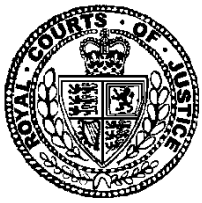

Neutral Citation Number [2020] EWHC 2064 (Ch).

Case No: CR-2015-007978

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (CHD)

MR ANDREW HOCHHAUSER QC
(Sitting as a Deputy Judge of the High Court)

7, Rolls Building,
Fetter Lane, London
Date: 31 July 2020

IN THE MATTER OF TRANSFORM MEDICAL GROUP (CS) LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

BETWEEN:

(1) MARTIN CHARLES ARMSTRONG
(2) JAMES EDMUND PATCHETT
(As Joint Administrators of the above-named company)

Applicants

-and-

(1) BERRYMANS LACE MAWER LLP
(TRADING AS BLM)
(2) TRAVELERS INSURANCE COMPANY LIMITED

Respondents

CHRISTOPHER BOARDMAN QC, instructed by Charles Russell Speechleys LLP, for the Applicants

DAVID HALPERN QC, instructed by Mills & Reeves LLP, for the First Respondent

BEN LYNCH QC, instructed by DWF LLP, for the Second Respondent

Hearing dates 4, 5, 6, and 7 February 2020

I direct that pursuant to CPR PD 29A para 6.1 no official shorthand note shall be taken of this Judgement and that copies of this version as handed down may be treated as authentic.

ANDREW HOCHHAUSER QC

APPROVED JUDGMENT

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10.30am on 31/07/2020.

Introduction

1. This is the hearing of an issue (the "**Issue**") directed for determination by ICCJ Jones on 8 July 2019, namely "*whether or not the Joint Retainer files (defined in the parties' evidence) should be disclosed to HJI and / or to Hugh James*". The Issue arises in the context of an application issued on 11 January 2019 (the "**Application**"), pursuant to section 234 and section 236 of the Insolvency Act 1986 (the "**1986 Act**"), by the Applicants, the joint administrators (the "**Administrators**") of Transform Medical Group (CS) Ltd ("**Transform**") seeking an order against the First Respondents, Berrymans Lace Mawer LLP ("**BLM**") that they "*deliver up to the Applicants' solicitors all files that they hold pursuant to retainers with the Company*".

2. On 28 June 2019, the Application came before ICCJ Jones and he made an order, sealed on 8 July 2019 (the "**July Order**"), joining Travelers Insurance Company Ltd ("**Travelers**") as a party and requiring "*subject to (a) the Undertakings and (b) the "sifting" process set out below, the Joint Retainer Files shall be delivered up to the*

Applicants by the Respondent by 4.30pm on 27 September 2019" (the "**Deadline**"). He further ordered "*the Respondent is to use its best endeavours to deliver up documents from the Joint Retainer files that have been through the "sifting" process including the monitoring to the Applicants every three weeks*" (the "**Ongoing Obligation**"). The effect was to determine the Application, save for the Issue and costs.

3. Notwithstanding the July Order, none of the Joint Retainer files (or any of their contents) were provided to the Administrators. On 17 September 2019, ICCJ Mullen made an Order by consent extending the Deadline to 4.30 pm on 27 December 2019.

4. On 4 December 2019, Travelers made an application for a stay of the disclosure procedure set out in the July Order, alternatively an extension of time ("**Travelers' Application**").

5. On 10 January 2020, Deputy ICCJ Shaffer made an Order on the Travelers' Application (for a stay of compliance until this hearing, alternatively an extension of time for compliance) further extending the Deadline to 21 February 2020, suspending the Ongoing Obligation until this hearing, and adjourning the Travelers' Application to this hearing. It is accepted that the determination of the Issue will render Travelers' Application largely irrelevant, save as to the issue of costs.

6. At the conclusion of the hearing before me, on 7 February 2020, I made an Order further extending the Deadline to 6 March 2020 and lifting the suspension of the Ongoing Obligation. That was followed by a further short hearing before me on 28 February 2020, when, upon certain undertakings being given by BLM, I extended the Deadline once again to 13 March 2020.

The Evidence

7. The evidence before me consisted of the following:

   (1) The Witness Statement of Martin Armstrong dated 10 January 2019 ("**Armstrong 1**");

   (2) The First Witness Statement of Mark Whittaker dated 13 February 2019 ("**Whittaker 1**");

   (3) The Witness Statement of Andrew Sherwood dated 4 March 2019 ("**Sherwood 1**");

(4) The Witness Statement of Praveen Reddy dated 23 April 2019 ("**Reddy 1**");

(5) The Second Witness Statement of Mark Whittaker dated 5 June 2019 ("**Whittaker 2**");

(6) The Witness Statement of Richard James Locke dated 5 August 2019 ("**Locke 1**");

(7) The Witness Statement of Douglas John Keating dated 6 September 2019 ("**Keating 1**");

(8) The Third Witness Statement of Mark Whittaker dated 4 December 2019 ("**Whittaker 3**");

(9) The Second Witness Statement of Praveen Reddy dated 3 January 2020 ("**Reddy 2**");

(10) The First Witness Statement of David Jonathan Charles Gooding dated 7 January 2020 ("**Gooding 1**")

(11) The Second Witness Statement of Richard James Locke dated 27 January 2020 ("**Locke 2**");

(12) The Second Witness Statement of Douglas John Keating dated 29 January 2020 ("**Keating 2**");

(13) The First Witness Statement of Mark Andrew Harvey dated 3 February 2020 ("**Harvey 1**");

(14) The First Witness Statement of Jonathan Michael Herne dated 6 February 2020 ("**Herne 1**")

8. Despite the objection of Travelers to the late service of Locke 2 and Harvey 1, I permitted both witness statements to be adduced in evidence, giving Travelers a right of response to Harvey 1, if necessary, Keating 2 having already responded to Locke 2. No further evidence was produced.

Representation

9. At the hearing, the Administrators were represented by Christopher Boardman and Travelers by Ben Lynch. Since then both have been appointed to the ranks of Queen's Counsel. The quality of their oral and written submissions showed their elevation was

richly deserved. BLM was represented by David Halpern QC. I am grateful to all Counsel for their assistance.

The Background

10. Transform carried on business as one of the UK's leading cosmetic surgeries, with 25 clinics across the UK, which provided (amongst other things), breast implants, manufactured by a French company, Poly Implant Prothese ("**PIP**"). In 2010, Transform faced a large number of claims by female claimants in respect of allegedly faulty PIP breast implants, who claimed that there was a failure to use medical grade silicone in the manufacturing process, causing the implants to rupture. Proceedings were subsequently issued and on 17 April 2012 a group litigation order ("**GLO**") was made, with Hugh James LLP ("**Hugh James**") acting as lead solicitors for the claimants. Each claimant was also represented by their own solicitors. Hugh James and the other solicitors acted on the basis of conditional fee agreements ("**CFAs**").

11. Travelers provided product liability insurance to Transform over the period 31 March 2007 to 30 March 2011, which covered some, but not all, of the claims. Transform participated in the GLO. Transform and Travelers jointly engaged BLM to act on their behalf in relation to the insured claims. In addition, BLM was retained by Transform alone in relation to the uninsured claims and by Travelers alone in relation to additional matters. In June 2014, Transform voluntarily disclosed to the claimants in the GLO the extent of its insurance cover, despite an earlier unsuccessful application by the claimants to obtain such disclosure from Transform. It was apparent by then that, without insurance, Transform would be unlikely to have the resources to pay compensation or costs to successful uninsured claimants.

12. The insured claims were settled in 2015 and Transform then entered into administration, the Administrators being appointed on 30 June 2015. The uninsured claimants (to whom I will refer to hereafter as the "**Claimants**") obtained summary judgments against Transform on 20 October 2016. One effect of pursuing Transform to judgment was to trigger the CFAs under which the Claimants' solicitors were acting, thereby exposing the Claimants to the liability to pay their own solicitors' costs.

13. The Claimants then sought a third party costs order under section 51 of the Senior Courts Act 1981 (the "**section 51 costs application**") against Travelers, which had funded the entire costs of Transform's defence. That application succeeded at first

instance and on appeal, but it was rejected by the Supreme Court: see *Travelers Insurance Company Ltd v XYZ* [2019] UKSC 48. As Lord Briggs recorded and held at [12] and [74], one important reason why the Claimants pursued Transform to judgment was in order to pursue a section 51 costs application against Travelers. The total costs claimed were at least £11.5 million.

14. On 11 April 2018 Charles Russell Speechlys ("**CRS**"), acting on behalf of the Administrators, wrote to BLM stating: "*We are aware that your firm acted for [Transform] in relation to the PIP Breast Implant Litigation. These files are the property of [Transform] and accordingly we would be grateful if you would deliver the files to us as soon as possible.*" They also relied upon section 234 of the Insolvency Act 1986, which provides that an office holder is entitled to delivery up of "*any property, books, papers or records to which the company appears to be entitled*".

15. On 9 May 2018, BLM wrote to CRS stating: "*Where there has been a joint retainer I believe that we are still required to obtain the consent of the other client i.e. the insurer – see* ***Hamilton and Dixon Group Sipp v Hastings and Company (Solicitors)(sued as a firm)*** *[2014] NICh 27. That consent is being obtained and I believe will not be withheld, whereupon your client will be entitled to a copy of the documents to which your client is entitled at their expense. You will appreciate that those papers which are confidential to Travelers or BLM will have to be removed.*"

16. It is important to remember that there were three categories of files held by BLM relating to the PIP Breast Implant Litigation (the "**PIP Litigation**"):

    (1) The files held in respect of Transform's sole retainer of BLM in respect of the uninsured claims (the "**Transform Retainer files**");

    (2) The files held in respect of the sole retainer of BLM by Travelers (the "**Travelers Retainer files**"); and

    (3) The Transform / Travelers joint retainer of BLM in respect of the defence of the claims in the GLO (the "**Joint Retainer files**").

    Unfortunately, the Travelers Retainer files and the Joint Retainer files were not maintained as separate files and therefore it was necessary for a time-consuming sifting exercise to be carried out in order to separate them. BLM's stance initially was that the costs of that exercise should be borne by the Administrators.

17. In an email sent on 14 May 2018, BLM stated that Travelers agreed that the Administrators were entitled to "*a copy of Transform's file under the joint retainer and also their own file under the separate retainer, all at their cost as set out below*." The outstanding issue of costs resulted in the Joint Retainer files not being handed over. That point was later abandoned by BLM, which agreed to bear its own costs on the basis that its solicitors, Mills & Reeve ("**M&R**"), performed the sifting exercise.

The Assignment

18. On 30 August 2018 the Administrators entered into an agreement and assignment (the "**Assignment**") with Hugh James Involegal LLP ("**HJI**") (which is wholly owned by the equity partners of Hugh James, but operates as a distinct legal practice, with its own Solicitors Regulation Authority number and website) whereby they assigned "*all claims, choses in action and rights whatsoever*" which Transform had against BLM and counsel instructed by BLM (referred to as the "**Potential Defendants**") in relation to their conduct of the PIP Litigation. Under clause 1(ii) of the Assignment, the Administrators agreed to provide HJI "*with reasonable access to all documentation which is in the Administrators' possession and control relating to Transform's defence in the [PIP] Litigation, to include any privileged documentation.*" Clause 2 provided for HJI to instruct Hugh James to act for it in the claims against the Potential Defendants (the "**Assigned Claims**").

19. Pursuant to clause 2(i), in respect of any sums recovered from BLM and / or counsel the Administrators are entitled to £250,000 in respect of any "Net Recoveries" (as defined therein) over £250,000 and up to £5 million, plus 5% of any Net Recoveries over £5 million. The balance of the Net Recoveries is to be divided up, pursuant to the terms of a Declaration of Trust, amongst the Claimants and Hugh James and the Administrators on behalf of Transform.

The Client Agreement

20. Additionally, under the terms of a Client Agreement, in consideration of HJI agreeing that the Claimant shall be one of the Claimants, who are beneficiaries under clause 1 of the Declaration of Trust, each Claimant agreed that when she has recovered against BLM and / or counsel in full, she will not claim in the administration of Transform.

21. Therefore, by 30 August 2018, the Assignment having been entered into, it was clear to the Administrators that, pursuant to clause 1(ii) thereof, any relevant documents in the

Administrators' possession and control would be disclosed to Hugh James as HJI's solicitors. Further, the Administrators must at that time also have been aware that Travelers, as Transform's insurer, had been indirectly in litigation with Hugh James, acting as lead solicitor for the Claimants in the GLO and in direct litigation in relation to the section 51 costs application, such an application having been first intimated in December 2015.

22. On 6 September 2018, Hugh James wrote to BLM, as solicitors acting for HJI, notifying it of the Assignment and stating that HJI intended to sue BLM for negligence in having advised Transform that the insurance position should not be disclosed to the Claimants. In very large part, the sums now sought to be recovered against BLM are made up of the Claimants' claim for costs in the unsuccessful section 51 costs application. It was therefore clear to BLM at that stage that HJI had taken an Assignment of the Assigned Claims and Hugh James was acting for HJI.

23. On 14 November 2018, BLM wrote to CRS, seeking confirmation of the purpose of the request for the files and asking what right they had to request the same "*where the Administrators have assigned absolutely all claims, choses in action and right which [Transform] has or may have against the Potential Defendants. In respect of the file which was the subject of the joint retainer with Travelers ('the joint file'), it seems to us that whilst we appreciate an Administrator's usual right to access documents produced under a joint retainer, such rights would not extend to unilaterally waiving privilege in such documents by providing them to third parties. Accordingly, we would be grateful for your confirmation that documents to which joint privilege attaches will not be produced to any third party such as [HJI] or Hugh James. We are awaiting confirmation of Travelers' stance, in the light of the Assignment and involvement of [HJI] in relation to the joint file.*"

24. On 20 November 2018, CRS responded, stating the Assignment was irrelevant to the request for delivery up of the files pursuant to section 234 of the Insolvency Act 1986. "*Irrespective of the assignment, the Administrators are under a duty to investigate any potential actions that [Transform] has against third parties generally… Privilege in the file rests with client of your firm, [Transform]. Given that there was a joint retainer there can be no privilege. There can therefore be no objection to providing the entirety of the file to [Transform] (see Walker Morris v Khalastchi [2001] 1B.C.L.C). As the file*

is the property of [Transform] there can be no basis for you to impose conditions on how that property can be used."

They indicated that the Administrators would make an application to the Court for delivery up if the files were not produced within seven days.

25. On 29 November 2018, BLM wrote to CRS stating: "*...we are still waiting for Traveler's response to your request given that privilege rests with both Travelers and [Transform]. Whilst we have been in communication with Travelers since May 2018, they have only just learned about the assignment of the claim against our firm, and naturally want to consider their position further, in the light of this development. You will appreciate that: (1) where privilege vests jointly in two clients, their permission is required before jointly privileged documentation is passed to a third party – you have failed to confirm that you will not pass the file to a third party; and (2) some documentation on the file was produced further to a single retainer with Travelers and we will need to extract such documentation before any files are released.*"

26. Stated shortly, thereafter the matter was not resolved, and on 11 January 2019 the Application was issued by the Administrators against BLM. It was not served until 29 January 2019. Armstrong 1 was served in support of the Application. Reference was made to the Assignment at paragraph 18, but a copy was not exhibited and Mr Armstrong did not refer to the fact that, under the terms of the Assignment, Hugh James had been instructed by HJI to act in relation to the Assigned Claims, although at paragraph 7 reference was made to the fact that Hugh James acted on behalf of the GLO claimants. From the terms of Hugh James's letter of 6 September 2018, however, BLM were already aware of the fact that Hugh James had been instructed on behalf of HJI in relation to the Assigned Claims. At paragraph 28, Mr Armstrong stated: "*The Joint Administrators require the Files because they are the subject of requests for information from claimants in the GLO, Scottish and Northern Irish claims in the near future, the information that will be in the Files sought from the Respondent will be relevant for the adjudication process.*" No mention was made in that paragraph of the need for those files for the purpose of pursuing the Assigned Claims.

27. On 7 February 2019, DWF LLP ("**DWF**"), solicitors for Travelers wrote to CRS, stating:

> *"In respect to the Joint Retainer… in the context of the Assignment that would (on the Administrators' case) include passing on the documents to HJI. As commented above, however, joint privilege can only be waived jointly and cannot be waived by one of the parties unilaterally. The Administrators should therefore be entitled to see the Joint Retainer documents, but only on the basis that they receive them subject to the joint privilege Transform shared with Travelers.*
>
> *Travelers of course has no desire to be in any way obstructive. Travelers does not seek to prevent the Administrators from sharing the documents with HJI for the purpose of investigating the merits of a claim against BLM or Counsel, particularly as your firm asserts that the Administrators will share in the proceeds of a successful claim. Travelers, however, is concerned that the documents are privileged and are currently the subject of live litigation that is proceeding in the Supreme Court.*
>
> *In those circumstances, Travelers proposes that it will not object to the Administrators sharing the documents with HJI on condition that there are undertakings from HJI, the Administrators and your firm in relation to all documents produced by BLM (other than those relating exclusively to the Transform Retainer) not to use the documents or to disclose them to any third party other than for the purpose of the investigation and pursuit of the claims which are described in paragraph 18 of Armstrong 1, and otherwise to maintain the confidentiality of the documents. If there are any terms of the Assignment that would achieve the proposed result, no doubt your firm will disclose the Assignment to allay Travelers' concerns…"*

Travelers indicated that if the Administrators did not agree to the proposed course, it would intervene. The voiced concern related only to the pending appeal to the Supreme Court in the section 51 costs application.

28. Matters were not resolved and on 14 February 2019 Travelers made an application to intervene. It was supported by Whittaker 1. In it, Mr Whittaker stated:

> *"14. … as it is understood from paragraph 18 of Armstrong 1, the Administrators have assigned to HJI … The Administrators' intention is, according to Armstrong 1, to pass over Transform's files to HJI for the purposes set out at paragraph 18 of Transform 1. The Court may regard this as an unusual situation because HJI is understood to be directly related to Hugh James LLP, who (as above) acted for the claimants in the GLO (against BLM and Transform) and continue to act for the claimants against Travelers in the live s.51 proceedings currently before the Supreme Court…*

> *20. The Joint Administrators should therefore be regarded as entitled to see the Joint Retainer documents but only on the basis that they receive them subject to the joint privilege….*
>
> *21. Travelers does not seek to prevent the Joint Administrators from sharing the documents with HJI (if that is what is intended) for the purposes of investigating the merits of a claim…Travelers, however, is concerned that the documents are privileged and are currently the subject of live litigation that is proceeding in the Supreme Court.*
>
> *22. In those circumstances, Travelers has proposed (please see the DWF letter dated 7 February 2019) that it will not object to the Joint Administrators sharing the documents with HJI on the condition that there are undertakings from HJI, the Administrators and CRS in relation to all the documents produced by BLM (other than those relating to all documents exclusively to the Transform Retainer) not to use the documents or to disclose them to any third party other than for the purpose of the investigation and pursuit of those claims which are described in paragraph 18 of Armstrong 1, and otherwise to maintain the confidentiality of the documents. Travelers asked whether there were any terms of the Assignment that would achieve the proposed results, but the Assignment was not disclosed."*

It is therefore clear that Travelers were then aware that it was the intention of Administrators pursuant to the Application to share the Joint Retainer files with HJI, but at that time it had not seen the terms of the Assignment.

29. In their second progress report dated 27 February 2019, the Administrators confirmed that the costs of pursuing the Application and their reviewing the files are being met by Hugh James.

30. In subsequent correspondence, CRS did not reveal to Travelers that Hugh James were representing HJI in relation to the Assigned Claims. Travelers' solicitors, DWF, were informed of this by M&R for the first time on 4 March 2019. This led to Travelers requesting a copy of the Assignment from the Administrators "*on an unfettered basis*". In a letter dated 13 March 2019, CRS stated that the Administrators' position was that they would supply a copy of the Assignment upon Travelers confirming that they would "*abide by the implied undertaking pursuant to Part 31.22 of the Civil Procedure Rules.*" Travelers agreed to this on 2 April 2019 and a copy of the draft unsigned Assignment was provided by CRS under cover of a letter dated 17 April 2019. That letter stated "*HJI is only a Special Purpose Vehicle who* [sic] *the Joint Administrators*

have assigned the claim to." A signed and dated copy of the Assignment was not provided until 3 July 2019.

31. In their skeleton dated 25 June 2019 for the hearing before ICCJ Jones, which led to the July Order, the Administrators stated at paragraphs 14 and 15 that "*In addition the Administrators intend to forward the [Joint Retainer] files to HJI under the terms of the [Assignment]*." However, in subsequent correspondence between CRS and DWF, which I will not set out at length here, the Administrators' stated purpose for seeking the Joint Retainer files varied. For example, on 25 September 2019, in response to DWF's question posed on 18 September 2019 "*whether or not the Joint Administrators and / or yourselves on behalf of the Joint Administrators would be reviewing the [Joint Retainer] files for the purposes of the Assigned Claims?*", CRS stated: "*…we intend to review the files as they form part of the books and records of the Company. The purpose of that review is* ***not intended to be related to the potential claim against BLM or Counsel***." [emphasis added]. In contrast, on 26 November 2019, CRS stated that "*… it is patently obvious that the request for the files was for the dual purpose of (1) pursuing the assigned claim to HJI against BLM and Counsel; and (2) assisting the Joint Administrators with issues relating to the Company generally*".

The Issue before the Court

32. The broad issue before the Court is whether Travelers' privilege in the Joint Retainer files prevents the Administrators from disclosing those files to HJI and / or Hugh James, when such privilege is jointly held by Transform and Travelers.

33. During oral argument, it became clear that it is common ground between the parties that:

    (1) Travelers is not permitted to see the Transform Retainer files;

    (2) Transform (and therefore the Administrators and their solicitors) are not permitted to see the Travelers Retainer files; and

    (3) both Transform and Travelers can see the Joint Retainer files, but neither can disclose it to a third party without the other's consent.

Other relevant matters

34. Before turning to the parties' submissions, there are a number of matters relied upon by Travelers which need to be mentioned.

35. They fall into four categories of claims in which Travelers are or may be involved, namely (1) claims in relation to Allergan; (2) Scottish PIP claims; (3) other potential PIP claims; (4) claims in France. I shall describe each in turn.

The Allergan claims

36. Approximately 40 women have been diagnosed with or investigated for Breast Implant Associated Lymphoma as a consequence of being implanted with Allergan textured breast implants. As Mr Locke, a partner of Hugh James, states in paragraph 9 of Locke 2, Hugh James acts for one of those women in a claim against a clinic (which is not Transform[1]) that sold the Allergan product directly. Leigh Day act for some of the other women, but Mr Locke states that his firm is not in discussions with Leigh Day about the other Allergan claims.

37. The Allergan claims have been recently and widely publicised in the media and Travelers contends that it seems likely that the Allergan claims will escalate into a new GLO. Travelers, as an insurer for Transform, has received correspondence from Leigh Day, requesting information regarding Transform's insurance policy, with a view to possibly bringing claims against Travelers under the Third Parties (Rights Against Insurers) Act 2010 in respect to Allergan implants. So far, Travelers has been told that five clients of Leigh Day obtained their implants from Transform. According to Mr Armstrong, one of the Administrators, Transform performed around 1,800 replacement operations on women with PIP implants [see paragraph 5 of Armstrong 1]. According to the evidence of Mr Keating, given on behalf of Travelers, when Transform stopped using PIP implants, it used Allergan implants from late 2005 (or early 2006) [see paragraph 7 of Keating 2]. In such circumstances, Travelers contend that it is quite possible that a number of the claimants in the PIP Litigation may also ultimately bring Allergan claims.

38. The Joint Retainer files contain privileged material relevant to claims in respect of Allergan implants because (amongst other things) one issue in the PIP breast implant litigation was a comparison of the PIP implants with other implants. Travelers contend that if the Joint Retainer files are disclosed to Hugh James, this creates a significant risk that those files will be disclosed to Allergan claimants and PIP claimants to the disadvantage of Travelers.

[1] See also paragraph 5 of Harvey 1.

The PIP Claims in Scotland (the "Scottish Claims")

39. Some 70 PIP claims against Transform are still being pursued in Scotland. Proceedings have been issued in those cases, but the litigation is in its early stages. The claims are the same as or similar to the claims pursued in the GLO, i.e. claims for breach of contract against Transform alleging that the PIP implants provided were not of satisfactory quality, in breach of the provisions of the Sale of Goods Act 1979. Travelers was Transform's only relevant insurer and therefore remains interested in these Scottish Claims.

40. If the Joint Retainer files are disclosed to Hugh James (and, thereby, to the GLO claimants), Travelers contends that there is a very real risk that there will be disclosure to the Scottish claimants. Thompsons solicitors represent some of the claimants in the GLO (and there are 23 claimants in the list of Claimants in the section 51 costs application who are represented by Thompsons). They also represent the claimants in Scotland. Travelers submits that the risk of disclosure to the Scottish claimants is obvious for this reason alone. Further risks of disclosure are set out by Mr Keating, a Chartered Insurer, employed by Travelers, in paragraphs 16 to 18 of Keating 1. Travelers' position is that disclosure of the Joint Retainer files to the Scottish claimants would in effect be handing over Transform's and Travelers' privileged files on the defence of the PIP claims to the Scottish claimants against Transform whilst those claims are still live.

Potential further new claims

41. Paragraph 21 of the Written Case for the Claimants in the Supreme Court states that a large number of uninsured claims were brought against Transform, 426 of which were registered in the GLO (these are the Claimants who brought the section 51 application against Travelers), yet further claims were brought and stayed outside the GLO and "*... yet further such claims may continue to be brought in the future*". Travelers contends that any such claimants (in the stayed claims or in the new claims) would understandably have a keen interest in trying to obtain the Joint Retainer files.

42. There is a dispute between the parties as to whether the limitation period in relation to such further claims has expired. It is Travelers' position that the limitation period has not necessarily expired, and Travelers is still involved in the wider PIP litigation.

The claims in France

43. There is a pending claim in France against a German company that granted accreditation for the PIP product. Contrary to the evidence of Mr Locke on behalf of the Administrators, according to paragraph 9 of Keating 2, Transform is a named party in those proceedings. Mr Keating further states in that paragraph: "*Transform assigned to the PIP claimants their rights to pursue such a claim against the German company. Travelers is not aware whether or how those assigned claims are proceeding*."

44. I now turn to the parties' submissions, which I shall summarise.

The Administrators' submissions

45. Section 234 of the 1986 Act applies where "*a company enters administration*" and "*any person has in his possession or control any property, books papers or records to which the company appears to be entitled*". It empowers the Court to "*require that person forthwith (or within such period as the court may direct) to pay, deliver, convey surrender or transfer the property, books or papers to the office-holder*".

46. Section 236 of the 1986 Act applies "*as does section 234*" (i.e. where "a company enters administration") and there is "*any person known or suspected to have in his possession any property of the company ... or any person whom the court thinks capable of giving information concerning ... the promotion, formation, business, dealings, affairs or property of the company*". It empowers the Court to "*require any such person ... to produce any books, papers or other records in his possession or under his control relating to the company or the matters mentioned*".

47. The different principles relevant to section 234 and section 236 applications can be seen from *Re Corporate Jet Realisations Ltd* [2015] BCC 625. In holding at [26] that "*As regards s.234 there is little or no argument that the court may order a person to deliver up books and records that belong to the company in question*", Registrar Briggs, implicitly accepted at [17] that "*the extensive jurisprudence regarding the exercise of discretion under s.236 is not necessarily relevant in respect of company property ... there would have to be exceptional circumstances for the court to deny a liquidator company property*". By contrast, he stated at [22] in a section 236 application "*the court will need to be satisfied that the applicant has a reasonable requirement for the material sought, that the section is not being used abusively and that production does not impose an unnecessary and unreasonable burden on the respondents*". However, he

said at [32], even in section 236 applications "*there is no obligation to explain in detail what the office-holder is going to do with documents but that should not be understood to minimise the need to show a reasonable requirement*".

48. An illustration of the Court's exercise of its powers is *Walker Morris* (*a firm*) *v Khalastchi* [2001] 1 BCLC 1, where the Court ordered a firm of solicitors to deliver up the company's files to its liquidator. Nicholas Strauss QC, sitting as Deputy Judge of the High Court, held at [9b-e] "*The starting point is that the files are the property of the Company, and the liquidator is entitled to possession of them. (2) A liquidator's duty is to investigate the affairs of the company, and there is an obvious and urgent need for him to investigate the capital gains tax situation … (3) It is for a liquidator to decide whether to make a voluntary disclosure of the company's documents, whether privileged or not, to third parties. If he needs guidance as to where his duty lies, he can apply to the court for directions*".

49. Hollander's *Documentary Evidence*, 13th ed, §19-01 states the following principles at the beginning of Chapter 19, Privilege Deriving from Joint and Common Interests: "*Persons who grant a joint retainer to solicitors retain no confidence against one another; if they subsequently fall out and sue one another, neither can claim privilege against the other for documents generated in respect of the joint retainer. A trustee or successor stands in the shoes of the original party. Against the rest of the world, however, either can maintain a claim for privilege in respect of such documents.*"

50. The cases cited by Hollander include *Crescent Farm (Sidcup) Sports v Sterling Offices* [1972] Ch 553 and *Surface Technology v Young* [2002] FSR 387. In the former, Goff J (as he then was) held at p.562F: "*It is clearly established that legal professional privilege of a predecessor in title does enure for the benefit of his successor*". In the latter, Pumfrey J held at [26] that the principle applied both "*in respect of the Bird and Bird files in relation to which Bird and Bird were solely instructed by Ultraseal UK* [i.e. to sole retainer files] *and the position as stated by Peter Gibson J in Re Konigsberg in relation to the matter which is jointly privileged obtains here equally*" [i.e. to the Joint Retainer files as well].

51. In *Winterthur Swiss Insurance Company and others v AG (Manchester) Limited (in liquidation) and others* [2006] EWHC 839 (Comm), a case in which BLM were also involved, Aikens J applied the successor principle (as here) to an assignee of a breach

of duty claim against the solicitors. He said [130] "*if there is an assignment of causes of action in favour of Winterthur as assignee, then Winterthur stands in the place of the assignor. In my view, an assignee is in a similar position to a successor in title with regard to the incidence of legal professional privilege. It is well established that a successor in title succeeds and is entitled to assert any legal privilege that was available to its predecessor in title*". Reliance was also placed by Mr Boardman on [127], where Aikens J stated: "*Winterthur, as assignee of NIG's causes of action against the Panel Solicitors, must be in the same (but no better) position with regard to disclosure of documents as the assignor of the of the claim.*" This case is also heavily relied upon by Travelers and I will consider it in greater detail, when considering its submissions below.

52. In *Hilton v Barker Booth & Eastwood* (*a firm*) [2003] PNLR 610, the Court of Appeal held it was clear law that a solicitor acting for a mortgagor and mortgagee owed no duty to disclose confidential information about one to the other. Morritt VC analysed the authorities and set out the general principles as follows: "*(1) a solicitor's duty of disclosure depends on the nature and terms of his retainer … (2) a solicitor is under no obligation (quite the reverse) to disclose to a later client confidential information obtained under an earlier retainer … (3) if a solicitor acts for more than one party to a transaction then he may be obliged to disclose information obtained in that transaction from one of them to the other … and (4) in that event he cannot excuse his breach of duty to either of them by reference to the duty he owns to the other*".

53. In *Stiedl v Enyo Law LLP* [2012] PNLR 4, Beatson J held that a distinction was to be drawn between, on the one hand, cases where a firm had previously acted for, and had possession of privileged information in relation to, someone against whom they were not acting and, on the other hand, cases where a solicitor came into possession of such information in respect of someone they had not previously represented. In the latter case, any remedy is normally restricted to an order restraining the solicitor from using the confidential information. He also said [44] "*the logical first question … is whether there is a real risk that information in the documents over which Mr Stiedl claims privilege and confidentiality can be used so as to yield an advantage to the claimants in the main proceedings or a disadvantage to Mr Stiedl. On the authorities, "real" risk means more than fanciful or theoretical risk, but does not mean "substantial" risk.*"

54. Applying the above principles, the starting point is that the Joint Retainer files are Transform's property and, accordingly, the Administrators are entitled to delivery up. They are not obliged to give, and BLM and / or Travelers are not entitled to demand, reasons why the Administrators want them. BLM and Travelers' attempts to question or cross-examine the Administrators, necessitating more and ever more evidence from which they seek to find inconsistency, is wrong in principle.

55. Read fairly, fully and in the context of the requirements for applications under section 234 and section 236 of the 1986 Act, in Armstrong 1 Mr Armstrong explains in perfectly adequate detail why the Administrators wanted to see the files and pass them onto HJI. As can be seen from the *Jet Realisations* case at [30] and *Khalastchi* case at [9c-d], an office holder is a stranger to the affairs of the company and his task is an evolving one. In order to obtain a full understanding of a company's affairs, he needs to see its books and records, including its solicitor files. It is unjustified and impossible for an office holder to set out in evidence every matter on which documents he has not seen might be relevant to his duties. There is no obligation on him to do so.

56. As pointed out by Mr Reddy, a partner in CRS, in Reddy 2, there is a notable contrast between the unrestricted access that has been provided to Travelers and the use of the Joint Retainer files in the section 51 costs application without seeking Transform's consent, and the response to the Administrators' enquiries and the Application.

57. The Joint Retainer files contain a large number and wide variety of documents, only some of which (and it is likely to be only a small fraction) will be subject to legal professional privilege. It is accepted that such privilege is a joint one, with the result that the Administrators (in the same way as Travelers) cannot pass on privileged material to a third party without the other client's permission. However, that is not what the Administrators' are seeking to do: they want to pass on the Joint Retainer files to HJI, as an assignee of the Company's right of action in which the Company still retains an interest. Travelers' initial position in response to the Application was stated at paragraph 21 of Whittaker 1, namely that "*Travelers does not seek to prevent the Joint Administrators from sharing documents with HJ1 (if that is what is intended) for the purposes of investigating the merits of a claim against BLM or Counsel, particularly as CRS asserts that the Joint Administrators will share in any proceeds of a successful claim.*". BLM's initial position was that because they had chosen to mix Travelers'

documents (but not Transform's documents) with the jointly owned documents, all of the latter had to be 'sifted' to remove Travelers' own documents at the Administrators' expense: see paragraphs 18 and 20 of Sherwood 1.

58. None of the points advanced in Armstrong 1, Whittaker 1, Sherwood 1 and Whittaker 2 persuaded ICCJ Jones not to make the entirely conventional order for delivery up of the Joint Retainer files (after sifting) to the Administrators. Nor did it dissuade him from (a) ordering at paragraph 6 of the July Order, that BLM should pay the costs of the sifting process (a concession made by BLM only on 26 June 2019, subject to their solicitors, M&R, carrying out that process); and (b) reciting that Travelers will bear its own costs of monitoring the same: see *Re Harvest Finance Ltd (in liquidation)* [2013] BPIR 1020.

59. The main issue for determination at this hearing is whether the Administrators are entitled to pass on the Joint Retainer Files to HJI. The answer, on the basis that most of them are not privileged and applying the successor principle referred to in the *Winterthur* case above, is clearly yes. HJI are the assignees of Transform's potential causes of action against BLM and counsel. As such, they will obviously need, and are entitled, to see BLM's files, including the instructions received by those parties, the advice that they gave and the other matters which would be subject to legal professional privilege. As stated by Goff J in the *Surface Technology* case at [25]: "*This follows, it seems to me, because otherwise the privilege is valueless, since the claimants have no way of knowing what material they are asserting privilege in. It seems to me that this follows from the existence of the privilege itself and not from any entitlement to the documents in question under the Agreement*".

60. That leaves the question of whether HJI can engage Hugh James as solicitors to review the Joint Retainer files. A person is generally entitled to engage whatever solicitor he likes. If a person enjoys privilege in a file, they are entitled to instruct their solicitor to review it on their behalf. The solicitor is not a third party, but an agent acting on behalf of their client. Accordingly, unless BLM or Travelers are entitled to prevent Hugh James from acting as solicitors for HJI, there is no basis for Travelers to object to the documents being provided by HJI to Hugh James for review.

61. Is Travelers entitled to stop Hugh James acting? Hugh James is not before the Court and Travelers have not issued any application for an injunction to restrain them from

acting. Nevertheless, Hugh James (and HJI) are willing to give undertakings to assuage Travelers' concerns and ensure that the joint privilege is respected. Travelers has objected and claimed that no undertakings can be provided to assuage their concerns.

62. Travelers' position has changed over time. At paragraph 21 of Whitaker 1, Mr Whitaker stated that "*Travelers … is concerned that the documents are privileged and are currently the subject of live litigation that is proceeding in the Supreme Court*" and at paragraph 8 of Whitaker 2, he said that "*Hugh James (as Travelers' opponent) obviously cannot have access to the Joint Retainer documents because they are conflicted*". Accordingly, the Administrators offered undertakings to protect Travelers' position in the section 51 costs application and Hugh James agreed not to seek the documents in the Joint Retainer files after its final determination. Then in Keating 1 at paragraph 13, it was contended by Mr Keating that "*If the Transform / BLM files are disclosed to Hugh James, they will as I understand it be available to the individual claimants (as Hugh James clients) … Once any documents and information is* [sic] *in the public domain, it will be essentially impossible to recover that documentation / information and / or to prevent its use."* That is simply wrong (per the *Hilton* case) and ignored the undertakings. Then in Whitaker 3 at paragraph 14, it was argued by Mr Whittaker, based on the Administrators' progress report, that *"the Joint Administrators might in fact have been planning to use the disclosed documents for purposes other than those permitted*". That was another incorrect argument, as the undertakings in the July Order and the Administrators' longer-term intentions are obviously different things.

63. Locke 2 was produced to provide clarity both as to what Hugh James would do with the files and the undertakings (or such reasonable other undertakings) they are willing to provide. There is no risk of Travelers' privilege being breached in the circumstances. If there was, the only remedy Travelers would be entitled to (per the *Stiedl* case) would be an order restraining use (which is unnecessary given Hugh James' willingness to give any reasonable undertakings). If that is wrong (and Hugh James must be restrained from acting), then HJI must be free to act themselves or instruct another firm. In either event, HJI should not be deprived of all access to the Joint Retainer Files.

The Administrators' response to Travelers' further arguments

64. At paragraph 5 of Whittaker 3, Travelers submits that "*it is clear that the impact of the Supreme Court's decision is that it renders Hugh James' / HJIs proposed claim against BLM / Leading Counsel as a hopeless claim*". This is the basis of a further argument raised at paragraph 9 that "*if the proposed professional negligence claim is hopeless, the application for disclosure of the Joint Retainer files is pointless and should cease immediately (insofar as it is proposed that the Joint Retailer files be disclosed to HJI / Hugh James). The disclosure exercise can then be conducted on a very significantly cheaper and more proportionate basis to provide documents to the Joint Administrators for the limited purposes set out in paragraph 28 of Armstrong 1 – in particular,* "*key word" searches would be a significantly better and more appropriate option*". This is a non sequitur and both limbs of the further argument are wrong.

65. As to the first limb:

(1) As appears from the limited correspondence between Hugh James and M&R, the professional negligence claim by HJI against BLM and counsel (even so far as it is presently formulated and engaged with) is complex, factually and legally. This court does not have any of the pleadings, the evidence, or the other relevant materials to adjudicate on the merits of that claim. It is no part of this Court's function, in the absence of directions or the joinder of parties in that claim, for it to begin to do so.

(2) The matter before the Supreme Court was an appeal against a third party costs order. The main issue concerned the legal principles that apply to applications against insurers when the costs sought to be recovered arise in the conduct of claims outside the scope of cover. Lord Briggs (with whom Lady Black and Lord Kitchin agreed) held at [54] that in such cases "*it is the intermeddling principle which falls to be applied*". He also held at [55] that "*If the non-party has not gone beyond the confines of those contractual obligations … liability as an intermeddler may be very hard to establish*." At [58]-[67], Lord Briggs went on to consider whether Travelers had intermeddled by contributing to costs asymmetry. At [61], he held "*the reliance placed by the courts below on asymmetry or lack of reciprocity as a factor tending to justify a section 51 order against Travelers was misplaced*". On whether Travelers' involvement in the

advice given by BLM to the Company was intermeddling, he said at [63] that was "*not in any recognisable sense an inappropriate intervention*". On whether it had caused any costs to be incurred, he said [67] "*The judge found that there was a causative link between the non-disclosure of the limits of the cover and the incurring of costs by the uninsured claimants. But for the reasons already given the non-disclosure was not itself conduct by Travelers in relation to the uninsured claims which falls within the necessary requirement for unjustified intermeddling.*" No analysis was conducted, or finding made, as to whether BLM, counsel, or anyone else had acted in breach of duty to Transform causing it loss.

(3) Even if such a finding had been made, it would not be binding or give rise to any estoppel between HJI, BLM and counsel. Neither the claim, nor the parties, were before the Supreme Court. Further, the Supreme Court did not interfere with any of the judge's findings of fact. Lord Briggs said at [49]: "*Travelers also sought to mount a detailed attack on the judge's findings of fact, although they were confirmed by the Court of Appeal. This court would not have considered it appropriate to entertain this part of the appeal…*"

66. As to the second limb:

(1) By clause 1(i) the Assignment extends to "*all claims, choses in action and rights whatsoever which Transform has or may have against the Potential Defendants arising out of or concerning the conduct of the defence by the Potential Defendants of Transform's defence in the Litigation*". The Potential Defendants are defined as "*BLM … Jonathan Waite QC and others who did act for/or advise Transform in the Litigation*". There may be additional or alternative claims, possibly involving other parties, from the ones presently being pursued by HJI against BLM and Mr Waite QC. Until the Joint Retainer files are reviewed, it is impossible to know or assess the merits of those claims.

(2) The Application has never been put on the basis that the only thing the Administrators want to do with the Joint Retainer files is pass them to HJI / Hugh James. If the Court finds that the Administrators are unable to do that, they still want, are entitled to, and have already obtained an order for delivery up of the files to them. Despite BLM and / or Travelers' arguments to the contrary, the purposes for which the Administrators seek to review those files have never been

defined or limited by paragraph 28 of Armstrong 1. The Administrators did give an interim undertaking in the July Order not to pass on to HJI or use the Joint Retainer files other than as stated in paragraph 28 of Armstrong 1, but nothing had been provided to them to date and depending on the outcome of this hearing and the Court's view as to what is appropriate, the Administrators will be released from those undertakings, free to pass the documents to HJI and free to review them for the purposes of the Administration, subject always to Travelers' privilege.

(3) The process required to be carried out by BLM pursuant to the July Order is, in any event, now complete.

67. In relation to the additional matters relied upon by Travelers:

(1) **The Allergan Claims** – as set out at paragraph 36 above, the evidence of Mr Locke is that Hugh James acts only for one woman in an Allergan claim against a clinic which is not Transform and is not in discussions with Leigh Day about the other Allergan claims. There is therefore no danger, let alone a significant danger, that privileged material in the Joint Retainer Files will be disclosed to Allergan claimants to the disadvantage of Travelers. Hugh James and HJI are willing further to protect Travelers' position in relation to this perceived danger by each giving undertakings (a) not to use any information or documents from the Joint Retainer Files for any other purpose than in pursuing the Claim and (b) not to accept any further instructions or bring any further PIP claims.

(2) **The Scottish Claims** – there is no danger of any disclosure of the privileged information in the Joint Retainer files by Hugh James or HJI to any of the Scottish claimants in their PIP claims. Neither firm represents any of those claimants and there would be no obligation to provide the Joint Retainer Files to Thompsons or any other firm representing any of those claimants. Hugh James and HJI also rely on the undertaking set out in (1) above.

(3) **Potential new claims** – no new claims will be brought in the PIP Litigation by Hugh James or HJI. Judgments have been entered in favour of their clients. The section 51 costs application has now come to an end with the Supreme Court

decision. The PIP Litigation is therefore concluded, and no further steps are capable of being taken.

(4) In relation to other future claims, given that Travelers' indemnity for Transform's PIP products stopped on 30 March 2011, any claimant bringing a new claim now in respect of the same would have to have suffered their injury by that date for Travelers to be exposed to any liability. That product was withdrawn from the market in 2010. After extensive publicity in 2011 and 2012, the GLO register closed in April 2013. Given the making of the GLO, there is no prospect of the Court now exercising its discretion in favour of such a claimant under section 33 of the Limitation Act 1980. In any event, in addition to the undertakings set out in (1) above, HJI and Hugh James are willing to give undertakings not to pass any such information or documents to any GLO Claimants and not to take on any new GLO Claimants with any connection to Transform or Travelers.

(5) **The French Claims** – according to paragraph 4 of Harvey 2, the claims in France against the German company do not involve Transform or Travelers. Travelers are not involved in any of the PIP claims which Hugh James is prosecuting in France. There is no danger of any disclosure of privileged material contained within the Joint Retainer files being disclosed to claimants in those claims. In any event, Travelers is protected by the proposed undertakings from Hugh James and HJI.

A summary of the undertakings offered by HJI and Hugh James

68. The nature of the undertakings offered by both HJI and Hugh James can be summarised as follows, namely undertakings:

(1) not to use any information or documents from the Joint Retainer Files for any other purpose than in pursuing the Claim;

(2) not to accept any further instructions from any potential PIP claimants or to bring any further PIP claims in any jurisdiction;

(3) not to pass any such information or documents to any GLO Claimants and not to take on any new GLO Claimants with any connection to Transform or Travelers.

69. **The proposed information barriers**: In addition to the undertakings offered by HJI and Hugh James, referred to in paragraph 68 above, Mr Locke at paragraphs 11 and

12 of Locke 2 and Mr Harvey in paragraph 9 of Harvey 1 set out the information barriers which will be put in place. The conduct of the Assigned Claims will be carried out by Hugh James's dispute resolution department in Cardiff. None of the individuals involved have had any dealing with the PIP Litigation, including the third party costs litigation. Mr Harvey, who is the Claimants' Lead Solicitor in the PIP Litigation GLO, is not involved in the conduct of the Assigned Claims. He is the head of Hugh James' London office, and is primarily based in London, although occasionally he works in the Cardiff office, but in a different part of the building. He and his team will have no access to the Joint Retainer Files.

Travelers' submissions

70. In summary, Mr Lynch submits on behalf of Travelers that:

(1) The simple answer to the Application is that the Joint Retainer files remain (jointly) privileged to Travelers, and Travelers does not waive that privilege, meaning that the files cannot be disclosed to Hugh James. The joint privilege cannot be unilaterally waived by the Administrators.

(2) Sections 234 and 236 of the 1986 Act do not abrogate the fundamental right to privilege.

(3) Even if sections 234 and 236 of the 1986 Act permitted any encroachment of the right to privilege, the balancing exercise conducted by the Courts clearly militates against making the Order sought by the Administrators.

(4) To allow the Application to succeed would place Hugh James in a position of conflict, presenting significant and complicated problems which are not possible adequately to resolve, even if undertakings are given, as now (belatedly) proposed in Locke 2. The undertakings offered by HJI and Hugh James are both imprecise and inadequate. The proposed information barriers that Hugh James intends to put in place do not provide sufficient protection.

Sections 234 and 236 of the 1986 Act do not abrogate privilege

71. In this case, the issue of privilege arises in the context of an application for disclosure and delivery up made under sections 234 and 236 of the 1986 Act. It is well-established that privilege, as a fundamental human right, is not capable of being abrogated by statute unless by express words or necessary implication. Unless a statute makes it clear

by express words that privilege is abrogated, it will be a rare case indeed where the court will hold that it has such an effect by implication. Sections 234 and 236 of the 1986 Act do not by express words or necessary implication make it clear that privilege is abrogated.

72. Notably, courts are "*slow to find that [privilege] has been impliedly excluded*": *Matthews and Malek on Disclosure* (5th edn) at 11.97. As noted by the editors of *Phipson on Evidence* (19th Ed.) at paragraph 23-15:

> *"Privilege can be impliedly or expressly abrogated by statute. The now-recognised status of privilege as a fundamental right means that, particularly since the HRA, privilege should not be regarded as abrogated by a statute unless by express words or necessary implication. This was held by the House of Lords in R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax [2002] UKHL 21, [2003] 1 AC 563. There, at [45], Lord Hobhouse provided an authoritative definition of "necessary implication":*
>
> > *"A necessary implication is not the same as a reasonable implication … A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, had it thought about it, probably have included and what it is clear that the express language of the statute must have included. A necessary implication is a matter of express language and logic not interpretation."*
>
> *In B v Auckland District Law Society [2003] 2 AC 736, Lord Millett expanded on this:*
>
> > *"A useful test is to write in the words 'not being privileged documents' and ask, not 'does that produce a reasonable result?' or 'does it impede the statutory purpose for which production may be required?' but 'does that produce an inconsistency' or 'does that stultify the statutory purpose?' The circumstances in which such a question would receive an affirmative answer would be rare. But a statutory right to require production of correspondence between a person and his solicitor for the purpose of obtaining legal advice, for example, would obviously be inconsistent with the existence of a right to withhold documents on the ground of legal professional privilege. And unless a taxing master could require the production of privileged*

> *documents it would be impossible for him to perform his function of taxing a solicitor's bill of costs …".*[2]
>
> *It follows that unless the statute makes it clear by express words that privilege is abrogated, it will be a rare case indeed where the court will hold that it has such an effect by implication. Thus in Shlosberg v Avonwick Holdings Ltd [2016] EWCA Civ 1138 the Court of Appeal applied the presumption to lead it to the conclusion that the right to claim privilege (and the right to waive privilege) did not vest in the trustee in bankruptcy under the Insolvency Act but remained a right of the bankrupt. …"*

73. On their true interpretation, there is nothing in sections 234 and 236 of the 1986 Act that necessitates the overriding of privilege. On the facts of the present case, Travelers acknowledges that the Joint Retainer files can be conveyed to the Administrators and they could bring a claim against BLM. The statutory purpose is not in any way prevented by a "normal" exercise of the Administrators' powers. What cannot be done, on the true interpretation of sections 234 and 236, is for the Administrators to use those sections to override Travelers' privilege in those documents to hand them to Hugh James. Again, if the Administrators are so prevented from overriding Travelers' privilege, this does not deprive them of their statutory powers because (as above) if they had wanted to pursue BLM, they could have done. What has happened in the present case is simply that the Assignment has been given in circumstances which mean that there are now serious issues relating to Travelers' privilege.

74. Further, when exercising its discretion under section 236 of the 1986 Act, the Court engages in a balancing exercise: *Cloverbay Ltd (Joint Administrators) v Bank of Credit and Commerce International SA* [1991] Ch 90. To permit privilege to be abrogated by virtue of sections 234 and 236 of the 1986 Act would be antithetical to the well-established principle that "*once privilege is established… [it] is an absolute right, and there is no balancing act to be performed by the court*": *Phipson on Evidence* (19th edn) at 23-07. Courts have taken pains to emphasize that "*the prospect of a judicial balancing exercise* [regarding privilege] *is illusory, a veritable will-o'-the-wisp*" and an "*essentially impossible task*": *R v Derby Magistrates Courts ex parte B* [1996] 1 AC 487 at page 512.

75. Strong reliance was placed by Mr Lynch on the decision of *Re Corporate Jet Realisations Ltd* (*in liquidation*); *Green v Chubb* [2015] EWHC 221 (Ch); [2015]

[2] See *Goldman v Hesper* [1988] 1 W.L.R. 1238.

2 BCLC 95. He referred in particular to [18], [20], [22], [25], [48], [52] and the summary taken from the headnote as follows:

> *"(4) As regards details of all work undertaken during the course of the independent business review and prior to the appointment of the joint receivers, subject to the limitations regarding privilege, confidentiality and strategic considerations, those documents were, in theory, disclosable under s 236(3). As one of the receivers carried out or headed up the business review, he fell within s 236(2)(c). The liquidator's case for disclosure of such documents and records had to be balanced against considerations of oppression, privacy and a third party's rights to keep information confidential. The liquidator asserted that he needed to see all the e-mails between the respondents and the bank in order to investigate the involvement of the bank in a potential fraudulent trading, but there was no sufficiently cogent evidence to justify overriding the right to confidentiality. Accordingly, there was no reasonable requirement for disclosure of that category of documents or records. However, there was a reasonable requirement to obtain the working papers created or produced by the receiver in his capacity as business reviewer, unless they were confidential, privileged, or related to the strategic considerations of the receivership. Subject to those constraints the production of the papers should include documents relating to the monitoring of cash from the period prior to the appointment of the joint receivers to the date when the company was wound up. That would save the liquidator considerable time and expense and enable him to efficiently carry out relevant investigations in connection with his functions as liquidator."*

76. Travelers also referred to the decision of Mr Registrar Jones in *Re Harvest Finance Ltd* [2013] B.P.I.R. 1020, a case which involved the application of the fraud exception to a claim to privilege, which does not arise here. In that case, disclosure was ordered, but in reaching that conclusion the learned Registrar held that:

> *"15.1 The analysis of the sample documentation reveals that the relevant documents concern past conveyancing transactions and that the legal advice or assistance is being given for the purpose of achieving the conveyances. As a result, whilst the importance of privilege is not to be under-estimated, the substance of the privilege in this case will be on what might be described as "the low side" of the weight of the interest in non-disclosure.*
>
> *…*
>
> *15.3 Those to whom the privilege belongs are special purpose vehicles and it is difficult to see that prejudice will arise if the documents are considered*

(save to the extent that adverse conclusions of fraud will be drawn which would prevent there being privilege in any event).”

77. In the present case, Mr Lynch submitted that the substance of the privilege is not on what might be described as “the low side” of the weight of the interest in non-disclosure. Further, in the present case it is certainly not difficult to see that prejudice will arise if the documents are considered. Further and in any event, the above considerations were applied in the context of the application of the fraud exception, which has no application here and, *a fortiori*, if the above considerations were considered to be potential reasons not to permit disclosure in that context, they are even stronger reasons for not giving disclosure in the present context. He therefore submitted that if, which is denied, sections 234 and 236 of the 1986 Act permitted any encroachment of the right to privilege, on the highly unusual facts of this case, the Court’s discretion should be exercised against the Administrators.

Joint Privilege

78. It is common ground that joint privilege can only be waived jointly. In the present case, the relevant files are held subject to the joint privilege of Transform and of Travelers. Travelers contended that the consequences of joint privilege arising between party A and party B can in summary be stated, insofar as relevant, as:

(1) party A and party B retain no confidence against one another; neither can assert privilege as against the other in relation to any privileged communication arising out of the joint retainer;

(2) however, as against any third party both party A and party B can maintain a claim for privilege in respect of any such documents. It is sufficient if only one of party A or party B claims privilege as against the third party;

(3) as the privilege is joint it can only be waived jointly and not unilaterally by either party A or party B;

(4) so far as joint privilege is concerned, it is accurate to say that once privileged, always privileged, and

(5) turning to sections 234 and 236 of the 1986 Act, a ground to refuse disclosure would be that the documents are privileged [see: *Re Corporate Jet Realisations Ltd* (*in liquidation*) supra].

79. The law is also clear that joint privilege cannot be waived unilaterally, even where there is a potentially conflicting statutory power to inspect or possess the relevant documents: see *Leeds v Lemos* [2017] EWHC 1825 (Ch) at [66]; *R (on the application of Ford) v Financial Services Authority* [2011] EWHC 2583 (Admin) at [63]; and *Twin Benefits Ltd v Barker* [2017] EWHC 177 (Ch) at [31].

The *Winterthur* case

80. Insofar as the Administrators rely upon the *Winterthur* case to enable them to provide access to HJI to the Joint Retainer files, such reliance is misplaced. Far from supporting their position, it supports Travelers'. That case concerned "After the Event" ("**ATE**") legal expenses insurance, which had been underwritten by the second claimant ("**NIG**"). NIG appointed the First Defendant ("**TAG**") (in liquidation when the proceedings were issued) as its agent and delegated to it the underwriting and handling of ATE policies (the "**TAG Scheme**"), which was a "no win, no fee" basis. The procedure was as follows: a claimant (the "**TAG Claimant**") would complete preliminary details about a potential claim. There was then a detailed, four stage vetting procedure carried out before an ATE policy was issued, carried out by TAG, another company related to TAG ("**AIL**"), the Second Defendant ("**Rowe Cohen**") and one of a large panel of solicitors (the "**Panel Solicitors**"). TAG concluded contracts with Rowe Cohen and each of the Panel Solicitors, NIG and the First Claimant, its assignee, ("**Winterthur**") claimed that TAG did so as NIG's agent, and therefore NIG could sue them as principal.

81. Once the claim had passed the vetting procedures, at that stage a Panel Solicitor would be treated as retained, subject to the TAG Claimant's instructions. The Panel Solicitors presented the TAG Claimants with a number of documents for signature. Once this was done and the ATE Policy premium was paid, the ATE Policy was on risk and the TAG Claimant would be issued with a Certificate of Insurance by TAG. There was an important term in the NIG Master Policy Document between NIG and the Assured (the "**ATE Policy Terms**"), namely condition 6 entitled Subrogation, which provided as follows:

> *"In relation to any case or loss paid or payable under the Policy, the Company shall be subrogated to the Assured's rights of recovery. In this regard, the Assured shall do and concur in doing and permit to be all such acts and things as may be necessary or required by the Company for the*

> *purpose of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated upon their paying for any case or loss under the Policy, whether such acts and things shall be or become necessary or required before or after the Assured's indemnification by the Company."*

82. The TAG Scheme did not prosper and of those claims covered under it, some 67% of those claims resulted in demands for an indemnity. Litigation was brought because NIG asserted that it had suffered large losses as result of breaches of contract and duty by TAG, Rowe Cohen, and the Panel Solicitors. There were two assignments by NIG to Winterthur. The first was in relation to all causes of action against the defendants (the "**First Assignment**") and the second related to an assignment of "*NIG's rights of access to information and documents relating to claims in respect of which ATE Policies were issued and on which an indemnity has been paid*." (the "**Further Assignment**".) (see [6]).

83. Two categories of documents were considered. These were described at [42]. The first category consisted of those documents that were created before the ATE Policy for that particular claim came on risk (the "**Pre-ATE documents**"). The second category consists of all the documents that were created after the ATE Policy came on risk (the "**Post-ATE documents**").

84. Two of the issues to be determined were (a) whether NIG was entitled to rely on "common interest privilege as a sword" so as to have access to documents that would otherwise be covered by privilege in favour of the TAG Claimants and (b) assuming that NIG was entitled to have access to documents in the hands of those solicitors acting for the TAG Claimants (the "**Panel Solicitors**"), was Winterthur entitled to the same access? (see [63](4) and (5)).

85. At [79] Aikens J held that "common interest" privilege could be used as "a sword" in relation to both "litigation" privilege and "legal advice" privilege, applying the approach of Rix J (as he then was) in *Svenska Handelsbanken v Sun Alliance and London Insurance PLC* [1995] 2 Lloyd's Rep 84 at 88. Further applying the principle formulated by Bridge LJ (as he then was) in *Cia Barca v Wimpey* [1980] 1 Lloyd's Rep 598, followed by Moore-Bick J (as he then was) in *Commercial Union v Mander* [1996] 2 Lloyd's Rep 640 at 648, he found at [81] that once a communication is subject

to common interest privilege, it will always remain so. Mr Lynch submitted that the same considerations applied in relation to joint privilege.

86. In relation to the Pre-ATE documents, Aikens J found at [92] that insofar as there was "litigation" privilege in such documents, it belonged to NIG. The TAG Claimants had no such privilege. Further at [127], he held that

> *"Winterthur, as assignee of NIG's causes of action against the Panel Solicitors, must be in the same (but no better position) with regard to such documents as the assignor of the claim. Therefore they must be disclosable to Winterthur in any action it brings against the Panel Solicitors." At [129] he held that "NIG has, by implication, waived privilege in favour of Winterthur by granting Winterthur the assignment of the causes of action under the First Deed. Therefore Winterthur is entitled to disclosure of these documents by the Panel Solicitors in any action against them."*

87. Finally, at [130] he held that;

> *"Secondly, if there is an assignment of causes of action in favour of Winterthur as assignee, then Winterthur stands in the place of the assignor. In my view, an assignee is in a similar position to a successor in title with regard to the incidence of legal professional privilege. It is well established that a successor in title succeeds to and is entitled to assert any legal professional privilege that was available to its predecessor in title. Therefore, if NIG was entitled to claim legal professional privilege in relation to pre-ATE Policy documents, then so can its assignee, Winterthur. It follows that, as between Winterthur and the Panel Solicitors, the latter cannot refuse to give the former disclosure of pre – ATE Policy documents, because as against Winterthur, the Panel Solicitors cannot assert any privilege on behalf of the TAG Claimants."*

88. In relation to both the Pre- and Post-ATE documents, Aikens J found at [107] and [111], that NIG had a contractual right to demand that the TAG Claimant give it access to documents in the hands of the Panel Solicitors for use to pursue its rights and remedies to which it is "*entitled*". Any assertion of a right to "litigation" privilege by the TAG Claimant in respect of pre-ATE or post-ATE Policy documents would be inconsistent with NIG's right of access.

89. On the issue of reliance on "common interest privilege as a sword", at [113], Aikens J found that the relationship between the TAG Claimant and NIG as ATE insurer gave rise to a common interest that could give rise to "common interest privilege". At [116] he held that whilst documents that are obtained in the exercise of common interest

privilege obviously cannot be used for any purpose the applicant wishes, it is clear that they can be used in litigation between the two parties who at an earlier stage had a "common interest", as happened in *Commercial Union Insurance Co PLC v Mander*. [1996] 2 Lloyd's Rep 640. He stated : "*It seems to me that it is a legitimate extension to allow use of the documents in litigation between one of the two parties that had a common interest at the time the document was created, (say A and B), and a third party where B (in this case the TAG Claimant) is under an express contractual obligation to A (in this case, NIG) in the wide terms set out in Condition 6 of the ATE Policy wording.*" He concluded at [117] that NIG could rely on "common interest privilege as a sword" to have access to the Pre- and Post-ATE Policy documents in the hands of the Panel Solicitors that would otherwise be subject to the TAG Claimants' privilege.

The position of Winterthur

90. The Judge held that it was first important to understand exactly what had been assigned by both assignments. Under the First Assignment, NIG had assigned to Winterthur the right to bring proceedings to pursue the causes of action identified therein.

91. The Further Assignment, referred to at paragraph 82 above, stated that rights of access to information and documents arising under or in connection with various agreements, which include the ATE Policies, were being assigned. At [119], Aikens J stated "*In my view, the only choses in action which NIG can purport to assign must be those that it can enforce by action. Therefore any purported assignments made by the Further [Assignment] must be limited to those rights of access to information and documents relating to Claims that NIG can enforce by action; i.e. the rights of action must be limited to NIG's* ***contractual*** *rights of access to information and documents.*" Those rights included obtaining documents from the TAG Claimants that were "*genuinely necessary or required for the purpose of enforcing rights and remedies that NIG is "****entitled****" to enforce upon payment of an indemnity under the ATE Policy.*" He therefore concluded at [124] that the Further Deed took effect as an assignment of the contractual rights of access to documents that were granted to NIG by the TAG Claimants under Condition 6 of the ATE Policy Terms.

92. At [125], however, he made clear that "*... it does not make sense to talk of NIG purporting to assign "privilege" or "common interest privilege" by virtue of either Deed. Legal professional privilege is not a right to conduct and prosecute causes of*

*action against TAG, Rowe Cohen, or Panel Solicitors. Nor, in my view, is it a right of access to documents or information that "**arises under or in connection with**" the ATE Policy, upon the proper construction of the Further [Assignment]. As I have indicated, in my view the rights assigned are limited to contractual rights of access granted to NIG; they do not extend to any rights of "privilege" created by the law.*"

93. The Judge then considered the position separately in relation to Pre- and Post- ATE documents. Having held that only NIG possessed any legal profession privilege in relation to the Pre-ATE documents, he held at [127], that "*Winterthur as assignee of NIG's causes of action against the Panel Solicitors, must be in the same (but no better) position with regard to disclosure of documents as the assignor of the claim. Therefore they must be disclosable to Winterthur in any action it brings against Panel Solicitors.*"

94. As far as the Post-ATE documents were concerned, at [132], Aikens J said that it was necessary to examine whether the right to access depends on the "common interest as a sword" or is based on the contractual right to access found to exist. At [133] he found that if the right is based on the former, it would be met by the claim that there is a "common interest privilege" in favour of both the TAG Claimants and NIG. He said: "*Moreover, if legal professional privilege is held jointly, then it cannot be waived by one person alone. In my view that rule must apply equally to common interest privilege as much as to "joint privilege" where, e.g. two parties jointly obtain advice from a lawyer.*"

95. Importantly, at [134] he said; "*As I have already stated, the assignment of the rights given by the First Deed will not, by itself, enable Winterthur to obtain disclosure of the post-ATE Policy documents that are the subject of "common interest privilege". I agree with the submission of Miss Carr that Winterthur must take the assignment of the causes of action with "all its benefits and burdens", one of which is that the post-ATE Policy documents are subject to a privilege that is common to the TAG Claimants and NIG. NIG's right to assert that privilege is not within the assignment of the causes of action covered by the First Assignment. Nor, as I have already stated, is the right to assert "common interest privilege" within the terms of the assignment of the Further Deed."*

96. Mr Lynch relied on this paragraph of the judgment and submitted that by parity of reasoning the Assignment in the present case, could not put HJI in a better position to

that in which Transform had been prior to the Assignment. The assignment of the causes of action came with all the existing benefits and burdens, one of which was that the Joint Retainer files are subject to a privilege which is jointly shared by Transform and Travelers. They cannot therefore be provided by the Administrators to HJI or Hugh James without Travelers' consent, which it is not prepared to give.

97. Aikens J then considered the contractual position. Looking at the terms of Condition 6 of the ATE Policy Terms (recited at paragraph 81 above), he held at [136] that its wording was extremely wide and was such that "*it required the TAG Claimant to waive any privilege that it may have in documents if that is necessary or required by NIG for the purpose of enforcing claims against third parties if it is entitled to bring such claims upon paying an indemnity under the policy. As the TAG Claimant has no choice, then I think that the wording of the Condition 6 is, effectively, an automatic waiver of privilege by the TAG Claimant, provided that it is necessary or required by NIG for the purposes defined in the clause.*" He continued: "*That conclusion is, I think, consistent with the decision in Brown v GRE, [1994] 2 Lloyd's Rep 325, which holds that an insured cannot use "litigation privilege" to prevent the insurer from using his contractual right of access to the documents."* The effect of the Further Deed was that Winterthur could demand the Post-ATE documents insofar as those related to "Claims" as defined therein, which included *"all activities conducted in relation to the pursuit of claim by it or on behalf of the Insured."* Secondly, by reason of Condition 6 of the ATE Policy Terms, the TAG Claimant could not enforce its common interest privilege that it would otherwise would have had with NIG.

98. Mr Lynch contrasted the terms of the Assignment in the present case, and he submitted that neither clause 1(i) or (ii) affected or overrode the rights of Travelers, the other holder of the joint privilege. There was no contractual automatic right of waiver here, nothing comparable to Condition 6 of the ATE Policy Terms. Insofar as the Administrators relied upon [127] and [130] of the Judgment, such reliance was misplaced because those paragraphs were not dealing with joint privilege (see paragraphs 86 and 87 above).

Detriment to Travelers

99. When Travelers believed that disclosure of the BLM files was to be made to HJI and was unaware that it was also to be made to Hugh James, Travelers sought to assist the

Administrators by offering to waive its privilege in the files, subject to necessarily strict undertakings (i.e. to prevent disclosure to any third party, which Travelers says includes Hugh James). However, had Travelers known at that time that it was intended that the files were to be provided to Hugh James, Travelers would simply never have offered the possibility of accepting such undertakings, for obvious and very strong reasons. There has therefore been no waiver on its part.

A conflict of interest on the part of Hugh James

100. Hugh James is under a duty to its clients to disclose information relevant to its retainer(s). This principle was summarised in *Spector v Ageda* [1973] Ch 30, by Megarry J at page 48:

> *"A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has."*

101. The duty to disclose relevant information applies even when the solicitor is subject to conflicting duties. In *Moody v Cox* [1917] 2 Ch 71, Lord Cozens-Hardy MR held that the solicitor was bound to disclose all material facts relating to his client's matter, and was not relieved of that obligation by the fact that he owed a conflicting duty to his *cestui que* trust. The existence of a conflicting duty does not negate the duty of a solicitor towards his client. The solicitor remains bound by both duties, which places him in a position of "grievous responsibility". The principle has been affirmed in the case of *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, where at [41] Lord Scott held that "*if a solicitor puts himself in a position of having two irreconcilable duties … it is his own fault. If he has a personal financial interest which conflicts with his duty, he is even more obviously at fault*".

102. Paragraph 93 of Travelers' skeleton sets out Hugh James's various retainers on which Travelers relies. Some of these, such as the claims in France and the claims against The Hospital Medical Group [see paragraphs 7 and 8 of Locke 2] do not appear to have anything to do with Transform or Travelers, but others include:

    (1) The retainers with the individual PIP claimants in the GLO (both insured and uninsured claimants). Hugh James acts as the individual solicitors for 73 insured claimants and 80 Claimants.

(2) The retainers with all the other PIP claimants in the GLO by virtue of Hugh James being the lead solicitors – see paragraph 2.1 of the GLO. There are 623 claimants in the GLO bringing claims against Transform.

(3) The retainers with the Allergan claimant(s) against one or more clinics.

(4) The retainers with the PIP claimants who seek to bring the professional negligence claim – these are 426 in number, according to the Schedule to the Agreement and Assignment. There is likely to be a fuller and more detailed retainer letter for each claimant.

(5) Although this is unclear, possible retainers with claimants whose claims are stayed outside the GLO. Travelers noted Hugh James' offer not to accept any further PIP instructions or bring any further PIP claims. This undertaking would not, of course, address existing "live" and stayed claims.

The Allergan Claims

103. I have addressed these at paragraphs 36-37 above. Mr Lynch submits that disclosing the Joint Retainer files to Hugh James (which contain privileged materials relating to Allergan claims) would amount to handing over Travelers' privileged files to Travelers' (apparent) opponents in those Allergan claims. Even if Hugh James are not acting in any Allergan claim that directly affects Travelers at present, the Allergan claims will most likely be determined as part of a GLO, where all information will be shared, meaning that any privileged information of Travelers that is leaked will realistically be shared amongst all Allergan claimants (including those against Travelers and / or its insureds).

104. The undertakings offered by Hugh James and HJI in Locke 2 are not a realistic solution to the issues created by handing privileged files to Travelers' and Transform's opponents in the PIP litigation and possibly the Allergan litigation. At paragraph 94 of its skeleton, Travelers sets out the reasons why the proposed undertakings do not work. They can be summarised as follows: there is a risk that some claimants in the GLO may also bring claims relating to Allergan. If the Joint Retainer files were disclosed, the individual women claimants who instruct Hugh James in the PIP litigation and the Allergan litigation (unless their retainers have been appropriately restricted and / or they themselves give undertakings, which has never been indicated) would be entitled to request from Hugh James disclosure of the Joint Retainer files (and

use them as they wish). This would result in a position of conflict for Hugh James (if they gave the proposed undertakings not to disclose the files). That issue of conflict would not ultimately be resolved by Hugh James no longer acting for any claimants who request to see the files because the claimants could apply to Court for an order that the files be disclosed to them. The outcome of such application(s) is unknown, but obviously a high risk for Travelers.

105. Furthermore, even if there were no such risk as above, no draft undertakings have been produced, nor have the details of the proposed information barriers been sufficiently articulated to be given proper consideration, especially in the complicated and opaque circumstances of the Application. There is a real risk that the proposed information barriers will not work. As to information barriers, Travelers referred to the well-known decisions of *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 and *Koch Shipping Inc v Richards Butler* (*A Firm*) [2002] EWCA Civ 1280. The authorities provide that the Court should intervene unless it is satisfied that the risk of disclosure of confidential information is no more than fanciful or theoretical. Further and in any event, the authorities on information barriers address a very different and less troubling situation than the present. Travelers relied upon *Conflicts of Interest* by Hollander and Salzedo, 5th Ed., paras 4-027, 4-028, 4-031, 6-001, 6-002, 6-004, 6-017, 6-024 to 6-028, 7-001 to 7-003 and 7-011 to 7-017.

106. Once any such documents and information enter the public domain, it will be essentially impossible to recover that documentation / information and / or to prevent its use. This will, of course, include privileged material (where the privilege belongs to both Transform and Travelers) and material relevant to the new Allergan claims. Further, once confidential information enters the public domain, it is likely to be argued that such information loses its quality of confidentiality and seeking to restrain the use of the information will also be difficult. This concern is even more significant where the material is privileged.

107. Even if it cannot be said for certain that there will be a leak of Travelers' privileged information as envisaged, or even that such leak is likely, there remains a material risk to Travelers for the reasons set out above. As long as that risk is more than fanciful (which it plainly is, given the extreme circumstances of this case), that on the

authorities is sufficient to prevent disclosure (if, which is denied, Travelers' privilege can be overridden at all).

The Scottish Claims

108. Travelers' position in relation to them is described at paragraphs 39-40 above. Mr Lynch emphasised that (1) Hugh James' duties as the lead solicitors in the GLO were very broad, as can be seen from paragraph 2 of the GLO dated 17 April 2012; and (2) most claimants had their own individual solicitors acting for them as well as Hugh James, meaning that those other solicitors were and remain entitled to see any documents disclosed to Hugh James (whether directly or via their claimant clients).

Potential further new claims

109. I have referred to these at paragraphs 41-42 above. Travelers contended that disclosure to the current claimants risks disclosure to "new" claimants, particularly where the current claimants are represented by both Hugh James (as lead solicitors) and / or a large number of other firms of solicitors, more than likely the same solicitors who will represent the "new" claimants and who would be entitled to obtain the Joint Retainer files, were they disclosed to Hugh James / the claimants. The risks to Travelers of the privileged material being used against it in some way at some later stage and / or getting into the public domain and being used against it in future is sufficiently high that it is not reasonable that Travelers should be compelled to face that risk.

Other matters relied upon by Travelers

110. In their skeleton argument, Travelers relied upon an alleged lack of candour on the part of the Administrators in not revealing in Armstrong 1 that Hugh James would be acting for HJI and thus would receive all the disclosed documents, and further, that in correspondence with Travelers' solicitors, DWF, neither CRS nor the Administrators disabused Travelers of its obviously mistaken belief that the files would only go to HJI and not to Hugh James. This should be taken into account, when determining whether disclosure to the Administrators and thereafter to Hugh James is essentially "safe" for Travelers and should result in disclosure of the Joint Retainer files being refused.

111. The proposed professional negligence claim that is envisaged is weak, which should militate against disclosure of the Joint Retainer files, because it is a pointless exercise. Moreover, very little of the proceeds will be received by the Administrators pursuant to

the terms of the Agreement and Assignment. The bulk of the proceeds will be going to lawyers, which Transform submitted, was "*not a particularly meritorious reason to order that Travelers' fundamental rights be overridden*".

BLM's submissions

112. BLM has set out the steps taken by them in relation to compliance with the July Order in Gooding 1 and in Herne 2. I have set out the procedural history above and say no more about it here. It denied that it has favoured Travelers over the Administrators, but amongst other things, stated it was concerned that Travelers should be aware of the Assignment, so that if HJI and Hugh James were held to be third parties, Travelers might have a valid objection to disclosure to them. In relation to the provision of the Transform files, they could have been provided earlier but by reference to the correspondence they submitted that this was not high on the Administrators' priorities.

113. As far as the issue before the Court is concerned, BLM submitted that from the outset, it accepted that Transform (acting by the Administrators) is entitled to the Joint Retainer files over which there is joint privilege, or at least to a copy of those files, but it has been necessary to go through the exercise of sifting the papers so as to exclude documents over which Travelers has the sole privilege. It is now common ground that Transform (acting by the Administrators) is entitled to the Joint Retainer files.

114. The real dispute between the parties is over what the Administrators are entitled to do with the Joint Retainer files. From the outset BLM have taken a neutral stance on this issue. BLM's only role in these applications is to assist the court. BLM are in the same position as a trustee who is faced with a dispute between two beneficiaries or a debtor who interpleads because he is not sure which of two rival candidates is entitled to the money which he admittedly owes.

Discussion and conclusion

115. It is important to remember that the Joint Retainer files sought by the Administrators, are the property of Transform. Where an application is made pursuant to section 234 of the 1986 Act, adopting the approach taken in the *Re Corporate Jet* case, "*there is little or no argument that the court may order a person to deliver up books and records that belong to the company in question*". Travelers do not seem to me materially to challenge that entitlement.

116. The dispute revolves around what the Administrators are entitled to do with the documents and materials contained in the Joint Retainer files once they have them. As stated at paragraph 33 above, it is common ground that both Transform and Travelers can see the Joint Retainer files, but neither can disclose it to a third party without the other's consent. Thus if the Administrators had not assigned the Assigned Claims, would they be entitled to use the documents within the Joint Retainer files for the purposes of proceedings in relation to such claims and to instruct solicitors to advise in that regard? In my view Travelers could not prevent this and as I understand it, it accepts this. That exercise would not require a waiver by Travelers, because a party's solicitors are not to be regarded as independent third parties, but as the agents of those instructing them. Such an approach is consistent with the *Winterthur* case where at [116], Aikens J held that whilst documents that are obtained in the exercise of common interest privilege obviously cannot be used for any purpose the applicant wishes, it is clear that they can be used in litigation between the two parties who at an earlier stage had a "common interest". Another permitted purpose, therefore, would be for the Administrators to use the documents in seeking advice from solicitors in relation to possible litigation relating to the claims that were subsequently assigned by Transform, and in any litigation which followed.

117. In my judgment, the key issue here relates to the effect of the Assignment and the entitlement of HJI, following the execution of the Assignment. In *Winterthur*, Aikens J held at [130] that the right to access privileged information can be transferred by the assignment of rights of suit. This is because the assignee of such rights stands in the position of the assignor. If HJI are to be regarded as assignees, then the successor principle applies. However, as Mr Lynch points out, correctly in my view, that paragraph was dealing with a situation where there was sole, as opposed to common interest, privilege. Aikens J treated "common interest" privilege and "joint" privilege as being governed by the same principles, see [133]. I agree and therefore I will adopt the same approach as he did. With joint privilege, the position is as set out at [134] of *Winterthur*, namely that the assignment of the causes of action comes with "all its benefits and burdens", one of which is that the Joint Retainer files are subject to a privilege that is jointly shared with Travelers. I accept Mr Lynch's submission that the Assignment cannot put HJI in a better position to that in which Transform had been prior to the Assignment. It is in the same position as the Administrators, but no better.

118. It therefore follows that if the Administrators would have been entitled to use the documents and materials in litigation relating to the Assigned Claims, without seeking a waiver from Travelers, why should HJI, as an assignee not be in the same position? In the present situation, in my judgment, there has been an effective assignment of rights of suit against BLM and counsel by the Administrators to HJI. Clause 1(i) of the Assignment between the Administrators and HJI is drafted in wide terms, assigning "*absolutely all claims, choses in action and rights whatsoever*" that Transform might have against BLM and counsel. It follows from that where the assignor would have been entitled to disclose privileged information to his solicitors, an assignee would equally be entitled to do so. It follows that HJI has equal entitlement to access the Joint Retainer files as have the Administrators to the extent that Travelers cannot invoke the joint privilege against them for the purpose seeking advice and litigating the Assigned Claims .

119. I would make clear that in reaching this conclusion, and in finding that HJI are entitled to access the Joint Retainer files as assignees, I do not do so on the basis of overriding any joint privilege in favour of a third party or interpreting the provisions of section 234 and 236 of the 1986 Act so as to abrogate privilege. In my judgment, all that is being done here is to enable Transform's documents, namely the Joint Retainer files, some of which are privileged, to be delivered up to the Administrators, who are entitled to provide access to HJI to them as assignee of Transform's cause of action of the Assigned Claims for the purpose of seeking advice and pursuing litigation in relation to those claims. It seems to me that there is no need to rely upon the provisions of section 236 of the 1986 Act here. In my view, the remedy sought by the Administrators is to be found within section 234. I would make it plain, however, that had I regarded HJI as a third party, as opposed to the assignee of Transform's cause of action of the Assigned Claims, I would not have overridden privilege in order to provide it access, either under the provisions of section 234 or 236 of the 1986 Act.

120. If I am wrong that waiver of privilege was required, in paragraphs 21 and 22 of Whitaker 1 (recited at paragraph 28 above), by reference to DWF's letter dated 7 February 2019 (recited at paragraph 27 above), Travelers stated: "*Travelers has proposed (please see the DWF letter dated 7 February 2019) that it will not object to the Joint Administrators sharing the documents with HJI on the condition that there are undertakings from HJI, the Administrators and CRS in relation to all the documents*

produced by BLM (other than those relating to all documents exclusively to the Transform Retainer) not to use the documents or to disclose them to any third party other than for the purpose of the investigation and pursuit of those claims which are described in paragraph 18 of Armstrong 1, and otherwise to maintain the confidentiality of the documents". That, in my judgment, amounts to a waiver, subject to satisfactory undertakings being put in place to achieve the protection sought by Travelers (whose focus was then solely on the section 51 application). I accept that, at the time, Travelers was unaware that HJI had instructed Hugh James, but such instruction would make Hugh James an agent of HJI, rather than a third party.

121. That then raises the question, having found that HJI are entitled to access the Joint Retainer files, as the assignees of Transform's right of suit in relation to the Assigned Claims, can Travelers prevent Hugh James, as HJI's solicitors, from having access to the files on the grounds of an alleged conflict of interest, the section 51 costs application having been conclusively determined by the Supreme Court?

122. As Mr Boardman points out, Hugh James is not before the Court and Travelers have not issued any application for an injunction to restrain them from acting. A person is generally entitled to engage whichever solicitor he wants, subject to the solicitor being willing to act. The solicitor is not a third party but acts as the agent of their client. In those circumstances, I cannot see how in the present action, I can prevent HJI instructing Hugh James and Hugh James from having access to the Joint Retainer files, particularly in the light of the undertakings which have been offered by HJI and Hugh James, as set out in paragraph 8 of Locke 2, or such reasonable alternatives as the Court should require.

123. In relation to the various objections made by Travelers to the proposed undertakings:

    (1) I do not accept the submissions by Travelers that the fact that the precise wording of the undertakings has not yet been finalised should mean that they should not be considered;

    (2) Whilst I accept Travelers' submission that the Administrators should have made Travelers aware far sooner of the fact that, under the terms of the Assignment, Hugh James were instructed to act for HJI in respect of the Assigned Claims, I do not regard their failure so to do as a ground for the Court to refuse to accept undertakings from HJI or Hugh James, whose partners are officers of the Court.

Insofar as complaint is made about the failure in Armstrong 1 to refer to the fact that, under the terms of the Assignment, Hugh James had been instructed by HJI to act in relation to the Assigned Claims, it should be remembered that only BLM was a party to the application at the time and, as stated at paragraph 22 above, it was well aware of this fact since receiving Hugh James' letter of 6 September 2018. In my view, however, Armstrong 1 should have made clear that the purpose of the Administrators' application went beyond the matters referred to in paragraph 28 thereof and included the need for those files for the purpose of pursuing the Assigned Claims, particularly as Hugh James was funding the Application;

(3) In relation to the variety of concerns now expressed by Travelers, I note that none of these were referred to in DWF's letter of 7 February 2019 referred to at paragraph 27 above. That letter and Whitaker 1, in support of Travelers' application to intervene, focussed solely on the section 51 costs application, paragraph 14 of Whitaker 1 stating: "*The Court may regard this as an unusual situation because HJI is understood to be directly related to Hugh James LLP, who (as above) acted for the claimants in the GLO (against BLM and Transform) and continue to act for the claimants against Travelers in the live s.51 proceedings currently before the Supreme Court…*" Thus, although at that time, Travelers had not been informed that Hugh James was acting for HJI, reference was made to the connection between the two. Travelers' position has, therefore changed over time, as the Administrators contend and the real cause of concern, namely the section 51 proceedings, has now concluded;

(4) I regard many of the further concerns now expressed by Travelers as more imagined than real, and some of the hypothetical problems as very unlikely to occur, such as:

(a) the risk of disclosure of privileged information to Travelers' opponents in the Allergan litigation, given the fact that Hugh James is involved in only one case for a claimant against a clinic whose insurer is not Travelers and there have been no discussions between Hugh James and Leigh Day:

(b) the risk of such disclosure in the Scottish PIP claims, given that, as I understand the position neither Hugh James nor HJI act for any of those claimants and are willing to undertake not to act for any in future;

(c) the risk of such disclosure in future PIP claims yet to be brought, since for Travelers' policy to cover the claim any injury would have to appear by end March 2011, and the likelihood of a court exercising its discretion to permit such a claim to be brought in 2020 or later, given the GLO register closed in April 2013, is highly unlikely;

(d) the risk of such disclosure in the French claim against the German company. The state of play in that litigation is unclear. Given that Travelers asserts it is a party to those proceedings, it provides no detail as to the progress of that action and the nature of the claim against it. In relation to the assignment by Transform to the PIP claimants of its rights to pursue a claim against the German company, it states that it is unaware whether or how the assigned claim is proceeding.

(5) I am satisfied that appropriate information barriers can be put in place at Hugh James to ensure that privileged information within the Retained Files will be seen only by the team dealing with the Assigned Claims. Such arrangements can be the subject of undertakings to the Court.

124. I do not regard myself as in a position to form a clear view as the strength or weakness of the professional negligence claim by HJI as assignees against BLM or counsel, nor would it be appropriate for me to do so in the absence of the relevant materials. I do not regard it as material in terms of the findings I have made earlier or the suitability or otherwise of the undertakings proffered by HJI and Hugh James.

125. In short, having reached the conclusion that HJI are entitled to see the Joint Retainer Files pursuant to the application of the successor principle, I am satisfied that Travelers can be afforded appropriate protection against potential misuse of the Joint Retainer files' information by Hugh James by way of undertakings by HJI and Hugh James.

The Nature of the Undertakings

126. In the present circumstances, it should suffice that:

(1) HJI undertake to instruct Hugh James on such terms that the contents of the Joint Retainer files shall be disclosed only to those employees of Hugh James that are handling HJI's claims against BLM and counsel; and further that those employees of Hugh James that have had any involvement with the PIP Litigation or Allergan claims shall not be part of the team handling HJI's claims;

(2) Hugh James undertake to accept such instructions on that basis and to put in place information barriers (which should be specified to reflect the details of paragraphs 11 and 12 of Locke 2 and paragraph 9 of Harvey 1) in order to preserve confidentiality

(3) HJI and Hugh James should give the undertakings referred to at paragraph 67(1) and (4) above, namely undertakings (a) not to use any information or documents from the Joint Retainer Files for any other purpose than in pursuing the Claim, (b) not to accept any further instructions from any potential PIP claimants or to bring any further PIP claims in any jurisdiction, and (c) not to pass any such information or documents to any GLO Claimants and not to take on any new GLO Claimants with any connection to Transform or Travelers. On this point, I do not share Travelers' fears that Hugh James will be unable to withhold the contents of the Joint Retainer files from the other solicitors involved in the GLO claims and their clients. Further, as the Administrators point out at paragraph 67(3) above, the PIP Litigation is at end.

(4) Further, insofar as there are any live or stayed PIP claims in relation to which Hugh James are acting, it undertakes that it will cease acting for such PIP Claimants, that they currently represent. This will address the concerns expressed by Travelers at paragraphs 41 and 102(5) above.

Disposal

127. I determine the Issue in favour of the Administrators, subject to satisfactory undertakings being provided by HJI and Hugh James covering the matters set out in paragraph 126 above.

128. As I understand it, the Joint Retainer Files have been provided to the Administrators pursuant to the July Order as amended. If there are any further matters that need to be addressed in terms of timetabling, these can be addressed in any submissions in relation to consequential matters. I propose to deal with costs and any other consequential

matters in writing and would ask that written submissions be lodged, together with the draft Order, no later than 4.30pm on Friday 7 August 2020.

129. I would also ask that by that date, Counsel endeavour to agree the terms of a draft Order, and the terms of the proposed undertakings to be given by HJI and Hugh James, reflecting the matters I have referred to in paragraph 126 above. Insofar as there are areas of disagreement, I would ask that that they set out the rival versions in the draft. If amendments are subsequently made by me to the draft undertakings, I will require HJI and Hugh James to indicate to the Court that they are prepared to give those undertakings in that form. Once this is done, CRS and the Administrators will be released from their undertakings contained at paragraph 10i of the July Order insofar as it relates to HJI and Hugh James, and 10ii should be amended to "*other than for the purposes of the investigation and pursuit of those claims which are described in paragraph 18 of Armstrong 1 and those described in paragraph 28 of Armstrong 1.".*

130. I conclude by thanking Counsel once again for their assistance in this matter.