



CL-2018-000283

Neutral Citation Number: [2019] EWHC 3 (Comm)

Case No: CL-2018-000283

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**COMMERCIAL COURT (QBD)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 15/01/2019

**Before :**

**THE HONOURABLE MRS JUSTICE MOULDER**

**Between :**

**RAIFFEISEN BANK INTERNATIONAL AG**

**Claimant**

**- and -**

**(1) ASIA COAL ENERGY VENTURES LIMITED**

**Defendants**

**(2) ASHURST LLP**

**Jeffrey Gruder QC, David Foxtton QC and Michael d’Arcy** (instructed by **Stephenson Harwood LLP**) for the **Claimant**  
**Matthew Hardwick QC** (instructed by **Holman Fenwick Willan LLP**) for the **First Defendant**  
**David Wolfson QC and Michael Watkins** (instructed by **Mayer Brown International LLP**) for the **Second Defendant**

Hearing date: 17 December 2018

**APPROVED JUDGMENT**

**Mrs Justice Moulder :**

1. This is the claimant's application dated 21 November 2018 for the second defendant to answer the claimant's Request for Further Information dated 10 July 2018 (the "First RFI") and to give specific disclosure of certain classes of documents (the "Disclosure Application"). The claimant also makes a second application for the second defendant to answer the claimant's Request for Further Information dated 6 November 2018 (the "Second RFI").
2. The claimant's application is supported by a witness statement dated 21 November 2018 of Ms Newman, partner in the firm of Stephenson Harwood LLP, solicitors for the claimant.
3. The second defendant, Ashurst LLP ("Ashurst") has filed evidence in response in a witness statement of Mr Glassey dated 5 December 2018. Mr Glassey is a partner in the firm Mayer Brown International LLP, solicitors for the second defendant.
4. The applications which fall for determination do not concern the first defendant, Asia Coal Energy Ventures Ltd ("ACE") and no submissions were advanced for ACE at the hearing of the applications.

**Background**

5. The claim in this matter by Raiffeisen Bank International AG ("RBI") arises out of a proposed public takeover by ACE of a company, Asia Resource Minerals plc ("ARM"). RBI held 23.8% of the shares in ARM together with the benefit of certain loans and associated collateral.
6. The purchase by ACE of the ARM shares and the loans made by RBI was financed by PT Sinar Mas Multiartha TBK ("SM Multiartha").
7. The purchase price for the assets was to be paid directly to RBI.
8. In the transaction ACE was represented by Holman Fenwick Willan, RBI was represented by Allen & Overy and SM Multiartha was represented by Ashurst.
9. A sale and purchase agreement dated 7 May 2015 was entered into between ACE as purchaser and RBI as seller (the "SPA") in relation to the sale of the loans and ancillary rights. The SPA contemplated the parties agreeing an escrow arrangement (clause 4.1) pursuant to which the documents relating to the transfer of the loan assets and the maximum amount due to the seller (\$85 million) would be held in escrow and released upon satisfaction of the conditions precedent to the sale under the SPA.
10. The SPA also acknowledged that the seller, RBI, had received from Ashurst a confirmation that Ashurst would hold \$85 million in their

client account pending the transfer to the escrow agent and had instructions to transfer that amount to the escrow agent upon signing of the escrow agreement.

11. Clause 4.2 of the SPA provided that if the escrow agreement was not entered into within 30 days of the SPA, the parties would discuss alternative arrangements to achieve the same commercial purpose.
12. As provided in the SPA, Ashurst issued a confirmation (the "Confirmation") dated 7 May 2015 stating:

"We confirm that:

- (a) we have been put in funds in an amount that is not less than US\$85 million...; and
- (b) we have irrevocable instructions as follows:
  - (i) to transfer the Escrow Amount to the Escrow Agent upon the signing of the Escrow Agreement in accordance with the terms thereof; and
  - (ii) in the event that the Escrow Agreement is not signed within 30 days of the date hereof, to continue to hold the Escrow Amount pending agreement by the Parties contemplated by clause 4.2..."

The Confirmation was expressed to be governed by English law.

13. The shares in ARM were transferred to ACE on 1 July 2015 and \$50 million was paid. However the loans and "ancillary rights" intended to be sold as part of the deal were not transferred and a dispute arose. ACE did not complete the purchase and the payment of the balance of US\$70 million was not made.
14. RBI in these proceedings brings a claim against ACE for breach of contract and against Ashurst for misrepresentation in respect of the Confirmation and breach of a duty of care to RBI.
15. Ashurst's defence is that it gave warranties that it had been put in funds and had instructions to transfer the funds to the escrow agent when the escrow agreement was signed, or if it was not signed, to hold the funds whilst the parties were seeking to agree an alternative i.e. whilst such agreement was "pending". Ashurst says this meant that they would hold the funds until there was no realistic prospect of an agreement being reached.
16. Whilst counsel for the claimant made submissions on the construction of the Confirmation advanced by Ashurst and in particular, made reference to the evidence of the intended value of the Confirmation to RBI, this court cannot of course consider the

merits of the competing arguments as to the construction of the Confirmation which is a matter for trial. The court also notes that the issue of whether Ashurst made a warranty or a representation is disputed. Accordingly references in this judgment to “representations” made by Ashurst are for convenience and should not be taken as expressing any view on the legal nature of the assurances in this regard.

#### Relevant legal principles applying to the applications

17. Pursuant to CPR 18.1 the court may order a party to clarify any matter which is in dispute or to give additional information in relation to any such matter, whether or not the matters are contained or referred to in a statement of case. PD18 paragraph 1.2 states that the request should be:

“strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his case or to understand the case he has to meet.”

18. An application for specific disclosure is made pursuant to CPR 31.12. The court has a discretion and in exercising the discretion will take into account all the circumstances of the case and the overriding objective. The court needs to satisfy itself that the documents are relevant and that they are or have been in the party’s control or at least that there is a prima facie case that these requirements will be met.
19. In this case Ashurst assert that it is not entitled to disclose or offer inspection of the instructions received by Ashurst from SM Multiartha in respect of the Confirmation because such instructions are subject to legal advice privilege and the right to privilege cannot be overridden simply because the information could be relevant to the issues in dispute. It is submitted that equally Ashurst cannot be required to plead a case which sets out the substance of those instructions in a pleading.

#### The claim for privilege and confidentiality in relation to both the RFI and the Disclosure Application.

#### Relevant legal principles

20. It was, I believe, accepted for RBI that legal professional privilege where it applies is absolute: *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 at [25]. Submissions therefore made on behalf of RBI that went to the relevance of the information which was sought cannot affect the decision whether to order disclosure and/or a response to the information sought if privilege is established.

21. Legal professional privilege can be waived by the client but in this case the court was informed that SM Multiartha has refused Ashurst's request to disclose its instructions to Ashurst so there has been no express waiver.
22. The claim for privilege was advanced by Ashurst on the basis that it has a duty to claim privilege where it arguably exists: *Nationwide Building Society v Various Solicitors* [1999] PNLR 52 at 65. Accordingly Ashurst advanced its analysis as an officer of the court.
23. It was also common ground that legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement. (*Three Rivers ibid* at [24])
24. As to the scope of legal advice privilege, Lord Scott of Foscote at [38] in *Three Rivers* cited with approval Taylor LJ in *Balabel v Air India* [1988] Ch 317 at 330, that for the purposes of attracting legal advice privilege  

“legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”
25. By its Disclosure Application RBI seeks disclosure and inspection of:
  - (a) any document containing the “irrevocable instructions” referred to in the Confirmation;
  - (b) any document containing any variation or change of the “irrevocable instructions”;
  - (c) the balance of Ashurst's client account into which the escrow amount referred to in the Confirmation was paid, from the date on which the escrow amount entered the account until the date on which the escrow amount left the account: and
  - (d) all instructions given to the individuals at Ashurst concerning what was to be done with the US\$85 million including instructions concerning the transfer of the amount upon signing of the escrow agreement, concerning the basis on which the amount was to be held in the account if the escrow agreement was not signed and any instructions as to when and where the amount was to be moved from the account.

### Client account

26. Dealing first with the application to disclose the balance of Ashurst's client account (as described in subparagraph (c) above), it was submitted for Ashurst that the status of the client account is confidential but not privileged (*Nationwide* at p76) and that given that the claimant is not seeking documents relating to the client account, disclosure of the details of the balance which are requested would not be likely to reveal privileged information. Accordingly Ashurst, whilst not consenting to the order, did not object to an order being made by the court for disclosure of the details sought as set out in subparagraph (c) above.
27. I accept that disclosure of the balance of the client account as sought does not involve legal advice privilege. Further the order sought will enable replies to be given to the RFI which, as required by CPR 18.1, will clarify a matter which is in dispute or give additional information in relation to any such matter, in that it will confirm whether the Confirmation was accurate as to the receipt of funds and will show whether funds were paid away; it will also show whether this was inconsistent with the instructions set out in subparagraph (b) of the Confirmation. I therefore make an order accordingly.

### Documents sought

28. In relation to the documents which are sought (as described above), it was submitted for RBI (in summary) that:
  - (a) the instructions are not confidential because SM Multiartha authorised Ashurst to enter into a legal relationship with RBI, Ashurst was asked by its client to state what instructions the client had given to Ashurst (and did so) and those instructions were irrevocable;
  - (b) by authorising Ashurst to enter into the relationship and make such statements, SM Multiartha had authorised Ashurst to disclose the instructions or waived any privilege in the instructions;
  - (c) the nature of the instruction as to the use of funds was not a communication of a kind which attracted legal advice privilege: Ashurst was doing no more than a bank often does in similar circumstances, namely confirming that funds have been remitted to it and that it holds irrevocable instructions as to the use of those funds; and
  - (d) to the extent that Ashurst entered into communications with ACE which record the instructions given to Ashurst, these are not privileged as ACE was not Ashurst's client and it was

unlikely that the instructions were shared on a confidential basis.

### Confidentiality

29. Dealing firstly with the question of whether the instructions can be said to be confidential, counsel for RBI relied on the Court of Appeal decision in *Conlon v Conlons* [1952] 2 All ER 462 as authority for the proposition that legal professional privilege did not extend to a communication which the client instructed the solicitor to repeat. Counsel noted that *Conlon* was expressly approved in *Balabel* at 331.
30. For Ashurst, counsel sought to distinguish *Conlon* on the basis that the information sought in that case was very narrow in scope and only minimal information was to be disclosed through interrogatories. It was also submitted for Ashurst that the decision in *Conlon* may be more readily explained as a case of implied waiver as suggested by *Matthews and Malek on Disclosure* (Fifth edition) at 11.73 referring to the Australian case of *Moreay Nominees Pty Ltd v McCarthy* (1994) 10 WAR 293.
31. *Conlon* was a case where the plaintiff refused to answer the defendant's interrogatories on the ground that they were enquiries as to communications passing between him and his solicitors and were privileged. The proposed interrogatories were based on letters written by the plaintiff's solicitors to the defendant stating that the plaintiff was prepared to accept £1000 in settlement of the claim. The plaintiff refused to answer the interrogatory as to whether he authorised the solicitor to make the offers of settlement. The court held that the plaintiff could not claim privilege in respect of that which he had said to his solicitor and at the same time had told his solicitor to communicate to the other side. Singleton LJ said it would be legitimate and proper to put to the plaintiff a question as to whether he authorised his solicitors to settle the case for £1000. He said [at 466B]:

“I do not think that the putting of interrogatories on those lines or the putting of a question on those lines would go against the rule of privilege in any sense whatsoever. The very object of the plaintiff in so instructing his solicitors would be that they should make that communication to the other side. If he had not instructed them so to do the answer is simply “no”. If he had instructed them, to the plain question which I suggest the answer would be “yes”...”
32. Morris LJ, agreeing with the judgement of Singleton LJ said:

“When those letters are examined a fair and reasonable reading of them is: “my client authorises me to say to you that he will accept such and such an amount in settlement”. That being so, an enquiry whether the plaintiff did or did not authorise his solicitor to write those letters is not an enquiry as to communications passing between the plaintiff and his solicitor confidentially. There is no suggestion in this case of asking for the disclosure of anything that the solicitors may have said to the plaintiff in regard to his claim generally or by way of giving advice as to the prospects of the action. The enquiry that is raised is whether the plaintiff did or did not authorise his solicitor to write certain letters which state that the plaintiff will accept a certain sum.”

33. What is sought by the Disclosure Application in this case includes “any document containing the irrevocable instructions” and any document containing any variation or change of the irrevocable instructions.
34. In relation to the first category “any document containing the irrevocable instructions”, the application in this case is much broader than the position in *Conlon* where the plaintiff was able to give a simple “yes” or “no” response. The claimant seeks specific disclosure of documents which as well as containing the irrevocable instructions may well contain legal advice. The situation is therefore in my view closer to the position in *Ramac Holdings Ltd v Brachers* [2002] EWHC1683 (Ch).
35. In that case the claimant sought documentary material upon which a solicitor had relied in making representations about the existence of an agreement. Etherton J refused to allow cross-examination of the solicitor for a number of reasons, including that permitting cross examination might give rise to difficult disputes as to whether the evidence was subject to privilege. He noted that it was possible that the instructions to the solicitor were bound up with discussion generally about the agreement and the meeting.
36. Etherton J also considered whether he should direct the solicitor to make a witness statement or affidavit as to his instructions. It was submitted that if a solicitor is instructed by his client to certify a particular matter the solicitor should be at liberty if subsequently challenged to refer to the underlying facts and matters on which he relied, even if those facts and matters were communicated to him by the client in confidence and for the purpose of legal advice. Etherton J rejected the submissions: he stated that the starting point was that the courts have long been cautious about permitting exceptions to legal professional privilege and that fairness was not



the “touchstone” by which it is determined whether a client has impliedly waived his privilege. It could not be implied that the client had waived his privilege.

37. It was submitted for the claimant that the sole purpose of the instructions which are recounted in the Confirmation was to pass on the instructions of SM Multiartha, its client, and that there was no other independent purpose. Further it was submitted that it was a “striking proposition” that the client authorised Ashurst to enter into a separate legal relationship with RBI pursuant to which RBI relied on the fact that an irrevocable instruction had been given, and yet it could be withheld from RBI whether the instruction in fact given was properly and accurately described as irrevocable.
38. In my view that submission takes too narrow an approach to the circumstances of this case. In *Conlon* the client clearly authorised the solicitor to make the offer and that was the purpose of the instructions which were given; on that basis it was clear that there was nothing confidential about the answer to the question whether or not the plaintiff had instructed the solicitors to make the communication.
39. Unlike the position in *Conlon*, in this case Ashurst were not acting as agent of the client in giving the Confirmation to RBI but gave an independent legal commitment. Properly analysed, it was not an instruction by SM Multiartha to tell RBI what the client’s instructions were but was an instruction by SM Multiartha to enable Ashurst to give an independent confirmation, for which Ashurst was solely liable, regarding the holding of the funds and their subsequent payment out of the Ashurst account. As distinct from the position in *Conlon*, the purpose of the underlying instructions was not to pass on the instructions given by SM Multiartha to RBI but to enable Ashurst to be in a position where it could give the independent confirmation which would allow the transaction to be completed. The essence of the instructions from SM Multiartha was not that Ashurst should tell RBI that the instructions were irrevocable but that Ashurst should be in a position to provide independent and legally binding representations on its own behalf to RBI, irrespective of the position as between Ashurst and SM Multiartha which was a matter for Ashurst.
40. It is unclear on the evidence before the court whether there are documents which contain the “irrevocable instructions” but which do not contain commentary or explanation as to the basis on which the instructions were being given or detail of the transaction as a whole. However in my view the documents which “contain” the irrevocable instructions remain confidential for the following reasons:

- (a) unlike in *Conlon*, Ashurst was not acting as agent of the client in giving the Confirmation;
  - (b) in *Conlon* the plaintiff put in issue the authority of his solicitor and the decision in that case may be viewed as a form of waiver by the client;
  - (c) the underlying instructions do not cease to be confidential merely because the client authorises his solicitor to divulge information which has passed in the course of confidential communications; the question is what authority the client has given to his solicitors (*Nationwide* at p72). In my view in the circumstances of this case SM Multiartha did not give authority to disclose the underlying communications.
41. The claimant also seeks disclosure of any document containing any variation or change of the irrevocable instructions on the basis that the client has instructed Ashurst to represent that there are no further instructions and the instruction remains and stands unchanged. It was submitted that any communication relating to that instruction will lack confidentiality because the client has promised that what the lawyer is telling RBI “exhausts the field of relevant instructions”.
42. As noted above, Ashurst did not give the confirmation as agent for its client. Ashurst did not make any representation on behalf of its client but gave an independent assurance. There is no relationship between the client, SM Multiartha and RBI and the purpose of the instructions, as discussed above, was not to instruct Ashurst to convey to RBI that there were no variations or changes to the instructions. Accordingly in my view if there are documents which change or vary the original instructions, such documents remain confidential.
43. The documents sought in subparagraph (d) are even broader extending to the instructions given by SM Multiartha to Ashurst as to when and where the amount was to be moved from the account; the documents sought extend beyond the irrevocable instructions themselves to matters associated with and consequential upon those instructions. In my view there can be no question that SM Multiartha gave authority to Ashurst to disclose any such instructions and it cannot be inferred from the fact that the original instructions were stated by Ashurst to be irrevocable.
44. In my view for the reasons discussed above, the documents sought in relation to the instructions to Ashurst by paragraphs (a), (b) and (d) (as set out above) between SM Multiartha and Ashurst are to be regarded as confidential.

## Waiver

45. As to the submission for the claimant that SM Multiartha had waived any privilege by authorising Ashurst to enter into the relationship and make statements, counsel for the claimant accepted that this was really a repackaging of the arguments made in relation to confidentiality. Counsel for RBI submitted that the present situation was narrower than the position in *Ramac* because it was concerned with the “very thing” that the client has authorised the solicitor to tell the other side exists and has been given, and further that it did not involve the sort of “roving around” amongst legal advice that you would have necessarily had in *Ramac*.
46. Even if disclosure were confined to the documents sought under paragraph (a) namely “any document containing the “irrevocable instructions””, I do not accept, for the reasons discussed above, that the underlying instructions can be construed as the “very thing” that the client has authorised the solicitor to tell the other side exists. It would in my view involve “roving around” in the underlying legal advice and is therefore analogous to the position in *Ramac*.
47. In my view, for the reasons discussed above, the nature of the instructions were to put Ashurst in a position where it could give the independent confirmation but in so doing SM Multiartha cannot be taken to have authorised or waived the confidentiality in the underlying instructions.

## The nature of the communication-the relevant legal context

48. Having determined that the underlying instructions are confidential, the question which then has to be addressed is whether a “relevant legal context” existed such that privilege attaches to the communications. The court was referred to the test formulated by Lord Rodger in *Three Rivers* at [60D] whether the lawyer has put on “legal spectacles”. I note that Lord Rodger stated at [58]:

“In relation to legal advice privilege what matters today remains the same as what mattered in the past; whether the lawyers are being asked *qua* lawyers to provide legal advice.”
49. It was common ground that privilege attaches not only to a document conveying legal advice and a specific request for advice but that where the transaction involves protracted dealings, advice may be required or appropriate at various stages and there will be “a continuum of communication”. As stated by Taylor LJ in *Balabel* at [330] and cited with approval by Lord Carswell in *Three Rivers* at [111]:

“where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach... Legal advice is not confined to telling the client the law; it must include advice to what should prudently and sensibly be done in the relevant legal context.”

50. Lord Carswell said:

“I agree with the view expressed by Colman J... that the statement of the law in [*Balabel*] does not disturb or define the principle affirmed in *Minter v Priest* ...that all communications between a solicitor and his client relating to the transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.”

51. It was submitted for RBI that:

- (a) it must be an extremely rare instruction that attracts legal advice privilege that is irrevocable; it is at the heart of instructions clients give to lawyers within the domain of legal advice that the client reserves the right to change its mind;
- (b) the instruction could have come from somebody else and could have come from a bank; there is nothing inherently legal about the context;
- (c) there was no transaction between RBI and SM Multiartha and Ashurst were not advising anyone on any transaction that they were entering into with RBI.

52. As noted by Lord Carswell in *Three Rivers* and cited above, all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.

53. In this case, communications regarding the transfer of the funds to be held by Ashurst and the confirmation to be provided by Ashurst to RBI, were part of the completion arrangements for the purchase by ACE of the loans and the provision of finance by SM Multiartha.

The role and duty of Ashurst was to provide legal advice to SM Multiartha in relation to the provision of that finance. Ashurst had a duty as its legal adviser to reduce the risk to its client that the money was transferred by SM Multiartha without the assets having been received in return, or a condition remaining unsatisfied such that its client was exposed to a financial loss or legal liabilities which did not reflect the commercial deal. The Confirmation from Ashurst has to be viewed in the context of the transaction viewed as a whole and the advice that Ashurst would give as to the necessary steps in order to achieve the commercial objective of its client and protect its client.

54. I reject the submission that SM Multiartha was not a party to the transaction merely because there was no agreement between RBI and SM Multiartha. It is clear from the outline referred to above that SM Multiartha was providing finance to ACE for the transaction. It is therefore not sustainable to describe SM Multiartha as not being a party to the transaction. It was a key participant and I infer that as such SM Multiartha engaged Ashurst to provide legal advice to protect its interests.
55. In my view the role of Ashurst is distinct from the scenario where a bank may be instructed to receive and hold monies and to give a confirmation. Ashurst in advising SM Multiartha on the transaction, and in particular the transfer of the funds, is applying its legal knowledge and advising the client on a legal matter, namely how best to safeguard the interests of SM Multiartha in paying away funds in order to complete the acquisition. It is wrong in my view to focus narrowly on the Confirmation when determining whether or not the underlying communications are made in a relevant legal context. The underlying communications which contained the irrevocable instructions are inextricably bound up with the legal advice of Ashurst to protect the interests of its client. Unlike the example of the bank, the context here is an inherently legal context, namely legal advice given to SM Multiartha in relation to the financing. Ashurst were not advising on the wisdom of giving the instruction or merely lending their name to provide RBI with confidence; they were advising SM Multiartha in relation to the financing as a whole and in particular on how to protect its position in paying over the money at completion.
56. I do not accept the submission that the fact that the client may or may not be able to change its mind in relation to the instructions affects the question of whether there was a relevant legal context nor does it demonstrate that the instructions were not given in the context of legal advice.
57. It may be the case that the documentation between SM Multiartha and Ashurst containing the irrevocable instructions relating to the holding of the funds did not itself contain advice on matters of law,

however for the reasons discussed above, they would be part of the continuum of communication.

58. In my view therefore the documents containing the irrevocable instructions (referred to under subparagraph (a)) and the documents sought under subparagraphs (b) and (d) are privileged as they were given in a relevant legal context. In context they must be seen as directly related to the performance by Ashurst of its role of providing legal advice to its client.

#### Communications with third parties

59. As to communications between Ashurst and ACE, it was accepted by counsel for RBI that if the advice had been shared confidentially, the privilege would apply but it was submitted that in order to apply Ashurst and ACE would have to communicate in respect of the instructions on a confidential basis. It was submitted for RBI that this was unlikely as the undertaking was provided as part of the SPA and that Ashurst must have communicated with ACE whether they had received instructions, whether they had received the funds, whether they ceased to hold the funds and whether the escrow agreement was no longer pending. It was submitted that it was inherently unlikely that the instructions which were shared were confidential.
60. It was submitted for Ashurst that the court cannot resolve on this application whether the communications were on a confidential basis. It is common ground that if the instructions were privileged then a summary sent to a third party will remain privileged if the communication is confidential. Counsel for Ashurst therefore submitted that the court can only accept the general principle and should not order specific disclosure.
61. Given that SM Multiartha was financing ACE in the transaction and Ashurst, acting for SM Multiartha, had no duties to RBI other than the specific obligations arising under the Confirmation, I do accept the submission that it is improbable that communications between Ashurst and ACE were not intended to be confidential. Counsel for RBI relied on the fact that under the SPA RBI and ACE had an obligation to carry out good faith negotiations if the escrow arrangement was not entered into. In my view this obligation (even if legally binding) does not lead to a conclusion that to the extent that Ashurst's instructions from SM Multiartha were shared with ACE, those communications were anything other than confidential. ACE and SM Multiartha shared a common interest in the purchase of the assets and may therefore have exchanged information through Ashurst on a confidential basis; there was no such common interest between ACE and RBI or SM Multiartha and RBI which would suggest that communications between Ashurst and ACE as to instructions received from SM Multiartha would be or were intended to be shared with RBI.

62. For these reasons I accept the submission for Ashurst that it would be premature to order specific disclosure of any such communications with third parties.

### Conclusion

63. For the reasons set out above, I find that the instructions from SM Multiartha are privileged and the claimant is not entitled to the documents sought in the Disclosure Application pursuant to paragraphs 1 (a), (b) and (d) or to require Ashurst to plead a case which sets out the substance of those instructions. I order disclosure and inspection of the balance of the Ashurst client account as set out in paragraph 1 (c) of the draft order.
64. As to the first RFI Application, in the light of the court's findings the parties should be able to reach agreement.

### Second RFI Application

65. As to the Second RFI Application, the claimant seeks a response to the following questions:
- (a) when on Ashurst's case the alternative arrangements ceased to be "pending" (Request 1);
  - (b) the identity of the individuals who received and acted on the client's instructions and formed the opinion that the arrangement had ceased to be pending (Request 2);
  - (c) whether the relevant individuals at Ashurst understood the Confirmation to bear the meaning contended for by Ashurst (Requests 3 - 6).
66. Ashurst has declined to provide answers on the basis that in relation to Request 1, the date at which the arrangements cease to be "pending" is already pleaded; in relation to Request 2, Ashurst's case as to the meaning of the Confirmation is a question to be judged objectively; and in relation to Requests 3 - 6, these requests are not confined to that which is reasonably necessary or proportionate to enable RBI to understand the case it has to meet.
67. It was submitted for the claimant that depending on the intention of the individuals at Ashurst, there was either a negligent misrepresentation as to the instructions they received or alternatively there may be a claim in rectification.
68. Whilst counsel for Ashurst accepted that a Part 18 request is not limited to pleaded issues, it was submitted that the case advanced by RBI as to misrepresentation is based on the objective meaning of the representation and not the intention of individuals at Ashurst. In relation to the alternative submission that a case might be

advanced on the alternative basis of rectification, it was submitted that such an argument could be advanced in every contractual construction case.

69. Counsel for Ashurst accepted that the issue of reliance on the representation was subjective but submitted that the meaning of the representation and whether it was false was an objective matter.
70. In my view, Request 1 has been answered by reference to the pleadings in particular by the cross references to paragraphs 52, 53, 57 and 58 of the Defence. In relation to Request 2 I accept that Ashurst's case as to the meaning of the Confirmation, as set out in paragraph 9 of the Defence, is a question to be judged objectively and therefore Request 2 requiring Ashurst to identify the individuals who formed an opinion, has not been shown to be necessary in order for RBI to understand the case it has to meet. The possibility of a rectification claim is not sufficient in my view to justify the requests made in Requests 3 - 6 of the RFI. Counsel for the claimant has expressly disavowed in oral submissions any fraud claim being advanced against Ashurst. Accordingly in my view Requests 3 - 6 are not necessary to enable the claimant to prepare its case. The claimant seeks information in order to advance a different case. It was submitted that it would be proportionate to deal with the matter now to avoid the matter being raised once pleadings had been amended to plead a case in rectification. I do not accept that the argument based on "proportionality" is sufficient to justify an order to obtain information about a case which is not currently pleaded and may not be advanced.