Neutral Citation Number: [2022] EWHC 3124 (Ch)

Case No: BL-2021-MAN-000115

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (ChD)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 6 December 2022

Before:

HHJ CAWSON KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

PAUL CLEMENTS

Claimant

- and –

ADAM FRISBY

Defendant

- -
- -

Elisabeth Tythcott (instructed by **Clarke Willmott LLP)** for the Claimant
Stephen Connolly (instructed by **TLT LLP**) for the Defendants

Hearing date: 2 December 2022

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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HHJ CAWSON KC:

Contents

Introduction

1 Amongst the number of applications that I heard at the Pre-Trial Review ("**the PTR**") of the present claim ("**the Claim**") last Friday was the Defendant's application dated 21 November 2022 ("**the Disclosure Application**") whereby the Defendant seeks, pursuant to CPR PD57AD.17.1 and/or 18.2, an order in the terms of the draft order attached to the Disclosure Application ("**the Draft Order**") for the Claimant to provide a revised Disclosure Certificate and to comply with the Extended Disclosure Order dated 30 June 2022 ("**the June Order**") by providing the documents outlined in the Draft Order and/or to vary the June Order and for the Claimant to provide specific disclosure.

2 The Draft Order identified three classes of documents in paragraph 1 thereof in respect of which the Defendant sought an order that a further search be carried. I determined the Disclosure Application so far as concerns the first two classes of documents at the PTR. However, having heard submissions in relation to the third class of documents, I reserved judgment in respect thereof. This judgment determines this last aspect of the Disclosure Application.

3 The third class of documents is described in paragraph 1(3) of the Draft Order as follows:

> *"As referred to at paragraph 45 of the Claimant's witness statement:*
>
> *a. Copies of the correspondence/documentation in which Davis Blank Furniss advised (or in which such advice is recorded) that the Claimant should not*

pursue the claim or advising the Claimant that the claim was not worth pursuing, between June 2019 and December 2020; and

b. *copies of any other documents (including advice given by DBF to the Claimant and/or copies of the instructions given by the Claimant to DBF), which record or refer to the other reason(s) why the Claimant did not progress the claim before December 2020."*

4 By paragraphs 2 and 3 of the Disclosure Application, the Defendant sought orders in the following terms:

> *"2. The Claimant shall by [4pm on the date 10 days after the hearing] serve on the Defendant's solicitors, a further Extended Disclosure List of Documents, clearly identifying any additional documents being disclosed as a result of the searches referred to in clause above, together with electronic copies of each of the documents contained in the list.*
>
> *3. The Defendant shall by [4pm on the date 10 days after the hearing] serve a revised Disclosure Certificate substantially in the form set out in Appendix 4 to PD 57AD, signed by the party giving disclosure, to include a statement supported by a statement of truth signed by the party that all known adverse documents (as defined in PD 57AD.2.7 to 2.9) have been disclosed."*

5 The principal issue that arises in relation to this aspect of the Disclosure Application is as to whether, by what he said in paragraphs 44 and 45 of his witness statement dated 4 November 2022 prepared for trial, the Claimant waived legal professional privilege and, if he did waive legal professional privilege, as to the scope or extent of that waiver.

6 Ms Elisabeth Tythcott of Counsel appeared on behalf of the Claimant, and Mr Stephen Connolly of Counsel appeared on behalf of the Defendant, although the Defendant's Skeleton Argument was prepared by Mr Connolly together with Mr Giles Maynard-Connor KC, Leading Counsel instructed by the Defendant, who was unable due to a prior commitment to attend the PTR. I am grateful to Counsel for their helpful written and oral submissions.

The background to the dispute

7 The background to the Claim was helpfully set out in the agreed Case Summary prepared for the PTR. Based substantially thereupon, the background can be summarised as follows.

8 The dispute relates to In The Style Fashion Limited, a company incorporated on 27 November 2013 with company number 08792519 ("**the Company**").

9 The Claimant is a businessman engaged in enterprises which include property investment and development.

10 The Defendant is a director of the Company.

11 Jessica Devine ("**Ms Devine**") is a friend of, and witness on behalf of the Defendant, and a former director of the Company.

12 The Claimant's case is that:

(a). In early 2013, he conceived and developed a business idea and model to exploit the younger-end women's retail fashion market ("**the Business Plan**"). The intended business was to be incorporated in a company to be formed by the Claimant to trade as *"In the Style";*

(b). Through the involvement of Ms Devine, the Defendant was introduced to the Claimant who engaged the Defendant in the task of testing and activating the Business Plan;

(c). The Claimant committed money to the venture in the sum of £10,330 which was invested in the remuneration of the Defendant, the acquisition of cheap fashionwear from suppliers and the creation of a website;

(d). The Claimant orally and fully disclosed the Business Plan to the Defendant as an essential element in the exercise with which he was entrusted including the business name, the ideas for advertisement, promotions and marketing and the identity of potential suppliers; and

(e). The Defendant, through Ms Devine, falsely or wrongly told the Claimant that the Business Plan had no future.

13 The Defendant's case is that:

(a). In or around May 2013, he and Ms Devine were inspired by, amongst others, *'Want That Trend'*, an online business which sold women's clothing online through a website, and discussed doing something similar;

(b). From about June 2013, the Defendant has worked tirelessly in the creation, development, growth and success of the Company and its business and has done so without any input or involvement of the Claimant;

(c). The Defendant met the Claimant only once when he and Ms Devine approached the Claimant to ask if he would consider investing £10,000 in their venture, but he was not interested. The Claimant did not invest, did not speak to the Defendant ever again and did not discuss the venture in any great detail with Jessica again after the meeting.

14 The Claimant asserts that the Defendant took advantage of the position obtained by him and developed the Business Plan through his own company rather than in line with the agreement to the extent that the share capital of the Company is now held by The Style Group Plc, which was admitted to the Alternative Investment Market on 15 March 2021, thereby realising substantial sums for the shareholders of the Company including the Defendant.

15 The Defendant asserts that the claim is entirely fraudulent, and that the Claimant's lack of involvement is demonstrated by the fact he took no steps to pursue any claim for a number of years.

The Claim

16 The Claimant issued the Claim on 21 December 2021, and by his Claim Form and Particulars of Claim seeks a declaration that the Defendant held his interest In the Style Fashion Limited on trust for the Claimant; an account of profits; equitable compensation, damages for breach of contract and/or confidence; damages for deceit; all necessary accounts and inquiries, other relief; and costs and interest.

17 The Defendant served a Defence dated 23 February 2022.

18 Case management directions were given by the June Order in consequence of which a trial on liability only has been listed to commence on 17 January 2023. So far as disclosure is concerned, paragraph 9 of the June Order confirmed that the Disclosure Pilot in Practice Direction 51U to the CPR applied to the Claim, and paragraph 12 of the June Order set out the issues for disclosure for the purposes of Section 1A of the Disclosure Review Document ("**DRD**"). Practice Direction 51U, which was a temporary practice direction for the purposes of the relevant disclosure pilot in the Business and Property Courts, has now been permanently replaced by CPR Practice Direction 57AD.

19 Reflective of the Defendant's contention that the Claimant's lack of involvement is demonstrated by the fact he took no steps to pursue any claim for a number of years, issues 11 and 12 included in Section1A of the DRD were in the following terms:

(a). Issue 11 – *"The state of the Claimant's knowledge in relation to In the Style down to and including 2016 and the inaction of the Claimant in bringing the claim asserted in December 2020 down to and including 2016*" – in respect of which extended disclosure was to be given under Model D.

(a). Issue 12 – "*The state of the Claimant's knowledge in relation to In the Style from and after 2016 and the inaction of the Claimant in asserting the Claim before December 2020*" – in respect of which extended disclosure was to be given under Model D.

20 In accordance with an extension of time granted by an Order dated 7 September 2022, Disclosure Certificates were served by the Claimant and Defendant on or about 29 September 2022.

21 Witness statements were exchanged in early November 2022.

22 In paragraphs 42 and 43 of his witness statement dated 4 November 2022, the Claimant referred to having only discovered about the Defendant incorporating the Company, and carrying on the "In the Style" business in 2016. The Claimant then went on in paragraphs 44 and 45 of his witness statement to state as follows:

> *"44. After finding this information out, I took advice from various of my business contacts which led me to consult with several law firms during 2017. This included PLS Solicitors in Altrincham, RHF Solicitors in Manchester and also Hilton Law in Manchester. Eventually after a tiresome process of lawyers not really being sufficiently specialist in this field and realising the costs which would likely be incurred, I engaged David Blank Furniss ("**DBF**") in or around June 2019 who appeared better placed to advise.*
>
> *45. DBF then took time to make progress with my claim, primarily because they felt that the business Fashion did not look at all valuable and did not appear to present a target worth pursuing. Nevertheless, a letter of claim was produced and dated 22 December 2020. The preparation for this letter was carried out before I had knowledge of Fashion's flotation on the AIM market. I found out about this in March 2020 which was days before the floatation was said to happen. I recall being surprised when I found out*

and discussing with my then solicitor. I questioned how had we not managed to get notice of the floatation prior to this time." [My emphasis]

The central issue

23 The central issue that arises for determination is as to whether, in saying what he did in paragraph 45 of his witness statement, and in particular by the words used in the first sentence of paragraph 45 thereof, the Claimant has waived privilege in respect of advice or other documentation relating to DBF taking time to make progress with the Claimant's claim and, if so, as to the extent or scope of that waiver.

24 On behalf of the Defendant, it is submitted that the Claimant is in reality saying that DBF advised him that the subject business did not appear valuable or to be a target worth pursuing, and in reliance on that on the basis of that advice, he instructed DBF not to pursue his claim against the Defendant before December 2020. It is submitted that the Claimant cannot realistically be saying that, having instructed DBF to pursue the claim, DBF, of their own volition took the decision not to do so for a period of some 18 months, it being inconceivable that a reputable firm such as DBF would so act.

25 It is then submitted that in relying upon DBF's advice to explain and justify his delay of 18 months in pursuing his claim against the Defendant, the Claimant has deployed in court material which would otherwise be privileged and, in doing so, has waived privilege in that advice. Reliance is placed upon authorities such as *Great Atlantic Insurance v Home Insurance* [1981] 1 WLR 529, 538 citing *Nea Karteria Maritime Co v Atlantic and Great Lakes Steamship Corp* [1981] Com LR 138, 139 per Mustill J.

26 It is submitted on behalf of the Defendant that it is irrelevant that the Claimant does not refer to a specific document in which the relevant advice was given, and that it is sufficient that the Claimant has deployed advice which would otherwise be privileged (be it oral or written advice) in court – see e.g. *Government Trading Corporation v Tate & Lyle International* 1984 WL 283024 at pages 4 and 6.

27 Two consequences are said by the Defendant to flow from the Claimant's waiver of privilege:

(a). He is obliged now to disclose and provide inspection of the advice which he was given by DBF that the business Fashion did not look valuable and did not appear to present a target worth pursuing; and

(b). He is not entitled to cherry pick and must therefore disclose and provide inspection of the whole of the material relevant to the issue in question, i.e., why DBF took time to make progress with the claim.

28 Although I will examine the case advanced by Ms Tythcott in more detail below, the essence of her case is that it is not be inferred that DBF did advise as contended by Mr Connolly on behalf of the Defendant, that the Claimant has a claim to litigation privilege in respect of the documentation in respect of which the Defendant seeks disclosure, and that privilege has not been waived on the basis that what was said was mere narrative, and mere reference to the fact of legal advice or what DBF considered the position to be, rather than any reliance being on the contents thereof.

29 If it is found that there has been a waiver, then it is the Claimant's case that it ought to be strictly limited to documentation regarding DBF feeling that the business Fashion

did not look at all valuable and did not appear to present a target worth pursuing, being the specific matter identified in the first sentence of paragraph 45.

Paragraphs 17 and 18 of CPR PD 57AD

30 Apart from any question of privilege and waiver, it is of course incumbent upon the Defendant to satisfy the Court that the requirements of paragraph 17 and /or paragraph 18 of CPR PD 57AD is satisfied.

31 So far as paragraph 17 is concerned, the question is as to whether there has been or may have been a failure adequately to comply with an order for Extended Disclosure, in which case the Court may make such further orders as may be appropriate requiring a party to take the various steps set out in paragraph 17.1. However, pursuant to paragraph 17.2, the Court must also be satisfied that an order is *"reasonable and proportionate"*, i.e., reasonable and proportionate within the meaning of paragraph 6.4 which provides that an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the various factors set out in subparagraphs 6.4 (1) to (7).

32 Under paragraph 18, the Court may vary Extended Disclosure, including making an order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure. Again, it is necessary to show that the variation sought is reasonable and proportionate (as defined in paragraph 6.4), but also that varying the original order is *"necessary for the just disposal of the proceedings"* – see paragraph 8.2.

Waiver of privilege - the law

Waiver

33 Both parties referred to the decision of Waksman J in *PCP Capital Partners LLP v Barclays Bank Plc* [2020] EWHC 1393 (Comm) as a helpful recent analysis of the relevant principles. Ms Tythcott also referred to the recent decision of Moulder J in *PJSC Taftnet v Bogolyubov* [2020] EWHC 3225 (Comm), [2021] 1 WLR 1612.

34 At [47] in *PCP Capital*, Waksman J helpfully identified the following overarching points:

> *"(1) Legal professional privilege is regarded as a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore to be carefully controlled;*
>
> *(2) Generally, privileged documents cannot be ordered to be provided in litigation by the party whose privilege it is unless this is as a result of a waiver;*
>
> *(3) Absent waiver, the fact that such documents might be highly relevant does not entail their production;*
>
> *(4) Applications for documents based on a waiver of privilege entail at least the two following fundamental questions:*
>
> > *(a) Has there been a waiver of privilege?*
> >
> > *(b) If so, is it appropriate to order production of privileged documents other than those to which reference has been made which was the foundation for the waiver?*

(5) The concept of fairness underpins the rationale for having a concept of waiver which can then entail the production of further privileged documents. This is because if the party waiving is, by the waiver thereby creating a partial picture only of the relevant legal advice, it is unfair to the other party to allow him to "cherry pick" in this way.

(6) That said, it is also clear that the question of whether or not there has been a waiver is not to be decided simply by an appeal to broad considerations of fairness."

35 However, as Waksman J went on to say at [48], with regard to the question waiver itself, it is not easy to find a succinct and clear definition of when it arises.

36 At [49], Waksman J gave two examples of what was clearly not waiver:

"First, a purely narrative reference to the giving of legal advice does not constitute waiver. This is because, on any view, there is no reliance upon it in relation to an issue in the case. Nor does a mere reference to the fact of legal advice along these lines, "My solicitor gave me detailed advice. The following day I entered into the contract". That is not waiver, however tempting it may be to say that what is really being said is "I entered into the contract as a result of that legal advice". The corresponding point is that if that latter expression is used, then there will be waiver."

37 At [50], Waksman J went on to identify: *"the vexed question which still confounds the law of privilege, namely the idea that, quite apart from reliance, waiver cannot arise if the reference is to the "effect" of the legal advice as opposed to its "contents"."*

38 In this context, Waksman J referred to the case of *Marubeni v Alafouzos* [1986] WL 408062, a decision of the Court of Appeal relied upon by Ms Tythcott. In this case, in evidence in support of an ex parte application, and in the context of deposing as to the merits of the proposed claim and possible defences in accordance with the duty of full and frank disclosure, it was said that: *"The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever."* It was held that there was no waiver of privilege in the Japanese legal advice because the relevant reference was to the effect of the advice, rather than the contents thereof. It is to be noted that, significantly, the plaintiffs had no need to, and did not rely upon the references to the advice save for the purpose of fulfilling the duty of full and frank disclosure in making the ex parte application. After that, whatever advice might have been given by the Japanese lawyers was irrelevant to the issues in the case.

39 At [59], Waksman J identified that the same point arises on an application for summary judgment where the applicant states that he has been *"advised by my solicitor and believe that there is no defence to this claim."* No question of waiver arises. Once the application for summary judgment has been made, reliance ceases to be placed on this evidence and, in any event, what the applicant's solicitor thought about the merits of the defence is irrelevant.

40 At [60], Waksman J commented that:

"Once the distinction is viewed in that context, one can see that the result in Marubeni was plainly correct. The judgments in that case were somewhat compressed in their reasoning but I am quite sure that they were in effect applying

the kind of analysis that I have just set out. I will refer to some other cases below, but at this point, and to deal with matters of principle, in my judgment the correct approach to applying the content/effect distinction is this: the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver." [My emphasis].

41 Waksman J went on to consider three previous cases, commenting that in applying the effect/contents distinction in these cases, the court had done so in a contextual and nuanced fashion, and that the approach in these cases was consistent with the approach that he had adopted at [60].

42 I would note the following about the cases referred to.

43 In *Brennan v Sutherland City Council* [2009] ICR 479, Elias J (as he then was) sitting as President of the EAT, at [64], said that typically cases attempting to determine the question whether waiver has occurred focus on two related matters. Firstly, the nature of what has been revealed. Is it the substance, the gist, contents or merely the effect? The second is 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?

44 At [67], Elias J said this:

".... In our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities ... strongly support the view that a degree of reliance is required ...but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question of whether fairness requires full disclosure."

45 In that case, the advice that it was suggested had been waived had formed an exhibit to a lengthy witness statement, but it had not been pleaded or referred to in the witness statement itself, and the defendant Council was not seeking to rely upon the advice to justify the reason why it decided to implement pay protection. At [70], Elias J emphasised that the situation would change if the material was subsequently to be relied upon by the Council, for example if it sought to rely upon the legal advice to support a stance that they were driven into a four-year pay protection period against their will. As he put it: *"they would be seeking to use the advice to their advantage and we would have thought that it would be clear that waiver had occurred."*

46 Particular reliance is placed by Ms Tythcott upon the next case referred to by Waksman J, *Digicel v Cable & Wireless* [2009] EWHC 1437. Ms Tythcott submits that the position of the Claimant in the present case is closely analogous to that of the defendants in that case.

47 In that case the honesty of the defendants in connection with certain interconnection negotiations was in issue. There was extensive reference to various representatives of the defendants having received legal advice. Many of the references were no more than references to the fact that legal advice was being taken, but other references might be construed as going further, such as that referred to at [30] of Morgan J's judgment.

48 In the event, Morgan J was not required to decide the issue because the defendants' counsel conceded that, in the absence of disclosure of legal advice, the defendants could not contend for an inference in their favour that what they were doing was supported by the legal advice. Morgan J did, however, go on to consider aspects of the issue, but in these circumstances his remarks are therefore strictly obiter.

49 Morgan J referred to the assertion that the claimants, who were seeking disclosure, said was being made by the defendant by referring to the relevant material, namely that the defendants' own beliefs as to the legal position were supported by the legal advice they had received. In this context, at [27], Morgan J said this:

> *"Even if the suggested inference were appropriate, I do not see how it could be said that as a result of that inference the witness statements contain a reference to the contents of the legal advice. There needs to be a reference - and I stress the word 'reference' - to the contents of the legal advice for there to be the beginnings of a case as to waiver by deployment by the Defendants."*

50 As to the possible reference to legal advice in the example referred to in [30] of his judgment, Morgan J commented as follows:

> *"31. ...[It] is a question of fact, whether the reference is fairly construed as a reference to the contents of the legal advice or to something less than that."*
>
> *32. The case for saying that [this] is a waiver is that when Mr Batstone refers to his explanation for why other persons acted as they did, he must be taken to be saying that the others relied on his legal advice and the contents of legal advice are shown by the conduct which was said to have been influenced by or based on that legal advice. Although this argument can be put, it is my view that this reference ...is not a sufficient reference to the contents of the advice nor reliance on such contents. The Defendants have not crossed the ill-defined line which separates the contents of advice from the effect of advice so as to result in a waiver of privilege."* [My emphasis]

51 At [77] and [78] in *PCP Partners* (supra), Waksman J noted that Morgan J's analysis was quite nuanced and context specific, but that he did not detect any inconsistency with his approach.

52 Finally, Waksman J referred to the decision of Males J (as he then was) in *Mid-East Sales v United Engineering* [2014] EWHC 892. In that case, the legal advice in question was referred to in the context of the question of delay by the second defendant in responding to service of a claim form. Essentially, there were two witness statements before the court in which it was being said that acting on the advice of the solicitors in question, the claim form and enclosures had been returned to the British High Commission, and that it was as a result of the solicitor's advice that the second defendant took the steps that it did in responding to the claim form. At [18], in concluding that there has been a waiver, Males J observed that:

"It seems to me these two statements, taken together, do cross the line from reference to deployment. They make a case that the second defendant was acting on legal advice in responding to the claim form in the way that it did. That can only be relevant because the second defendant seeks to rely on that as a factor going to the exercise of the court's discretion. I can see no other reason why the reference to acting on legal advice should have been included ...Now that the second defendant has invited the court to exercise its discretion on the basis that it was acting on legal advice, it may be highly relevant to know what that advice was."

53 I agree with Waksman J's observation in *PCP Partners* at [83] that two important things can be taken from this decision:

(a). Firstly, it does not apply a mechanistic approach to the contents/effect distinction, or the content/fact distinction; and

(b). Secondly, the question of reliance and purpose is central to the determination of waiver.

54 The above authorities were applied by Moulder J in *PJSC Taftnet v Bogolyubov* (supra). This case supports the proposition that it cannot be said that a reference by a party to the subject matter of a privileged communication, as opposed to details of its contents, would never be viewed as having resulted in the waiver of privilege in respect of the communication, or even unlikely that it would be so viewed. Rather, the question is whether there had been reliance on the communication in order to advance the party's case on an issue that the court had to decide, and not just a reference to describe the purpose and effect of the communication. This is a fact sensitive exercise, and where a party choses to put forward a positive case in reliance on a privileged communication, there could be a waiver of privilege.

Scope or extent of waiver

55 In *PCP Partners* at Waksman J helpfully observed as follows:

"85. If waiver is established, then, and only then, the question of whether further privileged documents should be provided arises. Here the position was much less controversial between the parties as to the law. In essence, the court has to decide the issue or "transaction" which the waiver was concerned with. Once that has been identified, then all the privileged materials falling within that issue or transaction must be produced. There may be no more if on a proper analysis the transaction itself was limited to the privileged material already referred to. The identification of the transaction should be approached realistically so as to avoid either artificially narrow or wide outcomes.

86. The transaction analysis itself is driven by the concept of fairness. It is why one has to ascertain the transaction, because then that establishes the playing field, as it were. If the playing field is in truth wider than the documents which have been referred to so far, then it is not level as far as the non- waiving party is concerned because disclosure has in truth been only partial."

56 In *PJSC Taftnet* (supra), Moulder J referred to and applied the decision of the Court of Appeal in *R (Jet2.Com Ltd v Civil Aviation Authority (Law Society intervening)* [2020] QB 1027, where Hickinbottom LJ, at 111-114, said this:

“111. The relevant principles are uncontroversial. Although the voluntary disclosure of a privileged document may result in the waiver of privilege in other material, it does not necessarily have the result that privilege is waived in all documents of the same category or all documents relating to all issues which the disclosed document touches. However, voluntary disclosure cannot be made in such a partial or selective manner that unfairness or misunderstanding may result (Paragon Finance plc v Freshfields [1999] 1 WLR 1183 at page 1188D per Lord Bingham CJ).

112. Collateral waiver of privilege allows for documents and other material that would otherwise be non-disclosable on public interest grounds, to be required to be disclosed even though the individual with the right to withhold disclosure objects. The courts have therefore imposed certain constraints on collateral waiver.

113. The starting point is to ascertain "the issue in relation to which the [voluntarily disclosed material] has been deployed", known as the "transaction test" (General Accident Fire and Life Assurance Corporation Limited v Tanter [1984] 1 WLR 100 at 113D per Hobhouse J), waiver being limited to documents relating to that "transaction" subject to the overriding requirement for fairness. The "transaction" is not the same as the subject matter of the disclosed document or communication, and waiver does not apply to all documents which could be described as "relevant" to the issue, in the usual, Peruvian Guano sense of the term as used in disclosure (Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company (1882) 11 QBD 35).

114. In Fulham Leisure Holdings Limited v Nicholson Graham & Jones [2006] EWHC 158 (Ch); [2006] 2 All ER 599 at [18], having reviewed the relevant authorities, Mann J described the approach thus:

> *"18. What those citations show is that it is necessary to bear in mind two concepts. First of all, there is the actual transaction or act in respect of which disclosure is made. In order to identify the transaction, one has to look first at what it is in essence that the waiving party is seeking to disclose. It may be apparent from that alone that what is to be disclosed is obviously a single and complete 'transaction' — for example, the advice given by a lawyer on a given occasion…. [O]ne is in my view entitled to look to see the purpose for which the material is disclosed, or the point in the action to which it is said to go…. Mr Croxford [Counsel for the claimant, which sought to rely on LAP] submitted that the purpose of the disclosure played no part in a determination of how far the waiver went. I do not agree with that; in some cases it may provide a realistic, objectively determinable definition of the 'transaction' in question. Once the transaction has been identified, then those cases show that the whole of the material relevant to that transaction must be disclosed. In my view it is not open to a waiving party to say that the transaction is simply what that party has chosen to disclose (again contrary to the substance of a submission made by Mr Croxford). The court will determine objectively what the real transaction is so that the scope of the waiver can be determined. If only part of the material involved in that transaction has been disclosed then further disclosure will be ordered and it can no longer be resisted on the basis of privilege.*

> *19. Once the transaction has been identified and proper disclosure made of that, then the additional principles of fairness may come into play if it is apparent from the disclosure that has been made that it is in fact part of some bigger picture (not necessarily part of some bigger 'transaction') and fairness, and the need not to mislead, requires further disclosure. The application of this principle will be very fact sensitive, and will therefore vary very much from case to case…."*
>
> *The purpose of the voluntary disclosure, which has prompted the contention that privilege in other material has been collaterally waived, is therefore an important consideration in the assessment of what constitutes the relevant "transaction" (see also Dore v Leicestershire County Council [2010] EWHC 34 (Ch) at [18]-[19] also per Mann J).*

57 I find of particular assistance the endorsement by the Court of Appeal of the observation by Mann J in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* (supra) that the essential task of the Court is to identify the actual transaction in respect of which disclosure is to be made, and to then ask whether it is apparent from the disclosure that has been made that it is part of some bigger picture, and that fairness, and the need not to mislead, requires further disclosure. As I see it, the actual transaction is likely to be informed by what the party said to have waived privilege was actually seeking to rely upon, whereas the *"bigger picture"* is likely to go beyond what the potentially waiving party is actually seeking to rely upon.

Waiver of privilege – the present case

Waiver?

58 Paragraph 45 of the Claimant's witness statement is to the effect that DBF took time to make progress with his claim, *primarily* because they felt that the business Fashion did not look at all valuable and did not appear to present a target worth pursuing. It is not in terms said that DBF specifically advised the Claimant that this was their view, or whether this was a feeling that DBF had that held back the progress of the claim in some other way during the period from when DBF was first instructed in 2019 and a claim being intimated in correspondence in December 2020.

59 Ultimately, I am not convinced that anything turns on this. On the Claimant's case at least, litigation was clearly in prospect or contemplation when DBF were instructed, thus even if the Claimant could not assert legal advice privilege in respect of the matters referred to in paragraph 45, it is likely to be open to him to assert litigation privilege in respect of communications between himself and DBF and third parties for the purpose of obtaining information if made for the dominant purpose of the conduct of that litigation. Of course, if neither advice privilege nor litigation privilege were available to the Claimant, then the question of waiver as an object to disclosure does not arise.

60 Ms Tythcott, as I have touched upon, draws an analogy between the position of the Claimant in this case and that of the defendants in *Digicel* (supra). She places reliance on Morgan J's reference at [27] to the need for reference to the contents of the legal advice, and to the fact that at paragraph 32, Morgan J expressed the view that there was, in respect of the example under consideration, not a sufficient reference to the contents of the advice nor reliance on such contents.

61 Further, Ms Tythcott submits that Waksman J's identification, at [60] in *PCP Partners* (supra), of the need to focus on the particular context is of critical importance in the present case. Ms Tythcott submits that the present case is a case that falls within Waksman J's description at [49] ibid of examples of what is clearly not waiver, on the basis that the relevant part of paragraph 45 of the Claimant's witness statement amounts to narrative, or mere reference to the fact of DBF's feelings, and no more than that.

62 Despite Ms Tythcott's persuasive submissions, I am satisfied that, to the extent that it was open to the Claimant to claim legal professional privilege in respect of the matters referred to in the first sentence of paragraph 45 of his witness statement, there has been some waiver of privilege by what was referred to therein.

63 There is, as I see it, a clear reference in paragraph 45 of the Claimant's witness statement to content, namely the specific reference to DBF feeling that the business Fashion did not look at all valuable and did not appear to present a target worth pursuing. This does, as I see it, go very much further than the facts of *Digicel* (supra) where the fact of advice was referred to, but it was necessary to infer what the content that advice was, albeit perhaps not too difficult to draw that inference.

64 Further, the fact is that the Claimant does, as I see it, rely not just on the fact that DBF had certain views, and/or expressed certain views that meant that progress was not being made with the claim, but the content thereof is specifically relied upon and deployed to provide a reason to support the assertion that, in consequence thereof, DBF took time to make progress, thus providing the Claimant with some explanation for the apparent inactivity that the Defendant relies upon and that is specifically provided for as an issue for disclosure in issue 12 of the DRD.

65 A fundamental distinction with the case of *Marubeni v Alfouzos* (supra), also relied upon by Ms Tythcott, is that in the present case the Claimant continues to rely upon the matters referred to in paragraph 45 of his witness for the purposes of his claim whereas, as referred to above, once the ex parte application in *Marubeni v Alfouzos* was out of the way, the claimant had no continuing need to rely upon the reference to the legal advice in the further pursuit of the claim.

66 In the present case, and in the circumstances of a continuing reliance upon the matters referred to in paragraph 45 of the Claimant's witness statement for the purpose of advancing the Claimant's case with regard to the allegation of inaction, I am satisfied that there is sufficient reference to the contents of the advice or other manifestation of DBF's feelings regarding the business of Fashion not looking at all valuable etc. to mean the line has been crossed such that there has been a waiver of privilege. As the authorities that I have referred to make clear, the question of reliance and purpose is central to the determination of waiver.

67 I consider the present facts to be somewhat analogous to those in *Mid-East Sales v United Engineering* (supra), where the claimant was seeking to explain the delay in the service of the claim form, and did so by reference to solicitors' advice which was said to have occasioned the delay. There was held to have been waiver.

68 I am therefore satisfied that there has been a waiver of legal professional privilege.

Scope of waiver

69 The question then arises as to the scope of the waiver by the Claimant of legal professional privilege.

70 In accordance with the authorities that I have referred to, it is necessary to first identify the relevant *"transaction"* the reference to which occasioned the waiver.

71 In the present case, I consider that the *"transaction"* must be correspondence and other documentation with regard to DBF's feeling that the business Fashion did not look at all valuable and did not appear to present a target worth pursuing, and relating to that being a reason for the claim not being progressed. This is what is specifically relied upon by the Claimant in paragraph 45 of his witness statement in support of the assertion that DBF took time to make progress, which in turn is relied upon in order to seek to undermine the Defendant's case as to inaction.

72 As is apparent from paragraphs 1(3)(a) and (b) of the Draft Order referred to in paragraph 3 above, the Defendant contends that I should find that the waiver extends considerably further, and in particular that it extends to all correspondence/documentation in which DBF advised that the Claimant should not pursue the claim, for whatever reason, and more generally recording other reasons why the Claimant did not progress the claim.

73 The Defendant relies upon a cherry picking and fairness argument. It is submitted on behalf of the Defendant that DBF's feelings with regard to the business Fashion referred to in paragraph 45 of the witness statement form part of a bigger picture as to why DBF took time to progress the claim, particularly given that the specific example is expressed to be only *"primarily"* the reason, suggesting other reasons. It is said that it would be wrong for the Claimant to be able to cherry pick by relying upon this specific example, and that doing so creates an unfairness to the Defendant.

74 I am not persuaded that there is any such unfairness on the facts of the present case, or that there is to be regarded as having been any further waiver beyond the identified *"transaction"*.

75 As Hickinbottom LJ observed in *Jet2.Com Ltd v CAA* (supra) at 111, although voluntary disclosure of a privileged document may result in the waiver of privilege and other material, it does not necessarily have the result that privilege is waived in all documents of the same category or all documents relating to all issues which the disclosed document touches.

76 Although it might be said that the reference to DBF feeling that the business of Fashion did not look at all valuable and did not appear to present a target worth pursuing is part of a bigger picture involving other non-primary reasons as to why DBF took time to make progress with the Claimant's claim, I note that no other reasons have been identified as being relied upon by the Claimant in support of his case. That being the case the generalised reference to other reasons is unlikely to carry any real evidential weight. Consequently, any generalised reliance upon other reasons has no real significance so far as the determination of the case is concerned.

77 This, to my mind, has a number of consequences:

(a). Firstly, from an evidential and forensic perspective, there is no real need for the Defendant to address any other reasons. Consequently there can be no real need for disclosure for the purposes of doing so.

(b). Secondly, given that only one specific and distinct reason for inaction has been identified as being relied upon for the purpose of resisting the case as to inaction, it is difficult to see that this is a case where the Claimant can be said to have cherry picked to his advantage, or that further disclosure is required to prevent the Defendant or the Court being misled.

78 Overall, I do not consider fairness requires that waiver be extended in the way suggested by the Defendant. Any extension of the waiver would, as I see it, give the Defendant a largely speculative advantage rather than a principled one. Further, once the genie is let out of the bottle so far as any extension of waiver is concerned, I consider it difficult to see how the limit could be sensibly set as to what becomes disclosable.

79 In the circumstances, I consider that the scope of the waiver should be limited to copies of correspondence and other documentation relating to the contention in paragraph 45 of the Claimant's witness statement dated 4 November 2022 that his Solicitors, DBF, felt that the business Fashion did not look at all valuable and did not appear to present a target worth pursuing and that this was a reason why DBF took time to make progress with his claim.

Application of paragraphs 17 and 18 of PD57AD

80 I consider that the present case falls within paragraph 17 of PD 57AD rather than paragraph 18 thereof.

81 Extended Disclosure as provided for by the June Order, and specifically issue 12 contained within the DRD, extends to the issue of the *"inaction of the Claimant in asserting the claim before December 2020"*. Disclosure is a continuing process. Now that what is said in the first sentence of paragraph 45 of the Claimant's witness statement has been said, then subject to the question of privilege and waiver, a duty of disclosure arises in respect thereof. In the light of my findings regarding waiver, I consider that it can now properly be said for the purposes of paragraph 17 of PD 57AD that there has been a failure adequately to comply with an order for Extended Disclosure, namely the June Order to be read in the light of subsequent developments.

82 Given the importance of the issue in the case, particularly having regard to the allegation of fraud raised by the Defendant as to the false basis of the claim, I am satisfied that it is both reasonable and proportionate (having regard to paragraph 6.4 of PD57AD) to order disclosure as sought by the Defendant, limited as referred to above.

Conclusion

83 Whilst I will, if required, hear further submission as to the precise form of the Order, in the light of my finding that there has been waiver of legal professional privilege, but limited as above, I am prepared to make an order that the Claimant should by a specified date carry out a search of the scope referred to in paragraph 79 above, and to make an order in the terms of paragraphs 2 and 3 of the Draft Order in respect of that class of documents.