November 2013

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial (including judicial directions as to the examination of vulnerable witnesses)
3. Trial bundle for Interim Application and Mini-Trial
4. Blank Trial Strategy Plan

In the accompanying email you have been advised which party you are representing.

November 2013

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

This is an application by the Defendant for an order that;

"the plaintiff shall give disclosure and inspection of documents constituting or evidencing legal advice which was given to or received by Jane Cheung regarding the enforceability of the penalty clause [clause 7] contained in the agreement between the plaintiff and Grand Casino Hotels Limited".

The ground for the application is that the plaintiff has waived privilege in such legal advice in order to advance its alleged case that it acted reasonably in not challenging such clause as being unenforceable. The application is opposed by the plaintiff.

Please assume that the following documents are before the court on the hearing of the application and that they are all in order: application notice, draft order, witness statements setting out the salient evidence in support of/opposition to the application, and respective statements of costs (note: these documents are not provided at the assessment hearing or in this bundle).

For the purpose of the application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

i. The statements of case in the trial bundle,

ii. The statement of agreed facts and procedural position as set out on the final page of this document,

iii. Facts in the witness statements in the trial bundle,

iv. The following case authorities, copies of which are attached:

   a. *Expandable Limited v Rubin* [2008] EWCA Civ 59

   b. *Digicel (St. Lucia) Limited and others v Cable & Wireless Plc and others* [2009] EWHC 1437

v. Hong Kong Civil Procedure (the Hong Kong White Book)

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the position of the party you are representing. You have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, One-sided, 12 font, Single spaced).

You may refer to the attached authorities as you think appropriate. You do not need to attach them to the skeleton; the Judge will have a copy of them at the hearing. You may also refer to the White Book as you think appropriate.

Please note that your arguments must be limited to these case authorities and the White Book.

Your skeleton must be emailed to the Higher Rights Assessment Board by no later than 3pm on the Wednesday prior to the day of the assessment. Please note that if you submit your skeleton late, it may not be marked for the purpose of the assessment.

THE CONDUCT of the Interim Application

i. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

ii. No reply to submissions will be conducted.

iii. You should be prepared to deal with Judicial interventions and questions in relation to your submissions.

iv. You should be prepared to address the court on the issue of costs as a matter of principle.

Statement of Agreed Facts and Procedural Position

1. In the last sentence of paragraph 8 of Jane Cheung's witness statement she states that in paying the sum of $1 million to Grand Casino Hotels Limited she was'acting on written legal advice…'.

2. The amount has actually been paid by the plaintiff to Grand Casino Hotels Limited.

3. Paragraph 5 of the plaintiff 's Reply [to Defence] states that;

   "c. The plaintiff took written legal advice before paying the sum of $1,000,000."

4. The plaintiff did take legal advice on all matters relating to liability and quantum .

5. This application is being heard 3 months prior to the trial start date.

6. This application is being heard before the judge who has management of the case.
   .

Neutral Citation Number: [2008] EWCA Civ 59

Case No: A2/2007/1881

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
MR JUSTICE PATTEN
2007/1881

Royal Courts of Justice
Strand, London, WC2A 2LL
11/02/2008

B e f o r e :

LORD JUSTICE RIX
LORD JUSTICE JACOB
and
MR JUSTICE FORBES

Between:

EXPANDABLE LIMITED & ANR	**Appellants**
- and -	
RUBIN	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Daniel Lightman (instructed by Messrs Goldkorn Mathias Gentle) for the Appellant
Mr Hermann Boeddinghaus (instructed by Messrs Edwin Coe) for the Respondent
Hearing dates : 21st January 2008

HTML VERSION OF JUDGMENT

Lord Justice Rix :

1. What is involved in a document being "mentioned" in a statement of case or witness statement or the like? If a document is so mentioned, has privilege against its inspection been waived? These are the two questions which arise on this appeal. The provisions of CPR Part 31 are in issue.

2. The circumstances in which these questions arise do not much matter, but they are briefly these. Mr David Rubin, the respondent, is the supervisor of a failed IVA of the debtor Mr Martin Clarke, who is now a discharged bankrupt. There is a dispute as to whether Mr Rubin should transfer to the debtor's trustees in bankruptcy some £684,000 in his hands which represent the debtor's share of the sale and development of some land in Hendon, London (the "Hendon project"). A claim has in turn been made to that sum by Expandable Limited and Prime Trust Corporation Limited, two Gibraltar companies, who are appellants in this appeal (the "companies"). They say that in return for the advance to the debtor in 2001 of £245,000, they were to receive a secured 50% interest in the debtor's profit from the Hendon project. The debtor acknowledges the advance of the £245,000 from a Mr Robert Noonan, a Gibraltar resident, but not a proprietary interest by the companies in the project proceeds.

3. At one time Mr Rubin considered that it was not possible for him to reject the claim outright and he therefore sought the determination of the court under an application under section 363 of the Insolvency Act 1986. However, in due course he came to the conclusion that there was no proper basis for the companies' claim and that he did not need the assistance of the court. It was eventually agreed that the section 363 proceedings should continue but with the companies having carriage of the application as plaintiff s in it. They are now appellants in this court, and Mr Rubin is the respondent.

4. In the course of Mr Rubin's enquiries into this matter, his solicitors, Messrs Edwin Coe, had interviewed the debtor. In particular, a Mr Ali Zaidi of that firm had interviewed the debtor on 19 December 2005. Mr Rubin referred to that interview in his second witness statement dated 21 February 2007. He said:

   "22. I confirm that the above-mentioned documents represent the totality of my written communications with the Debtor (including those of my Solicitors on my behalf) concerning the issue of the Expandable claim…

   23. In particular it will be noted that there are several inconsistencies between Mr Clarke's note to me and what he told Mr Zaidi…I think it right I draw the Court's attention to the fact that after Mr Zaidi had interviewed Mr Clarke he [Mr Zaidi] *wrote to me enclosing a copy of his note of the meeting and drawing my attention to the discrepancies* (which, by the way, I did not think in any way assisted Prime/Expandable Trust with their claim)" (emphasis added).

5. The words emphasised are the basis of the dispute on this appeal. It is recognised that Mr Zaidi had enclosed his notes of interview under cover of a letter to Mr Rubin in which, as Mr Rubin said in his statement, Mr Zaidi had drawn attention to discrepancies between what the debtor had said at the December 2005 interview and what the debtor had said in his own note to Mr Rubin on an earlier occasion. The companies have disclosure of those notes of interview and of the debtor's own note to Mr Rubin. What they seek further is Mr Zaidi's covering letter. They plainly want to be able to determine for themselves whether the debtor's inconsistencies do or do not assist them in their claim to the funds held by Mr Rubin. In practice, however, it must be doubtful how disclosure of the covering letter would tell them anything more than they already have in the form of the underlying material.

6. It is nevertheless common ground that privilege would, subject to the arguments raised below and again on this appeal, attach to the solicitor's letter that Mr Zaidi had sent to his client, Mr Rubin. It is submitted, however, that such privilege has been waived and lost by mention of the letter in Mr Rubin's witness statement.

7. On 9 March 2007 the companies' solicitors, Messrs Goldkorn Mathias Gentle ("GMG"), wrote to Edwin Coe to request a copy of Mr Zaidi's letter, claiming a right of inspection pursuant to CPR 31.14(1)(b). On 26 March 2007 Edwin Coe replied to say –

   "The document you have requested is privileged and there has been no waiver of that privilege simply by reference to it in a witness statement."

   On 28 March 2007 Edwin Coe again wrote:

"As we have stated previously, mere reference to a document in a witness statement does not in itself waive privilege."

8. On 5 April 2007 the companies applied for disclosure of the covering letter, citing inter alia a right of inspection under CPR 31.15. Their application came before Registrar Simmonds who, in a reserved judgment dated 21 June 2007, refused it. He held that "he wrote to me" did not amount to mention within the meaning of CPR 31.14. Even if it did, he observed "in passing" that such mention would not have waived privilege. He did not elaborate that second point, but as to the first he said this:

"The communication is imprecise. It does not say whether it is a letter or email. It is not mentioned by date. The wording is explanatory of process rather than being mentioned in a specific and direct form."

9. There was an appeal by the companies to Patten J, whose judgment was given on 24 July 2007, [2007] EWHC 2463 (Ch). He came to the same conclusions. He referred to the corresponding provisions under RSC Order 24, rule 10 and to relevant jurisprudence, and rejected the submissions made by Mr Daniel Lightman on behalf of the companies that the detailed provisions of CPR Part 31 demonstrated a fundamental change in approach. He agreed with Registrar Simmonds that there had been no mention of any document in the witness statement and that even if there had, there had been no waiver of privilege. As to the first point, he said –

"33. As Mr Registrar Simmons pointed out, the term "wrote" could connote a number of different types of document, not just a letter, nor were the contents of the letter relied on in themselves."

10. As for waiver of privilege, Patten J rejected the submission that the general provisions of CPR 31.19 relating to a claim for privilege did not apply equally to documents for which there might otherwise be a right of inspection by reason CPR 31.14. He referred to *Buttes Gas and Oil Company v. Hammer (No3)* [1981] QB 223 (CA), decided under the old law, for the proposition, which he considered to remain good under the CPR regime, that bare reference to a document in a pleading did not waive any privilege attached to it. In as much as it was also submitted to him that Mr Rubin's witness statement had gone beyond bare mention and amounted to a deployment of the contents of the covering letter and on that broader ground amounted to a waiver of privilege, he decided otherwise.

11. The appeal to this court is now a second appeal, for which permission has been given by Sir John Chadwick, who correctly observed that important points of principle or practice were involved in the interpretation and application of Part 31. However, he refused permission to appeal on the separate ground that, even if there was mention of a document but no automatic waiver of privilege, nevertheless there had been waiver in this particular case. We are therefore concerned only with the two issues: (1) Was a document mentioned in Mr Rubin's witness statement for the purposes of CPR 31.14? (2) If so, was that an automatic waiver of privilege?

The provisions of CPR Part 31

12. The focus of Mr Lightman's submissions for the companies is on CPR 31.14 and 31.15, but it is necessary to see those provisions in a wider context within Part 31 as a whole. Thus Part 31 provides –

"31.1–(1) This Part sets out rules about the disclosure and inspection of documents…

31.2 A party discloses a document by stating that the document exists or has existed.

31.3–(1) A party to whom a document has been disclosed has a right to inspect that document except where –

…

(b) the party disclosing the document has a right or a duty to withhold inspection of it;…

31.4 In this Part –

"document" means anything in which information of any description is recorded…

31.10–(1) The procedure for standard disclosure is as follows.

(2) Each party must make, and serve on every other party, a list of documents in the relevant practice form…

(4) The list must indicate –

(a) those documents in respect of which the party claims a right or duty to withhold inspection…

(Rule 31.19(3) and (4) require a statement in the list of documents relating to any documents inspection of which a person claims he has a right or duty to withhold.)…

31.12–(1) The court may order specific disclosure or specific inspection…

31.14–(1) A party may inspect a document mentioned in –

(a) a statement of case;

(b) a witness statement;

(c) a witness summary; or

(d) an affidavit

(e) [Revoked]

(2) Subject to rule 35.10(4), a party may apply for an order for inspection of any document mentioned in an expert's report which has not already been disclosed in the proceedings.

(Rule 35.10.4 makes provision in relation to instructions referred to in an expert's report.)

31.15 Where a party has a right to inspect a document –

(a) that party must give the party who disclosed the document written notice of his wish to inspect it;

(b) the party who disclosed the document must permit inspection not more than 7 days after the date on which he received the notice; and

(c) that party may request a copy of the document…

(Rules 31.3 and 31.14 deal with the right of a party to inspect a document.)…

31.16–(1) This rule applies where an application is made to a court under any Act for disclosure before proceedings have started…

(4) An order under this rule must –

…

(b) require him, when making disclosure, to specify any of those documents –

…

(ii) in respect of which he claims a right or duty to withhold inspection…

31.17–(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party…

(4) An order under this rule must –

…

(b) require the respondent, when making disclosure, to specify any of those documents –

…

(ii) in respect of which he claims a right or duty to withhold inspection.

31.19–(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest…

(3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document must state in writing –

(a) that he has such a right or duty; and

(b) the grounds on which he claims that right or duty.

(4) The statement referred to in paragraph (3) must be made –

(a) in the list in which the document is disclosed; or

(b) if there is no list, to the person wishing to inspect the document.

(5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld…

(8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest…

31.21 A party may not rely on any document which he fails to disclose or in respect of which he fails to permit inspection unless the court gives permission.

31.22–(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where…"

13. CPR 31.14(2) cross-refers to CPR 35.10(4). CPR 35.10 is concerned with the contents of experts' reports and provides in part:

"(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

14. Thus, in brief: the definition of "document" is very broad; the rules distinguish between disclosure and inspection; disclosure gives a right of inspection, but in general subject to savings in favour of the public interest and of privilege (rule 31.19). Mention of a document within rule 31.14 appears to be treated as a species of disclosure giving a right of inspection. However, there is no cross-reference in rule 31.14 to rule 31.19, in the way that there is in rule 31.3 (and, implicitly, in rule 31.16(4)(b) and rule 31.17(4)(b)(ii)). Even so, the question of privilege is, obliquely, addressed in rule 31.14 by means of the cross-reference to CPR 35.10(4) in relation to documents mentioned in an expert's report, but not otherwise. Rule 31.14 was amended in 2001 by the introduction of rule 31.14(2) and the deletion of reference to an expert's report in rule 31.14(e). However, this amendment appears to have been more a matter of form than substance, because rule 31.14(e) had previously provided –

"subject to rule 35.10(4), an expert's report.

(Rule 35.10(4) makes provision in relation to instructions referred to in an expert's report)"

The previous regime under RSC order 24, rule 10

15. Because much of the jurisprudence considered by the judge below and cited again in this court concerned the previous regime under RSC order 24, rule 10, it is necessary to set out the terms of that rule:

"10.–(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any party in whose pleadings, affidavits or witness statements reference is made to any document requiring him to produce that document for the inspection of the party giving notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within four days after service of the notice, serve on the party giving the notice a notice stating the time within seven days after the service thereof at which the documents, or such as them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds."

16. RSC order 24, rule 9 was the general rule which provided for inspection of documents referred to in a list, and rule 11 was the rule which provided for a court order for the production for inspection of any documents which a party was required to produce under either rules 9 or 10. Rule 11(1) expressly contemplated that the party of whom production was expected could object to such production, for it provided that –

"11.–(1) If a party…objects to produce any document for inspection…then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order for the production of the documents in question…"

Rule 13(1) there mentioned stated that no order for production of any documents should be made unless the court was of the opinion that the order was necessary for disposing fairly of the case or for saving costs (see also rule 8 to similar effect). Rule 11(1) did not expressly cross-refer to rule 13(2), which nevertheless in general terms recognised a claim of privilege against production for inspection. Rule 5 had meanwhile provided that a claim for privilege "must be made in the list of documents with a sufficient statement of the grounds of privilege".

17. It may be observed that RSC order 24, rule 11, unlike CPR 31.14 or 31.15, makes express reference to a claim for privilege being made in answer to a notice to inspect a document under rule 10. It may also be observed that RSC order 24, rule 10 uses the language of

"reference is made to any document", whereas CPR 31.14 speaks of documents "mentioned in" witness statements and the like. Whatever might be the significance, if any, of the latter change, it may also be noted that the heading of CPR 31.14 retains the language of reference, thus – "Documents referred to in statements of case, etc".

Issue (1): was there mention of a document in Mr Rubin's witness statement?

18. On behalf of the companies, Mr Lightman submitted that the language "he wrote to me enclosing a copy of his note of the meeting and drawing my attention to the discrepancies" mentioned a document, namely Mr Zaidi's covering letter. He was content to assume that the test developed under RSC order 24, rule 10 of asking whether there had been a "direct allusion" to a document still remained the correct test. On behalf of Mr Rubin, however, Mr Hermann Boeddinghaus submitted that such a test excluded any documents which might merely be inferred but had not been specifically identified. Although it might be possible to infer, even to a high degree of probability, that Mr Zaidi had written a letter, nevertheless no letter was mentioned or referred to as such, and for all one knew Mr Zaidi had written not a letter but an e-mail.

19. We were referred by the parties to the following jurisprudence. In *Dubai Bank Ltd v. Galadari (No 2)* [1990] 1 WLR 731, where RSC order 24, rule 10 was in issue, the language being considered was "instrumental in setting up a discretionary trust", "with a guarantee" and "by virtue of a mandate from the account holders". Did these phrases refer to documents? This court held that there was no such reference in the first phrase, since in its context that merely referred to the setting up of a trust, not the actual execution of a document; but that the second and third phrases did refer to documents by way of guarantee and mortgage respectively. Slade LJ, who gave the judgment of the court, reasoned the matter as follows. First, he acknowledged that a reference might be compendious rather than to individual documents (at 738C). He then contrasted the case where a transaction is referred to and a document is specifically mentioned. In the former case, such as in the phrase "the property Blackacre was conveyed by A to B", it may be more or less certain that the transaction was effected by a document, but even so none had been referred to. Counsel had made "the broad submission that, if an affidavit refers to a transaction which on the balance of probabilities will have been *effected* by a document, that must involve a reference to such document for the purpose of the rule", but Slade LJ said that that broad submission could not be accepted, and continued (at 739A):

"It seems to us to involve reading the phrase "reference is made to any document" as including *reference by inference*. This we do not regard as the natural and ordinary meaning of the phrase. To our minds, the phrase imports the meaning of a *direct allusion* to a document or documents."

He also spoke of "the real difference between a reference to the effect of a document and the contents of a document" (at 739H). It would appear that the latter would come within the rule.

20. It appears therefore that a reference to a conveyance, guarantee, mandate or mortgage (another example given by Slade LJ at 740F) would be a reference to a document, as would reference to the contents of such documents: but that mere reference to the *effect of* some transaction or document, such as to say that a property was conveyed or that someone had guaranteed a loan would not be sufficient.

21. Two decisions at first instance on CPR 31.14 and its phrase "a document mentioned in" have been drawn to our attention. In *Vardinoyannis v. Ansol Ltd* (unreported, 23 May 2001) Blackburne J had to consider the significance of the fact that a deponent had deleted earlier references to documents in an affidavit. He referred to *Dubai Bank v. Galadari (No 2)* and commented that he did not consider that there was any material difference between the expression "reference is made to a document" in RSC order 24, rule 10 and the expression "a document mentioned" in CPR 31.14. In *Rigg v. Associated Newspapers* [2003] EWHC 710 (QB), [2003] All ER (D) 97 Gray J was concerned with a defence which had set out at length and in quotation marks the contents of an interview which the defendants' journalist had conducted with the plaintiff. It was submitted that thereby mention had been made of the journalist's interview notes, inspection of which was therefore sought. However, Gray J,

adopting Slade LJ's test of direct allusion, held that any such notes (to which reference had in fact been made in correspondence) were not directly alluded to in the defence. Gray J said (at para 13):

"There is no reference in the Defence to the notes as such and certainly no direct and specific reference…It does not appear to me that quoting from a document amounts to mentioning or directly alluding to it."

22. As often in this area, some fine distinctions may arise. Thus it appears to make all the difference whether the reference is to the fact or effect of a guarantee or to the guarantee itself. Slade LJ contemplated that reference to the contents of a document would be within the previous rule, but Gray J considered in *Rigg* that quoting from a document was not the same as mentioning or directly alluding to it.

23. I am content to assume that there is no effective or substantive difference in the meaning of the previous and the present rule. I am content to adopt the test of direct allusion as an elucidation of the present rule's language which speaks of "mentioned". Nevertheless, the rule is in terms of "mentioned", and any gloss can only be by way of elucidation. I am inclined myself to think that the change in the rule's language from "reference is made" to "mentioned" does underline two matters. The first is to confirm the test of "direct allusion" or, to use another gloss used by Slade LJ, "specifically mention". This is because the expression "refer" or "reference" is ambiguous between a direct or an indirect reference. *Dubai Bank v. Galadari (No 2)* determined that the reference must be direct or specific: hence "specifically mention" and "direct allusion". I think this is underlined by the current expression "mentioned".

24. The second matter is that, subject to my first comment, the expression "mentioned" is as general as could be. This is not to my mind intended to be a difficult test. The document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned. Subject to Mr Lightman's second point, that the mention of a document within CPR 31.14 amounts to automatic and absolute waiver of privilege in it, which if correct would give to that rule a most important effect, I do not see why there should be need for a strict approach to a request for inspection of a specific document mentioned in one of the qualifying documents. The general ethos of the CPR is for a more cards on the table approach to litigation. If a party thinks it worthwhile to mention a document in his pleadings, witness statements or affidavits, I do not see why, subject as I say to the question of privilege, the court should put difficulties in the way of inspection. I look upon the mention of a document in pleadings etc as a form of disclosure. The document in question has not been disclosed by list, or at any rate not yet, but it has been disclosed by mention in what, for the purposes of litigation, is another important and formal category of documents. If so, then the party deploying that document by its mention should in principle be prepared to be required to permit its inspection, and the other party should be entitled to its inspection. What in such circumstances is the virtue of coyness?

25. In the present case, the expression which we have to consider begins "he wrote to me". The courts have not before had to consider such a formula for these purposes. Registrar Simmonds and Patten J considered that this expression fell on the wrong side of the line. However, in my judgment "he wrote" is not a mere reference to a transaction otherwise to be inferred as effected by a document, as in "he conveyed" or "he guaranteed", but is a direct allusion to the act of making the document itself. It is the same as saying "he wrote a writing". Suppose the question was whether there had been a direct allusion to a telephone call in the expression "I telephoned him that day": in my judgment it would make no difference whether the expression was "I telephoned him" or "I made a telephone call to him", in either case there would be a direct allusion to the telephone call. Suppose the expression was "I recorded and transcribed our telephone call that day": there would be a direct allusion to the transcript in question. If in *Rigg* the defence had said that the journalist had "written up the interview", there would have been a direct allusion to that document. In all these expressions, the making of the document itself is the direct subject matter of the reference and amounts in my judgment to the document being "mentioned". "Document" is defined as "anything in which information of any description is recorded". If one then asks whether the expression "he wrote to me…drawing my attention to the discrepancies" makes mention of "anything in which information of any description is recorded", I would find it hard to explain why it does not. I

observe that Mr Rubin's solicitors had just the same reaction, because they twice wrote in terms which, while denying any waiver of privilege, accepted that there had been reference to a document in the witness statement (see at para 7 above).

26. Mr Boeddinghaus submitted that it made a difference that the writing in question might have been an e-mail rather than a letter. This appears to have influenced both courts below. In fact, it was common ground that there was a covering letter (as Patten J remarked). In any event, in my judgment it makes no difference: both are documents, and as long as there could be no confusion as to the document there would be nothing in that point to prevent a direct allusion. It might have been different if there had been both a covering letter and an e-mail, and only one or the other had been mentioned: that would not be a mention of the other. In this case, however, there could be no uncertainty as to the writing of which the witness statement made mention.

27. Subject, therefore, to a possibility that this reasoning would have to be revisited on the basis that the test in CPR 31.14 should be a strict one, in order to guard against the casual mention of documents whose privilege would thereby be automatically and absolutely waived, I would therefore conclude that the covering letter was mentioned in Mr Rubin's witness statement.

Issue 2: Was mention of the letter an automatic and absolute waiver of privilege?

28. Mr Lightman developed a powerful submission based on the terms of CPR Part 31 to the effect that the rule-makers had deliberately decided to depart from the former law under RSC Order 24 in order to make a right of inspection under CPR 31.14 supersede any ability otherwise to claim privilege. On this basis, mention of a document in one of the relevant categories of documents operated as an automatic and absolute waiver of privilege. In this connection he was able to point to the absolute terms of rules 14 and 15 (subject to the specific and narrow rule 14(2) exception in relation only to documents mentioned in an expert's report), and to counter-point the presence in rules 3(1)(b) and 10(4)(a), but not in rule 14, of an express reference to a right or duty to withhold inspection, as well as to cross-references to rule 19. (A similar point could be made about rules 16.4(b)(ii) and 17.4(b)(ii).) He was also able to show that for the purposes of RSC order 24, rule 10 express allowance had been made in rule 11(1)(b) for the case where a party "objects to produce any document for inspection". That had disappeared from CPR 31.14/15. The waiver, although automatic, was understandable because the party mentioning the document and thus waiving privilege had an unfettered choice to decide for itself what it wished to do. It could mention and waive privilege, or not. What it could not do was both to rely on a document and claim privilege in respect of it. He was prepared to allow, nevertheless, that during the seven days in which a rule 15 notice required inspection the party mentioning the document had an opportunity to withdraw, by deleting its mention and thereby dispensing with its waiver of privilege.

29. Mr Boeddinghaus, on the other hand, submitted that rule 19 was of general application, and that in particular rules 19(3) and 19(4)(b) permitted a party against whom inspection was sought to object to inspection even "if there is no list", as for instance where inspection is sought on the basis of a rule 14 mention. That was a matter of interpretation of the rules. More fundamentally, however, the substantive change from the previous regime in respect of so important a right as privilege could not be left to a mere inference, either from the rules of CPR Part 31 themselves or from any change of language as between Part 31 and the previous regime under RSC Order 24. If mention of a document was to be an absolute waiver, then that had to be done by express language, if that was even possible as being within the powers of the rule-makers, which he submitted it was not.

30. While it must be remembered that the rules are now in different terms to what they were, it is necessary and helpful to start with the relevant jurisprudence under the RSC regime. In *Buttes Gas and Oil Co v. Hammer (No 3)* [1981] 1 QB 223 certain documents had been referred to in the plaintiff's pleadings of which inspection was sought. The plaintiffs relied on public interest privilege and legal professional privilege to resist inspection. The right to privilege was contested. The defendant submitted that in any event privilege had been waived by reference to the documents in the pleadings. The members of this court each spoke in somewhat different terms on that latter question: but the upshot was that mere reference to documents in the pleadings was not a waiver. Thus Lord Denning MR said (at 246F):

"In general, it is clear that if a party refers in his pleading to a document, the other side are entitled to require it to be produced, see R.S.C., Ord. 24, r. 10(1) and (2); but it is open to the pleader to object to its production, see R.S.C., Ord. 24, r. 11(1)(a).

Buttes in their amended reply and defence to counterclaim referred to a number of documents. By pleading them, Buttes show that they intend to rely on them. They should make them available for production. If and in so far as they contend that those documents are the subject of a privilege, they should amend their pleading by striking out all reference to them."

31. Donaldson LJ said (at 252E/F):

"It must be right that a bare reference to a document in a pleading does not waive any privilege attaching to it as otherwise there would be no scope for taking objection under R.S.C., Ord. 24, r. 11(i), when a notice was served under rule 10(1). If, on the other hand, a document is reproduced in full in the pleading, its confidentiality is gone and no question of privilege could arise. Where the line is to be drawn between these two extremes may be a matter of some nicety, but I do not think that it is necessary to reach a conclusion in the present case which does not, in my judgment, turn on so narrow an issue as waiver in relation to the few documents which are referred to in the pleadings."

32. Brightman LJ said (at 268C/D):

"So far as waiver by pleading is concerned, I agree with the judge that reference to a document or to its contents in a pleading does not waive any legal professional privilege attached to it. It is to my mind equally clear that a party cannot rely on a privileged document so pleaded without thereby waiving privilege. Therefore sooner or later Buttes will have to decide whether to forego privilege in respect of a privileged document which is pleaded, or to abandon reliance on it. If they sit on the fence until the trial (if any) begins or is in actual progress, they will do so at their own risk. Circumstances might arise in which the other side could properly claim to be entitled to an adjournment at Buttes' expense. Whether Buttes could force Occidental to step down from the fence prior to trial by an application to strike out a pleaded document in respect of which privilege is maintained does not arise for decision on this appeal, but I would think that Occidental might be able to do this."

33. That was the position under the RSC regime, where, as Lord Denning and Donaldson LJ each remarked, the rules themselves demonstrated that the party asked for inspection of a document referred to in a pleading could object to its production. A more modern authority, under the CPR regime, is *Lucas v. Barking, Havering and Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102, [2004] 1 WLR 220. That concerned expert reports which referred to other documents of which inspection was sought under CPR 31.14(2). Inspection was resisted on the ground that the documents in question fell within CPR 35.10(3) and (4) as part of the instructions given to the experts and thus subject to the limitations on waiver of privilege contained in rule 35.10(4). This court sustained the claim to privilege. In the course of the hearing, however, there was some albeit incomplete discussion of the general effect of CPR 31.14 on the maintenance or waiver of privilege. Thus Waller LJ said this:

"[24] Where there is a right to inspect without application, and without the right being subject to r 35.10(4), it is not absolutely clear whether a party is still entitled to refuse inspection on the grounds of privilege. There is a suggestion in *Hollander and Adam's Documentary Evidence* 7th ed (2000), para 13-14 that CPR r 31.14(1) provides an absolute right to inspection. The suggestion is that CPR r 31.21 then acts as a sanction disallowing the party who has refused inspection from using the document referred to. I have my doubts as to whether that is right. It seems to me unlikely that the CPR would have intended to abolish privilege at a stroke under CPR r 31.14(1) without expressly saying so. In relation to 'instructions' in experts' reports CPR r 35.10(4) expressly refers to there being no privilege and if privilege was to be lost I would expect express reference to that result. There is no indication that there was an intention to revoke privilege in all other cases. In addition if privilege has been waived by deployment of the contents of a privileged statement, it is not a satisfactory sanction that a party should simply be precluded from relying on the document of which it is

not allowed inspection. If a party has in fact waived privilege, the other party should be entitled to use the documents then disclosable for its own purposes.

[25] …However, the question whether there was an absolute right to inspection under CPR r 31.14(1)(a)-(d) was not fully argued out before us. It is possible that on a proper construction of r 31.14 there is a right to refuse inspection on the grounds of privilege even if documents are referred to in a statement of case, a witness statement, a witness summary or an affidavit. CPR r 31.15 appears in broad terms to refer to a party's right to inspect without any right to refuse to do so but in parenthesis at the end of the rule it says: "Rules 31.3 and 31.14 deal with the right of a party to inspect a document". By bringing in CPR r 31.3 at that stage it is possible that the draughtsmen contemplated that a party may be able to refuse disclosure on the grounds that it has "a right" to do so under CPR r 31.3(1)(b) allowing for the matter to be argued out as to whether reference to the document or deployment of its contents has waived the privilege."

34. Laws LJ expressed himself provisionally but in strong terms as follows:

"[44] Although, as Waller LJ has pointed out in para 25, the matter has not been fully argued before us, and thus no doubt it would be wrong to express a concluded view, for my part I would have very great difficulty in accepting that CPR rr 31.14(1)(a)-(d) confer an absolute right to inspect, thus abrogating privilege otherwise inherent in any document there referred to. Such a construction would require very clear words. The sub-paragraphs are not generally concerned with documents which would attract privilege, and so have ample scope to operate without the assumption of any incursion into the law of privilege. It is inconceivable that they abrogate the impact of public interest immunity, which presumably they would if they created absolute rights. And it would be quixotic if documents whose privilege is expressly withdrawn (rule 35.10(4)) were subject only to limited rights of disclosure but those (rule 35.14(1)) whose privilege is only impliedly withdrawn were liable to be inspected without restriction."

35. In *Zuckerman on Civil Procedure*, 2006, at para 14.30, the opinion is expressed in relation to *Lucas* that –

"The better view is that a precise and specific mention of a document in a statement of case and the like amounts to a waiver of the privilege."

However, no reason is given for that opinion. *Disclosure*, by Matthews and Malek, 2007, however, appears to be of a different view, for at para 9.04 at pp 217/218, the following appears:

"Once it is shown or admitted that a document is mentioned in a statement of case, a witness statement, a witness summary, an affidavit or an expert's report, the onus is on the party against whom the application is made to produce it unless he can show good cause why he should not"

citing *Quilter v. Heatly* (1883) 23 Ch D 42 at 51. (That, however, concerned a rule which spoke in terms of "other sufficient cause for not complying with such notice" at 46.) The special position of expert's reports under CPR 35.10 is then addressed. The authors of *Disclosure* deal specifically with the question of privilege in relation to documents within CPR 31.14 again at paras 12.19/24. The general position taken there, again by reference to authorities preceding the CPR regime, is that a mere reference to a privileged document does not of itself amount to a waiver of privilege, although the deployment of its contents may be. In essence, the authors do not regard the position as having changed with the new regime.

36. If the arguments were confined to a careful analysis of the language of the new CPR regime as compared with that of the old rules in RSC Order 24, I can see that there is much to be said for Mr Lightman's submissions. Waller LJ in *Lucas* canvassed the possibility that the solution was to be found in the cross-reference in CPR 31.15 to rules 31.3 and 31.14. But Mr Lightman pointed out that whereas rule 31.3 allowed expressly of the taking of objection on the ground of a right or duty to withhold inspection, rule 31.14 said nothing about this – save to a limited degree via cross-reference to rule 35.10 in the sole case of documents mentioned in an

expert's report. And although rule 31.19(4)(b) might have been designed to maintain a right of objection "if there is no list" in the case of a rule 31.14 right of inspection, Mr Lightman was able to show that there could be other circumstances where there was a right of inspection in the absence of a list, so that there was no necessity to ascribe rule 19(4)(b) to our case.

37. Nevertheless, in my judgment these factors, influential as they are, are not as powerful as the contrary arguments. I would describe these as follows. First, Mr Lightman was unable to provide a solid, if any, reason why the drafters of the CPR, in contra-distinction to the previous law, should have decided to require the automatic and absolute waiver of privilege as the price for the mere mention of documents in statements of case and the like. Secondly, there is nothing in Part 31 itself to explain this change of philosophy. Mr Lightman attempted to meet these points, on which Patten J had remarked in his judgment, by submitting that the party subject to a rule 31.14 right of inspection has a seven day *locus poenitentiae* during the rule 31.15 notice period, in which he may decide to withdraw and delete his reference to the documents whose inspection is in the progress of being sought. The difficulties with this suggestion, however, are that rule 31.15 says nothing to this effect; and it is not obvious how privilege once waived can be reacquired. Moreover, the effect of this submission is that mention of documents within rule 31.14 is no longer to be regarded as an automatic and absolute waiver of privilege.

38. Thirdly, the change mooted in the philosophy of CPR Part 31 is to the effect that, apparently for the first time in the history of English litigation, the fundamental protection of privilege is automatically abandoned by the mere mentioning of documents. I would respectfully agree with the albeit provisional views of Waller and Laws LJJ in *Lucas* that such a fundamental change should not be regarded as having been effected by mere inference. The role of privilege as "a fundamental condition on which the administration of justice as a whole rests" (*per* Lord Taylor of Gosforth, *R v. Derby Magistrates' Court, ex p B* [1996] 1 AC 487 at 507) needs no emphasis. Its importance is such that a provision in CPR 48.7(3) requiring the disclosure of privileged documents in the context of applications for wasted costs orders has been held to be *ultra vires* of the statute under which the CPR were made, being the Civil Procedure Act 1997: see *General Mediterranean Holdings SA v. Patel* [2000] 1 WLR 272. Toulson J there quoted and applied in this context Lord Hoffmann's words in *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131 that

    "Fundamental rights cannot be overridden by general or ambiguous words…In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

    Toulson J also quoted Steyn LJ, delivering the judgment of this court in *R v. Secretary of State for the Home Department, ex p Leech* [1994] QB 198, where he said at 211:

    "Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice. It is not without significance that counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly."

39. Fourthly, ultimately there is no sufficient reason, especially in this context, why CPR 31.19 should not be read as having general application, whether or not a previous rule within Part 31 should have referred expressly to a right to object to inspection or should have expressly cross-referred to it. One strong indication of this is that rules 19(1) and 19(8) concerning public interest immunity seem to be of quite general application. In my judgment CPR 31.19(4)(b) appears to be well designed for the situation where disclosure is made by mentioning a document within CPR 31.14. For all that CPR 31.15 appears to be absolute in terms ("must permit inspection"), it is not, as the cross-reference to rule 31.3 (with its allowance for claims of privilege) alone demonstrates.

40. Fifthly, one possible reason why CPR 31.14 itself does not expressly cross-reference to rule 19 is that rule 14 is viewed as merely an adjunct to CPR 31.3, so that a further cross-reference is unnecessary. In this connection it will be observed that rule 3 is of general application whenever "a document has been disclosed". Although disclosure generally takes

place by list under rule 10, it also takes place by virtue of the mention of documents within rule 14. Thus rule 14 disclosure (with its ancillary right to inspect) is merely a species of disclosure and comes within the general provisions of rule 3. That appears to have been the view of this court in *SmithKline Beecham plc v. Generics (UK) Ltd* [2003] EWCA Civ 1109, [2004] 1 WLR 1479, albeit there the point arose not in the context of an argument about privilege, but in the context of an analogous issue as to whether documents mentioned within rule 14 and thereupon provided to the other party were "disclosed" for the purposes of CPR 31.22 and therefore confidential to the proceedings save (inter alia) with the leave of the court. It was argued that such documents were not "disclosed" within rule 22, because they had been produced voluntarily (at para 28). However, this court concluded that such documents were still "disclosed". Aldous LJ said (at para 29):

"29. I agree with Mr Turner that CPR Pt 31 is a complete code, but I reject his submission that that code perpetuated in all respects the distinction between documents disclosed in a list of documents and those that might be disclosed in another way. The obligation to disclose and the ability to inspect are dealt with separately as is the ability to use a document after disclosure. CPR r 31.3 is concerned with disclosed documents but reserves an ability to refuse inspection. CPR r 31.14 adds to CPR r 31.3. In any case the wide definition in CPR r 31.2 must be determinative. That states that "A party discloses a document by stating that the document exists or has existed". No distinction is sought to be drawn between documents obtained from third parties and no limitation is placed on the way that the statement is made. In my view a reference by a party to a document in a witness statement is a statement that the document exists. I therefore reject Mr Turner's application. It follows that the judge was right to consider the application by Generics as an application under CPR r 31.22(2)."

Chadwick and Latham LJJ agreed.

41. That is tantamount to a decision that the letter in our case was disclosed for the purposes of rule 3. Rule 3, which is expressed in general terms and is not confined to disclosure by list, states that the right to inspect (which is further developed in rule 15) is subject to a claim to a right or duty to withhold inspection. Rule 15 cross-refers to both rule 3 and rule 14. Thus what might appear to be an "absolute" right to inspect for the purposes of rules 14 and 15 is in fact a qualified right, by reference to rule 3. This would of course be wholly consistent with the view that rule 19 is of general application. It is also consistent with my untutored view (see para 14 above) that mention of a document is a species of disclosure.

42. Sixthly, for these reasons the contemplation of the qualified rights of privilege dealt with in CPR 35.10(4) and to which rule 14(2) makes reference throws no light on the role of the principles of privilege in relation to documents mentioned otherwise than in an expert's report. No inference can be drawn therefore from the provisions of rule 14(2). Moreover, the detailed provisions in relation to privilege in relation to an expert's report in any event needed to be separately addressed, requiring cross-reference to CPR 35.10, since that is where this issue in the case of experts' reports is dealt with. Even so, CPR 35.10 deals only with the role of privilege in relation to "instructions". It does not deal with the role of privilege in relation to documents mentioned in an expert's report wholly generally. Therefore, outside the scope of CPR 35.10, the position of documents mentioned in an expert's report is the same as in the case of documents mentioned in a statement of case, a witness statement, a witness summary or an affidavit. Laws LJ's observations in *Lucas* ("it would be quixotic if…") are therefore particularly pertinent.

43. In the circumstances, it is unnecessary to consider whether a provision impliedly leading to the automatic and absolute loss of privilege merely by virtue of the mention of documents in other specified categories of documents, however slight the reference and whether or not the mentioned documents are deployed in the litigation, would have been *ultra vires*. It is also unnecessary to revisit issue 1.

Conclusion

44. For these reasons, I conclude that the covering letter was mentioned in Mr Rubin's second witness statement, but that privilege for it was not thereby automatically and absolutely lost. I would therefore dismiss the appeal.

LORD JUSTICE JACOB:

45. I agree.

MR JUSTICE FORBES:

46. I also agree.

Neutral Citation Number: [2009] EWHC 1437 (Ch)

Case No: HC07C01917

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice Strand,
London, WC2A 2LL

17/06/2009

B e f o r e :

MR JUSTICE MORGAN

Between:

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

- and -

1) Cable & Wireless Plc
2) Cable & Wireless (West Indies) Limited
3) Cable & Wireless Grenada Limited (a company registered under the laws of Grenada)
4) Cable & Wireless (Barbados) Limited (a **Defendants**

company registered under the laws of Barbados)
5) Cable & Wireless (Cayman Islands) Limited (a company registered under the laws of the Cayman Islands)
6) Telecommunications Services of Trinidad & Tobago Limited (a company registered under the laws of Trinidad & Tobago)

Mr Stephen Rubin QC, Mr Huw Davis QC, Mr Stephen Houseman & Mr Rupert Allen (instructed by Jones Day) for the Plaintiff s
Lord Grabiner QC, Mr Edmund Nourse & Mr Conall Patton (instructed by Slaughter & May) for the Defendants
Hearing date: 16 June 2009

HTML VERSION OF JUDGMENT

MR JUSTICE MORGAN

Introduction

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

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

3. In the action, the various plaintiffs claim that the various defendants have committed various unlawful acts in relation to a process which is called "interconnection". The interconnection in question was to have been between the various defendants' telecommunications networks in various islands in the Caribbean and the telecommunications networks which were at the relevant time or times proposed to be created by the various plaintiffs. The claims made by the plaintiffs include an allegation that the defendants, or some of them, conspired together to injure the various plaintiffs by unlawful means.

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

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

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

7. The plaintiffs have served a re-amended particulars of claim which sets out their contentions that: (1) there was no such belief on the part of the defendants; and (2) any such belief would not prevent the plaintiffs proving all the necessary ingredients of the tort of conspiracy, nor provide a defence in law to the allegation of the tort of conspiracy.

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

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

(1) At least each of the following honestly believed, at all times material to the issues in any particular jurisdiction, that there was no obligation upon the relevant defendant in the particular jurisdiction to commence physical interconnection, in particular by ordering equipment and/or commencing civil works, until there was a concluded and/or approved interconnection agreement between the parties: Donald Austin, Clive Batchelor, Geoff Batstone, Errald Miller, John Thompson, Lawrence McNaughton, Rudy Ebanks, Lisa Agard, Carlos Espinal, Kurleigh Prescod.

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

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

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

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

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

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

The Application

9. On 11 June 2009 the plaintiffs issued the application which is now before me. Part 3 of the application notice reads as follows:

"The plaintiffs seek an order that the defendants shall give disclosure and inspection of documents constituting or evidencing legal advice which was given to or received by the

individuals identified in the draft order attached regarding the lawfulness or otherwise under the laws of St Lucia, St Vincent and the Grenadines, Grenada or Barbados of the defendants' refusal or failure to commence negotiations or progress interconnection with the relevant plaintiff prior to the formal grant of a licence to the relevant plaintiff and/or the defendants' refusal or failure to order equipment required for interconnection with the relevant plaintiff prior to the signing and/or approval of an interconnection agreement between the relevant defendant and the relevant plaintiff . Alternatively, the plaintiff s seek an order that the defendants shall give disclosure and inspection of documents constituting or evidencing such legal advice which the individuals identified in the draft order attached received from or were directly or indirectly given by Mr Geoff Batstone.

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

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

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

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

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

    "Any documents constituting or evidencing legal advice given to or received by Mr John Thompson and/or Mr Lawrence McNaughton and/or Mr Clive Batchelor and/or Mr Donald Austin and/or Mr Errald Miller as to the lawfulness or otherwise of the refusal and/or failure of any of the defendants to order equipment required for interconnection with any of the plaintiff s in advance of the signing and/or regulatory approval of an interconnection agreement between the relevant defendant and relevant plaintiff in relation to St Lucia, St Vincent and the Grenadines, Grenada or Barbados."

11. The submissions on behalf of the plaintiff s were presented by Mr Rubin Q.C. The submissions on behalf of the defendants were presented by Mr Patton. I am grateful to both counsel for the clarity of their submissions and the help they gave me.

The Plaintiff s' Submissions

12. Mr Rubin puts his case in two ways. Adopting the order in which the submissions were presented in oral argument, his first submission can be described as the narrow submission and the second submission can be described as the broad submission. The narrow submission is in support of the second part of the relief sought by the application notice. The broad submission is in support of the first part of the relief sought by the application notice and by the draft order. Following the sequence adopted by counsel in their oral submissions, I will deal first with the narrow submission and then with the broad submission.

The Narrow Submission

13. Mr Rubin accepts that the documents that he wishes to have disclosed were initially the subject of legal professional privilege. He submits that the witness statements served by the

defendants and referred to in paragraph 88 of the re-amended defence contain passages where the witnesses refer to their beliefs as to the lawfulness of their conduct and also refer, in a way which I will describe in more detail later, to the topic of legal advice being given, in particular by a Mr Batstone, a lawyer. Mr Rubin submits that taking all the witness statements together, there is a waiver of legal professional privilege in any such legal advice.

14. The parties are agreed that where a party is entitled to claim legal professional privilege but nonetheless deploys some of the privileged material in the litigation, then that party may be held to have waived privilege in the relevant material. The waiver will not necessarily be confined to the privileged material deployed by the party but may extend further, to some extent, to other privileged material. It has been said that the party who makes a partial waiver of privileged material is not entitled to cherrypick from the material so as to disclose and deploy the part of the material which suits him but to withhold other parts which might not suit him.

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

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

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

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

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

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

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

    "However, in our view, the answer to the question whether waiver has occurred or not depends upon considering both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities in England strongly 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."

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

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

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

20. Mr Patton, on behalf of the defendants, does not I think fundamentally disagree with this approach. He does not in terms quarrel with the way in which the matter is discussed in Brennan. To assist analysis of the problems which arise, he identified three questions which he submitted should be asked in turn. His questions are as follows:

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

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

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

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

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

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

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

Mr Rubin has taken me in detail and with care through a large number of witness statements. He submits that, having regard to the statements made as to the belief of various witnesses and the role of some of those witnesses in giving legal advice, I can infer that the case being put forward by the defendants is that the beliefs, as to the legal position, that are being relied upon by the defendants, are supported by legal advice given to those witnesses with the alleged beliefs. He submits that the consequence of this is that the defendants are deploying the legal advice in this litigation and have waived privilege in that advice.

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

24. Mr Patton submits that this argument by Mr Rubin contains the seeds of its own destruction. He points out that this particular argument does not seek to rely upon any express references in the witness statements to the contents of legal advice supporting the alleged beliefs. Rather the argument is that the statements made by the witnesses give rise to an inference -- and Mr Patton stressed the word "inference" -- that the relevant beliefs were supported by legal advice. Mr Patton submitted that if there were no reference to the contents of the legal advice, there could be no waiver in relation to such advice.

25. Mr Rubin accepted that if the legal advice were not disclosed as a result of this application, he would contend in closing submissions at the end of the trial that it could not be inferred that the legal advice supported the alleged beliefs. I put to Mr Rubin that if the defendants did not disclose the legal advice, they could hardly ask the court to infer that the legal advice supported the alleged beliefs. That would not be a case of drawing adverse inferences against the defendants by reason of the claim to privilege; it would instead be a case of not drawing inferences in their favour; the reason for not drawing inferences in their favour being that the material was simply not before the court and could not be assessed.

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

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

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

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

29. I have carefully considered the many passages in the witness statements to which my attention was drawn. These passages have been extracted and set out over eight pages in a witness statement from the plaintiff s' solicitor. That was, of course, helpful in the course of the application but it is neither necessary nor appropriate for me to set out all those passages in this judgment.

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

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

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

argument. The only purpose of referring to my contemporaneous belief or understanding in this respect is to explain why I (or those with whom I was working) acted (or omitted to act) as we did. I understand this may be relevant given that it is alleged in these proceedings that the defendants pursued a strategy of deliberate and unlawful delay as regards interconnection."

31. I should make a few preliminary remarks about that statement. First, whether a reference to legal advice gives rise to a waiver is a matter of law to be judged objectively. Thus a statement that the reference is not to be taken as a waiver of privilege does not prevent the court holding that, as a matter of law, objectively considered, the statement does constitute a waiver. To be fair to Mr Batstone, he does not try to say that there is no intention to waive; rather he says that the privilege had not previously been waived. Secondly, a statement that the witness does not refer to the contents of the advice can be material when the court considers the separate question, which is a question of fact, whether the reference is fairly construed as a reference to the contents of the advice or to something less than that. Thirdly, the fact that Mr Batstone refers to his own belief and his own conduct in reliance on his belief does not of itself state that he gave legal advice, much less what was the content of that legal advice.

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

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

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

    "RE: request for interconnection.

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

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

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

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

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

    "Cable & Wireless reserves its legal rights."

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

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

35. Mr Rubin expressly conceded in the course of argument that the letter of 23 May 2003 did not involve a waiver of privilege in the advice referred to in that letter. In view of that concession, I do not see anything in paragraph 283 of the witness statement which takes the matter any further.

36. The third statement is in paragraph 369 of Mr Batstone's witness statement. Paragraph 369 referred to an earlier point mentioned in paragraph 368 of the statement about allegations of certain conduct and the like. Paragraph 369 reads as follows:

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

37. The argument for this being a waiver of privilege is that when Mr Batstone refers to "the stance we took", he not referring to himself alone. It can be said that he is saying that he ensured that the advice he gave to others affected the stance of those others. Therefore, it is argued, the contents of the legal advice are revealed by the conduct of those others.

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

38. The fourth and last statement to which I will refer is in paragraph 28 of Mr Austin's witness statement. That paragraph also refers to the letter of 23 May 2003 which I have referred to earlier in this judgment. Paragraph 28 reads as follows:

    "We heard nothing further in response to that letter until 14 May 2003 when Digicel sent a letter. Digicel did not produce a copy of a licence but put forward an explanation of what they said were our obligations. I thought that their delay in replying indicated that they knew they had no right to request interconnection at that time. I responded on 23 May 2003 with our position that we had no obligation to interconnect with someone who was not a licensed carrier which, as set out in that letter, was based on advice."

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

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

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

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

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

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

My Conclusion on the Narrow Submission

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

The Broad Submission

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

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

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

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

(2) The alleged state of mind relates to matters of law as to whether certain acts or omissions were lawful under various statutes and regulations.

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

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

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

(6) It is unrealistic to think that the plaintiff s can properly cross-examine the relevant individuals unless the plaintiff s have available to them the same material.

(7) It would be most unfair for the defendants to be allowed to advance their pleaded case as to the alleged state of mind while the plaintiff s and the court are denied access to the legal

advice which probably contributed to or caused the individual forming the alleged views, or indeed their actual views if different.

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

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

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

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

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

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

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

(3) That fundamental right is jealously protected by the relevant legal principles.

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

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

(6) To override the defendants' privilege, the plaintiff s must show that something which has been done by the defendants has amounted to a waiver by them of that privilege.

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

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

The Authorities on the Broad Submission

47. In addition to several authorities which dealt more generally with the question of legal professional privilege, both sides referred me to, and made detailed submissions on, the decision of the Court of Appeal in Paragon Finance v Freshfields [1999] 1 WLR 1183 and the decision of Mr Justice Ramsey in Farm Assist Limited v Secretary of State for Environment, Food and Rural Affairs [2009] PNLR 321.

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

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

"If the question were one of balancing the requirements of fairness and justice in the instant proceedings against any legitimate interest a plaintiff might have in maintaining the confidentiality of a confidential relationship, there might be much to be said for the result reached by the judge in the Kershaw case [1996] 1 WLR 358 but Reg v Derby Magistrates' Court Ex parte B [1996] AC 487 makes plain that in the context of legal professional privilege no such balance is involved. This authority is important, not only for its clear restatement of principle, but also as illustrating in graphic terms the all but absolute nature of this privilege in the absence of waiver. If ever there was a case in which the interests of justice militated in favour of disclosure, that surely was it."

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

"We need not linger on Hayes v Dowding, a case in which the plaintiffs were held to have impliedly waived their right to legal professional privilege by bringing proceedings even though the proceedings were not against any legal adviser. In reaching that conclusion the judge relied heavily on Australian and United States authority. Neither party before us sought to contend that this case was correctly decided and we are satisfied that it was not. The authorities on which the judge principally relied do not represent the law in this country, and the decision must be overruled."

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

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

49. In the Farm Assist case, the decision of Mr Justice Ramsey, reading from the headnote was:

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

In that case, having described the state of mind which was in issue on the pleadings and the arguments as to waiver of privilege as a result of that being an issue, the learned judge reviewed the authorities, which I need not list. He then referred to statements in the textbooks which were relied upon in that case by the applicant for disclosure. I will refer to one statement in particular, which is in paragraph 32 of Mr Justice Ramsey's judgment, which reads:

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

That statement in the textbook was plainly heavily influenced by the decision in Hayes v Dowding, which itself was heavily influenced by the Australian and United States decisions. Essentially, in his conclusion, Mr Justice Ramsey stated that the statement in the textbook was wrong as a matter of law. Mr Justice Ramsey gave detailed reasons for that conclusion which I need not describe, much less read out. However, I will read paragraphs 53 and 54 of this judgment, where he said the following:

"Rather English law maintains the right of a party to maintain legal privilege. Whilst a person's state of mind and also that person's actions may well have been influenced by legal advice, there is no general implied waiver of privilege material merely because a state of mind or certain actions are in issue. This means that in the absence of disclosure of the privileged

legal advice, the other party is precluded from being able to put that legal advice to a person to show that the advice influenced the state of mind or actions of that person. In many cases it could be said that privileged legal advice might be relevant to establishing an issue and that in this way the privileged material could be said to be put in issue.

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

Before leaving that authority, my attention was drawn to paragraph 56, where Mr Justice Ramsey said that the case before him was not a case where the plaintiff had expressly put in issue some legal advice giving rise to an implied waiver. My interpretation of paragraph 5 6 is that the possibility, which did not arise on the facts but which was being referred to by Mr Justice Ramsey, was the possibility of waiver by reason of deployment of the contents of legal advice in the litigation.

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

My Conclusion on the Broad Submission

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

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

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

54. Accordingly I reject the broad submission put forward by the plaintiff s.

The Overall Result

55. The overall result is that the application fails.

Other Matters

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

57. First, I am not deciding who bears the legal or the evidential burden in relation to the issue as to honest belief as to the lawfulness of the conduct of the defendants.

58. Secondly, nothing in this judgment involves any prediction of the conclusions which I will come to on the issue of honest belief, having heard all the evidence in this case. It is neither appropriate nor indeed possible to form any view on that matter until I have heard all the evidence and the closing submissions from counsel.

November 2013

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

Claim

The claim is for damages for alleged breach of express and implied terms of a contract.

Witnesses

The witnesses for the two parties are described below.

You will be informed which two witnesses will appear at the mini trial when you hand in your "TSP" prior to the assessment.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the plaintiff:

1. Jane Cheung
2. Henry Au (a vulnerable witness. Mr. Au has learning difficulties. He must be questioned in accordance with the judicial directions set out on the final page of this document)
3. Michael Chu
4. D.S. Chow (an expert)

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii.the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the 1st Defendant:

1. David Poon

2. Queenie Lam (a vulnerable witness. Ms. Lam has learning difficulties. She must be questioned in accordance with the judicial directions on the final page of this document)

3. Tiger Wong

4. Samuel Sage (an expert)

You can assume:

i. the witnesses will appear at trial in the order listed above

ii.the witnesses who will not appear 'live' at the mini trial have given/will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

BEFORE the Mini-Trial

Before the day of the assessment, you must complete your Trial Strategy Plan ('TSP'). Please note that this should be completed with respect of all witnesses.

A blank TSP form has been provided with your assessment papers. You may complete it in manuscript or you may type it.

You should hand your TSP to the Assessor when you arrive at the assessment venue.

DURING the Mini-Trial

You will be required to:

- make an opening speech (max 5 minutes)

- examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. Please note that one of the potential witnesses you may examine is a vulnerable witness. You should observe the judicial guidance noted on the final sheet of this instruction if this is the case. Please also note that; you should conduct a full examination in chief of the witness on the basis that their statement does not stand as evidence in chief

- cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that one of the opponent's potential witnesses is a vulnerable witness. If this is the case, you should observe the judicial guidance noted on the final sheet of this instruction when cross-examining this witness. Please note that the opponent's witness may be un-cooperative at times. Please also note that; the witness' statement does not stand as evidence in chief

- deal with any interventions made by the advocate representing the opposing party

- make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party

- deal with any Judicial interventions/questions as and when they arise

NOTE TO CANDIDATES

VULNERABLE WITNESSES

The judge has directed that the following adjustments and measures be taken by both advocates so as to ensure that the hearing proceeds in a fair and equitable manner

- Ask single rather than compound/multi clausal questions
- Allow thinking time before pressing for a response
- Make allowances if the witness has difficulty answering concisely
- Speak more slowly, use simple words and sentences, and do not go on too long without a break
- Avoid questions containing a choice of answers which may not include the correct one
- Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given
- Do not move to new topics without explanation (e.g. of such an explanation: 'let's now talk about…'). And do not ask abstract questions (e.g. ask 'was it after breakfast' rather than 'was it after 9.00am')
- Allow the witness to request that questions be repeated or rephrased and/or permit the witness to check understanding by rephrasing them him/herself without censure or implied criticism
- Allow the witness to tell his/her own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding)
- It may be necessary to explain something more than once using simple language
- Always ensure that the witness is treated with due respect and is not ridiculed if unable to understand the way questions are being asked.