Neutral Citation Number: [2020] EWHC 1393 (Comm)

Case No: CL-2016-000049

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

Date: **1 June 2020**

Before :

Mr Justice Waksman

- -

Between :

(1) PCP Capital Partners LLP	**Claimants**
(2) PCP International Finance Ltd	
- and -	
	Defendant
Barclays Bank Plc	

James Collins QC, James Sheehan and Owen Lloyd (instructed by **Quinn Emanuel Urquhart and Sullivan UK LLP**) for the **Claimant**

Richard Lissack QC and Rebecca Loveridge (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing date: **1st June 2020**

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APPROVED JUDGMENT

INTRODUCTION

1. This is an application for further disclosure (“ the Application”) made by the Claimants, PCP Capital Partners LLP and PCP International Finance Limited (“PCP”), which represented an investment consortium including investors from Abu Dhabi, against the Defendant, Barclays Bank Plc (“Barclays”). The trial of the action, estimated to last eight weeks, commences in a week's time on 8 June.

2. Following the financial crisis of 2008, Barclays needed to raise at least £6.5 billion. It sought to do this through private investors rather than by way of assistance from the government. The state of Qatar and related entities and persons (“the Qataris”), already Barclays' largest shareholder, offered to invest £2 billion. PCP agreed to invest £3.25 billion. In this action, PCP alleges that Barclays represented to it that PCP would get "the same deal" as the Qataris which PCP says meant that PCP would receive as much *pro rata* by way of fees or other payments and consideration for the investments as the Qataris would receive.

3. PCP further contends that the representation was false and knowingly so because, in addition to the expressly declared fees, the Qataris received a further £280 million, disguised as consideration payable for advisory services from the Qataris pursuant to a written advisory services agreement dated 31 October 2008 (“ASA2”). I call this ASA2 because Barclays already had entered into a similar agreement with the Qataris in June 2008 (“ASA1”). A first attempt at extending ASA1 did not result in any binding agreement but PCP says it is relevant and it has been referred to as ASA1.5. I refer to all of them collectively as the ASAs.

4. PCP contends that all the ASAs were shams. It says that there were no or no real advisory services ever intended to be provided and, in any event, the sums payable pursuant to those agreements were completely disproportionate. Moreover the sums payable under ASA1 and ASA2 matched precisely the further remuneration which the Qataris had been seeking in respect of their original and then their later investments.

5. PCP is only directly concerned with ASA2 since it was not involved in the earlier capital raising (“CR1”) but only the second one (“CR2”), but it says that all these arrangements are of a piece, as Barclays well knew.

6. PCP also alleges that at the time of CR2, Barclays agreed to lend to the Qataris $3 billion which almost exactly matched the amount of their proposed investment and which, if used for that purpose, would have constituted unlawful financial assistance.

7. A variety of very substantial losses (up to £1.6 billion) are claimed by PCP depending upon which is the correct counterfactual on the hypothesis that PCP had been told the truth, namely that the Qataris were receiving the substantial additional fees, or at least that the misrepresentations had not been made. The Application relates essentially to the ASAs.

8. The above is a general summary of these proceedings. It is not an exhaustive account of them.

THE CRIMINAL PROCEEDINGS

9. Following an investigation, the SFO brought criminal charges in relation to these matters against Barclays Plc and four senior Barclays executives, being John Varley, the Group CEO, Roger Jenkins, Head of Structured Capital Markets at Barclays Capital, Tom Kalaris, CEO of Barclays Wealth Management, and Richard Boath, Co-Head of Barclays Finance. In February 2018 Barclays Bank Plc, ie the Defendant here, was added to those charges. However, in May 2018 the charges

against both Barclays companies were dismissed. Subsequently the cases against the four individuals were all dismissed at the end of the prosecution case in the first trial. Following a decision of the Court of Appeal, a retrial took place but now involving Mr Jenkins, Mr Boath and Mr Kalaris only. On 28 February 2020, they were all acquitted. Key and substantial witnesses for Barclays in the trial before me will include Mr Varley and Mr Jenkins.

10. During June 2015, the SFO made an application for a search warrant as part of their investigations in respect of documents over which Barclays had claimed legal professional privilege. The application was never heard or determined because Barclays agreed to provide the documents sought under what has been described as a "limited waiver of privilege". The terms of the waiver were contained in a letter from Barclays' solicitors from the criminal proceedings, Willkie Farr & Gallagher LLP, to the SFO dated 19 February 2016 as follows:

> "You have agreed to accept these documents on the basis that they are being provided to the SFO for the sole purpose of your criminal investigation and pursuant to a limited waiver of privilege for this limited purpose. The SFO will of course be able to use the documents for the purpose of its investigation, prosecution and SFO related criminal proceedings and to disclose them to a third party in accordance with its statutory functions, including under the Criminal Justice Act 1987".

11. The SFO subsequently did use a number of those documents provided under the limited waiver, including referring to them in open court at trial and cross-examining Mr Jenkins in particular about them. As a result, it is common ground that the documents referred to at trial, to which I shall refer as "the Open Documents", lost the privilege previously attaching to them at that point.

12. Prior to the use of the Open Documents at trial, a number of employees of Barclays had been interviewed by the SFO and the FCA. Transcripts of those interviews have been provided by Barclays to PCP as part of its disclosure in these proceedings. Redactions on the grounds of proportionality have been applied to them following the deployment of some of the privileged documents at the first trial. Those redactions have remained. Notwithstanding the use at court of the Open Documents, Barclays contends that there is no basis for removing them.

WITNESS STATEMENTS IN THESE PROCEEDINGS:

13. The witness statement of Mr Varley was originally served on 21 February 2020 but it was then the subject of substantial revision. This followed a ruling by me on 13 March to the effect that it contained much inappropriate material for a witness statement, for example impermissible argument. The revised witness statement of Mr Varley was served on 3 April and then the witness statement of Mr Jenkins came on 12 May. Barclays served its written opening for trial on 18 May. In addition, on 4 September 2019, Barclays served a witness statement from Ms Victoria Hardy, now its General Counsel but in 2008 a solicitor working in its General Counsel's office.

THE APPLICATION

14. This was made on 4 May. It seeks the following by way of documents:

> "1.1. Any contemporaneous document and any interview transcript, insofar as it (1) was previously withheld from disclosure or inspection, whether by redaction or otherwise, on the ground of privilege; and (2) concerns the ASAs or either of them.
>
> 1.2. All interview transcripts, insofar as those transcripts (a) are not or are no longer subject to legal professional privilege but have been withheld from disclosure and/or inspection, whether by redaction or otherwise, on the ground of proportionality and/or which were previously withheld from disclosure and/or inspection, whether by redaction or otherwise, on the ground of legal professional privilege, but which contain the same or substantially the same information as documents in which confidentiality has been lost as a result of the use in the criminal proceedings."

15. Finally, at 1.3 it seeks unredacted versions of seven specific documents.

16. Barclays denies that PCP is entitled to any of these orders. The underlying disputes relating to each of them have been referred to by both parties before me as Issues 1, 2 and 3. I will deal with each in turn but I should add that if PCP succeeds on Issue 1, Issues 2 and 3 become unnecessary. If it fails on Issue 1, Issues 2 and 3 then arise but Issue 3 stands or falls with Issue 2.

17. For the purpose of this application, I have the fifth and sixth witness statements of Mr Khatoun, a solicitor for PCP, dated 4 and 22 May and the fourteenth witness statement of Mr Passmore, solicitor for Barclays, dated 19 May.

ISSUE 1

The dispute

18. It is common ground that within the witness statements of Mr Jenkins, Mr Varley and Ms Hardy, and in Barclays' Opening, there are at the very least references to legal advice. PCP says first that the references are in fact sufficient to constitute a waiver of privilege in the advice referred to. Second, it says that the scope of the documents that must now fall for inspection as a result of that waiver are all the otherwise privileged documents relating to ASA1 and ASA2.

19. As against that, Barclays makes four essential submissions:

(1) On a proper application of the relevant legal principles there has been no waiver at all. I will call this “the Basic Point”;

(2) Even if there otherwise would have been a waiver it does not arise here because all the references are to the Open Documents which PCP now has. Since the time they were deployed in court in the criminal trial they have been non-privileged documents; so to deploy them now in these proceedings cannot amount to a waiver. I refer to this as “the Timing Point;

(3) Even if the above two arguments do not succeed, the scope of the documents now sought is far too wide (“the Scope Point”);

(4) Finally and in any event, any order of the kind sought by PCP is disproportionate and inappropriately burdensome on Barclays at this stage of the proceedings (“the Proportionality Point”).

The relevant materials

20. These have been set out in detail principally in Mr Khatoun's fifth and sixth witness statements to which reference should be made, but here I am going to concentrate on the examples that have been given in PCP's skeleton argument for this application.

21. I deal first with Barclays' written Opening and take these extracts contained in paragraph 19 of PCP's skeleton argument for this application by reference to Barclays' trial opening. First of all, at paragraph 21, and I quote:

> "The contemporaneous documents show beyond any doubt that the ASAs were in fact known to among others large numbers of Barclays' internal and external lawyers and Qatar's external lawyers, who were all involved in drafting them. The documents show that both sides' lawyers also knew the genesis of the ASAs ... The close involvement of lawyers (for both Barclays and Qatar) makes the allegation of sham still more improbable." [footnote omitted]

22. Then at paragraph 308, it says that PCP's allegations were inherently improbable:

> "... in view of the obvious high level of internal and external scrutiny of Barclays. A whole series of lawyers (again both internal and external and on both sides of the transaction) were involved in documenting the agreement being reached with Qatar - all of them would have had to be 'squared' either by bringing them into a conspiracy, or by deceiving them; but there is no evidence of either."

23. Finally, paragraph 310(2):

> "The lawyers ... were well aware of and comfortable with the proposition that the origin of the ASAs was the need for a mechanism to meet Qatari demands for additional value."

24. Otherwise see paragraph 14 of Mr Khatoun's sixth witness statement.

25. I then turn to Mr Varley's witness statement. This is dealt with at paragraphs 30 to 31 of Mr Khatoun's fifth witness statement. He refers first to paragraph 33 of Mr Varley's witness statement:

> "Barclays had the benefit of extensive legal advice, as well as the input of other professional advisers, during the capital raising in June and October 2008. The Board required (and I expected) that legal advice would be sought and obtained on all relevant aspects of these activities. I personally was aware that internal and external lawyers were heavily engaged throughout the period and I relied on our General Counsel, Mark Harding, to keep me updated as necessary ... His team, including his deputy, Judith Shepherd, had responsibility for the giving and procuring of legal advice in relation to the Bank's business and in particular the capital raisings, the June advisory services agreement with Qatar, and its October extension."

26. Then some more detailed references in paragraph 82, that Mr Varley would have had an open mind about how to satisfy the demand for a higher fee, "provided that the route was approved by the Bank's lawyers". In paragraph 89 he "would have expected the ASA concept to have been reviewed and approved by the Bank's lawyers (particularly Mr Harding and Ms Shepherd) who, as I have noted above, were intimately involved in the negotiations with the Qatari investors and at least one of whom attended all Board meetings".

27. Then paragraph 92:

> "I knew at the time that members of the Bank's internal legal team, including Mark Harding and Judith Shepherd, in both of whom I had great confidence, were closely involved in the detailed negotiations of both [ASA1] and the capital raising, in conjunction with external lawyers. I relied on and trusted both to identify any legal issues. One or both of them attended Barclays Board/BFC meetings for that purpose."

28. At paragraph 93, there is again a reference to internal and external advisers "who were closely, and simultaneously, involved in both the capital raising and the proposed advisory relationship", at each stage the subject of scrutiny of internal lawyers, and he was fully aware that lawyers were advising.

29. At paragraph 223, he states that he believed that proper internal and external legal advice was being taken.

30. At paragraph 225 to 226, he refers to Mr Harding and Ms Shepherd being present at a board meeting where ASA2 was discussed "as a legitimate means to help achieve the Qataris' desire for greater value" and "I am certain that if anything had been proposed at the meeting which created a problem from a legal perspective, both Mark and Judith would have said so".

31. Then, referring to the "late ask" by the Qataris to increase the ASA2 fee to £280 million (previously increased to £185 million), Mr Varley says: "I think it likely that I would have spoken with Mark Harding about the late ask."

32. Then one comes to the evidence of Mr Jenkins. There is some comment about the paragraphs in the Claimant's skeleton which, for the sake of convenience, I will simply quote at this stage, rather than making further references later on.

33. One begins with paragraph 19 which I read in full.

> "I understand that Barclays has not waived privilege over the legal advice sought and received in connection with the drafting of the ASAs, but that certain of the communications recording those matters, and various drafts of the ASAs, have lost their confidentiality by virtue of their use at the criminal trial. Without any waiver of privilege by me, I can say that I took comfort from and adhered to the lawyers' advice in these matters. I refer throughout this statement to examples of such legal advice relevant to the various matters I cover below which I know were used in the criminal proceedings (the full extent of such advice being apparent from the evidence I gave before the criminal court and from the documents used in the criminal court and therefore available in these proceedings)."

34. I then turn to paragraph 60. Here Mr Jenkins says that there was a call in the morning of 13 June and he says this:

> "Messrs Kalaris, Boath, Lucas and Ms Shepherd attended. The purpose, from my perspective, was to 'set the table' for Ms Shepherd so she could understand what had been agreed. Ms Shepherd wanted to understand how the Qataris were going to provide value under ASA1. I explained that Barclays had previously done very little business with Qatar, but there was a lot of money to be made from Qatar."

35. He says he explained the concept of Qatar providing business opportunities at least to the value of ASA1 and Barclays becoming a preferred provider.

36. There is a comment made here which is to the effect that that of course is Mr Jenkins' account of the meeting. There has been no document produced evidencing it.

37. I then go to paragraph 62 where he says that a memo was produced that afternoon on 13 June in conjunction with Ms Shepherd that records that he had discussed with them the different approach of entering into a memorandum of understanding to set out a framework for the Qatari Investment Authority advising BarCap on developing strategy in the Middle East and that the QIA was content with the agreed 1.5% commission for their then £2 billion investment. It is said that there are no documents evidencing what assistance was given by Ms Shepherd.

38. In paragraph 65 he says it is very clear from the documents referred to in that section that Barclays' lawyers were intimately involved with ASA1 from the outset and that the Qataris' lawyers were also heavily involved with drafting and negotiation:

> "Barclays' lawyers were aware that ASA1 was a mechanism for delivering additional value to the Qataris to meet their commercial 'ask' in respect of the capital raising (see paragraphs 60-64 above and 66-67 below). They were also aware of the sorts of valuable services that we expected would be provided under the agreement."

39. Paragraphs 66 to 68 refer to a number of emails. I just refer to paragraph 66(D) where he says that the fee of 1.5% was fixed as for the other investors. Ms Shepherd had said that any additional payments must be in exchange for additional value and be independently justifiable, and Mr Jenkins replied "The extra fee does not relate to the placing it relates to our advisory deal with them."

40. At sub-paragraph (E) he refers to what Ms Shepherd had stated which included:

> "On this basis CC are happy that this is not a material contract therefore does not need to be on display and the summary for the prospectus can remain in line with the disclosures provided below."

41. At paragraph 85 there was a reference to how (in connection with a proposed further investment by the Qataris) Clifford Chance lawyers and other individuals held discussions about how the 3% fee could be paid to Qatari investors and they concluded it could be delivered by way of an extension to the June ASA with a contemplated fee of $49 million.

42. At paragraph 156 he refers to a meeting including Mr Harding and Ms Shepherd to discuss how the ask of £600 million in respect of the second capital raising could be delivered and therefore (claims PCP) how it could be <u>lawfully</u> delivered.

43. At paragraph 268 Mr Jenkins says he received a draft extension to the June ASA (this is now dealing with ASA2) following a conversation they had had on the types of opportunities to be considered. This was from Mr Hughes, head of BarCap Legal, and he says it was consistent with his understanding at the time.

44. At paragraph 295 he says this:

> "I was aware that, like with ASA1 and the proposed ASA1.5, ASA2 was drafted by the lawyers. I took comfort from their involvement.On 28 October Mr Dobson sent an email confirming that, as a business as

> usual matter, ASA2 documentation would be for BarCap Legal. On 30 October I explained to Mr Hughes (of BarCap Legal) the type of opportunities that I expected to be covered within ASA 2.".

45. Finally, here, I make reference to 306:

> "The fact that the Qataris viewed the transactions in this way was known within the core team at Barclays. For example, on 23 October, the 8:30am meeting (at which Mr Harding was present) as referred to at paragraphs 156 - 158 above considered a paper which showed the Qataris' effective entry price252 for CR1 and CR2 (plus £1bn of MCNs) was 223.8p. We discussed that this left Qatar needing approximately £600 million to get to an overall 175p per share. The core team, including Mr Harding, were therefore aware of the way the Qataris viewed the transaction and alive to the risk that the ASA2 fee might be misunderstood, by those unfamiliar with the situation, as a disguised commission under CR2, but were comfortable that in reality it was not."

46. Finally there is also reliance by PCP on what Ms Hardy said in her witness statement for the purpose of waiver. I will deal with that in context below.

THE LAW

47. I begin with a number of overarching points.

    (1) Legal professional privilege is regarded as a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore to be carefully controlled;

    (2) Generally, privileged documents cannot be ordered to be provided in litigation by the party whose privilege it is unless this is as a result of a waiver;

    (3) Absent waiver, the fact that such documents might be highly relevant does not entail their production;

    (4) Applications for documents based on a waiver of privilege entail at least the two following fundamental questions:

        (a) Has there been a waiver of privilege?

        (b) If so, is it appropriate to order production of privileged documents other than those to which reference has been made which was the foundation for the waiver?

    (5) The concept of fairness underpins the rationale for having a concept of waiver which can then entail the production of further privileged documents. This is because if the party waiving is, by the waiver thereby creating a partial picture only of the relevant legal advice, it is unfair to the other party to allow him to "cherry pick" in this way.

    (6) That said, it is also clear that the question of whether or not there has been a waiver is not to be decided simply by an appeal to broad considerations of fairness.

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

49. I give two examples of what is clearly not waiver. First, a purely narrative reference to the giving of legal advice does not constitute waiver. This is because, on any view, there is no reliance upon it in relation to an issue in the case. Nor does a mere reference to the fact of legal advice along these lines, "My solicitor gave me detailed advice. The following day I entered into the contract". That is not waiver, however tempting it may be to say that what is really being said is "I entered into the contract as a result of that legal advice". The corresponding point is that if that latter expression is used, then there will be waiver.

50. I next turn to the vexed question which still confounds the law of privilege, namely the idea that, quite apart from reliance, waiver cannot arise if the reference is to the "effect" of the legal advice as opposed to its "contents". The judicial disquiet to which this distinction has given rise is well-summarised in *Passmore on Privilege* 4th Edition, at paragraphs 7-224 to 7-242.

51. The distinction, it seems, came to particular attention following the decision of the Court of Appeal in *Marubeni v Alafouzos* [1986] WL 408062. Here an application for disclosure based on waiver arose out of what the applicant for leave to serve out of the jurisdiction had deposed to in the required affidavit in support. Being initially an *ex parte* application on paper, there were duties of disclosure. In the context of deposing to the merits of the proposed claim, the solicitor said this in respect of certain defences which the solicitor was dealing with as things which might arise:

> "The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever."

52. So there was a clear reference to the legal advice and as to its conclusion, though not the underlying reasoning or any detail as to its contents. The Court of Appeal said there was no waiver. Lawton LJ said that all the deponent was saying was he was asking the court to allow service out of the jurisdiction. He was being frank with the court and really just saying "I have received certain information from Japan and I believe it provides no defence to the Defendants." In other words, he was not relying on the contents of the document: he was relying on the effect of the document. He had to refer to the Japanese lawyers because he was under a duty to give the source of his information and he could only do so by referring to what they had told him.

53. Similarly, in the judgment of Lloyd LJ:

> "I would not accept that there was here a reference to the contents of the document and there was certainly no verbatim quotation. There was a reference to the effect of the document, which is a very different thing."

54. He went on to say that it may be that in some cases it would be hard to draw the line.

55. It is not completely clear to me what meaning was ascribed to the word "effect" in that case but I proceed on the basis that it meant the conclusion or outcome of the advice because, given the brevity of the reference to it, it is hard to see what else it could be. But it is then very difficult to understand how that distinction works if applied mechanistically and without any reference to context and purpose.

56. Mr Lissack QC (correctly and inevitably, in my view) recognised the force of this in the course of argument because he accepted that if the reference was, "My solicitor told me that what I was about to do was lawful", that would be a matter of substance, not of effect, ie there would have been a waiver. Put another way, he said that the statement "I went and discussed it with my solicitor and he told me that it would be okay to go and do this transaction as a matter of law on Tuesday. On Tuesday I went and did it." would be effect and substance. And finally "I went to speak to the lawyer about whether I could sell somebody else's car and he said it would be lawful" would probably be substance. See in general pages 90 to 94 of the transcript. But on a strict application of the content/effect distinction, those examples could not constitute a waiver because only the conclusion is stated and not the contents of what might have been a lengthy written opinion. Such a mechanistic application of the distinction therefore has no logic nor any underlying principle and in this exchange at least, Mr Lissack QC did not advocate such a mechanistic test although he still relied upon the distinction on the points in issue when we turned to them.

57. I think it is possible to discern why the distinction might have been thought to have some superficial attractiveness and it is this. If one refers to large sections of a legal advice, it is difficult to see why that should be done unless the advice is being relied upon in some way. Otherwise, it is mere

verbiage. On the other hand a reference simply to the effect, for example concentrating on the outcome of the advice, may, and I stress may, indicate something different.

58. This is what happened in *Marubeni*. The solicitor had to depose to the advice received because it was a procedural requirement under the rules for service out, but once deposed to, the fact that the lawyers had advised there was no defence in Japanese law was irrelevant to the issue of service out after it had been dealt with initially. If the parties served out sought to set aside service on the basis, for example, that there was an extremely strong defence in Japanese law, then the court might have to decide that question. But if it did, what the applicant's solicitors originally advised is neither here nor there. A claim before the court is not a good claim because the claimant's solicitors have said so. It is a good claim if the court thinks so. In other words, there is no reliance by the claimant on the solicitor's advice once the affidavit has been lodged.

59. Exactly the same point arises in applications for summary judgment. To depose, for example, that "I have been advised by my solicitor and believe that there is no defence to this claim" is required by the rules. Such requirements are there to avoid bad faith applications for summary judgment where the applicant knows it is hopeless and that there is a defence. But, again, once the application for summary judgment has been made and is being decided by the court, what the applicant's solicitor thought about the defence is irrelevant.

60. Once the distinction is viewed in that context, one can see that the result in *Marubeni* was plainly correct. The judgments in that case were somewhat compressed in their reasoning but I am quite sure that they were in effect applying the kind of analysis that I have just set out. I will refer to some other cases below, but at this point, and to deal with matters of principle, in my judgment the correct approach to applying the content/effect distinction is this: the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver.

61. Furthermore, and in truth, where the courts have sought to apply that distinction, they have in substance done so in a contextual and nuanced fashion. I refer to some cases now.

62. I deal first with *Brennan v Sunderland City Council* [2009] ICR 479. It was a decision of Mr Justice Elias, as he then was, the President of the EAT, with two wing members. At this stage I simply deal with the exposition of the principles in the context of the waiver application made there.

63. At paragraph 62, he says that the underlying principle is fairness. The test for determining whether there is such an inconsistency -- that is waiving when it suits and claiming privilege where it does not -- is fairness. At paragraph 64, he says that typically cases attempting to determine the question whether waiver has occurred focus on two related matters. The first is the nature of what has been revealed. Is it the substance, the gist, content or merely the effect? The second is the circumstances in which it is revealed. Has it simply been referred to, used or deployed, or relied upon in order to advance the party's case?

64. He agreed with the *dicta* of Waller LJ in *Dunlop Slazenger International Limited v Joe Bloggs Sports Limited* [2003] EWCA Civ 901 that the principles were not altogether easy to discern, partly because of the vagueness of the language adopted and partly because the cases are necessarily fact-sensitive.

65. Elias J went on to say:

> "65. It is an error to treat the earlier authorities as if the words falling from judicial lips had the sanctity of statute. We would not, therefore, adopt in quite such stark terms the contents/effects distinction which Mr White submits represents the law. Plainly the fuller the information provided about the legal advice, the greater the risk that waiver will have occurred. But we do not think that the application of the waiver principle can be made to depend on a labelling exercise, particularly where the categories are so imprecise. The concepts shade into each other, and do not have the precision required to justify their employment as rigid tests for defining the scope of waiver.
>
> 66. Having said that, we do accept that the authorities hold fast to the principle that legal advice privilege is an extremely important protection and that waiver is not easily established. In that context something more than the effect of the advice must be disclosed before any question of waiver can arise.
>
> 67. However, in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities ... strongly support the view that a degree of reliance is required ... but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question of whether fairness requires full disclosure."

66. I should say, with respect, that it is not entirely easy to reconcile the contents of those paragraphs with each other if read literally, but in my judgment the clear upshot is that something like the more nuanced version of the test which I had referred to above is being countenanced and approved.

67. That is borne out by the EAT's actual decision on the case before it. At paragraph 69 it says that the authorities demonstrate that reliance is necessary. There was no indication that the council had any intention of relying on the advice which had been referred to. It had been put before the court as an exhibit to a lengthy witness statement. It had not been pleaded and it was not in the witness statements itself. That was not sufficient to constitute a waiver. They were not seeking to rely upon the advice to justify the reason why they decided to implement pay protection.

68. Here there were references to some details about the advice. In paragraph 70 Elias J said that:

> "We should emphasise that the situation would change if the material was subsequently to be relied upon by the council. For example, if they seek to rely upon the legal advice to support a stance that they were driven into a four-year pay protection period against their will, then they would be seeking to use the advice to their advantage and we would have thought that it would be clear that waiver had occurred. However, that is not how the council are currently seeking to put their case."

69. In my judgment, the conclusion reached in paragraph 70 of that decision could not possibly be supported if it was based on a mechanistic application of the contents/effect test.

70. Next I refer to the case of *Digicel v Cable & Wireless* [2009] EWHC 1437, to which considerable reference was made by both sides. Here there was a real issue as to what, if anything, the relevant party was asserting by its references to legal advice and whether he was really relying on them in a meaningful sense at all. The suggestion was made in the context of a trial where the beliefs of the relevant party were relevant and his references to legal advice, it was claimed, amounted to an assertion that what he believed was supported by that advice.

71. In the end, Mr Justice Morgan did not have to decide that point. This is because of the concession made by the defendants' counsel that they accepted in clear terms that in the absence of disclosure of the legal advice, the defendants could not contend for an inference in their favour that what they were doing was supported by the legal advice.

72. Since the reliance point went away, that would have been the end of the matter. But Morgan J said that even if there was reliance, he would deal with the position anyway. He had the case of *Brennan* cited to him. At paragraph 21, he said:

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

73. Then in paragraph 22 he noted that it was agreed that a statement which merely records the fact that legal advice had been given will not amount to a waiver.

74. He then recounted the assertion which the party seeking disclosure said was being made by the other party, by referring to the relevant material. It was that the parties' own beliefs as to the legal position were supported by the legal advice they received. In that context, Morgan J said this, at paragraph 27:

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

75. He went on to say that many of the statements relied upon were no more than references to the fact of legal advice being taken, in which case there was no waiver, but four particular statements called for analysis. I simply take one as an example. Paragraph 10 of the relevant statement is dealt with at paragraph 30 of the judgment. The witness had said:

> "As legal adviser, my role has included providing legal advice in the context of interconnection negotiations. Such advice is, or course, privileged and [I do not make a waiver, etc] ... On occasion, however, I do set out what my belief was as to the existence or extent of any obligations in relation to interconnection. In doing so, I do not seek to trespass on questions of statutory or contractual interpretation which I understand are questions for the court ... The only purpose of referring to my contemporaneous belief ... is to explain why I (or those with whom I was working) acted (or omitted to act) as we did. I understand this may be relevant given that it is alleged in these proceedings that the Defendants pursued a strategy of deliberate and unlawful delay as regards interconnection."

76. As to this Morgan J said:

> "31. …[It] is a question of fact, whether the reference is fairly construed as a reference to the contents of the legal advice or to something less than that."
>
> 32. The case for saying that [this] is a waiver is that when Mr Batstone refers to his explanation for why other persons acted as they did, he must be taken to be saying that the others relied on his legal advice and the contents of legal advice are shown by the conduct which was said to have been influenced by or based on that legal advice. Although this argument can be put, it is my view that this reference ... is not a sufficient reference to the contents of the advice nor reliance on such contents. The Defendants have not crossed the ill-defined line which separates the contents of advice from the effect of advice so as to result in a waiver of privilege."

77. What that example shows is that the decision of Mr Justice Morgan was in fact quite nuanced and context-specific.

78. I do not draw the conclusion that there is anything in what are *obiter* passages which is in fact inconsistent with the approach which I have referred to above and of course no criticism was made of the reasoning in *Brennan*.

79. Finally, I rely upon a decision of Mr Justice Males as he then was in the case of *Mid-East Sales v United Engineering* [2014] EWHC 892. I start at paragraph 15 of the judgment. He refers to waiver and *Hollander on Documentary Evidence*, where the authors noted a distinction between a reference to the fact of legal advice and reliance on the content of that advice. Males J went on to say:

> "That distinction reflects a policy not to hold that there has been a waiver without good reason and to confine cases of waiver to cases where the party said to have waived is relying on the content of the legal advice for some purpose. Sometimes the distinction is drawn between reference to legal advice and deployment of it. The overriding principle is one of fairness, that if the content of legal advice is deployed or relied upon in order to

> advance a party's case, then fairness may require that disclosure of that advice be made available so that the court can properly assess that assertion."

80. And then:

> 16. In the present case the legal advice which is said to have been given has been referred to in the context of the question of delay by the second defendant in responding to the service of the claim form. It appears to be relevant to the question as to whether...the court should exercise its discretion to set aside the default judgment….Mr Zahid Mumtaz…says at para. 29:
>
> > "Acting on the advice of IA Solicitors, the claim form and enclosures were returned to the British High Commission ... on the basis of Article 13 of the Hague Convention."
>
> He then sets out the letter pursuant to which that was done
>
> 17. In his second witness statement..He says at para. 7:
>
> > "the thrust of Dudley 8 is that the second defendants' conduct was premised on incorrect legal advice from IA Solicitors. Again I will address this point and demonstrate that it was as a result of IA Solicitors' advice that the second defendant took the steps it did in responding to the claim form.""

81. Then the judge concludes:

> "18. It seems to me these two statements, taken together, do cross the line from reference to deployment. They make a case that the second defendant was acting on legal advice in responding to the claim form in the way that it did. That can only be relevant because the second defendant seeks to rely on that as a factor going to the exercise of the court's discretion. I can see no other reason why the reference to acting on legal advice should have been included ... Now that the second defendant has invited the court to exercise its discretion on the basis that it was acting on legal advice, it may be highly relevant to know what that advice was."

82. He concludes by saying there had been a waiver.

83. I take two important things from this decision. First, it clearly does not proceed on the basis of any mechanistic application of the contents/effect distinction or indeed even on the contents/fact distinction. Secondly, the question of reliance and purpose is central to the determination of waiver. All of that is consistent with and indeed supports my approach here.

84. Therefore there is nothing in any of those three cases which is contrary to the approach that I have outlined and indeed there is much there to support it.

85. If waiver is established, then, and only then, the question of whether further privileged documents should be provided arises. Here the position was much less controversial between the parties as to the law. In essence, the court has to decide the issue or "transaction" which the waiver was concerned with. Once that has been identified, then all the privileged materials falling within that issue or transaction must be produced. There may be no more if on a proper analysis the transaction itself was limited to the privileged material already referred to. The identification of the transaction should be approached realistically so as to avoid either artificially narrow or wide outcomes.

86. The transaction analysis itself is driven by the concept of fairness. It is why one has to ascertain the transaction, because then that establishes the playing field, as it were. If the playing field is in truth wider than the documents which have been referred to so far, then it is not level as far as the non-waiving party is concerned because disclosure has in truth been only partial.

87. I deal with any further legal points that arise in context below.

<u>ISSUE 1 - ANALYSIS</u>

The Basic Point

88. The starting point in my judgment is paragraph 19 of Mr Jenkins' witness statement. In my judgment, the sentence "I took comfort from ..." amounts to a general statement that what he did in connection with the ASAs which are the subject of that paragraph was to follow the lawyers' advice

or, to put it more directly, the lawyers approved of it or, to put it in yet another way, the lawyers advised that it was lawful.

89. On any sensible and realistic view, Mr Jenkins was doing more than simply referring to the fact of advice. In one sense, the scope of the reference is only to the effect of the advice, if by "effect" one does indeed mean conclusion. None of its contents are quoted as such and all he relies upon is the conclusion: it is lawful. But that, depending upon context, can still be sufficient for waiver for the reasons which I have given above and with which Mr Lissack QC was disposed to agree in argument.

90. One therefore turns to reliance. Is Mr Jenkins relying on the advice to that effect? Plainly he is because he is saying that he followed it in connection with the ASAs alleged to be shams.

91. One then asks what the purpose of that reliance is. Again the answer is obvious. It is to say that this following of advice goes to the state of mind of Mr Jenkins and the proper characterisation of these agreements. If the lawyers advised they were lawful, it is less likely that they were or should be regarded as shams.

92. These references arise in the context of very substantial civil litigation following a criminal trial where there has been and will continue to be considerable forensic examination of numerous documents and the motives and mindsets of Barclays executives. References to legal advice are not made casually or by accident here. They can only be designed to improve Barclays' case on the issues surrounding the ASAs. To be fair to Barclays, it was not seriously suggested that, if the reference to the advice was to be characterised as I have described, there was then no such reliance. Its principal argument on paragraph 19 was that the application of the contents/effect test meant that there was no waiver at all but I have already explained why this test does not work mechanistically.

93. Turning to the other passages in Mr Jenkins' evidence that I have set out above, a number of them must plainly fall into the category of the examples that he referred to in his paragraph 19, which on any view clearly set out some detailed communications between Barclays and its lawyers. Indeed, since Mr Jenkins expressly says in paragraph 19 that his later evidence refers to "legal advice", that much cannot be in doubt.

94. One then has the general statements, to which I will refer again, in paragraph 295 that the ASAs were drafted by lawyers and "I took comfort from their involvement". Here, as in other places, one has the reference to "comfort". It is important to understand what this actually means. It cannot mean anything other than that the lawyers were approving what was being done as lawful. Nothing else here matters. The same applies to paragraph 306 where there is reference to the fact that the team, including the lawyers, were aware of how the Qataris viewed the transaction but were comfortable that in reality it was not a disguised commission. Again, that can only mean that the lawyers were approving what was being done as a legitimate transaction and not a disguised commission. Moreover, this is an overarching statement of lawfulness in the way that has been asserted by Mr Jenkins.

95. I turn next to Mr Varley. I have cited the relevant paragraphs above. They are detailed references to the involvement of the lawyers. I consider then why the reference is made. In Mr Khatoun's fifth witness statement he refers to where Mr Varley said that he knew that members of the bank's internal legal team had been closely involved in the detailed negotiations. He relied and trusted on them to identify any legal issues. One or both of them had meetings for that purpose. The only point in saying that is to assert that the lawyers did not identify any adverse legal issues, ie they did not say that the contemplated transactions were legally problematic. The same analysis must be made on what he said in the later paragraphs, 225 to 226:

> "I am certain that if anything had been proposed at the meeting which created a problem from a legal perspective, [the lawyers] would have said so."

96. Again, this can only mean that not only was advice taken but that the advice was not inconsistent with what was going to be done from a lawfulness point of view. Other references make the same point, that the lawyers did not consider what was to be done as legally problematic. That other reference is paragraph 223:

> "I believed at all times ... proper internal and external legal advice was being taken."

97. It is true that all of these statements are couched in negative terms: "they did not advise X was unlawful" rather than saying that "they did advise X was lawful". That makes no difference in my view. The examination of waiver has to be concerned with what on a fair and objective analysis is the substance of what is being asserted about the legal advice referred to and its purpose - and not its form.

98. The passages that I have referred to from Mr Varley's witness statement again amount to the assertion that whatever was done was approved as lawful by the lawyers.

99. As for the Opening, I have referred above to examples of the passages relied upon by PCP. The effect of those statements can only be that the lawyers approved the transaction done as lawful. They were "comfortable" with, ie approved as lawful, the origin of the ASAs being to meet the demands for additional value. Yet again, and to state the obvious, the only reason to make those assertions is to assist Barclays on the merits of its case about the legitimacy of the ASAs. Otherwise there would be no point in including it in its Opening for trial.

100. Accordingly, and subject only to the Timing Point, in my judgment on the facts it is plain that waiver has occurred. Because of these conclusions, it has not been necessary for me to address a further point made by PCP. This concerns the evidence of Ms Hardy. It referred in one part specifically to the obtaining of advice from Mr Todd QC but it also addressed the counterfactuals advanced by PCP for the purpose of the claimed losses. Ms Hardy says what the consequences would have been on some of the counterfactuals and that they would have led to the taking of legal advice which (a) would have identified material risks to the Board and (b) which advice the Board would be likely to follow. She also says the Board would follow legal advice based on compliance with a quantitative threshold and where it was qualitative, the board would follow any strong recommendations from lawyers that the risk should be avoided.

101. Though she does not say so expressly, PCP contends that she is relying on the taking and following of legal advice on the matters in issue in this case as supporting her proposition that the same approach would be true in relation to any counterfactual. In fact, I do not read her statement in that way, so I would not have seen it as creating some separate basis for waiver; but in the event, it does not matter.

The Timing Point

102. Barclays' essential point here is that all of the references to legal advice concern the Open Documents which are no longer privileged, so deploying them now in this context does not involve waiver at all. I do not accept the underlying premise which is that a once-privileged document which has lost that status where it has been deployed on one occasion has therefore become irrelevant from a privilege point of view, thereafter and for all purposes.

103. As against that, PCP says that if this was the case, it would be possible for a party intent on relying upon only some privileged documents to avoid the consequence of any waiver by deliberately making them open beforehand. PCP has referred to some decided cases which it says contemplate the continuing relevance for waiver of privileged documents already made open. There was some

very limited debate about those cases, in which Barclays argued that they did not in fact assist PCP. However, this debate does not matter because Barclays accepts that there can be circumstances where questions of waiver would still arise on the later occasion.

104. Paragraph 32 of Barclays' Skeleton Argument says this:

> "It is accepted that collateral waiver may be a two stage process involving, for example, loss of privilege in a document as a result of a party's own actions (including deliberately arranging for the documents to be made public or providing the document to the other side as part of its disclosure) and, subsequently, reliance on that document in the proceedings in a way which gives rise to a collateral waiver. But none of the cases relied on by PCP bears any resemblance to the present facts, where the Open Court Privileged Documents lost privilege as a result of a process of selection and deployment by third parties in the Criminal Proceedings and, once this privilege was lost, Barclays relied on those documents in the present proceedings."

105. So the key points made by Barclays are fact-sensitive. They are to the effect, first of all, that Barclays did not do the earlier deployment of the Open Documents, the SFO did. Secondly, it argued that from a fairness or utility point of view, since the SFO had sight of all the privileged documents, one can assume that it chose to deploy those which were most adverse to the case against Mr Jenkins and the others. So it is very unlikely that any documents not part of the Open Documents will be of any use to PCP here.

106. I deal with each of these two arguments in turn. As to who deployed it, it is of course correct that the SFO deployed them but the privilege belonged to Barclays and as set out in its solicitors' letter referred to in paragraph 10 above, Barclays gave a limited waiver in the full knowledge that some or all would see the light of day at trial. So it can hardly be said that Barclays had nothing to do with the deployment of the Open Documents. In the circumstances of what happened, its original disclosure under the limited waiver was the starting point for what follows. I therefore reject the first argument.

107. As to the second, it is of course correct that the issue of whether the ASAs were shams was a central part of the criminal trial. It is also true that one can assume that the SFO decided to use the documents that it felt were adverse to the Defendant's case but that is not a reason why PCP should be bound by the actions and decisions of the SFO. In addition, the particular nuances of the sham arguments may well differ between the two sets of proceedings.

108. Finally, the only party who knows what the non-Open Documents might reveal is Barclays. If the remaining documents are so tangential and of so little value and would harm its own case less than those which have been disclosed, it could have taken a pragmatic decision to disclose them anyway and take the heat out of the point altogether but it has not. Nor would it be an answer to say that it would be open to PCP to invite the court in this civil trial to make inferences from the fact that disclosure is limited to the Open Documents and there are more, to the effect that since the disclosure of the privileged documents is incomplete, the court should assume there are unseen privileged documents which may be adverse to Barclays' case. That can be said of any application based on waiver which would otherwise succeed. It is not an answer because it does not remove the unfairness of one party having only partial disclosure where a waiver has been found.

109. There is a further matter. PCP also contended before me that in fact it is not even clear that the privileged communications referred to by Barclays in its evidence and Opening are limited to the Open Documents. If that was the case, the Timing Point could not be a complete answer anyway. I have been told by Barclays that the references are so limited and after the hearing I was provided with some helpful documents giving all the references. PCP also say that it is not clear from the terms of paragraph 19 of Mr Jenkins' witness statement that all he is intending to refer to in terms of the legal advice from which he took comfort is limited to the Open Documents, although I have been told that that was certainly the intention. However, the position is not helped by the fact that the

statement in paragraph 19 looks compendious. It does not say, for example, that there are other undisclosed pieces of advice from which he did not take comfort. But these points do not actually matter in the light of my rejection of the Timing Point itself.

The Scope Point

110. Since there has been a waiver, this is the next question. First, we know, because Mr Passmore has told us, that there are some 1,500 further privileged documents that are not comprised in the Open Documents. So there is further material. The next important question is what the transaction is, for which waiver has occurred. Again, if one takes paragraph 19 of Mr Jenkins' statement as an example, it is obvious that it is the lawyers' advice about the ASAs.

111. Mr Lissack QC urged me that if I reach this point, I should examine each and every reference to legal advice which constitutes waiver and consider the particular transaction to which that relates. Without taking any account of context, there may have been something in this, but the truth is that Barclays is relying on all the references to legal advice to make its compendious point about the lawfulness of the ASAs. That being so, it is not open to it now to argue for some much narrower transaction or transactions.

112. One can test it out. How can Mr Jenkins or other witnesses be properly cross-examined about their belief that the lawyers approved the transaction without knowing the full picture of the advices on the ASAs?

113. Moreover, there is a further point. It is obvious that a lawyer's advice is produced not in a vacuum. It all depends on what the lawyer is told in her instructions. PCP says that this is critical here because certainly not all of the Open Documents include what those instructions were. Unless that is known, the value of the legal advice relied upon is open to question, and there may be further credibility points if it turns out that the lawyers were advisedly not told of certain things.

114. PCP says it has already found examples from the Open Documents of inconsistencies between what it was said the lawyers knew and what they did know or were asked. See the reference to this at paragraph 25.2 of the Claimant's Skeleton Argument dealing with the evidence of Ms Hardy. See also the memo from Mr Jenkins to Ms Shepherd dated 13 June 2008 at E5/102/133 which was said to be inconsistent with how Mr Jenkins referred to the purpose of the ASAs in the conversations he cited at paragraphs 65 and 66(D) of his witness statement.

115. In my judgment, considerations of fairness plainly dictate that the relevant transaction is the legal advice in relation to the ASAs.

The Proportionality Point

116. The commencement of the trial is but a week away. Barclays say that the exercise of disclosure of the remaining privileged documents on the ASAs will take some time and involve cost. Moreover the application has been brought far too late.

117. As to that last point, I cannot accept that the application was too late. It could not be meaningfully brought and it certainly could not be meaningfully determined by the court until the final versions of the relevant witness statements were produced since in the case of Mr Varley, PCP could not know what changes would emerge following my order of 13 March and since Mr Jenkins' witness statement did not arrive until 12 May anyway.

118. As to time and costs, Mr Passmore estimates a total of around 10,000 pages of documents involving a total review time of nearly 500 hours at a cost of around £150,000. In answer to that, Mr Khatoun says that the exercise could be done faster and cuts the time by a third and therefore the cost by a third. I am not going to make any findings between these two pieces of evidence. It is not necessary.

But in litigation of this mammoth scale, with the extremely large legal resources deployed on both sides and where the claims made and defended may be as much as £1 billion, the expense which my order would entail is clearly not disproportionate.

119. It is of course close to trial but the documents do not have to be ready for Day 1. Mr Varley, who is Barclays' first witness, is not due to give evidence until 26 June and Mr Jenkins not until 2 July.

Conclusion on Issue 1

120. For all those reasons, and subject to any questions of time for compliance or drafting, I will make an order in terms of paragraph 1.1 of the Application Notice.

ISSUE 2 - ANALYSIS

121. On that basis, Issue 2 falls away since what is sought here will be caught under issue 1. However, in deference to the arguments, I should say something about it.

122. Barclays has redacted a number of passages in the various transcripts of the interviews between Barclays' employees and the SFO and the FCA. These redactions were applied subsequent to the deployment of the Open Documents at the first trial. PCP says that the redactions should be removed where what is redacted is the same or in substance the same as any of the Open Documents. This is subject only to the fact that if what is said about that communication then involves a reference to some other privileged communication, to that extent only the redaction should remain. PCP points out that, subject to privileged references, the interviews themselves are relevant and disclosable.

123. Barclays agrees to some extent. It accepts that if the interview refers to the same communication as that contained in the Open Documents, then the redaction can go insofar as the redaction was of the actual reference to or quotation from that communication. However, it says that the reference to the "in substance" is too wide and could give rise to all sorts of issues as to what references fell within that definition. But it also says that the redactions should otherwise be lifted only to the extent of the question asked of the interviewee about the communication in question and not the answer. Finally, it also makes the same caveat as PCP as to any reference to other privileged communications.

124. Let me deal with the suggested exclusion of the answers. That cannot in my judgment be correct. Provided there is no reference in the answer (or the question) to other privileged communications, there is no basis for excluding the answer. The answer is not privileged at all. To take a simple example: if Ms Hardy was asked about what she understood to be the import of a particular email from Mr Jenkins, itself contained in the Open Documents, or whether she agreed with what it said, there is no reason why the answer is inadmissible.

125. As for the "same as or in substance the same" issue, I accept that paragraph 47 of the ruling of Sir William Gage in the *2010 Baha Mousa Inquiry* is correct when it says that a document which substantially reproduces the privileged communication in question should be disclosed. So it is not necessarily limited by way of secondary material to a verbatim copy. In practice I doubt whether much will turn on this because the interviews must surely have been conducted on the basis of particular privileged documents being put to the interviewee or where the interviewee is asked about them; or at least that must be so in the majority of cases. If so, the real point is not about the nature of the similarity, it is about the answer given by the interviewee.

126. So, had Issue 2 been live on its own, I would have granted the relief sought save that I may well have restricted the references to communications which are the same or in substance the same, rather than information which I can see could cause problems. In the event, however, this does not arise and there is no need for a separate order.

ISSUE 3 - ANALYSIS

127. It is accepted that the decision here to make the redactions on seven documents stands or falls with Issue 2. It is also now made unnecessary by issue 1 and I need say no more about it.

CONCLUSION

128. Accordingly I will make the order sought at paragraph 1.1 of the draft.

129. I make one further point here. It is accepted by PCP that if Barclays wishes to avoid the consequences of the waiver which I have now found and spelled out, it could withdraw its reliance (in the way I have also spelled out) on the privileged material in question and in connection with the issues surrounding the lawfulness of the ASAs. There may still be a need to refer to lawyers being involved for the purpose of establishing a coherent narrative, but that is quite different and would not itself be objectionable.

130. I will discuss with counsel whether that is an option which Barclays wishes or may wish to explore. I am most grateful to them for their succinct and helpful submissions.