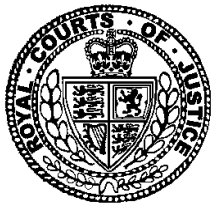

Neutral Citation Number: [2023] EWHC 477 (Ch)

Claim No. BL-2021-002295

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Before :

Jonathan Hilliard KC sitting as Deputy Judge of the High Court

(In Private)

- -

Between :

DAVID EMANUEL MERTON MOND	**Claimant / Respondent**
- and –	
INSOLVENCY PRACTITIONERS ASSOCIATION (Company No.1151132)	**Defendant / Applicant**

- -
- -

Stephen Davies KC and Kavan Gunaratna (instructed via Direct Access) by the Claimant
Andrew Westwood KC (instructed by Gateley plc) for the Defendant
Hearing dates: 30 November 2022, 1 December 2022

- -

JUDGMENT

JONATHAN HILLIARD KC sitting as a Deputy Judge of the High Court:

Introduction and conclusion

1. This summary judgment application (the **"Application"**) by the Defendant concerns a claim about the limited waiver of privileged information.

2. In my judgment, the Application should be dismissed, for the reasons set out below. Given this result, I do not include details of the content of the privileged material.

The relevant background

3. The claim and Application arise in the following way.

4. The Claimant, Mr Mond, is a licensed insolvency practitioner and chartered accountant. He is licensed by the Defendant, the Insolvency Practitioners Association (the **"IPA"**), which has authorised him, among other things, to accept appointments as supervisor of individual voluntary arrangements (**"IVAs"**). The IPA is his professional regulatory body for this purpose.

5. In its 4 May 2018 decision, the Disciplinary Committee (the **"DC"**) of the IPA upheld the three allegations made in a 27 October 2017 formal complaint against Mr Mond (the **"Complaint"**). The Complaint related to Mr Mond's conduct in his role as a supervisor of various IVAs between October 2012 and September 2016 in creating a scheme designed to avoid the requirement in Statement of Insolvency Practice 9 (**"SIP 9"**) to obtain creditor approval for certain payments out of IVA estates. The Complaint alleged that Mr Mond had:

   (1) failed to disclose to debtors and creditors his financial interest as 38.61% shareholder of a holding company called ClearDebt Group plc in referrals of work in connection with the IVAs to a company called DRSP Ltd (**"DRSP"**) and/or earned an unauthorised profit as shareholder through such referrals, in breach of the fundamental principles of Integrity and/or Professional Competence and Due Care, as set out in the Insolvency Code of Ethics;

   (2) failed to obtain approval for payments made out of certain IVA estates to DRSP in breach of SIP 9 and/or in breach of the fundamental principles of Integrity and/or Professional Competence and Due Care as set out in the Insolvency Code of Ethics; and

   (3) failed to obtain approval for payments made out of certain IVA estates to ClearDebt Group plc, again in breach of SIP 9 and/or in breach of the fundamental principles of Integrity and/or Professional Competence and Due Care as set out in the Insolvency Code of Ethics.

   The debate before the DC on allegation (2) above, which is the most important one for present purposes, related to whether DRSP was an independent third party for the purposes of SIP9 such that the payments to it did not require creditor approval.

6. The DC imposed a severe reprimand, a fine of £500,000 and a costs order of £208,369.51. Mr Mond was represented before the DC by Counsel.

7. Mr Mond appealed to the Appeals Committee of the IPA (the **"AC"**). Having submitted substantive grounds of appeal, Mr Mond changed Counsel. On 9 August 2019, he applied to amend his notice of appeal to introduce a preliminary ground of appeal. That preliminary ground of appeal was that (a) his former Counsel had a serious conflict of interest and/or a real risk of conflict when acting for Mr Mond in connection with the proceedings, was unable to act in his best interests and should not have acted for him, (b) that this risked prejudicing Mr Mond's case, deprived him of the opportunity to present further or alternative defences which merited serious consideration, and/or otherwise adversely affected the preparation and presentation of his case, and (c) therefore Mr Mond's lack of independent representation before the DC meant that the DC proceedings did not comply with the requirements of natural justice and article 6 of the European Convention on Human Rights (the **"ECHR"**).

8. The new ground of appeal was accompanied by a witness statement from Mr Mond, contending that his former Counsel had been heavily involved in advising on the setting up of the arrangements to which the Complaint related. The statement exhibited 22 documents from 2011-2012, including privileged material (the "**Original Category of Privileged Material"**), principally instructions to and advice from former Counsel. Mr Mond stated expressly at the time of disclosure that he was only waiving privilege for the purpose of the appeal and not beyond. His witness statement provided that "*where I have disclosed materials in this evidence, I have done so on the proviso that they should remain confidential, with my rights of privilege reserved to the fullest extent, and I intend that any waiver of privilege should be limited to what is strictly necessary for the purposes of this appeal only and not beyond*". Only two pieces of Counsel advice had been placed before the DC, and both were from after the scheme had been set up.

9. The IPA sought disclosure of all written communications and notes of oral communications between Mr Mond and his former Counsel, contending that Mr Mond could not cherry-pick the privileged material that he put in evidence before the AC. Mr Mond resisted this. One of the points made in his e-mail of response was that he regarded the preliminary ground of appeal as concerning whether there had been a fair process rather than relating to the merits of the defences that he could have run, which he stated were a matter for a differently constituted DC to consider in due course.

10. By its 16 August 2019 order, the AC granted permission to Mr Mond to amend his grounds of appeal and adduce the further witness statement, ordered Mr Mond to disclose this broader category of material (the **"Privileged Material"**), and listed the preliminary ground of appeal for hearing on 25 September 2019. The AC stated that it regarded the preliminary issue as entirely independent of the issues raised in the substantive appeal.

11. Mr Mond duly provided the broader disclosure, again stating that in providing it he was only doing so for the purpose of the appeal. He stated that he needed to put in the privileged material because it was the only way to explain the full extent of the involvement of previous Counsel and the extremely close relationship with him. Specifically, he stated that:

> "*As I stated in…my witness statement…, this disclosure of material which is the subject of legal professional privilege is being made as a result of a*

> *limited waiver of privilege for the purpose of this appeal only. This is because I do not see how otherwise I might properly explain to the Appeal Committee the full extent of the involvement of previous counsel in the events in issue. I understand that such limited waiver is permissible and effective: see Eurasian Natural Resources Corpn Ltd v Dechert LLP [2016] 1 WLR 5027. As a result, I do not consent to this material being communicated to any third parties or used for any other purpose.*"

12. The broader disclosure comprises over 200 documents running up to 2019. Mr Davies submitted that there were a number of unusual features of the personal and professional relationship with his former Counsel that extend well beyond those of the conventional provision of legal services by a barrister.

13. The appeal was heard in private, Mr Mond having asked for it to be so in order to respect what he contended were the limits of his waiver and the IPA not having objected.

14. In its 7 October 2019 decision the AC allowed the appeal on this preliminary ground. In consequence, the DC's orders on liability, sanction and costs were set aside or fell to be set aside. The AC remitted the matter back to the DC to be heard by a differently constituted panel.

15. It is necessary to explain the core reasoning for this decision. The AC considered that "*the client must show that, by being deprived of an independent approach by a new lawyer, he has lost the opportunity of putting forward a different case to the one which (ex hypothesi) has proved unsuccessful at trial*": [69]. If that could be shown, then the person concerned would not have had a fair trial to which he was entitled at common law and under article 6 of the ECHR: [70]. A number of criminal cases were put before the AC, of which the AC found *R v Morris* [2005] EWCA Crim 1246 the most useful. In that case, the solicitor for Mr Morris also acted for two brothers called Lewis. The solicitor influenced the conduct of Mr Morris's defence of a murder charge to the extent that Mr Morris ran a defence that the murder had been carried out by third parties other than the Lewises rather than by the Lewises. The Court of Appeal held that the solicitor was conflicted, that his conflict had tainted the conduct of the defence, and that the defence might well have been conducted differently if another solicitor had been involved, so the Court ordered a retrial.

16. The core of the AC's reasoning is contained in [77] of its decision. The AC stated that "*by a majority and with some reluctance*" it considered that Mr Mond's former Counsel "*had indeed 'got too* close'". The AC continued:

> "*His relationship both to the affairs of CDL and DSRP [two of the companies involved in the scheme] and to Mr Mond personally were such that the necessary objectivity and independence that any tribunal is entitled to demand were compromised. The Panel accepts that, had independent counsel been instructed to conduct Mr Mond's case before the DC, such counsel might have advised Mr Mond to run a reliance defence and that such a defence might conceivably have led to a different result, even if only as to sanction. It is unnecessary to decide whether Mr Mond would have accepted such advice or whether a different outcome would have resulted from his taking it. It is the*

> *loss of the possibility of such a defence which makes the findings below sufficiently unsafe for this appeal to succeed.*"

Therefore, the AC considered that the test that it had set out at [69] was satisfied. The AC decision has not been published, although some elements are extracted in the Cotter J judgment that I refer to below.

17. While the issues raised by the preliminary ground of appeal related almost exclusively to the second of the three allegations made in the Complaint, the AC remitted the whole case back to the DC.

18. The AC made a number of criticisms of Mr Mond's evidence before the DC, including that Mr Mond had given an explanation before the DC that was wholly at variance with the true position, not completely truthful and misleading.

19. The AC ordered that the costs order made by the DC should stand. Mr Mond sought judicial review of this decision and- having sat in private- Cotter J upheld this claim in his 10 November 2021 judgment.

20. In the meantime, following the AC's decision, Mr Mond and the IPA had been in correspondence about the how the referral back to the DC should be dealt with. Mr Mond contended that he had adduced the Privileged Material for the limited purpose of the appeal, and, that purpose having been spent, the IPA was not entitled to use the material for the further DC hearing. He further contended that the IPA should not be entitled to use a legal team for the further hearing that had seen the Privileged Material. The IPA's legal team at the time of the AC hearing comprised Nicholas Peacock QC, instructed by Bates Wells & Braithwaite London LLP (**"BWB"**). By May 2020, Gateley plc had been instructed in place of BWB. The IPA continued to retain Mr Peacock and the Privileged Material was passed to Gateley.

21. Through the 8 and 15 December 2021 letters from Gateley, the IPA stated that while it remained of the view that Mr Mond had waived privilege in the Privileged Material, it was prepared to take a pragmatic view to draw a line under the issue. On the basis that the Privileged Material was highly unlikely to be relevant to the remitted proceedings, it offered undertakings (the **"Undertakings"**) that it would destroy the Privileged Material in its possession and not deploy it at the further DC hearing, subject to the caveat that if Mr Mond sought to deploy any of it, then the IPA would be entitled to deploy any of the material itself. The IPA was not willing to change its legal team. In its 15 December letter, it stated that the undertakings were subject to clarification by Mr Mond as to whether he intended that the DC should consider any of the content of the Privileged Material.

22. Mr Mond was not willing to accept that the further DC hearing should proceed on the basis set out in the Undertakings. He stated that he considered that the legal team acting for the IPA on the further DC hearing should not have seen the Privileged Material. Instead, Mr Mond issued proceedings on 24 December 2021 (the **"Claim"**). He sought a declaration that he had not waived privilege in the Privileged Material and that he was entitled to assert privilege in it as if no disclosure had been made for the purposes of the preliminary ground of appeal. Further or alternatively, he sought a declaration that the IPA was under a positive obligation under article 8 of the ECHR to protect him against arbitrary interferences with these rights by respecting his

privilege and privacy in the Privileged Material. The pleaded basis of his claim was that he had made clear that he could only deal with the preliminary ground of appeal if he disclosed the Original Privileged Material on a confidential basis and that he intended to do so for a limited purpose. In his reply, he pleaded among other things that while an agreement to the limited nature of the waiver of privilege was not necessary, on the facts the IPA's agreement to or acquiescence in the waiver should be inferred.

23. In response to this claim, the IPA, having put in a defence, applied for summary judgment. That is the application dealt with in this judgment. The key elements of the defence are that (a) it is denied that, taken objectively, Mr Mond's waiver of privilege was for the sole and exclusive purpose of the preliminary ground of appeal, such that Mr Mond was entitled to re-assert privilege in any other part of the disciplinary proceedings, including any remitted hearing before the DC, (b) further or alternatively, it is not open to Mr Mond, having elected to disclose privileged material in the course of the preliminary ground of appeal, to maintain that the same was immune from disclosure at the remitted hearing directed by the AC, and (c) in any event, in light of the Undertakings Mr Mond is not entitled to the relief sought.

24. I asked Counsel whether the AC decision would be put before the remitted DC hearing, and the response was that it was a matter for the DC in due course.

25. I heard the summary judgment application in private given that, among other things, the deployment of the Privileged Material in a public hearing would or might well cause privilege to be lost in it, thereby defeating the purpose of the hearing. In the event, there was very limited reference to the content of the Privileged Material during the hearing. Counsel for Mr Mond's former Counsel and the Bar Mutual Indemnity Fund applied on the morning of the second day of the hearing to be allowed to sit in on the hearing and a take a note on the basis that such a note could only be used for the purposes of the Claim or the professional negligence proceedings that Mr Mond has brought against his former Counsel. Neither party opposed this application, given that the Privileged Material is in evidence in the professional negligence proceedings and those proceedings are being dealt with in private. Accordingly, I granted the application.

The grounds of the summary judgment application (the "Application")

26. The IPA puts forward two grounds for the Application:

    (1) Mr Mond stands no real prospect of success in showing that privilege has been maintained (**"Ground 1"**); and

    (2) if it is wrong on that, granting the declarations sought by Mr Mond would in light of the Undertakings be of no practical utility, and Mr Mond has no real prospect of arguing to the contrary (**"Ground 2"**).

The test for summary judgment

27. With one exception, the relevant principles were not in dispute.

28. Under CPR r.24.2, a Court may give summary judgment on the whole of a claim or a particular issue if it considers that the claimant has no real prospect of success and that there is no other compelling reason why the case or issue should be disposed of at a trial.

29. Both parties relied on the well-known considerations set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [39(vii)], in particular that "*[i]t is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it*". Mr Westwood contended that the result to which the application of limited waiver principles should lead was clear, so that while he accepted that some of the legal questions are nice ones, he contended that I should grasp the nettle in the manner set out by Lewison J. Mr Davies contended that far from giving rise to a short point of law, the relevant law was developing and the subject of both debate and inconsistent judicial decisions, relying on the reasoning in the Court of Appeal decision in *The LCD Appeals* [2018] EWCA Civ 220 at [38] that "*an application for summary judgment is not appropriate to resolve a complex question of law or fact*". That paragraph also helpfully explains that "*[a]lthough it is necessary to have a case which is better than merely arguable, a party is not required to show that they will probably succeed at trial. A case may have a real prospect of success even if it is improbable.*"

30. Mr Davies also submitted that the decision in *The LCD Appeals* supported the proposition that save in very clear cases, the Court should not grant summary judgment where the determination of the claim required an evaluative judgment based on an assessment of all the circumstances. That was not accepted by Mr Westwood. I do not consider that the case goes as far as Mr Davies submits. The relevant reasoning in that case, contained in [57] of the judgment, was that save in a very clear case, the Court cannot make the value judgment required to determine the applicable law in a tort case under section 11(2)(c) of the Private International Law (Miscellaneous Provisions) Act 1995. Section 11(2)(c) requires the Court to determine the law of the country in which the most significant element or elements of the events constituting the tort occurred. That sort of evaluation will in a typical case be heavily assisted by disclosure and potentially witness evidence, and the Court of Appeal emphasised at [58] that this was so on the facts before it. Therefore, that case must be read in its context. In contrast, in an express waiver of privilege case, by definition the terms of the intended waiver will normally be clear. The Court may, depending on the case in question, consider that there is unlikely to be further factual or other relevant material that could bear on the determination of the limits of that waiver and that is able to determine the matter on a summary judgment application. Nevertheless, I need to bear in mind carefully the nature of the test for locating the limits of an express waiver in determining whether I can be satisfied that the Claim stands no real prospect of success. I return below to what that test is.

Ground 1: whether Mr Mond stands a reasonable prospect of success in showing that privilege has been maintained

The submissions of the parties

31. Before setting out the relevant case-law and applying it, it is helpful to outline the submissions of the parties.

32. Mr Westwood submitted that:

(1) While there may be issues to be worked out in some areas of the law of limited waiver, for present purposes the applicable principle was clear, namely that the Court should ask whether the conduct of the disclosing party was consistent with the maintenance of the confidentiality which the privilege is intended to protect.

(2) In the present case, it was clear that Mr Mond's conduct was not consistent with the maintenance of privilege, for the following reasons:

(a) The Privileged Material had been disclosed to the opponent in the litigation, namely the IPA.

(b) This disclosure was in proceedings which have now been remitted. Therefore, the context in which the disclosure was made, namely the appeal to the AC, forms part of the same composite process as the context in which Mr Mond seeks to assert privilege, namely the further DC hearing brought about by the AC's remittal of the matter. The single, composite process is the proper determination of the Complaint against Mr Mond. The waiver must therefore be treated as for the purposes of the whole of that composite process.

(c) The disclosure given was of the relevant privileged material itself, rather than waiver occurring through, for example, mere reference to privileged material in another document.

(d) Mr Mond's disclosure was deliberate in the sense that he consciously deployed the material in support of the preliminary ground of appeal in order to gain a litigation advantage, which he duly obtained, because the AC accepted the preliminary ground of appeal and remitted the matter back to the DC. It was his privilege to decide whether to waive, and he deliberately chose to do so in his own interests. Having obtained a re-hearing of the disciplinary proceedings against him, it was not open to him to assert a right to prevent the IPA making any use of that same material at the very re-hearing which he sought to and did obtain on the basis of its contents.

(e) The specific argument that the disclosure was adduced to support, and which the AC accepted in allowing the appeal, was that Mr Mond had lost the opportunity *to run a reliance defence* to the Complaint, namely a defence that he reasonably relied on the advice of his former Counsel in setting up the arrangements that formed the subject matter of the Complaint. Therefore, the deployment of the Privileged Material before the AC was inextricably linked to the substantive issues to be dealt with at the further hearing before the DC that the AC ordered.

(f) Given that the AC considered that Mr Mond had not given accurate evidence before the DC, it would not be just to deny the IPA the ability to cross-examine Mr Mond at the further DC hearing on inconsistencies between the

material before the AC and the evidence given by Mr Mond at the original DC hearing.

Mr Westwood also pointed to the fact that the AC appeared in its decision (at [79]) to contemplate that the Privileged Material would be before the DC at the further hearing. The AC stated that it "*did not consider it appropriate to remit only the second complaint because it impinges on the first complaint and, in any event, were there to be an adverse finding by the DC at a re-hearing, it would be appropriate for the panel below to reconsider sanction in light of the new material*".

(3) I had all the relevant material before me that might go the merits of the claim, such as Mr Mond's detailed account in his witness statement and the AC decision that fully set out the context, and the parties had been given an adequate opportunity to make submissions on it.

33. Mr Davies submitted that:

(1) It was important to keep in mind that this was a case of *express* waiver, in the sense that Mr Mond had expressly limited the purpose for which he was waiving privilege to the preliminary ground of appeal. There is no case that deals specifically with the circumstances in which the limits expressly placed by the disclosing party on a waiver of privilege can be departed from, and the relevant test was therefore unclear.

(2) The most satisfactory test for answering that question was that one should give effect to the express limits of the waiver unless there is a countervailing legal principle that trumps that, such as that waiver given at one stage of a unitary process is a waiver for the whole of that process. If that was wrong, the correct test was that the express limits on the waiver formed an important part of the relevant circumstances to take account in determining whether the conduct of the disclosing party was consistent with the maintenance of the confidence that the privilege is intended to protect.

(3) Either way, the summary judgment test was not met. On the former test, there was no countervailing legal principle, as the preliminary ground of appeal did not form part of a composite process that included the further DC hearing. On the latter test, the following factors were sufficiently weighty to give Mr Mond, at the very lowest, a real prospect of successfully establishing that his conduct was consistent with the maintenance of the confidence that the privilege was intended to protect:

(a) Mr Mond put in evidence the Original Privileged Material to seek to vindicate his article 6 right to a fair trial, not to support the substantive grounds of appeal that he initially raised.

(b) Mr Mond was very clear in the words he used in setting the limits of his intended waiver of privilege. He even went as far as referring to a case on the limits of waiver of privilege, *Eurasian National Resources Corpn Ltd v Dechert LLP* [2016] 1 WLR 5027, in explaining the basis for the limits that he was setting.

(c) Mr Mond made no application to adduce fresh evidence in support of the substantive grounds of appeal, and therefore made doubly clear that he was only adducing the Original Privileged Material in support of the preliminary ground of appeal.

(d) The purpose of Mr Mond's further evidence, and as part of that the Original Privileged Material, was that his former Counsel was too close to Mr Mond to be able to represent him properly. Mr Mond wanted to have the matter remitted so that he could have independent legal advice on all his options, including whether to run a reliance defence. He wanted to be put back in the position that he was in before the original DC hearing. Therefore, the Original Privileged Material was not put in to advance any particular case on the merits, but rather to support the "process" appeal set out in the preliminary grounds of appeal.

34. Mr Davies made clear that he was not seeking summary judgment in Mr Mond's favour. Rather his submission was that the matter should be disposed of at a final hearing.

The relevant case-law on limited waiver

35. It was common ground that the subjective intention of the person disclosing the privileged material was not itself determinative in ascertaining the proper limits of the waiver.

36. It was also common ground that there could be situations in which countervailing considerations would mean that privilege should be treated as being waived for broader purposes than those stated by the disclosing party. For example, to test the point, I put to the parties in oral submissions the scenario of a party who stated that he wished to waive privilege in documents for the purpose of allowing him to make submissions on a point but not to allow his opponent to make submissions in response on the material. That would obviously not be permitted: disclosing in the former context means that the material can be used in the latter context.

37. However, neither of those points answers the question of precisely what test should be applied to determine whether a party who expressly seeks to limit the purposes for which he waives privilege should be treated as having waived privilege more broadly.

38. Therefore, I shall examine the case law. There were six decisions of particular importance that were debated before me. I shall set out the decisions in each, before analysing their implications for the present case.

39. The first is the decision of the Privy Council in *B v Auckland District Law Society* [2003] 2 AC 736. That was a case of express waiver. A law firm provided privileged material to counsel appointed by the local law society to assist its complaints committee in investigating complaints made against the firm and certain of its individual practitioners. The material was provided on terms agreed with that individual prior to the disclosure that the privilege would not be waived. Following a change in the identity of the counsel appointed by the society and the passing of the documents to the new counsel, the firm sought the return of the material, contending that it had not waived privilege beyond the terms agreed with the original investigator.

The law society contended that once the material was provided to the original counsel, privilege was waived. The Privy Council rejected the law society's argument. Lord Millett considered at [68] that it would be unfortunate if the law was not able to accommodate the waiver of privilege for a limited purpose as "*[i]t must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it*". He stated that one of the grounds on which a party who has parted with possession of privileged documents may be able to recover them is "*because he has parted with them for a limited purpose and equity will not permit the recipient to retain them once that purpose is fulfilled*" ([70]). In determining what the limits of the waiver were, Lord Millett focused on the terms of the letter disclosing the material, as "*objectively ascertained*" ([73]), by which Lord Millett appears to have meant embarking on the ordinary process of construction that one would apply to interpreting a document.

40. It is plain from Lord Millett's judgment that he saw no countervailing principle applicable on the facts before him that could trump the honouring of the express limits of the waiver.

41. In the decision of the Inner House of the Court of Session in *Scottish Lion Insurance Co Ltd v Goodrich Corporation* [2011] SC 534 delivered by Lord Reed and the decision of the Divisional Court of the Queen's Bench Division in *R (Belhaj and another) v Director of Public Prosecutions (No 2)* [2018] 1 WLR 3602, the question was considered of whether the waiver of privilege in one context could be held to lead to the waiver in another context where those two contexts could be regarded as part of the same "process". The arguments in *Scottish Lion* were principally based on English authority.

42. In *Scottish Lion*, the petitioner sought an order under section 896 of the Companies Act 2006 for meetings of creditors and for an order under section 899 sanctioning a scheme of arrangement. The Court ordered meetings under section 896 at which creditors cast their votes. The votes were given a weighting according to the value placed on the creditor's claim. Creditors were invited to submit documentation to the petitioner supporting the valuation of their claims. Some creditors opposed the application for sanction. The Court ordered as part of this that documentation submitted to the petitioners by certain creditors be produced for the purposes of the hearing. The latter group of creditors opposed this, contending that the documentation submitted by them contained privileged material and that their privilege had been maintained. The petitioner contended that it had been waived by the act of submitting documentation supporting the valuation of their claims.

43. The case was therefore not one of express waiver. Rather the Court considered the question that it had to determine was "*whether waiver is to be inferred*": [45]. The Court stated that waiver of privilege

> "*will arise, as we have explained, in circumstances where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally, or in a particular context. Such circumstances will exist where the person's conduct has been inconsistent with his retention of that right: inconsistent, that is to*

say, with the maintenance of the confidentiality which the privilege is intended to protect." ([46])

44. The Court went on to explain that waiver did not depend on the subjective intention of the person making the disclosure, but is judged objectively, specifically by an objective analysis of the conduct of the person asserting the privilege: [47]. The Court regarded this objective analysis as turning on the question of whether the conduct of the person entitled to the benefit of a privilege has been inconsistent with the maintenance of confidentiality: [46], and that the latter analysis was dependent on the relevant circumstances: [48].

45. The Court explained that one situation where this question had arisen was where a person had chosen to disclose privileged material in particular circumstances and then subsequently asserted privilege in different circumstances. The Court gave as an example *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113, where privileged documents disclosed in a criminal investigation and those disclosed in a criminal trial were held to be privileged in civil proceedings. The Court considered that this was because the criminal proceedings and the civil action were different *processes*, with the consequence that the there was no inconsistency between disclosure in one process and the assertion of privilege in the other: [48]. In contrast, it *would* be inconsistent for a party disclosing privileged material to a taxing master to assert privilege against the paying party, as that was necessary for the taxation process to be conducted fairly.

46. The Court was clear that a mere nexus between the creditors' meeting and the subsequent Court hearing was not sufficient to cause disclosure for the purposes of the former to be taken as a waiver of privilege in the latter. Rather it was necessary to consider with care how disclosure for the purposes of the meeting may bear upon consideration of the application for sanction: [58]. The Court explained that the statutory procedure by which an arrangement becomes binding on the company and its creditors involves three stages: (1) the application to the Court for an order that a meeting or meetings be summoned; (2) the scheme proposals are put to the meeting or meetings and are approved or not by the requisite majority; and (3) if the meeting or meetings approved the proposals, there must be a further application to the Court to obtain the Court's sanction for the arrangement.

47. On the facts before it, the Court concluded that "*for a person to submit material for the purpose of the second stage of the statutory procedure for approval of a scheme of arrangement is inconsistent with his subsequently resisting the disclosure of that material when it is necessary at the third stage of the procedure in order for a relevant challenge to be properly considered, since such conduct at those two stages of the process is incompatible with the proper operation of the statutory procedure*": [60]. Therefore, as in the context of taxation of costs, "*the assertion of privilege would prevent the proper operation of the procedure for the purpose of which the material was disclosed*": [60]. In order to satisfy itself that it possessed jurisdiction to sanction the arrangement and should exercise that jurisdiction to grant the application for sanction, the Court needed to be able to examine the valuations placed on the claims and the material submitted by creditors for the purpose of the valuation: [59]. Creditors providing privileged material in support of their claims must be taken to have done so in the knowledge that disclosure of those documents to the Court and the creditors opposing the grant of the sanction application might be necessary to

satisfy the Court that sanction should be granted. Therefore they had waived any right to object to the disclosure of the documents to the extent that such disclosure was necessary to enable the Court to deal with the application: [62].

48. *Scottish Lion* was distinguished in *Belhaj*, which was an express waiver case. In *Belhaj*, the Foreign and Commonwealth Office disclosed privileged material to the DPP for the sole purpose of assisting the DPP with its investigation into whether the claimants had been the subject of an unlawful rendition process, and expressly stated when disclosing that they did not consider that they had waived privilege for any other purpose, including any future prosecution or civil claim: [2]. The DPP decided not to prosecute, and the claimants sought judicial review of this decision. The question for the Divisional Court was whether privilege had been waived in respect of the judicial review proceedings.

49. The Court considered that the intended limits of the waiver were clear, whether one looked at that intention subjectively or objectively: [13]. Therefore, the argument that it had to consider was "*that, as a matter of policy, the limited waiver given was ineffective, because the processes of the decision and internal review formed a single, composite, whole, along with the subsequent process of judicial review, such that waiver for one meant waiver for all*": [24].

50. The Court was told that there was no authority directly on point but that the nearest authority that could be found was *Scottish Lion*: [25]-[26]. The Court considered that there was a clear distinction between *Scottish Lion* and the facts before it, because "*there is no inevitable or necessary nexus between, on the one hand, the advice to the DPP, the decision on prosecution and the review, and, on the other hand, a subsequent judicial review of the ultimate decision arrived at. These are discrete processes not one composite process*": [31]. The Court concluded that "*the Scottish Lion case identifies what is, or is near to, the outer limits of inferred waiver. We are clear that the present case falls well beyond the outer perimeter of that doctrine*": [34].

51. The operation of limited waiver at different stages of a conventional civil litigation process has been considered in three cases that were put before me.

52. In *Berezovsky v Abramovich* [2011] EWHC 1143 (Comm), Gloster J held at [20] that:

> "*ii) Once a party (on an interlocutory application) has opened up issues on the merits of the case, which will form part of the very questions to be determined by the trial judge, no party which has chosen to refer to privileged material or discussions for the purposes of that application, should be entitled [to] use them to his advantage on the merits of the case in the interlocutory context, but then assert a right to prevent its opponent from doing so on the merits at trial…*
>
> *iv) As a matter of principle and policy, it is not just, on the one hand, to permit one party to deploy legally professionally privileged, or without prejudice, material for the purposes of an interlocutory application, in order to advance that party's case on the merits, and thereby to gain a litigation advantage, and on the other hand, to deny the other party the opportunity to refer to, or*

deploy, such materials at trial, where, likewise the merits of the case are in issue."

53. The Court concluded that the disclosing party could not avoid disclosure for trial of the material deployed on the merits at the interlocutory stage simply by saying that he had not made up his mind about whether to refer to such evidence at trial: [21]. That would be cherry-picking of the worst kind, and give the disclosing party the unjust advantage of deploying privileged materials for the purpose of surmounting the summary judgment hurdle but not requiring him to give full disclosure of such materials at trial.

54. *Berezovsky* dealt with deployment of the privileged material *on the merits* at an interlocutory stage. In contrast, in *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 3272 (Ch), Birss J held that disclosure of privileged material at an interlocutory stage for a purpose that did not relate to the underlying merits of the claim, namely to inform the court's orders for disclosure, did not waive privilege more broadly in the claim: [73].

55. In *Pickett v Balkind* [2022] 4 WLR 88, Judge Paul Matthews, sitting as a Judge of the High Court, held that he was unable to agree with the decision of Birss J and that "*if there is a deliberate disclosure of information by a party to its opponent, even for an interlocutory purpose, it ceases to be confidential as against that party, and hence loses its privilege*": [77]. In that case, it was held that the claimant had by deploying privileged material to seek an adjournment of the trial waived privilege not just for the purposes of the interlocutory proceedings but more generally. The privileged material there consisted of a reference- in a letter from an expert exhibited to a witness statement in support of the adjournment application- to counsel having commented on the draft experts' joint statement. Therefore, it was not an express waiver case.

56. Pausing there, Mr Westwood argued that the present case was one where Mr Mond had sought to deploy the Privileged Material to obtain a "*litigation advantage*" in the sense identified in [20(iv)] of *Berezovsky*, and that if that was wrong, then on the authority of *Pickett* the fact that it had been disclosed to overturn the original hearing on the grounds of unfair *process* rather than on the merits was irrelevant.

57. I was also referred by Mr Davies in his skeleton to *Kyla Shipping Co Ltd v Freight Trading Ltd* [2022] EWHC 376 (Comm). However, in my judgment its comments at [40]-[47] on the difficulties of determining whether reference to privileged materials in a document constitute a waiver of privilege are not on point here, because here we are concerned with the different question of a deliberate waiver of privilege.

Applying the law to the facts

58. Mr Westwood's argument summarised at [32.] and [56.] above has considerable attraction and was very elegantly put in oral submission.

59. In particular:

(1) The appeal to the AC does in one sense form part of the same process as the further DC hearing, because (i) the AC has power to remit the matter back to the DC, (ii) it is the AC decision which remitted the matter back to the DC in the

present case, and (iii) more broadly they are both IPA committees involved in determining complaints. Therefore, in that sense there has been deliberate disclosure of privileged material in the IPA process of determining the Complaint, so one can see the argument that Mr Mond should not be able to submit material at one stage of that process and then seek to keep the IPA from using it at a later stage.

(2) Moreover, the way that the preliminary ground of appeal was put, and therefore the specific end to which the disclosure of the privileged material was ultimately directed, was to show that Mr Mond had lost the opportunity to determine whether to run a reliance defence to the Complaint. As Mr Westwood pointed out, the appeal skeleton itself went as far as stating that with independent representation Mr Mond could have been advised about the merits of such a defence and *would* then have been able to include such a defence. Therefore, the preliminary ground of appeal complained of the loss of a chance to run an argument on the *merits* at the DC hearing, so the deployment of the material could for example be seen as analogous to the deployment of privileged material at an interlocutory stage on the merits as discussed in the *Berezovsky* case above.

(3) Further still, *Pickett* shows, at least in the most recent decision on the topic, a disinclination to divide up the parts of a litigation process into different parts for privilege purposes. The same, so the argument runs, should equally be true of the disciplinary process here, all the more so in circumstances where it is the AC remittal that has given rise to the further DC hearing. Such an approach also avoids any difficulties for the recipient in having its legal team continue to act at the latter stage of the process by virtue of having seen the privileged material at the earlier stage.

(4) As explained above, the AC considered that the Mr Mond had given a far from accurate account to the DC. Allowing Mr Mond's claim would deny the IPA the ability to use the Privileged Material to cross-examine Mr Mond on this, which illustrates powerfully the consequences of allowing Mr Mond to assert privilege against the IPA at the further DC stage. Without deciding the point, that seems to me to be the most natural way of putting the relevance of Mr Mond's conduct in giving an inaccurate account to the DC. The alternative would be to regard the enquiry into whether the conduct of the discloser is consistent with his continued maintenance of privilege as requiring one to undertake a more general enquiry into how well or poorly the discloser has acted. While *Scottish Lion* states at [48] that one must examine the relevant circumstances to determine the consistency of the discloser conduct with continued maintenance of privilege, I find it difficult to take that itself to suggest a broad multifactorial enquiry. It is difficult to determine how one would balance a broad range of relevant factors against one another, and the situations in *Scottish Lion* at [48] to [49] are simply examples of situations where the question of whether a disclosing party seeks to limit the extent of the waiver of the privilege he makes. Those examples bring out that the focus will likely be, consistent with Mr Westwood's submission, on whether the limited waiver is unfairly selective, whether through being made as part of the same process as the context in which the privilege is asserted or otherwise.

60. These are forceful points.

61. However:

(1) In this case, the limits of the waiver were clearly and expressly stated, and Mr Mond's statement that it was limited to the appeal was not contested at the time or indeed at any stage of the AC process. Therefore, at the very lowest, this should in my judgment be accorded some importance. Those decisions that were cases of express waiver- *B v Auckland* and *Belhaj*- both did so.

(2) Mr Mond disclosed the Original Privileged Material to vindicate his article 6 rights because he had not received a fair trial. The fact that the DC was blameless in this does not alter the position in this regard. Mr Mond needed to make the disclosure if he was to vindicate his rights. Therefore, I do not characterise this disclosure as simply being to obtain a litigation advantage, and the deployment of the material was not deployment of material on the merits in the sense, or certainly to the same extent, as that being discussed in *Berezovsky*. Rather the preliminary ground of appeal was seeking to *return* Mr Mond to the position he would have been in had he received independent legal advice. It was seeking to undo the procedural unfairness that had tainted the original DC hearing. Had Mr Mond received such independent advice before the original DC hearing, he would have been able to take an informed decision about whether to deploy any of the Privileged Material in order to support his substantive case.

(3) Accordingly, in my judgment, it is seriously arguable that – unlike in *Scottish Lion*- this is not a case where (to use the language of [60] of that decision) "*the assertion of privilege would prevent the proper operation of the procedure for the purpose of which the material was disclosed*". The further DC hearing is capable of taking place without the Privileged Material. I note that the IPA stated in correspondence that the Privileged Material was highly unlikely to be relevant to that hearing and made clear in [17.2] of its defence that the remitted hearing can be conducted without reference to the Privileged Material. In contrast, in *Scottish Lion*, the Court considered that the stage of the process at which the privilege was asserted- namely the Court hearing to determine whether to sanction the arrangement- could not work properly unless the Court could see the privileged material. Therefore, by the creditors submitting privileged material to start down that process, the material had to be capable of being used for the whole of the process. Here it was necessary for the AC to see the material to determine *the article 6 complaint*. It does not follow that it is necessary for the further DC hearing to see it to be able to fulfil its role of adjudicating *on the Complaint* any more than it would be necessary for it to see such privileged material if privilege had never been waived.

As *Scottish Lion* emphasised at [58], a nexus between the context in which the disclosure occurs and the context in which privilege is asserted is not sufficient. Rather, care is needed to examine how disclosure in the former context bears on the operation of the latter context. After all, in *B v Auckland*, the successor counsel was seeking to use the privileged material in the same investigation that the recipient of the privileged information had been engaged in, but that did not on the facts cause privilege to be lost in the material for the purposes of the investigation generally: see [72]-[73].

(4) A striking practical illustration of this point in the present case is that the Original Privileged Material consisted of 22 documents from 2011-2012, whereas, following the AC order for disclosure, the Privileged Material disclosed exceeds 200 documents. This latter category includes documents relating to the conduct of the original DC hearing itself and more generally documents from well after the Complaint was made. It also includes a considerable amount of material of a more personal nature. Therefore, the disclosure that Mr Mond has needed to make to succeed on his 'fair trial' ground of appeal includes a very significant amount of material that is not contemporaneous evidence from the time of the events with which the Complaint is concerned, and not the type of material with which the DC would normally be concerned in determining a Complaint. It also includes material that would not necessarily be relevant to a reliance defence, and therefore not necessarily be disclosable on ordinary cherry-picking principles if Mr Mond was to seek to deploy some of the privileged material in support of a reliance defence. Therefore, it cannot be assumed that the running of a reliance defence would bring all, or even most, of this material into evidence.

(5) It is seriously arguable that events post-dating the disclosure of the Privileged Material, such as the fact that the AC decision appears to have envisaged that the Privileged Material would be before the further DC hearing, are not relevant to the extent of the waiver because, so the argument runs, the scope of the waiver should be set at the time of the disclosure of the material and not enlarged by later acts of persons other than the disclosing party.

(6) I do not consider that the *Pickett* case can itself decide the present question before me. Given that it takes a different view to the previous decision in *Property Alliance*, that the *B v Auckland* and *Scottish Lion* cases do not appear to have been cited to the Judge, and that *Scottish Lion* states that implied waiver at least should depend on all the circumstances that are relevant to assessing whether the conduct of the disclosing party is consistent with the maintenance of privilege, there is, as Mr Davies submitted, inevitably room for argument about its correctness, and in any case the present case is not a case of commercial litigation with interlocutory and final stages forming part of the same Court process.

(7) While the AC did refer at [79] of its decision to the DC considering sanction "*in the light of the new material*" if the IPA succeeded at the remitted hearing, it did not seek to impose as a term or condition of its remitting back under rule 39(c) of the Appeal Committee Rules that all of the Privileged Material be in evidence before the DC at the further hearing, and I have seen no evidence of argument before the AC on this point. I also note that the IPA did not seek to contend that [79] was itself decisive of its summary judgment application and that the IPA has offered the Undertakings, which means that it would destroy the Privileged Material in its possession and not rely on it before the DC if Mr Mond did not rely on it either.

62. Given the above, there is room for serious argument that, assuming for the moment that the test to determine the limits of an *express* waiver is (as Mr Westwood submits) the one set out in [48] of *Scottish Lion*, that the application of this test would lead to the conclusion that privilege has been maintained in the Privileged Material for the purposes of the further DC Hearing. Therefore, I do not consider that the test for summary judgment is met.

63. I have taken careful account of the fact that the AC considered on the basis of the material before it that Mr Mond's account to the first DC hearing was significantly inaccurate in material respects, and that the Privileged Material was used to obtain the remitted hearing in respect of which Mr Mond now seeks to assert privilege over the material. I can see the force of those points, and the argument that care is needed before concluding that one party can disclose privileged material to another party in one context and use the material in that context while barring the use of it by the recipient in other contexts, given the unfairness to which such selectivity can lead in some circumstances. Janice Brabyn makes a powerful argument on the last point in her article, '*Limited purpose waivers of legal professional privilege*' (2012) 31 CJQ 176, that Mr Westwood referred me to, and I can see the problems with allowing limited waiver of privilege in some contexts, particularly during a Court or tribunal process and where there is no express advance agreement as to the terms of the waiver. However, on the facts of the present case there are a number of countervailing factors in the above, specifically points (1)-(4), that give Mr Mond a serious argument to the contrary.

64. Further, as Mr Davies submitted, there is room for serious argument about whether the test in [48] of *Scottish Lion* does apply to express waiver. I can see the argument that it should do so, and that the express nature of the waiver can be accommodated as one of the relevant circumstances to be taken account of in the application of the test set out in [48]. However, the discussion of waiver at [46] of *Scottish Lion* that leads into the relevant test refers to privilege being waived where it can be *inferred* that the party disclosing has given up his right to resist disclosure.

65. This all reflects the fact that, as Charles Hollander QC puts it in the latest edition of his *Documentary Evidence* book (14th ed, 2021), there are a number of strands of case-law on the limited waiver doctrine, that how they should be brought together is open to serious argument, and that the case-law is continuing to develop: [24-10]. He regards, as do I, the most difficult issue, where the law is developing, to be how far the limited waiver principle extends as between the same parties when privileged documents are disclosed, as is the case here: [24-12].

66. The specific points this gives rise to in the present case include (i) the test for when the intended limits of an express waiver should be departed from, (ii) the relevance of the purpose of the waiver being to vindicate a right to a fair trial rather than simply being adduced on the merits, (iii) the relevance of the terms of the express waiver not being agreed at the time but rather not being objected to, (iv) whether the fact that the party has given previous inaccurate evidence is material on the present facts and if so what weight to give it, (v) whether the AC and further DC processes are to be regarded as part of one composite process for present purposes in the sense articulated in *Scottish Lion* and *Belhaj*, and (vi) whether post-disclosure events, such as the AC envisaging in its decision that the DC would have before it the Privileged Material, are of any relevance. In my judgment, I should not seek to seek to strike new ground in deciding these points on a summary judgment application, because they are, taken collectively, far from clear-cut. This is very far from the short point of law or construction of which Lewison J spoke in *Easyair,* and is better left to a final hearing.

67. I consider that the matter should be decided on the basis of fuller argument and evidence than available on a summary judgment application. That will allow for greater consideration of the case-law that might assist. Moreover, importantly, it will

also allow for a more in-depth examination of matters like (i) the precise context in which the disclosure was made, (ii) precisely how the privileged material was deployed in argument before the AC, (iii) the likely extent of the relevance of the disclosure to the further DC hearing, and (iv) the nature of the inconsistency with the previous evidence given. If it is right that the test is the one in [48] of *Scottish Lion*, then in my judgment the relevant circumstances need to be considered with some care in the present case. I did not receive any evidence about the detail of how the privileged material was deployed in argument before the AC or how the matter was put before the DC, other than Mr Mond's evidence that he did not put before the DC the fact that he had sought, obtained and relied on counsel's advice from the outset. As Mr Davies submitted, the Judge at the final hearing will have the full run of submissions that were made before the AC. Further, while the three files of Privileged Material were included in the hearing bundle and certain documents were mentioned in Mr Mond's witness statement and skeleton, there was necessarily not time for oral submissions in relation to them.

68. I rest my judgment on those grounds rather than that there is likely to be significant further factual material outside the possession of Mr Mond that could emerge on disclosure and bear on these points. I do not consider that is likely. It seems implausible, for example, that there will be significant internal material from the IPA that is not privileged and is relevant to whether the IPA agreed to or acquiesced in the terms of the limited waiver that might be disclosable, or- as Mr Davies puts it in his skeleton- relevant to what the IPA ought reasonably to have understood at the time of Mr Mond's disclosure as to the limits of such disclosure. Material discussing Mr Mond's disclosure would likely be privileged but in any event such material does not go to what the Investigation Committee of the IPA communicated to Mr Mond or the AC at the time of such disclosure, to what Mr Mond stated in making such disclosure (which was set out in e-mails and a witness statement) or how the IPA *should* have interpreted Mr Mond's words.

Ground 2: whether there is a reasonable prospect of Mr Mond demonstrating that the declarations that he seeks have practical utility

69. I can deal with this ground more shortly.

70. This ground is a fallback to ground 1. Therefore, it proceeds on the basis that Mr Mond is correct that his waiver of privilege was limited so that the privilege can be asserted against the IPA in relation to the further DC hearing.

71. The IPA points out that subject only to confirmation from Mr Mond as to whether he intends that the DC should consider on the remitted hearing any of the Privileged Material, the IPA has offered to destroy the Privileged Material and not deploy it at the further DC hearing unless Mr Mond chooses to. Therefore, the IPA submits, there is no practical utility in declarations being made as to whether Mr Mond can assert privilege against the IPA in respect of the material for the purposes of the further DC hearing.

72. In my judgment, Mr Mond does have at the very least a reasonable prospect of showing that the declarations that he seeks have practical utility if he is right in his submissions on limited waiver, and I would regard his arguments on this practical utility point as significantly stronger than that.

73. Mr Mond's stance is that the IPA legal team that acts on the further DC hearing should not have seen the Privileged Material because he has not waived privileged in it (the **"Legal Team Question")**, and that he will apply for this to be determined by the DC if the IPA does not accept this position. While that is not a matter for determination before me, and while I understand the IPA contends that there is no bar to a legal team acting even if it has seen privileged material, the question of whether the material is privileged is in my judgment plainly capable of being of relevance to the question of whether the present legal team can act. Therefore, granting a declaration on this point would assist in the resolution of the question of whether the IPA's legal team can act on the further DC hearing. It will remove from the scope of argument at any future preliminary DC hearing to decide the Legal Team Question the question of whether privilege is maintained in the Privileged Material.

74. Moreover, the undertaking given in correspondence by the IPA provides that if Mr Mond deploys any of the Privileged Material at the further DC hearing, the IPA may use any of the Privileged Material itself at the hearing. The most obvious example of Mr Mond deploying the material at the further hearing would be in aid of the reliance defence referred to in his appeal to the AC. In such circumstances, the question of whether Mr Mond was, prior to such deployment, able to assert privilege against the IPA at the further DC hearing could be practically important. If he was so entitled, then it would, at the lowest, be open to debate whether he would on ordinary cherry-picking principles have been taken by the act of such deployment to have waived privilege in the totality of the Privileged Material given that such material extends chronologically well past the contemporaneous events to which the Complaint relates and into the conduct of the original DC hearing itself. In contrast, the undertaking of the IPA would allow the IPA to use any of the Privileged Material in such a situation. I put this orally to Mr Westwood and he said that, subject to instructions, he would be inclined to accept that the undertaking should not allow use of material that would fall outside the cherry-picking principle in such a scenario. However, the undertaking previously given has not been formally varied and remains as set out in correspondence by the IPA.

How Mr Mond's Counsel were instructed

75. I have referred on the front page of the judgment to Mr Davies QC and Mr Gunaratna as being instructed via direct access. It was stated before me that former Counsel had been instructed on a direct access basis and in the Cotter J judgment current Counsel are referred to as instructed on a direct access basis. In his suggested corrections to the draft judgment, Mr Mond suggested that current Counsel has been instructed by in-house solicitor rather than on a direct access basis, but this is not presently accepted by the IPA. Accordingly, I have retained the reference to direct access in the heading but make clear that this is not intended to preclude argument at the detailed assessment stage as to whether current Counsel for Mr Mond has been instructed by in-house solicitor.