



Neutral Citation Number: [2022] EWCA Civ 1484

Case No: CA- 2022-001108

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
FINANCIAL LIST
Mr Justice Robin Knowles CBE
[2022] EWHC 1136 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LADY JUSTICE NICOLA DAVIES

and

LORD JUSTICE MALES

Between:

LORELEY FINANCING (JERSEY) No 30 LIMITED

**Appellant/
Claimant**

- and -

- 1) CREDIT SUISSE SECURITIES (EUROPE)
LIMITED**
2) CREDIT SUISSE INTERNATIONAL
3) CREDIT SUISSE SECURITIES (USA) LLC
4) CREDIT SUISSE AG

**Respondents/
Defendants**

Tim Lord KC & Fred Hobson (instructed by **Reynolds Porter Chamberlain LLP**) for the
Appellant

Tamara Oppenheimer KC & Adam Sher (instructed by **Cahill Gordon & Reindel (UK)
LLP**) for the **Respondents**

Hearing date: 12 October 2022

Approved Judgment

This judgment was handed down remotely at 10.30am on Thursday 10 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Males:

1. This appeal is concerned with the scope of litigation privilege. The respondent defendants (“the Bank” -- there is no need to distinguish between them) wish to know which individuals are authorised to give instructions in relation to these proceedings on behalf of the appellant claimant (“Loreley”), a special purpose vehicle with no employees whose directors are supplied by a professional services company. Loreley responds that this information is privileged. But another question also arises, whether (regardless of privilege) this is the kind of information which Loreley should be ordered to provide under CPR 18 as a matter of good case management when it is unrelated to the content of any disclosable document.
2. Mr Justice Robin Knowles made a declaration that:

“In the present case, the identities of the individuals who are, or have been, authorised to give instructions to Reynolds Porter Chamberlain LLP (‘RPC’) on behalf of the Claimant in relation to these proceedings are not subject to legal professional privilege.”
3. He ordered Loreley to disclose this information in response to a Part 18 Request dated 16th October 2020.
4. In addition, he ordered Loreley to disclose an unredacted copy of the engagement letter from RPC to Loreley dated 12th November 2018, which had previously been disclosed in redacted form so as to conceal (among other things, with which we are not now concerned) the identity of those with whom RPC would communicate (“Redaction 6”).
5. In the case of other documents which had been disclosed in redacted form, the judge required Loreley to reconsider the question of privilege for the redactions in the light of the principles set out in his judgment.
6. Loreley now appeals.

Background

7. Loreley’s claim in this action concerns the purchase of notes from the Bank in 2007 (“the Notes”) for US \$100 million. The Notes formed part of a collateralised debt obligation (“CDO”) transaction and were linked to the credit of residential mortgage-backed securities (“RMBSs”). The Bank had been involved in the securitisation of a number of these RMBSs.
8. Loreley alleges fraud in relation to the securitisation by the Bank of the RMBSs and in representations made to it in the sale of the Notes. The causes of action advanced include fraudulent misrepresentation and unlawful means conspiracy.
9. The Bank contends, among other defences, that the claims are barred by limitation. As the proceedings were not issued until 15th November 2018, the claims are *prima facie* time barred, but Loreley seeks to rely on section 32 of the Limitation Act 1980, alleging that time only began to run when it discovered the alleged dishonest misconduct or could with reasonable diligence have discovered it. It says that this did not occur until January 2017.

10. Accordingly there is an issue whether Loreley did discover or could with reasonable diligence have discovered the alleged misconduct before 15th November 2012, six years before the issue of proceedings. Because Loreley is a special purpose vehicle with no employees whose directors are supplied by a professional services company, there are issues as to whose knowledge is to be attributed to Loreley for this purpose. The Bank's case is that matters which were known to, or could with reasonable diligence have been discovered by, two German banks, referred to as IKB and KfW, should count as matters known to or discoverable by Loreley for the purpose of section 32. Loreley disputes this.
11. IKB Deutsche Industriebank AG ("IKB") was the sole "Liquidity Facility Provider" to Loreley in connection with the purchase of the Notes. A subsidiary of IKB, IKB Credit Asset Management, acted as Loreley's investment adviser. The Bank's case is that Loreley is reliant on IKB for its record keeping.
12. Another German bank, Kreditanstalt für Wiederaufbau or KfW Bankengruppe ("KfW"), rescued IKB in 2007 in the global financial crisis. KfW took over as the "Liquidity Facility Provider" to Loreley and became a creditor of Loreley with security over its assets, including the claim in this action or its proceeds. It is now common ground that any sums recovered in this action will ultimately benefit KfW as Loreley's main creditor.
13. The Bank's case is that "in reality, all decisions by [Loreley] were made by IKB (albeit then formally approved by the professional directors)". In its Defence, the Bank alleges that "KfW initiated and/or was otherwise involved in the decision to launch the present litigation and (it appears) may be providing instructions to RPC on behalf of [Loreley]". This is the context in which it wishes to find out the identity of the individuals giving instructions to RPC. The Bank will contend that if such instructions are given by IKB/KfW, that is relevant evidence that IKB/KfW exercised control over Loreley six years earlier, in the period before 15th November 2012, supporting its argument that the knowledge of IKB/KfW during that period is to be attributed to Loreley. The significance of this is, or at least appears to include, that in 2011 IKB commenced proceedings against the Bank in New York, making very similar allegations to those made by Loreley in the present action.
14. The judge did not decide, and was not asked to decide, whether the knowledge of IKB and/or KfW should count as Loreley's knowledge for the purpose of section 32 of the Limitation Act. It was and is common ground that this will be an issue for trial. Loreley has questioned whether the information sought by the Bank will be of any probative value in relation to the limitation issue, but has so far accepted that the question who gives instructions on its behalf to RPC is "relevant as a building block (albeit a small one) for Credit Suisse's contention that the claims against it are time barred".

Procedural history

15. On 16th October 2020, after exchanges of pleadings which already ran to hundreds of pages, the Bank served an extensive Request for Further Information pursuant to CPR 18. Request 17 was as follows:

"Paragraph 104(3)(b) of the Defence inter alia alleges that KfW may be providing instructions to RPC on behalf of Loreley 30.

Please therefore confirm whether or not individuals at KfW provide instructions in relation to this litigation on behalf of Loreley 30.

(For the avoidance of doubt, this request does not seek disclosure of the content of any communications which are subject to legal professional privilege, seeking (at most) to identify the individuals who engaged in such communications, which fact is not itself a communication or subject to legal professional privilege).”

16. The response, dated 7th December 2020, consisted of a denial that the knowledge of KfW was to be attributed to Loreley, together with a claim to privilege:

“In any event, the request seeks information as to the circumstances in which the decision was made to pursue the present claim and/or the provision of instructions in relation to the conduct of the claim. That information is, by its nature, subject to legal professional privilege.”

17. On 14th May 2021 a case management conference, in fact the second such conference in the action, was held before Mr Justice Picken. There were numerous items on the agenda, one of which (in fact the last) was that the Bank sought an order requiring Loreley to provide this information, and to produce for inspection RPC’s letter of engagement. Loreley did not resist production of the engagement letter, provided that this did not pre-judge whether all or any parts of it were covered by privilege. It did resist answering the Request for Further Information, contending in its skeleton argument that, in view of what was already common ground (see [12] above), the information was not reasonably necessary to enable the Bank to prepare its case; and that it was covered by litigation privilege. In oral argument, the principal focus of Loreley’s resistance was concerned with privilege. Under some pressure of time, Mr Justice Picken did not give a formal judgment, but commented that the real issue was whether the information was privileged and that he would take what he described as the same “pragmatic and sensible approach” as in relation to the letter of engagement by ordering the information to be provided, subject to any claim for privilege.

18. The result was an order dated 14th May 2021 which ordered Loreley to produce (among other things):

“All engagement letters between RPC and [Loreley] and/or [IKB] or relevant subsidiary (together ‘IKB’), and/or KfW Group or relevant subsidiary (together ‘KfW’) concerning the present litigation.”

19. The order went on to say that if Loreley sought to claim privilege, including by making redactions, full particulars of the matters relied on for the basis of the claim to privilege should be provided.

20. The order also required Loreley to provide a further response to Request 17, identifying all individuals who were or had been authorised to give instructions to RPC in relation to the proceedings. This was subject to the same qualification, that if Loreley sought to

claim privilege, full particulars of all matters relied on for the basis of that claim should be given as part of the response.

21. It was pursuant to this order that the engagement letter dated 12th November 2018 and containing Redaction 6 was disclosed. Redaction 6 conceals the contents of paragraph 6.1 of the letter while Redaction 7 conceals the contents of paragraph 6.2, both paragraphs coming under the heading “Next steps and reporting arrangements”. The further response to Request 17 was that the identity of individuals giving instructions to solicitors in relation to litigation on behalf of a corporate client is subject to litigation privilege as a matter of law.
22. This led to the issue of an application notice which came before Mr Justice Robin Knowles on 24th November 2021. In a witness statement explaining the basis of the claim to privilege, Mr Thomas Hibbert of RPC said that Loreley’s position was that the identity of those giving such instructions was inherently privileged. He did not suggest that disclosure of their identity would in fact reveal the content of any advice sought or given in relation to the litigation in this case. Further, although a statement of the next steps which the solicitors proposed to take in the litigation might well have been privileged, Mr Hibbert did not suggest that anything concealed by Redaction 6 included such information or that Redaction 6 disclosed any information apart from the identity of the individuals to whom RPC would report and from whom it would take instructions.

The judgment

23. The judge began his judgment by identifying the proposition of law for which Loreley contended. This was that the identity of the persons who are authorised to give instructions to solicitors on behalf of a corporate client in ongoing litigation is a matter which is covered by litigation privilege. The judge identified the requirements for litigation privilege, set out by Lord Carswell in *Three Rivers District Council v Governor & Company of the Bank of England (No. 6)* [2004] UKHL 48, [2005] 1 AC 610 at [102] and applied by this court in *Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2018] EWCA Civ 2006, [2019] 1 WLR 791 at [64] to [66]. He examined also a number of cases where disclosure had been ordered of the identity of a solicitor’s client and rejected the submission on behalf of Loreley that these cases were specific to legal advice privilege rather than litigation privilege.
24. The judge’s conclusion was as follows:

“25. In my judgment, the answer to the question whether the identity of a person communicating with a lawyer is privileged lies in whether two requirements are met. First, whether the communication is privileged. Second, whether that privilege will be undermined by the disclosure of identity sought. This answer applies as much where the person communicating does so as a person authorised to give instructions to the lawyer on behalf of the lawyer's client as where that person has a different role.”
25. As submitted by Ms Tamara Oppenheimer KC on behalf of the Bank, it is clear that what the judge meant by saying that privilege might be undermined was that disclosure of the identity of the person concerned would reveal or tend to reveal the content of

privileged communications. He rejected the concept of litigation being subject to a “zone of privacy” within which everything which happened was subject to litigation privilege. Because there was no evidence that privilege would be “undermined” in this sense by disclosure of the information sought, the claim to privilege failed and Loreley was ordered to provide its answer to Request 17 and to provide an unredacted copy of the letter of engagement.

Submissions on appeal

26. For Loreley, Mr Tim Lord KC submitted (in outline) that the identity of persons who are authorised to give instructions to solicitors on behalf of a corporate client in the course of ongoing litigation is necessarily covered by litigation privilege and does not depend on whether privilege would be “undermined” by disclosure of the identity. He accepted that litigation privilege extends to lawyer/client communications in the course of ongoing litigation, and may therefore co-exist with legal advice privilege, but submitted that these two forms of privilege have distinct rationales and purposes. He submitted that the purpose of litigation privilege is to establish a “zone of privacy” around a party’s preparation for litigation, a term used in *Thanki, The Law of Privilege*, 3rd Ed (2018), para 3.10, which is derived in this context from the Canadian case of *Blank v Canada (Minister of Justice)* [2006] SCC 39, [2006] 2 SCR 319 at [32]. He submitted that the identity of those authorised to provide instructions to the client’s solicitors is itself an aspect of those instructions which is “paradigmatically” within the scope of litigation privilege because disclosure of this information might provide an advantage to the opposing party. He instanced as examples that disclosure of the identity of someone whose job was known to involve settling litigation would convey to the opposing party an intention to settle the case; or that disclosure of the identity of someone with expertise in the quantum of the claim might convey that liability was not seriously in issue. While there were cases in which disclosure of the identity of the client had been ordered, these were cases concerned with legal advice privilege and not with litigation privilege; they were concerned with a different question (“who is the client?”), whereas here the identity of the client, Loreley, is known, and they had a different rationale. In the context of litigation privilege, the identity of those authorised to give instructions was just as privileged as the identity of a prospective witness or expert.
27. For the Bank, Ms Oppenheimer supported the judge’s reasoning and conclusion. She submitted (again in outline) that privilege, whether litigation privilege or legal advice privilege, is concerned with communications and not merely with information or facts. Such privilege means that the content of communications is protected from disclosure, as is secondary evidence which would tend to reveal the content of such communications, but the disclosure of the identity of those authorised to give instructions to solicitors does not generally reveal such content. The concept of a “zone of privacy” is far too broadly expressed. If there are exceptional cases where disclosure of the identity of those authorised to give instructions would tend to reveal information communicated in confidence so as to justify a claim for privilege, the basis of that claim must be explained so that the court can evaluate it: this was the explanation for cases such as *JSC BTA Bank v Ablyazov* [2012] EWHC 1252 (Comm), where the client’s contact details had been communicated to the solicitor in confidence for the purpose of enabling him to seek legal advice. The proposed analogy with the identity of a potential

witness with whom the solicitor has been in contact breaks down: to identify potential witnesses necessarily tends to reveal the solicitor's advice as to litigation strategy.

28. In the course of the hearing the court expressed concern that whereas privilege is concerned (at this stage of the case) with whether documents can be withheld from production in whole or in part, the declaration made by the judge and his order that Loreley should provide an answer to Request 17 were not related to the content or even the existence of any document. While it is possible to test the issue of privilege by reference to Redaction 6 in the letter of engagement, the declaration is a much wider proposition unrelated to any actual communication, whether written or oral. Indeed, the judge's order requires identification of all those who were *authorised* to give instructions to RPC, whether or not in fact they ever did so.
29. We allowed the parties an opportunity to address this point in post-hearing written submissions.
30. This led to an application by Loreley to amend its grounds of appeal to contend in addition that Request 17 was an inappropriate Part 18 request which was framed in a generalised and abstract way, and which could not be said to be "strictly confined to matters which are reasonably necessary and proportionate to enable the [requesting] party to prepare his own case or understand the case he has to meet", as required by CPR 18 PD 1.2. Accordingly Loreley should not have been ordered to answer Request 17 and the declaration made by the judge which underpinned that order should be set aside.
31. In response the Bank submitted that this argument came too late. Loreley had not appealed the order made by Mr Justice Picken which had ordered that Request 17 be answered subject only to the question of privilege, which question was then dealt with by Mr Justice Robin Knowles and is the only subject of the appeal to this court. But in any event, the orders made by the judge were conventional and appropriate. The Bank then requested an opportunity to make further submissions in response to Loreley's application to amend its grounds of appeal. However, although the application to amend was only formally made in Loreley's post-hearing written submissions, it was clear from the directions given at the hearing that the appropriateness of Request 17 was an issue which the Bank should address as a matter of substance in its post-hearing submissions, as indeed it did.

Analysis

The scope of litigation privilege

32. It is common ground that there is no authority addressing the precise issue in this case, whether the identity of those authorised to give instructions to solicitors on behalf of a corporate client is covered by litigation privilege. It is therefore necessary to consider the matter as one of principle. Fortunately, however, it is unnecessary to travel again over ground which has been thoroughly ploughed in *Three Rivers (No. 6)* and *SFO v ENRC*, two authoritative recent decisions which are binding upon us.
33. In *SFO v ENRC* at [66] this court described Lord Carswell's statement of the requirements for litigation privilege in *Three Rivers (No. 6)* as carrying the authoritative weight of the House of Lords. Lord Carswell said:

“102. 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 the 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.”

34. It is worth noting that this statement of the scope of litigation privilege is entirely concerned with communications.
35. Lord Carswell said at [85] that the object of litigation privilege was accurately described in “the classic statement” of Sir George Jessel MR in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 649:

“The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.”

36. Similar statements of the rationale for litigation privilege, in more modern language, can be found in other cases also cited in the speeches in *Three Rivers (No. 6)*: see *R v Derby Magistrates Court, ex parte B* [1996] AC 487, 507 (Lord Taylor: “... a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent”); *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736 at [47] (Lord Millett: “A lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent”); and *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 at [7] (Lord Hoffmann: “Such advice cannot be effectively obtained unless the client is able to put all the facts before the advisor without fear that they might afterwards be disclosed and used to his prejudice”). Or as Lord Rodger put it in *Three Rivers (No. 6)* at [52], “each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations”.

37. Lord Carswell added that determining the bounds of litigation privilege requires two important public interests to be balanced. While litigation privilege, when it applies, is an absolute and fundamental right (see the *Derby Magistrates Court* case), it must also be borne in mind that its effect is to deprive the court of relevant evidence:

“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 at 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*, vol 8, para 2291 McNaughton rev. 1961), 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 at 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, paras 46-7. It is not based upon the maintenance of confidentiality, although in earlier case-law that was given as its foundation. If that were the only reason behind the principle the same privilege would be extended to such confidants as priests and doctors, whereas it has been settled in a line of authority stemming from the *Duchess of Kingston's Case* (1776) 1 East PC 469 that it is confined to legal advisers: see, eg, *Cross & Tapper on Evidence*, 9th ed, pp 461-5.

38. I conclude, therefore, that in order to determine whether litigation privilege extends to the identity of the persons communicating with a solicitor in relation to litigation, it is necessary to consider whether disclosure of that identity would inhibit candid discussion between the lawyer and the client (or the person communicating on behalf of the client). If so, the identity of such persons should be privileged. But if not, to extend privilege to the identity of such persons is unnecessary and may deprive the court of relevant evidence needed in order to arrive at a just determination of litigation.
39. In my judgment, at least in general, there would be no such inhibition. The content of the communications would be privileged, but disclosure of the existence of such communications or the identity of the person communicating on behalf of the client would reveal nothing about the content of those communications. To apply Lord Rodger's test in *Three Rivers (No. 6)* at [52], disclosure of the identity of those giving instructions would not affect Loreley's ability to prepare its case as fully as possible and would not enable the Bank to recover the material generated by its preparations.
40. I would allow the possibility that, in what is likely to be an unusual case, identification of the person giving instructions to the solicitor may tend to reveal something about the

content of the communication or the litigation strategy being discussed, but that would need to be explained as the basis of a claim for privilege. I recognise that any explanation would need to be in sufficiently general terms as not to disclose the very thing which is privileged, but I see no reason why this should not be done in an appropriate case. Beyond asserting that it would be difficult or impossible, Mr Lord was only able to give his examples of instructions given by someone whose job was to settle litigation or who was known to have expertise in issues of quantum. I have to say, however, that I found these examples far-fetched (I do not think I have ever come across what Mr Lord described as a “Head of Litigation Settlement” in over 40 years’ experience of commercial litigation). If these are the best examples of the problem which Mr Lord asserts would arise, that suggests to me that the problem does not really exist.

41. I therefore accept Ms Oppenheimer’s submissions as I have summarised them at [27] above. There is in my view no support in the English authorities or in the principles underpinning litigation privilege for the concept of a “zone of privacy”. Rather, litigation privilege attaches to communications (including secondary evidence of such communications) rather than information or facts divorced from such communications. Indeed it is commonplace for the identity of a person giving instructions to a solicitor to be revealed, for example in a witness statement made by a solicitor on instructions in which he is required to set out the source of his information and belief, or in a disclosure statement under CPR 31.10, without it ever having been thought that this discloses privileged information.
42. The cases relied on by Mr Lord in this regard do not in my view provide support for the existence of any “zone of privacy”. One such case was *China National Petroleum Corporation v Fenwick Elliott* [2002] EWHC 60 (Ch). The claimants were concerned that the opposing party’s solicitor was obtaining confidential information from one of their employees or former employees with whom the solicitor was in contact as a potential witness. They sought disclosure of the witness’s identity. Sir Andrew Morritt V-C was not satisfied that there was any evidence that confidential or privileged information of the claimants had been obtained in this way. He held, therefore, that there was no basis for disclosure of the witness’s identity by way of *Norwich Pharmacal relief* (*Norwich Pharmacal Co v Customs & Excise* [1974] AC 133). He added that:
 - “45. In the normal course of proceedings a solicitor will interview and obtain proofs of evidence from all manner of potential witnesses for use in actual or prospective litigation. Both the information given and the identity of the person supplying it are confidential and privileged unless and until the privilege is waived by that person giving evidence in the proceedings or some other equivalent action. This was and is recognised in the common form claim to privilege contained in the former affidavit of documents as well as in the present disclosure statement in neither of which was or is the name of the witness who has given the proof revealed.
 46. If the information provided by and the identity of a potential witness is privileged information then the claim to privilege made by Techint must preclude the grant of the order now sought

by the Consortium. There is no evidence to justify any conclusion that the nature of the communications between Mr Fenwick Elliott and the potential witness were such as to exclude any claim for privilege. Even if it is assumed that the potential witness is an employee of OGP or the Consortium the information he is assumed to have given cannot have been imparted to Mr Fenwick Elliott in breach of duty because it is not, as between the parties to the arbitration, either confidential or privileged. Even if the information given by the potential witness indicated some earlier breach of a duty of confidence by him or another that cannot preclude privilege for the communication between him and Mr Fenwick Elliott. Frequently information given by a potential witness to a solicitor indicates the past commission of a crime or fraud but that is no ground for denying privilege in the communication; quite the opposite. If, as I conclude, the communication between the potential witness and Mr Fenwick Elliott is privileged then it must follow that the identity of the person giving the proof is similarly privileged.”

43. The case confirms that the identity of a potential witness contacted by a solicitor in the course and for the purpose of litigation is privileged, but that is readily explicable: to identify a potential witness would necessarily tend to reveal advice which the solicitor has given or will give as to litigation strategy and information about the solicitor’s preparation for trial. The case says nothing about any zone of privacy within which litigation is to be conducted. Nor does *S County Council v B* [2000] Fam 76, which was concerned with the identity of an expert witness.

The cases about facts to do with the client

44. In my view the cases concerned with whether facts to do with the client, as distinct from the content of communications concerning legal advice or litigation strategy, are subject to privilege are consistent with the conclusions which I have reached above, although the questions which they discuss are not precisely the same as that arising here.
45. In *Bursill v Tanner* (1885) 16 QBD 1 the claimant sought to enforce a judgment against a married woman and the question arose whether she was possessed of any property separate from her husband’s. A solicitor who had possession of her marriage settlement refused to state the names of the trustees on the ground that the information was privileged. The claim to privilege was rejected. Lord Esher MR said:

“Stating the names of these trustees would not, in my opinion, be stating a material part of the contents of a written instrument within the meaning of the rule of law on the subject. No doubt the trustees are named in the deed, but it is a fact de hors the deed who they are. With regard to the question whether the solicitor could refuse to disclose the names on the ground that they were communicated to him in confidence, the matter stands thus: he is in this predicament. He must allege that the communication was privileged because the trustees, his clients, made it to him in confidence, and then he cannot refuse to say who these clients

are. I agree with the opinion expressed by James LJ in *Ex parte Campbell, In re Cathcart* (1870) LR 5 Ch App 703, that the fact who the clients were was not the subject of a professional confidence. The client does not consult the solicitor with a view to obtaining his professional advice whether he shall be his solicitor or not.”

46. Lord Justice Cotton said that not everything which solicitors learn in the course of their dealings with clients is privileged from disclosure; the privilege extends only to confidential communications, which did not include the identity of the trustees.
47. More recently, in *R v Manchester Crown Court, ex parte Rogers* [1999] 1 WLR 832, the issue arose in criminal proceedings whether the defendant had left the scene of the incident in question in order to visit solicitors. An order for production of any record held by the solicitors of the defendant’s arrival time at their offices, or any record of any appointment, was made. These records were held not to be privileged. Lord Bingham CJ (with whom Mr Justice Smedley agreed) said:

“It is in my judgment important to remind oneself of the well established purpose of legal professional privilege, which is to enable a client to make full disclosure to his legal adviser for the purpose of seeking legal advice without apprehension that anything said by him in seeking advice or to him in giving it may thereafter be subject to disclosure against his will. It is certainly true that in cases such as *Balabel v Air India* [1988] Ch 317, the court has discountenanced a narrow or nit-picking approach to documents and has ruled out an approach which takes a record of a communication sentence by sentence and extends the cloak of privilege to one and withhold it from another. It is none the less true that legal professional privilege applies, and applies only, to communications made for the purpose of seeking and receiving legal advice.

In this case we must consider the function and nature of the documents with which we are concerned the record of time on an attendance note, on a timesheet or fee record is not in my judgment in any sensory communication. It records nothing which passes between the solicitor and the client and it has nothing to do with obtaining legal advice. It is the same sort of record as might arise if a call were made on a dentist or a bank manager. A record of an appointment made does involve a communication between the client and the solicitor’s office but is not in my judgment, *without more*, to be regarded as made in connection with legal advice. So to hold would extend the scope of legal privilege far beyond its proper sphere, in my view.”

48. I have emphasised the words “without more” because they have been emphasised in later judgments. Thus a record of a communication is not to be regarded as privileged without more, but Lord Bingham left open the possibility that privilege may attach if the circumstances warrant that conclusion. But there would have to be evidence to explain why that should be so.

49. It is true that the *Rogers* case, like *Burshill v Tanner*, was concerned with legal advice privilege and not litigation privilege. However, the rationale stated by Lord Bingham for legal advice privilege was the same rationale as applies to litigation privilege. The case demonstrates, therefore, that both forms of privilege are concerned with communications and do not extend to facts which have nothing to do with obtaining legal advice.
50. In *R (Miller Gardner Solicitors) v Minshull Street Crown Court* [2002] EWHC 3077 (Admin) a production order was made which extended to a solicitor's records of the client's telephone numbers. Applying *Rogers*, Mr Justice Fulford (with whom Lord Justice Rose agreed) held that this material was not privileged:

“18. The enduring principle set out in *R v Cox and Railton* (1884) 14 QBD 153, and repeated down the years, is that a client must be free to consult his legal advisers without fear of his communications being revealed. It is therefore critical for the court to look at the purpose behind the communication, because the limitations on the situations properly covered by this legal concept mean that not every communication will attract privilege solely on the ground that it is made to a solicitor. ...

...

20. That decision [i.e. *Rogers*] provides strong support, for the proposition that the provision of an individual's name, address and contact number cannot, without more, be regarded as being made in connection with legal advice. It records nothing which passes between the solicitor and client in relation to the obtaining of or giving of legal advice. Taking down the name and telephone number is a formality that occurs before the legal advice is sought or given. As my Lord observed during argument, providing these details does no more than create the channel through which advice may later flow

21. It follows, in my judgment, that the identity of the person contacting the solicitor is not information subject to legal professional privilege and the telephone numbers of the brothers, equally, are not covered by this protection; neither are the dates when one or either of those men phoned the office. Moreover, the record of appointments in the office diary and attendance notes, insofar as they merely record who was speaking to the solicitor and the number they were calling from, fall within the same category. Other details contained within the attendance notes may well be covered by legal professional privilege depending on what, if anything was discussed.”

51. These principles were applied again in *R (Howe) v South Durham Magistrates' Court* [2004] EWHC 362 (Admin), [2005] RTR 4, where a solicitor was required to say whether the defendant was the same person for whom he had previously acted.
52. These cases may be contrasted with *Ablyazov* (to which I have already referred) and *SRJ v Person(s) Unknown* [2014] EWHC 2293 (QB), both of which were rather special

cases in which there was evidence to explain the claim for privilege. Mr Ablyazov was a judgment debtor who had been found to be in contempt and sentenced to a term of imprisonment. While he was on the run, he provided his contact details to his solicitors so that they could take instructions from him and provide legal advice. Mr Justice Teare distinguished *Rogers* and *Miller Gardner* on the ground that Mr Ablyazov's telephone number and email address had been provided to the solicitors in confidence for the purpose of enabling him to seek legal advice: as he put it at [24], "the connection between the telephone number and the seeking and receiving of legal advice in the present case is clear and manifest". The defendant in *SRJ* was the unknown author of two blogs in which the claimant's confidential information had been published. The claimant sought an order that the defendant's solicitors disclose his identity. Sir David Eady referred to the cases which I have cited and held that the client's identity was privileged because it had been provided in the strictest confidence and for the purposes only of obtaining legal advice:

"27. I have come to the conclusion, in the light of the circumstances of this unusual case, and in particular the evidence given by his solicitor, that the information as to the Defendant's identity was indeed the subject of legal professional privilege and thus protected (whether "absolutely" or according to settled practice). Even if it were not, there are powerful reasons not to override the duty of confidence. It was not simply a piece of neutral background information, as would generally be the case with a client's name, since both he and his solicitor were well aware that the Claimant was keen to establish his identity (for perfectly legitimate reasons): it was accordingly central to their discussions about the retainer that confidentiality should be maintained."

53. This was a case where the client's identity was disclosed and the solicitor gave advice for the purpose of actual or contemplated litigation. Like *Ablyazov*, it was therefore a case of litigation privilege as well as legal advice privilege.

Redaction 6

54. In the light of these principles, and in agreement with the judge, I would reject Loreley's claim to privilege for the material concealed by Redaction 6. As I have indicated, the claim is advanced solely on the ground that the identity of those giving instructions on behalf of Loreley is inherently privileged. It is not suggested that disclosure of these individuals' identity will reveal the content of any advice sought or given in relation to this litigation, or that the material redacted will disclose any information apart from the identity of the individuals to whom RPC would report and from whom it would take instructions. Without more, that information is not covered by litigation privilege.

The declaration

55. However, I would set aside the declaration made by the judge that the identities of the individuals who are, or have been, authorised to give instructions to RPC on behalf of Loreley in relation to these proceedings are not subject to legal professional privilege. It seems to me that a declaration in such general terms serves little or no purpose and that the question of privilege ought to be tested, when it arises, by reference to particular

communications rather than in the abstract. If the question arises hereafter whether the identity of an individual who was party to a relevant communication is privileged, it can be answered by reference to the principles set out in this judgment.

Request 17

56. Request 17 raises different issues. As I have explained, the request for further information is not concerned with disclosure of documents, let alone the content of documents, at all. Nor is it concerned with the content of any oral communications. It is simply a request for a list of names. I would hold that the information sought is not privileged because the doctrine of privilege, which is concerned with communications, is not engaged.
57. But it does not follow, in my view, that Loreley ought to be ordered to provide this information under CPR 18. Although Loreley has conceded (subject to a legal argument that the knowledge of an agent should not be attributed to its principal) that the identity of those giving instructions in relation to litigation which commenced in 2018 is relevant to the issue whether the knowledge of IKB and/or KfW before 15th August 2012 is to be attributed to it, it seems to me that this is likely to be of only peripheral relevance. There is a spectrum of relevance, however. Not everything which is relevant is the subject of a proper request under CPR 18.
58. While CPR 18 itself is expressed in wide terms, giving the court power to order a party to clarify any matter which is in dispute in proceedings or give additional information in relation to any such matter, whether or not the matter is contained or referred to in a statement of case, the circumstances in which this power should be exercised are regulated by a Practice Direction. This provides:

“1.2 A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.”
59. This is an important requirement in order to keep litigation within reasonable bounds. It applies equally to commercial litigation where, because of the large sums involved, there can be a tendency to apply a scorched earth policy to the conduct of proceedings, as it does to any civil litigation: see paragraph D14.1(c) of the Commercial Court Guide (11th Ed, 2022), which refers to information which is “strictly necessary to understand another party’s case”.
60. It was Loreley’s submission at the case management conference before Mr Justice Picken that this requirement was not satisfied in the case of Request 17, albeit that the principal focus of Mr Lord’s oral submissions on that occasion was privilege. The result, however, was that Mr Justice Picken did not consider whether disclosure by Loreley of the identity of the individuals authorised to give instructions on its behalf was reasonably necessary and proportionate to enable the Bank to prepare its own case or to understand Loreley’s case; or if he did, did not explain why he formed the view that it was. I can understand why the request for information was dealt with in this way in the court below, at a case management conference with a crowded agenda on a busy Friday morning. The fact remains, however, that the requirement of the Practice

Direction does not appear to have been addressed. When the matter then came before Mr Justice Robin Knowles, the only topic remaining was privilege.

61. I find it hard to think that the information requested could be regarded as strictly necessary or proportionate. It is clear that the Bank already has considerable information about the roles played by IKB and KfW during the relevant period. It has been able to allege that all decisions by Loreley were in reality made by IKB; that KfW initiated and/or was otherwise involved in the decision to launch the present litigation; and that KfW “may” be providing instructions to RPC on behalf of Loreley. Further, it is accepted by Loreley that KfW is its main creditor, with security over its assets, including the claim in this action or its proceeds, and that any sums recovered in this action will ultimately benefit KfW. It appears, moreover, that pre-action correspondence on behalf of Loreley came from KfW’s General Counsel. There is no evidence, and there has been no suggestion by the Bank, that it is in any difficulty in preparing its case for trial.
62. In those circumstances, quite apart from the question of privilege, I consider that Loreley should not have been ordered to answer Request 17. It was unnecessary and disproportionate. I would not encourage such requests.
63. It is true that there was no application for permission to appeal from the order made by Mr Justice Picken. That is understandable in circumstances where his order was no more than the first stage of a two-stage process in which the question whether Loreley should be ordered to answer Request 17 would be dealt with. It would have been premature to appeal Mr Justice Picken’s order when the question whether Loreley should be ordered to answer Request 17 was still unresolved. I would therefore grant Loreley’s application to amend its grounds of appeal to contend that the request was not reasonably necessary and proportionate to enable the Bank to prepare its case or understand the case that it had to meet.

Disposal

64. For these reasons I would:
 - (1) grant Loreley’s application to amend its grounds of appeal;
 - (2) set aside the declaration contained in paragraph 1 of the judge’s order;
 - (3) set aside paragraph 2 of the judge’s order which requires Loreley to serve a full response to Request 17; and
 - (4) dismiss the appeal from paragraph 3(1) of the judge’s order which requires Loreley to produce a copy of RPC’s engagement letter with Redaction 6 removed.

Lady Justice Nicola Davies:

65. I agree.

Sir Geoffrey Vos, Master of the Rolls:

66. I also agree.

