

JERSEY / JUDGMENT

Smith -v- SWM Limited [2017]

JRC 167 (11 October 2017)

[2017] JRC 167

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judgment

the master:

Introduction

1. This judgment represents my decision in respect of an application for summary judgment by the plaintiff. As a result of the way the matters developed in argument, it also contains my decision in relation to the admissibility of two reports produced by Grant Thornton UK LLP (the "Grant Thornton Report") and by Duff and Phelps Ltd (the "Duff and Phelps report"). 2. The Grant Thornton Report came into existence as a result of the Jersey Financial Services Commission ("the Commission") exercising its powers to require the defendant to produce a report pursuant to Article 32 of Financial Services (Jersey) Law 1998 ("the Law"). The Duff and Phelps report was produced for the Commission, again following the Commission exercising its powers under the Law. I refer to the relevant parts of these reports later in this judgment.

Background

3. In general terms the plaintiff's claim against the defendant is that the defendant failed to take reasonable care and skill in advising the plaintiff to enter into a particular investment product known as the PATF2 ("the Fund") thus causing the plaintiff loss. I set out later in this judgment the detailed allegations the plaintiff now relies upon in support of her claim and in support of her application for summary judgment. The plaintiff's case is hotly disputed. 4. There is also an ongoing dispute between the defendant and the Commission which has led to two judgments of the Royal Court (see *SWM Limited v JFSC and AG*

[2016] JRC 14 and *SWM Limited v JFSC*

- [2016] JRC 94). 5. As noted above, the Commission required the defendant to obtain a report from a reporting professional. The Grant Thornton Report was disclosed to the plaintiff following argument before me pursuant to an act of court dated 8 th February, 2017. In my detailed written reasons for this decision dated 17 th February, 2017, reported at Smith-v-SWM Limited
- [2017] JRC 026 I made the following observations at paragraphs 37 and 38:- "37. I accept that my conclusions mean that a regulated entity might receive a complaint from an individual about services provided, which complaint is also made to the Commission, that such a complaint could lead to the Commission exercising regulatory powers, including the production of a report, which report the regulated entity then has to disclose if it is later pursued by the complainant. Ultimately this is a risk a regulated entity will always have to face, absent unreasonable conduct on the part of the Commission, where complaints are made and where the Commission decides to investigate those complaints. It does not mean however that the purpose of any report the Commission requires is to enable the defendant to obtain legal advice or to conduct or aid in the conduct of an anticipated claim. Rather the report is a fact finding exercise and an assessment of whether or not regulatory standards have been met. It is not its primary purpose to obtain legal advice. 38. This conclusion applies even if a regulated entity can establish that proceedings by a former client or clients are reasonably in contemplation. In this case I have assumed in the defendant's favour that this was the case even if strictly speaking evidence was not before me to reach a conclusion on this part of the test. Such an assumption however does not lead to the conclusion that the dominant purpose of an exercise by the Commission of its regulatory powers is the obtaining of legal advice or the conduct of litigation. This is a separate question." 6. At the same time as ordering discovery of the Grant Thornton report (which decision was not appealed), I also gave directions in relation to expert evidence. The orders made permitted each party to retain one expert in the field of investment advice, required exchange of experts' reports by 14 th July, 2017, and provided for experts meetings to follow (see paragraphs 6 to 12 of the Act of Court dated 8 th February, 2017). 7. The same Act of Court also directed the parties to fix trial dates which have since been fixed for 13 th to 15 th November, 2017. 8. On 21 st June, 2017, I made further orders by consent concerning redactions by the defendant of parts of the Grant Thornton and Duff and Phelps reports. I also varied the directions for expert evidence and permitted, in relation to issues of liability, evidence on the suitability of investment advice received by the plaintiff and, in relation to quantum, evidence relating to the loss of opportunity claimed by the plaintiff. 9. Following the approval of Amendment No 20 to the Royal Court Rules 2004 which introduced a new test for summary judgment applications under part 7 of the Rules, on 4 th August, 2017, the plaintiff issued her application for summary judgment. The plaintiff's application was supported by her third affidavit sworn on 2 nd August, 2017. She and her husband had already filed affidavits in May 2017 to stand as their evidence in chief. 10. The defendant in May 2017 had also filed written statements from those witnesses whose evidence it wished to rely on trial. For the purposes of this

judgment, the relevant witness statement is that of Mr Le Fondre, a director of the defendant. In response to the plaintiff's summary judgment, Mr Le Fondre also sworn an affidavit dated th August, 2017. 11. In addition during the hearing, the defendant also disclosed a report of Mr Trevor Gray dated 25 th August, 2017, which it intended to rely on at trial as expert evidence. Disclosure occurred because reference had been made to the defendant's expert evidence during argument. The report had not been produced earlier because exchange of experts' reports, permitted by the orders referred to above, had been deferred, by my subsequent order, until 1 st September, 2017. 12. During the hearing, Advocate Sharp for the plaintiff made it clear that the plaintiff has elected not to obtain any expert evidence of her own on liability as permitted by me. Instead the plaintiff seeks to rely on the Grant Thornton report and Duff and Phelps report. 13. It was this stance by the plaintiff which led Advocate Blakeley for the defendant to take objection to both reports and to argue that they were inadmissible because they contained opinion evidence. To be fair to Advocate Blakeley, while his initial submission was to contend that the reports were inadmissible in their entirety, he later refined his position during the hearing and accepted that the reports were admissible in so far as they contained evidence of fact. 14. As this issue emerged during argument, at the conclusion the oral hearing I reserved my decision but directed both parties to file supplemental skeletons dealing with whether or not the Grant Thornton and Duff and Phelps reports were admissible both in respect of the summary judgment application before me or, if that application was not successful, at trial. I propose to deal with this issue first and then the application for summary judgment. The admissibility of the Grant Thornton and the Duff and Phelps reports 15. I start by setting out to what extent the Grant Thornton report and Duff and Phelps report (together the "reports") have been referred to in pleadings or in evidence. 16. The Grant Thornton report is firstly referred to in the Order of Justice at paragraph 6(i) which pleads;- "SWM are in possession of a Grant Thornton Report that comments on the investment advice provided to the plaintiff and other investors who were sold the PATF2 product by SWM. Grant Thornton are critical of SWM's conduct. SWM have refused to disclose the report to the plaintiff." 17. Paragraph 2 of the plaintiff's response to a request for Further and Better Particulars of the Order of Justice dated th January, 2017, states as follows:- "SWM have obtained an expert report from Grant Thornton who, inter alia, reviewed the plaintiff's investment in PATF2. GT concluded that the plaintiff received inappropriate advice from SWM and she should not have been sold the PATF2 product." 18. The defendant's Answer at paragraph 21 simply admits paragraph 6(i) of the Order of Justice. This admission was noted in the plaintiff's Reply at paragraph 3. 19. In the plaintiff's second affidavit, disclosed as her witness statement in May 2017, by which time the plaintiff had received a copy of the reports albeit in redacted form, the plaintiff stated at paragraph 27 "the GT report has now been disclosed to us all albeit in heavily redacted form. It confirms that the advice I received was unsuitable." 20. Mr Smith in his affidavit, also disclosed in May 2017 as his witness statement, made similar observations at paragraph 41. He also referred at paragraph 42 to the defendant's response to the Grant Thornton Report dated 2 nd July, 2015, which had also been disclosed. 21. Mr Le Fondre in

his statement at paragraphs 33 to 37 explored that the plaintiff appeared to have misunderstood the scope of the review that had been carried out by Grant Thornton. 22. The third affidavit of the plaintiff filed in support of the application in part relied upon the reports at paragraphs 11, 13-15, 41, 43, 52, and 61(i). 23. Mr Le Fondre at paragraph (b)(v) of his affidavit, filed in opposition to the summary judgment application, on page 2 stated "I am also criticised for not responding to Grant Thornton's conclusions about the plaintiff not being an experienced investor. For what it is worth, Grant Thornton's conclusions are in my opinion, and the opinion of SWM's expert witness, wrong. I simply do not see the relevance of Grant Thornton's report to this summary judgment application. Grant Thornton prepared a report because SWM was ordered by the JFSC to instruct them to do so and only for that reason. SWM is not relying on Grant Thornton's Report. While I set out here my opinions on the "experienced investor" point I am encroaching into expert witness territory and my evidence is not supposed to be expert evidence. I fully accept it will be necessary to challenge Grant Thornton's conclusions. They will be challenged. They will be challenged vehemently. But the conclusions will be challenged by reference to SWM's expert evidence. This is the whole point; just because Grant Thornton says something does not make it "fact". At most, it is a considered opinion but it is no more. If the plaintiff asserts that because Grant Thornton says something "it must be correct" why cannot SWM say the same of its expert reports? It is notable that in a Royal Court judgment by the Deputy Bailiff when SWM challenged JFSC he made this very point. I can't stray into setting out why the "experienced investor" provision is immaterial to the plaintiff's claim because that is not my remit. The crystal clear point is that is all evidence that needs to be tested and tested at trial and not simply glossed over in order to grant summary judgment to the plaintiff." 24. In relation to the Duff and Phelps report, Mr Le Fondre relied on the observations about Grant Thornton as also applying to Duff and Phelps. At paragraph d(i) on page 4 of his affidavit Mr Le Fondre also stated:- "Duff and Phelps can write what they choose but my evidence at trial is about what I said and did in respect of the plaintiff. In any event, without prejudice to particular factual points relating to case study 8, the general points I have made at sub-paragraph 3(b) above relating to "the experienced investor" description apply equally;". 25. It is also right to refer to paragraph (b)(iv) of Mr Le Fondre's affidavit where he exhibited an expert report from a Mr Grahame Goodyer commissioned by the defendant for the purposes of its dispute with the Commission. Mr Le Fondre deposed that the defendant "has not made the final decision as to whether to use Mr Goodyer's report in the present proceedings". By the time of oral argument before me, Advocate Blakeley made it clear that he was not going to call Mr Goodyer; rather his client was going to rely on the report of Mr Gray referred to above. 26. The reference to remarks of the Deputy Bailiff by Mr Le Fondre appears to relate to the decision of the Royal Court reported as SWM Ltd v JFSC

[2016] JRC 094 . These proceedings concerned directions issued by the Commission requiring the defendant to notify its clients including the plaintiff' of the Grant Thornton report. Paragraph 5 of the Royal Court's judgment states as follows:- "SWM seeks a stay of

direction 1.3.2. The main basis for its application is that the direction from the Commission to SWM requiring it to write to its clients is, so SWM argues, premature. Inevitably the letter draws upon the findings of Grant Thornton which are extensively disputed by SWM as indeed is reflected in its "management response". If a letter is sent to clients in the terms required by the Commission at this point then, so SWM argues, inevitably clients will believe that SWM has mis-sold investment advice which is a matter that is substantially disputed by SWM. SWM will lose the confidence of its clients, perhaps unnecessarily, and inevitably claims against SWM would be encouraged when they may not in fact be merited. SWM's argument, in essence, is that any letters sent to clients should be balanced and therefore should await a further independent report which SWM wishes to procure but which, in effect, the Commission is preventing by refusing SWM access to its funds to pay for such a report and by requiring that the letter is sent to clients at this point". 27. In granting a stay of the direction issued by the Commission, the Deputy Bailiff stated as follows at paragraphs 17 and 18:- "17. We understand the sensitivity of the Commission in the light of the Grant Thornton report which suggests that at least eight and very possibly significantly more clients of SWM have been sold by SWM investments which were unsuitable for them. However in our view it does not sit comfortably that SWM has effectively been blocked from seeking its own advice and counsel by the position taken by the Commission but, nonetheless, is required by the Commission to draw a damning report to the attention of its clients without the ability to challenge it. 18. We cannot see that there is any benefit in sending the letter required by the Commission at this stage. As we have already noted all of the investors will be aware of the loss that they have suffered - what they may not be aware of is that there is a report that suggests that in some manner SWM may be responsible to some extent for those losses. To send the letter now would, in our view, inevitably encourage claims against SWM where a fuller evidentiary picture may not." 28. I now turn to the arguments advanced by Advocate Blakeley and Advocate Sharp in relation to the admissibility of the reports. 29. Starting with Advocate Blakeley, firstly he contended that the reports were generally inadmissible. However ultimately he did not object to purely factual evidence contained in the reports being considered although he urged extreme caution in deciding which evidence was factual and which was opinion evidence because the distinction was often a difficult one to draw in practice. 30. Secondly, any expert reports were not matters to which I could have reference on a summary judgment application. This was because a summary judgment application should not be decided on the basis of which expert opinions were to be preferred. The only relevance of the reports at best was for me to be satisfied on a summary judgment application that there were issues in dispute between experts which could only be resolved at a trial. 31. Thirdly, opinion evidence is generally inadmissible unless the witness expressing the opinion has better knowledge than the trial court. This is why rules of court were developed to allow for expert evidence. 32. In this case directions had been given for expert evidence. The plaintiff had not chosen to adduce such evidence but instead sought to rely on the reports. However the reports were not covered by the directions given. Neither Grant Thornton nor Duff and Phelps have been retained

by the plaintiff to give expert evidence in accordance with the directions given by the court. 33. It therefore followed that only expert opinion adduced by the parties should be permitted at trial and no other evidence should be allowed. 34. Helpfully Advocate Blakeley referred to the authority of *Rogers v Hoyle*

[2013] EWHC 1409 (QB) where the High Court ruled that a report produced by the Air Accidents Investigation Branch was admissible following a plane crash. This report contained factual data, expert opinion, and accounts from eye witnesses. The High Court ruled that the entire report was admissible because it was relevant, and it contained evidence from an expert. In respect of factual evidence although the evidence was hearsay, hearsay evidence was now admissible. 35. Advocate Blakeley sought to distinguish this decision because:- (i) The reports were compiled years after the event; (ii) The parties had leave to call their own expert evidence; (iii) It was unfair and prejudicial to rely on opinion evidence when the experts would not be called at trial and could not be challenged on their findings; (iv) What investors might have told the authors of the reports some years after they had invested and suffered losses was very different from accounts of an air crash taken at the time or soon after the incident. 36. Advocate Sharp in response contended: (i) any challenge to the reports had been left far too late as it was only during his submissions in reply that real objection was taken to the reports. (ii) steps could still be taken for the authors of the reports to attend trial either because they chose to appear voluntarily or because they were compelled to do so or in the case of the Grant Thornton Report because the defendant as the instructing client asked the author to do so. (iii) where there was unchallenged expert evidence on a particular issue, the court could accept that evidence for the purposes of determining a summary judgment application and did not have to permit a trial to take place. (iv) The expert evidence was now admissible pursuant to Article 2 of the Civil Evidence (Jersey) Law 2003 . 37. Advocate Sharp in the alternative contended that the summary judgment application could be resolved without the need to consider the arguments about admissibility of the reports at all. 38. In relation to the admissibility of the reports, my conclusions are as follows. Firstly, the reports are not expert reports falling within the scope of the directions given in February and June this year. Neither Grant Thornton or Duff and Phelps are experts retained or called by the plaintiff. What was contemplated by the directions was the plaintiff electing to call its own expert evidence. However she has chosen not to do so and instead seeks to rely on the reports. 39. This approach by the plaintiff does give rise to the question whether these reports are admissible. The question arises as part of determining the plaintiff's summary judgment application because the plaintiff's primary argument very much relied on the reports. This means, given the manner in which the arguments developed, I have to consider whether there is an issue between Grant Thornton and Duff and Phelps on the one hand and any expert retained by the defendant on the other. 40. I also consider it is within my jurisdiction to determine whether or not the reports are admissible because if they are, but the summary judgment application is not successful, then the case management powers vested in me, in particular since the introduction of the overriding

objective, require me to consider how evidence contained in the reports might be tested and whether further directions are needed. This issue only arises however if the summary judgment application is unsuccessful. 41. In *Rogers v Hoyle*, Mr Justice Leggatt firstly approached matters as a matter of principle and therefore at paragraphs 64 to 66 stated as follows:- "64 First of all, as I have described, the report contains statements of fact as well as statements of opinion. On any view, the factual evidence in the report is admissible since, as discussed earlier, the evidence is relevant and fact that it is hearsay is not a ground for its exclusion, nor is there any other rule of law which prohibits its reception. Second, the opinion evidence in the report is also in principle admissible in so far as the opinions stated are those of qualified experts on subjects involving special expertise. Many of the opinions stated in the report on subjects such as aeronautical engineering, the piloting of aircraft, meteorology, pathology and the interpretation of flight track logs and other data clearly fall into this category. The main thrust of the defendant's objection to the report is directed to the AAIB's findings - consisting of the summary and analysis of information obtained in the investigation and the AAIB's conclusions about the causes of the accident. Mr Marland is right to say that as all these findings involve inferences drawn from facts they fall into the category of opinion evidence. The opinions expressed, however, are not those of a lay person. The AAIB is a body which is specifically established by statute and charged with responsibility for the investigation of air accidents and in consequence has very considerable experience and expertise in determining the circumstances and causes of such accidents. The findings in an AAIB report are therefore informed (whether explicitly or not) by knowledge gained from past investigations as well as the general aeronautical knowledge of the inspectors and the inspectors' own observations in carrying out the particular investigation. That knowledge and experience gives the findings in the report a special value as opinions of experts who are, moreover, entirely independent of the parties to the litigation." 42. In relation to these extracts, I consider that the same observations can be made in respect of the reports. Firstly, they contain factual evidence, albeit as Advocate Blakeley observed, care needs to be taken in relation to such factual evidence because it is taken long after the event and where those providing factual evidence have suffered financial loss. 43. Secondly, both Grant Thornton and Duff and Phelps are qualified to give expert evidence and have relevant expertise. Otherwise Grant Thornton would not qualify as a reporting professional under the Law and Duff and Phelps could not be retained by the Commission to provide a report. Like the Air Accident Investigation Bureau, the Commission is a body specifically established by statute and charged with responsibility for regulating Jersey's financial services industry. The professionals it retains or requires a financial services business to retain must possess considerable experience and expertise in financial services. The knowledge and experience of Grant Thornton and Duff and Phelps does therefore have special value as the opinions of experts. 44. The conclusions of Leggatt J. were set out at paragraphs 114 to 118: "114 It is not necessary to hope for legislative intervention, however, where the findings are those of an expert investigator and not a judge. None of the authorities relied on by Mr Marland concerned such findings and, for the reasons given, I consider that the

rule in *Hollington v Hewthorn* does not apply to them. AAIB inspectors do not act as judges whose role is limited to evaluating evidence put before them. As well as the evidence of others, the inspectors are able to take into account their own first hand observations, their own technical knowledge, and their own experience (as well as the collective experience of the AAIB) gained from other accident investigations. Those characteristics give the opinions of the AAIB a value for a court seeking to determine the cause of an air accident which could not and should not in principle be accorded to the opinions of another judge. This is not to say that all the findings in the AAIB Report are of equal significance. To the extent that they reflect or may be taken from their nature to reflect matters of expertise, the court will accord them weight. To the extent that they consist of inferences drawn from factual evidence which involve no special expertise and which the court is equally well qualified to draw, the court will not accord weight to the findings over and above the evidence on which they are based. In this regard the AAIB Report is similar, as it seems to me, to many experts' reports commissioned by parties to litigation. It is common to find in such reports (particularly from experts in certain disciplines) some statements of opinion based on an evaluation of factual evidence of a kind which does not deploy any expert knowledge and which the court is as well placed to make as the author of the report. Such evidence is not helpful and is not evidence to which the court will have regard. It seems to me preferable, however, to treat this as a question of weight rather than admissibility, particularly since there is no clear point at which an expert's specialised knowledge and experience ceases to inform and give some added value to the expert's opinions. It is a matter of degree. The more the opinions of the expert are based on special knowledge, the greater (other things being equal) the weight to be accorded to those opinions. Even if some opinions expressed in an expert's report are regarded as inadmissible rather than as simply not entitled to any weight, there is nothing to be gained by seeking to exclude or excise them. Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in *Secretary of State for Business Enterprise and Regulatory Reform v Aaron*

- [2008] EWCA Civ 1146 at para 39: "It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible." I therefore conclude that the whole of the AAIB Report is admissible as evidence in these proceedings, with it being a matter for the trial judge to make such use of the report as he or she thinks fit. Even if I had concluded that the AAIB Report contains some inadmissible material, I would not have thought it sensible to engage in an exercise of editing out parts of the report. Even on that view, the whole report should be before the court, with the judge at trial taking into

account what is admissible and ignoring the remainder." 45. In my judgment these observations apply equally to the reports. The observations at paragraph 115 to 117 in particular reflect the concerns expressed by Advocate Blakeley. However these remarks are not reasons to regard the reports as inadmissible. Rather they emphasise the importance of the Court deciding what weight to attach to evidence before it with the Court ultimately being required to make its own decision on all the evidence before it. Just because an expert makes a statement does not mean the Court must accept that statement; however the converse is also true; just because the Court does not or may not agree with an expert's statement does not make that statement inadmissible. 46. Although not referred to me by either counsel (as it should have been) in preparing this decision I became aware that *Rogers v Hoyle* was upheld on appeal [2015] Q. B.25. The headnote states as follows: "(1) the rule that the findings of courts, tribunals and inquiries were inadmissible in subsequent proceedings, the foundation of which was the preservation of the fairness of a trial in which the decision was entrusted to the trial judge alone, did not apply to the AAIB report since it contained not findings but statements of fact and expressions of the opinions of its authors who, it was to be inferred, were experts in their respective fields; that in so far as the report consisted of statements or reported statements of fact it was prima facie admissible, it being *266 immaterial that it constituted hearsay whether primary or secondary, and those statements were evidence which the trial judge could take into account as he would any other factual evidence, giving to it such weight as he thought fit; that the court was entitled to have regard to the expressions of opinion since it was open to someone with the appropriate special expertise to express an opinion based on the facts as he understood or assumed them to be, if and in so far as his conclusion was informed by or a reflection of that expertise; that the AAIB was a body with the requisite expertise, charged as it was with responsibility for investigating air accidents and having considerable qualified expertise and experience in doing so; that, although in so far as an expert's report merely opined on facts which required no expertise of his to evaluate it was inadmissible and should be given no weight, there was nothing to be gained, except in very clear cases, from excluding or excising such opinions; and that, accordingly, the report was admissible as a whole for its record of factual evidence and its expert opinion, it being a matter for the trial judge to make use of the report as he saw fit, leaving out of account any part which was inadmissible, and the judge had been right so to hold

- (2) That CPR Pt 35 was not a comprehensive and exclusive code regulating the admission of expert evidence but rather regulated the use of evidence from experts who had been instructed to give or to prepare expert evidence for the purpose of the proceedings; that since the AAIB had not been instructed by, and was wholly independent of, any of the parties the expert evidence in its report did not fall within CPR Pt 35 ; and that, accordingly, that evidence was prima facie admissible and the claimant did not require the permission of the court to adduce it (post, Court of Appeal judgments, paras 62, 63, 67, 100, 101).

- (3) That the report, as well as being admissible evidence, was of potential value because the AAIB was independent, its reports were the product of an impartial investigation and it had much greater ability than anyone else to obtain and analyse data relating to an aircraft accident which was likely not otherwise to be available or only with considerable difficulty and at considerable cost; that the circumstances in which it was appropriate to the exercise of discretion under CPR r 32.1(2) to exclude admissible evidence which was likely to be helpful were limited; that that discretion was to be exercised in accordance with the overriding objective of dealing with cases justly and at proportionate cost; that, while every case depended on its own facts, that objective did not call for or justify the exclusion of the AAIB evidence, which Parliament had provided should be made public and the admissibility in evidence of which it had not legislated to restrict, but rather would tend to favour its inclusion; and that, accordingly, the judge had been right to decline to exclude the report in the exercise of his discretion under rule 32.1(2)." 47. While therefore I am of the view that the reports are admissible, they are not admissible as expert opinion called by the plaintiff under Rule 6/20(2)(d). Rather, I consider they fall within Rule 6/20(3) which provides that:- "The Court shall have full discretionary power, at any time before the delivery of judgment, to receive such further evidence as in the opinion of the Court the justice of the case may require, and may of its own motion direct that additional witnesses be heard." 48. This rule is not one of those rules which is limited to the Royal Court only and accordingly the power to admit evidence is a discretionary power also vested in the Judicial Greffier/Master. This conclusion is not inconsistent with the approach taken by the English Court of Appeal in *Rogers v Hoyle* summarised at paragraph 2 of the headnote cited above. 49. In this case, the reports have either been required or obtained by the Commission under the statutory powers in the Law. Both organisations are appropriately qualified professionals to express views on the practices of the defendant. Furthermore they were also disclosable which decision was not challenged. It would be an odd position if the reports were disclosable and yet irrelevant as Advocate Blakeley argued. 50. Such reports are also documents which the Commission would ultimately be entitled to rely on to decide whether to impose any regulatory sanction against the defendant or officers of the defendant. In such a scenario, should it occur and should any decision be appealed, the Royal Court would be entitled to consider any material on which such a decision was based including the reports. Yet the effect of Advocate Blakeley's argument is that such reports could not be considered at all in relation to whether or not investors who suffered loss could claim compensation even though they could be considered in relation to a challenge to any regulatory sanction imposed. I am not persuaded that I should give effect to such a distinction. 51. I also note that nothing in the Law excludes use of the report in subsequent civil litigation. 52. Furthermore, the defendant has left it very late in the day to object to the reports. In my earlier judgment in this matter reported at [2017] JRC 026 at paragraph 41 I recorded that Advocate Blakeley did not pursue his argument that the Grant Thornton report was inadmissible. In addition, nowhere in its answer or in the evidence to which I have referred, in particular the third affidavit of the defendant, is it suggested that the reports are inadmissible. Rather the approach of Mr Le Fondre is to dispute the reports. That has also

been the approach of the defendant in relation to its dispute with the Commission. Given that stance I also consider it too late in the day to object to the reports. 53. I also consider that, insofar as the reports were recording factual matters then those parts are admissible in any event. In this case it would be an impossible exercise to strip out factual matters from opinion evidence. 54. Rather, if there is an issue to be tried between the parties, then the question of how the Court should approach the reports is one of what weight should be accorded to evidence in accordance with the approach set out by *Rogers v Hoyle*. This in turn depends on how far the reports are tested. In relation to the summary judgment application, I consider I am entitled to look at the expert evidence adduced by the defendant and the Grant Thornton and Duff and Phelps reports as part of determining whether or not summary judgment should be granted. If there are disputes between experts then, as indicated during oral argument, it is only a trial that can resolve disputes between experts. The Summary Judgment Application 55. There was no dispute about the applicable legal principles on a summary judgment application as set out by me in *Holmes v Lingard*

[2017] JRC 113. Rather Advocate Sharp argued that the defendant was under a duty to explain all material risks to a potential investor citing *O'Hare v Coutts* [2106] EWHC 2224(QB). The existence of such a duty was not disputed. Advocate Sharp's focus was therefore that the defendant had failed to advise on four main issues as follows:- (i) The first issue is what I will refer to in this judgment as the 'experienced investor' issue. The criticism is that the defendant failed to advise that the fund was for experienced investors only; that the plaintiff was never assessed as an experienced investor as admitted in a response to the Grant Thornton report, that the plaintiff was not an experienced investor; and that the defendant's reasons for recommendation referred to as a 'reasons why' letter dated 23rd August, 2007, was silent on the issue that the fund was an experienced investor only scheme; (ii) The second issue was described as the liquidity issue and concerned the management of the fund having the power to reduce the value of the fund by 50% or more and that the defendant failed to advise the plaintiff about this risk, either orally or in the reasons why letter; (iii) The third issue was described in argument as the gearing issue and concerned the fact that the fund could borrow up to 50% of the value of the fund; and (iv) The fourth issue concerned the fact that the investment fund was unregulated. 56. In respect of each of these issues Advocate Sharp criticised the defendant because its evidence, in particular that of Mr Le Fondre, did not address these issues. Accordingly, it was not necessary for a trial to take place. In addition, Advocate Sharp contended that any expert evidence that the defendant was seeking to rely on was no substitute for factual evidence. The key issue was whether there were risk factors, whether these were appreciated as being risk factors by Mr Le Fondre and, if they were, what was said in relation to them. 57. The plaintiff in the affidavits filed as witness statements and her affidavit filed in support of the application for summary judgment it was contended had set out clearly what she was not told. Where there was total silence from Mr Le Fondre in his witness statement the court was entitled to draw inferences and accept the evidence filed on behalf of the plaintiff. 58. To the extent that the affidavit of Mr Le Fondre filed in

opposition to application for summary judgment said anything, according to Advocate Sharp, these were their assertions contradicted by contemporaneous documents and therefore there was no substance to the affidavit. While Advocate Sharp accepted that I should not conduct a mini trial, he argued that there was nothing that required a trial. 59. To evaluate his submissions and the submissions of Advocate Blakeley in response it is necessary to examine in detail each of the four issues which it is said that the defendant through the evidence of Mr Le Fondre has failed to address. 60. In referring to each of these issues, initially there was some disagreement as to whether these issues were raised by the pleadings in this matter. Ultimately this argument was not pursued because the experienced investors issue was raised by paragraph 6(g) of the order of justice. In relation to the other factors paragraph 6(h) of the order of justice states "At no stage, did SWM advise Mrs Smith as to the relevant risk factors relating to PATF2". The plaintiff's answer denied paragraph 6(h) and averred "SWM explained the relevant risk factors relating to PATF2 to (at least) Mr Smith on 1st August, 2007 in accordance with the agency authorisation. These explanations inter alia were later recorded in the reasons why letter." There is therefore clearly a dispute on the face of the pleadings. 61. For the sake of completeness I also set out the plaintiff's response at paragraph 1 of its further and better particulars of the order of justice "PATF2 was an unregulated, significantly geared, high-risk fund that invested in traded endowment policies and was only suitable for experienced investors and not retail customers such as herself. The particulars of the scheme for PATF2 featured a statutory warning imposed by the Isle of Man Government that, inter alia, required potential investors to be warned and properly advised that it was suitable for experienced investors only. SWM failed to advise Mrs Smith about any of these material points and instead advised that it was a suitable low risk product." 62. In my judgment Advocate Blakeley was right to concede that the issues raised by Advocate Sharp for the plaintiff fell within the pleadings notwithstanding suggestions to the contrary in his skeleton argument and in the affidavit of Mr Le Fondre. 63. I therefore now turn to deal with each of the criticisms set out by Advocate Sharp by reference to the four issues he identified. The experienced investor issue 64. The scheme particulars of the fund on page 5 under the heading 'key information' stated:- "The Protected Asset TEP Fund Plc ("PATF") is an experienced investor fund and complies with the requirements of the Isle of Man Financial Supervision (Experienced Investor Fund) (Exemption) Order 1999 as amended ("the Order"). Shares are only available to persons whom Abacus Financial Services Limited consider to be sufficiently experienced to understand the risks associated with an investment in PATF. The value of shares and the income produced by them can fall as well as rise. Investors may not get back the value of their original investment. PATF is not subject to any form of regulation or approval in the Isle of Man and investors are not protected by any statutory compensation arrangements in the event of PATF's failure. The Isle of Man Financial Supervision Commission does not vouch for the financial soundness of PATF nor for the correctness of any statements made or opinions expressed with regard to it." 65. The prospectus also contained on the same page a definition of experienced investors as follows:- "...persons who, in relation to any experienced investor fund, are

sufficiently experienced to understand the risks associated with an investment in that fund")..." 66. This definition reflects the definition of an experienced investor contained in the Financial Supervision (Experienced Investor Fund) (Exemption) Order 1999 issued by the Treasury of the Isle of Man pursuant to the Financial Supervision Act 1988 . 67. On 2 nd August, 2007, the plaintiff signed her application form to invest in the fund. The form stated on page 2 "I/we confirm that that I am/ we are experienced investors as defined on page 1 of the scheme particulars of PATF2 and further confirm that I/we have read, fully understood and accepted the risks associated with an investment in PATF2." The form also contained an express acknowledgement of receipt of the scheme particulars and that these had been carefully considered. 68. In her second affidavit, the plaintiff stated:- "13. My husband told me prior to signing the form that he had seen Mr Le Fondre who had advised him that this was a low risk product that was suitable for our financial circumstances. I understood that this was low risk and the assets would be protected as the name suggested. 14 I did not see the details of the scheme which I understand runs to some 37 pages. All I saw was the application form that was on its own when I saw it and signed it. My personal details had already been completed for me.

15. It has been pointed out to me that the document I signed featured a number of declarations including one that says I am an experienced investor. I understood from my husband that this was a low risk investment and therefore did not give further thought to these particular declarations. I assumed my position as someone with a home, a buy-to let property and the Skandia investment bond meant that I was experienced enough in the context of a low risk investment and I did not question it at the time. I understood the fund was protected hence the name Protected Asset. It was not explained to me that the 'experience' required by the PATF2 particulars of the scheme related to the knowledge, other risks and associated with an unregulated collective investment scheme that invested in traded endowment policies. If I had known that I would not have gone ahead with the investment." 69. Mr Smith who met Mr Le Fondre on behalf of the plaintiff on 1 st August, 2007, at paragraph 20 of his affidavit denied ever seeing the particulars of the scheme. 70. In her third affidavit filed in support of the application for summary judgment the plaintiff set out that she did not regard herself as an experienced investor. In support of this at paragraph 11 she relied on the Grant Thornton Report and the conclusion in it that she was not an experienced investor by any reasonable definition of that term. She also raised that the reasons why letter received did not mention the fact that the fund was for experienced investors only. 71. Mr Le Fondre in his witness statement at paragraph 23 stated:- "He could not remember all those specific details of his conversations with Mr Smith on 1st August." 72. He therefore set out what his normal practice would have been. As part of that process he described that his normal practice would have been to have provided the PATF2 scheme particulars. 73. In his affidavit at paragraph b(i) he stated that he would have brought the particulars to the plaintiff's attention as part of his normal practice. He then went on in his affidavit at paragraph b(ii) to explain that there was no assessment of the plaintiff being an experienced investor because this was purely a limitation on the fund preventing investors off the street from investing

directly. In order to be accepted to the scheme investors like the plaintiff had to invest through an independent financial adviser ("IFA") such as the defendant. Mr Le Fondre then went on to state at paragraph (b)(v) set out at paragraph 23 above that this would be supported by expert evidence. 74. It was this statement by Mr Le Fondre that led to Advocate Blakeley to make it clear that he was not calling Mr Goodyer as a witness (although Mr Goodyer's report was attached to Mr Le Fondre's affidavit). Mr Goodyer's report has also not been served as expert evidence in accordance with the directions previously given. Instead the defendant now relied on the report of Mr Gray. However the report of Mr Gray does not address directly the argument raised by Mr Le Fondre that the experienced investor warning was a limitation on the fund and that investment through an IFA was sufficient. Mr Gray does say however at paragraph 7(1) that he did not consider the fund only to be suitable for experienced investors and that it was appropriate for a low to medium risk portfolio. He also would have assessed the fund at the time the investment was made in 2007 as being medium risk although noting that others might have rated it as to low to medium risk. 75. As part of his report Mr Gray noted that the risk assessments carried out by the defendant rated the plaintiff's attitude as low to medium or medium but went on to observe at paragraph 12 of part 2) that in his view there were a number of instances where the plaintiff had shown together with her husband a "much more aggressive and high risk attitude to investment". 76. The other factual issue that arises in relation to this issue was whether the scheme particulars were sent undercover of a letter dated 7 th August, 2007, from Mr Le Fondre. The plaintiff in her second affidavit at paragraph 9 denies that the scheme particulars were enclosed with the 7 th August, 2007, letter. The letter refers to the scheme particulars being enclosed. 77. In my judgment, there is a factual dispute between the parties as to what was discussed between Mr Le Fondre and Mr Smith on 1 st August, 2007. Mr Le Fondre asserts that he would have drawn the experienced investor definition to Mr Smith's attention. Mr Smith denies that Mr Le Fondre did so. This is a matter that can only be resolved at trial. I do not therefore accept that the contemporaneous documents are conclusive. The fact that the reasons why letter does not mention the experienced investor point does not mean that I can conclude on a summary judgment application that the point was not raised by Mr Le Fondre by reference to his normal practice. The plaintiff also signed the application form saying she was an experienced investor. Why she did so and what was said to her by her husband about this declaration is also an issue that can only be resolved by hearing oral evidence at trial. The explanations are matters for the jurats and it is for them to decide whose account they accept having heard all the witnesses and having heard cross-examination. 78. I accept there may be tension between Mr Le Fondre saying that he drew the experienced investor definition to Mr Smith's attention and that he did not carry out an assessment that the plaintiff was an experienced investor but this is not conclusive. It is possible for the trial court to conclude that Mr Le Fondre pointed out the experienced investor provision and explained his view of the definition which Mr Smith accepted. Both will certainly be questioned on this issue and in all likelihood in some detail. In particular, while Mr Le Fondre may face challenges to his account, that does not make his evidence fanciful or improbable which is what is required to grant summary judgment. This issue also

gives rise to a causation argument, (which is not the subject of an application for summary judgment) namely that even if Mr Le Fondre should have carried out an assessment, it would have made no difference to the plaintiff and Mr Smith who would have invested in any event. While the plaintiff accepts that causation and loss can only be resolved at trial, in my view it is not possible to separate out issues of liability in the manner contended for by Advocate Sharp. 79. There is also a factual dispute as to whether the scheme particulars were sent under cover of the letter of 7 th August, 2007. The letter itself suggests that they were. This is also disputed by the plaintiff and her husband. Again that is a matter that only can be resolved at trial. It is not however an argument that is necessarily inconsistent with Mr Le Fondre's evidence that he discussed the scheme particulars with Mr Smith on 1 st August, 2007. While ultimately it is a matter for trial, it is neither fanciful nor improbable that the letter might have been sent as a follow-up. Again this is a matter only the Jurats can resolve. 80. The above issues are separate from the argument that the experienced investor definition as a matter of Isle of Man Law could be met by investing through an independent financial adviser. While Mr Gray does not adduce any evidence on this point directly as set out above, the plaintiff has not called her own expert evidence either. Rather she relies on the Grant Thornton Report. However, given the warnings in *Rogers v Hoyle* set out above, the Grant Thornton Report cannot be regarded as conclusive on this issue as it is a document-based review together with interviews of (former) clients of the defendant. It is not the same as an assessment following oral evidence from all parties tested by cross examination. In my view it is therefore a matter for the Jurats as to how much weight they attach to the Grant Thornton Report in the context of having heard evidence from the plaintiff, her husband and Mr Le Fondre. 81. The experienced investor issue also gives rise to a factual issue concerning the plaintiff's attitude to risk and that of her husband and how far they understood the investments they either made or contemplated. This is addressed both in the witness statement of Mr Le Fondre at paragraphs 6 to 14 and in the evidence of Mr Gray. There is therefore a factual issue whether the plaintiff and/or her husband on her behalf were sufficiently experienced to understand the risks associated with her investment in the fund. 82. For all these reasons I am not therefore satisfied that it is appropriate to give summary judgment on the experienced investor issue. The liquidity issue 83. In his argument Advocate Sharp at paragraph 12 stated that Mr Le Fondre had failed to deal with the following:- "(k) The fact that one material risk with PATF2 was the prospect of the management fund reducing the value of the fund by 50% in the event of a liquidity risk. This risk materialised in December 2008 resulting in a massive loss to Mrs Smith;

- (l) why he did not advise Mrs Smith about this devaluation risk." 84. Advocate Sharp referred to a letter dated of 4 th December, 2008, from the fund exhibited to the plaintiff's second affidavit. The plaintiff in relation to this letter at paragraph 22 of her second affidavit stated "the letter appears to explain that PATF2 had been the subject of considerable redemption requests during this particular period of time and the only method of satisfying those requests was to sell some of the fund's assets. Because of market conditions, these assets could not be sold at full value. Therefore the managers of the fund decided to reduce the

NAV (which I am told stands for net asset value) of the PATF2 fund by 40 to 50%. I understand that this the principal cause of my loss. I absolutely had no idea that such a problem might arise with what I thought was a low risk fund. I certainly had no idea that such a risk issue might reduce the value of the fund by up to 50% overnight. I was not told about any such risk." 85. At paragraph 23 the plaintiff then says that had she been told about this risk she would not have invested. 86. Mr Le Fondre in his affidavit in response to paragraph 12(k) of the plaintiff's skeleton argument stated that he did not understand paragraph 12(k) and that he felt he was trespassing on expert evidence. However at paragraph g(i) he also stated in response to paragraph 12(l) of the skeleton argument:- "These paragraphs allege that I failed to advise the plaintiff about a risk of a loss in value to the investment. I always set out to my clients the risk of an investment falling in value and I did so with the Plaintiff. I never suggested to the Plaintiff her investment was safe and could never reduce in value and in fact I specifically made it clear it could drop in value. I have no doubt whatsoever the Plaintiff was aware of the risk of a loss in value and this was not only because I said so but also because she, by herself, and through her husband knew this as a general fact to investments such as the one in issue. The Plaintiff's apparent assertion that this was a relevant factor of which she was unaware and/or if she had known about it she would not have invested is one which I don't believe." 87. Advocate Sharp characterised Mr Le Fondre's response to paragraph 12(k) of the plaintiff's skeleton that he did not understand the risk. He further characterised paragraph g(i) of the affidavit quoted above as simply being a generic warning that investments might fall in value. It was not evidence that the plaintiff explained the risk of management reducing the value of the fund by 50%. 88. Mr Gray in his report dealt with "liquidity risk" at paragraphs 16.5.1 to 16.5.14. He referred to the power to alter the fund pricing basis on a temporary basis as being referred to in the scheme particulars and as being a power that was beneficial to shareholders. 89. Advocate Sharp was critical of Mr Gray's report because it failed to recognise expressly the liquidity risk which Advocate Sharp contended was a risk that Mr Gray had recognised in reports previously provided by Mr Gray to the Royal Court in other cases. Mr Gray's evidence also could not answer the question whether or not the plaintiff was told by Mr Le Fondre about this risk. 90. Advocate Sharp also relied on the Grant Thornton report at paragraph 5.8 which identified the ability to change redemption values as one of the key risks applicable to the fund. He also relied on paragraph 3.9 of the Duff and Phelps report which described the risk warnings as generic. 91. It was Advocate Sharp's reliance on these reports that led Advocate Blakeley to object to them being referred to, the principle of which I have dealt with above. Advocate Blakeley also contended that paragraph g(i) of Mr Le Fondre's third affidavit was a specific response to the assertion at paragraph 12(l) of the plaintiff's skeleton that Mr Le Fondre did not advise the plaintiff about this risk. 92. In my judgment, this is a factual dispute that can only be resolved at trial. It is only by cross-examination that a conclusion can be reached as to whether the advice given by Mr Le Fondre was generic or whether it covered liquidity risk. No doubt Mr Le Fondre will be cross-examined extensively and forcefully on this issue. Ultimately he will have to satisfy the court at trial, assuming the court accepts this was a risk factor, that the risk factor was explained. He might also face

cross-examination concerning the reasons why letter being consistent only with a generic warning, rather than addressing the specific risk. However, I cannot conclude that the statements made in his affidavit are either false or fanciful or improbable. At best all that can be said is that he might face significant challenges, but that does not mean I can conclude at this stage that there is no defence to the claim. 93. There is also an issue in respect of Mr Gray's evidence concerning the effect of the power to revalue assets. Again Advocate Sharp's criticisms are matters for cross-examination; they are not matters where I can draw a conclusion at this stage. It is also for the jurats to decide how far they accept Mr Gray's evidence or whether they accept the reports relied on by the plaintiff. 94. I am not therefore satisfied it is appropriate to grant summary judgment in respect of the liquidity risk issue. The gearing issue 95. In relation to this issue Advocate Sharp argued that the ability of the directors to borrow was a risk that should have been explained to the plaintiff but it was not. Instead in the reasons why letter characterised the ability to borrow as a benefit because it was said that the fund "utilises innovative low level borrowing to increase investors' returns." He was critical of this description because it did not make it clear that the 50% of the value of the fund could be borrowed. 96. He accepted that Mr Gray's report did contain a justification for the ability of the fund to borrow in Mr Gray's report. In part 5 Mr Gray analysed the actual level of gearing for the fund between 2004 and 2013. This led Mr Gray to regard such gearing as "a useful prudent concept used to enhance returns and control and reduce risk" (paragraph 5.4.5). 97. Advocate Sharp was critical of this report because it did not deal with what could happen if there was significant borrowing and a risk of subsequent liquidation if indebtedness was not repaid. He also suggested that Mr Gray's report was inconsistent with reports previously filed by him with the Royal Court in other proceedings where Mr Gray described gearing as a risk. 98. He also contrasted Mr Gray's views with those of Grant Thornton and Mr Goodyer, the individual whose report Mr Le Fondre exhibited to his affidavit, but which was not relied upon. 99. In my judgment again this is an issue that could only be resolved at trial. In particular, it is a matter for trial whether or not the ability to borrow was a benefit or a risk. It is not appropriate for me to resolve this issue on a summary judgment application. The fact that Mr Le Fondre did not advise that the gearing issue was a risk is not a basis to grant judgment if the Royal Court accepts that the ability to borrow was not such a risk. The scepticism of Advocate Sharp about Mr Gray's conclusions are matters that can only be resolved following cross-examination. I am not in a position to conclude that his views are improbable. Rather his views are matters for the Jurats to evaluate to decide whether they agree with Mr Gray or not. Mr Sharp is also entitled to put the Goodyer and Grant Thornton reports to Mr Gray in cross-examination. However, what the court makes of the reports and Mr Gray's answers are again matters for trial. The unregulated fund issue 100. I can deal with this issue briefly because it overlaps with the experienced investor issue and what was said by Mr Le Fondre to Mr Smith on 1 st August, 2007, and what information was provided to the plaintiff under cover of the defendant's letter of 7 th August, 2007. 101. Mr Le Fondre in his witness statement at paragraph 24 set out his general practice and at step 6 stated that he would have provided the PATF2 scheme particulars. I have set out above at paragraph 64 the extracts

from those particulars which make it clear that the scheme was unregulated. 102. Mr Smith disputes that he ever received those particulars as does the plaintiff. 103. I therefore agree with Advocate Blakeley that this is a factual issue which can only be resolved at trial. The fact that the reasons why letter does not refer to the fund being unregulated does not permit me to resolve the conflict in evidence between Mr Le Fondre and Mr Smith. The reasons why letter is not a document that is inconsistent with or fatal to Mr Le Fondre's account (unlike documentary evidence in *Holmes v Lingard*) even if the failure to refer to the fund being unregulated in the letter will no doubt form part of Advocate Sharp's cross examination.

Conclusion

104. By reference to the grounds advanced relied upon by Advocate Sharp, I am not satisfied in respect of any of them that the summary judgment test is met. This is therefore a case that should proceed to trial. This conclusion does not mean however that Mr Le Fondre and Mr Gray will not face significant challenges at trial. To grant Advocate Sharp's application at this stage for the plaintiff however would be in effect to reach conclusions based on a mini trial and evaluating evidence without the benefit of cross-examination. That is not the applicable test. The fact that the plaintiff and Advocate Sharp consider that there are questions which the plaintiff's evidence does not adequately address is a matter for trial. The defendant has advanced a case through a combination of Mr Le Fondre's witness statement and affidavit and the report of Mr Gray which is not improbable and which might be accepted at trial. Putting it in another way it is open to the Jurats having heard all the evidence to accept the defendant's evidence. That does not mean they will do so; all it means is that a trial is required to resolve the issues in dispute. Further directions 105. When this judgment is handed down, I wish to be addressed by the parties on the following issues:- (i) Whether the pleadings should refer to the Grant Thornton and Duff and Phelps Reports; (ii) Whether the authors of the Grant Thornton and Duff and Phelps Reports should be called as witnesses at trial; (iii) Whether any party wishes to adduce any further expert evidence; (iv) If they do wish to adduce any further expert evidence whether they should be permitted to do so; (v) The impact on the trial dates if further expert evidence is permitted; and (vi) What costs orders should be made both in relation to this judgment; and if any further expert evidence is permitted. *Authorities Financial Services (Jersey) Law 1998. SWM Limited v JFSC and AG*

[2016] JRC 14 . *SWM Limited v JFSC*

[2016] JRC 94 . *Smith-v-SWM Limited*

[2017] JRC 026 . *Royal Court Rules 2004. Rogers v Hoyle*

[2013] EWHC 1409 (QB) . *Civil Evidence (Jersey) Law 2003. Holmes v Lingard*

[2017] JRC 113 . *O'Hare v Coutts*

[2106] EWHC 2224(QB). Financial Supervision (Experienced Investor Fund) (Exemption) Order 1999. Financial Supervision Act 1988. Page Last Updated: 13 Oct 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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