

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/06/2009

Before :

**MR JUSTICE MORGAN**

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Between :

- 1) Digicel (St. Lucia) Limited (a company registered under the laws of St. Lucia)
  - 2) Digicel (SVG) Limited (a company registered under the laws of St. Vincent & the Grenadines)
  - 3) Digicel Grenada Limited (a company registered under the laws of Grenada)
  - 4) Digicel (Barbados) Limited (a company registered under the laws of Barbados)
  - 5) Digicel Cayman Limited (a company registered under the laws of the Cayman Islands)
  - 6) Digicel (Trinidad & Tobago) Limited (a company registered under the laws of Trinidad & Tobago)
  - 7) Digicel (Turks & Caicos) Limited (a company registered under the laws of Turks & Caicos)
  - 8) Digicel Limited (a company registered under the laws of Bermuda)
- and -

**Claimants**

- 1) Cable & Wireless Plc
  - 2) Cable & Wireless (West Indies) Limited
  - 3) Cable & Wireless Grenada Limited (a company registered under the laws of Grenada)
  - 4) Cable & Wireless (Barbados) Limited (a company registered under the laws of Barbados)
  - 5) Cable & Wireless (Cayman Islands) Limited (a company registered under the laws of the Cayman Islands)
  - 6) Telecommunications Services of Trinidad & Tobago Limited (a company registered under the laws of Trinidad & Tobago)
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**Defendants**

**Mr Stephen Rubin QC, Mr Huw Davis QC, Mr Stephen Houseman & Mr Rupert Allen** (instructed by **Jones Day**) for the Claimants  
**Lord Grabiner QC, Mr Edmund Nourse & Mr Conall Patton** (instructed by **Slaughter & May**) for the Defendants

Hearing date: 16 June 2009

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MORGAN

1 **Introduction**

2 1. This judgment deals with an application made  
3 yesterday by the claimants. The application raised  
4 issues as to possible waiver by the defendants of legal  
5 professional privilege in relation to certain documents  
6 which contained or may have contained legal advice given  
7 to the defendants.

8  
9 2. Yesterday was the 25th day of the  
10 continuing trial of this action. I will give a heavily  
11 abbreviated summary of what the action is about and what  
12 has given rise to the application.

13  
14 3. In the action, the various claimants claim that the  
15 various defendants have committed various unlawful acts  
16 in relation to a process which is called  
17 "interconnection". The interconnection in question was to  
18 have been between the various defendants'  
19 telecommunications networks in various islands in the  
20 Caribbean and the telecommunications networks which were  
21 at the relevant time or times proposed to be created by  
22 the various claimants. The claims made by the claimants  
23 include an allegation that the defendants, or some of  
24 them, conspired together to injure the various claimants  
25 by unlawful means.

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4. Among the matters relied upon by the defendants is a contention that if it should be determined at the trial that certain acts or omissions on their part were unlawful, then nonetheless the defendants are not liable in the tort of conspiracy to injure by unlawful means because the relevant defendants genuinely believed at the relevant times that the relevant acts or omissions were lawful.

5. In the written opening submissions served on behalf of the defendants, counsel for the defendants developed the case that: (1) the defendants had the relevant belief as to the lawfulness of their actions; and (2) such a belief prevented the claimants proving a necessary ingredient in the tort of conspiracy to injure by unlawful means or provided a defence to the claimants' allegations of the tort of conspiracy.

6. As a result of the submissions made by both sides in opening this case, it was agreed that both sides would address in their pleadings this question of belief in the lawfulness of the relevant conduct.

7. The claimants have served a re-amended particulars

1 of claim which sets out their contentions that: (1)  
2 there was no such belief on the part of the defendants;  
3 and (2) any such belief would not prevent the claimants  
4 proving all the necessary ingredients of the tort of  
5 conspiracy, nor provide a defence in law to the  
6 allegation of the tort of conspiracy.

7  
8 8. The rival case was pleaded in a re-amended defence  
9 served by the defendants. It is relevant to refer in  
10 particular to what is pleaded in paragraph 88 of the  
11 re-amended defence:

12 "Without prejudice to the burden of proof, insofar  
13 as the claimants do identify particular individuals as  
14 having the relevant intention that can be attributed to  
15 particular defendants, as they should, the defendants'  
16 position is as follows:

17 (1) At least each of the following honestly  
18 believed, at all times material to the issues in any  
19 particular jurisdiction, that there was no obligation  
20 upon the relevant defendant in the particular  
21 jurisdiction to commence physical interconnection, in  
22 particular by ordering equipment and/or commencing civil  
23 works, until there was a concluded and/or approved  
24 interconnection agreement between the parties: Donald  
25 Austin, Clive Batchelor, Geoff Batstone, Errald Miller,  
26

1 John Thompson, Lawrence McNaughton, Rudy Ebanks,  
2 Lisa Agard, Carlos Espinal, Kurleigh Prescod.

3 (2) The defendants refer to the witness statements  
4 of the relevant individuals cited in this respect, which  
5 provide sufficient particulars to enable the claimants  
6 to understand the defendants' case.

7 (3) Insofar as it is held that the defendants'  
8 failure to order equipment and/or to progress physical  
9 interconnection was a breach of duty, the abovementioned  
10 individuals' honest belief to the effect that they were  
11 not acting in breach of duty is relied upon as showing  
12 that there was no intention to injure through unlawful  
13 means.

14 (4) At least each of the following honestly  
15 believed at all times material to the issues in any  
16 particular jurisdiction that there was no obligation in  
17 relation to interconnection with Digicel in any  
18 particular jurisdiction until Digicel had obtained  
19 a licence and/or concession in that jurisdiction: Donald  
20 Austin, Paul Barnes, Geoff Batstone, Nigel Fisher, Chris  
21 Forrest, Mark Macfee, Lawrence McNaughton, Glenda  
22 Medford, John Thompson, Rudy Ebanks, Derrick Nelson,  
23 Frans Vandendries, Lisa Agard, Carlos Espinal, Kurleigh  
24 Prescod.

25 (5) The defendants refer to the witness statements  
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1 of the relevant individuals cited in this respect, which  
2 provide sufficient particulars to enable the claimants  
3 to understand the defendants' case.

4 (6) Insofar as it is held that the defendants'  
5 failure to commence negotiations and/or interconnection  
6 prior to the award of a licence to the relevant claimant  
7 was a breach of duty, the defendants rely upon [the]  
8 abovementioned individuals' honest belief to the effect  
9 that they were not acting in breach of duty as showing  
10 that there was no intention to injure through unlawful  
11 means.

12 (7) The defendants do not plead to schedule D,  
13 which is not a proper pleading, but argument, and  
14 mischaracterises the defendants' position."  
15

16 **The Application**

17  
18 9. On 11 June 2009 the claimants issued the application  
19 which is now before me. Part 3 of the application  
20 notice reads as follows:

21 "The claimants seek an order that the defendants  
22 shall give disclosure and inspection of documents  
23 constituting or evidencing legal advice which was given  
24 to or received by the individuals identified in the  
25 draft order attached regarding the lawfulness or  
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1 otherwise under the laws of St Lucia, St Vincent and the  
2 Grenadines, Grenada or Barbados of the defendants'  
3 refusal or failure to commence negotiations or progress  
4 interconnection with the relevant claimant prior to the  
5 formal grant of a licence to the relevant claimant  
6 and/or the defendants' refusal or failure to order  
7 equipment required for interconnection with the relevant  
8 claimant prior to the signing and/or approval of an  
9 interconnection agreement between the relevant defendant  
10 and the relevant claimant. Alternatively, the claimants  
11 seek an order that the defendants shall give disclosure  
12 and inspection of documents constituting or evidencing  
13 such legal advice which the individuals identified in  
14 the draft order attached received from or were directly  
15 or indirectly given by Mr Geoff Batstone.

16 "The ground for the application is that the  
17 defendants have waived privilege in such legal advice in  
18 order to advance their alleged defence that each of the  
19 defendants (through the individuals identified in the  
20 draft order attached) held an honest belief at the  
21 relevant time as to the lawfulness of their refusal or  
22 failure to commence negotiations or progress  
23 interconnection prior to the formal grant of a licence  
24 to the relevant claimant and/or their refusal or failure  
25 to order equipment required for interconnection prior to  
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1 the signing and/or approval of an interconnection  
2 agreement between the relevant defendant and the  
3 relevant claimant."

4  
5 10. The application notice refers to a draft order which  
6 is on the basis that the court accedes to the primary  
7 head of relief sought by the application notice rather  
8 than the alternative head of relief.

9 Paragraph 1(1) of the draft order reads as follows:

10 "Any documents constituting or evidencing legal  
11 advice given to or received by Mr John Thompson and/or  
12 Mr Lawrence McNaughton and/or Mr Chris Forrest and/or  
13 Mr Paul Barnes and/or Mr Nigel Fisher and/or Mr Donald  
14 Austin as to the lawfulness or otherwise of the refusal  
15 and/or failure of any of the defendants to commence  
16 negotiations and/or progress interconnection [with] any  
17 of the claimants prior to the formal award of a licence  
18 to the relevant claimant in relation to St Lucia,  
19 St Vincent and the Grenadines, Grenada or Barbados."

20 Paragraph 1(2) of the draft order reads as follows:

21 "Any documents constituting or evidencing legal  
22 advice given to or received by Mr John Thompson and/or  
23 Mr Lawrence McNaughton and/or Mr Clive Batchelor and/or  
24 Mr Donald Austin and/or Mr Errald Miller as to the  
25 lawfulness or otherwise of the refusal and/or failure of  
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1 any of the defendants to order equipment required for  
2 interconnection with any of the claimants in advance of  
3 the signing and/or regulatory approval of an  
4 interconnection agreement between the relevant defendant  
5 and relevant claimant in relation to St Lucia,  
6 St Vincent and the Grenadines, Grenada or Barbados."

7  
8 11. The submissions on behalf of the claimants were  
9 presented by Mr Rubin Q.C. The submissions  
10 on behalf of the defendants were presented by Mr Patton.  
11 I am grateful to both counsel for the clarity of their  
12 submissions and the help they gave me.

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14 **The Claimants' Submissions**

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16 12. Mr Rubin puts his case in two ways. Adopting the  
17 order in which the submissions were presented in oral  
18 argument, his first submission can be described as the  
19 narrow submission and the second submission can be  
20 described as the broad submission. The narrow  
21 submission is in support of the second part of the  
22 relief sought by the application notice. The broad  
23 submission is in support of the first part of the relief  
24 sought by the application notice and by the draft order.

25 Following the sequence adopted by counsel in their  
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1 oral submissions, I will deal first with the narrow  
2 submission and then with the broad submission.

3  
4 **The Narrow Submission**

5  
6 13. Mr Rubin accepts that the documents that he wishes  
7 to have disclosed were initially the subject of legal  
8 professional privilege. He submits that the  
9 witness statements served by the defendants and referred  
10 to in paragraph 88 of the re-amended defence contain  
11 passages where the witnesses refer to their beliefs as  
12 to the lawfulness of their conduct and also refer, in  
13 a way which I will describe in more detail later, to the  
14 topic of legal advice being given, in particular by  
15 a Mr Batstone, a lawyer. Mr Rubin submits that taking  
16 all the witness statements together, there is a waiver  
17 of legal professional privilege in any such legal  
18 advice.

19  
20 14. The parties are agreed that where a party is  
21 entitled to claim legal professional privilege but  
22 nonetheless deploys some of the privileged material in  
23 the litigation, then that party may be held to have  
24 waived privilege in the relevant material. The waiver  
25 will not necessarily be confined to the privileged  
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1 material deployed by the party but may extend further,  
2 to some extent, to other privileged material. It has  
3 been said that the party who makes a partial waiver of  
4 privileged material is not entitled to cherry-pick from  
5 the material so as to disclose and deploy the part of  
6 the material which suits him but to withhold other parts  
7 which might not suit him.

8  
9 15. On the narrow submission, the first issue is as to  
10 what is sufficient to amount to conduct by a party which  
11 has the effect of waiving privilege in this way.  
12 Although the principles in this area are  
13 long-established and the subject of a considerable body  
14 of authority, Mr Rubin relied on one case in particular.  
15 That was the recent decision of the Employment Appeal  
16 Tribunal, *Brennan v Sunderland City Council* [2009] ICR  
17 470.

18  
19 16. In *Brennan*, the judgment of the tribunal was given  
20 by the then president, Mr Justice Elias. At  
21 paragraph 16, when summarising the law, Mr Justice Elias  
22 referred to the classic case of waiver where a party  
23 refers in detail to, and seeks to rely upon, part of  
24 a document setting out legal advice.

25 At paragraph 45 Mr Justice Elias referred to earlier  
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1 cases where a distinction had been drawn between  
2 a reference to the contents of a document containing  
3 legal advice and the effect of such a document. It was  
4 stated that reliance on the contents of the document may  
5 amount to a waiver whereas reliance on the effect of the  
6 document would not.

7 At paragraph 64, Mr Justice Elias referred to the  
8 need for the court to form a view, first, as to the  
9 nature of what had been revealed and, secondly, the  
10 circumstances in which it had been revealed. In the  
11 latter regard, he distinguished between a reference to  
12 a document and reliance upon the document.

13  
14 17. I will read from certain paragraphs in  
15 the judgment on which particular emphasis was placed in  
16 the course of argument. At paragraphs 65 to 67,  
17 Mr Justice Elias, giving the judgment of the  
18 tribunal, said this:

19 "In our judgment, it is an error to treat the  
20 earlier authorities as if the words falling from  
21 judicial lips had the sanctity of statute. We would not  
22 therefore adopt in quite such stark terms the  
23 contents/effects distinction which [counsel] submits  
24 represents the law. Plainly the fuller the information  
25 provided about the legal advice, the greater the risk  
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1       that waiver will have occurred, but we do not think that  
2       the application of the waiver principle can be made to  
3       depend on a labelling exercise, particularly where the  
4       categories are so imprecise. The concepts shade into each  
5       other and do not have the precision required to justify  
6       their employment as rigid tests for defining the scope  
7       of waiver.

8               "Having said that, we do accept that the  
9       authorities hold fast to the principle that legal advice  
10      privilege is an extremely important protection and that  
11      waiver is not easily established. In that context,  
12      something more than the effect of the advice must be  
13      disclosed before any question of waiver can arise.

14             "However, in our view, the answer to the question  
15      whether waiver has occurred or not depends upon  
16      considering both what has been disclosed and the  
17      circumstances in which disclosure has occurred. As to  
18      the latter, the authorities in England strongly support  
19      the view that a degree of reliance is required before  
20      waiver arises but there may be issues as to the extent  
21      of the reliance. Ultimately there is the single composite question  
22      of whether, having regard to these considerations,  
23      fairness requires that the full advice be made  
24      available. A court might, for example, find it  
25      difficult to say what side of the contents/effect line  
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1 a particular disclosure falls but the answer to whether  
2 there has been waiver may be easier to discern if the  
3 focus is on the question whether fairness requires full  
4 disclosure."

5  
6 18. I read also paragraph 69 of the judgment in that  
7 case, where Mr Justice Elias said this:

8 "In our view, the authorities demonstrate that  
9 reliance is necessary and there is currently no  
10 indication that the Council have any intention of  
11 relying on the advice. The disputed material was put  
12 before the court as an exhibit to a lengthy witness  
13 statement. The legal advice had not been specifically  
14 referred to in the pleadings, nor in the witness  
15 statements themselves, and in our view the mere  
16 reference to the advice, even to the contents of it, was  
17 not in the circumstances sufficient to constitute  
18 a waiver of privilege. The Council are not seeking to  
19 rely upon the advice to justify the reason why they  
20 decided to implement pay protection for a period of four  
21 years."

22  
23 19. Mr Rubin invited me to apply the approach encapsulated  
24 in those passages from Brennan.

25

26

1 20. Mr Patton, on behalf of the defendants, does not

2 I think fundamentally disagree with this approach. He  
3 does not in terms quarrel with the way in which the  
4 matter is discussed in Brennan. To assist analysis of  
5 the problems which arise, he identified three questions  
6 which he submitted should be asked in turn. His  
7 questions are as follows:

8 (1) Is there a reference to the legal advice? He  
9 submits if there is not, there is no waiver of any such  
10 privilege.

11 (2) If there is a reference to the legal advice, is  
12 there reliance on that legal advice? He submits if  
13 there is not, there is no waiver of privilege.

14 (3) If there is reliance on the legal advice, is  
15 the reliance on the contents of the advice or only on  
16 the effect of the advice? He submits that if the  
17 reliance is only on the effect of the advice, there is  
18 no waiver of privilege.

19 I do not think that at the end of the day there is  
20 any substantial difference between the parties as to  
21 Mr Patton's questions, save that Mr Rubin submits that  
22 the Brennan case has put its own gloss on the  
23 distinction between the contents of and the effect of  
24 a document.

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1 21. I am happy to say that it is not necessary for the  
2 purposes of this judgment to attempt a definition of the  
3 line which divides the contents of legal advice from the  
4 effect of legal advice. Indeed, in view of the remarks  
5 in Brennan, it may be altogether unhelpful in this area  
6 to attempt too rigid a definition of that kind.

7  
8 22. In addition to the above submissions as to the  
9 relevant law, I record the fact that the parties agreed  
10 that a statement which merely records the fact that  
11 legal advice has been given will not amount to a waiver  
12 of privilege in that advice.

13  
14 23. Having identified the legal principles to be  
15 applied, I now turn to the way Mr Rubin puts his case on  
16 the facts as to waiver.

17 Mr Rubin has taken me in detail and with care  
18 through a large number of witness statements. He  
19 submits that, having regard to the statements made as to  
20 the belief of various witnesses and the role of some of  
21 those witnesses in giving legal advice, I can infer that  
22 the case being put forward by the defendants is that the  
23 beliefs, as to the legal position, that are being relied  
24 upon by the defendants, are supported by legal advice  
25 given to those witnesses with the alleged beliefs. He

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1 submits that the consequence of this is that the  
2 defendants are deploying the legal advice in this  
3 litigation and have waived privilege in that advice.

4 Mr Rubin stresses that his submission relies upon  
5 the effect of the witness statements taken together  
6 rather than relying upon a particular reference here or  
7 there in a statement to the contents of legal advice.

8  
9 24. Mr Patton submits that this argument by Mr Rubin

10 contains the seeds of its own destruction. He points  
11 out that this particular argument does not seek to rely  
12 upon any express references in the witness statements to  
13 the contents of legal advice supporting the alleged  
14 beliefs. Rather the argument is that the statements  
15 made by the witnesses give rise to an inference -- and  
16 Mr Patton stressed the word "inference" -- that the  
17 relevant beliefs were supported by legal advice.

18 Mr Patton submitted that if there were no reference to  
19 the contents of the legal advice, there could be no  
20 waiver in relation to such advice.

21  
22 25. Mr Rubin accepted that if the legal advice were not

23 disclosed as a result of this application, he would  
24 contend in closing submissions at the end of the trial  
25 that it could not be inferred that the legal advice

1 supported the alleged beliefs. I put to Mr Rubin that  
2 if the defendants did not disclose the legal advice,  
3 they could hardly ask the court to infer that the legal  
4 advice supported the alleged beliefs. That would not be  
5 a case of drawing adverse inferences against the  
6 defendants by reason of the claim to privilege; it would  
7 instead be a case of not drawing inferences in their  
8 favour; the reason for not drawing inferences in their  
9 favour being that the material was simply not before the  
10 court and could not be assessed.

11 In due course, Mr Patton, on behalf of the  
12 defendants, accepted in clear terms that in the absence  
13 of disclosure of the legal advice the defendants could  
14 not contend for such an inference in their favour.

15  
16 26. These exchanges during argument mean that the witness  
17 statements are not to be read as justifying the  
18 inference initially contended for by Mr Rubin, although  
19 it now appears that his contention was for the  
20 purposes of this application only and a different  
21 contention would be put forward at the end of the trial.  
22 It seems to me to follow that his contention that the  
23 inference exists and has led to a waiver of privilege  
24 must accordingly fail.

25

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1 27. The matter does not stop there. Even if the  
2 suggested inference were appropriate, I do not see how  
3 it could be said that as a result of that inference the  
4 witness statements contain a reference to the contents  
5 of the legal advice. There needs to be a reference --  
6 and I stress the word "reference" -- to the contents of  
7 the legal advice for there to be the beginnings of  
8 a case as to waiver by deployment by the defendants.

9  
10 28. That deals with the primary way in which Mr Rubin  
11 put his case on the alleged deployment of privileged  
12 material. However, there are undoubtedly references in  
13 the witness statements to the topic of legal advice and  
14 accordingly, applying conventional principles, the  
15 question remains to be asked whether there is  
16 a reference which, fairly read, amounts to reliance on  
17 the contents of legal advice.

18  
19 29. I have carefully considered the many passages in the  
20 witness statements to which my attention was drawn.  
21 These passages have been extracted and set out over  
22 eight pages in a witness statement from the claimants'  
23 solicitor. That was, of course, helpful in the course  
24 of the application but it is neither necessary nor  
25 appropriate for me to set out all those passages in this  
26

1 judgment.

2 Many of the statements so extracted simply record  
3 the fact that the legal advice was given. In accordance  
4 with settled principles, accepted by both parties on this  
5 application, a statement of that fact does not result in  
6 any waiver of privilege.

7

8 30. There were, however, four statements which were the  
9 subject of particular attention in the course of  
10 argument. The first of these is in paragraph 10 of  
11 a witness statement of Mr Batstone, to whom I have referred  
12 in passing. Paragraph 10 reads as follows:

13 "As legal adviser, my role has included providing  
14 legal advice in the context of interconnection  
15 negotiations. Such advice is, of course, privileged and  
16 I understand that this privilege has not been waived.  
17 Consequently, when I refer to events and meetings below,  
18 I do not refer to the content of any legal advice that  
19 may have been given. On occasion, however, I do set out  
20 what my belief was as to the existence or extent of any  
21 obligations in relation to interconnection. In doing  
22 so, I do not seek to trespass on questions of statutory  
23 or contractual construction which I understand are  
24 questions for the court to determine after hearing legal  
25 argument. The only purpose of referring to my

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1 contemporaneous belief or understanding in this respect  
2 is to explain why I (or those with whom I was working)  
3 acted (or omitted to act) as we did. I understand this  
4 may be relevant given that it is alleged in these  
5 proceedings that the defendants pursued a strategy of  
6 deliberate and unlawful delay as regards  
7 interconnection."

8  
9 31. I should make a few preliminary remarks about that  
10 statement. First, whether a reference to legal advice  
11 gives rise to a waiver is a matter of law to be judged  
12 objectively. Thus a statement that the reference is not  
13 to be taken as a waiver of privilege does not prevent  
14 the court holding that, as a matter of law, objectively  
15 considered, the statement does constitute a waiver. To  
16 be fair to Mr Batstone, he does not try to say that  
17 there is no intention to waive; rather he says that the  
18 privilege had not previously been waived. Secondly,  
19 a statement that the witness does not refer to the  
20 contents of the advice can be material when the court  
21 considers the separate question, which is a question of  
22 fact, whether the reference is fairly construed  
23 as a reference to the contents of the advice or to  
24 something less than that. Thirdly, the fact that  
25 Mr Batstone refers to his own belief and his own conduct  
26

1 in reliance on his belief does not of itself state that  
2 he gave legal advice, much less what was the content of  
3 that legal advice.  
4

5 32. The case for saying that paragraph 10 is a waiver is  
6 that when Mr Batstone refers to his explanation for why  
7 other persons acted as they did, he must be taken to be  
8 saying that the others relied on his legal advice and  
9 the contents of legal advice are shown by the conduct  
10 which was said to have been influenced by or based upon  
11 that legal advice.

12 Although this argument can be put, it is my view  
13 that this reference by Mr Batstone is not a sufficient  
14 reference to the contents of the advice nor reliance on  
15 such contents. The defendants have not crossed the  
16 ill-defined line which separates the contents of advice  
17 from the effect of advice so as to result in a waiver of  
18 privilege.  
19

20 33. The second statement to which I refer is in  
21 paragraph 283 of Mr Batstone's statement. Before  
22 reading that paragraph, I need to refer to a letter  
23 dated 23 May 2003 from Cable & Wireless (Barbados) Limited  
24 to Digicel (Barbados) Limited:

25 "Dear Mr McDermott.  
26

1           "RE: request for interconnection.

2           "We are in receipt of your letter of 14 May 2003 in  
3 which you requested interconnection with Cable &  
4 Wireless (Barbados) Limited.

5           "Notwithstanding that section 28(1) of the  
6 Telecommunications Act 2001 provides that a 'person'  
7 that wishes to interconnect with Cable & Wireless'  
8 network shall make a request in writing, it is Cable &  
9 Wireless' view that Part VI of the Telecommunications  
10 Act must be read in its entirety for an accurate  
11 interpretation of 'person' to be determined.

12           "We have been advised that person must be  
13 interpreted to mean a 'carrier' who has been licensed to  
14 own or operate a telecommunications network, and is  
15 therefore eligible to be provided with interconnection  
16 services pursuant to subsection 25(1) of the said Act  
17 which is the leading section. Any other interpretation  
18 would make nonsense of the legislation and would result  
19 in operating carriers being obligated to negotiate  
20 interconnection with parties who may have no intention  
21 or prospect of providing these services.

22           "We have also been advised that licences have not  
23 been issued to Digicel or any other identified new  
24 entrant. In addition, the regulatory framework for the  
25 liberalised environment remains incomplete.

26



1            "We are unable to accede to your request at this  
2            time and Cable & Wireless' position in its letter of  
3            14 March 2003 stands.

4            "Cable & Wireless reserves its legal rights."  
5

6    34. Paragraph 283 of Mr Batstone's statement reads as

7            follows:

8            "Within a week, on 23 May 2003, Mr Austin replied on  
9            behalf of C&W Barbados explaining that in the context of  
10           the Act, the reference to 'person' should be read as  
11           a reference to a carrier. Mr Austin's letter (which  
12           I helped draft) noted that so far as C&W Barbados was  
13           aware, licences had not been issued to Digicel Barbados  
14           or any other new entrant. In addition, the regulatory  
15           framework for the liberalised environment remained  
16           incomplete. Mr Austin explained that, for these  
17           reasons, C&W Barbados' position as set out in its  
18           14 March 2003 letter stood and it was unable to accede  
19           to Digicel Barbados' request for the present. I believe  
20           our position, as set out in Mr Austin's letter, to be  
21           both legally correct and commercially sensible."  
22

23    35. Mr Rubin expressly conceded in the course of

24           argument that the letter of 23 May 2003 did not involve  
25           a waiver of privilege in the advice referred to in that  
26

1 letter. In view of that concession, I do not see  
2 anything in paragraph 283 of the witness statement which  
3 takes the matter any further.  
4

5 36. The third statement is in paragraph 369 of

6 Mr Batstone's witness statement. Paragraph 369 referred  
7 to an earlier point mentioned in paragraph 368 of the  
8 statement about allegations of certain conduct and the  
9 like. Paragraph 369 reads as follows:

10 "These allegations were all, in my view, entirely  
11 false and, indeed, offensive. I have explained the  
12 nature and extent of the involvement of the London  
13 office above. No-one in London ever gave me an  
14 instruction, written or verbal, as to how I should  
15 conduct myself during the interconnection negotiations.  
16 In any event, I was (and remain) a qualified legal  
17 adviser. I was carrying out my job as legal adviser to  
18 the Carrier Services team to the up most of my  
19 abilities. I exercised independent judgment to ensure  
20 that the advice I gave and the stance we took in  
21 negotiations was in accordance with the law."  
22

23 37. The argument for this being a waiver of privilege is

24 that when Mr Batstone refers to "the stance we took", he is  
25 not referring to himself alone. It can be said that he  
26

1 is saying that he ensured that the advice he gave to  
2 others affected the stance of those others. Therefore,  
3 it is argued, the contents of the legal advice are  
4 revealed by the conduct of those others.

5 In my judgment, as before, this reference to legal  
6 advice is on the side of the ill-defined line between  
7 the contents and the effect of legal advice such that  
8 this is not a statement which relies on the contents of  
9 the legal advice and does not constitute a waiver of  
10 privilege.

11  
12 38. The fourth and last statement to which I will refer

13 is in paragraph 28 of Mr Austin's witness statement.

14 That paragraph also refers to the letter of 23 May 2003  
15 which I have referred to earlier in this judgment.

16 Paragraph 28 reads as follows:

17 "We heard nothing further in response to that letter  
18 until 14 May 2003 when Digicel sent a letter. Digicel  
19 did not produce a copy of a licence but put forward an  
20 explanation of what they said were our obligations.

21 I thought that their delay in replying indicated that  
22 they knew they had no right to request interconnection  
23 at that time. I responded on 23 May 2003 with our  
24 position that we had no obligation to interconnect with  
25 someone who was not a licensed carrier which, as set out  
26

1 in that letter, was based on advice."  
2

3 39. In my judgment, the reference to the letter being  
4 based on advice does not amount to reliance on the  
5 contents of the advice as distinct from the fact of the  
6 advice or possibly the effect of the advice.  
7

8 40. The result of the above is that if I apply, as best  
9 I can, conventional principles in this area to the facts  
10 of this case, I ought to conclude that the contents of  
11 the legal advice have not been deployed in such a way as  
12 to lead to a waiver of the privilege in that advice.  
13

14 41. Mr Rubin says that it is most unfair for the  
15 defendants to be able to give evidence as to their  
16 alleged beliefs on what is a matter of law and yet  
17 withhold disclosure of the legal advice they obviously  
18 received on that matter.

19 I have three comments to make in relation to that  
20 submission. The first is that fairness is not the  
21 touchstone by which it is determined whether there has  
22 been a waiver of privilege. I do not regard  
23 Mr Justice Elias's decision in the Brennan case as  
24 altering that fact. I will refer later to the authority  
25 which establishes or restates the proposition on which  
26

1 I rely.

2 Secondly, although the legal advice would be highly  
3 relevant to the fact-finding enquiry into the alleged  
4 beliefs and although it is therefore very tempting for  
5 the court to require the disclosure of that legal  
6 advice, I am only in a position to make an order which  
7 compels the defendants to do that which they do not wish  
8 to do if I can make such an order in accordance with  
9 legal principle. To order disclosure is tempting, but  
10 wrong.

11 Thirdly, in the case much relied upon by Mr Rubin,  
12 the Brennan case, Mr Justice Elias stressed that  
13 privilege was a very important matter and was not  
14 lightly to be overridden by an over-readiness on the  
15 part of a court to find a waiver of privilege.

16

17 **My Conclusion on the Narrow Submission**

18

19 42. My conclusion on the narrow submission is that the  
20 way in which the legal advice has been described in the  
21 various witness statements is not such as to amount to  
22 a waiver of privilege in the legal advice in question.

23

24

25

26

1 **The Broad Submission**

2

3 43. The broad submission was put forward before my  
4 conclusion on the narrow submission was known. The  
5 broad submission was made whatever the fate of the  
6 narrow submission might be. Thus it is said that the  
7 broad submission is right even in a case where the  
8 defendants have not deployed the contents of legal  
9 advice in the litigation. In view of my earlier  
10 decision on the narrow submission, that is indeed this  
11 case.

12 44. Mr Rubin says that, nonetheless, he is able to  
13 show that the nature of the issue as to honest belief  
14 raised by the defendants in this case is such that the  
15 defendants, by raising that issue, have waived privilege  
16 in the legal advice.

17

18 45. In support of this broad submission, Mr Rubin prayed  
19 in aid a number of matters. I will attempt to summarise  
20 the various matters which he relied upon. He submitted  
21 as follows:

22 (1) The defendants have pleaded the state of mind  
23 of various individuals.

24 (2) The alleged state of mind relates to matters of  
25 law as to whether certain acts or omissions were lawful

26

1 under various statutes and regulations.

2 (3) The alleged state of mind is in issue and the  
3 court will be asked to make findings as to whether the  
4 state of mind existed.

5 (4) On the evidence in the defendants' witness  
6 statements it is, at the lowest, very likely that the  
7 defendants did receive legal advice and that that legal  
8 advice contributed to the state of mind of the  
9 individuals which is pleaded.

10 (5) It is quite unrealistic to think that the court  
11 can fairly make findings of fact as to the alleged state  
12 of mind unless the court has available to it all the  
13 material which contributed to the individual having the  
14 alleged state of mind. That material critically  
15 includes any legal advice communicated to that  
16 individual.

17 (6) It is unrealistic to think that the claimants  
18 can properly cross-examine the relevant individuals  
19 unless the claimants have available to them the same  
20 material.

21 (7) It would be most unfair for the defendants to  
22 be allowed to advance their pleaded case as to the  
23 alleged state of mind while the claimants and the court  
24 are denied access to the legal advice which probably  
25 contributed to or caused the individual forming the  
26

1       alleged views, or indeed their actual views if  
2       different.

3           (8) The position as to the fairness of what is  
4       proposed means that the court is able to conclude that  
5       there has been a waiver of the privilege in the  
6       communicated legal advice, whether that was communicated  
7       by documents or orally.

8           (9) Whether the defendants do or do not rely upon  
9       the receipt of legal advice does not matter for present  
10      purposes.

11          (10) Any confidentiality in the legal advice has  
12      been waived because the defendants have put in issue the  
13      state of mind of certain witnesses as to matters of law.

14          (11) There is no authority which prevents the court  
15      holding that there has been a waiver of legal  
16      professional privilege and, if necessary, the court  
17      should now provide such authority itself.

18

19   46. Mr Patton joins issue with the submissions. In  
20      summary, he submits:

21          (1) The documents in question on this application  
22      are clearly privileged.

23          (2) The right to maintain legal professional  
24      privilege is a fundamental right of the defendants.

25          (3) That fundamental right is jealously protected



1 by the relevant legal principles.

2 (4) The relevant principles do not involve the  
3 court in balancing up the desirability of the documents  
4 being disclosed and the documents being withheld.

5 (5) The relevant principles do not turn on what is  
6 perceived by the court to be fair in all the  
7 circumstances. It is not enough for the claimants to  
8 appeal to the court's sense that it would be altogether  
9 fairer if the documents were available and were examined  
10 at this trial.

11 (6) To override the defendants' privilege, the  
12 claimants must show that something which has been done  
13 by the defendants has amounted to a waiver by them of  
14 that privilege.

15 (7) There is clear authority that simply to plead  
16 a state of mind which might or might not have been  
17 influenced by legal advice which might or might not have  
18 been given is not an act of waiver of the privilege.

19 (8) that authority applies whether the pleaded state  
20 of mind is a belief as to fact or a belief as to matters  
21 of law.

22  
23 **The Authorities on the Broad Submission**

24  
25 47. In addition to several authorities which dealt more  
26

1 generally with the question of legal professional  
2 privilege, both sides referred me to, and made detailed  
3 submissions on, the decision of the Court of Appeal in  
4 Paragon Finance v Freshfields [1999] 1 Weekly Law  
5 Reports 1183 and the decision of Mr Justice Ramsey in  
6 Farm Assist Limited v Secretary of State for  
7 Environment, Food and Rural Affairs [2009] Professional  
8 Negligence Law Reports 321.

9  
10 48. In Paragon, the judgment of the Court of Appeal was  
11 given by the then Lord Chief Justice, Lord Bingham of  
12 Cornhill. At page 1188 Lord Bingham referred to the  
13 case of express waiver; he also referred to a case of  
14 implied waiver which arises where a client sues his  
15 solicitor and he explained the legal principles in that  
16 respect.

17 At page 1192, beginning at letter H, Lord Bingham  
18 said this:

19 "If the question were one of balancing the  
20 requirements of fairness and justice in the instant  
21 proceedings against any legitimate interest a plaintiff  
22 might have in maintaining the confidentiality of  
23 a confidential relationship, there might be much to be  
24 said for the result reached by the judge in the Kershaw  
25 case [1996] 1 WLR 358 but Reg v Derby Magistrates' Court

26

1        Ex parte B [1996] AC 487 makes plain that in the context  
2        of legal professional privilege no such balance is  
3        involved. This authority is important, not only for its  
4        clear restatement of principle, but also as illustrating  
5        in graphic terms the all but absolute nature of this  
6        privilege in the absence of waiver. If ever there was  
7        a case in which the interests of justice militated in  
8        favour of disclosure, that surely was it."

9            At page 1193, beginning at letter G, Lord Bingham  
10        referred to an earlier decision of Mr Justice Jonathan  
11        Parker in Hayes v Dowding [1996] Professional Negligence  
12        Law Reports 578. That authority had referred to  
13        authority from Australia and the United States and it is  
14        clear from Lord Bingham's treatment of the authority  
15        that the way in which the law has developed elsewhere is  
16        not descriptive of the way in which  
17        the law has developed in this jurisdiction.

18        Lord Bingham said this:

19            "We need not linger on Hayes v Dowding, a case in  
20        which the plaintiffs were held to have impliedly waived  
21        their right to legal professional privilege by bringing  
22        proceedings even though the proceedings were not against  
23        any legal adviser. In reaching that conclusion the  
24        judge relied heavily on Australian and United States  
25        authority. Neither party before us sought to contend  
26

1           that this case was correctly decided and we are  
2           satisfied that it was not. The authorities on which the  
3           judge principally relied do not represent the law in  
4           this country, and the decision must be overruled."

5           At page 1194A to B, on the subject of fairness,  
6           Lord Bingham had this to say:

7           "Fairness is an important part of the reason why  
8           a solicitor who is sued cannot be required to respect  
9           the confidentiality of his relationship with the client  
10          who is suing him; but, save as between the client and  
11          the solicitor he is suing, fairness is not the  
12          touchstone by which it is determined whether a client  
13          has or has not impliedly waived his privilege."

14

15   49. In the Farm Assist case, the decision of

16          Mr Justice Ramsey, reading from the headnote was:

17          "The learned judge held that the mere fact that  
18          a party's state of mind was in issue in other  
19          proceedings did not give rise to an implied waiver of  
20          privilege in relation to any legal advice which might  
21          have influenced him."

22          In that case, having described the state of mind  
23          which was in issue on the pleadings and the arguments as  
24          to waiver of privilege as a result of that being an  
25          issue, the learned judge reviewed the authorities, which

26

1 I need not list. He then referred to statements in the  
2 textbooks which were relied upon in that case by the  
3 applicant for disclosure. I will refer to one statement  
4 in particular, which is in paragraph 32 of  
5 Mr Justice Ramsey's judgment, which reads:

6 "Where in litigation allegations are made by a party  
7 concerning his state of mind (eg in entering an  
8 agreement) to which legal advice contributed, that party  
9 cannot withhold the advice on grounds of privilege but  
10 this is because of implied waiver rather than because no  
11 privilege attached in the first place."

12 That statement in the textbook was plainly heavily  
13 influenced by the decision in Hayes v Dowding, which  
14 itself was heavily influenced by the Australian and  
15 United States decisions. Essentially, in his  
16 conclusion, Mr Justice Ramsey stated that the statement  
17 in the textbook was wrong as a matter of law.

18 Mr Justice Ramsey gave detailed reasons for that  
19 conclusion which I need not describe, much less read  
20 out. However, I will read paragraphs 53 and 54 of this  
21 judgment, where he said the following:

22 "Rather English law maintains the right of a party  
23 to maintain legal privilege. Whilst a person's  
24 state of mind and also that person's actions may well  
25 have been influenced by legal advice, there is no  
26

1 general implied waiver of privilege material merely  
2 because a state of mind or certain actions are in issue.  
3 This means that in the absence of disclosure of the  
4 privileged legal advice, the other party is precluded  
5 from being able to put that legal advice to a person to  
6 show that the advice influenced the state of mind or  
7 actions of that person. In many cases it could be said  
8 that privileged legal advice might be relevant to  
9 establishing an issue and that in this way the  
10 privileged material could be said to be put in issue.

11 "That is not the approach taken in English law.  
12 Rather the underlying policy considerations for creating  
13 privilege to protect communications between a client and  
14 solicitor are treated as paramount even if some  
15 potential unfairness might occur. The test in English  
16 law is therefore based neither on general principles of  
17 fairness nor of relevance. Implied waiver arising from  
18 particular proceedings or pleading allegations in those  
19 proceedings is, in my judgment, limited to proceedings  
20 between solicitor and client as set out in Lillicrap v  
21 Nalder and Paragon Finance."

22 Before leaving that authority, my attention was  
23 drawn to paragraph 56, where Mr Justice Ramsey said that  
24 the case before him was not a case where the claimant  
25 had expressly put in issue some legal advice giving rise  
26

1 to an implied waiver. My interpretation of paragraph 56  
2 is that the possibility, which did not arise on the  
3 facts but which was being referred to by  
4 Mr Justice Ramsey, was the possibility of waiver by  
5 reason of deployment of the contents of legal advice in  
6 the litigation.

7  
8 50. It was submitted to me that Mr Justice Ramsey had  
9 gone too far in his statement of principle in the  
10 passage I have read. I do not take that view. My view  
11 is that the learned judge's treatment of the authorities  
12 and his conclusions based upon them cannot be faulted.  
13 In any event, his conclusions accord with the  
14 conclusions I think I would myself have reached on these  
15 matters even in the absence of that authority. I am, of  
16 course, encouraged to reach and state my own conclusions  
17 in the light of what I regard as a most helpful judgment  
18 in that case.

19  
20 **My Conclusion on the Broad Submission**

21  
22 51. I prefer the submissions made on behalf of the  
23 defendants. There is no waiver of privilege in the  
24 legal advice in this case.

25  
26

1 52. The fact that the legal  
2 advice is relevant to an issue does not result in  
3 a waiver of privilege. Relevance is a necessary  
4 precondition for disclosure but it is not itself  
5 a sufficient condition for a finding of waiver. The  
6 position is the same even where the legal advice is  
7 "highly" relevant, rather than relevant to a lesser extent,  
8 and even where an investigation of the issue may be  
9 hampered by the absence of the privileged material. The  
10 position is the same again even when the issue is as to  
11 a person's state of mind. Equally, in my judgment, it  
12 makes no difference that the alleged state of mind  
13 relates to a matter of law rather than to a matter of  
14 fact.

15  
16 53. There will of course be a waiver of privilege if  
17 a party deploys the contents of the legal advice in the  
18 litigation. In the absence of such deployment, there is  
19 no rule of law which allows the court to override the  
20 claim to privilege just because the court thinks it  
21 would be fair to do so. The court will simply have to  
22 do the best that it can to come to what it hopes will be  
23 the right conclusion on all the evidence presented, even  
24 where evidence that would be relevant has been withheld  
25 by a party who is entitled in law to withhold that  
26



1 evidence.

2

3 54. Accordingly I reject the broad submission put

4 forward by the claimants.

5

6 **The Overall Result**

7

8 55. The overall result is that the application fails.

9

10 **Other Matters**

11

12 56. For the avoidance of doubt, I wish to add two

13 further comments.

14

15 57. First, I am not deciding who bears the legal or the

16 evidential burden in relation to the issue as

17 to honest belief as to the lawfulness of the conduct of

18 the defendants.

19

20 58. Secondly, nothing in this judgment involves any

21 prediction of the conclusions which I will come to on

22 the issue of honest belief, having heard all the

23 evidence in this case. It is neither appropriate nor

24 indeed possible to form any view on that matter until

25 I have heard all the evidence and the closing

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1           submissions from counsel.

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3 JUDGMENT .....1

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