Neutral Citation Number: **[2024] EWHC 188 (Comm)**

Case No: **CL-2021-000369**

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **30 January 2024**

Before :

His Honour Judge Pelling KC

- -

Between :

Frasers Group plc	**Claimant**
- and -	
1) Saxo Bank A/S	**Defendant**
(2) Morgan Stanley & Co International plc	

- -
- -

Adrian Beltrami KC, Adam Temple and Mark Wassouf (instructed by **RPC**) for the **Claimant**
Camilla Bingham KC, James MacDonald KC and Richard Mott (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: **30th January 2024**

- -

JUDGMENTS

His Honour Judge Pelling KC **Tuesday, 30 January 2024**
(**13:58** pm)

Judgment 1 by **HIS HONOUR JUDGE PELLING KC**

1. This is the hearing of an application by the claimant issued on 11 January 2024 for an order compelling the second defendant, Morgan Stanley, to disclose communications between its solicitors, Clifford Chance, and its experts in relation to the preparation of expert joint statements. The application was listed to be heard at the pre-trial review and took up almost all the time allocated for that hearing. The argument finished at 16.15 and there was other business to be dealt with so I indicated I would give judgment on the first available date in the following week, and that is today. I should add that the trial is due to commence on 19 February 2024. That is just over three weeks' time. The parties are fully occupied in preparing for what will be a complex trial. This application is therefore, in effect, if not intent, a distraction. The application is opposed on the basis that the material sought is privileged, privilege has not been waived and none of the other exceptions that apply are either engaged or have been relied on.
2. I do not propose to take up time setting out the general background to this claim. I incorporate by reference the narrative of the background set out in my last judgment in this claim, when I gave Morgan Stanley permission to amend its defence.
3. The factual basis on which the application is founded can be relatively shortly stated. On 24 November 2023, the claimant's solicitors, Reynolds Porter Chamberlain, wrote to Clifford Chance asserting that it was wrong for solicitors to communicate with experts in relation to the contents of joint statements, stating that they were not communicating with any of the experts they had instructed in connection with the content of the joint statements and asking Clifford Chance to confirm they had and would adopt a similar approach.
4. On 28 November 2023, Clifford Chance responded in terms which were the trigger for this application. Having set out some primary comments concerning what they maintained was the correct practice, Clifford Chance then stated:

> "Without waiving privilege, we have communicated with the experts appointed by our client and/or, in the case of Mr Harris Martello, (1) to discuss logistics and timing and (2) to raise issues of clarity or completeness with a view to ensuring that the joint statement is as helpful as possible for the court in identifying the key issues between the experts and articulating clearly each expert's position on those issues."

There then followed some correspondence between solicitors in which Reynolds Porter Chamberlain asserted that the statement referred to above ostensibly caused the claimants concern that the communications referred to "*... exceeded the ambit of acceptable involvement ...*" and asking Clifford Chance to "*... please confirm the precise nature and extent of these communications ...*". The request setting out the detail of what was sought runs to some five paragraphs, one of which is broken down into four subparagraphs. Ultimately, Clifford Chance responded by a letter dated 5 January 2024, which, after complaining about what Clifford Chance perceived to be an overly aggressive and tendentious approach to the litigation, concluded by saying that Reynolds Porter Chamberlain and its clients were not entitled to the further information sought. It is against that background that this application came to be issued.

5. As a matter of basic principle, communications between solicitors and expert witnesses that they instruct are generally subject to litigation privilege. I do not understand this general proposition to be in dispute. To that, there is only one quasi-statutory exception contained in CPR rule 35.10. By that rule, an expert's report must state the substance of all material instructions. By CPR rule 35.10(4), such instructions are not privileged but a court will not order disclosure of the documents containing such instructions "*... unless it is satisfied that there are reasonable grounds to consider the instructions in the expert's report to be inaccurate or incomplete*". As HH Judge Matthews held in Pickett v Balkind [2022] EWHC 2226 (TCC), [2022] 4 WLR 88, paragraph 90, following earlier Court of Appeal authority, "*The aim of the rule is to ensure that*

the factual basis of the claimant's opinion evidence is apparent to the reader of that evidence." It follows, as Judge Matthews stated at paragraph 91 of his judgment, that there is no reason to construe the effect of CPR rule 35.10 as requiring an expert to state the substance of all communications that go beyond stating the factual assumptions he or she was required to make for the purpose of expressing an opinion. As Judge Matthews also stated at paragraph 92 of his judgment, "*In consequence, if the documents concerned do not fall within the limited subset of documents referred to in CPR rule 35.10, then they are privileged and remain so until privilege is waived*." It is not open to me to take a different view in relation to these principles unless I concluded that they were obviously wrong. Not merely do I not conclude that they are wrong. On the contrary, I consider them to be correctly stated.

6. I reach no concluded view as to whether in principle CPR rule 35.10(4) is capable of applying to instructions given ahead of a joint meeting, although on a purposive construction of that provision, I see no reason why it should not. However, the point does not arise because the letter that forms the basis of the application does not even arguably suggest that instructions concerning the factual assumptions that the defendant's experts were to make had been given. No doubt the claimant can explore that issue further at trial, possibly in cross-examination with the experts, and if it emerges that such instructions were given, then the claimant will be able to apply for disclosure of those instructions at that stage from the trial judge.
7. It follows, therefore, that this application can succeed only if either the documents that are sought fall within another recognised exception to litigation privilege or privilege can be said to have been waived.
8. Litigation privilege is a variant of legal professional privilege. Legal professional privilege does not exist in respect of documents that are part of a criminal or fraudulent proceeding. No one suggests that this exception to the general privilege rule is of any application to the facts of this case. The key to its applicability is whether the conduct complained of is dishonest and not

merely disreputable or amounting to a failure to maintain good ethical standards; see Hollander, Documentary Evidence, 14th edition, at paragraph 25-12 and footnotes 57 to 59. It is difficult to see how even arguably that exception could apply based on the content of Clifford Chance's letter, even if, contrary to my view, the exception could in principle be relied upon.

9. Mr Beltrami KC maintains that the material which is sought by way of disclosure is not privileged at all. His basis for this is either the content of paragraph 13.6.3 of the TCC Guide and/or the principles he submits are to be derived or have been derived from that paragraph by His Honour Judge Stephen Davies in BDW Trading Limited v Integral Geotechnique (Wales) Limited [2018] EWHC 1915 (TCC).

10. The relevant provisions of the TCC Guide for present purposes are, it seems to me, paragraphs 13.5.2 and 13.6.3, which respectively provide:

> "13.5.2. In many cases it will be helpful for the parties' respective legal advisers to provide assistance as to the agenda and topics to be discussed at the experts' meeting. However, save in exceptional circumstances and with the permission of the judge, the legal advisers must not attend the meeting. They must not attempt to dictate what the experts say at the meeting ...
>
> "13.6.3. Whilst the parties' legal advisers may assist in identifying issues which the statement should address, those legal advisers must not be involved in either negotiating or drafting the experts' joint statement. Legal advisers should only invite the experts to consider amending any draft joint statement in exceptional circumstances, where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement ...."

It was submitted by Ms Bingham KC on behalf of Morgan Stanley that these provisions do not appear in the Commercial Court Guide and so do not reflect Commercial Court practice. Whilst it is true to say that there is no statement in similar terms within the Commercial Court Guide, little, if any, weight can be attached to that point. Firstly, H2.22 and H2.23 of the Commercial Court Guide clearly emphasise that the procedure to be adopted at joint meetings is a matter for the experts, not the parties or their lawyers, and that neither the parties or their legal representatives should seek to restrict the issues on which experts agree. In substance, these provisions, at least implicitly, support a similar approach to that identified in the TCC Guide.

11. Secondly and perhaps more importantly, there has been some limited recognition that the relevant paragraph of the TCC Guide on which the claimant relies is of general application or at any rate reflects what should be general practice - see paragraph 35.12.2 of volume 1 of the White Book and Andrews v Kronospan Limited [2022] EWHC 479 (QB) at paragraph 21.

12. Thirdly, irrespective of the technical debate concerning the scope of paragraph 13.6.3 of the TCC Guide, at least some of the principles to be derived from it were adopted by His Honour Judge Stephen Davies in BDW Trading Limited (ibid.) where he concluded at paragraph 17 that the effect of the TCC Guide, when read together with CPR Part 35 and its relevant practice direction, was that

    a. the role of legal representatives in expert discussions is limited to agreeing an agenda where necessary;

    b. legal representatives can attend expert discussions if ordered or it is agreed but may not participate other than to answer questions or advise on the law;

    c. experts do not require the authority of the parties to sign statements reflecting what has been agreed;

    d. experts should not ask solicitors for their comments or suggestions on the content of the joint statement nor should solicitors make any comments or suggestions, save to both

experts and save where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement; and

e. where, having seen the joint statement, a solicitor considers it may have proceeded on a misunderstanding of the law or facts, that may be drawn to the attention of the experts, but that must be done "*... in the open so that everybody, including the trial judge ... can see what has happened and, if appropriate, discourage any attempts ... to seek to reopen the discussion ...*".

However, none of this leads to the conclusion that a communication by a solicitor with an expert either is not privileged or ceases to be so. If, arguably, there has been a transgression of any of the principles identified by HHJ Stephen Davies, none of the cases that have been cited to me in this case suggest this to be so. One of those cases is concerned with the impact on the credibility of an expert witness of such a transgression and the other concerned an application for an order precluding reliance on an expert witness who had transgressed the principles identified by Judge Davies in a wide ranging and fundamental manner. There is nothing within either the TCC Guide or CPR Part 35 (other than CPR rule 35.10.4) or any practice direction that disapplies litigation privilege as a result of such considerations and the insertion of the limited exception in CPR rule 35.10.4, suggests that no such wide ranging disapplication was intended or made. Legal professional (and, therefore litigation) privilege is absolute unless waived or overridden by statute and it is "*... hard, if not impossible, to envisage any circumstances where legal professional privilege could properly be directly overridden by an order of the court made in the exercise of its case management powers ...*" - see JSC BTA Bank v Shalabayev [2011] EWHC 2915 (Ch), per Henderson J, as he then was, at paragraph 34. In my judgment, it would be wrong in principle to direct disclosure of the documents sought unless it can be shown that privilege had been waived.

13. There are, as it seems to me, real difficulties about how the waiver has been addressed in this application. It was not referred to either in the application notice or in the evidence in support of the application. It is not referred to, as far as I can see, in the skeleton arguments and no relevant authority has been identified, much less cited, as setting out the applicable principles against which assertions of waiver are to be tested. This makes coming to a final conclusion on this question difficult and dangerous. An example of the difficulty this has causes me concern relates to the terms of Clifford Chance's letter on which the claimant relies. As is apparent from the quotation set out above, the relevant part of the letter starts with the proposition that what is said is said "*without waiving privilege*". Ms Bingham relies on that as negating any possible waiver. The effect of such a reservation was not the subject of any submissions to me. However, my research on this issue after the hearing (and it goes without saying that is not something I should be having to undertake) suggests that such a reservation may be ineffective if otherwise there might have been a waiver - see Digicel (St Lucia) Limited and others v Cable & Wireless Plc and others [2009] EWHC 1437 (Ch), per Morgan J at paragraph 31, where he held that a statement that reference to privileged material in a witness statement was not to be taken as a waiver did not prevent a court holding that, as a matter of law, objectively considered, the statement constituted a waiver. So since this authority was not the subject of any submission before me, it would be wrong of me to reach any final conclusions as to the effect of such a qualification. Not merely was this point not explored by reference to the authorities but a more fundamental point was not considered either - that is whether a reference in solicitors' correspondence to privileged material is capable of amounting to a waiver of privilege. My own post hearing research suggests it may not be - see the statement of principle at paragraph 26-31 in the 20th edition of Phipson on Evidence. Again, that issue was not explored at all in the submissions before me notwithstanding the statement of general principle in a well known

practitioners text book, where ethe principles relating to privilege are to be found set out and analysed.

14. Even if one or other of these points is wrong, generally waiver will be found to have occurred only if a party has not merely referred to privileged material but has relied on its contents. The dividing line between disclosing the existence of privileged material and relying on it is ill-defined at best in the authorities and is highly fact-specific, with all the established textbooks in this area suggesting that careful reference has to be made to the various authorities where the occurrence of an alleged waiver is being considered in order to set the relevant context for the making of a decision on that issue.
15. Had I thought all this was simply error or omission, I might have been tempted to adjourn the application and ask counsel for further submissions, but, as I have explained, this application has been issued relatively late in the trial process, came on for hearing at the pre-trial review and the start of the trial is very close. Distracting the attention of leading counsel on what currently appears to be an issue of limited practical importance will unfairly disrupt both parties' preparation for what will be a complex and technically demanding trial. Nonetheless the application raises issues of general principle that cannot safely be determined without consideration of the fundamental issues I have summarised. Tempting though it is simply to dismiss the application that too would be inappropriate if upon proper analysis the claimant is entitled to some or all of the additional disclosure that it claims.
16. In my judgment, this unsatisfactory situation is largely the result of an application being listed at the last minute, when the parties are actively involved in preparing for a complex trial and where the specific waiver issue was not apparent to the defendant or its advisors at any time before the start of the hearing before me.
17. In my view, it would be unsound for me to reach any final conclusion on the waiver issue in these circumstances. In my judgment, this conclusion give rise to a series of unattractive

possibilities. Provisionally at the moment I consider that the least unattractive course is simply to adjourn this application for it to be determined by the trial judge at the start of the trial if it is renewed. However, on that limited point, I will hear further submissions from counsel.

His Honour Judge Pelling KC **Tuesday, 30 January 2024**
(**14:22** pm)

Judgment 2 by **HIS HONOUR JUDGE PELLING KC**

1. The issue that I have now got to determine is a short one. At the close of the judgment I delivered a moment ago, I suggested provisionally that the least unattractive possibility of the options available to me was to adjourn this application over to the trial judge. I remain of the view that that is the least unattractive option available because, in litigation of this sort and in relation to issues of this sort of sensitivity, it would be wrong to proceed in the circumstances that have arisen without proper regard to all the applicable principles.

2. Although it is not open to me to be able to bind the trial judge in relation to the conclusions that I have been able to reach, it is likely, I foresee, that any argument before the trial judge will focus on the waiver issue and two issues that I have identified in the judgment as not having been satisfactorily addressed so far – that is the effect of the express qualification in the correspondence relied on by the claimant and whether comments in solicitors correspondence is capable of constituting a waiver either or privilege or confidence and if the matter whether the express qualification has a different effect in relation to the confidence issue than apparently it has in relation to the waiver issue. On that basis I am confident that if the application is renewed at the start of the trial it ought not to take long. It will take no time at all at that stage if it is left further outstanding until after some limited cross-examination of the experts focused on the CPR rule 35.10(4) issue. In those circumstances, what I propose to do is to adjourn this application over to the trial judge.