Neutral Citation Number: [2022] EWHC 376 (Comm)

Case No: CL-2019-000380

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 February 2022

Before :

CHARLES HOLLANDER QC
SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

(1) KYLA SHIPPING CO LTD **(2) VEGA CARRIERS LTD**	**Claimant**
- and -	
(1) FREIGHT TRADING LTD **(2) C TRANSPORT PANAMAX LTD** **(3) C TRANSPORT MARITIME S.A.M** **(4) LUIGI CAFIERO**	**Defendant**

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- -

Luke Pearce (instructed by **Schjodt**) for the **1st 3rd and 4th Defendants**
Adam Turner (instructed by **Watson Farley & Williams**) for the **Claimants**

Hearing date: 10 February 2022
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JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 22 February 2022 at 10:30 am

Charles Hollander QC :

1. By this application the First, Third and Fourth Defendants:

   a. challenge the Claimants' claim for litigation privilege and

   b. contend that there has been a waiver of privilege which entitles them to disclosure of additional materials referred to in a witness statement.

2. The Second Defendants play no part in these applications. For convenience I refer however to "the Defendants".

3. The claim arises out of 41 forward freight agreements (the FFAs) entered into in 2007 and 2008 between the First Claimant (Kyla) and the First Defendant (FTL), or in one case between Kyla and either FTL or the Second Defendant (CTP). The Claimants allege that the FFAs were entered into by the Third Defendant (CTM) through the Fourth Defendant (Mr Cafiero) at off market rates in order to enrich FTL or CTP who were at the time in the same corporate group as CTM, at the expense of Kyla. They say the FFAs are void as concluded by CTM without authority. This claim is referred to as the "mispricing claim" or "mispricing fraud". When I use those terms, I should make clear that I express no view as to whether such a claim will be made out at trial.

4. The Defendants deny that CTM ever acted as agent for Kyla. They say the FFAs were concluded for Kyla by its own principal Nikolaos Livanos (NEL). They say the claims are also time barred. The Claimants respond by relying on s.32 of the Limitation Act 1980. The trial commences on 7 March 2022, for 12 days.

5. Kyla was 70% owned by NEL and 30% by YPA, which Peter Livanos (PGL) was interested in. There was in 2018 a dispute between Kyla and its shareholders as to whether a dividend should be declared in relation to the monies received from insurers as a result of the constructive total loss of the vessel *Kyla*. This led to a dispute (the YPA Dispute) which was potentially litigious. It is now accepted by the Defendants that by the end of October 2018 litigation was in reasonable contemplation in relation to the YPA Dispute and that litigation privilege may be claimed by the Claimants for documents created for the dominant purpose of that dispute.

6. On 29 October 2018 Mr Haramis wrote on behalf of YPA to NEL. The letter stated:

> "*You will not need reminding that YPA's Principals have provided you personally with great support and consistent assistance over the years, starting from your very first steps as a young man in the shipping industry. … Further still, when you/Vega Carriers Limited ran up huge debts on the freight forwarding agreements entered into in 2008, we procured that our affiliated entities showed great flexibility and patience in circumstances where they could have simply demanded payment and accelerated enforcement against you/Vega Carriers Limited.*
>
> *The resolution of the Kyla Shipping position therefore represents much more than simply the proper distribution/return of assets*

> *and interests belonging to YPA Associates. The considerable assistance provided to you personally over the years makes proper resolution of the Kyla Shipping position a question of integrity and trust*."

7. On 15 November 2018 NEL wrote to PGL. The letter includes the following passage:

> "***FTL***
>
> *Given our relation and trust, full authority was granted to your affiliated company to act on our behalf. From this venture losses amount to excess of $31 million, which were paid in full. As you very well know, the industry was settling unsecured FFA outstandings at a discount, but FTL elected to settle at par value, without giving us the option to negotiate a discount. Relevant documents were repeatedly requested, but were never disclosed. This case indicates without doubt a great level of mismanagement and abuse of the powers previously granted to you, as well as complete failure to safeguard our interests; thus now the entirety of transactions executed by FTL on our behalf is questioned.*"

8. In support of the Claimants' application for service out at the outset of the proceedings on 8 October 2019 Kyla relied on a witness statement from Mr Charles Buss of Watson Farley Williams (WFW). Mr Buss said as follows anticipating a potential limitation defence:

> *164. By late 2018, the correspondence concerning a distribution to the minority shareholder had become highly antagonistic (and the situation has since then escalated, with YPA bringing proceedings in Norway to seek to force disclosures by Gard). I am limited in the reference I can make to this correspondence, because some of it was sent on a "without prejudice" basis. I can say, however, that NEL was upset by the tone of the correspondence, particularly given the family connections involved. The historical situation with the FFAs had some relevance to this reaction. NEL had paid the full $31 million FFA exposure from his own pocket, despite the more modest assets which existed within Kyla, and despite the fact that, in late 2008, the industry as a whole had been settling unsecured FFA undertakings at a discount, whereas CTM/FTL had never obtained any discount on Kyla's liabilities. On 15 November 2018 NEL wrote a letter to PGL in which he raised this grievance about the absence of any discount on FFA Settlements.*
>
> *165. At about this time, having appointed a new firm of accountants to perform an analysis of Kyla's historical transactions, NEL decided it was appropriate to appoint an expert to audit the FFAs. This would allow him to make good any legitimate grievance that might exist, for the sake of providing ballast in the correspondence with YPA/PGL. In late 2018 an expert was appointed, and as part of the process, data on market rates from the relevant dates in 2007 and 2008 was obtained from SSY, in the form of the daily reports of estimated course-of-business prices on the relevant dates. This historic information is not publicly available or readily accessible.*

166. The initial data set was obtained from only one broker, and therefore required caution to be exercised as to its reliability. It did, however, raise real questions about the Contract Rates in the FFAs. In early 2019, therefore, expert evidence was obtained on the pattern of trading conducted on behalf of Kyla, and particularly on the question of whether the apparent discrepancies between the Contract rates achieved and the historic market data was indicative of fraud. This led to further data being sought, particularly in the form of the daily BFA reports from the relevant dates, which, being an average of figures from the leading brokerages, were expected to be more reliable than the SSY figures. Once the BFA data was received, it was the subject of further expert evidence, and the bottom line of this analysis was a heightening of the concern raised by the original data. This analysis, and a parallel review by WFW and counsel, resulted in the summary of pricing deviations and suspicious trading patterns which is now set out in the draft Particulars of Claim. For NEL, the revelation that the FFAs were, or may have been, deliberately mispriced, has come out of nowhere. Self-evidently, he would not have funded the FFA losses out of his own pocket (ie without appealing to the limited liability of Kyla) if he had harboured any suspicion that the contracts had been arranged in an untoward manner.

9. The Claimants stated on their disclosure certificate that they withheld because of privilege "*documents relating to the investigations into the FFAs*."

10. Mr Buss, in his 9th witness statement, states that in 2018 Kyla became increasingly engaged in a dispute with its minority shareholder, YPA, in relation to the insurance proceeds following the constructive total loss of the *Kyla*. He states that by 31 October 2018 at latest, litigation between Kyla and YPA was believed to be in reasonable prospect by Kyla's inhouse lawyer Ms Iliopoulou and legal advice or litigation privilege is claimed in relation to the YPA Dispute from then onwards.

11. Mr Buss explains that on 15 November 2018 NEL wrote to PGL (see above) raising a grievance about the way the FFAs had been handled. PGL had been at the time of the FFAs the ultimate owner of FTL, CTM and CTP as well as having an interest in YPA. WFW were retained on 26 November 2018 and from November 2018 onwards litigation was, he says, in reasonable prospect between the Claimants and one or more of the Defendants in relation to the FFAs. Litigation privilege has been claimed between WFW and third parties and experts from then on for the dominant purpose of that litigation.

12. I do not understand there to be any dispute about claims for legal advice privilege.

13. Thus YPA (and therefore PGL), had referred to the conduct of YPA's principals in assisting NEL in settling debts from losses arising from the FFAs post 2008 and sought to contrast that with NEL's present stance (in relation to the dividend) claiming that it raised questions of integrity and trust. In response NEL countered that rather than provide assistance to NEL, YPA's associated company FTL had mismanaged the post 2008 position in relation to the FFAs by settling on NEL's behalf at par without giving NEL the opportunity to negotiate a discount. In other words what was being said was "*I paid late but I paid in full and should not have had to pay in full."*

14. The Claimants say that in November 2018 an expert was instructed to audit the FFAs in the light of this exchange. Ms Buss in his service out witness statement explains the purpose of the instruction as:

> *"This would allow him to make good any legitimate grievance that might exist, for the sake of providing ballast in the correspondence with YPA/PGL"*

15. Ultimately, the result of the instruction of the expert, and further consequential enquiries, was that the Claimants say the mispricing fraud emerged, which is the subject of these proceedings. The discovery of that alleged fraud came later, say the Claimants, and was a surprise to everyone on their side.

16. As to the "ballast" wording in his first witness statement Mr Buss says (Buss 10/20):

> "*The quoted text is true, if somewhat colloquial, but it must be kept in mind that the relevant correspondence with YPA was correspondence in which YPA was expressly threatening to sue (see above) and the preparation of a counterclaim is an effective way to "provide ballast" when responding to such correspondence.*"

17. So there is no dispute that documents created for the dominant purpose of the YPA Dispute are covered by litigation privilege. And once the mispricing claim had been identified and crystallised that would also be a proper subject for a claim for litigation privilege. The question is whether litigation privilege can be claimed for the "ballast exercise", prior to the crystallisation and discovery of the mispricing claim.

Litigation privilege

18. In order to make good a claim for litigation privilege it must be shown by the party asserting a claim for privilege that the document in question was created for the dominant purpose of conducting litigation in reasonable prospect.

19. The dominant purpose test derives from *Waugh v British Railways Board*[1] where the House of Lords regarded it as insufficient that a document was prepared for two equal purposes if only one of those was a privileged purpose.

20. In *Starbev GP Ltd v Interbrew Central European Holding BV*[2] Hamblen J said:

> "*11. The legal requirements of a claim to litigation privilege may be summarised as follows:*
>
> *(1) The burden of proof is on the party claiming privilege to establish it – see, for example, West London Pipeline and Storage v Total UK [2008] 2 CLC 258 at [50].*
>
> *(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible – see, for*

[1] [1980] AC 521
[2] [2013] EWHC 4038 (Comm)

> *example, Sumitomo Corporation v Credit Lyonnais Rouse Ltd (14 February 2001) at [30] and [39] (Andrew Smith J); West London Pipeline and Storage Ltd v Total UK Ltd [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); Tchenguiz v Director of the SFO [2013] EWHC 2297 (QB) at [52] (Eder J).*
>
> *(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation – see, for example, United States of America v Philip Morris Inc [2004] EWCA Civ 330 at [68]; Westminster International v Dornoch Ltd [2009] EWCA Civ 1323 at paras [19] – [20]. As Eder J stated in Tchenguiz at [48(iii)]: "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".*
>
> *(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA [1992] BCLC 583, 589–590 (cited in Tchenguiz at [54]-[55]); West London Pipeline and Storage Ltd v Total UK Ltd at [52].*
>
> *12. In relation to the Court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence "to "anxious scrutiny" in particular because of the difficulties in going behind that evidence" – per Eder J in Tchenguiz at [52]. "The Court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose" – ibid. 48(iv). Further, as Beatson J pointed out in the West London Pipeline case at [53], it is desirable that the party claiming such privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect*".

21. This passage is often cited. I would simply make two points on it. Firstly, references to *West London Pipeline* must be read subject to *WH Holding* (see below). Second, the expression "anxious scrutiny" is much used in administrative law and I would suggest is better avoided in the present context.

22. Hamblen J continued:[3]

> "*19. …I consider the effect of [Mr Golden's] evidence to be that he had a suspicion concerning the sale of the Business by Starbev and instructed Barclays to investigate in order to see if there was substance to his suspicion. Barclays' role was investigatory. Unless and until they confirmed that there was substance to Mr Golden's suspicion there was no real reason to anticipate litigation."*
>
> *20. This is borne out by his statement that "it occurred to me that ICEH would end up in another dispute with Starbev". This suggests no more than that such a dispute was a possibility. It does not connote that it was reasonably anticipated both that there would be such a dispute and that it would result in litigation. Whether or not it would do so was unlikely to be known until Barclays investigated and reported.*
>
> *21. That Barclays' role was investigatory is borne out by a number of contemporaneous documents which refer to their role as one of checking the position and calculating the payment that might be likely to come to ICEH as a result of the sale*."

23. In *West London Pipeline and Storage Ltd v Total UK Ltd*[4] Beatson J had reviewed the authorities as to when the court could go behind a claim for privilege in an affidavit and held that under the CPR the court could do so when it was shown with "reasonable certainty" that the claim for privilege was in error. This was disapproved by the Court of Appeal in *WH Holding Ltd v West Ham United FC Ltd*.[5] The Court of Appeal, chaired by Etherton MR, held that the "reasonable certainty" test derived from the pre-1893 position when the court had no power to inspect and the modern position was that the court had a discretion to inspect.

24. Whilst the Court of Appeal in *WH Holding* disapproved part of what Beatson J said, they endorsed other parts of his analysis as to how the court should deal with an affidavit or witness statement claiming privilege. The burden is on the party claiming privilege to prove it. An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement is not determinative. The court has four options if it is not satisfied as to the assertion of privilege on the basis of the affidavit or witness statement. It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection. It may order a further witness statement to deal with matters which the earlier witness statement does not cover or on which it is unsatisfactory. It may inspect the documents, or order cross-examination on the witness statement.

25. Beatson J also considered what should be the content of such an affidavit. He said:

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[3] [19]-[21]
[4] [2008] EWHC 1729 (Comm).
[5] [2018EWCA Civ 2652

> "*Thus, affidavits claiming privilege whether sworn by the legal advisers to the party claiming privilege as is often the case, or, as in this case, by a Director of the party, should be specific enough to show something of the deponent's analysis of the documents or, in the case of a claim to litigation privilege, the purpose for which they were created. It is desirable that they should refer to such contemporary material as it is possible to do so without making disclosure of the very matters that the claim for privilege is designed to protect.*"[6]

26. In *Axa Seguros SA De CV v Allianz Insurance Plc*[7] Christopher Clarke J summarised the position as follows:

> "*An affidavit which sets out a claim for privilege by stating the alleged purpose of the communication is not conclusive where it is appears from other evidence that the characterisation of the documentation is misconceived. The court must consider the issue in the light of all the evidence including, but not limited to any statement of purpose."*

27. It is also relevant that the person who has all the relevant knowledge will be the party claiming privilege. The other side will have none. Thus one must bear in mind as Neuberger J said in the pre- CPR case *Bank Austria Aktiengesellschaft v Price Waterhouse*[8]:

> "*A claim for privilege is an unusual claim in the sense that the legal advisers to the party claiming privilege are, subject to one point*[9] *the judges in their own client's cause. The court must therefore be particularly careful to consider how the claim for privilege is made out*."

28. This serves to emphasise the importance of the position of the lawyer who determines whether to claim privilege as officer of the court. There is simply no escaping the lawyer being judge in his own, or his client's own, cause in such cases.

29. "*In reasonable prospect*" means more than a mere possibility but not necessarily a 50% or greater chance. In *United States v Philip Morris,*[10] the judge had said that the person seeking to claim privilege must show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility:

> "*The requirement that litigation be "reasonably in prospect" is not in my view satisfied unless the party seeking to claim privilege can show that he was aware of circumstances which*

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[6] [2008] EWHC 1729 (Comm) at [53].
[7] [2011] EWHC 268 (Comm).
[8] unreported 16 April 1997.
[9] Namely the power of the court to look at the documents to see if it agrees with the claim for privilege.
[10] [2004] EWCA Civ 330.

> *render litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility*."

30. In *Axa Seguros SA De CV v Allianz Insurance Plc*[11] Christopher Clarke J said:

> "*The dividing line between circumstances which afford a reasonable prospect of litigation (but not necessarily that litigation is more probable than not), on the one hand, and a (mere) possibility of litigation on the other, is not entirely clear. The fact that one or more conditions have to be fulfilled in order for a dispute to arise which requires the commencement of litigation in order to resolve it does not necessarily mean that litigation is only a possibility. Much may depend on what, at the relevant time, is the prospect that the conditions will be fulfilled.*"

31. In *Director of the SFO v ENRC*[12] the SFO conducted an investigation into possible overseas bribery and corruption by ENRC. ENRC conducted an internal investigation using external solicitors under the 2009 SFO Self-Reporting Guidelines. At first instance Andrews J held that the documents there created were not protected by legal advice privilege. It was argued that litigation was in reasonable contemplation and thus the documents were protected by litigation privilege. The judge rejected the claim for litigation privilege because there was no evidence that there was anything beyond the unverified allegations themselves. The Court of Appeal reversed the judge on litigation privilege on the facts. They adopted a much more generous view as to when litigation can be said to be in reasonable contemplation. It is notable that the court treated it as something of an issue of principle. Vos C said that it was obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation. Were they to do so, the temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered, whatever might be agreed with a prosecuting authority[13]. The judge had held that adversarial litigation was not in reasonable contemplation in August 2011. By contrast the Court of Appeal accepted[14] that adversarial litigation was in contemplation by April 2011, long before the SFO investigation commenced.

32. I was also referred to *Sothebys v Mark Weiss*[15] where Sothebys instructed an expert to consider whether a Franz Hals painting was forged; if the expert concluded that the it was, Sothebys would rescind the sale contract and it is was argued litigation would be in reasonable contemplation. Teare J held, rejecting the claim to litigation privilege, that the correspondence had two purposes: one to decide whether the painting was a fake and whether to rescind, a second to enable Sothebys to defeat the arguments of Mark Weiss in the anticipated litigation. The decision is fact specific, but I would point out that the facts bear a real similarity to *Re Highgrade Traders Ltd*[16] where a report

[11] [2011] EWHC 268 (Comm).
[12] [2019] 1 WLR 791.
[13] [116]
[14] [101]
[15][2018] EWHC 3179 (Comm)
[16] [1984] BCLC 151

into the cause of a fire commissioned both to ascertain the cause of the fire and to determine whether the insurance claim could be resisted, and the Court of Appeal held the two purposes could not be separated but constituted a "single wider purpose". It is not obvious that the two purposes of Sothebys were other than two aspects of the same purpose.

Litigation privilege: submissions

33. The Defendants criticised the limited information provided by Mr Buss in support of the claim for privilege. They submitted that the evidence did not support the contention that the documents were created from November 2018 for the dominant purpose of a dispute at that stage wholly unknown to Kyla. The instruction of an expert was at the time a fishing expedition. The facts were similar to *Starbev*. Litigation in relation to the FFAs was not in reasonable prospect in October 2018, alternatively there were two equal purposes and the dominant purpose test was not satisfied. The purpose of the expert instruction was to see *whether* there was any legitimate grievance in respect of the FFAs. The fact that Mr Buss and Ms Iliopolou had said it was their view that the test for litigation privilege was satisfied did not prevent the court looking at the matter in the light of all the evidence. Key was the wording in the service out witness statement which did not support the present privilege claim.

34. The Claimants refer to the considered statement in evidence from Mr Buss, an experienced city solicitor, and Ms Iliopolou as to the purpose of creation of documents. It was impossible to say more without running the risk of waiving privilege. Litigation was in reasonable prospect in relation to the YPA claim and the purpose of the instruction of an expert was, in circumstances where there was reason to believe there was material to justify the bringing of a counterclaim in those proceedings, and where there was desire to bring such a counterclaim, to provide evidence in support. So the documents were for the dominant purpose of litigation in reasonable contemplation.

Litigation privilege: discussion

35. The evidence indicates that an expert was instructed in the light of the correspondence cited above in order that the expert report could be used as a basis for supporting NEL's mismanagement allegation in correspondence. I do not consider the dominant purpose was for litigation in reasonable prospect:

    a. There is no suggestion in the correspondence that proceedings or a counterclaim in proceedings is envisaged in relation to the "mismanagement" claim.

    b. The parties to any such litigation would have not been the shareholders of Kyla, so the dispute is with different parties

    c. The references in Mr Buss' first witness statement to the purpose of the instruction being for "ballast in the correspondence" are difficult to square with a claim for litigation privilege.

    d. All in all, so far as one can judge from the relatively limited explanation provided, the instruction of an expert appears to have been for the purpose of trying to provide backing for the mismanagement claim, albeit that the parties to such a claim would have been different, but it does not seem to have reached

> a stage where it was possible to say that litigation in relation to the mismanagement claim was in reasonable prospect

36. I do not consider that the Defendants' submission on dominant purpose adds anything to the above.

37. The information provided by Mr Buss in support of the challenged claim to privilege is very limited. Mr Buss seems to have been concerned by the possibility of a claim that by providing more information he was waiving privilege in the underlying material. However, given the apparent difficulty in making good a claim for litigation privilege in the light of the evidence I have set out above, I would also hold that the Claimants have not discharged the burden of proving their claim for litigation privilege.

Litigation privilege: disposal

38. Despite my findings above, there is no reason to doubt that Mr Buss is an experienced and competent solicitor whom the court can trust to redo the privilege assessment in the light of my direction.

39. I will order that the Claimants reconsider the claim for litigation privilege on the basis that litigation privilege may not be claimed for the mismanagement dispute but may be claimed when litigation was in reasonable contemplation in respect of the mispricing claim. The Claimants should serve a further list supported by a confirmatory witness statement from Mr Buss or another appropriate individual. I would expect that to be done, given the imminence of the trial, within 7 days from the hand down of this judgment.

Waiver of privilege

40. I turn to the other issue argued before me. The test for whether reference to privileged materials in a document such as a witness statement constitute a waiver of privilege is easier to state than apply. The case law is inconsistent. The test is said to be whether there is reliance on the contents or effect of the privileged material (only the former giving rise to a waiver) but that is not an easy test to apply.

41. In *Brennan v Sunderland City Council*[17] Elias J in the EAT recognised that prior cases were difficult to rationalise, and pointed out that typically the cases determine whether waiver has occurred by focusing on two related matters: first, the nature of what has been revealed, is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed: has it been simply referred to, used, deployed or relied upon in order to advance the party's case?[18] It was an error to treat earlier authorities as if the words falling from judicial lips had the sanctity of statute. The fuller the information provided about the legal advice, the greater the risk that waiver will have occurred

> *"… 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 in England strongly*

[17] [2009] I.C.R. 479.
[18] [2009] I.C.R. 479 at [64].

> *support the view that a degree of reliance is required before waiver arises, 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 whether fairness requires full disclosure.*"

42. In *Mid-East Sales v United Engineering*[19] Males J said :

> "*That distinction reflects a policy not to hold that there has been a waiver without good reason and to confine cases of waiver to cases where the party said to have waived is relying on the content of the legal advice for some purpose. Sometimes the distinction is drawn between reference to legal advice and deployment of it. The overriding principle is one of fairness, that if the content of legal advice is deployed or relied upon in order to advance a party's case, then fairness may require that disclosure of that advice be made available so that the court can properly assess that assertion."*

43. I was referred to Waksman J's analysis in *PCP Capital Partners LLP v Barclays Bank plc*[20] :

> "*48. As to the question of waiver itself, it is not easy to find a succinct and clear definition of when it arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case. But on any view in my judgment, first, the reference to the legal advice must be sufficient (a point I return to below) and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide.*
>
> *49. I give two examples of what is 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….*

[19] [2014] EWHC 892 [15]
[20] [2020] EWHC 1393 (Comm)

> *60….. 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.*"

44. There are a number of old cases on this issue which are difficult to explain and not consistent with each other. Despite Waksman J's brave attempt to explain *Marubeni v Alafouzos*[21] I prefer to say that it is, in the light of more modern authority, unnecessary to try to reconcile the older cases.

45. The cases are generally concerned with whether there is waiver in the document referred to. But, as is apparent from the terms of the Defendants' application, there are actually two connected questions. The first is whether there is a waiver in relation to the document in question. The second, which has received less attention in the caselaw, is whether the waiver gives rise to a collateral waiver in other documents on the same issue or "transaction". This is because, as Mustill J explained in *Nea Carteria Maritime Co Ltd v Great Lakes Steam Ship Corpn*[22] a waiver of privilege carries with it an obligation to disclose associated documents in relation to the same issue or transaction. In other words, once a party has taken a voluntary decision to rely in court on privileged material, it is obliged to make available to the other parties the other privileged material on the same issue. It is thus important to have in mind the consequences of the finding by the court that there has been such a waiver.

46. The caselaw speaks of "fairness". Fairness is often a concept which indicates a discretion for the court. But I do not think there is a discretion here. Fairness in this context is a fact-specific judgment for the court. On the one hand where one party relies on privileged material, it is only fair to the other party that the latter has an opportunity to satisfy itself that what has been disclosed is not a partial account. On the other hand, privilege is a fundamental right and it is only fair to the disclosing party that what must be disclosed is the minimum consistent with fairness to the other. The potential for waiver to extend to collateral documents emphasises the importance of limiting the waiver to what is necessary.

47. Thus the difficulty in reconciling the caselaw is partly a reflection of the fact-specific nature of the judgment for the court to exercise.

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[21] [1986] WL 408062
[22] [1981] Com LR 138

48. I was also referred to authority in the specific context of a limitation defence, which was the purpose of the relevant passages in Mr Buss' first witness statement. In *MAC Hotels Ltd v Rider Levett Bucknall UK Ltd*[23] Judge Havelock-Allen QC said:

> " *When it comes to proof of knowledge under section 14A , the assertion by a claimant that he was unaware of the material circumstances until a certain date, carries with it the assertion that he did not have the requisite knowledge at any time before that date. To that extent, the assertion involves proving a negative. MAC is here saying that it did not have the requisite knowledge any earlier than 6 December 2006: but it does not want to be compelled to establish that proposition by having to disclose details of its investigations into the defendants' conduct only in order to establish that those investigations produced no credible leads which should have instigated a further enquiry leading to requisite knowledge about the Midas fraud and the other new non-fraud-derived claims against the defendants. However, sometimes, difficult and invidious choices have to be made if the evidence, without some waiver of privilege, risks being insufficient to enable the claimant to persuade the court that the running of limitation was postponed for as long as the claimant says.*"

49. Judge Havelock-Allen referred to the then current edition of *Thanki on Privilege*[24]

> "*…a claimant's plea that he could not with reasonable diligence have discovered the relevant matter will not of itself entail a waiver of privilege. However a claimant may find it hard to maintain that the limitation period should not begin to run from a period in which he was in receipt of legal advice unless he is prepared to waive privilege in that advice*."

Waiver: submissions

50. The Defendants say that in the application for service out, Mr Buss' first witness statement refers to the various stages of the process leading to the discovery of the alleged mispricing fraud. The references at [165] and [166] cited above involve a waiver of privilege by relying on the expert report and underlying documents there referred to. Disclosure is needed to test what Mr Buss says. The Claimants cannot have their cake and eat it. It is not merely whether the mispricing fraud was discovered in 2018 or 2019 but goes to the question whether reasonable diligence was exercised. The waiver encompasses internal communications and communications with the Claimants' legal advisers.

51. The Claimants say that pursuant to the duty of full and frank disclosure it was incumbent on Mr Buss to explain the circumstances in which the mispricing fraud was discovered. He did so in general terms. As the relevant events took place in about 2008, the primary limitation period had long since expired. The reason Mr Buss set out events in 2018/9 was that (i) it was necessary to explain the circumstances of disclosure of the mispricing fraud and (ii) the efforts and information which had to be gone through to get to the discovery was potentially relevant to the submission that it should have been

[23] [2010] EWHC 767 (TCC) at [43]
[24] 1st ed 5.91. The reference in the current 3rd ed is 5.114:

discovered earlier with reasonable diligence. Mr Buss did not rely on any documents, indeed he did not even identify them.

Waiver: discussion

52. I regard the answer on this issue as clear cut. I reject the allegation of waiver for the following reasons:

a. Unlike the sort of case referred to by Judge Havelock-Allen, where the state of mind of relevant personnel during the primary limitation period will be central to the question whether the primary period of limitation is to be overridden, here the primary period of limitation expired in about 2014. By November 2018 it had long expired. There are certainly issues as to what was known when, and whether reasonable diligence was exercised, but the purpose of including the information in Buss 1 is a different purpose from most of the limitation cases.

b. Read in this light, the purpose of the explanation at [165] and [166] is to explain the circumstances surrounding the instruction of the expert and the steps leading up to the discovery in general terms.

c. There is not in any sense a reliance on any particular document by Mr Buss. Indeed, he does not even refer expressly to documents, merely does so in general terms. I think the information he gives is some way away from reliance on the documents which he may be said to refer to implicitly. He merely goes through the various steps that were taken by the Claimants from November 2018 which led to the discovery of the mispricing fraud.

Conclusions

53. For the reasons given I dismiss the waiver of privilege application but require a further list of documents from the Claimants with supporting witness statement on the litigation privilege issue as set out in paragraph 39 above.

54. Finally, the Commercial Court sometimes has expressed disappointment that so much of the advocacy before it is done by silks. This complex application was argued outstandingly well by two well matched junior counsel who handled my many questions in argument with consummate skill.