Neutral Citation Number: [2018] EWCA Civ 2652

Case No: A3/2018/2580

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
CHANCERY DIVISION
Norris J
[2018] EWHC 2784 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2018

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LADY JUSTICE ASPLIN

- -

Between :

WH HOLDING LIMITED (1)	**Appellants**
WEST HAM UNITED FOOTBALL CLUB LIMITED (2)	
- and -	
E20 STADIUM LLP	**Respondent**

- -
- -

Paul Downes QC, **Joseph Sullivan** and **Luka Krsljanin** (instructed by **Gateley Plc**) for the **Appellants**
Thomas Plewman QC and **Tom Wood** (instructed by **Gowling WLG (UK) LLP**) for the **Respondent**

Hearing date: 15 November 2018

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Approved Judgment

Sir Terence Etherton MR, Lord Justice Lewison and Lady Justice Asplin:

1. This expedited appeal raises issues as to: the scope of litigation privilege; the grounds upon which the court will be prepared to inspect documents where there is a challenge to the assertion of privilege; and the application of the "dominant purpose" test in relation to documents produced for more than one reason.

2. The appeal arises out of an application dated 10 September 2018 made by the Appellants, WH Holding Limited and West Ham United Football Club Limited (together referred to as "West Ham"), by which West Ham applied for the court to inspect a number of documents, by way of a sample of redacted disclosure in relation to which privilege had been asserted. The application was made pursuant to CPR 31.19(6)(a).

3. By his order of 23 October 2018 Norris J dismissed the application save that: the parties were directed to make submissions on the issue of whether or not sample document 4 had been properly redacted pursuant to the claim of litigation privilege; and the solicitor with conduct of the matter, Ms Carr, was directed to conduct a further review of the two redactions to sample document 5. The citation for Norris J's judgment is [2018] EWHC 2784 (Ch).

4. The Judge gave permission to appeal on two grounds, namely: whether the scope of litigation privilege is restricted to documents concerned with obtaining advice or evidence for the conduct of litigation; and the correct approach to be taken by a court to an application for inspection of documents by the court where a claim to privilege is challenged. Lewison LJ subsequently granted permission to appeal on the additional ground that the Judge did not consider or apply the "dominant purpose" test when addressing the question of whether to inspect documents 8 – 13 of the sample of redacted documents. It is not in dispute that in order to fall within the ambit of litigation privilege a document must at least have been produced for the dominant purpose of conducting that litigation. Lewison LJ also granted a request for expedition and the application to rely upon the email which had been referred to as document 4 and was made available in unredacted form as a result of the directions made by the Judge in his Order.

5. The appeal is concerned only with West Ham's challenges to the documents numbered 8-13 of the sample (the "Disputed Documents"). They consist of six emails, all dated 30 January 2017, passing between the Board members of the Respondent, E20 Stadium LLP ("E20"), and between E20 Board members and stakeholders. E20 asserts that each of the six emails were composed with the dominant purpose of discussing a commercial proposal for the settlement of the dispute between E20 and West Ham in relation to rights arising under the agreement between the parties providing for West Ham to use the London Olympic Stadium for its home football matches (the "Concession Agreement") at a time when litigation was in reasonable contemplation.

6. The main proceedings, in relation to which the disclosure and the challenges to it arise, were listed for trial for five weeks commencing on 19 November 2018. The claims and counterclaims relate to a dispute over the number of seats in the stadium that West Ham is entitled to use. E20 contends that West Ham is only entitled to use 53,500 seats whereas West Ham asserts that it is entitled to use all of the seats, subject

only to necessary permissions being granted by the appropriate authorities. West Ham also contends that E20 is obliged to maximise such permissions and consents, that the Concession Agreement imposes a general obligation of good faith and that E20's refusal in February 2017 to seek the relevant permissions or consents for an increase in capacity was not made in good faith. It is not in dispute that the Disputed Documents are relevant to the issues arising in the proceedings. The only question is whether litigation privilege applies to them.

7. We heard this appeal on Thursday 15 November 2018. In view of the imminence of the trial we announced our decision on the following day to allow the appeal and to order disclosure of the Disputed Documents, with reasons to be given in writing in due course. These are those reasons.

Appeal Ground 1 - scope of litigation privilege

8. The real issue under this ground is whether litigation privilege extends to documents which are concerned with the settlement or avoidance of litigation where the documents neither seek advice or information for the purpose of conducting litigation nor reveal the nature of such advice or information. Mr Downes QC, on behalf of West Ham, submits that it does not. The Judge dealt with the matter in the following way. First, he held that litigation privilege did not apply to the process of expert determination of disputes envisaged under clause 50 of the Concession Agreement and, therefore, on the facts of this case, if litigation privilege were to apply it must do so in relation to court-based proceedings: [38] of the judgment. Further, he noted that it was accepted that litigation privilege only arises when litigation is reasonably contemplated or anticipated, and he found at [44] that E20 could fairly and properly say that litigation was in reasonable contemplation from 31 August 2016. Having recorded that it was common ground that "litigation privilege relates to documents brought into existence for the purpose of the conduct of litigation, and passing between client, lawyer, agent or third party" (see [45] of the judgment), he went on to consider the scope of the principle and the documents in the sample. He concluded as follows:

> "46. First, Mr Downes QC submitted that the only documents to which litigation privilege can attach are documents concerned with obtaining advice or evidence for use in litigation because only such communications could fairly be said to relate to "conducting" the litigation. He said the documents which concern strategy or potential settlement offers fall outside the ambit of litigation privilege. I do not accept that this narrow formulation is now correct. In *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA CIV 2006 ("the ENRC case") the Court of Appeal made clear (a) at para [102] that legal advice given to head off, avoid or settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of defending those proceedings (a proposition that Mr Downes QC was inclined to accept); and (b) at para. [118] that documents prepared for the purpose (I will come back to that) of settling or avoiding a claim are created for the purpose of defending litigation. At a time when there is so much emphasis (by means of pre-action protocols and otherwise) on discouraging the commencement of proceedings and encouraging compromise this is entirely

understandable. The pre-action gathering of evidence for potential deployment in reasonably contemplated proceedings is plainly within the scope of litigation privilege: and so, in my judgment, is the pre-action gathering of information and material created for the purpose of settling or avoiding a claim (whether or not it might be deployed in evidence if litigation started), and the analysis of that material for the purpose of considering a settlement offer. The documents at issue in the *ENRC* case itself consisted not only of notes of evidence that could be given by individuals relevant to the events under investigation but also summaries of reviews of documents and information about the work being undertaken, presentations made to the Board or internal committees, and reports prepared by forensic accountants. These were held to be the proper subject of a claim to litigation privilege once litigation was reasonably in contemplation (and a consideration of self-reporting to avoid or mitigate criminal proceedings was under way).

47. Second, Mr Downes QC submitted (in my judgment correctly) that it was not sufficient that a document was of the correct character; but it must also have been produced for the sole or dominant purpose of conducting the relevant litigation. He referred to *Rawlinson & Hunter v Akers* [2014] 2 BCLC 1 at [53]. So, the task of the person or tribunal considering a potential claim that litigation privilege applies is to determine the actual intention of the party claiming privilege, and, if there is more than one purpose, what is the dominant purpose of the author or of the person or entity commissioning the creation of the document. Faced with a challenge the Court must subject the evidence in support of such a claim to "anxious scrutiny". Given the evidential constraints upon challenging a witness statement on an interlocutory application this means that the Court must make an objective assessment of the document itself and of what is disclosed by the evidence as to the circumstances of its creation.

. . .

55. Mr Downes QC submitted that the discussion of settlement proposals does not fall within the scope of litigation privilege, which is confined to documents generated to obtain advice or to gather evidence. The consequence of this submission appears to be that if E20 in fact made a "without prejudice" offer to West Ham to dispose of the impending litigation then that document *would not* be before the Court in any subsequent case: but any document (not passing between solicitor and client) recording the terms of the proposed offer, or recording discussion of the offer, or authorising the terms and putting of the offer *would* be open to inspection and to inclusion in the trial bundle. That is odd. It is even odder if the discussion within the board of a corporate party arises during the trial itself: can it really be the case that that party (under its ongoing disclosure obligation) is bound to disclose to its opponent documents recording its settlement strategy because they are not covered by litigation privilege? I do not think that can be right.

> 56. In my judgment documents prepared for the dominant purpose of formulating and proposing the settlement of litigation that is in reasonable contemplation (or in existence) are protected by litigation privilege. The principle must be carefully applied. Documents may, of course, be generated about the settlement of a claim for other purposes, such as the general management of the business ("We must dispose of this claim because its continuation is harming our fund-raising"). Litigation privilege would not apply. Documents may be generated which are relevant to a settlement e.g. a projected cashflow which has a bearing on the terms of an offer. But litigation privilege does not apply because if you ask the question "Why was this document created?" the answer is not "Because of the litigation" but "Because prudent management of the business requires cash flow projections". The document is created in connection with the litigation; but not for the sole or dominant purpose of the litigation."

9. Mr Downes, on behalf of West Ham, submitted that it is well established that litigation privilege covers communications which are directed at obtaining advice or evidence, including information or documents which might lead to evidence and that that is the meaning of the phrase "conducting litigation". He said that the Judge erred in concluding at [46] that such a "narrow formulation" was no longer correct in the light of the decision of the Court of Appeal in *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA (Civ) 2006 ("*ENRC*"). Mr Downes submits that in *ENRC* the Court of Appeal did not remove the requirement that for a communication to be for the dominant purpose of conducting litigation it must be concerned with obtaining advice or evidence. The issue was whether evidence gathering for the purpose of avoiding litigation fell within the scope of the privilege. Mr Plewman QC, on behalf of E20, on the other hand, submitted that the phrase "conducting litigation" encompasses discussions relating to formulating, finalising, and setting out a purely commercial settlement proposal. He further submitted that in any event internal communications within a corporation for the dominant purpose of conducting the litigation are themselves subject to privilege.

10. It is now clear from the decision of the House of Lords in *Three Rivers DC v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 that legal professional privilege is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege; and that litigation privilege is restricted to adversarial proceedings: Lord Carswell at [105]. But although these are two sub-heads of a single privilege, they are not necessarily coterminous. As the court pointed out in *ENRC* at [63], they have different characteristics. For example, legal advice privilege is dependent on the involvement of a lawyer. Litigation privilege is not.

11. Lord Carswell's summary of the scope of litigation privilege in *Three Rivers* at [102] was accepted by both sides on this appeal as an authoritative statement. He said, having considered many authorities:

> "The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining

> information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

12. Mr Plewman concentrated on sub-paragraph (b) in that formulation. He submitted that "conducting litigation" encompassed avoiding or settling litigation. We agree. That much is clear from *ENRC* at [102] in which the court stated:

> "In both the civil and the criminal context, legal advice given so as to head off, avoid, or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings."

13. Nor, in our judgment, is that a new proposition. In *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, at 649-650, Sir George Jessel MR said:

> "Again, the solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as solicitor for the purpose of the litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing *whether* he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defence. All that, therefore, is privileged." (Emphasis added)

14. Deciding "whether" to defend or prosecute an action must include a decision to head it off by compromise. Buckley LJ seems to have taken a similar view in *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* [1913] 3 KB 850 at 856.

15. In our judgment, however, the fallacy in Mr Plewman's argument is to treat sub-paragraph (b) as being an extension to the general proposition that Lord Carswell formulated. On the contrary, it is a qualification or restriction on the width of that principle. The principle itself is that the communication must be made "for the [sole or dominant] purpose of obtaining *information or advice* in connection with existing or contemplated litigation." The proposition that it must be for the sole or dominant purpose of conducting the litigation (including settling it) is a restriction on that principle.

16. The proposition that Lord Carswell formulated is consistent with all the authority to which we were referred, including leading textbooks. He himself said that it was

based on the 19th century cases. In *Wheeler v Le Marchant* (1881) 17 Ch D 675 at 681 Sir George Jessel MR said that documents were protected by privilege:

> "… where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence…"

17. Later cases have repeated the qualification: see, for example, *Starbev GP Ltd v Interbrew Central European Bank* [2013] EWHC 4038 (Comm) at [11] (4). Likewise, in *Excalibur Ventures LLC v Texas Keystone Inc* [2012] EWHC 2176 (QB) Popplewell J, in our judgment correctly, rejected the submission that litigation privilege covered all documents brought into existence for the purposes of actual or contemplated litigation.

18. We were not shown any authority which would extend the scope of litigation privilege to purely commercial discussions. In particular we do not consider that *ENRC* extended the scope of the documents covered by litigation privilege. The disputed documents in that case all fell within the recognised categories of advice or information going to the merits of the contemplated litigation. The only possible change attributable to the decision in *ENRC* was the confirmation that the conduct of litigation includes its avoidance or compromise. In our judgment the Judge was wrong in thinking that *ENRC* had gone any further.

19. We do not consider that there is any justification for extending the scope of litigation privilege in that respect. It has always been recognised that privilege is an inroad into the principle that a court should be able to decide disputes with the aid of all relevant material. Thus, in *Three Rivers* Lord Carswell said at [86]:

> "Determining the bounds of privilege involves finding the proper point of balance between two opposing imperatives, making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves. The practice which has developed is a reconciliation between these principles: *Seabrook v British Transport Commission* [1959] 1 WLR 509, 513, per Havers J. There is a considerable public interest in each of these. The importance of keeping to a minimum the withholding of relevant material from the court, upon which Mr Pollock laid emphasis, is self-evident. It was stressed by Wigmore (Evidence in Trials at Common Law, vol 8, rev McNaughton (1961), p 554, para 2291), who expressed the opinion that the privilege should be strictly confined within the narrowest possible limits consistent with the logic of its principle, an approach echoed in the speech of Lord Edmund-Davies in *Waugh v British Railways Board* [1980] AC 521, 543. The competing principle of legal professional privilege is also rooted in public policy: cf *B v Auckland District Law Society*

> [2003] 2 AC 736, 756-757, paras 46-47. It is not based upon the maintenance of confidentiality, although in earlier case law that was given as its foundation."

20. We would accept that a document in which advice or information obtained for the sole or dominant purpose of conducting litigation cannot be disentangled, or a document which would otherwise reveal the nature of such advice or litigation, would itself be covered by litigation privilege. It must also not be forgotten, as Popplewell J pointed out in *Excalibur* at [23], that even if a document is not covered by litigation privilege it may yet be covered by legal advice privilege.

21. That is not, however, the basis on which privilege for the Disputed Documents is claimed in this case. In relation to some documents, which were in issue below but are not the subject of this appeal, privilege was claimed on the basis that they "implicitly reflect[ed]" legal advice. The Judge upheld that claim to privilege, and West Ham do not challenge that ruling. But the sole ground upon which privilege is claimed for the Disputed Documents is that (with immaterial variations) they were created:

> "… with the dominant purpose of discussing a commercial settlement of the dispute when litigation with [West Ham] was in contemplation."

22. We do not consider that a claim in those terms falls within the scope of litigation privilege.

23. Mr Plewman made something of the fact that the focus of the challenge had shifted during the course of the application. He also complained that the detailed grounds of challenge only emerged in a witness statement served very shortly before the hearing below. There is, however, no Respondent's Notice; and E20 have not adduced any further evidence to modify or amplify the grounds on which privilege was claimed.

24. Mr Plewman also submitted that there was privilege for internal communications within a corporate body. For that proposition he relied on the decision of Pearson J in *Mayor and Corporation of Bristol v Cox* (1884) 26 Ch D 678. That was a case in which the defendant asked for disclosure of the minutes of meetings of two committees of the local authority with which he was in dispute. The minutes were records of meetings that had taken place after litigation was either contemplated or in progress.

25. Pearson J upheld the claim. He said, at 681-682:

> "All those documents or minutes made by the committees of the corporation to whom the matters were referred, and which contain nothing more, as far as I can gather from the affidavit, and I may add also from the statement of counsel at the Bar, than simply a record of proceedings which took place at the meetings of the committee, with reference either to litigation, which it was contemplated might take place, or to the litigation which did take place before, or the litigation which is now in existence—whether the minutes relate to either one or the other of those matters, I am of opinion that those minutes are

> privileged. I conceive that any notes made by a man with reference to his own conduct in the litigation—simply notes made of his own opinions—are just as much privileged as the thoughts which pass through his mind, and I conceive, inasmuch as this corporation cannot in its corporate capacity either think or write or act except by certain machinery, which is, so to speak, extraneous of itself, the corporation is perfectly justified in referring all these matters to a committee and asking the committee to deal with them as it would deal with them itself, and they are *simply the agents of the corporation* for the purpose of considering what ought to be done, and *their reports are confidential matters; and under those circumstances* those matters are to my mind protected." (Emphasis added)

26. No authority is cited in support of this part of the decision. The key to it appears to us to be that the reports were protected either because they were confidential or because the committee was simply the agent of the corporation. It was at one stage commonly thought that confidential documents need not be disclosed; but that is not (or is no longer) the law. We cannot see any justification for covering all internal corporate communications with a blanket of litigation privilege. Quite apart from anything else we do not see why corporations should have greater protection than, say, partners or bodies of trustees who in practice are equally likely to discuss matters among themselves. Nor is the fact of agency sufficient of itself to attract litigation privilege. That is amply demonstrated by *Anderson* where a letter from agent to principal was ordered to be disclosed even though it pertained to the facts underlying the dispute. In our judgment *Bristol v Cox* is wrong on this point and should be overruled.

27. In summary, our conclusions are as follows:

i) Litigation privilege is engaged when litigation is in reasonable contemplation.

ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.

iii) Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.

iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.

v) There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

28. We decided to allow the appeal on this ground.

Appeal Ground 2 – Inspection

29. In the light of our decision on Appeal Ground 1, it is not strictly necessary to consider the remainder of the grounds of appeal. As we heard full argument, however, we will address them both. First, what is the appropriate test for deciding when a court should inspect documents to ascertain whether they are privileged and did the Judge apply the correct test properly? The power to inspect documents in relation to which privilege has been asserted and challenged is now contained in CPR 31.19(6) which provides, so far as relevant, as follows:

> "For the purpose of deciding an application under paragraph (1) (application to withhold disclosure) or paragraph (3) (application to withhold inspection) the court may –
>
> (a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the court;…"

30. A power to inspect was first introduced into the Rules in November 1893 in the form of Order XXXI Rule 19A (2). It provided that:

> "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege."

Stirling J stated that he believed that the object of the new rule was to "to free the Court from the fetters imposed by the old practice, and enable it to be determined at once whether or no the objection which is sought to be raised is well or ill founded." See *Ehrmann v Ehrmann* [1896] 2 Ch 826 at 828.

31. The power was expressed in a slightly different way in the Rules of the Supreme Court (1962) Order 24 at Rule 13 and subsequently at Rule 12 as follows:

> "At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1) [inspection only to be ordered when necessary], order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit."

32. Having noted at [17] that the relief sought by West Ham "may be granted under CPR 31.19(6)(a), provided that to do so is consistent with dealing with the case justly and at proportionate cost (as elaborated in CPR 1.1(2))", the Judge set out his guiding principles at [18] of the judgment as follows:

> "In approaching the exercise of that power, I shall apply the following principles:-

> a) Legal professional privilege is a fundamental condition upon which the administration of justice rests: *Re Derby Magistrates* [1996] 1 AC 487.
>
> b) The burden clearly lies on the party claiming legal professional privilege to make out the claim: *West London Pipeline and Storage Ltd v Total UK* [2008] 2 CLC 258 at [50]. The claiming party is not required to provide such detail as will disclose the very material in respect of which privilege is claimed: *ibid* at [86].
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> c) Given that constraint, the burden is ordinarily discharged by a witness statement from the solicitor to the party claiming privilege which sets out (as specifically as possible in the circumstances) the basis of the claim to withhold inspection.
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> d) Such a witness statement can be challenged (CPR 31.19(5)) and if challenged is not determinative: *Starbev GP v Interbrew Central European Holding* [2013] EWHC 4038 at [11]. The question then is whether (after considering the original claim to privilege, the challenge and any response to the challenge) it is reasonably certain that the person claiming privilege has mistakenly represented or has misconceived the character of the documents or it is apparent from other material that the evidence supporting the claim to privilege is incorrect on material points: *West London Pipeline* (*supra*) at [86]. If it is reasonably certain that the party claiming privilege has misunderstood the process or has proceeded upon an incorrect basis then the evidence supporting the claim for privilege cannot be treated as determinative of the question.
>
> e) If that threshold is crossed, then the Court must determine how to reassess the claim to privilege. It may (1) decide that the evidence does not establish the right to withhold inspection, and order inspection: or (2) require the question to be reviewed again and direct the filing of further evidence (either in the form of a new disclosure statement or in the form of evidence supplementing that already supporting the existing disclosure statement); or (3) as a matter of last resort, itself inspect the documents if either (i) there is credible evidence that the party claiming privilege has misunderstood the duty or is not to be trusted with the decision making; or (ii) there is no reasonably practicable alternative: *West London Pipeline* (*supra*) at [86]."

33. The Judge went on to apply these principles in relation to each of the sample documents, including the Disputed Documents. For example, at [48] he concluded that on the totality of the evidence, without having looked at the document itself, it was reasonably certain that Ms Carr had misconceived the character of document 4; and at [52] and [53] he concluded that, on the totality of the evidence, he was not reasonably certain that the claims for privilege in relation to documents 6 and 7 respectively were misconceived. Having considered the scope of litigation privilege, at [57] the Judge considered the description of document 8, and concluded that he "was not reasonably certain that Ms Carr's disclosure statement [was] incorrect." He

came to the same conclusion at [58] in relation the remainder of the Disputed Documents numbered 9 – 13.

34. Mr Downes submits that there is a broad and flexible discretion to inspect documents which are the subject of a challenged claim to privilege, and that the discretion will be exercised on the facts of each case on a common sense basis and will be affected by the overriding objective. Mr Plewman, on the other hand, endorses the approach taken by the Judge and which was advocated by Beatson J in the *West London Pipeline* case. He says that there is good reason for the court to be cautious about inspecting documents.

35. In the *West London Pipeline* case Beatson J was concerned with an application by a third party for specific disclosure of documents over which the defendant asserted litigation privilege and in relation to which an order for cross examination was sought. Following a review of the authorities, Beatson J distilled the following propositions from the authorities on challenges to claims of privilege. Although the paragraph is lengthy, it is helpful to consider it as a whole:

> "86. . . .
>
> (1) The burden of proof is on the party claiming privilege to establish it: see *Matthews & Malek on Disclosure* (2007) 11-46, and paragraph [50] above. A claim for privilege is an unusual claim in the sense that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: *Bank Austria Akt v Price Waterhouse*; *Sumitomo Corp v Credit Lyonnais Rouse Ltd* (*per* Andrew Smith J).
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> (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which may require to be independently proved: *Re Highgrade Traders Ltd; National Westminster Bank plc v Rabobank Nederland.*
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> (3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:
>
> (a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co*, per Lord Esher MR and Chitty LJ; *Lask v Gloucester Health Authority.*
>
> (b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: *Neilson v Laugharane* (the Chief

> Constable's letter), *Lask v Gloucester HA* (the NHS Circular), and see *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co,* per A L Smith LJ.
>
> (c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: *Jones v Montivedeo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland.*
>
> (4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it:
>
> (a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection: *Neilson v Laugharane; Lask v Gloucester Health Authority.*
>
> (b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory: *Birmingham and Midland Motor Omnibus Co Ltd v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland.*
>
> (c) It may inspect the documents: see CPR 31.19(6) and the discussion in *National Westminster Bank plc v Rabobank Nederland* and *Atos Consulting Ltd v Avis plc (No. 2).* Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.
>
> (d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets: (*House of Spring Gardens Ltd v Wait; Yukong Lines v Rensburg; Motorola Credit Corp v Uzan (No. 2)*). However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents: *Frankenstein's* case; *Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co* and *Fayed v Lonrho.* In cases where the issue is whether the documents exist (as it was in *Frankenstein's* case and *Fayed v Lonrho*) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue."

36. Beatson J had considered *Lask v Gloucester Health Authority* (6 December 1985) at [68] – [71] of his judgment, a case in which the Court of Appeal went behind an affidavit sworn in support of a claim for privilege and concluded that the claim for privilege was not established. O'Connor LJ had applied the test stated in *Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co.* [1897] 2 QB 62 and *Attorney-General v Emerson* (1882) 10 QBD 191: is the court reasonably certain from

statements of the party making the affidavit that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed?

37. Beatson J also considered, at [80] – [82] of his judgment, the older case of *Birmingham & Midland Motor Omnibus Co Ltd v London and North Western Railway Co* [1913] 3 KB 850 which was concerned with the power to inspect under Order XXXI, rule 19A(2). That was a case in which the Court of Appeal held that the Judge had been entitled to inspect the documents in question if in his discretion he thought fit to do so. The Court of Appeal inspected the documents itself and concluded that privilege had been appropriately claimed. Hamilton LJ (with whom Vaughan Williams and Buckley LJJ agreed on these matters) observed that claiming privilege in an affidavit was not "pronouncing a spell which, once uttered, makes all the documents taboo." He held that the power to inspect contained in Order XXXI, rule 19A (2) was "quite general", should be "read widely" and that "he [the Judge] can test the accuracy of the affidavit and of the terms in which it claims the privilege by means of the documents themselves." He went on:

> "I do not say that I think there is any ground for doubting the good faith of the affidavit in this case, but mis-understandings as to the meaning and application of the rules on discovery, and also misconceptions as to the character and contents of particular documents, are constant, and the judge cannot be wrong at least in using the documents themselves to see whether such misunderstanding or misconception has in fact occurred."

See 857, 858-9 and 860.

38. We were also referred to the judgment of Jenkins LJ in *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 KB 134, to which Beatson J did not refer, which was also concerned with Order XXXI, rule 19A (2). At 146, Jenkins LJ referred to the *Birmingham and Midland Omnibus* case and concluded that:

> "The question whether the court should inspect the documents is one which is a matter for the discretion of the court, and primarily for the judge of first instance. Each case must depend on its own circumstances; but if, looking at the affidavit, the court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim to privilege would appear to be properly made in respect of them, then, in my judgment, the court should, generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents."

39. It seems to us that, contrary to Beatson J's narrow formulation contained in [86(3) and (4)(c)] of the *West London Pipeline* case, as the Court of Appeal identified in both the *Birmingham and Midland Omnibus* and the *Westminster Airways* cases the power to inspect a document is a matter of general discretion. That was also the approach of Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1971] 2 QB 102 at 130D-H. It is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied. The need for "reasonable certainty" appears to have sprung from the earlier case of *Attorney-General v Emerson*, which was concerned

with the position prior to the introduction of the express power of inspection in November 1893 and which was followed in *Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co*.

40. The court may inspect the documents in relation to which privilege is claimed in order to see whether the test has been correctly applied, although it should be cautious about doing so and should be alive to the dangers of looking at documents out of context. The discretion must be exercised in accordance with the overriding objective, which requires balancing dealing with cases justly, proportionately and at proportionate cost and allocating an appropriate share of the court's resources. Among the factors which will be relevant to the exercise of the discretion are (a) the nature of the privilege claimed (b) the number of documents involved and (c) their potential relevance to the issues.

41. The cases relied upon by E20, including *Atos v Avis Europe* [2008] Bus LR 20, *National Westminster Bank plc v Rabobank Nederland* [2006] EWHC 2332 (Comm) and *Bank Austria Aktiengesellschaft v Price Waterhouse* [1997] LC 1829, may provide useful guidance on how the discretion might be exercised in different circumstances but are not prescriptive and, to that extent, we do not agree with Beatson J. As a result, we consider that the Judge was wrong to apply the test of "reasonable certainty" when approaching the question of whether to inspect the Disputed Documents.

Appeal Ground 3 – Purpose test

42. It is common ground that, in order to benefit from litigation privilege, a document must have been produced for the sole or dominant purpose of conducting litigation: see for example *Waugh v British Railways Board* [1980] AC 521 per Lord Wilberforce at 533. The Judge so held at [47]. He had also held that litigation was in reasonable contemplation from 31 August 2016: see [44]. The third ground of appeal is that the Judge erred in law in failing to assess whether the Disputed Documents were actually created with the dominant purpose of adversarial litigation as opposed to non-adversarial expert determination.

43. The complaint arises from the way in which the Judge dealt with this matter at [57] - [58] as follows:

> "57. In the present case there is no doubt about the centrality of the dispute to the relationship between E20 and West Ham. I have no reason to doubt that the nature of the document is correctly described. It is headed "WH capacity commercial proposal" and the clear evidence of Ms Carr is that it related to the development of a potential settlement offer. If it was an e-mail regarding settlement proposals the remaining question is whether it was sent with the dominant purpose of discussing with the recipients a commercial settlement of the dispute to be put to West Ham. There is no direct evidence from the creator of the document: there is the evidence of Ms Carr that it was so related. That evidence must be looked at objectively. If the nature of the document is correctly described, then why else would the document be created other than to dispose of the litigation that had been threatened in December 2016? No-one has suggested (and the evidence to which I have been

> directed does not establish) that there was some other emerging opportunity open to West Ham and E20 to which a commercial proposal might be directed. Rather the evidence shows that what dominated the fractious relationship was West Ham's demand for greater seating capacity at no extra cost and its assertion that E20 was bound to facilitate it, backed by the threat of legal proceedings. I am not reasonably certain that Ms Carr's disclosure statement is incorrect.
>
> 58. I would give the same answer in relation to sample documents 9, 10, 11,12,13 and 17 (each of which I have separately considered). The point of objection taken was the point of principle that it is not possible to claim litigation privilege in respect of a settlement proposal. For the reasons I have given I do not accept that argument. No detailed argument was advanced in relation to any individual redaction. My determination of the point of principle therefore dictates the outcome of each of these challenges."

44. It is true that the Judge did not analyse the purpose of each of the documents in order to determine whether they were produced with the dominant purpose of conducting the litigation which was in reasonable contemplation or the determination of the issues by an expert which had been aired as a possible means of dispute resolution. In relation to the document under consideration at [57], having noted the nature of its description, he asked rhetorically why else it would have been produced other than to dispose of the litigation. He came to the same conclusion at [58] in relation to documents 9 – 13.

45. It seems to us that the Judge was entitled to take the course he did, even though the expert determination route may also have remained in the air, for two reasons. First, he had already found that litigation had been in reasonable contemplation since 31 August 2016, some five months or so before the Disputed Documents were produced: see the judgment at [44]. Secondly, and in any event, in circumstances in which there are two or more ways in which a dispute may be resolved by adjudication, one of which is adversarial litigation and litigation is in reasonable contemplation, the dominant purpose requirement of litigation privilege is met if the information or advice is obtained for the purposes of settling the dispute. It is not necessary to investigate further.

46. Had it been necessary therefore, we would have allowed the appeal in relation to Appeal Ground 2 and dismissed the appeal on Appeal Ground 3.