IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

No. CL-2021-000710

Neutral Citation Number: [2022] EWHC 2411 (Comm)

Rolls Building
Fetter Lane
London EC4A 1NL

Friday, 8 July 2022

Before:

MR JUSTICE JACOBS

(In Private)

B E T W E E N :

FORTIMAT PROPERTIES S.A. — Claimant

- and -

PINSENT MASONS LLP — Defendant

MR S. CRIBB (instructed by Wallace LLP) appeared on behalf of the Claimant.

MR S. GOLDSTONE (instructed by Kennedys LLP) appeared on behalf of Defendant.

J U D G M E N T

(via Microsoft Teams)

MR JUSTICE JACOBS:

1 This present application arises from proceedings by the claimant against Pinsent Masons, but it is related to proceedings which the claimant has brought against a large number of other parties in separate proceedings. The claim arises out of the participation of the claimant in a property development project which is sometimes known as the "Cambridge Project".

2 In the related proceedings, the claimant alleges that its investment in the project had been fraudulently misappropriated pursuant to a conspiracy involving a number of people. Amongst the people alleged to have been involved in that conspiracy is a Mr Mikhaylenko, who was marketing the project and looking for investments on behalf of these two companies in which he was involved, one known as the IV Fund and the other known as Regency.

3 The claim against Pinsent Masons arises because it is said by the claimant that Pinsent Masons negligently advised in relation to the project. The essential argument against Pinsent Masons is that they failed to identify, in different ways, that conditions precedent which were necessary to be fulfilled in order for the project to proceed had not actually been fulfilled, and that therefore the claimant should not have been advancing any money at that stage. As part of its case against Pinsent Masons, the claimant relies upon an argument that the solicitors did not properly staff the transaction with which they were concerned and that it was, in practice, carried out by people who were too junior or too inexperienced to give proper advice.

4 I say nothing in this judgment at all about the merits of either side's case. It is plain that there are going to be substantial issues between the claimant and Pinsent Masons, including as to the scope of Pinsent Masons' responsibilities. There is very little doubt, I should say, on the materials which I have seen, that Pinsent Masons were responsible to an extent for considering the documentation that was required for the transaction. But the extent to which

they were being asked to advise is a matter which will need to be resolved at trial. Plainly, there is an arguable case on the part of the claimant that Pinsent Masons were required to advise, at least to some extent, in relation to the documents with which they were concerned.

5 The present issue arises in a very unusual way. There was an earlier hearing where a number of parties wished to have a consolidated claim and, in particular, it is Pinsent Masons' desire to consolidate the claim against them with the claim which is made in the other set of proceedings, known as the "development proceedings".

6 That gave rise to a hearing which was set down for one hour before Butcher J in May 2022, in consequence of substantial and developing arguments as to whether or not there was a principled objection to consolidation. The objection which was made by the claimant was that, if there were to be consolidation accompanied by, for example, common disclosure in the two actions, that would result in the claimant having in practice to disclose privileged documents to parties other than Pinsent Masons: i.e. documents to which those other parties would not normally be entitled.

7 At the time of the hearing before Butcher J, a principal argument which was raised by Pinsent Masons as to why this was appropriate was that there was no privilege which could conceivably be maintained in circumstances where the claimant had brought these proceedings. Reliance was placed on the well-known decision in *Paragon Finance v Freshfields* [1999] 1 WLR 1183 to the effect that a party that begins proceedings waives privilege, at least as against the solicitor who is being sued. Although this appeared to be Pinsent Masons' principal point at that hearing, it is not a point which has been relied upon by Mr Goldstone (on behalf of Pinsent Masons) at today's hearing.

8 It is not necessary further to describe the details of the arguments before Butcher J, because they culminated in an order which he made, which has in turn resulted in a relatively lengthy hearing before me today. He ordered that:

> There shall be a half-day hearing ("the Privilege Hearing") as soon as practicable … in the Trinity term 2022 (if possible) to determine the issue whether there are privileged documents as between Fortimat and Pinsent Masons which the Court will need to consider at trial in order fairly to resolve Fortimat's claim against [Pinsent Masons] (in relation to which the claimant must give examples of what those documents are said to be).

9 That has resulted in witness evidence being served on behalf of both parties. Helpfully, further documentation has been disclosed by Pinsent Masons, so that the claimant could identify examples, in accordance with Butcher's J order, of materials which they contend would be privileged and which would need to be considered at trial.

10 There are three matters which I will make clear at the outset before considering what I consider to be the main issue of privilege.

11 First, I do not consider that Butcher's J order requires me to go through each document or each category of documents which has been produced in the course of the proceedings so far in order to form a view as to whether any particular document is or is not privileged. The argument in this case has convinced me that that would not be a sensible thing to do, and it might even require me to form a view on disputed documents where there is likely to be substantial issue at the trial as to precisely what their effect was.

12 It does seem to me that the issue which I am considering is a more general one, namely whether, in practical terms, there are going to be documents which are privileged which will require some consideration at the trial. Provided there is a sufficient number of such

documents or indeed, in my view, provided there is one such document which appears to be important, that would necessitate a positive answer to the question which Butcher J has posed.

13 Secondly, I should make it clear that this is not a case management conference at which I am considering the question of consolidation or whether this case can be sensibly tried together with the development proceedings or, as I sometimes call them, the fraud proceedings. Butcher J expressed the view at the previous hearing that the case cried out for what he described as consolidation. He no doubt had in mind the various techniques which a court has which might result in cases, one way or the other, being heard together, even if not formally consolidated.

14 I would wish to make it clear that, as far as I am concerned, having heard the arguments in this case, the case does indeed cry out for some sort of consolidation; because it does not seem to me to be a sensible use of court resources for the two cases to be kept separate. That is very much a preliminary view, and I have not heard full argument on that from the parties in this case and still less from any parties in the other case. But what I would make clear is that the mere fact that (as I consider to be the case) there is privilege in some documents, which will be required to be considered at trial, does not necessarily lead to the conclusion that the two cases will necessarily proceed down entirely separate tracks. This is a matter to which I may return informally at the end of this judgment with Mr Cribb, who appears for the claimant.

15 I have to bear in mind that, even though there is, for reasons which I will explain, privilege in relation to at least some of the documents which I have been asked to look at, the fact is that proceedings have been brought by the claimant and there will in due course, at least as I see it

at the moment, be no reason why, this being a normal solicitor's negligence action, the case will not be heard in public.

16 What will therefore happen, if this case proceeds to trial (which, of course, it may not) is that the critical documents in the case which are being relied upon by both the claimant and the defendant will effectively come into the public domain; because the judge will be asked to look at them and witnesses will be asked about them. In those circumstances, the claimant which has brought these proceedings should recognise that the materials which are the basis of the professional negligence claim will, if the case fights, come into the public domain in any event, irrespective of the present position as to privilege.

17 The third point which I would make at this stage is that, as I made it clear to Mr Goldstone at the start, I did not consider that it was sensible for me to form a view or to even try to form a view as to precisely which privileged documents, if privileged documents there are, will be referred to at trial. It seemed to me that it is too early and it would not be possible for me at the present stage to say: "Yes, that document is going to be referred to. No, that document is not going to be referred to."

18 As Mr Goldstone recognised in his submissions, the case is in a stage of development. Full disclosure has not yet been given. Witnesses have not given their witness statements. To determine at the present stage that any particular document will not be referred to seems to me to be an impossible exercise. I posed the question in the course of argument: could I at the present stage decide and order that any particular document should not be included in the trial bundle, that no witness could possibly refer to it in his or her witness statement, that no cross-examination could be made upon it, no counsel could make any submissions upon it, and that the judge, because it was not in the trial bundle, should not read it?

19 All of that seems to me, looking at the documents with which I have been presented, to be really a quite impossible argument to be sustained at the present stage. Having read into this case, it does seem to me that, if, amongst the collection of documents I have, there are privileged documents, those are documents which the judge is going to see, not least in order to understand the context of the case which he or she is considering. Indeed, contrary to one aspect of Mr Goldstone's submissions, the fact that certain potentially privileged documents have been pleaded is not a reason why they do not need to be referred to at trial. Any judge will wish to look at the documents themselves, not simply at the excerpts or descriptions of those documents in the pleadings.

20 I will, against that background, turn to the question which has been debated as to whether or not there are privileged documents amongst those which have been produced hitherto. I think it is undesirable in the context of the present case, where there are arguments as to the scope of Pinsent Masons' duties and responsibilities, for me to begin to express views as to the effect of particular documents which are going to be the subject potentially of substantial argument at trial. As I have said, a major issue in this case is likely to be the precise scope of Pinsent Masons' responsibilities.

21 Nevertheless, it is possible, in my judgment, to focus on a handful of documents and to form a view without any substantial difficulty that they are not only privileged, but also that they are likely to be referred to at trial and are certainly documents which have to be, at the very least, in the trial bundle. Indeed, one would expect witnesses to refer to them or to be cross-examined about them in the course of their evidence. I will refer to simply a handful of these documents without prejudice to the possibility that other documents are similarly privileged. However, in order to preserve the confidentiality and privilege in the documents which I have

been considering, the version of my approved judgment which will be available to parties other than the claimant and Pinsent Masons will be redacted in order to avoid reference to privileged details of the documents.

22 In deciding whether or not a document attracts legal advice privilege, it is sufficient for me to say that I have considered in detail the statement of principle in paragraph [111] of the judgment of Lord Carswell in *Three Rivers DC v Bank of England (No. 6)* [2004] UKHL 48. That case cites from the well-known decision in *Balabel v Air India* [1988] Ch. 317, which makes it clear that there may well be, and often will be in the case of communications between a solicitor and client, a continuum which is, as Taylor LJ said, aimed at keeping both informed so that advice may be sought and given as required. At the end of paragraph [111], Lord Carswell said that:

> "All communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal advisor of his client."

23 That is the test which, also bearing in mind *Balabel*, I apply to the documents in this case.

24 I start by considering the document at A137 of the bundle of documents prepared for the hearing. At A137 was an email from Mr Litovchenko, who was the associate at Pinsent Masons who was contacted or became involved in the transaction, having been contacted by Mr Ilya Gorbatskiy ("Ilya"), who was, as I understand it, the son of the principal individual behind the claimant company. At the stage when this email was sent, he was the principal individual behind a different company called Gattaz, which, at this point in time, was envisaged as the investor.

25 On 15 May 2018, Mr Litovchenko sent an e-mail to Ilya and a gentleman called Roman Mikhaylenko, whom I have already mentioned.

26 Mr Goldstone has sensibly accepted that, subject to one point which featured in the argument, that was a privileged communication because it was being sent by Mr Litovchenko to his client, Ilya, who had asked for some advice or at least asked for some legal assistance at that point in time.

27 The one point which has been raised is that privilege was somehow lost because the email in question went not simply to Ilya, who was the client or prospective client of Pinsent Masons at that time, but also to Mr Mikhaylenko, who was the counterparty to the proposed transaction. He was acting for the people who were seeking investment.

28 I do not consider, having seen various authorities cited to me by Mr Cribb, that that is a waiver of privilege generally. What happened, as is clear from the responsive email, is that Mr Mikhaylenko was being brought into the circle of confidence which would normally have existed simply between Pinsent Masons and Ilya, who was its client. It is perfectly permissible for people, who are not clients, to have advice shared with them. In a commercial transaction, that may happen from time-to-time and it happened in this case.

29 However, there is no basis, in my judgment, for Mr Goldstone's submission that what happened here was a general waiver which went beyond simply bringing Mr Mikhaylenko into the circle of confidence. That is clear from the response to that email.

30 That then appears to set the scene for what happened thereafter, with Pinsent Masons communicating on occasions with both Ilya and Mr Mikhaylenko. But I do not accept that

there is anything in the communications which permitted Pinsent Masons to communicate with others outside the circle of confidence. It became clear in due course that that circle of confidence included a lawyer who was assisting Mr Mikhaylenko. But there is nothing to suggest that they were entitled to communicate with other people, including many of the other parties to the fraud proceedings. In fact, there is no evidence that Pinsent Masons ever did so.

31 I therefore come to the clear conclusion, looking at that document alone, that the e-mail sent on 15 May 2018 at 20.10 is privileged. In my judgment, the response to it is part of the ordinary continuum of communications between lawyer and client. The response is, therefore, itself a privileged response. The fact that both the original email and the response are copied to Mr Mikhaylenko does not mean that the claimant has lost its privilege.

32 The matter then moved on, in terms of the documents which I have, to a document which is in the bundle at page A139. This was an internal communication between various lawyers within Pinsent Masons. It related in general terms to the task on which they were engaged.

33 It seems to me that that is a document which is itself clearly privileged.

34 I can move then forward to a much later document. At some point in time, the deal that was to be done with Gattaz was changed, so that the deal was now to be done by the current claimant. Although Pinsent Masons had been involved for some time, that then led to the drafting of an engagement letter, initially for Gattaz and then subsequently for the claimant itself.

35 I have read the terms of that engagement letter, and it suffices to say that this document too is, in my view, a privileged document. It is not a document which, as I understand it, went to Mr

Mikhaylenko. But, in any event, even if it had, he would have been within the circle of confidence. It identified the advice which the client was seeking and indicated what it was that Pinsent Masons proposed to do.

36 I do not consider that the somewhat belated argument advanced orally by Mr Goldstone, that this document was in the public domain, is an argument that can be sustained. The document may have been referred to in the claimant's pleading, but it has never been exhibited or, as I understand it, produced to anyone in the outside world. It is, therefore, not necessary for me to engage in what the position would have been if it had been annexed to the pleading or otherwise provided to other parties.

37 The next series of documents relate to the time when Pinsent Masons sought payment from their client to enable the investment to be made. I am satisfied that, again, subject to any argument about public domain, that was a privileged communication. Mr Goldstone has submitted that one can treat that and other documents as being simply matters of process. But I do not consider that, in the context of a transaction where a transactional lawyer is engaged to look at documents, and to see the transaction through to a conclusion, that sort of distinction is a helpful or relevant one.

38 I go back to the words of Lord Carswell, namely "Is the communication directly related to the performance by the solicitor of his professional duty as legal adviser of his client?" If one gets to the stage where the transaction on which the transactional lawyer has been working is being consummated, then there can be no real doubt that advice given in relation to the consummation of the transaction is directly related to the performance by the solicitor of his professional duty.

39 There is an argument here that the relevant communications concerning the consummation of the transaction are in the public domain. That has given rise to brief submissions based on a passage in *Hollander: Documentary Evidence.* I will not express any final view on that particular point in relation to these documents. It is a matter which may need to be considered more carefully in due course. But, in relation to the documents which I have previously described, they are sufficient to give a positive answer to the question raised by Butcher J.

40 It also seems to me that there are two general points which Mr Cribb made which had particular force. First, I do agree with his general point that it would be very surprising indeed if, in the context of a professional negligence action, the case could be decided without looking at privileged documents passing between the client and the solicitor. Anyone who has done a professional negligence action knows that that is at the heart of what the case is all about. That is reflected in the important decision in *Paragon*, where the court decided the extent to which the bringing of an action in professional negligence amounted to a waiver.

41 Secondly, and again as a general point, I accept Mr Cribb's submission that, when one looks at the pleadings in this case, there is an issue which is pleaded and which is in play as to whether or not Pinsent Masons adequately staffed this particular work. That is likely to require consideration of the bills of Pinsent Masons, in conjunction with looking at their time records, to see who was doing what. I say that without prejudice to any arguments that may be advanced in due course as to whether such disclosure is actually required. But certainly, as it seems to me at present, where there is an issue on the pleadings as to whether or not a particular transaction was adequately staffed, it is highly likely that that will require those sorts of documents or at least some subset of them to be produced. Documents of that kind, the bills presented to the client, the billing records or other materials which evidence the

amount of work that was done, are themselves privileged documents, or at least they contain privileged material.

42 I am certainly unable to form a view at the present stage, as Mr Goldstone really invited me to do, that such documents are not going to feature in this case. The claimant may well wish to make points about the way in which this transaction was staffed. The defendant can, no doubt, make the point which Mr Goldstone made, which is that that is not really what the case is all about, and that the work was either good or it was bad. But that is an argument which is to be had in due course and each side can put its own case, and the judge will have to decide the relevance of those documents.

43 So, for all those reasons, it seems to me that the claimant has established that there are privileged documents for which privilege has been retained, notwithstanding a degree of dissemination of some of the documents to Mr Mikhaylenko and his colleague. In those circumstances, the answer to Butcher's J question is, "Yes". That is all that I need to say at the present stage.

CERTIFICATE

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