

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 July 2022

Before:

MRS JUSTICE MOULDER

Between:

**(1) E20 STADIUM LLP (2) LONDON LEGACY
DEVELOPMENT CORPORATION**

Claimants

- and -

ALLEN & OVERY LLP

Defendant

NIGEL TOZZI QC and KATE LIVESEY (instructed by **Gowling WLG (UK) LLP) for the
Claimants**
TONY SINGLA QC and JONATHAN SCOTT (instructed by **Clyde & Co. LLP) for the
Defendant**

Hearing dates: 5 July 2022

Approved Judgment

**I direct that no official shorthand note shall be taken of this Judgment and that copies
of this version as handed down may be treated as authentic.**

This judgment was handed down by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand-down is deemed to be 10.30am on 13 July 2022.

Mrs Justice Moulder :

1. This ruling relates to that part of the disclosure application dealing with privilege. The disclosure application was made by the Defendant, Allen & Overy LLP ("Allen & Overy"), on 29th April 2022 against the Claimants, E20 Stadium LLP ("E20") and London Legacy Development Corporation.
2. In relation to privilege the Defendant seeks permission for the use and/or disclosure in these proceedings of certain privileged documents, together with a declaration that privilege has been waived by the Claimants.
3. The application is supported by a first witness statement of Miss Clover of Clyde & Co. LLP, solicitors for the Defendant and a second witness statement dated 28 June 2022.
4. In response to the application, there is a witness statement of Mr Arben of Gowling WLG (UK) LLP ("Gowlings"), who act for the Claimants, dated 14 June 2022.

Background

5. The background to this part of the application is that in the DRD the following issues (amongst others) were agreed to be subject to Model C requests:

“Issue 29: What were the circumstances in which and reasons why the First Claimant: (a) installed more than 53,500 seats in the Stadium? (b) made those seats available to West Ham without West Ham paying an additional charge? (c) obtained Grantor Consents without seeking an additional payment from West Ham?

“Issue 30: Why did the First Claimant choose to defend the Proceedings brought by West Ham (and pursue counterclaims)?”
6. The Model C request on Issue 29 included a request for:

“(4) any communications with legal advisors, legal advice, or communications with other third party advisors (if any) that evidence this issue.”

7. The agreed position was:

“Legal advice and advice from any third party advisors (including related instructions) upon which the boards relied when making such decision(s). The request is subject to any objection to production that may be maintained on the grounds of privilege” [emphasis added]

8. The Model C request on Issue 30 included a request for:

“(4) any communications with legal advisors, legal advice (e.g. concerning the merits of the Defence or Counterclaim), or communications with other third party advisors (if any) that evidence this issue.”

9. The agreed position was as follows:

“Legal advice provided to the LLDC/E20 Boards and advice from any third party advisors (including related instructions) upon which the Boards relied when making such decision(s). The request is subject to any objection to production that may be maintained on the grounds of privilege” [emphasis added]

10. In its Disclosure Certificate dated 3 December 2021 the Claimants stated:

“8. The Claimant has waived its privilege on a strictly limited basis in respect of certain documents which are responsive to Model C requests 29(4) 30(4) and which resulted from the searches undertaken by the Claimant and described in the DRD.” [emphasis added]

11. At the end of the Disclosure Certificate the Claimants stated:

“I wish to withhold production of the following, which would otherwise fall within my obligations:

Description of document, part of a document or class of documents	Grounds upon which production is being withheld
Correspondence and associated documents sent/produced for the purposes of giving/obtaining legal	Legal Advice Privilege

advice, of which privilege is not waived, in accordance with the information above.	
Subject to paragraph 8 above, correspondence and associated documents sent/produced in the contemplation of litigation	Litigation Privilege

12. In a letter of 14 April 2022 Gowlings wrote:

“...Our clients have given disclosure against Issues 29(4) and 30(4) by way of limited waiver of privilege over a specific category of document, namely documents provided to the E20 board and/or board reports/summaries on the basis that the board that took the decision to defend the WHU Proceedings and to settle the WHU Proceedings. By way of clarification, the limited waiver of privilege applies to 41 documents and a list of the disclosure IDs is attached. This is sufficient to determine the points in issue. It would be disproportionate to waive privilege over all advice given/received over the life of the WHU Proceedings, in particular where it is unclear whether it was ever seen by decision makers...” [emphasis added]

13. In that letter Gowlings also sought to recall five documents which the Claimants said were privileged and inadvertently disclosed.

14. Much correspondence has passed between the parties over the past few weeks leading up to the hearing. To the extent that it is necessary to make reference to it in order to determine the outstanding issues, it is dealt with below.

Legal advice privilege

15. In the Defendant’s draft order it seeks a declaration that:

“the Claimants have waived privilege in respect of legal advice which was obtained by or on behalf of the Claimants in connection with the Seating Capacity Dispute and the West Ham Proceedings, as well as the instructions pertaining to that advice.”

16. “Seating Capacity Dispute” is defined in the draft order as:

“the dispute between E20 and West Ham that arose in 2016 regarding West Ham’s use of the seating capacity of the Stadium that ultimately led to the West Ham Proceedings and concluded with the execution of the Settlement Agreement”

17. “West Ham Proceedings” is defined as:

“Claim No HC-2017-001445 between E20 and West Ham including any interlocutory proceeding and/or appeal”

18. It was submitted for the Defendant that:

- i) The Claimants could not just waive privilege in relation to Issues 29 and 30 and that privilege can only be waived in relation to a “transaction”: *PJSC Tatneft v Bogolyubov* [2020] EWHC 3225 (Comm) and the authorities referred to in the judgment in that case;
- ii) The “transaction” is not the issues agreed for the purpose of carrying out the disclosure exercise but is “*advice that [the Claimants] received in relation to the dispute with West Ham*”;
- iii) The disclosure was selective and incoherent such that the right to claim privilege covering excess seat capacity has altogether been lost;
- iv) Once privilege had been waived over some advice, logically it should extend to all advice (although the Defendant accepts that it would be proportionate to limit it to “key advice”);
- v) The Claimants have failed to give straightforward answers and in circumstances where the Claimants have intentionally waived privilege in relation to some legal advice, they are not entitled to withhold advice that goes outside Issues 29 and 30 but is nonetheless relevant to the Defendant’s case.

19. It was submitted for the Claimants that:
- i) Upon giving disclosure the Claimants waived privilege on a strictly limited basis in respect of certain documents which are responsive to Model C requests 29(4) and 30(4);
 - ii) The starting point in determining the scope of the waiver that has been made is to identify the “*issue*” in relation to which the privileged material has been deployed, the question is then whether disclosure has been produced in relation to the whole of the material relevant to that issue or has been partial or selective;
 - iii) There has been no general waiver of privilege catching “all” advice in connection with the “*Seating Capacity Dispute*” or the “*West Ham Proceedings*”.
20. It was further submitted for the Claimants that in substance the Defendant is seeking to extend the disclosure request to other documents beyond the existing Model C requests and that this would have to be done by an application under paragraph 18 of PD51U to vary an order for Extended Disclosure setting out why such further disclosure is necessary for the just disposal of the proceedings and proportionate.
21. The Claimants submitted that leaving aside questions of privilege, such an application would not be proportionate as an order in relation to the “*West Ham Proceedings*” as defined would require a search of the whole of the litigation file and throw up a large number of documents estimated at over 50,000.
22. The Claimants submitted that, in light of the direction of Foxton J in advance of the hearing that the parties should work to narrow the scope of any dispute about

disclosure, the Claimants have volunteered to carry out a wider search and production exercise than was directed by consent and have offered to provide “key advice” relevant to Issues 29 and 30.

23. The Claimants submitted that if the Defendant refuses to accept the proposals made the Court should make no further order.

Discussion

24. The Claimants have now offered to extend the disclosure and to search for a wider range of advice/instructions. By letter of 24 June 2022 Gowlings offered:

- i) to carry out a search of its litigation matter file across the time period 1 March 2016-28 November 2018 for all correspondence sent by any Gowing employee to named and identified representatives at the Claimants applying certain keywords;
- ii) to review those documents by reference to Issues 29 and 30 and disclose any advice which is relevant to those issues and of significant importance ("key");
- iii) to carry out a review of all attendance notes on the matter file by reference to the same issues and subject to the same criteria as to "key"; and
- iv) to carry out a targeted search for the corresponding instructions.

25. Gowlings also stated in that letter that it would undertake a “*re-review*” of all the documents withheld on grounds of privilege and in doing so would consider whether any of those documents go to disclosure issues 29 and 30; and if they do, would disclose them by 15 July 2022.

26. In light of those offers, the dispute between the parties on disclosure had crystallised by the hearing as largely a question as to whether legal advice privilege had been waived in respect of all legal advice and not just in relation to issues 29 and 30, the Defendant's position being that the Claimants have waived legal advice privilege over all legal advice obtained in connection with the Seating Capacity Dispute and/or the West Ham Proceedings.
27. In *Tatneft I* set out the principles on waiver of legal advice privilege by reference to the relevant authorities. In so far as relevant to the circumstances of this case, I note the following extracts from that judgment:

“48. If there has been a waiver, the court must then consider the scope of the waiver. It was common ground that in considering the scope of the waiver, it is necessary to identify the issue or transaction with which the waiver is concerned. The court was referred to *PCP* [2020] EWHC 1393 (Comm) at [85]-[86] and to the recent decision of the Court of Appeal in the *R (Jet2.com Ltd) v Civil Aviation Authority (Law Society intervening)* [2020] QB 1027, paras 111-114.

...

50. In *Jet 2* the Court of Appeal said:

“111. The relevant principles are uncontroversial. Although the voluntary disclosure of a privileged document may result in the waiver of privilege in other material, it does not necessarily have the result that privilege is waived in all documents of the same category or all documents relating to all issues which the disclosed document touches. However, voluntary disclosure cannot be made in such a partial or selective manner that unfairness or misunderstanding may result: *Paragon Finance plc (formerly National Home Loans Corpn plc) v Freshfields* [1999] 1 WLR 1183, 1188D, per Lord Bingham CJ.

...

“113. The starting point is to ascertain “the issue in relation to which the [voluntarily disclosed material] has been deployed”, known as the “transaction test” (*General Accident Fire and Life Assurance Corpn Ltd v Tanter (The Zephyr)* [1984] 1 WLR 100, 113D, per Hobhouse J), waiver being limited to documents relating to that “transaction” subject to the overriding requirement for fairness. The “transaction” is not the same as the subject matter of the disclosed document or

communication, and waiver does not apply to all documents which could be described as “relevant” to the issue, in the usual, *Peruvian Guano* sense of the term as used in disclosure (*Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 35).

“114. In *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] 2 All ER 599, having reviewed the relevant authorities, Mann J described the approach thus: “18. What those citations show is that it is necessary to bear in mind two concepts. First of all, there is the actual transaction or act in respect of which disclosure is made. In order to identify the transaction, one has to look first at what it is in essence that the waiving party is seeking to disclose. It may be apparent from that alone that what is to be disclosed is obviously a single and complete “transaction”- for example, the advice given by a lawyer on a given occasion . . . one is in my view entitled to look to see the purpose for which the material is disclosed, or the point in the action to which it is said to go . . . Mr Croxford [counsel for the claimant, which sought to rely on LAP] submitted that the purpose of the disclosure played no part in a determination of how far the waiver went. I do not agree with that; in some cases it may provide a realistic, objectively determinable definition of the transaction in question. Once the transaction has been identified, then those cases show that the whole of the material relevant to that transaction must be disclosed. In my view it is not open to a waiving party to say that the transaction is simply what that party has chosen to disclose (again contrary to the substance of a submission made by Mr Croxford). The court will determine objectively what the real transaction is so that the scope of the waiver can be determined. If only part of the material involved in that transaction has been disclosed then further disclosure will be ordered and it can no longer be resisted on the basis of privilege. 19. Once the transaction has been identified and proper disclosure made of that, then the additional principles of fairness may come into play if it is apparent from the disclosure that has been made that it is in fact part of some bigger picture (not necessarily part of some bigger “transaction”) and fairness, and the need not to mislead, requires further disclosure. The application of this principle will be very fact sensitive, and will therefore vary very much from case to case . . .” The purpose of the voluntary disclosure, which has prompted the contention that privilege in other material has been collaterally waived, is therefore an important consideration in the assessment of what constitutes the relevant “transaction” (see also *Dore v Leicestershire County Council* [2010] EWHC 34 (Ch) at [18]— [19], also per Mann J).

...

“86. As also set out in *Jet2* at [114], the purpose of the voluntary disclosure is an important consideration in the assessment of what constitutes the relevant transaction. The identification of the transaction must be approached realistically to avoid either artificially narrow or wide outcomes: *PCP* at [85].”

28. Applying those principles to the circumstances of this case:
- i) it is for the court to determine objectively what the real transaction is so the scope of the waiver can be determined;
 - ii) one has to look at what it is in essence that the waiving party is seeking to disclose;
 - iii) in some cases the purpose of the disclosure may provide a realistic, objectively determinable definition of the transaction in question;
 - iv) once the transaction has been identified and proper disclosure made of that, then the additional principles of fairness may come into play if it is apparent from the disclosure that has been made that it is in fact part of some bigger picture (not necessarily part of some bigger transaction) and fairness, and the need not to mislead, requires further disclosure.
29. The starting point is to identify the “transaction”. In my view the “transaction” in respect of which disclosure is made is not, as the Defendant submitted (orally), *“advice that [the Claimants] received in relation to the dispute with West Ham”*. That is the disclosure which the Defendant seeks to obtain but not the issue in relation to which the disclosure had been made. Whilst it is for the court to determine the “transaction” or “issue”, the purpose for which the waiver was made is an important consideration. It was in my view clearly intended by the Claimants that waiver of privilege should extend only to the Issues for Disclosure 29 and 30. Even if there is any arguable debate on the language of the DRD as to what type of privilege was intended to be waived, in my view there is no reasonable inference from the DRD that the waiver of privilege was intended to extend beyond Issues 29 and 30. The

Defendant now seeks in effect to broaden the “transaction” in a way which was not contemplated when the DRD was agreed and in substance seeks to obtain a declaration that the “transaction” is the proceedings. That in my view would be an artificially wide outcome.

30. The question is then whether fairness and the need not to mislead demands greater disclosure. In my view by its offer to extend disclosure to the earlier period and to “key” advice as referred to above, the Claimants have closed out any argument that further disclosure over and above what the Claimants now propose is required on the grounds of fairness.
31. It was submitted for the Defendant that it is to be inferred that the resistance from the Claimants is not an academic debate and that there must be other documents which are not being disclosed.
32. In my view the Defendant has not established any unfairness which may result from the disclosure now proposed to be made. The Defendant has not established that any such disclosure as is now proposed would be partial or selective. It is not enough on the authorities to establish waiver for the Defendant to submit that there may be advice which is outside Issues 29 and 30 “*but is nonetheless relevant to our case*”. Further the Claimants have confirmed (paragraph 35(e) of their skeleton) that known adverse documents will not be withheld.
33. I therefore find that there has been no general waiver of legal advice privilege and that the waiver is confined to Issues 29 and 30.
34. As to the scope of what is now proposed, the Defendant’s draft order goes beyond what has been proposed by the Claimants in correspondence and (as well as extending

beyond Issues 29 and 30) inter alia, extends to documents merely “referring” to legal advice and to internal documents.

35. The original (agreed) position in the DRD was to focus on legal advice upon which the Boards relied.

36. The Claimants have now proposed that disclosure will extend to “key” advice. In my view the extension proposed in the Defendant’s draft order goes beyond “key” advice and cannot be justified as a matter of principle merely by a submission of potential relevance. As stated in *Jet 2* and referred to in *Tatneft* (above):

“The “transaction” is not the same as the subject matter of the disclosed document or communication, and waiver does not apply to all documents which could be described as “relevant” to the issue, in the usual, *Peruvian Guano* sense of the term as used in disclosure (*Cie Financière et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 35).”

37. The Defendant has not brought an application to vary the Extended Disclosure under paragraph 18 of PD51U. Paragraph 18 provides (so far as material):

“18.1 The court may at any stage make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

18.2 The party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate (as defined in paragraph 6.4).

18.3 An application for an order under paragraph 18.1 must be supported by a witness statement explaining the circumstances in which the original order for Extended Disclosure was made and why it is considered that order should be varied.”

38. Even if such an application had been made, I am not persuaded that the Defendant has satisfied the Court that the additional material sought over and above the additional

material which the Claimants have proposed in correspondence, is necessary for the just disposal of the proceedings.

Litigation Privilege

39. In her first witness statement (paragraphs 66 and 67) Miss Clover stated that, so far as litigation privilege is concerned, it was unclear from the Claimants' Disclosure Certificate what cut-off date the Claimants applied in respect of the documents created for the purpose of the West Ham Proceedings and it appeared that the Claimants may have proceeded on the basis that litigation privilege applied prior to 31 August 2016 because they purported to waive privilege in respect of earlier material.
40. The issue of what date is to be applied has now been confirmed by Gowlings (in its letter of 30 June 2022) as 31 August 2016 and is therefore no longer an issue.
41. Gowlings stated in correspondence:
- “The only documents attracting litigation privilege which have intentionally been disclosed are documents containing legal advice that were responsive to Model C requests 29(4) and 30(4) (i.e. dual-privileged documents also attracting legal advice privilege). This approach is what our clients' disclosure certificate intended to convey. The disclosure of such documents did not constitute a general waiver of litigation privilege...”
42. I accept the submission for the Claimants that the waiver of documents prior to 31 August 2016 cannot amount to a waiver of litigation privilege. In my view it is clear that there was no general waiver of litigation privilege.
43. As to the submission that the approach of the Claimants to litigation privilege has been “*selective*” and “*haphazard*”, by its letter of 17 June 2022 Gowlings offered to carry out a re-review of all documents marked as privileged by 15 July 2022. The

Defendant however seeks in addition a witness statement to confirm that the Claimants have applied the cut-off date correctly and to understand the background.

44. In my view nothing further is required by way of order of the court. The parties' legal representatives are under a duty to the court (paragraph 3.2(3) of PD51U):

“to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure...”

In my view there is no substantive benefit to impose any additional obligation on the Claimants' representatives in this regard which will only serve to increase costs.

45. I trust that the parties can now draw up an agreed order on this application. The issue of costs of this application is to be the subject of oral submissions at the adjourned hearing on 13 July 2022.