and Anor v Forster and Ors* [2018] JRC 078 and dated 26 th April, 2018. The judgment was an appeal against my decision to limit searches for documents held by the plaintiffs in a warehouse in Kenya, for the reasons set out in my judgment dated 8 th November, 2017 reported at *CMC Holdings Limited and Anor v Forster and Ors* [2017] JRC 188.

3 The decision of the Royal Court was to set aside my decision to limit discovery, for the reasons set out at paragraphs 52 to 65 of its judgment, as follows:-

> ***"52. It is clear that in making the Order the Master neither exceeded his jurisdiction nor had regard to other than the correct principles*** .

53. In the light of the information that was both before the Master and is before us, that the challenges that arise within the discovery exercise take this case out of the norm. To us it may well call for both an iterative and imaginative approach to the discovery exercise such as that it ensures, so far as is possible, any relevant material is identified and disclosed without requiring any party to undertake an unnecessarily expensive exercise, which would be unlikely to reveal any further documentation of a discoverable nature .

54. However, it seems to us that in the main this appeal turns upon one point, namely whether or not the Master, in saying that "what is at the heart of this case is whether or not the alleged scheme was approved by the Plaintiffs, or whether it was a secret scheme. Whilst the scheme is said to have operated over many years, the key issue is who knew about it and authorised it", was correct. If that were the determinative issue in the case then we can see justification for the Master limiting discovery in the way that he has done .

55. Whilst the scheme as pleaded by the plaintiffs is not admitted by the second and third defendants, it appears to be common ground that some form of scheme existed given the assertion to that effect by the first defendant in his answer. Is the existence of some form of scheme, whether in the form as pleaded by the plaintiffs or accepted by the first defendant sufficient to limit discovery insofar as it might disclose, absent limitation, documentation relating to the details of that scheme? We can see, looking at the picture overall, that the Master could legitimately form the view that he did. However, we are less confident in holding that that must be the case .

56. There is no doubt that the statement referred to above identifies one of the central issues to the case. That does not mean, however, that other issues are not equally important. Furthermore, to express the central issue in those terms, appears to presuppose that a scheme in the form as pleaded by the plaintiffs existed. That is, on the face of the pleadings, not of course a position that is accepted by the second and third defendants .

57. In our view, with some reluctance, we think that the case against the second and third defendants must, in the light of the non-admittance contained in the pleadings, be proved in all of its elements to the appropriate standard by the plaintiffs .

58. Accordingly, we do not see any alternative but that the plaintiffs must prove the existence of the scheme in the form they have pleaded, and given that it appears to us that part of that scheme encompasses the payment of secret commissions generated by an over-invoicing arrangement (which for the reasons set out above appears to us to have been accepted in effect by the plaintiffs) then it

must be that the plaintiffs must establish every element of that operation. Once they have established the existence of the scheme and the payment of monies to the entities in Jersey, they will then also have to establish that such was a breach of duties by the directors to prove that the second and third defendants had knowledge of the fact that the scheme was created in breach of duties owed by the directors to the plaintiffs and, in the light of that knowledge, dishonestly assisted the plaintiffs in the manner alleged. The existence of a scheme cannot in our view be assumed, and the second and third defendants are entitled to test whatever evidence may be available to support the fact that such a scheme existed .

59. As we understand the pleadings and arguments, the allegation is to the effect that the over invoicing and/or payment of secret commissions was as a result of arrangements made directly with the suppliers of vehicles to the plaintiffs. There must, so it seems to us (and as argued by the second and third defendants), be a number of documents that reflect those transactions. It may be that were those documents to become available through the process of discovery that would give greater understanding of the nature of any scheme that might have existed, who would have been aware of it, and indeed enable the Court to reach conclusions by way of inference that it might have otherwise been reluctant to do. It is not, in our view, simply a matter of requiring the plaintiffs to prove a negative. It is not a matter of proof in that sense at all. It is a matter of looking for evidence as to what happened, and that to our mind must be evidence that follows a proper evaluation .

60. We do not in any sense suggest that it is not appropriate in many cases to limit the scope of discovery, perhaps as to dates or particular files. Much will depend upon the nature of the case. The nature of this case, however, is that a key element that needs to be established and understood so far as possible is what happened with regard to the payment of secret commissions and over-invoicing. That may suggest who was, or should be supposed to have been, aware of it .

61. Accordingly, whilst we fully understand and sympathise with the Master's desire to limit what was otherwise a very substantial exercise in discovery, we do not feel able to uphold his order .

62. We are not intending to suggest that some appropriate limitation as to discovery process is not possible in this case. In fact, we feel it should be and is desirable. It may be, for example, that review of documentation can be limited in some way, perhaps to those where payments are known and set out in schedule 2 to the Order of Justice. It may be that this is not possible. Perhaps service records could be excluded or sampled. We are not in a position to say

because we were not addressed about any alternative. We were asked to uphold the order of the Master or to overturn it in favour of a full discovery exercise .

63. Without a greater understanding, we are unable to offer any suggestions as to what may be possible, and we are left, we think, with no alternative but to overturn the order of the Master and to find that the normal discovery exercise should take place. We wish to be clear that all we are doing at this point is expressing the view that a 10% dip sampling process will not, in our view, suffice to meet the justice of this case as it is currently pleaded. However, were those parameters to alter, in other words were the pleadings to change or some other method limiting the discovery process to be identified, then we do not mean anything in this judgment to suggest that it would be inappropriate to explore and order discovery in accordance with those limitations .

64. We do not fault the plaintiffs for seeking to limit discovery. We do not, however, agree that a 10% dip sampling approach meets the justice of the case. In that sense, and for that reason, we overturn the order of the Master. That being said, we also note the fact that the limitation was not originally opposed before the Master by the second and third defendants. This appeal in effect represents a change of position and we think that the costs before the Master in connection with this matter and of this appeal should be costs in the cause .

65. Lastly, and for the avoidance of any doubt, we wish to specify that in our view the issue of discovery is as it was prior to the making of the order by the Master and there is accordingly liberty to make any further application in connection with discovery (including its limitation) as may be appropriate. We see no reason why any such application should not be made to the Master."

4 In light of paragraph 65 the plaintiffs issued a summons seeking the following relief:-

"The Plaintiffs be given leave to undertake a limited search for discoverable documents, limited to a sampling of the documents contained in the storerooms of the Plaintiffs, as described in the affidavit of Sally Patricia Mukabana of 26 May 2017."

5 5. This summons is in substantially the same form as the relief sought by the plaintiffs to limit discovery leading to in my judgment of 8 th November, 2017, and Deputy Bailiff Le Cocq's judgment of 26 th April, 2018.

6 In support of their application, the plaintiffs served affidavits sworn by Mr Forster dated 23 rd July, 2018, Katherine Margaret Ferbrache of Baker & Partners dated 10 th September, 2018 and Advocate James Sheedy dated 14 th September, 2018. The application by the second and third defendants was to cross-examine Mr Forster on his affidavit.

7 Oral argument was heard on this application on 15 th and 16 th October, 2018 which were the dates originally fixed for the hearing of the plaintiffs' renewed application to limit discovery and an application by the second and third defendants seeking or requiring the plaintiffs and the first defendant to produce various categories of documents. The hearing of the summonses however adjourned until the application for cross-examination was determined.

8 At paragraph 10 of Mr Forster's affidavit he explained as follows:-

> *"The purpose of this affidavit is to explain as best I can, how the Scheme worked and what documents were created about it at the time, to what extent any documents are likely to exist and their location."*

9 In particular, the following paragraphs of Mr Forster's affidavit are pertinent:-

> "20. The original arrangement with the Japanese suppliers was done in person on a trip to Japan in 1980. It was never discussed in writing. The original arrangement with Leyland and Land Rover was arranged by Jack before my time at CMC. He was the person who dealt with the Scheme as it applied to these suppliers until his retirement in 1996. I've no idea whether the arrangement with Land Rover or Leyland was documented anywhere. It was first set up by Jack, before my time at CMC. If anyone wrote anything down about the payments from Land Rover or Leyland it would have been Jack although in my time at CMC I never saw any documents about the payment of commissions by Land Rover or Leyland. The only document I ever sent to Land Rover about the Jersey accounts was to Bob Stanton to tell him to stop the payment of commissions in around 2004. I recall that when I followed up with Bob Stanton on the phone to tell him to stop the payments he said something like "thank goodness." I think he was relieved the payment of commissions was discontinued.
>
> *22. I would not discuss each invoice with the supplier to confirm a commission was to be paid to Jersey. The arrangement with the suppliers was never that mechanical. Once I had agreed the price with the supplier, I wouldn't need to see the invoice again. To that extent there was a degree of trust that they money would be paid to Jersey. It would be a very laborious task to attempt to reconcile all of the surviving invoice records (if they even still exist) against the money that went to Jersey*.

25. The commission that was paid to the Jersey accounts was never shown on the face of the invoice. There was just the FOB price and the shipping/freight costs. The commission was inclusive within the price the supplier was charging.

26. I have reviewed the schedule of payments paid into the Jersey accounts listed at the back of CMC's Order of Justice. I understand this to have been compiled from the records RBC held. I could not say whether each of these payments represented one invoice or a bundle of invoices over a period of time with the commission paid to Jersey as a lump sum. If, for some reason, a commission was not paid in respect of a particular invoice, there was no way I, or anyone else at CMC would ever know.

27. With the likes of Nissoh Iwai, who we dealt with to supply cars from different suppliers Suzuki and Nissan, I would have no idea how to go about reconciling the payments Nissho Iwai made to Jersey against the individual orders from the manufacturers. Nissho Iwai presumably worked it out themselves.

28. CMC processed around 70–80 invoices per month across the whole business. Not all of those invoices would have had any commission arrangement attached to them (for example, CNH (New Holland) did not pay commissions to Jersey). I could not hazard a guess at how many invoices that did have a commission element paid to Jersey were involved.

30. The practice of suppliers paying commissions to Jersey was, to my knowledge, never documented in Kenya. All the documents there were in Kenya, which were relevant to the Scheme, were left in a thin file in the CEO's office. This was left to me, along with a list of names of people who got money from the Scheme, by Jack Benzimra when he retired.

31. When I was first introduced to the Scheme by Jack, after I joined CMC, he told me never to mention the payments to anyone. The payments to and from the accounts in Jersey were always considered 'off the books'. The money in Jersey was never included in CMC's financial statements and wasn't disclosed to the auditors.

33. The only discussions about the Scheme with individuals in Kenya happened when salaries were reviewed at the end of CMC's financial year in September. Jack and then later myself when I was CEO, would have a one on one meeting with recipients and tell them verbally whether there would be an offshore payment and how much it would be. At the same meeting we'd discuss whether there would be an increase in salary. Nothing about the offshore payments would be put in writing. It was not a question of negotiation with the recipient about how much would be paid from Jersey. The decision was made by the CEO alone. Payments were typically made around September and March. Payments were made from

Jersey to accounts outside Kenya. When new people were added to the Scheme the recipient would give their bank details and I would forward this on to either Paul or Stan Lewis. There was never any correlation between the money suppliers paid into the Jersey accounts and the amounts that were paid out to individuals. That was based upon the CEO's assessment of their performance.

34. The payment of commissions to Jersey and how much recipients got from the Scheme was never discussed by the board of CMC. The Board of CMC would sometimes request a report on the increment that was being applied to people's salaries (i.e. an increase on the previous year). The payments from the offshore accounts were not included.

41. In my mind the only paperwork that was ever kept about the Scheme on CMC's premises was what was kept in the CEO's office in the file in the safe. This is the same file that I left for Bill Lay when I was fired from CMC in 2011. This file contained the list of recipients and details about Fairvalley and Corival. I told Bill that it was highly confidential and to be careful how he used it. There were Kenyan citizens on that list who might get into trouble. People weren't supposed to have money offshore and none of the money paid out of Jersey was taxed. Bill decided to release the papers to the newspapers.

42. I am quite confident that there are no relevant documents that refer directly to the Scheme in CMC's warehouses. To look through these documents is a waste of time."

10 In relation to the production of this affidavit, the affidavit of Mrs Ferbrache, referred to above, exhibited all the correspondence between Baker & Partners, the first defendant and his lawyers since September 2017 setting out which documents had not been disclosed and the reasons why. In summary, the correspondence not disclosed was either without prejudice correspondence or a claim to litigation privilege was made, or a combination of the two.

11 I record at this stage that the second and third defendants' summons seeking discovery of specific categories of documents included seeking an order for production of the communications made on a without prejudice basis or where litigation privilege was claimed (see sub—paragraphs 1(a)(ii) and (iii)).. However during the course of argument Advocate Alexander was specifically asked by me during his submissions in reply whether he was withdrawing paragraphs 1(a)(ii) and (iii) set out above, and he accepted that was the position. Subsequent to the hearing Advocate Alexander wrote to me indicating that his concession was limited to a without prejudice documents only and not the challenge to litigation privilege. Both my notes of the hearing and the transcript records me putting that the Advocate Alexander whether he was withdrawing sub-paragraphs (ii) and (iii). I sought this clarification because of the contention of Advocate Thomas that allowing cross-examination would be unfair because Advocate Thomas could not effectively re-examine

without waiving privilege. In answering my question Advocate Alexander did not state that he was maintaining a challenge to litigation privilege. I informed Advocate Alexander of my notes. This led him to clarify that he was not seeking to cross-examine the first defendant on his understanding of any agreement with the plaintiffs as I had ruled he could not do so (which I explain later in this judgment). However he still wished to challenge the claim to litigation privilege. Ultimately I agreed that he could still make such a challenge because he referred me to authorities which indicated that there was a real argument to be determined on whether a claim to litigation privilege could be maintained.

12 In support of the application to cross-examine the first defendant, the second and third defendants relied upon the third affidavit of Mr Ben Thorp, an employee of Mourant Ozannes. I refer to the relevant parts of this affidavit later in this judgment.

The second and third defendants' submissions

13 The second and third defendants firstly contended that the summons issued in 2018 by the plaintiffs essentially sought to limit discovery on the same basis as that sought in 2017. They therefore assumed that the justification for seeking the same order was the new affidavit evidence referred to above, in particular, the affidavit of the first defendant. The second and third defendants therefore wished to challenge the assertion that there were no documents relevant to these proceedings to be found amongst the warehouse documents. As the plaintiffs were principally seeking to rely on the affidavit of the first defendant, the second and third defendants wished to cross—examine the first defendant about his affidavit because they had concerns about the circumstances in which it had been sworn and the consistency and reliability of the evidence set out in the affidavit.

14 14. In relation to the court's jurisdiction to order cross-examination, the second and third defendants contended that *bona fide* applications seeking to cross-examine should be granted unless exceptional circumstances existed, following the judgments of *Arya Holdings Limited v Minories Finance Limited* 1991/159 and *Pacific Investments Limited v Christensen and Seven Others* [1997] JLR 170. The same right to cross-examine was also recognised in *In re Yaheeb Trust* [2003] JLR 92.

15 The second and third defendants contended this test still applied and was not affected by the introduction of the overriding objective found in Rule 1/6 of the *Royal Court Rules 2004*, as amended ("the Rules").

16 The first proposed area for cross-examination were the circumstances in which the first defendant's affidavit had been sworn. This was because, by an email dated 14 th September, 2018 from the first defendant to Advocate Sheedy of Baker & Partners acting for the plaintiffs copied to all parties, the first defendant had stated:

> *"…I have a pending arrangement, with your client, through your Firm.* I obviously

need some guidance as regards my approach to Mourant's demand. Do I need, for example, attend the Jersey Court on the 15th of October?" (Added emphasis)

17 It was on the basis of this email, notwithstanding Advocate Thomas confirming that there was no arrangement or agreement between the plaintiffs and the first defendant in relation to the provision of his affidavit, that the second and third defendants argued they were nevertheless entitled to test the first defendants' understanding or belief of that arrangement and what he meant by *"pending arrangement"*.

18 The extent to which the first defendant believed there was any arrangement also went to any credibility that should be attached to his affidavit.

19 There were also proceedings in the Isle of Man between the plaintiffs and the first defendant where injunctive relief had been obtained. The second and third defendants wanted to question the first defendant about these proceedings to understand whether they had been used as some form of coercion to compel or persuade the first defendant to provide his affidavit.

20 20. The second and third defendants also wished to explore with the first defendant inconsistencies in the first defendant's affidavit with other materials produced by the plaintiffs on discovery, exhibited to the affidavit of Mr Ben Thorp as follows:-

(a) The first defendant had admitted sending an email to Nissho Iwai Corporation requesting that the invoicing arrangements ceased. This email had not been produced.

(b) The first defendant had indicated he could not access emails because his office laptop had been confiscated on the day he was dismissed by the plaintiffs. Yet, the plaintiffs had denied the existence of this laptop. The second and third defendants wished to explore the location of this laptop.

(c) Exhibited at pages 155 to 163 of the affidavit of Mr Thorp were various documents disclosed by the plaintiffs which referred to discussions about the offshore arrangements with various recipients of monies from the companies administered offshore notwithstanding Mr Forster alleging that there was nothing in writing and all discussions took place verbally.

(d) The second and third defendants wished to explore the accuracy of paragraph 11 of the first defendant's affidavit which referred to the suppliers he dealt with. This list of suppliers did not include all the suppliers identified in the order of justice alleged to have paid commissions to companies administered by the second and third defendants.

(e) It was also suggested that paragraph 11 of Mr Forster's affidavit was contrary to both the schedule to the order of justice and exhibit 158 of

exhibit BT3, as the offshore arrangements were discussed with a Mr Ivanovic and that he might receive an additional payment to his local salary facilitated by one of the suppliers.

21 The first defendant's assertion that there were no documents in the plaintiffs' warehouse was also said to be inconsistent with an email he sent to Mr Mark Kass in 2016. Mr Kass was the CEO of the plaintiffs at the time the email was sent.

22 The second and third defendants accepted that any cross-examination would be about the location and existence of documents not any scheme itself. In that context the second and third defendants also wished to explore with the first defendant the extent of his knowledge of the storage arrangements at the plaintiffs' warehouse.

23 In relation to paragraph 42 of the first defendant's affidavit, the first defendant had deposed that there were no documents that referred *"directly"* to the scheme in the warehouse. The second and third defendants wished to explore what was meant by *"directly"* because the relevance test applicable on a discovery was broader than documents referring *"directly"* to the scheme.

24 The delay that would be caused by cross-examination was not significant and was outweighed by the importance of the parties' discovery applications being determined properly.

25 The fact that the first defendant was unrepresented did not matter; that was his choice which was not a ground to refuse cross-examination.

26 Cross-examination was material to the weight to be attached to the first defendant's affidavit in light of the answers received.

27 In relation to video-link evidence, attendance in person was preferable, applying *McCann v Bateman & Ors* [2005] JRC 027B and *Republic of Brazil and Anor v Durant and Anor* [2012] 1 JLR 41.

28 The position of the second and third defendants was supported by Advocates Steenson and Pearmain. Advocate Steenson emphasised the importance of the credibility of the first defendant to determine the plaintiffs' application to limit discovery which is why cross-examination should be permitted.

The plaintiffs' submissions

29 Advocate Thomas for the plaintiffs argued that the power to order cross-examination was

fundamentally altered by the introduction of the overriding objective in Rule 1/6 of the Rules. The duty of the court, when faced with a request for cross-examination, was to assess the benefit of allowing cross-examination. What the court had to consider was how cross-examination would assist the court.

30 It was also important to distinguish between the documents produced in phase 1 of the plaintiffs' discovery process (i.e. those records held at the plaintiffs' head office) from those held in the warehouse. This explains the context of the first defendant's email in 2016 to Mr Kass because he was referring to documents held in the plaintiffs' head office rather than documents in the warehouse.

31 The plaintiffs' computer records have also been subject to a full review using appropriate technology to extract relevant material.

32 Any expectation on the part of the first defendant of some form of settlement was not enough to justify cross-examination (albeit this was denied). What had to be shown was fabricated evidence as a result of an expectation. There was no evidence of any such fabrication.

33 In this case the exercise the plaintiffs had carried out in respect of Phase 1 and the approach to date in the warehouse was corroborated by the affidavit of Mr Forster. This included the further review of the invoicing records of the plaintiffs found in Room 2, referred to in Advocate Sheedy's latest affidavit.

34 In respect of any agreement with the first defendant, Advocate Thomas repeated expressly before me that there was no agreement or assurance of any kind between the plaintiffs and the first defendant. The context of the email relied upon sent by the first defendant to Advocate Sheedy was that it was sent in response to a general email from the plaintiffs serving all the evidence they intended to rely upon in support of their application to limit discovery. Had the first defendant been represented, his email would not have been sent. This was immediately raised by Advocate Sheedy on the same day as Mr Forster sent his email to all parties, at 17:40 on 14 th September, 2018. The email stated:

> *"It should not have been copied to us (or it seems to any of us) as we do not represent Mr Forster and cannot advise him on his application."*

35 No other party responded to this email to take a different view. I also record that the third affidavit of Mr Thorp does not address this point.

36 Any questioning about any agreement was also inappropriate because re-examination could not take place without referring to privileged communications.

37 The reference to the first defendant having to pay costs if the first defendant did not explain where documents about the scheme might be located arose from a previous hearing where I had indicated that I expected the first defendant to explain his recollection about the location of relevant documents otherwise there could be costs sanctions. This was no more than a statement of what might happen and was not a basis for cross-examination.

38 In relation to the reliability of the first defendant's affidavit, this was an attempt to chip away at the first defendant's evidence in the hope that generally the reliability of his recollection might impugned.

39 There was no positive affidavit from the second and third defendants identifying a real issue between them and the first defendant. The best the second and third defendants could do was to put possibilities to the first defendant.

40 The request to cross-examine was being asked for at a time that was procedurally irregular i.e. before trial.

41 If there was to be any cross-examination, it had to be strictly controlled. The court had to be astute that no questions were asked or answers given that went beyond the scope of any permitted cross-examination in particular where the first defendant was a litigant in person. In particular, the court had to be careful about any question or answer that did not go to the issue before the court namely, the plaintiffs' summons seeking to limit discovery in the warehouse.

42 In relation to any specific emails the first defendant said he had sent, that was an issue of specific discovery and did not require cross-examination. The same analysis applied to the location of a laptop.

43 In relation to documents referred to in the email to Mr Kass in 2016, these were documents at head office which were reviewed as part of the plaintiffs' Phase 1 approach to discovery. What the first defendant did not say was that the documents he was referring to were in the warehouse, or that he needed to go to the warehouse to review documents.

44 Insofar as the first defendant mentioned some but not all suppliers, it was an attack on his credibility to suggest that the omission was deliberate. Paragraph 11 of the first defendant's affidavit might be inconsistent with the plaintiffs' case but any such inconsistency would not assist to ascertain what documents were located in the warehouse.

45 45. In respect of the documents at pages 155 to 163 of Mr Thorp's affidavit, apart from one all were disclosed in Phase 1 and so did not justify cross -examination about what was in the warehouse. The document at pages 161 and 162 was found in warehouse 6 but was not relevant because the sender of the communication was based in the Tanzanian branch

of the plaintiffs and did not receive any monies under the scheme according to the records disclosed by the second and third defendants.

46 If permitted, any cross-examination would also be extremely limited and would take no more than 30 minutes and so it was disproportionate to require the first defendant to travel to Jersey for such a short cross-examination. This submission did not mean, as far as the plaintiffs were aware, that Mr Forster would not come to Jersey or attend a video-link. Nevertheless, the plaintiffs were concerned that the cross-examination was tactical.

47 Finally, in relation to the third parties they should only be permitted to cross-examine if it assisted the court. The plaintiffs' position was that any possible cross -examination would be extremely limited and would not assist the court and so should be refused.

48 In reply Advocate Alexander contended firstly that the overriding objective was a development of existing principles of case management required by the Royal Court in particular the well-known statement of the Court of Appeal in the *Re Esteem* 2000/150 litigation reported at paragraph 31 (3) where the Court of Appeal stated:-

> ***"31. (3) From now on it has to be appreciated by all who are involved in civil proceedings in the Royal Court that their objective has to be to progress those proceedings to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time."***

49 If the second and third defendants were not entitled to explore why the first defendant had now filed his affidavit, this could lead to a decision to limit discovery which could materially affect the position of the second and third defendants at trial.

50 The fact that the first defendant is a litigant in person does not prevent cross-examination; rather it simply raises more difficulties for the court in managing any cross-examination.

51 In respect of the laptop and emails, Advocate Alexander fairly accepted that these arose out of the second and third defendants' application for discovery but contended these were still areas that could be explored in cross-examination.

52 52. The second and third defendants were also entitled to test the extent of the first defendant's knowledge about what was in the warehouse and how they operated. This followed on from his assertions that there were no relevant documents about the scheme kept in the warehouse.

53 Advocate Alexander was willing to attempt to agree parameters of areas to be cross-examined but it was not an obligation where cross-examination was ordered to provide the

actual questions to be asked in advance.

54 Cross-examination should not take more than half a day.

Decision

55 Firstly, in respect of the applicable legal principles, prior to the introduction of the overriding objective, an application to cross-examine the deponent of an affidavit filed voluntarily would only be refused in exceptional circumstances. I also note that both the applications in the *Pacific and Arya Holdings* cases were applications made in interlocutory applications. However, both the applications were strike out applications. In applications where the relief sought is effectively to deprive the party of the ability to contest all or part of a case at all, then in my judgment exceptional circumstances still have to be shown in order to deny a request to cross-examine a deponent of an affidavit filed voluntarily.

56 I consider the same reasoning applies to the approach taken by the Royal Court in the *In re Yaheeb Trust* case to which I was also referred. In my view this was also an application which was seeking effectively to determine the rights of the trustee to deal with assets held by it. Paragraph 3 of the judgment described the application as follows:-

> ***"3 This rather elliptical application disguises the true nature of the problem, both for the representor and for the trustee.*** The problem arises from the terms of the Proceeds of Crime (Jersey) Law 1999 ("the 1999 Law") which is designed, broadly speaking, to curb money laundering. The 1999 Law imposes an obligation on fiduciaries, inter alia, to report to the police any suspicion that they are holding property which might be the proceeds of criminal conduct. In July 2000, pursuant to that obligation, the trustee filed a suspicious transaction report with the police in relation to the trust funds under their administration. As a result of that disclosure, the police launched an investigation which is still in train. Following the court's judgment on May 17th, 2001 to the effect that the funds were not impressed with any constructive trust, the representor asked the trustee to make a capital distribution. The trustee remained concerned, however, that a distribution might involve the commission by the trustee of an offence under the 1999 Law. Under art. 32(3)(b)(i) of the 1999 Law a person who might otherwise commit an offence under art. 32 of assisting another to retain the benefit of criminal conduct is afforded a defence if he discloses to the police the proposed act and the act is subsequently done with the consent of the police. The trustee applied for that consent to the proposed capital distribution but the police declined to consent. The application by the representor for directions enabling the trustee "to resume the administration" of the trusts is in reality designed to overcome that refusal on the part of the police."

57 Given the nature of the application it is not surprising that in principle the court would order

cross-examination unless exceptional circumstances existed.

58 The present application by contrast relates to the scope of discovery to be produced. While discovery is an important part of the adversarial process, the hearing of an application to limit discovery or an application for specific discovery application is not determining whether or not a matter should proceed to trial in the same way as a strike out application or an application for directions. In respect of an interlocutory application that is procedural in the sense that the application concerns a particular step to be taken as part of the court making orders to get a case ready for trial, I consider that the question of whether or not to order cross-examination is now subject to the overriding objective rather than a party having an almost unfettered right to cross-examination unless exceptional circumstances exist. I have reached this conclusion because Rule 1/6(3) of the Rules requires the court to seek to give effect to the overriding objective when it exercises any power given to it by the Rules. The overriding objective also requires the court to actively manage cases including controlling the progress of a case and considering whether the likely benefit of taking a particular step justifies its cost. In my judgment therefore in case management type applications, where grounds are advanced for cross-examination, I have to decide whether an order for cross-examination means that I am dealing with the case justly and at a proportionate cost. This is a balancing exercise between on the one hand not shutting out the party seeking cross-examination unjustly and so not depriving a party of the ability to advance its case on a procedural issue as against ensuring that the request for cross-examination is one that is proportionate.

59 Applying the approach I have just described to the present application, I concluded that to refuse the request for cross-examination would not be just because the second and third defendants could not then challenge the affidavit of the first defendant at all.

60 60. However I also limited the scope of the cross-examination to the location and whereabouts of documents and not the operation of the scheme itself. Questions relating to any operation of any scheme were matters for trial only. Cross examination could not be used to explore issues that went beyond the scope of the challenge to the plaintiffs' application to limit discovery. I therefore made it clear that the cross-examination would be strictly controlled. Allowing cross-examination but ensuring its scope was limited in the way described below met the test of dealing with the application for cross-examination justly but at a proportionate cost. I should add that while I have referred to the scheme, this is not a finding on the matters alleged by the plaintiff but simply a shorthand phrase to describe the arrangements said to have existed. The nature and cope of any scheme is a matter for trial.

61 Limiting cross-examination in this way also meant that I was discharging the obligation to actively manage cases because the effect of ordering cross-examination was only to delay the hearing of the plaintiffs' application by a few weeks. In the context of how long the proceedings have taken to date this short period of delay was neither unjust nor disproportionate and still meant that the case was progressing.

62 My reasons for permitting cross-examination are as follows:-

(a) I was shown certain written records referring to payments to be made from the companies administered by the second and third defendants contrary to the first defendant's assertions that there was nothing in writing in relation to the Scheme. While this may be explainable because the first defendant was referring to whether there were any documents relating to arrangements with the suppliers of vehicles whereas the documents produced related to payments to employees, the second and third defendants should be permitted to explore this issue with the first defendant.

(b) The suppliers identified by the first defendant at paragraph 11 of his affidavit were not all the suppliers referred to in the order of justice alleged to have made payments under the scheme;

(c) the first defendant's assertions in his affidavit that there were no documents in the warehouse might be inconsistent with the email he sent to Mr Kass in 2016 requesting access to documents;

(d) It was not clear whether the first defendant had understood the applicable test on discovery by reference to the statement at paragraph 42 of his affidavit that there were no documents in the warehouse that referred *"directly"* to the scheme.

63 I also permitted the second and third defendants to cross-examine on the first defendant's knowledge of the storage arrangements that applied at the warehouse. However I warned Advocate Alexander that the knowledge expected should be that of a chief executive and not that of persons operating or managing the warehouse on a day to day basis.

64 The cross examination allowed was therefore limited to the above matters.

65 I refused to allow the second and third defendants to cross examine the first defendant on his discussions with the plaintiffs leading to the production of the first defendant's affidavit. This was because Advocate Thomas had stated expressly to me as noted above that there was no such agreement. The only possible evidence contrary to this statement by an officer of the court was the reference to a *"pending arrangement"* in the first defendant's email to Advocate Sheedy at Baker & Partners referred to at paragraph 16 above.

66 However, the context of this email was that it was sent in response to an email to all parties from Baker & Partners for the plaintiffs serving documents in support of their renewed discovery application. I agree with Advocate Thomas that had the first defendant been separately advised he would not have responded in the way he did. The email and reply was therefore clearly sent as a mistake. This was accepted by Advocate Sheedy for the plaintiffs by emailing all the other parties immediately, in my judgement quite correctly, and

no other party challenged that view at the time.

67 In my judgement, the position is therefore analogous with documents provided for inspection by mistake considered in *Café de Lecq Limited v R. A. Rossborough (Insurance brokers)* [2011] JLR 182. The first defendant's email in response was an honest mistake, recognised immediately as such by the plaintiffs, and where no other party took a different view.

68 In addition, I also agreed with Advocate Thomas that allowing cross-examination on this issue would be unfair because he could not effectively re-examine without waiving privilege in respect of material where the claim to without prejudice privilege was not challenged. Advocate Alexander was also right to confirm after the hearing that he was not at this stage seeking to cross-examine on material claimed to be subject to litigation privilege as well as without prejudice communications as noted above where he was not seeking to challenge Advocate Thomas' statement that there was no agreement between the plaintiffs and the first defendant. The attempt to question the first defendant on any belief as to what he may have agreed was an attempt to circumvent Advocate Thomas' clear statement and the claims to privilege by the back door. The question of whether the claim for litigation privilege can be sustained is now correctly being dealt with as a separate issue.

69 In respect of the second and third defendants' wish to cross-examine the first defendant on the location of specific emails, whether the first defendant had a laptop and/or the location of his computer, these issues are not relevant to the location of documents in the warehouse. Rather they relate to the second and third defendants' application for specific discovery. At present therefore the request to cross-examine on these issues is premature. The second and third defendants should await the plaintiffs' response to their affidavit filed in respect of their own discovery application to consider whether cross-examination on these issues is both just and proportionate. The status of any proceedings in the Isle of Man again is a matter of specific discovery.

70 In relation to the scope of cross-examination, this must only be about the location and whereabouts of documents by reference to the matters referred to in paragraphs 61 and 62 above. It should not be about the operation of the scheme because that is a matter for trial. To the extent it is necessary to refer to the scheme at all in order to put any questions about the location of documents in context, establishing the context should therefore be put on the basis of the pleaded cases of the parties.

71 In relation to whether or not to order cross-examination by video-link or in person, I agree that ordinarily cross-examination should be ordered in person. This is however where the overriding objective again applies. Given that I have allowed cross-examination on a limited basis and in respect of discrete areas only, I concluded it was not proportionate to require the first defendant to travel from Kenya to Jersey for a cross-examination that even on the second and third defendants' own case would only last half a day and may well be

shorter.

72 In addition the affidavit filed on behalf of the second and third defendants was not evidence filed by those with knowledge of how the scheme operated from individuals for the second and third defendants with responsibility for administration of the trust and offshore entities at the material times. In particular, no positive case or evidence was adduced from those individuals about any knowledge they may have had about how far the scheme was documented which could be relevant to the location or whereabouts of documents. Rather the affidavit only identified potential inconsistencies either inherent to the first defendant's own affidavit or with documents already disclosed by the plaintiffs. Cross-examination on the location of documents by reference to the limited grounds permitted by this judgment did not justify the expense of attendance in person.

73 It is also right as part of this judgment to record my reasons for the other order I made which concerned the second and third defendants' answer.

74 In reviewing the pleadings for the present application, in relation to the plaintiffs' pleaded case that various payments had been made into and out of the entities administered by the second and third defendants, the answer filed on their behalf did not admit these payments. Yet, this part of the plaintiff's case was based on records previously disclosed by the second and third defendants. The approach of the second and third defendants was therefore to put the plaintiffs to proof of matters based on the second and third defendants' own documents and within their own knowledge. I did not regard this approach as consistent with the overriding objective which includes requiring me to identify issues between the parties as part of active case management (see Rule1/6(6)(b) and (c)).

75 I therefore ordered the second and third defendants to make their case clear in respect of monies paid in and out of the entities they administered. This was an exercise of the power vested in me under Rule 6/15 of the Rules. The rationale for this was to identify whether the second and third defendants disputed the payments said to have been made into and out of the entities they administered. If they did dispute any payment or payments then a positive case setting out the reasons why was required, pleading all relevant facts.

76 The purpose of taking this approach was to identify whether any issue existed between the parties in respect of payments in and out of the entities administered by the second and third defendants. Otherwise significant costs would be incurred in proving matters already known to the second and third defendants. This is neither just nor proportionate and would be a waste of valuable time and money. Obviously, if the second and third defendants consider that the figures claimed are erroneous in some way then they are free to dispute any erroneous calculations as long as any error and the reasons why are identified. Any such pleading would then allow the parties to understand the extent of the issues between them on this point. I should of course make it clear that this order did not in any way affect the second and third defendants' denial of liability. The order was simply focused on the quantum of payments in and out made through the entities concerned.