

ENGLAND AND WALES / JUDGMENT

Acasta European Insurance Company Limited v Emmiera Group Limited

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Neutral Citation Number: [2025] EWHC 1168 (Ch) IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES BUSINESS LIST (ChD) Case No: BL-2025-000456 Royal Courts of Justice, Rolls Building Fetter Lane, London, EC4A 1NL Date: 15/05/2025 Before : Mr David Halpern KC sitting as a High Court Judge

- ----- Between : ACASTA EUROPEAN INSURANCE COMPANY LIMITED
- and - EMMIERA GROUP LIMITED Claimant Defendant
- -----

- ----- Mr Stuart Benzie (instructed by Gateley Legal) for the Claimant Mr Robert Mundy KC (instructed by Higgs LLP) for the Defendant Hearing date: 2 May 2025 Draft judgment circulated: 8 May 2025 Approved Judgment This judgment was handed down remotely at 10.30am on 15 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives. MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE

- ----- MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE
Approved Judgment Mr David Halpern KC : Acasta v Emmiera 1. This is the return date on an imaging order made without notice by Marcus Smith J on 2 April 2025. The dispute before me is as to the extent to which the court should order disclosure and inspection of the preserved images. (I shall use the term “disclosure” in this judgment to include inspection.) In brief, Mr Stuart Benzie, counsel for the Claimant, Acasta European Insurance Company Ltd (“C”), seeks a wide-ranging order for disclosure on the ground that he has pleaded a prima facie case for fraud against the Defendant, Emmiera Group Limited (“D”) and that the court should assist C as the victim of a fraudster to obtain recovery of its money. The facts 2. 3. 4. 5. 6. C is an insurance underwriter incorporated in Gibraltar which underwrites furniture warranty insurance. The policies tend to be for comparatively small sums of money, but there are a large number of such policies. D is a company which carries out furniture repairs in customers’ homes. It also has an insurance arm. When a customer buys furniture and takes out furniture warranty insurance, D is notified. Its role includes assessing the merits of any claim under the policy, carrying out any necessary furniture repairs and general responsibility for claims handling. D acted as agent for C in relation to policies underwritten by C. It is common ground

- (i) that there are two relevant agreements between C and D, viz a terms of business agreement and a claims handling agreement, (ii) that these agreements give C a proprietary interest in certain documents and a contractual right to see other documents and (iii) that the agency relationship between C and D was a fiduciary one. In 2023 Mrs Amjad, the holder of a policy with C, made a complaint to the Financial Ombudsman Service (“FOS”) that C had acted unfairly in treating her claim for damage to her sofa as being 15 claims. FOS wrote to C on 7 December 2023, saying that, although there had been 15 separate visits to her home, 14 related to damage caused by her children on or around 29 April 2023 and one related to damage caused when she moved the sofa. FOS concluded that there should have been two claims, not 15. On 21 December 2023 C emailed Christopher Whelan (“Mr Whelan”), a senior employee of D, forwarding FOS’s report and saying that C agreed with FOS’s conclusions and required D to take appropriate steps to prevent claims from wrongfully being treated as multiple claims in the future. C rely on this as evidence that, insofar as there were multiple claims thereafter, this was due to fraud and not mere negligence on the part of D. No underlying insurance policy was included in the bundle before me. Accordingly I am unable to reach a view as to what properly constitutes a single claim. However, it was common ground between counsel that damage caused in one incident and on one occasion would constitute one claim, so that, if a customer made a single report of damage caused to furniture on two different occasions on as a result of two different incidents, as Mrs Amjad did, that should properly be treated as two claims. The question whether two or more heads of damage arise out of a single incident or occasion is clearly fact-sensitive and I can see that there may be some cases where MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment *Acasta v Emmiera* 7. 8. 9. 10. there is genuine room for argument, albeit that there will be many cases in which the answer will be obvious. C’s concerns about multiple claims are that (i) they enable D improperly to claim more than one claims-handling fee, (ii) they might result in higher premiums for the customer who would acquire an unfairly bad claims record and (iii) they might cause C to be in breach of its regulatory requirements. For these reasons, C says that it remained concerned about the risk of multiple claims following the FOS report. In July 2024 Mr Whelan left D’s employment. D’s evidence is that, after Mr Whelan left, D discovered that he had processed fictitious claims and fraudulently caused payments to be made to his family and friends. D instructed Matt Ross of Clarity in Numbers Ltd to prepare a report. The report recorded that suspicions were first aroused in April 2024 when it came to light that claims had been made in respect of two policies which claims were not recorded on the system. Mr Whelan gave an explanation which was accepted at the time, but after his departure in July 2024 D’s new claims handler instigated a review of all recent claims which brought to light that there were eight claims linked to Mr Whelan for which there were no supporting records. Mr Whelan was then approached and repaid the sum of £24,632 to D on 12 and 13 November 2024. (D has subsequently stated that one of these eight instances did not relate to C.) In the meantime, in October 2024 C commissioned SX3, an insurance claims consultant, to undertake an independent review of Emmiera’s claims handling. SX3’s report for C and Mr Ross’s report for D were parallel but independent reports. SX3 wrote its report in October,

but C did not disclose it to D until January 2025, albeit that the findings were sent to D in December. Mr Ross wrote his report in November and disclosed it to C on 18 November. SX3's report stated that it had reviewed 50 random "master" claims (i.e. 50 single-claim events or incidents) which together had generated 116 recorded claims. The "leakage" frequency was 76%, i.e. 38 of the master claims showed leakage, meaning multiple fees charged for the same incident. This was said to result in duplicate fees totalling £7,994.07. The report explained that: "In relation to the overall results, it is important to caveat that there has been some disagreement in terms of how many claims should have been recorded against each report. In particular, claims considered either mechanical failure (wear and tear) or stain damage or a combination of both. Since most questions and responses have been captured in writing (by request of the audited entity) there are circumstances where the query has not been fully answered. In circumstances where SX3 and Emmiera have not reached a mutually agreed viewpoint, the report consistently records the outcome as hard leakage. Arguably, the outcome might equally be recorded as soft leakage (or removed all together)." 11. The report does not say what is meant by "hard" and "soft" leakage. Mr Benzie was unable to explain whether a distinction is being drawn based on (i) the degree of impropriety in claiming duplicate fees, (ii) the degree of certainty in concluding that MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera there has been leakage or (iii) something else. The report states that 43 of the 50 sample cases reviewed involved more than one claim and that D agreed that five of these 43 should have been treated as a single claim. It does not reach any conclusion as to whether it disagrees with D in relation to the remaining 38 claims, but merely states that it has recorded all of them as "hard" leakage. 12. On 20 December 2024 C wrote to D, summarising the SX3 report and requiring D within 10 business days (inter alia) (i) to provide a remediation plan, (ii) to provide the classes of documents listed in the schedule to that letter and (iii) to identify all claims which had wrongly been treated as multiple claims. On 23 December 2024 it was agreed that the deadline would be extended to 8 January 2025. On 6 January 2025 Mr Ross emailed C saying: "There is a significant amount of paperwork relating to the fraud and I'm of the opinion that a face-to-face meeting would be significantly reduce the amount of time invested by both parties." 13. The meeting which Mr Ross proposed took place on 15 January 2025. Ms McFadyen (on behalf of C) has exhibited to her affidavit a note of this meeting, but she does not say who prepared the note or when. In her affidavit she quotes the following extracts from the note (the underlining is hers): "Matt [Ross] & Raine [O'Reilly, D's claims manager] explained that all of the details on the system can be changed except anything financial related included the start date of policies. Matt & Raine explained these policies are all genuine customer policies but that Chris had manipulated a claim on the customers policy and entered his own family and friends bank details. Customers impacted by this. Raine confirmed that all customers had not been notified yet. UKG had also not been notified yet as they wanted to see how we reacted first. Raine demonstrated the system and jobs booked and explained that the minimal info and the fact the system just shows Chris Whelan concludes this is fraudulent as well as the payout within 48 hours. Gareth asked if they can they do a control report on the claims paid

within 48 hours of the incident date as this could be an indicator of other fraud cases – same day payment fraud risks. Action for EGL to confirm if this is possible as they stated it was but were not entirely sure.” 14. On 16 January 2025 Mr Ross sent a list of action points following the meeting, which included “Run report on all claims opened and settled within 48 hours”. On 20 January 2025 Ms O’Reilly sent an email to C attaching a spreadsheet listing all claims closed within 48 hours of being opened. The email said: “In the spreadsheet, claims highlighted in red are related to fraud. Kindly note that all other claims are legitimate and have MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera been reviewed to ensure a clear and accurate audit trail is on each claim. Happy to discuss further when you complete an onsite visit.” The spreadsheet attached to the email listed 5,826 claims, of which seven were highlighted in red. It is regrettable that Marcus Smith J was not shown the spreadsheet and was not told that only seven claims had been highlighted in red. 15. On 23 January 2025 there was an email exchange between the parties: i) ii) C emailed to say that it was “incredibly concerned” that almost 6,000 cases had been closed within 48 hours of being opened, and repeating its request for “a complete data dump” of claims relating to C. Mr Ross replied on D’s behalf saying: “Raine will be responding shortly to your observations on the closed claims timeline – there is a perfectly rational explanation for the volume of transactions.” He added that: “The sum of £22,583.50 will be sent across today ref ‘claim repayment’”. This sum was the amount which D regarded as representing the losses caused to C by Mr Whelan’s fraud. The figure has not been challenged by C. 16. The next email exchange was on 27 January 2025: i) Ms O’Reilly sent an email to C providing further information about the 5,826 claims which had been settled within 48 hours of being made. She said that 4,054 had been charged £0. She gave explanations in respect of the remaining claims, including 225 described as “anomaly” claims. She concluded as follows: “As mentioned before, I would be happy to discuss this in more detail during a site visit, where we can go through each of the cases on the system. Please feel free to reach out if you need any further clarification in the meantime.” ii) Twenty minutes later Mr Ross sent an email headed “fraud update”. He said: “Following exhaustive investigations, we are as satisfied as we can be at this point in time, that all fraudulent activities perpetrated by Chris Whelan have been identified. The sum of £22,583.50 that was highlighted as being claimed on the BDX [bordereaux] has been refunded and we await your feedback on claim 241436. [please refer to my email from 23rd January] The matter is further being investigated by the FCA and the police and moving forward we will deal directly and exclusively with these parties. MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera If any further fraudulent activity comes to light, we will advise you accordingly but can no longer respond direct to Acasta with any queries on this matter. In Raine’s earlier note, 225 “anomalous” claims were identified, however on review of a representative sample, these were all identified as relating to historic claims that were “reopened”. We do not have concerns of fraudulent activity relating to these transactions, however, there does appear to be several administrative errors pertaining to the sample we reviewed. We will share our findings on these claims during the forthcoming audit. We apologise for this regretful incident and look

forward to drawing a line under the matter.” 17. 18. On 28 January and 10 February 2025 C repeated its request for documents. On 10 and 13 March 2025 Mr Ross uploaded a large number of documents to a SharePoint site; D claims that this constitutes the “data dump” requested. There is a dispute between the parties as to whether D has properly answered C’s request. In the meantime, on 7 March 2025 Michael Gallagher and Ms MacFadyen (on behalf of C) met with Mr Whelan. Ms MacFadyen has exhibited her contemporaneous note of that meeting, in which Mr Whelan referred to numerous frauds allegedly perpetrated by Mr Lane and others within D. Of these alleged frauds, the most serious is probably ghost broking. The following is an example of the tone of Mr Whelan’s allegations: “Said everyone is involved and reason why Gary Wilkes left and Emma Gowland got involved as financial controller as he didn’t like all the corrupt stuff but Emma is evil and the worst person WB [the whistle-blower, i.e. Mr Whelan] has ever met and is so corrupt she finds ways to bury all the evidence in the payments and MI.” For reasons that will become clear in this judgment, I do not regard it as necessary to set out further details of Mr Whelan’s allegations. It is sufficient to note that they involve many types of serious fraud and other wrongdoing on a wholesale scale by employees and officers of D. The proceedings 19. On 1 April 2025 C issued its Claim Form seeking remedies for breach of contract, breach of fiduciary duty, deceit and conversion. The Particulars of Claim (“POC”) plead the eight instances of fraud on the part of Mr Whelan referred to in paragraph above and then refer to “further instances of suspected fraud”, including the settlement of numerous claims within 48 hours (see paragraphs 13 to above) and the allegations made by Mr Whelan on 7 March 2025 (see paragraph above). Mr Benzie MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera has very properly not pleaded these further instances as being actual examples of fraud, but has delicately referred to them as “suspected” fraud. 20. C made a “without notice” application for as an imaging order, as well as further relief, including delivery up both of documents belonging to C and documents to which C had a contractual right to access. C relied on affidavits from Mr Gallagher, a director of C, and Ms MacFadyen, head of compliance at C’s sister company. The application was heard on 2 April 2025 by Marcus Smith J, who made the imaging order and adjourned the balance of the application. Mr Benzie, who appeared on that occasion, told me that the judge gave a detailed judgment but I have not been provided with a transcript.

21. Mr Lane, the CEO of D, has served a witness statement for the purpose of the current hearing in which he denies the allegations of fraud and cover-up. 22. It is common ground between the parties: i) ii) iii) That the order requiring preservation of the imaged documents should continue until trial or further order; That a gagging order made against D should not continue; and That C should have disclosure of two classes of documents, viz (i) those in which it claims a proprietary interest and (ii) those to which it claims a contractual right of access. 23. The principal dispute before me is as to two remaining classes of documents which are covered by the imaging order: i) ii) “The Respondent’s bank statements showing transactions from November 2019 until the current date that relate in any way whatsoever to the business relationship between the Applicant and the Respondent including (but not

limited to) the Respondent's performance of its duties pursuant to the TOBA and CHA"; and "All emails, SMS messages, WhatsApp, Signal, Slack, Teams or other electronic messages, sent or received from November 2019 until the date of this order, including messages sent by other forms of social media including (but not limited to) LinkedIn, Facebook, Snapchat, Instagram, X (formerly Twitter) or any other form of messaging system whatsoever that are related to the business relationship between the Applicant and the Respondent including (but not limited to) the Respondents performance of its duties pursuant to the TOBA and CHA", including but not limited to "messages sent and received (whether as recipient and/or copied and/or blind copied) by any of the Named Individuals." Most of the submissions made to me relate to category (ii). MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment C's submissions in outline Acasta v Emmiera

24. Mr Benzie frankly admits that he would like to be able to plead further allegations of fraud, as envisaged in the POC, but is unable to do so without disclosure of the imaged material. He makes six submissions. 25.
- (1) There is prima facie evidence of fraud. His skeleton says: "The most important factor in this application is that there is prima facie evidence of fraud (strongly supported by the statements made by Mr Whelan) and Acasta has no alternative way of determining the full extent and nature of any fraud (and/or conspiracy) without access to the documents. ... This is a point of principle, and it is well established in fraud cases that "the court should do all it can to help innocent people to find out where their money has gone" (see Lord Denning in Bankers Trust v. Shapira [1980] 1 WLR 1274 at 1281G-1282E). We will rely upon this issue of principle." 26. There are numerous factors which Mr Benzie says point towards fraud. It is not proportionate in this judgment to list all of them, but I confirm that I have reminded myself of all of them by re-reading the affidavits, Mr Benzie's skeleton, and the notes I have made of his submissions. I summarise the principal allegations: i) ii) iii) iv) v) vi) Following the FOS report relating to multiple claims and the email from C which required D to take appropriate steps to avoid this happening in the future, the continuation of the practice of wrongfully treating claims as multiple claims was fraudulent (paragraph above). The admitted frauds by Mr Whelan in April 2024, which were not reported to C until November 2024 (paragraph above), albeit that he does not allege that there was deliberate concealment in this regard. The findings in the SX3 report (paragraph above). The fact that nearly 6,000 claims were settled by D within 48 hours of the claim being made. He submits that the note of the meeting on 15 January ("Raine demonstrated the system and jobs booked and explained that the minimal info and the fact the system just shows Chris Whelan concludes this is fraudulent as well as the payout within 48 hours ") shows that Ms O'Reilly regarded this as a "red flag" (paragraph above). The failure to respond properly to requests by C and the refusal of Mr Ross on 27 January 2025 to engage further with C (we "can no longer respond direct to Acasta with any queries on this matter": paragraph above). The allegations made by Mr Whelan on 7 March 2025 (paragraph above). Mr Benzie submits that there is a striking similarity between the allegations made in the FOS report and the allegations later made by Mr Whelan against D. He submits that disclosure is needed in order to see whether

Mr Whelan's MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera 27. 28. 29. 30. 31. allegations are true, but he accepts that none of the allegations made by Mr Whelan were put to D before the application was issued.

- (2) Proper management of the proceedings: Mr Benzie submits that, if disclosure is not ordered at this stage, it will be necessary to make substantial amendments to the POC at a later date, which will result in increased expenditure for all parties. He adds that, if proceedings had not been issued, this would have been an obvious case for pre-action disclosure under CPR r.31.16.
 - (3) C cannot reasonably be expected to engage in ADR pending disclosure.
 - (4) The process set out in the Court of Appeal: Mr Benzie refers to an extract from TBD (which I set out at paragraph below). I observe that, whilst he is right to refer to this decision as setting out the relevant test, I do not understand his submission that this somehow helps his case. To the contrary, the decision makes it clear that the burden is on C to justify early disclosure.
 - (5) FCA and consumer protection: Mr Benzie submits that C is regulated by the FCA. (This is not entirely accurate: I am told that C is regulated by the equivalent Gibraltar authority, but its sister company is regulated by the FCA. However, nothing turns on this inaccuracy.) The point which C makes is that it owes regulatory duties but is unable to contact customers or report breaches to the FCA until it has more information.
 - (6) Cost and prejudice: Mr Benzie submits that the cost to D of providing disclosure at this early stage should be no greater than providing it in due course and that the exercise will not be disproportionate. He says that C needs to see bank statements at this stage in order to see what payments were in fact made to policyholders. He accepts that D's bank statements will need to be redacted to remove entries which do not relate to C, but Mr Lane cannot be trusted to do this, given the allegations of fraud against him. D's submissions in outline
32. Mr Mundy KC submits that there is no proper evidence of widespread fraud by D. He responds to the points made by Mr Benzie (summarised in paragraph above) as follows: i) ii) iii) iv) There is no evidence of any widespread practice within D of wrongfully treating claims as multiple claims. D admits that there was fraud by Mr Whelan, for which D may be vicariously liable. This fraud was properly reported to C and compensation was duly paid by D to C. The findings in the SX3 Report are inconclusive, for the reasons set out in paragraph above. The note of the meeting with Ms O'Reilly on 15 January 2025 is unsatisfactory and does not constitute an admission that the settlement of claims within 48 hours is a "red flag". According to Mr Lane's evidence, Ms MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera O'Reilly confirmed to him that she "simply commented at the end of the meeting that all of these claims had been closed within 48 hours which may be another reason for questioning them." In other words, it is simply a factor to be considered, but does not amount to a "red flag". This is borne out by subsequent events. As requested by C, Ms O'Reilly sent a spreadsheet listing all 5,826 claims which had

been settled within 48 hours. Of this total, 4,054 proved to have no value. This could be for a number of reasons, including the fact that the policy in question had expired or did not respond for some other reason. Ms O'Reilly's spreadsheet offers explanations for the remaining claims, which show that only seven were found to be fraudulent. D did not refuse to engage with C's requests in and around January 2025. The email sent by Mr Ross on 27 January 2025 should be read in conjunction with Ms O'Reilly's email 20 minutes earlier. Properly construed, Mr Ross was simply indicating that D had reported Mr Whelan's fraud to the police and the FCA and that D was not willing to correspond further with C about that matter. He was not shutting the door to disclosure of further frauds (if any came to light), nor on further discussions with Ms O'Reilly in relation to her email 20 minutes earlier. Mr Mundy KC added that, with hindsight, the decision not to continue the correspondence with C about Mr Whelan's frauds proved to be a wise one, given that C later met with Mr Whelan without telling D. Mr Mundy KC also relies on paragraph 123 of the Supervising Solicitors' report of the execution of the imaging order, which described D as "cooperative and willing to assist". Mr Whelan's allegations should not be given any serious weight. In the first place, he is a fraudster and has accepted this by reimbursing D for the amounts which he misappropriated. Secondly, he has an axe to grind, because he is now working for Guardsman, which is a competitor firm. Thirdly his allegations are both unparticularised and intemperate, as is shown by the example given at paragraph above. Fourthly, it is unsurprising that Mr Whelan repeated allegations similar to those in the FOS report, given that he was still working for D when the FOS report came out and, indeed, the report was sent to him. No adverse inferences should be drawn from Mr Lane's failure to engage with each of his wild allegations. v) vi) 33. As regards the law: i) ii) iii) The starting point is the decision of Mann J in *A v B*, which I set out below. Bankers Trust is not in point. What Lord Denning actually said was: "In order to enable justice to be done — in order to enable these funds to be traced — it is a very important part of the court's armoury to be able to order discovery." This is not a licence to order early disclosure whenever there is an allegation of fraud. He relies on the following dictum of Lawton LJ in *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44 at 47H, (with whom Templeman and Fox LJ agreed): MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment *Acasta v Emmiera* "It has to be remembered by all concerned that we do not have in this country an inquisitorial procedure for civil litigation. Our procedure is accusatorial. Those who make charges must state right at the beginning what they are and what facts they are based upon. They must not use Anton Piller orders as a means of finding out what sort of charges they can make. They must deliver their statement of claim within the time specified in the rules, unless the court orders otherwise." iv) He also relies on *CBS Butler Ltd v Brown* [2013] EWHC 3944 (QB), in which Tugendhat J refused to order disclosure following an imaging order, saying: "38. In my judgment, an order which would deprive the Defendants of the opportunity of considering whether or not they shall make any disclosure is (in the words of Hoffmann J) an intrusive order, even if it is made on notice to the defendant. It is contrary to normal principles of justice, and can only be done when there is a paramount need to prevent a denial of justice to the claimant. The need to avoid such a denial of justice may be

shown after the defendant has failed to comply with his disclosure obligations, having been given the opportunity to do so (as in Mueller). Or it may be shown before the defendant has had an opportunity to comply with his disclosure obligations. But in the latter case it is not sufficient for a claimant such as the employer in *Lock v Beswick*, or the Claimant, to show no more than that the defendant has misused confidential information or otherwise broken his employment contract. The position is a fortiori where the claimant has not even shown that much. What a claimant must show is substantial reasons for believing that a defendant is intending to conceal or destroy documents in breach of his obligations of disclosure under the CPR. ...

40. There is, of course, no dispute that the Claimant is entitled to disclosure of the Defendants' documents. The Claimant is entitled to that at this stage of the action (after service of the Defence) in the course of the normal procedure for disclosure. What is at issue is whether the Claimant is entitled to deprive the Defendants of the opportunity of considering whether or not they shall make any disclosure of any particular documents." 34. As regards Mr Benzie's remaining submissions, Mr Mundy KC says: i) ii) The proper way to manage this case is to follow the usual procedures in the CPR, as confirmed in *TBD*. Mr Mundy KC describes Mr Benzie's approach as "topsy-turvy litigation", which does not promote efficiency or focus. This would not have been an appropriate case for pre-action disclosure. The disclosure sought (all emails etc "that are related to the business relationship between the Applicant and the Respondent": paragraph 23.ii) above) is very MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment *Acasta v Emmiera* much wider than would be permitted under CPR 31.16(4), which requires C to specify "the documents or classes of documents" of which disclosure is sought. If there is to be disclosure, it would be appropriate for D (acting by its solicitor) to be responsible for this, as would be the case if disclosure took place in the ordinary way. There were particular factors in the two cases reported under *A v B* which made it inappropriate for the defendants to conduct the exercise in those cases, but in the present case there are simply unsubstantiated allegations against Mr Lane and D. There is no force in the point about ADR. The same could be said in most sets of proceedings, i.e. that one party might be unwilling to mediate before disclosure. There is nothing to stop C from making whatever report it considers necessary to the FCA. iii) iv) v) Discussion 35. The starting point is the decision of Mann J reported as *A v B* [2019] EWHC 2089 (Ch); [2019] 1 WLR 5832. In the section of his judgment entitled "The proper approach to the question of who goes first" he said: "21 In my view one should answer the question of what should now happen in relation to inspection by going to the central purpose of a search and seizure order, by reference to the authorities and statute, and carefully considering how it fits into the normal established way of conducting litigation." 22 If one starts from the disclosure end, then the general rule is that the disclosing party has to carry out the disclosure exercise itself, applying a relevance test as best it can. It is assumed in the first instance that it will do that bona fide. In most cases comfort can be taken (at least to a degree) by the fact that solicitors are involved, and they are better placed to assess relevance than the party (and not inclined to suppress a relevant but damaging document).

If one party considers that the disclosing party has not carried out its obligations properly then the remedy is an order for specific disclosure which focuses the issue more sharply. That order is not generally an order which involves the receiving party itself conducting a search and assessment of a very large body of the disclosing party's documents in order to see what relevant documents might be found, though I accept that in theory such an order would be possible under the any other order head under CPR r 31.5(7). What is more likely to be ordered than that (if there is a problem which justifies it) is disclosure of a specified class of documents as a whole without any test for relevance being carried out by the disclosing party, though even then the MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment *Acasta v Emmiera* disclosing party is the party which looks for that class in the first place. 23 With that in mind it becomes necessary to look at the problem from the search and seizure end. As pointed out above, the prime reason for making such an order (in relation to documents) is preservation of those documents, in order to avoid the risk that they will not be available at the disclosure stage, whenever that might be. Its main source is not a jurisdiction to give the claimants a form of disclosure exercise which is (a) early and (b) a do-it-yourself form of exercise which would not normally be done as part of standard disclosure. Section 7 is not even aimed primarily at documents, though it undoubtedly covers them. 24 The reason that, to a degree, the old form of SSO in relation to documents seems to involve a disclosure exercise is because the exercise of preservation in relation to physical documents necessarily involves a search and assessment by the claimant. If one is preserving physical documents from a potentially predatory party then there is no other way of going about it. The same is true of digital documents which are not imaged (see the standard form of order). But that should not disguise the fact that the exercise is usually intended to be a preservation one, not (at that stage) a disclosure one. 25 In my view that informs an assessment of what should normally be done with an image of digital data once it is secured. Once the image is taken the documents on it are preserved and safe from the risk of destruction, and it is that wish which the order was primarily intended to meet. It is not necessary to carry out any searching or identification for that purpose; the image is safe. Any searches carried out in relation to those documents cannot be justified on the footing that it is necessary for the preservation of those documents. I can see no justification for a search of those documents being, as a general rule, carried out by the claimant and/or at that stage. 26 I therefore agree with the submissions of the defendants in both cases that if there is to be an inspection of documents on the images at this stage and by the claimants then it needs to be justified as a separate exercise, and analysed in terms of the disclosure jurisdiction. The process of looking for relevant documents is akin to disclosure if it is not actual disclosure (as that process is understood under the Civil Procedure Rules). I do not accept the submissions of [counsel] that the inspection of the image is ancillary to the SSO, or at least it is not ancillary in any meaningful way. If anything, the search and seizure order is ancillary to disclosure, because it enables MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment *Acasta v Emmiera* documents to be preserved for that purpose, but without necessarily determining who should do the disclosure." Mann J then referred to the dictum in *CBS v*

Butler quoted at paragraph above and concluded this section of the judgment with a non-exhaustive list of relevant factors at [30], including the following: “(i) The order will have been obtained in the first place on the basis of a strong prima facie case of not only the dishonesty of the defendant but also the propensity of the defendant to cover his or her tracks by destroying evidence. That may mean that the defendant should not necessarily be trusted to carry out the disclosure (inspection) exercise properly, though this factor may be seriously ameliorated by the defendant’s solicitors being involved in the process.” and “(vi) On the other side of the argument is the very important factor, which must not be lost sight of, that the whole exercise (including the order itself) is a highly intrusive one, and any digital image of the kind in issue in these cases is likely to contain irrelevant material which is private and confidential (if not privileged) and which should not, if it can be avoided, be seen by the claimant at all.” 36. In *TBD (Owen Holland) Ltd v Simons* [2020] EWCA Civ 1182; [2021] 1 WLR 992 at

[192] Arnold LJ (with whom Newey and David Richards LJ agreed) approved Mann J’s approach (subject to one small qualification relating to the selection of keywords). He added at [193]: “The basic safeguard required in imaging orders is that, save in exceptional cases, the images should be kept in the safekeeping of the forensic computer expert, and not searched or inspected by anyone, until the return date. If there is to be any departure from this, it will require a very high degree of justification, and must be specifically and explicitly approved by the court. On the return date, consideration must be given to the timing and methodology of disclosure and inspection of documents captured in the images. The presumption should be that it will be for the defendant to give disclosure of such documents in the normal way, but this presumption may be departed from where there is sufficient justification. Even if the presumption is departed from, there should be no unilateral searching of the images by or on behalf of the claimant: the methodology of the search must be either agreed between the parties or approved by the court.” 37. These authorities make it clear that disclosure of the imaged documents is not ancillary to an imaging order but is a separate exercise which has to be justified. There is a presumption that disclosure will take place “in the normal way”, i.e. following close of pleadings and the holding of a CMC, and the burden is on the party seeking early disclosure to show a justification for ordering this. MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment *Acasta v Emmiera* 38. 39. 40. 41. 42. It is neither appropriate nor possible to reach any conclusion at this interim stage as to whether fraud has been established. The POC pleads limited allegations of fraud, mostly on the part of Mr Whelan who both parties accept has committed fraud, and it refers to further suspected frauds which Mr Benzie is not yet able to plead. No defence has yet been pleaded to the existing POC, let alone any amended POC. I bear in mind Mann J’s dictum at [30(i)] that “the order will have been obtained in the first place on the basis of a strong prima facie case of not only the dishonesty of the defendant but also the propensity of the defendant to cover his or her tracks by destroying evidence.” I presume that Marcus Smith J must have been satisfied that there was a strong prima facie case of dishonesty and cover-up, but it does not follow

that I must reach the same conclusion on the evidence now before me. In the first place, I have not seen any transcript of his judgment. Secondly he did not have the benefit of seeing Mr Lane's witness statement or hearing Mr Mundy KC's submissions. A comparison of paragraphs 26 and 32 above shows that the facts set out in the first part of the judgment can be interpreted in two very different ways. I should make it clear that I am not making any finding that C is in breach of its obligation to make full and frank disclosure on its "without notice" application (and no such allegation has been made by D); I am merely explaining why I am unable to attribute as much weight to Marcus Smith J's judgment as Mr Benzie urges me to do. The issue before me is whether C has shown a sufficient reason to order early disclosure and, if so, what form of order should be made. As in A v B, the factors relied on to justify early disclosure are said to be strong prima facie evidence of dishonesty and cover-up by D. However, without prejudging what may emerge at trial, I prefer Mr Mundy KC's submissions that at this early stage C has not demonstrated strong prima facie evidence of either factor. One of the key features in C's case is the evidence of Mr Whelan, which Mr Benzie relies on as providing "strong" support. I should make it clear that I make no findings against Mr Whelan, who is not a party to these proceedings and has not made a witness statement. However, both C and D accept that he committed frauds and I therefore proceed, for the purposes of this application, on the assumption that he is a known fraudster. In these circumstances I conclude that I should not give any serious weight to his uncorroborated and wide-ranging allegations. Given that Mr Whelan has not shown a prima facie case of fraud by D, I am not satisfied that any adverse inference should be drawn from Mr Lane's failure to engage with each of his specific allegations. As regards the allegation of cover-up, I am not satisfied that the evidence shows a deliberate refusal to engage with C's requests. I agree with Mr Mundy KC that C is inviting the court to take a topsy-turvy approach. It is not sufficient simply to make limited allegations of fraud whilst hinting at wider allegations, and then seek to require D to provide disclosure so that C can make good the wider case that it is currently unable to plead. That is pure fishing. For this reason I refuse to make the wide order for disclosure of the two categories of documents set out in paragraph above. In the circumstances I do not need to consider the further issue of the terms of any such disclosure but I merely record that I would have had serious concerns: MR DAVID HALPERN KC SITTING AS A HIGH COURT JUDGE Approved Judgment Acasta v Emmiera i) As to whether sufficient grounds have been shown to justify departure from the usual principle that disclosure be handled by the disclosing party (via its solicitor); and ii) That the order sought was much too wide-ranging and unfocused.

Disposition

43. I therefore dismiss the application for disclosure of the two categories of documents set out in paragraph above. I will hear the parties as to the form of the order.

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