Neutral Citation Number: [2022] EWHC 2560 (Ch)

Claim No BL-2020-001435

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

BEFORE MR RECORDER RICHARD SMITH
(Sitting as a Judge of the Chancery Division)

B E T W E E N :-

HENDERSON & JONES LIMITED

Claimant

- and -

(1) DAVID JASON ROSS

(2) STEPHEN ROGER BARNES

(3) GERARD HUGH BARNES

~~**(4) LEILA JAYNE FELLOWS SAUNDERS**~~

(5) BARCLAYS BANK PLC

(6) THE WILKES PARTNERSHIP LLP

Defendants

Jeffery Onions KC, Hugh Sims KC, Stefan Ramel and Dan Butler (instructed by Harrison Clark Rickersbys, Inc. Spreicher Grier) for the Claimant
Adam Kramer KC and Hannah Glover (instructed by Addleshaw Goddard LLP) for the Fifth Defendant

APPROVED JUDGMENT

Hearing date: 5 October 2022

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 12 October 2022 at 10.30 am.

Introduction

1. On 5 October 2022, I heard the pre-trial review in this matter (**PTR**) and made a series of orders for trial. That trial is now fixed to start on 3 November 2022 (with my pre-reading), albeit in earnest on 9 November (with oral openings). The length of trial, including pre-reading, is 18 days. I am grateful to the parties for their co-operation at the PTR.

2. On the same day, I also heard an application as between the Claimant and the Fifth Defendant, Barclays Bank plc (**Barclays**), by which the former sought orders that:-

    (a) having waived privilege therein, Barclays produce all documents involving Eversheds previously withheld on privilege grounds; and

    (b) Barclays answer Request 7 of the Claimant's Request for Further Information dated 28 February 2022 (**RFI**).

3. I am also grateful to the parties for their written and oral submissions on the applications. These were of considerable assistance.

The claim

4. The claim concerns a restructure of the Hospital Medical Group Limited (**Company**) which took place from 30 November 2012. On 9 February 2016, the Company was placed into creditors' voluntary liquidation. Barclays was the Company's bank and held security over its assets, including a legal charge over property affected by the restructure. The Claimant (as assignee of the Company's relevant claims) alleges that:-

    (a) the transactions executed as part of the restructure were unlawful distributions and transactions at an undervalue intended to defraud creditors;

    (b) the First to Third Defendants acted in breach of fiduciary and other duties, including by causing the Company to enter into the restructure transactions and causing the Company's assets to be transferred to other group companies for insufficient consideration; and

    (c) Barclays assisted in the breach of those duties, including by agreeing the restructure, permitting the transactions to proceed and by lending to the new trading company.

5. The Claimant also alleges that Barclays' assistance was dishonest in that Mr Sweeney, a director of Barclays' business support unit:-

    (a) knew that the transactions were being made at an undervalue and that the restructure would leave the Company exposed to its remaining creditors but with no assets other than an insufficient intercompany balance from its parent company;

(b) did not act as an honest person would have acted in that he facilitated, participated in, and benefitted from, transactions that he knew were intended to defraud creditors and/or unlawful distributions and/or in breach of the directors' duties to the Company;

(c) had actual knowledge or targeted suspicion that the transactions were liable to avoidance as (i) being at an undervalue (ii) defrauding creditors (iii) an unlawful distribution and/or return of capital and/or (iv) a breach of the duties by the Company's directors; and/or

(d) suspected wrongdoing by the Company and its directors.

6. The Claimant alleges, in particular, that, because Mr Sweeney was directed to consideration of the balance sheets showing how the proposed restructure would work, he was aware that its intended effect was to (i) significantly decrease the net assets of the Company (ii) waive significant intercompany balances and (iii) declare a dividend of £6 million, at the same time leaving the Company with liabilities to creditors. The above allegations are also said to found a claim in unlawful conspiracy against all Defendants.

7. Barclays denies the allegations of dishonest assistance, pleading that Mr Sweeney did not know or suspect that any directors were breaching fiduciary or other duties and that he "*did not know or suspect that any transfers and/or any movements in intercompany balances… were at an undervalue… or unlawful… nor did he know about or suspect any reduction or intended reduction in the Company's net asset position*".

The applications

8. Barclays gave disclosure on 30 July 2021, stating in its disclosure certificate that it had withheld certain communications on privilege grounds. Barclays has since served the witness statement of Mr Sweeney in which he refers to Eversheds' role as Barclays' legal adviser and states, in the context of the dishonest assistance allegations, that there was "*nothing to put me on alert*". He also refers to an e-mail of advice he received from Mr Hill of Eversheds on 26 October 2012. Mr Sweeney says he understands the e-mail to be privileged. However, even though attached, he denies the Claimant's assertion that the e-mail "*referred to*" the balance sheets. That e-mail was sent after Eversheds had raised issues concerning the restructure, following which, Mr Sweeney himself made enquiries of the Company.

9. The Claimant says that, in relation to his admitted communications with Eversheds, when Mr Sweeney's references in his statement to the role of Eversheds and its legal advice are considered as a whole and in proper context, there has been a waiver of privilege. Mr Sweeney's evidence that nothing put him "*on alert*" must include the contents of the legal advice he received. The issue of Mr Sweeney's knowledge, and what did, or should have, put him "*on alert*" cannot be fairly determined without disclosure of the legal advice. The

Claimant now seeks such disclosure. Barclays resists the application, saying that there has been no waiver.

10. The Claimant also applies for an order, pursuant to CPR, Part 18, that Barclays provide the further information sought in Request 7 of the RFI on the basis that the allegations relating to Barclays' knowledge of the restructure arise in part from the e-mail from Eversheds to Mr Sweeney attaching the balance sheets. In response to the Claimant's Re-amended Particulars of Claim (**PoC**), Barclays denied in its amended Defence (**Defence**) that the e-mail "*referred to*" those balance sheets. In light of that denial, the Claimant asked Barclays to 'clarify' whether its understanding of "*referred to*" was limited to an express reference to the balance sheets or whether that also included any reference to their contents. Barclays has refused to answer this, including on the basis the further information sought is privileged.

Waiver of privilege - legal principles

11. The parties referred me to various authorities but the relevant principles were perhaps most usefully encapsulated in the three cases discussed below. In *PCP Capital Partners LLP* v *Barclays Bank plc* [2020] EWCH 1393 (Comm), Waksman J identified (at [47]) the following overarching points:-

    (a) Legal professional privilege is a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore carefully controlled;

    (b) Generally, privileged documents cannot be ordered to be disclosed by the party whose privilege it is unless as a result of waiver;

    (c) Absent waiver, the fact that such documents might be highly relevant does not entail their production; and

    (d) Applications for documents based on waiver of privilege entail at least the following two questions:-

        (i) Has there been a waiver of privilege?

        (ii) If so, is it appropriate to order production of privileged documents other than to which reference has been made as the foundation of the waiver?

12. Waksman J also explained (at [48-49]) that it was not easy to find a "*succinct and clear definition*" of when waiver occurs beyond general statements that the waiving party has deployed the documents in some way as part of its case. However, on any view (i) reference to the legal advice must be sufficient and (ii) the waiving party must rely on that reference in some way to support or advance his case on an issue the Court has to decide. A purely 'narrative reference' to the giving of legal advice does not constitute waiver because there is no reliance upon it in relation to an issue in the case. Nor does a mere reference to the fact of legal advice and the entry into the contract the next day.

If, however, the party refers to having entered into the contract "*as a result of the advice*", there will be waiver.

13. Waksman J also considered (at [51-60]) the "*vexed question*" of waiver not arising if the reference is to the *effect* of the legal advice as opposed to its *content*. After summarising the related 'judicial disquiet', he considered the correct approach to the distinction in determining whether there had been a waiver. That distinction should not be applied "*mechanistically*" rather than viewed through the prism of (i) whether there had been reliance on the privileged material adverted to (ii) the purpose of the reliance and (iii) the particular context of the case in question. This is an acutely fact-sensitive exercise and waiver may yet occur where only the conclusion of the legal advice is stated, as opposed to the detail.

14. In this context, Waksman J referred (as did the parties to me) to *Digicel v Cable & Wireless* [2009] EWHC 1437 in which there was a real issue as to what, if anything, the relevant party was asserting by its references to legal advice and whether it was meaningfully relying on those references at all. In *Digicel*, Morgan J was faced with an application heard during the trial in which various defendants were alleged to have committed unlawful acts, including conspiracy to injure by unlawful means. At issue in the case was whether the Defendants genuinely believed their actions to be lawful. The Claimants applied for disclosure of the legal advice received concerning the lawfulness of their actions on the basis that the Defendants had waived privilege therein to advance their defence as to their suggested honest belief.

15. The disclosure application in *Digicel* was put in two ways, broadly and narrowly. The former was advanced on the basis that, having pleaded the state of mind of various Defendants as to the lawfulness of their actions, and the evidence indicating that they had received legal advice which contributed to their pleaded state of mind, it was unrealistic for the Court to make factual findings or the Claimant properly to cross-examine the relevant individuals unless the privileged material was available. It would also be unfair for the Court and the Claimant to be denied access to the legal advice which probably contributed to the views said to have been formed by the Defendants, as to which, reliance thereon was said to be irrelevant. Morgan J rejected that submission, stating that there will be a waiver of privilege if the party *deploys* the privileged material. Absent such deployment, the Court cannot override claims of privilege merely because it would be 'fair'. The Court must do the best it can to come to the right conclusion on the material presented even if relevant evident has been withheld by a party entitled at law to do so.

16. As to the 'narrow' basis, the Claimant relied on the combination of the references by the Defendants' witnesses to (i) their beliefs as to the lawfulness of their actions and (ii) the topic of legal advice being given, to say that the Court could infer that the case being put forward was that the legal advice supported those beliefs. As to the sufficiency of conduct which might effect a waiver, Morgan J referred to *Brennan* v *Sunderland City Council* [2009] ICR 470 and Elias J's dicta that "*whether waiver has occurred or not depends upon considering both what has been disclosed and the circumstances in which*

disclosure has occurred." As to the latter, a degree of reliance is required before waiver arises, albeit the line dividing reliance on the *content* of the advice from reliance on its *effect* may not lend itself to rigid definition. In *Digicel*, Morgan J considered (at [25-26]) that the concession by Defendants' counsel that the witness statements were not to be read as justifying the inference in the Defendants' favour that the legal advice supported their alleged beliefs meant there was no reliance. However, had it been necessary to decide the point, Morgan J said he would have found that there would have been no waiver because (i) the relevant witness statements did not refer to the *content* of the legal advice and (ii) as to whether the Defendants relied on the legal advice, the relevant passages from the statements either merely recorded the fact that legal advice had been given or, upon analysis, fell on the side of the line concerned with the *effect* (rather than content) of the advice.

17. Finally, Barclays referred me to the judgment of Moulder J in *PJSC Tatneft* v *Bogolyubov* [2021] 1 WLR 1612 (at [47]) for the proposition that no waiver of privilege arises where a party responds to an assertion made by the other party in the litigation as to the contents of a privileged communication:-

> "*In my view, on the authorities, the question for the court is for what purpose the communication is being referred to. There is therefore, in my view, a distinction to be drawn between reliance on legal advice where a party has chosen to put forward a positive case in reliance on that advice, and this may include a negative proposition, such as "I discussed my divorce but did not discuss the house sale", and a situation where the party in response to a case advanced by the other party denies an assertion made by the other party, "I did not discuss the house sale with my lawyer". When one considers the rationale for privilege, it must be correct that no waiver of privilege can occur by responding to an assertion by the other party as to the contents of an otherwise privileged communication. In that sense it seems to me there has been no voluntary disclosure*."

Waiver of privilege - the Claimant's position

18. The Claimant made clear that it was not arguing that, simply because Mr Sweeney's state of mind was in issue, there had been an implied waiver in respect of the legal advice he received (as that 'broad' submission had been rejected in *Digicel*). Rather, the application was based on the *reference* in Mr Sweeney's statement to, and *reliance* on, the legal advice received. As to the former, as Barclays accepts, Mr Sweeney expressly refers (at [119]) to the contents of the advice to deny that this "*referred to*" the balance sheets. As to the latter, Mr Sweeney also refers (including at [141]) to having taken advice in support of his claim that he was not alerted to anything suspicious. When considered as a whole – or 'holistically' – Mr Sweeney is referring in his evidence to, and relying upon, the contents of that legal advice.

19. The question of waiver is fact-sensitive and the correct approach is set out in *PCP*. As Waksman J noted (at [60]), if there is reference to the contents of the advice, it is probably easier to say there is waiver but, even if only the

conclusion or effect of legal advice is stated, there may still be waiver depending on the context. The context here includes the nature of the claim, namely the bank's alleged dishonest assistance in breach of fiduciary duty, a transaction defrauding creditors and an unlawful distribution or return of capital, the relevant issue being Mr Sweeney's knowledge (or targeted suspicion) of the restructure.

20. Drilling down further, the context also includes the circumstances in which the advice came into existence as shown by the (non-privileged) e-mail chain in which the (redacted) legal advice was contained, concerning changes to the Company's restructure proposal. This included a report from Eversheds to Mr Sweeney about the former's discussion with the Sixth Defendant solicitors concerning the method of transfer of a freehold property out of the Company and how it was not known what other assets were to be transferred out or why. This prompted Mr Sweeney to contact the Third Defendant to clarify what assets were to be transferred, to seek confirmation that the transfer would be at market value and to request details of the current balance sheets and restructured balance sheets to ensure there was no 'leakage' of Barclays' security. The Third Defendant responded to Mr Sweeney by explaining the transfer out of the Company of the freehold property and other assets before explaining how payment of a dividend would reduce the intercompany balances within the Company and further reduce its assets "*should it come under attack*". The Third Defendant also attached the balance sheets to his e-mail. The Sixth Defendant then provided Eversheds with a proposed board paper setting out the proposed restructure, including the transfer of freehold property and other assets, explaining how the balance sheets provided by the Third Defendant showed how the intercompany balances "*work through*". Eversheds responded to the Sixth Defendant, confirming their understanding of the position and that they were putting together an advice note for Barclays. This was followed by the (redacted) advice note which also attached the balance sheets. These showed a significant decrease in the Company's assets, waiver of intercompany balances and declaration of dividends, albeit with the liabilities remaining within the Company. Finally, Mr Sweeney confirmed that, the Company having taken legal advice on the proposed transaction, Barclays would not object to the transfers taking place, subject to its existing security remaining in place and the taking of new security apparently already discussed.

21. Drilling down even further, Mr Sweeney's evidence explains (at [99]-[118]) his apparent frustration at the proposed changes to the proposal reflected in the above e-mail chain and his interests and considerations at the time, concluding ([at 119]) that:-

> "*I took advice from Eversheds in the period between being notified of the change in structure and my response to Gerard Barnes. I understand that advice is subject to privilege, although it is wrong for the Claimant to assert that the advice referred to the balance sheets that I had been sent*."

22. The Claimant says that such reference to legal advice was clearly more than a 'narrative reference'. It referred to the *content* of the legal advice. Moreover,

as *Digicel* makes clear (at [31]), the fact that privilege has been asserted does not mean that it has not been waived. In setting out his conclusions on his view of the restructure, Mr Sweeney also states (at [127]) that:-

> "*I looked at this as a straightforward facility and corporate restructure. I saw the transfer of the Hospital at market value and I believed that this was being done by a professional and honest management team supported by a* [sic] *professional accountants and professional lawyers. The Relationship Director was very supportive of the customer. There was no immediate risk to the Bank and there was nothing to put me on alert or which meant that I suspected anything underhand. I would have been looking at the information I had at the time and whether that structure and business plan made sense to me, which they did. Because of the cash flow and profitability, there was nothing to make me suspect that this business would fail in the short term, and in fact it was successful. There was no discussion about the Company ceasing to trade. I would remember that*."

23. The Claimant says that the information Mr Sweeney had at the time included the advice from Eversheds. This is also clear later in his statement where he says (at [141]) in the context of the alleged dishonesty and collusion that:-

> "*Here, there was nothing to put me on alert. I looked at the business at a high level. The business was generating cash, it was keeping up its loan repayments. The Group had Clement Keys as its accountants and The Wilkes Partnership advising them, and the Bank had Eversheds. I was dealing with professional advisers, both on my side and the Company's side, and I thought that I was dealing with a competent and experienced management team*."

24. Although there was no reference to a specific piece of legal advice in 141, looking at 119, 127 and 141 'holistically', there is reference to the content of the legal advice received from Eversheds and its deployment to support Mr Sweeney's assertion that he was not dishonest. The Claimant says this mirrors the position in *PCP* where Waksman J noted (at [95]) the evidence of one of the witnesses:-

> "*I am certain that if anything had been proposed at the meeting which created a problem from a legal perspective,* [the lawyers] *would have said so*."

25. Waksman J considered that this meant not only that advice had been taken but that such advice was not inconsistent from a lawfulness point of view with what was proposed. Although this and other similar passages from the evidence in that case were couched in negative terms, that made no difference to the analysis. As Waksman J said (at [97]-[98]):-

> "*The examination of waiver has to be concerned with what on a fair and objective analysis is the substance of what is being referred to and its purpose – and not its form.*

> *The passages that I have referred to amounted to the assertion that whatever was done was approved as lawful by the lawyers*."

26. In relation to the passages of the evidence cited in *PCP* by the bank in opening submission, Waksman J also stated (at [99]):-

> "*Yet again, and to state the obvious, the only reason to make those assertions is to assist Barclays on the merits of its case about the legitimacy of the ASAs. Otherwise there would be no point in including it in its Opening for trial*."

27. Furthermore, in relation to the statement of another witness that he "*took comfort from and adhered to the lawyers' advice in these matters*", Waksman J concluded (at [88]) that this amounted to a general statement that he followed their advice or, more directly, the lawyers advised it was lawful. Although the contents of the advice are not quoted and, in one sense, he was merely referring to its 'effect' or 'conclusion', that may, depending on context, yet be sufficient for waiver to occur. As to reliance, the witness was clearly relying on it since he said he followed it in relation to the agreements alleged to have been shams. Such statements were not made accidentally or casually but they could only have been designed to improve the bank's position. The Claimant here says the same point arises in this case of what was not in Eversheds' advice such that he was not put "*on alert*". Although the Claimant will rely on the sequence of e-mails (noted at [20] above) to say they should have put him "*on alert*", it remains necessary to look at Eversheds' advice to see if it contained anything further to that same end.

28. According to Waksman J (at [85]), if waiver is established, the Court must decide the issue or "*transaction*" with which the waiver is concerned. Once identified, all privileged materials falling within that category must be produced. The 'transaction analysis' is driven by the concept of fairness. The playing field is not level if disclosure has only been partial. The Claimant in this case says that, when the context of the references in Mr Sweeney's evidence and what they are being used for are considered, fairness requires that the Claimant should see the advice on which he bases those assertions. In terms of the "*transaction*", the Claimant submitted (more narrowly than the draft order) that this was "[t]*he advice provided by Eversheds which he said did not put him on alert*." As the Claimant submitted forcefully and repeatedly, the position could not be 'cured' by striking out paragraphs of Mr Sweeney's statement. Since he relies in his statement on the legal advice, that statement would have to be re-cast. Even then, as Morgan J put it in *Digicel* (at [25]), Barclays would also have to make very clear that, absent reference to the advice, it was not contending for the inference that the advice contained nothing to put Mr Sweeney "*on alert*".

Waiver of privilege - Barclays' position

29. According to Barclays, Mr Sweeney was perfectly entitled to deny the various allegations of dishonesty pleaded against him and to say, without waiver of privilege, that he had legal advice. That is the upshot of Morgan J's findings on the 'broad' basis advanced in *Digicel*. It is not open to the Claimant to say that this is unreal because the advice either helped him (or not) to reach his state of knowledge or suspicion. The advice must be ignored but the Claimant can still cross-examine Mr Sweeney on his state of mind.

30. The references in the evidence relied on by the Claimant are insufficient to bring the case within the 'narrow' basis in *Digicel*. As for paragraph 141, said to be the high point of the Claimant's waiver case, there is no suggestion that Mr Sweeney is waiving privilege. He says no more there than that this was not a 'back-street' deal and that there were "*professionals all over the place*." He does not refer to legal advice. As *PCP* makes clear, there has to be *sufficient reference* to, and *reliance* on, the advice, Waksman J rejecting the possibility of an inferential reference. Mr Sweeney is not saying that, *as a result of legal advice*, there was nothing to put him on alert. He is merely saying that there were professionals on both sides (reference to lawyers' involvement not being objectionable) and that the transaction was 'above board'. By contrast, in *PCP*, there were various clear statements by the bank's witnesses that they had taken advice. Moreover, Barclays has confirmed that it is not seeking a positive inference that Mr Sweeney was not advised as to the potential illegality of the restructure. If anyone is seeking to draw an inference from the documents, and what these might suggest about the legal advice received by Barclays, it is the Claimant.

31. Finally, the Claimant's reliance on paragraph 119 is misplaced. That paragraph arises as a discrete issue and solely in response to the Claimant's pleaded averment that Eversheds' advice attached and "*referred to*" the balance sheets (PoC at [80C]) to which Barclays, in turn, responded (Defence at [52B]), making clear it was not intending to waive, and denying, by means of the *Tatneft* 'gateway', that the balance sheets were "*referred to*" in the advice. To support the pleaded Defence by way of evidence, Mr Sweeney does no more at paragraph 119 than to confirm that denial. The *Tatneft* gateway applies equally to that paragraph.

Waiver of privilege - discussion

32. As a preliminary matter, I accept that:-

    (a) Mr Sweeney's statement (at [119]) refers to part of the content of Eversheds' legal advice;

    (b) Where, as here, that advice is referred to in negative terms, privilege is capable of being waived;

    (c) The distinction between a reference to the *content* of legal advice and to its *effect* is often difficult to identify but it is not decisive in any event. There may still be waiver by reference to the latter; and

(d) Determining whether privilege has been waived is a context dependent and fact-sensitive exercise.

33. Having analysed the passages of the evidence said to give rise to a waiver, I have come to the view that, considered fairly, objectively and in proper context, they do not bear the meaning or effect the Claimant ascribes to them. Taking paragraph 119 of Mr Sweeney's witness statement first, although this refers explicitly, albeit in negative terms, to the content of legal advice, the Claimant's submissions did not, in my view, sufficiently engage with the reason why that evidence had been put forward by Barclays. In this regard, having reviewed Barclays' disclosure, the Claimant amended its PoC, including (at [80C]) to read:-

> "*It is averred that Mr Hill prepared a further advice note or communication to Mr Sweeney which he sent to Mr Sweeney some time before 8.35pm on 26 October 2015 in which Mr Hill referred to and attached the pro-forma balance sheets. ….*"

34. In response to that averment, Barclays pleaded (Defence at [52B]) that:-

(a) Mr Hill sent an e-mail to Mr Sweeney at 16.44 on 26 October 2012 (not 2015) to which the balance sheets were attached;

(b) Barclays had not disclosed that e-mail, being the subject of legal advice privilege which was not waived; and

(c) Without waiver of privilege (in reliance on *Tatneft* (at [47]), the allegation that Mr Hill referred in that e-mail to the balance sheets was denied.

35. The Claimant accepted in oral submission that the e-mail was privileged when disclosed. Accordingly, consistent with *Tatneft* (at [47]), when the Claimant made assertions in its amended pleading as to the contents of that privileged document, including its suggested reference to the balance sheets, Barclays was entitled to respond thereto. Barclays did so in minimal terms, replying only to the specific averments positively advanced by the Claimant. In my judgment, it cannot therefore be said that privilege in the contents of that document has thereby been waived. Nor, in my view, does paragraph 119 alter the analysis. In 119, repeated below for convenience, Mr Sweeney states:-

> "*I took advice from Eversheds in the period between being notified of the change in structure and my response to Gerard Barnes. I understand that advice is subject to privilege, although it is wrong for the Claimant to assert that the advice referred to the balance sheets that had been sent*."

36. Mr Sweeney's statement in the first sentence that he took advice from Eversheds – a reference to the *fact* of legal advice, not its contents - is not objectionable (*PCP* at [49]). Although the second sentence does refer (again negatively) to the content of that advice, Mr Sweeney says in his own words no more than had

already been said in the (limited) pleaded language of the Defence (at [52B]). As such, the *Tatneft* 'gateway' is again available. I must, of course, still consider paragraphs 127 and 141 in conjunction with 119. However, the way in which 119 came about is important. Mr Sweeney was not, as the Claimant suggested in oral submission, making a 'positive assertion' as to the contents of the advice received. He was, in fact, responding to the Claimant's positive assertion in the PoC (at [80C]) as to its contents. In this context, therefore, it was the Claimant, not Barclays or Mr Sweeney, that *relied on* the contents of that advice.

37. At paragraph 127, also repeated below, Mr Sweeney states that:-

> "*I looked at this as a straightforward facility and corporate restructure. I saw the transfer of the Hospital at market value and I believed that this was being done by a professional and honest management team supported by a* [sic] *professional accountants and professional lawyers. The Relationship Director was very supportive of the customer. There was no immediate risk to the Bank and there was nothing to put me on alert or which meant that I suspected anything underhand. I would have been looking at the information I had at the time and whether that structure and business plan made sense to me, which they did. Because of the cash flow and profitability, there was nothing to make me suspect that this business would fail in the short term, and in fact it was successful. There was no discussion about the Company ceasing to trade. I would remember that*."

38. Mr Sweeney's state of mind that "*there was nothing to put me on alert*" is said to have been informed by the *information* he had at the time. The Claimant says that such information included, as Barclays have accepted, Eversheds' legal advice (referred to at 119). Although that may well be true, there is no reference in this paragraph 127 to legal advice received nor anything to suggest that Mr Sweeney's reliance on such legal advice resulted in the state of mind he describes. In this regard, I am unable to conclude that this paragraph should be read as referring to the limited (negative) reference to legal advice at paragraph 119. As noted (at [36] above), that reference was only made in response to the Claimant's own positive averment about that advice and there is nothing in 127 to suggest some wider reliance thereon.

39. Finally, paragraph 141, also repeated below, states that:-

> "*Here, there was nothing to put me on alert. I looked at the business at a high level. The business was generating cash, it was keeping up its loan repayments. The Group had Clement Keys as its accountants and The Wilkes Partnership advising them, and the Bank had Eversheds. I was dealing with professional advisers, both on my side and the Company's side, and I thought that I was dealing with a competent and experienced management team*."

40. This paragraph is in the section of Mr Sweeney's statement concerned with "[a]*lleged dishonesty and collusion*" where he also states (at [139]) that "*I do*

not think I was in any way dishonest". Although Mr Sweeney does mention Barclays receiving advice, he does not identify any specific advice received. Reading that paragraph fairly and objectively, Mr Sweeney is saying that, looking both at the business at a 'high level' and considering the apparent competence and professionalism of all those involved (including, but not limited to, Eversheds), there was nothing to cause him concern or "*to put him on alert*." Although the Claimant sought to rely by analogy on *PCP*, in my judgment, the facts of this case come nowhere close, whether in terms of the reference to legal advice or Barclays' reliance thereon. In *PCP*, the statements relied upon as giving rise to a waiver concerned variously the lawyers' knowledge of, and involvement with, the agreements sought to be impugned, their awareness of, and comfort with, their commercial rationale, the reliance and trust the witnesses placed in those lawyers to identify any issues, the absence of any legal issues identified and the relevant witnesses taking comfort from, and adhering to, the advice received. The statements found to have given rise to waiver of privilege in *PCP* were significantly qualitatively different from this case. First, there is no reference in paragraph 141 to the legal advice received (merely the fact that Barclays had lawyers advising them). Nor again, is there anything in 141 to suggest some broader reliance on 119 beyond the narrow purpose described (at [36] above). As such, there was no, or no sufficient, reference to legal advice in 141. Second, there was, in any event, no *reliance* by Barclays. In *PCP*, the *only* reason for making the relevant statements was to assist the bank on the merits of its case about the legitimacy of the underlying agreements being litigated. In this case, I am satisfied that Mr Sweeney was saying no more than, with the panoply of executives and professionals (including Eversheds) involved, things appeared to be 'above board'. Even if this could be said to represent inferential reliance, the authorities are clear that this is insufficient (*PCP* at [49]).

41. I am reinforced in my view on (the absence of) reliance by the limited nature of the legal advice identified at 119. Without having to engage in speculation about the full contents of that advice, the proposition that this might not have "*referred to*" the spreadsheets, even though attached, is unremarkable and ultimately inconclusive, not "*surprising*" as the Claimant suggested. As such, it seems doubtful that reliance on the reference to that advice would have meaningfully advanced Barclays' case. Such inconclusiveness is evident from the RFI (at [7]) in which the Claimant sought 'clarification' of Barclays' Defence (at [52B]) to ask whether Eversheds' e-mail of advice "*did not expressly or impliedly refer to the attached balance sheets and did not refer to any facts or matters stated or reflected in the balance sheets*". That the Defence begs these further questions about the advice confirms, in my view, that any inference sought to be drawn therefrom as to the bank's honesty would be weak, if not tenuous, and that Barclays would have gained little by relying on it. Indeed, at the hearing, Barclays met the Claimant's concern that Barclays "*have not accepted in clear terms that in the absence of disclosure of the legal advice, the defendants could not contend for an inference that there was nothing in the advice that put Mr Sweeney on alert*"[1] by confirming that it was not so contending.[2] Even ignoring the analysis above by which I have found there was

---

1 PTR Transcript, page 137, lines 10-13.

2 See, for example, PTR Transcript, page 164, lines 4-11.

no waiver, that confirmation would, in my view, have been dispositive of the matter, just as it was in *Digicel* (at [25]).

42. For all these reasons, I reject the disclosure application. I trust the concerns ventilated at the hearing about potential disruption at trial on account of this issue have fallen away and, having found that privilege in Eversheds' advice has not been waived, both parties understand the boundaries of what is permissible in terms of questioning Mr Sweeney. If, however, there remains any uncertainty, I will address this at trial before he enters the witness box.

RFI application

43. Turning more briefly to the application for further information, the Claimant says it is merely seeking clarification of Barclays' denial in the Defence (at [52B]). Reference to the balance sheets in the advice can be express or by reference to the contents of those balance sheets. CPR, Part 16.5(2) requires a defendant to state its reasons for denying an allegation. Since Barclays has not stated the reason or put forward an alternative case, the Claimant is entitled to ask the question and, in the absence of clarification in Mr Sweeney's statement – in fact, in light of the confusion created by his further evidence in paragraph 141 - the Claimant asks the Court to order Barclays to do so. Finally, even if the Claimant is wrong on the waiver point, the RFI can still be answered without revealing the actual advice given.

44. Barclays resists the application, saying it has already answered the Claimant's pleading consistently with *Tatneft*, thereby avoiding waiver of privilege. To go beyond what is in the pleading risks the benefit of the *Tatneft* 'gateway' falling away. If the Claimant had really wanted answers to its questions, it could have amended the PoC to encompass these matters. However, had they done so, Barclays would have declined to answer on privilege grounds this fuller interrogation of what was or was not in the e-mail. The power under CPR, Part 18 is subject to any rule of law to the contrary, including privilege, as the White Book commentary makes clear (at [18.1.3]).

45. Moreover, even setting aside privilege, the request does not meet the jurisdictional threshold for CPR, Part 18, as identified in *Al Saud* v *Gibbs* [2022] 1 WLR 3082 (at [35]) since it is not strictly confined to matters necessary and proportionate to enable the Claimant to prepare its case or understand the case it has to meet. Finally, even if that threshold can be met, the request should be refused on case management grounds: Barclays' pleaded case with respect to Mr Sweeney's awareness of the financial movements relied on by the Claimant (as indicated by the balance sheets or other sources) is already clear. Any answer to the request would be meaningless without identifying the *contents* of any implied reference to the balance sheets in the advice or *which* fact and matters stated in the balance sheets were referred to in the advice. The request is also too broad and imprecise.

46. Having considered the parties' submissions, I reject the RFI application. I do so for a number of reasons:-

(a) The order would require Barclays to disclose privileged information concerning the contents of its advice from Eversheds. Having found that such privilege has not been waived, it is not open to me to use CPR Part 18 to circumvent this. The Claimant's assertion that the provision of the information sought would not lead to the disclosure of the actual advice by Eversheds is supposition but it takes matters nowhere in any event. The information sought is still constitutive of that advice and, therefore, privileged;

(b) I am satisfied that the information sought is neither necessary nor proportionate. Having regard to the matters in issue between the Claimant and Barclays, as pleaded clearly on both sides, the former will have ample opportunity to cross-examine about them, including Mr Sweeney's awareness of the balance sheets and what effect, if any, they had on his state of mind. The Claimant can do so without encroaching on Barclays' privilege;

(c) Had it been necessary for me to consider the exercise of my case management powers, I would still have refused the order: first, the origin of Request 7 is the Claimant's own language from its own pleading. The linguistic issue since identified by the Claimant could have been anticipated at the outset and the RFI avoided; second, the RFI is still not formulated in sufficiently concise or precise terms, now introducing a new (potentially ambiguous) term, "*reflected in*"; third, most importantly, the information sought, framed by reference to whether something is "*referred to*", will not meaningfully advance the determination of the real matters in issue.

47. For all these reasons, I reject the RFI application.

Conclusion/ disposal

48. In light of my findings, the Claimant's applications are both dismissed.