IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 130 OF 2015 ASCJ
(FORMERLY CAUSE NO. 237 OF 2014

BETWEEN:	**EDITH M. PORTER-SHIRLEY, EXECUTRIX OF THE ESTATE PEGGY LUSTIG KELLY, DECEASED**	**PLAINTIFF**
AND	**1. RAYMOND WHITTAKER** **2. BRIANY LTD.**	**DEFENDANTS**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 27TH DAY OF JANUARY 2016

APPEARANCES: **Mr. Paul Keeble of Hampson & Company for the Plaintiff/Applicant**

Mr. Ian Huskisson and Mrs. Charmaine Richter of Travers Thorp Alberga for the Defendant/Respondent

Voluntary disclosure by plaintiff of otherwise privileged material- whether rest of her client's file held by her former lawyers attracts legal professional privilege- nature and purpose of privilege- whether legal advice privilege or litigation privilege – waiver of privilege- whether privilege waived over rest of file because of partial disclosure.

RULING

1. The Plaintiff brings this action in her capacity as executrix of her Deceased mother's estate seeking, among other things, declaratory orders as to the beneficial entitlement to shares in the 2nd Defendant ("Briany"), a land holding company. Alternatively, she seeks the sum of USD719,512.50, being one-half the proceeds of sale of land formerly held by Briany. The land in question was sold to the National Trust by

Briany acting under the directorship of the 1st Defendant - the transaction that lays at the heart of the allegations raised by the Plaintiff's Statement of Claim.

2. The question now to be answered is whether the Plaintiff, in having disclosed in this action evidence of certain exchanges between herself and her former lawyer and between her former lawyer and the 1st Defendant, has waived legal professional privilege in relation to the entirety of her file held by the firm of her former lawyer, of which the disclosed material is but a part.

3. The circumstances allegedly giving rise to the Plaintiff's claims in this action are described briefly as follows, as taken from the Statement of Claim and as necessary for setting the context to answer the question raised. For the purposes of answering the question I do not need to and so do not express any views on the merits of the claim or the defence.

4. By written agreement dated 26 April 1991 entered into with Signa South Ltd. (in liquidation), Briany agreed to purchase and by a transfer of land dated 30 April 1991, did acquire 118 acres in a property described as North Side, Block 54A Parcel 74, Grand Cayman ("the Property"). The purchase price was USD90,000 plus stamp duty of approximately USD10,000 and the entirety of the sum (ie: USD100,000) was paid by the Plaintiff's mother ("the Deceased") on behalf of Briany, out of her own monies. The Deceased lived in the United States and left to the 1st Defendant who resides here and whom she trusted, the administration of Briany. The understanding was that he would administer Briany in the interest of its shareholders, being herself (as to 50%) and the 1st Defendant himself, as to the other 50% of the shares.

Implicitly Briany would, of course, be administered in keeping with its Articles of Association.

5. The Statement of Claim goes on to allege that the purchase price of USD100,000 was agreed by the Deceased and the 1st Defendant to have been a loan by her to Briany and that upon a sale of the Property, that loan would be repaid and the balance of the proceeds of sale and any profits would be shared equally between them, it being implied that the necessary corporate resolution of Briany to effect this, would be passed by them acting together as shareholders.

6. It is further alleged that on numerous occasions after the death of the Deceased on 21 October 2006, the Plaintiff met and spoke with the 1st Defendant about Briany and about the Deceased's 50% interest in the Property. The Plaintiff avers that at no time was that interest brought into question nor was the sale to the National Trust disclosed. Far from that, the 1st Defendant consistently advised that the Property had little marketability and that the parties should hold on to it until its true value could be realized.

7. The averments continue that on or about 31 March 2006, unknown to the Plaintiff (and to the Deceased who was then alive but incapacitated), the 1st Defendant wrongfully in breach of contract, duty and trust; executed as director/secretary and submitted to the Cayman Islands Companies Registry, a document purporting to be the Annual Returns of Briany reflecting an AGM on 31 December 2005 and showing himself as sole shareholder and sole director of Briany, and representing further, that the Deceased had ceased to be a member since the last Annual Returns were filed. Thereafter, the 1st Defendant acting as director, submitted similar Annual Returns

each year to the Companies Registry, purporting to show himself as the sole shareholder and sole director of Briany.

8. Coming to the crux of the matter, it is further alleged that in or about January 2012, the Plaintiff discovered that by a transfer of land executed on 2 December 2011, and registered with the Land Registry of the Cayman Islands on 22 December 2011, the 1st Defendant, without the knowledge and consent of the Plaintiff and purporting to act as sole director of Briany, had sold the Property to the National Trust for the sum of USD1,439,025.00.

9. That being in broad outline the circumstances of the Plaintiffs' case, the parties have given discovery and served witness statements, among which on the part of the Plaintiff, is that of her former lawyer Mr. Edgar Stafford, at relevant times an associate at the local firm of Higgs & Johnson.

10. Mr. Stafford in his witness statement seeks to address certain factual matters, in particular his dealings with the 1st Defendant on behalf of the Plaintiff. He explains that his relevant involvement commenced in September 2009 when the Plaintiff sought to effect the transfer of her late mother's 50% shareholding in Briany to herself as the Executrix of her mother's will. He then became aware that the 1st Defendant was the other 50% shareholder in Briany and had been providing corporate administration and registered offices services to Briany.

11. Accordingly, he wrote under the letterhead of his firm Higgs & Johnson, to the 1st Defendant by letter dated 17 September 2009. This letter was addressed to the 1st Defendant at the address of Briany disclosed by the Companies Registry, and provided him with a copy of the re-sealed grant of probate of the Deceased's will

(probate having been originally granted by a Tennessee Court) and advised that the Plaintiff wished to proceed with the transfer of her Deceased mother's shares in Briany to herself as Executrix. A request was also made for copies of all Briany corporate records.

12. That letter was returned as undeliverable at the given post office box number provided by the Companies Registry and so was re-mailed to the 1st Defendant at his company FCM Limited, P.O. Box 1982, George Town, on 28 September 2009.

13. Still no response was received from the 1st Defendant and so a follow up letter was sent on 13 October 2009 which also failed to receive a response. And so, on 21 October 2009, Mr. Stafford states that he contacted the 1st Defendant by telephone and a contemporaneous file note made by him records the contents of that conversation:

> *"I spoke to (the 1st Defendant), he received our letter. All of the Company documents are "boxed up" after Hurricane Ivan. He will look for the documents and let me have a reply in 10 days."*

14. Mr. Stafford then describes how, the 1st Defendant not having replied within 10 days as promised, he made several attempts to contact him, leaving a phone message for him to return the calls on five subsequent occasions in early to mid-November 2009.

15. When Mr. Stafford eventually made contact on 18th November 2009, he states that the 1st Defendant was apologetic and promised that he would provide the requested corporate documents for Briany by 20 November 2009.

16. He heard nothing from the 1st Defendant on 20 November 2009 and so he wrote to him again on 1st December 2009, informing that unless the documents were provided by 8 December 2009, an application for disclosure would be made to this Court.

17. He kept his client, the Plaintiff, informed throughout and exhibits a copy of his email exchanges with her about the matter during the period 10 November 2009 to 8 January 2010.

18. He heard nothing further from the 1st Defendant and never received the corporate records for Briany.

19. He discussed the possibility of court proceedings with the Plaintiff and, as appears from an email exchange between himself and the Plaintiff; her instructions to him were to not pursue the matter in Court because of the expense of litigation. In what Mr. Stafford describes as her last email communication of 8 January 2010, the Plaintiff (at a time before she discovered that the Property had been sold) informed Mr. Stafford that she had sent the 1st Defendant an email advising that they were going to list the "real estate held by Briany" for sale.

20. Mr. Stafford exhibits the several referenced letters and email exchanges as between himself, the Plaintiff and the 1st Defendant, to his witness statement; which he concludes by referring to a letter dated 27 March 2013 apparently written by the 1st Defendant in which is stated in the closing paragraph on the fourth page the following:

> "*As to the allegation that I did not provide Higgs & Johnson with copies of the corporate documents, I do not recall making any promise to provide them with these documents but had suggested perhaps forwarded [sic] them copies of the resignation and transfer. I did not consider at the time that they were entitled to all the corporate records of the company and consider [sic] at the time retaining attorneys but*

felt that having left a message with secretary [sic] that there had been a clear resignation and transfer and if they wished to pursue further I would let my attorneys handle things from there, and with no further contact I presumed the matter had been resolved."

21. Mr. Stafford refutes this statement and asserts by reference to the contemporaneous letters and emails which he exhibits from his client's the Plaintiff's file, that the 1st Defendant had expressly agreed to provide him with the corporate documentation of Briany as he had requested, and had taken no issue with his entitlement to it on behalf of the Plaintiff as the Executrix of her mother's estate. He insists that the 1st Defendant made no mention at all of any suggested transfer by the Deceased of her shares in Briany, nor of any suggested resignation by her as director of Briany.

22. Had the 1st Defendant made mention of any such thing, that, states Mr. Stafford, would have obviously been the subject of immediate comment and investigation, since the transfer of the Briany shares to the Plaintiff as Executrix was the entire purpose of the enquiries made of the 1st Defendant.

23. Thus, Mr. Stafford speaks as a witness of fact to his communications with the 1st Defendant and to the extent relevant, to his exchanges with his client the Plaintiff about those communications. Apart from the tangential reference to the possibility of court action in the face of the 1st Defendant's failure to provide the corporate documentation of Briany to which the Plaintiff claims entitlement, Mr. Stafford in his statement reveals nothing of any legal advice rendered to the Plaintiff in relation to this matter.

24. This is the context in which Mr. Keeble on behalf of the Plaintiff and in opposition to Mr. Huskisson's application on behalf of the 1st Defendant, now claims legal professional privilege in relation to the contents of the Higgs & Johnson file, both in the sense of legal advice and litigation privilege, as the two concepts have come to be known at law, with emphasis primarily on legal advice privilege.

25. On behalf of the Defendants, Mr. Huskisson argues that even if the file otherwise attracted privilege (which he does not concede) , by disclosing the contents of Mr. Stafford's witness statement, the Plaintiff has waived her right to privilege and has done so in relation to the entire file. The matter thus calls for an examination of the legal principles.

Legal Professional Privilege

26. Legal professional privilege is an important and substantive right that protects a client from having to disclose confidential communications passing between the client and his or her lawyer. It is "*a fundamental human right long established in the common law*" said Lord Hoffman in R (*Morgan Grenfell & Co. Ltd. v Special Cons. Of Income Tax) (*infra., at 606 para. 2). The modern case law on legal professional privilege has divided the privilege into two categories, "*legal advice privilege*" and "*litigation privilege*". The two categories were authoritatively described in *Three Rivers District Council and others v Governor and Company of the Bank of England (No. 6)* per Lord Scott (at para. 10):

> *"Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients whereby legal advice is given."*

27. Citing Lord Jauncey's dictum from the earlier House of Lords decision in *In re L (A Minor) (a Police Investigation: Privilege)* [1997] A.C. 16 at 26, Lord Scott accepted that litigation privilege is to be described as "*essentially a creature of adversarial proceedings*" which could not be claimed in order to protect from disclosure a report (or other document) prepared for use in non-adversarial proceedings (ibid).

28. Legal advice privilege, that more emphatically claimed by the Plaintiff here, is not so circumscribed. As Lord Carswell also explained in his speech in *Three Rivers (No. 6)* (at para 65):

> *"(Legal professional) privilege is commonly classified in modern usage under the two sub-headings of legal advice privilege and litigation privilege (terminology which appears to owe its origin to the submission of counsel in In re Highgrade Traders Ltd. [1986] BCLC 51, adopted by Lord Oliver, at p169 G-H)). The former covers communications passing between lawyer and client for the purpose of seeking and furnishing advice, whether or not in the context of litigation. The latter, which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal adviser and potential witnesses" (emphasis added).*

29. As Lord Carswell went on further to explain (at para 100) and in common with the rest of the Court, litigation privilege extended to documents or other communications which may have come into being but only for *"the obtaining of legal advice in anticipation of litigation, or as earlier proposed in Waugh and British Railways*

Board [1980] 521, only if the document in question had been brought into existence for the "dominant" or "paramount" purpose of litigation".

30. Here, the Plaintiff's claim to privilege is not confined to any assertion that the contents of her Higgs & Johnson file or any of it, attracts only litigation privilege. She does not contend that at all times and stages of the compilation of the file, "*litigation was reasonably in prospect*", per Lord Carswell (ibid, para. 83), even if that came to be the situation at the latter stages.

31. Rather, she regards her file as containing confidential communications between her lawyers at Higgs & Johnson (including Mr. Stafford) and herself relating to matters upon which they were instructed for the purpose of giving her legal advice and so as privileged against disclosure on the broader basis of legal advice privilege.

32. On behalf of the 1st Defendant, Mr. Huskisson, for his part, does not seek to refute the confidentiality of the contents of the file, instead arguing that having chosen to disclose the information from it as contained in Mr. Stafford's witness statement for the purposes of this litigation, and having thus waived privilege, the Plaintiff is obliged to disclose the entirety.

33. It is therefore necessary to examine more carefully the scope of legal advice privilege to see whether it attaches to the rest of the file which remains undisclosed.

34. The cases examined by the House in *Three Rivers (No. 6)* were regarded (per Lord Carswell at para. 105) as establishing, so far from legal advice privilege being an outgrowth and extension of litigation privilege, that legal professional privilege is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege, and that it is litigation privilege which is restricted to proceedings in a court

of law by the requirements (a) that litigation must be in progress or in contemplation; (b) that the communications must have been made for the sole or dominant purpose of conducting that litigation; and (c) that the litigation must be adversarial not investigative or inquisitorial.

35. Lord Scott went on to explain in *Three Rivers (No. 6)* (op. cit. at para. 25 et seq.); that for legal advice privilege to be recognized (as a component of legal professional privilege), there are at least four factors to be considered:

> *"First, 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.*
>
> *Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute (cf R (Morgan Grenfell & Co. Ltd.) v Special Commr. Of Income Tax [2003] 1 AC 563), but it is otherwise absolute...legal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document cannot be set aside on the ground that some other higher public interest requires that to be done.*

Third, legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterization as procedural or substantive neither adds to nor detracts from its features.

Fourth, legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted: see e.g., Greenough v Gaskill (1833) 1 M +K 98, 102-103, per Lord Brougham and Minet v Morgan (1983) LR 8 Ch App 361.

On the other hand, it has been held that litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of being used in litigation. The connection between legal

advice sought or given and the affording of privilege to the communication has thereby been cut."

36. The principle that the scope of protected communications is very wide and is not limited to legal advice was also emphasized by Lord Carswell in his speech in *Three Rivers (No. 6)* (at para. 111); affirming the earlier pronouncement of the principle by the House in *Minter v Priest* [1920], L.B. 655 that:

> *"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, 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 a legal adviser of his client."*

37. As to the "*absolute*" nature of the privilege, and where legal advice privilege attaches, it will not be overridden on the basis simply that the protected information would be relevant to the just resolution of a dispute before a Court. There are competing public policy concerns arising and the case law explains that the balance is to be resolved in favour of the privilege.

38. Lord Nicholls of Birkenhead was regarded by the Court in *Three Rivers (No. 6)* (per Lord Carswell at para. 112) as having accurately stated this principle "*in modern legal parlance*" in *Re L (A Minor) (Police Investigation: Privilege)* above at p32, where he said:

"The public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to Courts when deciding cases."

39. And the policy rationale for this principle is long established in the case law, the earliest instances of which are to be found in 16th century reports, followed through in a number of cases in the 18th and 19th century. Lord Carswell discusses these cases in *Three Rivers (No. 6)* (at para. 90 et. seq.) recognizing as the *fons et origo* of the modern law, the fulsome dictum of Lord Brougham LC in *Greenough v Gaskill* 1 M + K 98, in 1833; the concluding passages of which were as follows:

"*The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be easy to discover why a like privilege has been refused to others, and especially to medical advisers.*

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to

consult any skilful person, or would only dare to tell his counsellor half his case.

If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adapt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."

40. Such longstanding dictum notwithstanding, the justification for legal advice privilege where the legal advice has no clear connection with adversarial litigation has been questioned. But the explanation has been provided authoritatively also in the case law, in affirmation of the dictum of Lord Brougham LC. At paragraph 30 et. seq. of his judgment in *Three Rivers (No. 6)* Lord Scott examined a number of the cases approving of the answer which they provide to this question:

"In R v Darby Magistrate's Court, Ex p B [1996] AC 487 Lord Taylor of Gosforth CJ said, at pp 507,588:

"In Balabel v Air India [1988] Ch 317, the basic principle justifying legal professional privilege was again said to be that the client should be able to obtain legal advice in confidence. The principle which runs through all the cases...is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent...once any exception to the rule is allowed, the client's confidence is necessarily lost."

41. In *R (Morgan Grenfell & Co. Ltd.) v Special Commr. of Income Tax* [2003] 1 AC 563, 607 para. 7, in similar vein Lord Hoffmann referred to legal professional privilege as *"a necessary corollary of the right of any person to obtain skilled advice about the law"* and continued:

> *"Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."*

42. And in *B v Auckland District Law Society* [2003] 2 AC 736, 757, para. 47, Lord Millett justified legal professional privilege on the ground that

> *"...a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent."*

43. These statements of principle require me first of all to resolve the question whether the Plaintiff's Higgs & Johnson file contains material which is the subject of privilege; that is: confidential communication between lawyer and client, even if going beyond the actual rendering of legal advice. But as I noted above, there has been no discussion before me as to the actual nature of the undisclosed contents of the file, nor in particular, as to whether it contains advice given in contemplation of these or other court proceedings. For this reason, I will offer no views on whether or not the file could, apart from attracting legal advice privilege, also more specifically attract litigation privilege.

44. But what is clear from Mr. Stafford's statement is that through Higgs & Johnson he was instructed as her lawyer by the Plaintiff, acting as the Executrix under her late

mother's will. Higgs & Johnson had earlier applied on her behalf to this Court to have the grant of probate issued by the Tennessee Court resealed in order that the Plaintiff might, among other things perhaps, deal with, as part of her mother's estate, the disputed 50% shareholding interest in Briany. Mr. Stafford's own relevant involvement commenced in September 2009 when the Plaintiff sought to effect the transfer of those shares to herself as Executrix. This sets the context for the establishment of the lawyer/client professional relationship and it clearly implies that the contents of the file must either be the basis or source of Mr. Stafford's and his firm's instructions to act and such work product and advice as he or other member(s) of his firm must have rendered acting upon those instructions.

45. This is to be inferred from the very nature of the lawyer/client relationship itself. In any lawyer/client relationship there will be a continuum of communication between them. As the case law recognizes, where information is passed between the two as part of that continuum, aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.

46. A communication from the client may end in a specific request for advice, but even if it does not, it will usually be implied in the relationship that the lawyer will at any stage (whether or not specifically asked) provide appropriate advice.

47. In *Balabel v Air India* (above) this was all explained in compelling terms on behalf of the English Court of Appeal by Taylor LJ where he stated as follows (at p330 D-G):

> *"Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable*

legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. 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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, 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."

48. By way of illustration, in subsequent cases, privilege has been found to attach to documents such as a client's contact details (*JSC BTA Bank v Ablyazov* [2012] EWHC 1252 (Com)); presentation slides (*Fulham Leisure Holdings v Nicholson Graham Jones* [2006] EWHC 158 (Ch)); and even to a client's identity (*SRJ v Person(s) Unknow*n (Author and Commenters of Internet Blogs [2014] EWHC 2293 (QB).

49. It seems to me from the foregoing discussion of the case law that legal advice privilege attaches to the file here because the Plaintiff's instructions and any advice given and contained within it all arose from a confidential and recognizable "*relevant legal context*" in which the Plaintiff and her lawyers at Higgs & Johnson communicated with each other.

50. This requirement, first enunciated by Taylor LJ in *Balabel v Air India* (as above), was accepted by Lord Scott in *Three Rivers (No. 6) to be* a prerequisite of legal professional privilege where he said at para 38:

> *"In Balabel v Air India...Taylor LJ said, at p330, that for the purpose 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."*
>
> *I would venture to draw attention to Taylor LJ's reference to "the relevant context". That there must be a "relevant legal context" in order for the advice to attract legal professional privilege should not be in doubt. Taylor LJ said, at p331, that:*

> *"to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide."*

This remark is, in my respectful opinion, plainly correct. If a solicitor becomes the client's "man of business" and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law.

Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one."

51. In his judgment, Lord Carswell agreed with Lord Scott in the adoption of the dictum of Taylor LJ, recognizing also that it provided the framework for determining the bounds of legal professional privilege which itself is an important balancing exercise (at para 86):

> *"Determining the bounds of privilege involves finding the proper point of balance between two opposing imperatives, making the maximum relevant material available to the court at trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves. The practice which has developed is a reconciliation between these principles: Seabrook v British Transport Commission [1959] 1 WLR 509, 513, per Havers J. There is a considerable public interest in each of these."*

52. And later, at para 113-114, Lord Carswell turned to apply these principles in the case at bar to answer affirmatively, the question whether the work product of the Bank of England's lawyers by way of advice given and presentational material prepared on behalf of the Bank as BCCI's regulator for submission to the Bingham Enquiry into the infamous collapse of BCCI, was protected by legal advice privilege. He stated:

> *"The question for decision is where the line is to be drawn and the bounds of privilege are to be set. It is unquestionable that the breath of work commonly carried out by lawyers has increased since the early 19th century [(when Lord Brougham's dictum in Greenough v Gaskill (above) was delivered].*

The increase in the number and variety of tribunals other than courts of law has been marked in recent years. Statutory and non-statutory inquires and investigations have proliferated, as Her Majesty's Government set out in its written case [here]. The consequences of findings in inquiries such as the Bingham Enquiry may, and I have earlier outlined, be serious for some of the persons or bodies to whom they relate, and investigations such as those held under the Companies Act 1985 can have a substantial effect. It may be of considerable importance for those who may be affected to ensure that their case is put before the inquiry in as effective a manner as possible. The Court of Appeal stated [2004] QB 916, 934, para 33, that a desire to protect reputation to avoid more intrusive regulation does not put the Bank on the same footing as an individual whose reputation is at risk in a public inquiry. That may be so, but I cannot agree that the Bank should for that reason be deprived of any protection of legal professional privilege. Its interests may differ from those of individuals whose conduct is called in question, but it does not follow that they are to be disregarded.

The work of advising a client as to the most suitable approach to adopt, assembling material for presentation of his case and taking statements which set out the relevant material in an orderly fashion and omit the irrelevant is, to my mind, the classic exercise of one of the lawyer's skills. I can see no valid reason why that should cease to be

so because the forum is an inquiry or other tribunal which is not a court of law provided that the advice is given in a legal context: see Lord Scott's opinion at para 42. The skills of a lawyer in assembling the facts and handling the evidence are of importance in that forum as well as in a court of law. The availability of competent legal advice will materially assist an inquiry by reducing irrelevance and encouraging the making of proper admissions."

53. And so, in identifying the bounds or limits of the privilege, the circumstances of the Bingham enquiry may be juxtaposed with situations, for example, where legal work is undertaken or advice is given in circumstances which can carry no legal consequences. In *Three Rivers (No. 6)* although the Bingham Enquiry had been non-adversarial in nature, the court accepted that its outcome was nonetheless likely to carry serious legal consequences for the Bank of England and so, as shown above, held that legal advice privilege attached to the advice and presentational work provided by the Bank's lawyers in response to the Enquiry. The Court contrasted those circumstances with other kinds of non-adversarial enquiries from which no such legal consequences could flow, the latter likely to be regarded as not attracting legal professional privilege to the work product or advice of lawyers rendered in relation to them for not having been rendered in a relevant legal context.

54. Here, the engagement of Higgs & Johnson and Mr. Stafford by the Plaintiff arose in an obviously confidential and "*relevant legal context*", in the sense recognized by the House in *Three Rivers (No. 6)*. As Lord Scott confirmed (at paragraph 50):

"legal advice privilege attaches to all communications made in confidence between solicitors and their clients for the purposes of giving or obtaining legal advice even at a stage when litigation is not in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either".

55. I therefore ask the question advised by Lord Scott; which is whether the contents of the file are likely to involve advice *"relating to the rights, liabilities or remedies of the client whether under private law or public law and whether in all the circumstances it was objectively "reasonable for [the client, Plaintiff] to expect the privilege to apply*" (see paragraph 50 herein, above) .

56. The firm had been engaged by the Plaintiff to assist her in the administration of her mother's estate within the Cayman Islands, including the resealing of the Tennessee grant of probate and the sorting out of the putative interest in Briany. It was this latter that was the context in which Mr. Stafford's own involvement became relevant and we see form the circumstances described above, how he set about engaging with the 1st Defendant on behalf of the Plaintiff. But clearly, that was not the commencement or end of the relevant legal context in which the firm itself was engaged or in which it rendered advice. The context was obviously much wider. It clearly had begun at an earlier stage, a stage when litigation was not in contemplation and there well may have been confidential communications with intermediaries, especially for the purpose of resealing of the Tennessee grant. While I accept that it is for the party refusing disclosure to establish her right to refuse (*Waugh v. British Railway Board,*

above at 541-542; per Lord Edmund Davies and reaffirmed per Lord Scott at paragraph 51 in *Rivers (No. 6;);* I am satisfied that the Plaintiff has done so in respect of her Higgs & Johnson file. I conclude that the undisclosed contents of the file are privileged.

57. It seems to me that it was this realization that legal professional privilege may well attach to the contents of the file as I have found, that led the 1st Defendant to buttress its arguments by reliance on waiver of privilege, the issue to which I now turn.

WAIVER

58. As the public policy rationale for the privilege examined above explains, although relevance in the context of litigation of the material sought is a necessary pre-requisite, relevance by itself is not a sufficient condition for disclosure.

59. Thus, the probability (even if one so regards it) that the Higgs & Johnson file contains material that would be relevant to this action, would not by itself be sufficient to override privilege or to premise a finding of waiver. But the privilege is that of the client and so can be waived by the client. Disclosure of specific documents which would be otherwise privileged clearly involves a waiver of privilege in those documents. The question is how much further does the waiver go in relation to other contents of the file.

60. Mr. Huskisson's argument for the 1st Defendant, is that the Plaintiff has elected to disclose only some of the contents of the file (in particular those aspects addressed by Mr. Stafford in his witness statement) but fairness requires that the entirety of the file should be disclosed. It should not be left to the Plaintiff to "cherry-pick" whatever aspects she, on the advice of her present lawyers, may regard as to be disclosed. By

having revealed important aspects of her communications with Mr. Stafford including the exchanges about possible litigation, she has waived the right to privilege and has opened up the entire file to disclosure and inspection.

61. It would be unfair, says Mr. Huskisson, for the Plaintiff to disclose and rely upon any aspect of the file and advice rendered to her while not disclosing other aspects which may be of relevance and so of assistance to the 1st Defendant and to the Court in disposing of her claim.

62. The case law shows that a party who waives privilege in relation to certain documents or communications is not automatically to be taken as having waived privilege in all. It is indeed, only if the waiver of part is selectively misleading that further disclosure will be required but the overriding test is one of fairness: once the objective scope of waiver has been determined, the party deploying documents may, as a matter of fairness, be required to produce other documents because it would be unfair to confine the waiver to the documents deployed. This principle is illustrated by the discussion of the cases which follow, the guiding statement having been expressed by Lord Bingham in *Paragon Finance plc v Freshfields (a firm) [1999] 1 WLR 1185 at 1188 as follows:*

> *"While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result."*

63. In *Fulham Leisure Holdings Ltd. v Nicholson Graham & Jones (a firm)* [2006] 2 All E.R. 599, in seeking to arrive at the proper practical approach to determining the

scope of waiver, Mann J. cited and applied an earlier judgment of Hobhouse J (as he then was) as follows.:

> *"The starting point to me seems to me to identify what Hobhouse J called the 'transaction' in General Accident Fire and Life Assurance Corp Ltd v Tanter, The Zephyr [1984] 1 All ER 35, [1984] 1 WLR 100. In that case Hobhouse J was dealing with a wide ranging request for disclosure and inspection of otherwise privileged documents (covered by legal professional privilege), on the basis of use of one note at a trial. Hobhouse J refused to order that disclosure, and in the course of his judgment he considered the then existing authorities on the point. He cited ([1984] 1 All ER 35 at 45, [1984] 1 WLR 100 at 111) part of the judgment of Cotton LJ in Lyell v Kennedy (1884) 27 Ch D 1 at 24 (see also [1881–5] All ER Rep 814 at 824), which he described as 'the cardinal quotation':*
>
> > *There was this contention raised, which I have not forgotten: that the Defendant had waived his privilege, and therefore could not claim it at all. That, in my opinion, was entirely fallacious. He had done this, he had said:*
> >
> > > *'Whether I am entitled to protect them or not I will produce certain of the documents for which I had previously*

claimed privilege—I will waive that, and

I will produce them'

but that did not prevent him relying on such protection with regard to others which he did not like to produce. It is not like the case of a man who gives part of a conversation and then claims protection for the remainder, and we think there is no ground for the contention that there has been here waiver of privilege."

64. Having thus acknowledged that it is open to a party to disclose some but not all of the documents falling within a privileged category, Mann J. went on to grapple with the practical difficulties with resolving the question in the case before him; viz: whether those privileged documents which had been disclosed (written legal advice), gave a true and fair picture or a misleading and selective picture such that other legal advice rendered should also be disclosed.

65. As he pointed out, there are two separate tests to determine the scope of the waiver. First, the court must consider what was being put in issue by the reference to the otherwise privileged material which has been deployed. It is wrong to allow a party to cherry-pick the material falling within that "issue" or "transaction" and yet to withhold what he does not wish to disclose.

66. In essence the court is here defining objectively the proper scope of deliberate waiver. As Mann J also stated (op, cit, par 18):

> *"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.... [In] order to ascertain whether that is in fact correct one 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.... [In] some cases ["the purpose of the disclosure"] may provide a realistic, objectively determinable definition of the "transaction" [or "issue] 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.... 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".*

67. Secondly (and this is the ultimate application of the overriding test), once the scope of waiver has been determined, the party deploying documents may, as a matter of fairness, be required to produce other documents because it would be unfair to confine the waiver to the material disclosed. The ultimate application of the overriding test thus remains a matter of judicial judgment and discretion.

68. Having thus discussed the test for determining the scope of waiver, Mann J went on to justify what he described as the "*relevant process*" to be followed in keeping with the earlier case law[1]"; setting out the following analysis:

> *"(i) One should first identify the "transaction" in respect of which the disclosure has been made.*
>
> *(ii) That transaction may be identifiable simply from the nature of the disclosure made – for example, advice given by counsel on a single occasion.*
>
> *(iii) However, it may be apparent from that material or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.*
>
> *(iv) When that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed.*"

69. This "transaction" analysis was later re-affirmed by Mann J himself in Dore and others v Leicestershire County Council and another [2010] EWHC 34 (Ch), where he emphasized (at para 19ff), the need to focus on the actual act(s) of waiver before examining the implications of the four steps of the analysis.

70. The transaction analysis is cited with approval in the leading textbooks: see Hollander, Documentary Evidence 12th ed. Ch. 23 D at p376 and Matthews and

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[1] Including *General Accident Fire v Tanter* (above) per Hobhouse J where the "transaction" analysis was first pronounced; *Paragon Finance & Freshfields* (also above, per Lord Bingham CJ); *R v Secretary of State for Transport, ex parte Factortame* (7 May 1997, unreported, CA (per Auld LJ) and *Nea Kartesia Maritime Co. Ltd. v Atlantic Great Lakes Steamship Corp.* [1981] Comm. L.R. 138, per Mustill J (as he then was and where he spoke of identifying the "issue" to which the disclosure was addressed).

Malek, Disclosure Ch. 16(b) at, 470 and (c) at p 472. See also, The Law of Privilege, 2nd Ed., by Bankim Thanki QC at para 5.137 et seq. and as noted by this author in his careful and thorough treatment of the case law - the transaction analysis, being a sound practical way of identifying the "issue" or "purpose" for which the disclosure in question was made and so the scope of the waiver is one which is worthy of adoption[2]. I am satisfied that it should be adopted here.

Application to the present circumstances

71. Applying the transaction approach to the present facts, the following four-step analysis emerges and I accept Mr. Keeble's submissions on behalf of the Plaintiff in relation to the facts:

(i) What is the "transaction"? In other words, "what [is it] in essence that the waiving party (here the Plaintiff) is seeking to disclose?"[3]

It is apparent from paragraphs 6 to 18 (inclusive) of Mr. Stafford's affidavit that he was concerned to deal with the communications (or in reality absence of communication) he had had with the 1st Defendant and report back to his client, the Plaintiff, in order to enable her to decide upon her course of action. Mr. Stafford was also concerned to rebut any possible suggestion that the 1st Defendant had informed him that the Deceased had transferred shares in Briany to the 1st Defendant. That was the confined nature and scope of the

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[2]. More recent examples of the court's approval of Mann J. approach in *Fulham Leisure* are to be seen in *MA Research Ltd. Cellxion Ltd* [2007] EWHC 2456 where the approach described as the "purpose" test was relied upon to limit the disclosure (where it had been inadvertent) and Berzovsky v Abramovich [2011] EWHC1143 (Comm).

[3] Per Mann J. at para 18 in *Fulham Leisure* (above).

"transaction" in respect of which it appears that the Plaintiff has sought to give disclosure.

(ii) In the wider context of the case, the relevance of the transaction is clearly identifiable from the disclosure itself and the reason for the disclosure appears from Mr. Stafford's affidavit itself. The disclosed communications will be relevant to the issues raised in the 1st Defendant's defence, whether the 50% shares in Briany had been transferred with the Deceased's knowledge and consent and so whether the subsequent sale of the Property was an authorized and bona fide transaction.

(iii) I note that there is no material –and none has been identified by the 1st Defendant – to suggest that the transaction is wider than that which is immediately apparent from the material disclosed through Mr. Stafford's affidavit. The point it seeks to address is self-contained and limited and there is nothing to suggest that the material which has been disclosed is partial, selective or misleading. Indeed, given that the material is comprised in the main of communication between Mr. Stafford and the 1st Defendant, one might expect that the 1st Defendant would be able to point to any such deficiency. Apart from his denial of important aspects of what Mr. Stafford relates, no such deficiency has been cited by the 1st Defendant.

(iv) In the circumstances, it does not appear that any further disclosure – and certainly not the Plaintiff's entire Higgs & Johnson file which may well deal with matters going beyond this case – is "n*ecessary in order to avoid*

unfairness or misunderstanding of what has been disclosed" (per Mann J in his fourth step of the "relevant process", (above).

72. The Defendant's application by summons (at paragraph 1.b) for disclosure and inspection of the Plaintiff's file at Higgs & Johnson is accordingly dismissed, with costs to the Plaintiff to be taxed if not agreed.

Hon. Anthony Smellie
Chief Justice

February 24, 2016