Neutral Citation Number: [2021] EWCA Civ 993

Case No: A3/2021/1014

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS
MR ROBIN VOS (sitting as a Deputy Judge of the High Court)
[2021] EWHC 1543(Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2021

Before :

LORD JUSTICE BAKER
LADY JUSTICE ANDREWS
and
SIR STEPHEN IRWIN

- -

Between :

(1) VICTORYGAME LIMITED **(2) SURJIT SINGH PANDHER**	**Appellants/ Defendants**
- and - **AHUJA INVESTMENTS LIMITED**	**Respondent /Claimant**

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- -

Nicholas Trompeter QC (instructed by **SBP Law**) for the **Appellants**
David Holland QC and Edward Rowntree (instructed by **Cardium Law Ltd**) for the **Respondent**

Hearing date: 22 June 2021

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Approved Judgment

Lady Justice Andrews:

1. This is an expedited appeal brought by the Defendants to the underlying proceedings, Victorygame Ltd and its director Mr Pandher, (collectively, "Victorygame") against the judgment and order of Mr Robin Vos, sitting as a deputy judge of the High Court, dated 8 June 2021.

2. The Judge upheld a claim to legal professional privilege by the Claimants, Ahuja Investments Ltd, ("Ahuja") over correspondence between their current solicitors, Cardium Law, and their former solicitors, Stradbrooks, reversing the decision of Master Pester, dated 29 April 2021, to order disclosure of those documents. The documents concerned are:

    i) A letter of claim from Cardium Law to Stradbrooks dated 10 February 2020, and

    ii) A letter of response dated 19 December 2020 from Stradbrooks' professional indemnity insurers.

3. Permission for a second appeal was granted on limited grounds on 14 June 2021 by Henderson LJ, who directed that the appeal be listed for hearing on 22 June. The reason for expedition was that the trial of the underlying claim had been listed to take place in a window commencing on 28 June.

4. After hearing and considering the arguments, attractively presented by Mr Trompeter QC on behalf of Victorygame, and Mr Holland QC (assisted by Mr Rowntree) on behalf of Ahuja, the Court informed the parties that the appeal would be dismissed, and that we would give our reasons in our reserved judgments.

5. For the purposes of this appeal it is unnecessary to set out the detail of the underlying claim. Suffice it to say that it arises out of the purchase by Ahuja from Victorygame of a commercial property in Southall, Middlesex, the ground floor units of which were rented out for retail purposes. Contracts were exchanged in March 2016, but the sale was not completed until 22 August 2018. Stradbrooks acted for Ahuja in the transaction. The solicitor who handled the file was a Mr Randeep Jandu.

6. Ahuja claims that it was induced to enter into the sale contract and a related loan agreement by fraudulent (alternatively negligent) misrepresentations about the duration of the leases of the retail units and the rental income. It is common ground that a schedule was provided to Ahuja which stated, in capitalised text, that "all tenants have signed a 15 year lease". In fact the leases were for 6 years 9 months.

7. Victorygame accept that there was a misrepresentation, which they say was due to an innocent mistake, but deny that there was any operative inducement. They contend that Ahuja knew the true term of the leases prior to the exchange of contracts, for a number of reasons, one of which is that the original leases were in the possession of Ahuja or Stradbrooks for around two months between February and April 2016 (which spanned the exchange of contracts). The leases were provided to Mr Sohal, Victorygame's selling agent, and subsequently delivered by him to Stradbrooks. It is argued that an inference can be drawn that, before they were returned to

Victorygame's then solicitors, Chhokar & Co., Mr Jandu inspected the leases and discussed them with his clients. Victorygame contend that:

> "in this context, the advice [if any] which Mr Jandu gave to Ahuja regarding the length of the terms of the leases is of critical importance to the fair resolution of the proceedings."

Ahuja is not planning to call Mr Jandu as a witness at trial.

8. In opposition to Victorygame's application for disclosure of the two letters, Ahuja's solicitor, Mr Davies of Cardium Law, served a witness statement, his sixth in the proceedings, dated 25 April 2021, claiming that they were subject to litigation privilege. In that statement, Mr Davies explained at [57] –[59] that Stradbrooks wrote the letter before action (in respect of Victorygame Ltd) to Chhokar & Co. on 29 November 2018, followed by an email expressly stating that Mr Pandher had made fraudulent and/or negligent representations and reserving Ahuja's rights in that regard. His firm was instructed in these proceedings in place of Stradbrooks in late December 2018. Numerous requests were then made by Cardium Law to Stradbrooks for their file relating to the matter, both before and after the commencement of the underlying proceedings against Victorygame in May 2019, but Stradbrooks refused to produce the file. Ahuja therefore had to issue a third party disclosure application for its production, which was successful. Stradbrooks produced their conveyancing file following the hearing of that application on 20 November 2019.

9. Cardium Law reviewed the conveyancing file upon its receipt, and sought advice from leading and junior counsel. Mr Davies explained what happened thereafter in the following terms:

> "64 … Without waiving privilege, it was decided that further information was required from Stradbrooks and Mr Jandu with a view to the conduct of this claim and to assess Mr Jandu's potential as a witness. Following this, on account of his prior lack of co-operation and his conduct, it was decided that the only way in which Stradbrooks or Mr Jandu would give any substantive comment in relation to his involvement in matters relevant to this action was to threaten to issue proceedings against him.
>
> 65. Accordingly (and again without any waiver of privilege) on 10 February 2020 a letter in the form of a Letter before Action was sent to Stradbrooks. It must be emphasised that whilst, of course, the Claimant had approved the sending of the letter, no instructions had been given to issue proceedings against Stradbrooks. The dominant purpose of sending the Letter before Action was to obtain information relevant to these proceedings, which was not apparent from the conveyancing file. The Letter before Action made a series of statements and sought a response. It also mentioned the fact that these proceedings had been issued…
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> [Mr Davies then referred to the fact that various letters were sent chasing a response from Stradbrooks, and to the dates on which they were sent.]

> 67. Without any waiver of privilege, on 19 December 2020, a Letter of Response was received from solicitors instructed by Stradbrooks' professional indemnity insurer. This contained the information sought…
>
> 68. The Claimant in this action has not issued proceedings against Stradbrooks and this firm has not been provided with instructions to issue proceedings."

The decision of the Master

10. In his *ex tempore* judgment, the Master said he did not find the privilege point particularly easy. He was not going to go behind what Mr Davies said. He described the fact that Ahuja had to issue the third party disclosure application against Stradbrooks as "absolutely extraordinary." He then referred to the decision of Birss J in *Property Alliance Group v Royal Bank of Scotland plc (No.3)* [2016] 4 WLR 3, ("*PAG")* which was relied on by Mr Trompeter.

11. The facts of that case were most unusual. A claim was brought by PAG against the defendant bank alleging that it had been mis-sold swaps contracts. A director of PAG, Mr Russell, arranged a meeting with two of the bank's former employees, ostensibly to discuss future business opportunities, and surreptitiously recorded the meetings with a view to obtaining information and evidence that might assist PAG in its claim against the bank. PAG claimed privilege over the recordings and any transcripts of them on the basis that they had been produced for the dominant purpose of conducting litigation.

12. Birss J accepted the bank's submission that what mattered in this context was the dominant purpose of the *meetings*, and not the dominant purpose of making the secret recordings of the conversations at the meetings. He considered and followed a number of authorities from this and other common law jurisdictions concerning the recording of conversations (including the decision of the Court of Appeal in *Parry v News Group Newspapers Ltd* [1990] 140 NLJ 1719, in which the leading judgment was delivered by Bingham LJ). Those cases establish that a record of a non-privileged conversation, whether in the form of a recording, a transcript or a verbatim note, cannot itself be privileged if the underlying conversation was not privileged, even if it can be said that the reason the recording was made was for use in litigation. Birss J decided that this principle applied irrespective of whether the non-privileged conversation was with a witness or between the parties to the litigation itself.

13. Having established that this was the guiding principle, Birss J went on to consider whether the conversations with the ex-employees were privileged. He rejected the bank's contention that the dominant purpose of the meetings had to be ascertained from the point of view of a dispassionate observer. He found that an objective assessment of the dominant purpose of the meetings (and thus the discussions that took place at them) meant that the court had to take into account all the evidence, including evidence of the intentions of all the participants, (in other words, the dominant purpose of a meeting could not be objectively ascertained merely by considering the intention of the party who convened it). He found that, assessed objectively, Mr Russell's intention was to gather evidence for the litigation, but the purpose of the ex-employees attending the meeting was to catch up and discuss possible future business.

14. Birss J said that it did not make a lot of sense to pretend that one could distil a dominant purpose from those two clear but entirely divergent purposes; however, the critical point was that Mr Russell actively deceived the ex-employees. The existence of the deception was what distinguished the circumstances from the example on which PAG had relied, of solicitors taking a proof of evidence. He said that in those circumstances: "Mr Russell could not complain if the court concluded that the fair and correct way of assessing what the dominant purpose of the meeting was, was to look at it from the ex-employees' point of view."

15. The Master distinguished *PAG* on the basis that he did not see this case as being a matter of deception on the part of the claimant. However, he decided that the two letters did not come into existence for the dominant purpose of being used in litigation because "the dominant purpose is not determined solely by what one party says it is." He drew the inference that, from Mr Jandu's and Mr Jandu's insurer's point of view, a professional negligence claim was being intimated against them. That appears to have been the reason for his conclusion that the documents were not privileged.

16. Ahuja appealed to the High Court, on the basis that the Master wrongly held that the dominant purpose test was to be applied from the point of view of the third party recipient of the communication when, as a matter of authority and principle, it is the intention of the party claiming privilege which is the only consideration. They argued that the Master wrongly relied on or drew an analogy with the *PAG* case, and that any principle in that case has no application to the facts of this case. If necessary, they were prepared to assert that that case was wrongly decided.

The Judge's decision

17. In his clear and well-structured judgment, the Judge directed himself in accordance with the classic statement of the requirements for litigation privilege by Lord Carswell in *Three Rivers District Council v Bank of England No 6)* [2005] 1 AC 610 ("*Three Rivers (No 6)"*) at [102]:

> "Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only where the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

Since there was no dispute that adversarial litigation was in progress, he identified the key question as being whether the communications were made for the dominant purpose of conducting that litigation.

18. The Judge referred to the rationale for litigation privilege, expressed in various authorities, including the oft-quoted passage from the judgment of Aikens J in *Winterthur Swiss Insurance Company v AG (Manchester) Ltd* [2006] EWHC 839 (Comm) at [68]:

> "to obtain the legal advice and to pursue adversarial litigation efficiently, the communications between a lawyer and his client and [between] a lawyer and a

> third party and any communications brought into existence for the dominant purpose of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed."

He also quoted from part of the well-known passage from Lord Wilberforce's speech in *Waugh v British Railways Board* [1980] AC 521 at p.531D:

> "a more powerful argument to my mind is that everything should be done in order to encourage anyone who knows the facts to state them fully and candidly – as Sir George Jessel MR said, to bare his breast to his lawyer: *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 699. This he may not do unless he knows that his communication is privileged".

19. Having reminded himself of the fact that the privilege is that of the litigant, rather than of any witness, the Judge rightly said at [20] that in determining whether a claim to privilege should be upheld, the main focus should be on the position of the litigant who is claiming privilege. Having considered the leading cases on dominant purpose (*Waugh* (above), *Winterthur* (above), and *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027), he concluded that the purpose which was relevant was the purpose of the person who was the instigator of the document in question (who may or may not have been its author), and that the purpose of that person must be determined objectively based upon all the evidence, including their subjective intention. Those conclusions are in accordance with principle and authority and cannot be challenged. Indeed, Henderson LJ refused Victorygame permission to appeal against them.

20. The Judge then directed himself in accordance with Hamblen J's useful distillation of the principles to be applied when considering whether such a claim is made out, in *Starbev GP Ltd v Interbrew Central European Holdings BV* [2013] EWHC 4038 (Comm) at [11]-[13]. At [50] he acknowledged that the fact that the letter seeking the information took the form of a letter before claim could be evidence that Ahuja's purpose was to consider a possible claim in negligence against Stradbrooks; but that would involve going behind Mr Davies' witness statement, which Mr Trompeter had expressly stated he did not intend to do. He said that in any event, no other evidence had been put forward which would cast doubt on Mr Davies' explanation of why that request for information took the form that it did.

21. The Judge concluded at [55] that, assessed objectively, the dominant purpose of Ahuja in bringing the correspondence into existence was to obtain information for use in the current proceedings. The next question was whether there was any deception on the part of Ahuja and if so, whether this changed his conclusion (about the dominant purpose) or prevented Ahuja from relying on litigation privilege.

22. He said this at [57]:

> "Although I accept Mr Holland's submission that there was no deception in relation to the fact that information was being requested, based on Mr Davies' witness statement, there clearly was an element of deception in the sense that Ahuja wanted information for the purposes of the present proceedings, anticipated that it would not get that information if it was requested on that basis, and so arranged for its solicitors to write a letter of claim under the professional

> negligence pre-action protocol with a view to obtaining the information that it was seeking. The clear purpose of the letter was to make Stradbrooks believe that a professional negligence claim was being considered (when, in fact, it was not) and that it should therefore provide information in accordance with the professional negligence pre-action protocol".

23. However, having considered the rationale for litigation privilege, the Judge said at [62] that whilst he did not condone Ahuja's tactics, there was no principled reason why the protection of privilege should not be available in relation to the information that was provided. He declined Mr Trompeter's invitation to find that there was a principle which would prevent a claim to privilege where the other party to the litigation is induced to provide information which they would not have provided had they known the true purpose of the request, and where the true purpose was deliberately concealed or suppressed, and (if such a principle did exist) to extend it to situations involving third parties rather than another party to the litigation.

24. The Judge recorded at [64] that he had not been invited to consider whether privilege was unavailable as a result of the deception giving rise to some sort of estoppel or waiver.

25. Victorygame sought permission to appeal on four grounds. Henderson LJ granted permission on Ground 1, which has two related limbs, and allowed the argument in Ground 4(b) to be run in conjunction with Ground 1. He refused to allow Victorygame to argue that the Judge was wrong to find that in ascertaining the dominant purpose, it was the purpose of the instigator of the document which matters, or to challenge his finding that Ahuja was the instigator of the relevant documents.

26. Ground 1 is that the Judge erred in law in holding that:

    a) There is no principle of law to the effect that if one party deliberately misleads another party as to the purpose for which information is required, and that party provides the information, the requesting party cannot thereafter maintain privilege over the information;

    b) If there is such a principle, it does not extend to a situation involving third parties.

    The Judge was therefore wrong to hold that whilst there was deception in the correspondence, it did not prevent Ahuja from claiming privilege.

27. Ground 4(b) is that the Judge erred in law in holding that, objectively assessed, Ahuja's purpose in instigating the correspondence was for the dominant purpose of this litigation.

28. In response to the Judge's finding that there was an "element of deception" and in order to counter any suggestion or inference that Stradbrooks and its professional indemnity insurers were unaware that information was sought in connection with the underlying claim against Victorygame, Ahuja sought permission to rely upon a seventh witness statement from Mr Davies, dated 16 June 2021. Mr Davies explained that his sixth witness statement was made before any allegations of deception were raised in respect of Cardium Law's conduct in corresponding with Stradbrooks and its

professional indemnity insurers, and that this was the first opportunity to deal with the unevidenced allegations of deception. The service of that witness statement prompted Victorygame to seek permission to raise a further argument that any privilege attaching to the correspondence had now been waived by Ahuja.

29. The Court decided to approach these applications pragmatically by considering Mr Davies' seventh witness statement *de bene esse* and hearing argument from Mr Trompeter and Mr Holland on the issue as to whether, by serving that statement, Ahuja had waived privilege.

30. I shall first address Victorygame's original grounds of appeal and then turn to consider the question of waiver.

Does the principle alleged by Victorygame exist and if so, is it applicable?

31. Mr Trompeter contended that if one party deliberately misleads another party as to the purpose for which information is required, and that party provides the information, the requesting party cannot thereafter maintain privilege over the information even if their dominant purpose in requesting it was for use in litigation. That is (or should be) the case irrespective of whether the request is made of another party to the litigation or a third party. He submitted that this principle was established by the decision of HH Judge Toulmin CMG QC in *London Fire and Emergency Planning Authority (LFEPA) v Halcrow Gilbert & Co Ltd* [2004] EWHC 2340 (QB), ("*LFEPA"*) following an assumption to that effect made by Millett J in *Plummers Ltd v Debenhams plc* [1986] BCLC 447 ("*Plummers*") at pp 458i - 459a.

32. *Plummers* was a case in which a lender was considering taking proceedings against the borrower under a loan agreement. The lender had contractual rights under the loan agreement to send in a firm of accountants to examine and report upon the state of the borrower's business. It commissioned such a report, and in doing so it gave the borrower the impression that its purpose was to consider whether to continue to support the business, whereas in reality it had already decided to withdraw that support and enforce the loan.

33. Millett J accepted that the dominant purpose of the report was litigation. He firmly rejected the contention that there was a requirement that the party contemplating litigation had to make that intention known to the other party in order to be able to claim privilege, stating that there was no trace in the authorities of any such requirement. However, he went on to say (at 459a-b) that he was prepared to assume that it is not open to a party to litigation to withhold the production of a relevant document by claiming that the purpose for which it was brought into existence was to obtain legal advice in connection with contemplated litigation, when that purpose was deliberately concealed from the other party, and when the document contains and its conclusions are based on evidence obtained from the other party only by suppressing the purpose for which it was received. He did not explain the principles on which he was relying to found that assumption.

34. Millett J's assumption in *Plummers* was based purely upon the hypothesis of deliberate concealment from the other party to litigation of the true purpose for which information is sought from that party, who would not have provided the information had he known of that purpose. I find that difficult to reconcile that with his ruling that

there is no positive obligation to divulge the purpose for which the information is sought. If there is no such obligation, then concealment of the purpose, whether deliberate or otherwise, is surely immaterial.

35. Moreover, if such a principle existed, then every time the requesting party failed to disclose why the information was wanted, or made known another legitimate reason for asking for it (but which was not the dominant purpose for which it was sought) the court would have to make findings about whether the non-disclosure of the dominant purpose was accidental, inadvertent or deliberate, and what the other party would have done if the dominant purpose had been revealed. This could lead to a most undesirable erosion of the right to claim privilege.

36. As the Judge in the present case observed, even though Millett J held that the truth had been suppressed, he upheld the claim to privilege in *Plummers* because the lender had a contractual right to the information without stating the purpose for which it was required, and the only effect of suppressing the truth was "to avoid hostility on the part of the borrower."

37. In the *LFEPA* case the issue was whether a report prepared by a third party for LFEPA based upon information provided by the other party to the litigation, Halcrow, was privileged. Halcrow was told at the time it provided the information that it was required for a project audit, but LFEPA subsequently claimed that the dominant purpose was to gather information for use in litigation contemplated against Halcrow relating to the project. HH Judge Toulmin was not prepared to find that LFEPA had lied; he decided that the dominant purpose of the report was not litigation, and therefore it was not privileged. However, he went on to suggest that even if the report had been privileged, the privilege was lost on the basis that "LFEPA is estopped by representation from asserting the privilege by falsely representing to Halcrow that the purpose of the investigation was one for which privilege could not be claimed."

38. Mr Trompeter also relied on Lord Wilberforce's explanation of the rationale for litigation privilege expressed in *Waugh* and quoted above. He submitted that it cannot serve the public interest, and would subvert that rationale if a person was entitled to assert privilege over relevant documentation or information which he had obtained by deception, irrespective of the identity of the party deceived.

39. In refusing to extend the supposed principle to third parties, the Judge had said (at [61]) that the purpose of litigation privilege was to enable a litigant to obtain information which could be placed before their legal advisers for the purposes of pursuing their proceedings without having to worry that such information may have to be disclosed to the other party. Mr Trompeter submitted that that reasoning applied irrespective of whether the provider of the information was a third party or the other party to the litigation, and in any event was inconsistent with the rationale given by Lord Wilberforce in *Waugh.*

40. Finally Mr Trompeter submitted that the Judge's analysis was inconsistent with authority, namely, the *PAG* case.

41. On behalf of Ahuja, Mr Holland submitted that the Judge was right for the reasons that he gave. The authorities establish that the purpose behind litigation privilege is the protection of the litigant in adversarial proceedings, as the Judge held. Lord

Wilberforce's observations in *Waugh* had to be read in context, and references to the need for candour were concerned with the relationship between lawyer and client. He pointed out that earlier in the same passage, Lord Wilberforce had expressly accepted the validity of the argument that litigation privilege was justified by what he called "the exigencies of the adversary system of litigation, under which a litigant is entitled within limits to refuse to disclose the nature of his case until the trial."

42. A similar explanation for litigation privilege was given by Lord Rodger in *Three Rivers (No 6)* at [52]:

> "Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations."

43. Mr Holland pointed out that the information was not in the hands of (and therefore already known to) the other party to the litigation. It was only known to the third party from whom Ahuja was seeking to obtain it, Stradbrooks. They were being deliberately uncooperative despite the fact that the knowledge of Mr Jandu was acquired when he was providing professional services for and on behalf of Ahuja and Stradbrooks owed a continuing duty to act in the best interests of their (former) clients. Ahuja was placed in an invidious position because Mr Jandu would not have disclosed the information to Ahuja voluntarily, as he probably should have done.

44. If Ahuja made a successful application for third party disclosure, as it had been forced to do by Stradbrooks' intransigence in respect of the conveyancing file, there was a real risk that it would be obliged to disclose the information to Victorygame irrespective of whether it was helpful or unhelpful to Ahuja's case against them. That would effectively deprive Ahuja of the opportunity to consider and evaluate that information privately with its legal advisers, and decide in the light of it whether to call Mr Jandu as a witness. In those circumstances, the only way to be sure of extracting the information that Ahuja wanted to obtain for the purposes of the litigation whilst maintaining privilege over it, was to indicate that it was considering issuing legal proceedings against Stradbrooks.

45. Mr Holland also sought to rely, if necessary, on Mr Davies' explanation, in his seventh witness statement, that Stradbrooks and their professional indemnity insurers were well aware that the information was sought in connection with the underlying claim, and had been supplied with a copy of Victorygame's Re-Amended Defence and Counterclaim prior to the letter of claim being sent.

Discussion

46. On the face of it, the documents are privileged; the Judge found as a fact that the dominant purpose for which they were sought by Ahuja was for use in the underlying litigation.

47. There was no error of law in the Judge's approach to that issue; he was entitled to reach that conclusion on the evidence before him. The Judge accepted Mr Davies' evidence, as he was entitled to do, for the reasons that he gave. His finding cannot be disturbed for any of the reasons advanced by Mr Trompeter, including that the evidence came from the solicitor who was responsible for sending the letter of claim, rather than from one of Ahuja's directors or officers. The court is not bound by a party's assertion that a document is privileged, nor is it obliged to accept at face value the evidence adduced by the party claiming privilege. The Judge was well aware of this, but, as he said, there was no other evidence to contradict the explanation Mr Davies gave for the form in which the request for information was made.

48. Mr Trompeter submitted that where there were two purposes, one patent and one latent, the court had no basis for refusing to treat the patent purpose as the dominant one. That is a highly unattractive proposition. It would be tantamount to allowing the form of the communication to take precedence over the substantive reason why it was sent, irrespective of the truth. The Judge properly took account of the fact that the form in which the request was made (a letter of claim) suggested that the information was required for a different (or additional) purpose, namely, potential litigation against Stradbrooks themselves, but he was not bound to treat that as a trump card. An objective assessment of the dominant purpose for which a document is created does not involve the application of an objective bystander test, particularly when it is the intention of the instigator of the documents that matters. The form of the request was therefore just one factor in the assessment. The Judge was entitled to accept Mr Davies' explanation. I would dismiss the appeal on Ground 4(b).

49. Turning to Ground 1 of the Grounds of Appeal, the starting point is that these documents are privileged. If Ahuja's solicitors had sent an ordinary letter requesting the information from Stradbrooks and it had been supplied, there would have been no obligation to disclose the correspondence. Victorygame's case is that the absolute privilege was lost because of the form in which the letter was sent (as a letter before claim). On the face of it, that does not seem to me to provide any, let alone any sufficient, justification in principle for precluding Ahuja from relying on an absolute right that derives from the purpose for which the information was sought.

50. The *PAG* case does not assist Victorygame. That case concerned the question whether the conversations were privileged in the first place, not whether the right to claim privilege was somehow lost. It also related to the different situation where the court was concerned with the status of a record of discussions at a meeting, which in turn depended on the purpose of the meeting, as that would determine whether the circumstances in which the conversations took place were privileged. In that specific context, Birss J decided that the intention of the party who arranged the meeting should not be the sole focus of attention (as it would have been where the subject of the claim for privilege was correspondence) but that it should be treated as only one aspect of the overall picture.

51. It is also clear from what Birss J said that the active deception of the bank's ex-employees, who had no idea that the meeting was an information-gathering exercise, and were told it was for a completely different purpose, was treated as the critical factor in distinguishing the situation from the normal one in which a solicitor was interviewing potential third party witnesses. It is unnecessary to express any view as to whether that was the correct approach; that is best saved for a case in which the

question directly arises. Whether or not it was rightly decided, the Judge was right to find that *PAG* is distinguishable. It sheds no light on the issues raised on this appeal.

52. The question here is whether Ahuja has lost the right to maintain the privilege because of some competing public interest that outweighs it. Neither *LFEPA* nor *Plummers* establish the broad principle for which Mr Trompeter contends.

53. Millett J's "assumption" in *Plummers* was made without reference to any authority, and both that assumption and the principle for which Mr Trompeter contends appear to me to be directly contradicted by what Lord Scott of Foscote said in *Three Rivers (No 6)* at [25]:

> "…if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute… but it is otherwise absolute. There is no balancing exercise that has to be carried out, see *B v Auckland District Law Society* [2003] 2 AC 736, 756-759, (paras 46-54). The Supreme Court of Canada has held that legal professional privilege although of great importance, is not absolute and can be set aside if a sufficiently compelling public interest for doing so, such as public safety, can be shown: see *Jones v Smith* [1999] 1 SCR 455. But no other common law jurisdiction has, so far as I am aware, developed the law of privilege in this way. Certainly in this country legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document, cannot be set aside on the ground that some other higher public interest requires that to be done."

54. It is well-established that a party can waive privilege. It also seems likely that Lord Scott's reference to waiver was shorthand for both waiver and estoppel, which is often put forward as an alternative argument to waiver and is a different way of giving up an otherwise inalienable right. It is generally the case that if a person can waive a right, he may also do or say something that precludes him from asserting that right because it would be unfair or unconscionable for him to do so. It must be possible for a party to become estopped from claiming privilege, though (like any other case of estoppel) the conduct or representation would have to be clear and unequivocal and relied on by the other party to their detriment. As with waiver, a court is unlikely to make a finding that someone entitled to assert privilege is estopped from doing so without very cogent evidence.

55. HH Judge Toulmin's *obiter* comments in *LFEPA* were based on an estoppel by representation, not some wider public interest exception to the circumstances in which a party may claim privilege. The question whether such an estoppel has arisen is quintessentially fact-specific. There has been no suggestion of an estoppel in this case.

56. In his oral submissions, Mr Trompeter contended that there was another established exception which Lord Scott had not mentioned in that passage, which he characterised as the exception for "iniquity". In support of that proposition he referred to *Dubai Aluminium Co Ltd v Al-Alawi* and others [1999] 1 WLR 1964. That was a case in which private investigators employed by the party claiming privilege had obtained otherwise confidential information by conduct which was, on the face of it, both

fraudulent and criminal, including impersonating the client to whom the Swiss banks concerned owed a duty of confidentiality.

57. Rix J extended the principle adumbrated in cases such as *R v Cox & Railton* (1884) 14 QBD 153 and *Barclays Bank Plc v Eustice* [1995] 1 WLR 1238 that a claim for legal professional privilege does not apply to communications in furtherance of a criminal purpose, to cover a situation where a criminal offence was committed in order to obtain the documents. However, he made it clear that this extension to the principle that "there is no privilege in an iniquity" was limited. Therefore, it did not cover behaviour that was not of a criminal nature, or closely akin to it, even if that behaviour might otherwise be regarded as reprehensible, such as trespass by the private investigators on the other party's property in order to search his dustbins for discarded papers (which would then be copied before returning them to the bin.)

58. As Mr Holland pointed out, Mr Trompeter's submissions appeared to be an illegitimate attempt to resurrect an "iniquity" argument based upon *Barclays Bank v Eustice* that had been rejected by the Master and was not renewed before the Judge. Irrespective of this, the *R v Cox & Railton* line of authority does not assist Victorygame. It does not concern the loss of privilege, once privilege is established, but whether as a matter of public policy it is open to someone who has committed a criminal offence (or whose agents have done so) to claim privilege over the documents in the first place. Cases of that nature are mercifully rare. The situation in the present case is far removed from that in *Dubai Aluminium*. That case does not detract from Lord Scott's proposition in *Three Rivers(No 6)* that legal professional privilege, *once acquired*, is absolute, unless waived by the party entitled to claim privilege or overridden by statute.

59. I can accept, without deciding the point, that an estoppel might be found to arise in the context where, in order to get the prospective defendant to the contemplated litigation to divulge information to their opponent that they would not otherwise have been obliged to disclose, a deliberate lie is told by the opponent about why the information is required. The defendant is unlikely to want to divulge that information so as to give the claimant a tactical advantage in the litigation, even if they might be compelled to reveal it at a later stage. Therefore if they are induced to provide information which they would not otherwise have provided or been obliged to provide, on the basis of "grossly misleading" representations (as in the case of *LFEPA*, where the alternative factual hypothesis addressed by Judge Toulmin was that the supposed "technical audit" was a fictitious cover for the information-gathering exercise) there might be a good foundation for an estoppel argument.

60. It is less easy to apply the estoppel analysis to a situation in which the supplier of the information is a third party, as in the present case, as it is less likely that they will be detrimentally affected by the use to which it is going to be put by the person requesting it, and therefore less likely that they would be detrimentally affected by handing it over even if they were materially misled. I would not go so far as to suggest that circumstances could never arise in which the party seeking the documents from a third party would be estopped from claiming privilege over them, but such circumstances are likely to be rare. In any event, Victorygame do not contend they arise in the present case.

61. Moreover, if the instigator has a right to the information, as was the case in *Plummers*, then there seems to me to be no sound reason for allowing him to claim privilege if he has not revealed that he wants it for the purpose of litigation, and has left the provider of the information labouring under a misapprehension (as happened in *Plummers*), but on the other hand refusing to allow him to maintain the otherwise irrefutable claim for privilege because he has actively fostered the misapprehension, or even told a deliberate lie. If the person making the request is entitled to the information, it does not matter to the person who is obliged to provide it why he wants it or what use he plans to make of it. He must give him the information. If the only principled basis for denying the right to claim privilege in circumstances of this kind is an estoppel, as I consider it is, it would be very difficult to establish the necessary detrimental reliance in circumstances in which the representee was obliged to disgorge the information irrespective of why it was required.

62. In the light of the principle that legal professional privilege, once acquired, is absolute, subject to waiver and, in an appropriate case, estoppel, I am not prepared to accept that the principle for which Mr Trompeter contends exists. However, even if it does exist, this is not a case in which anyone was deliberately deceived into handing over documents (or providing information) to which the requesting party was not entitled at that time.

63. In the present case, the information was not obtained from the other party to the litigation. What the Judge chose to describe as "an element of deception" was very limited and very different from the reprehensible behaviour considered in cases such as *PAG* and *LFEPA*. It was also irrelevant.

64. Taken at its highest, the fact that the information was requested in a letter of claim fostered an impression that there was a present intention to bring proceedings against Stradbrooks for professional negligence, when it can be inferred from the fact that Ahuja had not given instructions to sue Stradbrooks that, at most, that intention was contingent and depended upon what information was forthcoming. In common with the Master I would not, myself, characterise that as deception. It is of a completely different character from the lies told to the ex-employees about the purpose of the meeting in *PAG* or the (hypothetical) repeated false assurances given to Halcrow in the *LFEPA* case as to why the report was being prepared.

65. The Judge was not prepared to draw the inference that Stradbrooks would have realised that the information would be used for the purposes of the litigation against Victorygame. However it does seem to me, with respect, that there was a strong basis for drawing that inference in the light of the protracted history of the attempts to get hold of the conveyancing file from them, and the fact that Stradbrooks were still instructed by Ahuja at the time when the letters before action were sent in respect of both defendants (and therefore knew the nature of the case). In any event, there was no evidential basis for concluding that Stradbrooks were misled into believing it was <u>not</u> going to be used for that purpose, let alone that Ahuja's intended use of the information would have made a difference to the decision to provide an answer to its solicitor's request. Even if they were led to believe that Ahuja was contemplating suing Stradbrooks for professional negligence, that would not rule out the use of the information in the underlying litigation.

66. Mr Davies' further witness statement has provided clarification that Stradbrooks were well aware of the issues in the litigation between Ahuja and Victorygame and knew that Ahuja wanted the information for the purposes of that litigation. They may not have known it was the dominant purpose of the request, but that was not a matter of any concern to them.

67. Moreover, although one cannot be completely sure without knowing what the information was that Stradbrook's insurers supplied, it seems highly likely that Ajuha was entitled to that information, as Mr Holland submitted it was. In my judgment it would be difficult for a former legal representative to justify withholding information from the client about what he knew and what he did in respect of a transaction at a time when he was engaged to represent that client's interests. Stradbrooks were probably obliged to provide the information irrespective of why their former clients wanted it; but they were plainly not going to do so voluntarily. By using a letter of claim to seek the information, Ahuja left them no room for manoeuvre.

68. There is room for more than one view about those tactics, but even if one were to take the same critical view as the Judge, he was correct to find that any belief on the part of Stradbrooks that they might be sued for professional negligence and were therefore obliged to provide the information under the pre-action protocol, afforded Victorygame no principled basis for denying Ahuja's right to claim privilege.

69. Gathering all these threads together, I can see no good reason why there should be a principle that a party that is otherwise entitled to claim litigation privilege over correspondence with a third party should lose it simply because in order to obtain the information it needed, it was forced by the third party's behaviour to bring pressure on them by threatening litigation against them (even if it did not then intend to carry out the threat) – especially when it was probably entitled to that information in the first place. Moreover, I can find no basis for concluding that the Judge's reasoning was inconsistent with the rationale underlying litigation privilege.

70. Ahuja's behaviour comes nowhere near the type of reprehensible conduct that was justifiably criticised in the first instance cases on which Victorygame have sought to rely. Stradbrooks and their insurers were not deceived into handing the documents over on the basis of a misleading impression (deliberate or otherwise) that Ahuja was *not* going to use those documents for the purposes of the underlying litigation against Victorygame. There was no obligation to tell Stradbrooks what Ahuja intended to do with the information once it was obtained, or why it was wanted.

71. Mr Trompeter at one point conceded that matters would have been different if the threat of litigation had been a threat to sue Stradbrooks for withholding the information, rather than a threat to sue for professional negligence. He accepted that if Ahuja's solicitors had said to Mr Jandu: "our clients intend to bring proceedings against you for withholding information relevant to our proceedings against Victorygame, which you are obliged to give us" and the dominant purpose of writing the letter was to obtain the information for use in the Victorygame proceedings, the exchange of correspondence would have been privileged. I do not accept that a distinction can be drawn between that scenario and what actually happened. Either there was a present intention to sue Stradbrooks, or there was not. But the implicit misrepresentation of Ahuja's present intentions towards Stradbrooks, even if

deliberate, is not a principled basis on which to deny an otherwise well-founded claim for privilege.

72. The Judge was right to find that the privilege was not overridden by some wider public interest principle. I would dismiss this appeal on Ground 1.

Did the service of Mr Davies' fresh witness statement cause a waiver of privilege?

73. That just leaves the new argument on waiver, which can be disposed of more swiftly. Mr Trompeter relied on the helpful distillation of the relevant principles and analysis of the authorities in the recent decision of Waksman J in *PCP Capital Partners LLP and another v Barclays Bank Plc* [2020] EWHC 1393 (Comm), particularly the six overarching points adumbrated at [47], which it is unnecessary to repeat. As the judge said in that case, at [48], it is not easy to find a succinct and clear definition of when waiver arises, going beyond general statements to the effect, for example, that the party alleged to have waived privilege over advice or documents has deployed them in some way as part of its case. However, the underlying principle is fairness and each case will turn on its own facts.

74. As Elias J said in *Brennan v Sunderland City Council* [2009] ICR 479 (quoted in *PCP Capital* at [63]) the focus is typically on two factors, namely the nature of what has been revealed (is it the substance, the gist, the content or merely the effect of the legal advice or other privileged communication?) and the circumstances in which it is revealed. Has it simply been referred to, used or deployed, or relied upon in order to advance the party's case?

75. In the present case, Mr Davies' seventh witness statement (which is entirely consistent with his sixth) was produced in order to rebut the suggestion that Ahuja and its legal advisers had sought to obtain information from Stradbrooks by fraud or deception, and to prevent the inference from being drawn that Stradbrooks were unaware that information was being sought for the purpose of the underlying proceedings, when in fact the contrary was the case. It is in that specific context that Mr Davies made reference to the fact and dates of certain privileged correspondence and discussions with Stradbrooks and their legal advisers, that pre-dated the two letters which are the subject of the application for disclosure. He did so in the context of explaining that Stradbooks were aware that the information subsequently requested in the letter of claim was required for use in the litigation against Victorygame.

76. As Mr Holland submitted, there is nothing remotely unfair about allowing Ahuja to reveal that information, to prevent the Court of Appeal from being misled, whilst maintaining privilege. This is not an example of cherry-picking the aspects of privileged information which help to advance a party's case. It is difficult to see how else Ahuja could have rebutted the suggestion that they had actively deceived Stradbrooks as to the purpose for which they required the information, which Victorygame was advancing in order to try and persuade this Court that they could not claim privilege. In those circumstances, it would have been grossly unfair to find that their very limited references to privileged material for those purposes would have amounted to a waiver of privilege.

77. We did not need to admit Mr Davies' seventh witness statement in order to find that the Judge was right and to dismiss the appeal on the limited grounds for which

permission was granted. However, Ahuja was entitled to rely upon that statement for the purposes set out above without waiving privilege by so doing, or by serving it in the first place.

78. For all the above reasons, I would dismiss this appeal.

Sir Stephen Irwin:

79. I agree.

Lord Justice Baker:

80. I also agree.