



Neutral Citation Number: [2019] EWHC 1834 (Comm)

Case No: CL-2018-000829

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

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

Date: 12/07/2019

Before:

THE HONOURABLE MRS JUSTICE MOULDER

Between:

SKYMIST HOLDINGS LIMITED

**Applicant/
Intended
Claimant**

- and -

GRANDLANE DEVELOPMENTS LIMITED

**Respondent/
Intended
Defendant**

**Mr D Matthews QC & Mr T Leary (instructed by Stephenson Harwood LLP) for the
Applicant/Intended Claimant**
**Mr J Selby QC (instructed by Goodman Derrick LLP) for the Respondent/Intended
Defendant**

Hearing dates: 26 June 2019

APPROVED JUDGMENT

Mrs Justice Moulder :

1. This is the judgment on the application of Skymist Holdings Ltd (“Skymist”) of 5 March 2019 seeking an order requiring Grandlane Developments Ltd (“Grandlane”) to “comply fully” with the pre-action disclosure order made by Teare J on 22 February 2019.
2. In support of the application the court had witness statements of Mr Duncan Bagshaw and Mr Alan Bercow, both of Stephenson Harwood LLP (“Stephenson Harwood”), on behalf of Skymist dated 5 March and 30 April 2019, respectively.
3. In response were two witness statements of Mr Richard Bailey, partner at Goodman Derrick LLP (“Goodman Derrick”), acting on behalf of Grandlane, dated 27 February and 18 April 2019 (together with his earlier witness statement of 15 February 2019 in response to the original application for pre-action disclosure).

Background

4. Skymist is a company controlled by Mrs Baturina who sought to develop a property known as Beaurepaire Park. Mrs Baturina engaged Grandlane to provide development management services for the development of the property. In the course of developing the property, Grandlane hired a firm of architects, PTP Architects London Limited (“PTP”), for whom the contract was between PTP and Grandlane. Part of the arrangement between Skymist and Grandlane required that Skymist indemnify Grandlane for any sums owing to third party contractors, which in this instance is PTP.
5. On 27 October 2017 Skymist terminated Grandlane’s appointment.
6. Grandlane sent an initial letter of claim on 27 November 2017 from its then solicitors Joseph James Law. Skymist did not respond.
7. On 18 May 2018 Grandlane had what it says was its first meeting with its current solicitors, Goodman Derrick.
8. On 19 July 2018 Grandlane sent a letter of claim seeking the sum of approximately £1.9 million from Skymist of which £1.12m related to PTP’s fees.
9. Skymist responded on 9 August 2018 rejecting the claim.
10. On 10 August 2018 Grandlane commenced adjudication proceedings.
11. Skymist subsequently objected to the adjudicator’s appointment on jurisdictional grounds and on 29 August 2018 the adjudication was discontinued.
12. On 31 August 2018 Grandlane commenced fresh adjudication proceedings.
13. On 7 September 2018 Grandlane served a referral notice. On 17 September 2018 Skymist served its response.
14. On 27 September 2018 Skymist commenced Part 8 proceedings seeking a declaration that the adjudicator had not been validly appointed.

15. On 12 November 2018 a decision was given by the adjudicator in favour of Grandlane.
16. On 10 December 2018 the Part 8 proceedings were heard and judgment was handed down on 19 December in favour of Grandlane.
17. On 21 December 2018 Skymist commenced proceedings for pre-action disclosure.
18. On 3 January 2019 Grandlane commenced proceedings to enforce the adjudication award.
19. An order permitting Grandlane to enforce the award was granted by Jefford J following a judgment of 29 March 2019.
20. Skymist now propose to bring proceedings to assert that Grandlane acted in breach of duty in working with PTP to bring a claim for fees.

Order of Teare J

21. On 22 February 2019 Teare J granted Skymist pre-action disclosure ([2019] EWHC 659 (Comm)). The order required documents in the following categories to be provided to Skymist's lawyers by 5pm on 27 February 2019: all non-privileged documents containing/evidencing all communications between Grandlane (and/or Mr Deinis of Grandlane and its lawyers) and PTP before or after 9 November 2017 concerning:
 - i) the termination of PTP's appointment contract with Grandlane on 9 November 2017;
 - ii) PTP's claim for fees contained in PTP's invoice/letter dated 17 July 2018 addressed to Grandlane;
 - iii) the adjudications between Grandlane and Skymist and the decision reached by the adjudicator dated 12 November 2018.
22. The order also provided that, where documents were excluded, Grandlane must notify Skymist and provide a list in respect of each document over which privilege is claimed along with an "adequate explanation" of the privilege relied upon, including the nature of the privilege and the facts relied upon.

The Application

23. In its application before this Court, Skymist seeks an order that Grandlane be required to "comply fully" with the original order of Teare J by providing all of the documents falling into the categories set out above which have not already been provided.
24. The draft order then goes on to require 4 categories of documents which were not set out in the original order but which Skymist submit should be ordered to be provided "for the avoidance of doubt" and in compliance with the original order. These categories are:

- i) any documents which demonstrate the existence and terms of an agreement between PTP and Grandlane as to the basis on which Grandlane would pursue PTP's claim by way of an indemnity claim in the adjudication against Skymist;
 - ii) any documents by which Grandlane sought to establish, diminish or augment PTP's claim against Grandlane;
 - iii) any notes or record of the meeting held on 18 May 2018 between Grandlane and PTP;
 - iv) any notes or record of any other meeting or telephone call between Grandlane and PTP.
25. The draft order also requires Grandlane to provide all documents which, in relation to the original order, it had asserted a right to withhold inspection, i.e. over which Grandlane has asserted privilege (paragraph 8 of the draft order).
26. The issues for this court are therefore
- i) Should Grandlane be ordered to "comply fully" with the original court order?
 - ii) Should Grandlane be ordered to provide each of the four categories of documents now sought?
 - iii) Should Grandlane be ordered to provide all documents which, in relation to the original order, it had asserted a right to withhold inspection, i.e. over which Grandlane has asserted privilege?
27. The focus of both the written skeletons and the oral submissions was on the issue of whether the documents are privileged (Issue iii). Further the draft order which is now being sought by Skymist was submitted immediately before the hearing, and therefore the witness evidence for both the applicant and the respondent does not directly address matters according to the four discrete categories which are now sought by paragraph 2 of the draft order. However, subject to those limitations the court will address all three issues.

Should Grandlane be ordered to "comply fully" with the original court order?

Submissions

28. Counsel for Skymist submitted that the reason why such a course of action is necessary is due to the failings and omissions of Grandlane in complying with the original disclosure order and the blanket assertion of litigation privilege without any proper justification.
29. The submission of "failings and omissions in complying with the original disclosure order" appears to relate to:
- i) the notes of the meeting dated 18 May 2018; and
 - ii) nine emails exchanged between Mr Bailey and Mr Patel of PTP on 20-22 November 2018, the content of which concerned discussions relating to a

barrister's fee, namely PTP offering to pay Grandlane's solicitors for the barrister's fee of the Part 8 proceedings discussed above. Privilege was originally asserted but upon challenge by Stephenson Harwood the emails were subsequently provided by Grandlane on 29 April 2019 in redacted form.

30. Skymist submitted that the failure to properly list these emails concerning the barrister's fee demonstrates that "something has gone badly wrong with Grandlane's document review process in purported compliance with the order" (paragraph 11 of Mr Bercow's witness statement).
31. To this end, it had earlier been suggested by Skymist that an independent barrister should be instructed to go through the disclosure to ascertain which of the documents were genuinely entitled to protection via privilege, but this offer was declined by Grandlane.
32. Skymist also submitted that the disclosure exercise was inadequate in that Grandlane have adopted an approach of "dumping" documents on Skymist.
33. Finally, Skymist rely on alleged past failings to comply with disclosure requests.
34. Counsel for Grandlane submitted that:
 - i) the disclosure exercise was carried out at short notice and that, under the terms of the original order, Grandlane had only three working days in which to compile and list the relevant documents for disclosure. As a result, a number of communications with regard to counsel's fees, as discussed above, were listed both for inspection and as privileged and on account of the duplicate listing were not disclosed. However, when the issue was highlighted the problem was remedied within 24 hours and the documents were provided;
 - ii) it is neither necessary or proportionate to re-run the search: the aim of pre-action disclosure is to mitigate the costs of future proceedings but the costs incurred by Skymist are already approximately £600,000 (Bailey third witness statement, paragraph 14).

Discussion

35. Disclosure was provided on 27 February 2019 in compliance with the order of Teare J in the form of five lever arch files (paragraph 35 of Jefford J judgment). The documents relating to the barrister's fees on the Part 8 application had been listed as both to be disclosed but also in the list of privileged documents and therefore were not provided to Skymist. Upon being notified that the documents had failed to be produced for disclosure, Grandlane subsequently confirmed that the documents were not covered by privilege and accordingly disclosed them (third witness statement of Mr Bailey, paragraph 44). Given the short time for compliance with the order of Teare J and the fact that the documents were in fact identified, I do not accept that this demonstrates that "something has gone badly wrong" with the process undertaken by Grandlane.
36. In my view, any failings in relation to the claim for privilege including the claim to privilege for the notes of the meeting of 18 May 2018, should be addressed in relation

to the claim to privilege and is not evidence that supports a conclusion that the disclosure exercise should be ordered to be redone. The refusal by Grandlane to agree to have an independent review of the documents over which privilege is asserted is not relevant to the issue of whether the review exercise was properly carried out and whether disclosure should be redone. There was no obligation on Grandlane to agree to such a course.

37. The alleged “past failings” in relation to the disclosure have no relevance to the question of whether the court should order the disclosure exercise ordered by Teare J to be re-run. The complaint in this regard by Skymist relates to requests by Skymist with which Grandlane had no obligation to comply. In any event on the evidence no such “failings” are made out. The “request” by Skymist for disclosure in the period from September to December 2018 was refused on the basis that there was no obligation on Grandlane in the adjudication proceedings to do so. However, some disclosure (60 pages of emails and the termination letter of 9 November 2017) was then made in December 2018 in response to a request for pre- action disclosure which then led to the application for pre- action disclosure before Teare J (Bailey first witness statement, paragraphs 15-17).
38. Further, I do not accept the submission that by disclosing more than may have been necessary Grandlane have avoided their disclosure obligations in respect of certain categories of documents. Mr Bailey's explanation (paragraphs 6 and 9 of his second witness statement) is that wider disclosure was given by Grandlane as it had been suggested that Grandlane was trying to hide something and documents were therefore disclosed to address the allegation that there were "strange gaps". I do not therefore accept the submission that Grandlane were seeking to avoid their obligations as it is contrary in my view to the evidence. Given the stated broad approach, it is less likely in my view that the further documents alleged to have been omitted from the disclosure, do in fact exist.
39. For these reasons and having regard to the overriding objective, in my view it would not be proportionate or in the interests of justice to make an order which in effect would require Grandlane to re-run the disclosure exercise. I therefore decline to make an order requiring Grandlane to "comply fully" with the original court order.

Should Grandlane be ordered to provide each of the four categories of documents now sought?

40. It was submitted for Skymist that this application merely seeks to enforce the existing order as to which Teare J was satisfied that the test for pre-action disclosure was satisfied. Accordingly, it was submitted that this order should be granted as it is to police the existing order. It is far from clear to this court that the specific categories which are now sought were within the original order but insofar as the respondent appears to oppose the application only on the basis that all relevant documents have already been disclosed, I will consider the application to order disclosure of the four categories on that basis.

Any documents which demonstrate the existence and terms of an agreement between PTP and Grandlane as to the basis on which Grandlane would pursue PTP's claim by way of an indemnity claim in the adjudication against Skymist.

41. It was submitted for Skymist (the second witness statement of Mr Bercow) that there were a number of emails which reference an 'agreement' with respect to the above:

i) an email exchange on 17 July 2018 between Mr Deinis and Mr Patel in which Mr Deinis stated:

"...we will issue claim letter tomorrow. I have paid Richards services [Richard Bailey] for the claim documents draft and initial response. As agreed we need to discuss our financial arrangements for the purposes of adjudication as we have substantial bill from your firm. Let's speak tomorrow" [Emphasis added]

and Mr Patel's response which read:

"as explained before we are agreeable to paying costs the adjudication. We agree we should talk and agree whatever is reasonable so there is no confusion. We can seek an estimate from Richard for the adjudication costs". [emphasis added]

ii) an SMS from Mr Deinis to Mr Patel on 27 September 2018 in which Mr Deinis said:

"I also have a bill from Mr Silver first adjudicator, shall we split it as agreed?"

Mr Patel replied:

"yes we can split. I will call you."

iii) on 20 November 2018 Mr Patel sent an email to Mr Deinis asking Mr Deinis to "forward [him] a copy of invoice from GD relating to adjudication".

42. It was further submitted for Skymist that at no stage have Grandlane disclosed the terms on which Grandlane agreed with PTP to pursue its claim against Skymist either the basis on which they have agreed to share costs or to share in the proceeds. The emails concerning the payment of the barrister's fees on the Part 8 claim demonstrate that there was cost sharing but not the agreement pursuant to which those costs are paid. It was submitted that it was "likely" that terms were discussed at the meeting on 18 May.

43. In his witness statement Mr Bagshaw states (paragraph 14 and 15) that:

"[14]... an agreement is "very likely to have been recorded in writing to avoid, as Mr Patel put it, any "confusion" and because any solicitor would advise that such an agreement ought to be recorded in writing"

“[15]...as a matter of practicality, and probably to ensure that [Goodman Derrick] were aware of the source of funds used to satisfy the invoices (as any solicitor ought to be), an agreement for Grandlane and PTP to share the costs incurred by GD in the adjudication is very likely to have been recorded in writing.”

44. In response it was submitted on behalf of Grandlane that:
- i) documents have already been disclosed evidencing this agreement and there is nothing in the disclosed documents that suggests there are further documents evidencing or recording any agreement;
 - ii) although agreements may be formally recorded in writing they are not necessarily so recorded: the emails concerning the barrister’s fees show that there was no master agreement which govern the payment of costs incurred;
 - iii) it is speculation on the part of Skymist that further agreements exist;
 - iv) Mr Bailey has confirmed that all relevant correspondence was disclosed.

Discussion

45. The evidence of Mr Bailey (paragraph 18 of his third witness statement) is somewhat confusing in its hypothetical assertion that Grandlane would not need to reach an agreement with PTP to share part of its claim but it appears to be addressing the issue of sharing the proceeds of any claim rather than costs. It seemed to be accepted by counsel for Grandlane that an agreement as to costs had been reached but it was his contention that there was no formal agreement and disclosure was complete.
46. The application for this particular category of documents has to be viewed in the light of my findings above, rejecting the general assertion of Skymist that “something has gone badly wrong” with the process.
47. Despite the volume of the disclosure to date and the specific emails indicating oral discussions, Skymist have not identified any documents which suggest that there is likely to be further documents which relate to an agreement between PTP and Grandlane as to the basis on which Grandlane would pursue PTP’s claim. The evidence of the email exchange on 17 July 2018 indicates that no agreement had been reached at the meeting of 18 May and that oral discussions were proposed. Further Mr Bailey expressly states (paragraph 31 of his third witness statement) that all relevant correspondence relating to the meeting of 18 May has been disclosed.
48. The email of 20 November 2018 concerning the payment of adjudication fees supports Grandlane’s submission that there was no general or master agreement in place. The email from Mr Patel to Mr Bailey reads:

“... since the decision is in favour of PTP fees, we are minded to assist financially on this matter. As mentioned it is our intention (subject to my discussion with my partner) to pay the barrister’s fees... This will be on the understanding no further payments from GD will be payable by GDL till after the

decision at TCC on issue of jurisdiction... It is most likely PTP will cover your full invoice for adjudication once we receive the awarded amount. We are aware if TCC is successful all SD and barrister's fees will be payable by Skymist.

Please confirm you are in agreement with the above, that will allow me to discuss with my partner...

... We reserve our position to recover (any payment you make directly to you on this matter) from GDL at any time. We are taking this course of action to protect our position as we see it will benefit PTP, as there is a strong possibility of success.”
[emphasis added]

49. It was submitted that the barrister's fees may not have been covered by the original agreement and that it was surprising that Grandlane had not stated expressly in its evidence that there was no agreement. However, in the light of the fact that this category was not specifically sought by the original application, it is in my view not surprising that it was not addressed in the evidence.
50. In my view the explanations advanced by Mr Bercow to support Skymist's case of a written agreement rest on speculation and are not supported by the evidence of the contemporaneous correspondence.
51. For all these reasons I do not accept the submission that there has been only partial or “patchy” disclosure to date and I decline to make the order sought for disclosure of this category of documents.

Any documents by which Grandlane sought to establish, diminish or augment PTP's claim against Grandlane

52. This particular category of documents was also not specifically identified in the original application and the original draft order so is not addressed in the witness statements.
53. Counsel for Skymist referred to the proposed claims against Grandlane, as set out in paragraph 52 of his skeleton argument for the hearing before Teare J (but stating that paragraph 52(c)(i) was no longer pursued in the light of the ruling of Jefford J). That skeleton identifies the proposed claim against Grandlane as a fiduciary claim in respect of Grandlane's alleged breaches of fiduciary duty or implied duties of good faith in failing to properly assess PTP's claims before passing them onto Skymist and/or agreeing with PTP to pass on PTP's claim to Skymist knowing that it was overvalued or contained a secret commission or profit for Grandlane or Mr Deinis. Skymist also appeared still to be pursuing a conspiracy claim that Grandlane and PTP colluded in presenting a fraudulently inflated claim for PTP's fees notwithstanding observations in the judgment of Jefford J (paragraphs 91-93) which might suggest the contrary. Counsel submitted that Jefford J was concerned with a different test on the application to enforce the adjudication award.
54. Counsel for Skymist submitted that he was seeking an order for compliance with the order of Teare J. Counsel submitted that:

- i) there must have been some form of agreement between Grandlane and PTP: counsel relied on the email from Mr Deinis to Mr Patel dated 8 June 2018 in which he stated:

“...It is time to build a claim against Skymist.

I had another meeting with Richard and we came to agreement that Skymist is the employer.

I will call on Monday if you are available.”

- ii) There were “lots of gaps” in the correspondence disclosed, in particular the period from 17 October to 31 October 2018 and then a further gap until 17 November 2018. Counsel submitted that since according to the evidence of Mr Bailey, the adjudication required “frenetic activity” there should be correspondence in these periods.

55. It was submitted by counsel for Grandlane that:

- i) There is nothing to suggest that there are gaps in disclosure or that further documents exist which have not been disclosed; Grandlane and PTP agreed very early on in the time line to proceed against Skymist collectively and thus that there are very limited documents which evidence Grandlane and PTP discussing any prospective claims against one another. This is supported by communications sent between Grandlane and PTP in November and December 2017 which have already been disclosed and which demonstrate a consistent pattern of the parties working together from the beginning against Skymist to recover their fees.
- ii) Documents have already been disclosed which show the documents by which Grandlane sought to establish the claim against PTP: Counsel referred to emails of 19 June and 21 June 2018 from Mr Deinis to Mr Goddard of the quantity surveyors Leslie Clark [9/764 and 767]. On 19 June Mr Deinis wrote:

“...so my point is, if you are going to make calculations and estimate for PTP we should be in line with known values, as per tender pack, plus potential cost of the finishes. I believe PTP has escalated [pounds per square-foot pricing] up to £800 and this is not exactly right...”

please give me your thoughts”

On 21 June Mr Deinis wrote to Mr Goddard, copied to Mr Patel of PTP:

“As we are going for adjudication, there is no doubt others party will look at this project stage by stage.... Client was aware of the cost and fully accepted.”

Later we have received instructions to amend the scheme to the current planning consent. ...

In my opinion we could calculate this project costs as we wish but I would rather put myself in other party shoes for a moment and looked at this as a proportions (sic).

We can submit the highest anticipations in terms of finishes for example but it could be not accepted, as we never had a complete design....

You can easily spend around £1000 per sqf but if we are about to make an indicative assumptions, we should look at the market around.

That's my view”

Counsel also relied on an email on 17 October 2018 from Mr Patel of PTP to Mr Bailey and Mr Deinis [10/939]:

“We have now discussed this matter with Richard [Bailey] who has agreed that I should let you have the attached submission. I am sure you will review and have an idea on what to consider, however it should include comments on the following points

BCIS average – guides are not appropriate as used for one off housing.

Ponting... is suggesting a rate of £350 square-foot for listed building refurbishment. Then he goes on to say he accepts £2.7 million PTP figure for the KKR works. This only leaves £316k for completing the fit out. He does not say if the whole of existing wing can be fitted out this amount...

The bad news is that the deadline for submission is Monday. So your input in draft or what you can help with needs to be done by Friday ideally”

Finally, Grandlane have also disclosed an email dated 21 May 2018 to PTP which states that Grandlane “would like to finalise our final account one more time to make sure we are on the same page”. It then refers to certain detailed invoices, confirming the “outstanding payments” and requests the issue of a credit note.

Discussion

56. Whilst it is clear why Skymist are seeking these documents as pre-action disclosure, as referred to above, the evidence before this court demonstrates that Grandlane have disclosed documents that relate to the calculation of the claim by PTP. There is nothing to support the submission that there are documents that have not been disclosed in this regard, other than the general assertion as to inadequate disclosure which I have already rejected for the reasons discussed above. Whether or not the email of 8 June 2018 bears the interpretation for which Skymist contend (as to which I note in passing the observations of Jefford J at [69]), if Skymist were correct as to

their interpretation, the disclosure of such an email does not indicate that Grandlane have been failing to disclose documents which they should have disclosed. The “gaps” which counsel for Skymist relied upon need to be viewed against the background of the timetable of the submissions in the adjudication (paragraph 28 of Mr Bailey’s third witness statement): Grandlane filed its supplemental surrejoinder on 22 October 2018, there was then no further submissions from Grandlane but Skymist filed a rebuttal letter on 30 October 2018 and a further letter on 2 November 2018. The decision of the adjudicator was issued on 12 November 2018 which is then attached in the email of 17 November 2018. Against that background it seems to me that the “gaps” are not suggestive of any missing correspondence or documents.

57. For these reasons I decline to make the order sought for disclosure of this category of documents.

Notes / records of the meeting held on 18 May 2018 between Grandlane and PTP.

58. As explained in the second witness statement of Mr Bagshaw, five emails were disclosed demonstrating that the meeting took place at the offices of Grandlane and that Mr Bailey was present.

59. Skymist seek any minutes or notes of the meeting. Mr Bagshaw claims that:

"it is virtually certain that there is a note of the meeting on 18 May 2018. It is also likely that there are other notes and other documents which fall within the category of documents which should have been disclosed" (paragraphs 21-23).

60. In response to this request, Mr Bailey in his third witness statement states (paragraphs 31-32) that all of the documents which are disclosable have already been provided in relation to the meeting on 18 May and that litigation privilege applies as the dominant purpose of the meeting was the “threat of adjudication and the intention to commence an adjudication against Skymist on behalf of Grandlane”.

61. The appropriate order in respect of this category depends on whether there is a valid claim to privilege as discussed below.

Any notes/other records of any other meetings/telephone calls between Grandlane and PTP.

62. It was submitted for Skymist that it was “improbable” that there were no other meetings: the notes of the meeting of 18 May had not been disclosed and there were clear gaps in the documents disclosed.

63. Grandlane submit that there are no further notes/records of meetings to be disclosed and no evidence to suggest that there were other meetings.

64. The evidence of Mr Bailey (third witness statement at paragraphs 31 and 32) is:

"other than the meeting on 18 May, there were, as the disclosure already provided made clear, no other meetings between Grandlane, PTP and myself either (a) prior to the issue of the invoice or (b) during the correspondence between the Notice of Adjudication and the Response".

“with regard to the 18 May meeting this was in fact my first meeting with Grandlane...”

65. It is evident from the witness statement of Mr Bagshaw (paragraph 21) that documents which showed that a meeting took place on 18 May 2018 were disclosed and Mr Bagshaw sets out the emails in this regard. Mr Bagshaw’s complaint on behalf of Skymist is that no note has been produced of that meeting. It is therefore clear on this evidence that disclosure has been made of such documents that existed in relation to the meeting of 18 May (other than the notes of the meeting) and consequently there is no reason to reject the evidence of Mr Bailey in this regard and to infer (contrary to that evidence) that documents in relation to other meetings would have been withheld. The issue in relation to the notes of the meeting of 18 May is a question of whether privilege can be claimed and does not support Skymist’s application that the court should make an order for documents to be disclosed in respect of other meetings. The issue of “gaps” has already been considered and rejected above. It does not support the contention of Skymist.
66. For these reasons I decline to make the order sought for disclosure of this category of documents.

Should Grandlane be ordered to provide all documents which, in relation to the original order, it had asserted a right to withhold inspection, i.e. over which Grandlane has asserted privilege?

Relevant law

67. Hamblen J in *Starbev GP Ltd v Interbew Central European Holding BV* [2013] EWHC 4038 (Comm) set out the law as applicable to litigation privilege at [11]-[13]:

“11 The legal requirements of a claim to litigation privilege may be summarised as follows:”

(1) The burden of proof is on the party claiming privilege to establish it - see, for example, *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258 at [50].

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible - see, for example, *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* (14 February 2001) at [30] and [39] (Andrew Smith J); *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) at [52], [53], [86] (Beatson J); *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB) at [52] (Eder J).

(3) The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient

to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation - see, for example, *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 at [68]; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at paras [19] - [20]. As Eder J stated in *Tchenguiz* at [48(iii)]: "Where litigation has not been commenced at the time of the communication, it has to be 'reasonably in prospect'; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility".

(4) It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied: *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 , 589-590 (cited in *Tchenguiz* at [54]-[55]); *West London Pipeline and Storage Ltd v Total UK Ltd* at [52].

[12] In relation to the Court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence "to "anxious scrutiny" in particular because of the difficulties in going behind that evidence" - per Eder J in *Tchenguiz* at [52]. "The Court will look at 'purpose' from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose" - *ibid.* 48(iv). Further, as Beatson J pointed out in the *West London Pipeline* case at [53], it is desirable that the party claiming such privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect".

[13] As was further stated by Beatson J in the *West London Pipeline* case at [86]:

"(3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:

(a) the statements of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed: *Frankenstein v Gavin's*

House to House Cycle Cleaning and Insurance Co , per Lord Esher MR and Chitty LJ; Lask v Gloucester Health Authority.

(b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect: Neilson v Laugharane (the Chief Constable's letter), Lask v Gloucester HA (the NHS Circular), and see Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co, per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: Jones v Montivedeo Gas Co; Birmingham and Midland Motor Omnibus Co v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland.

(4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it:

(a) It may conclude that the evidence does not establish a legal right to withhold inspection and order inspection: Neilson v Laugharane; Lask v Gloucester Health Authority.

(b) It may order a further affidavit to deal with matters which the earlier affidavit does not cover or on which it is unsatisfactory: Birmingham and Midland Motor Omnibus Co Ltd v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland.

(c) It may inspect the documents: see CPR 31.19(6) and the discussion in National Westminster Bank plc v Rabo Bank Nederland and Atos Consulting Ltd v Avis plc (No. 2) . Inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.

(d) At an interlocutory stage a court may, in certain circumstances, order cross-examination of a person who has sworn an affidavit, for example, an affidavit sworn as a result of the order of the court that a defendant to a freezing injunction should disclose his assets: (House of Spring Gardens Ltd v Wait; Yukong Lines v Rensburg; Motorola Credit Corp v Uzan (No. 2)). However, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents: Frankenstein's case; Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co and Fayed v Lonrho. In cases where the issue is whether the

documents exist (as it was in *Frankenstein's case* and *Fayed v Lonrho*) the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue." [emphasis added]

68. Teare J in *Sotheby's v Mark Weiss Ltd* [2018] EWHC 1379 (Comm) set out guidance as to how litigation privilege should be approached with respect to the dominant purpose test at [4]-[7] and the issue of dual purposes at [18] and [23]:

[4] There is no dispute that in order to claim litigation privilege in respect of the correspondence between *Sotheby's* and Mr. Martin and the correspondence between *Sotheby's* and Mr. Twilley that correspondence must have been brought into existence for the "dominant purpose" of being used in contemplated litigation. The relevant principles were summarised in *Starbev GP Ltd. v Interbrew Central European Holdings* [2013] EWHC 4038 (Comm) at paragraphs 11-13 by Hamblen J...

5 Reference was also made to a recent decision of the Court of Appeal in *SFO v ENRC Ltd.* [2018] EWCA Civ 2006. There was a suggestion that this decision changed or at any rate clarified the law in those cases where a document was brought into existence for two purposes, one of which was for use in litigation. However, I do not consider that the decision changed the law. On the contrary the Court of Appeal confirmed (at paragraph 103) the statement of principle by Lord Wilberforce in *Waugh v British Railways Board* [1980] AC 520 that:

"It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply."

[6] That is entirely consistent with paragraph 11(4) of Hamblen J.'s comprehensive statement of the relevant principles in *Starbev GP Ltd. v Interbrew Central European Holdings*.

[7] The Court of Appeal in *SFO v ENRC* added that:

"The exercise of determining dominant purpose in each case is a determination of fact, and that the court must take a realistic, indeed commercial, view of the facts."

[18] ...There is no doubt that litigation with *Mark Weiss Ltd* (and/or the Buyer) was contemplated but what was also contemplated was the need for *Sotheby's*, in the context of its agreement with the Buyer, to determine whether the painting was counterfeit, and if so, to rescind the sale and return the purchase price. Thus sentence 5 refers to the "forthcoming

decision as to whether to rescind." That decision was taken on (or soon after) 11 July 2016. Thus the correspondence between Sotheby's and Mr. Martin in the period from 27 April 2016 to 11 July 2016 would appear to have been generated for two purposes: one, to enable that decision to be taken and two, for use in the litigation contemplated between Sotheby's and Mark Weiss Ltd. (and/or the Buyer).

[23] Both purposes were, it seems to me, of equal importance and relevance. At any rate Sotheby's is unable, in my judgment, to establish that the second purpose was the dominant of the two purposes.

69. In *Excalibur Ventures v Texas Keystone Inc & Ors*, with respect to litigation privilege, Popplewell J at [21]-[22]:

[21] I said that Mr Crane QC's submission accords with principle, because the rationale for litigation privilege is, in my view, correctly set out in paragraph 68 of the judgment of Aikens J (as he then was) in the Winterthur case. He said:

"The rationale for the first sub-type (i.e. litigation privilege) rests, in modern terms, on the principles of access to justice, the proper administration of justice, a fair trial and equality of arms. Those who engage in litigation or are contemplating doing so may well require professional legal advice to advance their case in litigation effectively. To obtain the legal advice and to pursue adversarial litigation efficiently, the communications between a lawyer and his client and a lawyer and a third party and any communication brought into existence for the dominant purpose of being used in litigation must be kept confidential, without fear that what is said or written might be disclosed. Therefore those classes of communication are covered by "litigation privilege"."

22 The width of the formulation advanced by Mr Picken QC goes well beyond that rationale. The terms on which a client engages his lawyer may or may not attract legal advice privilege, but if they do not engage legal advice privilege, then it does not seem to me that they engage that rationale. The same is true a fortiori of the terms on which a litigant secures funding in order to instruct a solicitor. If Mr Picken QC's formulation were correct, it would cover the case of a litigant who buys a new suit in order to appear as a witness and would make all information and documents in relation to that purchase privileged because its dominant purpose would be the conduct of the litigation. In my view, that illustrates the fallacy in the width of his formulation. [emphasis added]

70. In relation to where communications have a dual purpose, Christopher Clarke J (as he then was) in *AXA Seguros SA v Allianz Insurance Plc* [2011] EWHC 268 (Comm) at [40] and [49]:

40 As to purpose, Miss Davies submits that it is not established that the Halcrow material was commissioned for the dominant purpose of obtaining legal advice. They were instructed for the dual purpose of (i) assessing whether the highway had been constructed to internationally acceptable standards and (ii) determining to what extent any damage had been caused by the hurricane and verifying the correctness of Grupo Mexicano's quantum figures for remedial work. The issues were of equal importance, or, at the least, neither predominated. The first issue bore on the question whether there was cover under the reinsurance at all. The second set of issues did not. They were concerned with whether and to what extent there was liability under the original insurance, and thus the reinsurance. This duality of purpose is insufficient. As Lord Wilberforce observed in *Waugh v British Railways Board* [1980] A.C. 521:

"On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation."

49 The Defendants have not, however, established to my satisfaction that Halcrow were instructed to produce and produced their reports (and that the other material was generated) for the predominant purpose of anticipated litigation between the Claimant and the Defendants; rather than, as seems to me to be the case, for the dual purposes identified in para 40 above. That that was so appears from (a) the description in the Cunningham Lindsey reports of what Halcrow were to report on viz (i) the extent of the damage and of the remedial work for which Banobras was entitled to indemnity, which involved questions of quantum and causation of damage to the highway; and (ii) the standard of road construction and maintenance (see (a) Interim Report No 3: - para 22 above; (b) Interim Report No 4 - para 23 above); (iii) the Additional Pavement Report (see para 30 above) whose subject matter is the extent of damage to the pavement. Insofar as Halcrow were instructed in relation to the quantum of Banobras' claim the interests of the Claimant and the Defendants were common, not adverse. There is no evidence of any issue on quantum as between the Claimant and the Defendants or that Halcrow's work was in any way directed to any such issue. As between the two purposes I do not regard either purpose as predominant. Nor was it established that the material the subject of the application can be separated into

distinct parts, each wholly or predominantly attributable to a separate purpose.” [emphasis added]

71. It appeared to be common ground on the authorities that:

- i) the burden is on the party asserting privilege; and
- ii) the assertion of privilege in a witness statement is not conclusive and will be subject to “anxious scrutiny” by the court although counsel for Grandlane rely on *Starbev* at [13] (cited above) and the difficulty of going behind an affidavit at the interlocutory stage unless the conditions referred to are satisfied;
- iii) dominant purpose is a question of fact.

Submissions

72. It was submitted for Skymist that:

- i) the evidence in support of litigation privilege is wholly inadequate;
- ii) the evidence just says that litigation is contemplated and not that it is the dominant purpose; Grandlane have adopted the wrong test namely whether litigation was in contemplation;
- iii) in relation to the meeting on 18 May, Mr Bailey in his third witness statement at (paragraph 33) focuses on the dominant purpose of the “meeting” not the subject matter of the document;
- iv) the court must differentiate the purpose for which the document came into existence-*Axa* ;
- v) at paragraph 34 of his third witness statement Mr Bailey refers to litigation against PTP see also 12 13 16; whilst one purpose may have been to establish the terms of the agreement on which Grandlane would bring the claim against Skymist, the other was to establish its own liability to PTP and this was not privileged;
- vi) litigation privilege only protects communications for the dominant purpose of “conducting” litigation- as held in *Excalibur* funding agreements are not covered by privilege; thus the terms on which PTP and Grandlane have agreed that the litigation could be pursued is not privileged;
- vii) Insofar as the notes of the meeting of 18 May cover the adjudication between PTP and Grandlane these are not privileged, and insofar as they relate to the agreement as to the terms on which the claim will be brought by Grandlane against Skymist this is not privileged, because it is a funding agreement and is disclosable;
- viii) Grandlane have adopted the wrong approach to privilege as is evident from the correspondence in relation to the barrister’s fees which was clearly not privileged.

73. Counsel for Grandlane submitted that:
- i) litigation was contemplated against Skymist from the outset;
 - ii) the only purpose was the litigation against Skymist; any “other purpose” is not borne out by the contemporaneous evidence;
 - iii) this was not a case where Grandlane was fighting on two fronts or where Grandlane sought to resolve the case by PTP first before pursuing Skymist; Grandlane knew it would not be paid by Skymist and PTP realised that it would not be paid unless Skymist paid Grandlane and as a result PTP cooperated with Grandlane to pursue the claim against Skymist.

Contemporaneous evidence

74. I set out below some of the contemporaneous evidence before the court.
75. Letter dated 27 October 2017 (2/10/62 at 67) from Skymist to Grandlane explaining that they are being let go in terms of providing their project management services for the development of Beaurepaire Park. The final page of the letter states that "for the avoidance of doubt no further sums shall become due to Grandlane in respect of the Development Management Fee and/or your Sub-consultant's Fees".
76. Letter dated 2 November 2017 from Grandlane to PTP informing them that Skymist had terminated their contract and that "we have however been advised...that our own fees & that of our Sub-Consultants will not be paid" they then continued to explain that "we intend to pursue Mrs. Baturina for the unpaid fees, including those of PTP & will keep you updated on the progress of those negotiations" ending the letter with "can we thank you for your contributions to date in our team & hope we can close out all current matters to our mutual benefit" [emphasis added](9/13C/564).
77. Letter dated 9 November 2017, from PTP to Grandlane explaining that they are currently owed £144,240 plus VAT and £460,260 plus VAT and that "we do not believe Grandlane will be in a position to make these payments given their dispute with Skymist" (9/577).
78. Email dated 9 December 2017 from Grandlane to PTP explaining that they would like to update PTP that the solicitors have sent a pre-court protocol letter to Mrs Baturina and ask that "if confirmation or statement [is] require from PTP, can I please ask you to assist?".
79. PTP replied on 11 December 2017: "we will provide whatever statements or confirmations that are required" (9/ 612-613).
80. Email dated 13 March 2018 from Grandlane to PTP:
- "our solicitors are now preparing structure for the joint claim, they have confirmed that's easy done. We need to agree on legal costs between ourselves and possibly proceed with the claim". [emphasis added]
81. PTP responded the same day that:

"we appreciate your solicitors preparing a joint claim [against Skymist]. We can also appreciate this will keep the costs down as costs can be shared. Can we meet or if you can come to our office tomorrow to discuss this will be the best way forward so that we can understand the proposal for the joint claim".[emphasis added]

82. Grandlane confirmed that:

"we can arrange meeting and discuss available strategies" (9/658-660).

83. Email dated 13 April 2018 from PTP to Grandlane:

"we suggest we meet your solicitors to discuss the issues following which we can decide the direction for our fee recovery in respect to outstanding invoices and final account yet to be finalised" (9/666).

84. Email dated 21 May 2018 from Grandlane to PTP:

"to follow up Satish [PTP] and Olgert's [Grandlane] recent meeting with solicitors I would like to finalise our final account one more time to make sure we are on the same page" (9/680).

85. On 14 June 2018 Grandlane wrote to PTP asking "how are you getting [on] with the draft claim letter?" (9/745).

86. Email dated 14 June 2018, PTP wrote to Grandlane about ascertaining a figure for PTP's fees, explaining:

"I will provide you with my own assessment based on costs assumptions we have made. Following this review, we can proceed to issue our invoice to Grand Lane ...either way PTP will cover all your costs for preparing this Estimate and it will not be for Grand Lane to pay. We sincerely hope you can assist PTP with this request as this will be very helpful and essential for any Adjudication to back up our fee calculation" (9/749).

87. Email dated 21 June 2018, from Grandlane to PTP which starts "as we are going for adjudication..." and then continues to discuss project details and costs (9/767);

88. An email on 26 June 2018 from Grandlane to PTP asking:

"how are you getting [on] with the claim numbers? Please update" (9/781).

89. Email dated 2 July 2018, from Grandlane to PTP informing them that "we aim to submit the claim by the end of this week" (10/783).

90. Email from Grandlane's solicitors to Grandlane and PTP explaining "I am going to start work on the formal letter of claim...as I would like to send the claim to Skymist no later than next Friday" (10/789).
91. Email dated 30 July 2018 from PTP to Grandlane saying the following:

"I note Olgert [Grandlane] confirmed that they [Skymist] have requested to extend the date for their response. Can you please clarify or update us with the proposed strategy" (10/905).
92. Email dated 30 July 2018, from Grandlane's lawyers to Grandlane and PTP:

"we have been asked for and agreed a date of 9 August for a response. I have also agreed with Olgert [Grandlane] to write to you both in the next couple of days...setting out a proposed strategy with a view to commencing an adjudication against Skymist on Friday 10 August unless there is an offer to pay in the response on 9 August. This will mean serving the Referral on Friday 17 August this will some input from you and your team, are you available during this period? Allowing for 14 days for the Response, 31 August, we will then need to be working on a Reply in the first week of September, are you available then? I will write with a further proposed strategy and notes for going forward on Wednesday" (10/905E-F).
93. Email sent on 30 July from PTP to Grandlane's lawyer, explaining that:

"Since I will be actively involved on this matter [adjudication against Skymist] it seems my being away will hinder your proposed timeline" (10/905D).
94. Email sent on 31 July from PTP to Grandlane stating that:

"I will put together all we have with the agendas and workshop notes. The design meeting you are talking about is that between GL and Baturina. Presumably you will have all the instructions from Baturina that you can provide. We will add to the list any other documents that Richard may further clarify in his email" (10/905C).
95. Email dated 1 August 2018 shows PTP involved in drafting the Referral Notice with Grandlane's solicitors:

"please note it is most likely the matter will be referred to Adjudicator. The earliest date the Referral Notice will be served is 10th August 2018" (10/905G).
96. Email dated 1 August 2018 from Grandlane's solicitors to Grandlane and PTP:

"the purpose of this e-mail is to provide you with an overview of the adjudication process, a timeline for the adjudication, a list of documents that we will need for the adjudication, advice

on the likely cost of the adjudication and as attached a copy of the letter of claim as sent with its attachments" (10/905X).

97. Email dated 16 August from Grandlane's solicitor to PTP shows that PTP is still involved in passing information and/or instructions to Grandlane's lawyers with respect to the adjudication:

"Thank you for your voicemail. ...I will include a separate reference in the Referral to the 3 unpaid invoices of PTP issues before the final invoice" (10/906).

Discussion

98. The authorities to which the court was referred establish the following principles which are relevant in this context:

- i) Grandlane has to show that the communications were "seeking or obtaining evidence or information to be used in or in connection with anticipated or contemplated proceedings" (*Starbev* at [4]);
- ii) where communications may have taken place for a number of purposes it is incumbent on the party claiming privilege to establish the dominant purpose was litigation;
- iii) the purpose must be assessed from an objective standpoint. It is desirable to refer to contemporaneous material without making disclosure of the very material the claim is designed to protect;
- iv) the court must take a realistic and commercial view.

99. In relation to the four specific categories of documents which are sought by Skymist the position seems to be as follows: Grandlane does not seek to assert privilege in respect of category one, documents which demonstrate an agreement between PTP and Grandlane as to the pursuit of its claim against Skymist. Similarly, Grandlane does not seek to assert privilege over the documents in category two. In relation to category 4 the court has concluded that no such documents are likely to exist. The focus of the challenge to privilege by Skymist is therefore the notes of the meeting of 18 May and the four periods challenged by Mr Bagshaw (paragraph 39 to 45 of his witness statement).

100. It was submitted for Skymist that the failure to disclose the communications in respect of the barrister's fees demonstrated that privilege had been asserted "erroneously". The circumstances in which these particular communications were not disclosed has already been dealt with above and does not in my view support that submission.

101. It was submitted for Skymist that it was as "significant" for Grandlane to establish the claim against it by PTP and that claim had to be established in order for PTP to be able to pass on that claim to Skymist; counsel for Skymist referred to an email dated 12 July 2018 from Grandlane to PTP:

"we need your claim ready to send out tomorrow. This is now critical issue" (10/793).

102. Counsel also referred to the email exchange on 17 July 2018 between Mr Deinis and Mr Patel in which Mr Deinis stated:

"...we will issue claim letter tomorrow. I have paid Richards services [Richard Bailey] for the claim documents draft and initial response. As agreed we need to discuss our financial arrangements for the purposes of adjudication as we have substantial bill from your firm. Let's speak tomorrow" [emphasis added]

103. Whilst there is no doubt that Grandlane sought to establish the amount of the claim by PTP, the fact that the amount of the claim by PTP needed to be established in tandem with the claim which Grandlane was bringing against Skymist does not in my view establish the "dominant purpose" of the communications in question. Mr Patel's response on 17 July 2018 itself demonstrates that PTP and Grandlane were working together on the proposed claim against Skymist. It read:

"as explained before we are agreeable to paying costs the adjudication. We agree we should talk and agree whatever is reasonable so there is no confusion. We can seek an estimate from Richard for the adjudication costs".

Dominant purpose test/ dual purpose

104. It was submitted for Skymist that there was a "parallel claim" going on to establish Grandlane's liability to PTP and "it follows that" communications between Grandlane and PTP were for the "sole purpose" of dealing with the potential claim by PTP and not for "the sole or dominant purpose" of litigation between Grandlane and Skymist. Accordingly, it was submitted that the documents prepared for establishing the liability of Grandlane to PTP were not privileged.
105. Counsel for Skymist also submitted that if it was for the "additional purpose" of establishing liability of Grandlane to PTP, it will be "impossible" to show that the dominant purpose was for litigation against Skymist.
106. It is clear on the authorities that the test is the "dominant purpose" of the litigation. The fact that there is a "second" purpose does not mean that litigation against Skymist cannot be the "dominant" purpose. Similarly, it is not enough to lose litigation privilege that, as submitted by Skymist there was "another clear" purpose, namely to establish whether (and to what extent) Grandlane was liable for PTP's fees.
107. The evidence of the emails referred to above show that the communications between PTP and Skymist were to "conduct" litigation and the reliance on the analogy of a funding agreement is in my view misplaced. PTP have not been shown on the evidence to be acting as a mere funder. The claim by Grandlane comprised both the fees which it had itself incurred and the fees which it was liable to pay to PTP. The correspondence shows that PTP and Skymist were working together to prepare and to make the claim against Skymist; this is completely different from what is envisaged by Popplewell J in *Excalibur* (cited above) who refers to the situation where a litigant secures funding to instruct a solicitor.

108. I do not accept the submission for Skymist that there was an “implicit” acceptance that communications with PTP were not privileged by reason of the fact that the communications in relation to the barrister’s fees have now been accepted by Grandlane not to be privileged. The court has to look at the particular communications in question to see whether the particular communication for which privilege is asserted is in fact privileged.

Privilege over notes of meeting on 18 May

Evidence

109. Mr Bailey’s evidence is (paragraphs 32 and 33 of his third witness statement):

“With regard to the 18 May meeting this was in fact my first meeting with Grandlane and to the extent that PTP was not present during that meeting it is covered by legal professional privilege, but, for the reasons I will now explain litigation privilege also applies as the dominant purpose of the meeting, in fact the sole purpose of the meeting with PTP was the threat of adjudication and the intention to commence an adjudication against Skymist on behalf of Grandlane.” [Emphasis added]

“...prior to the meeting [on 18 May 2018], I had been sent the relevant correspondence from Stephenson Harwood and Joseph James Law who had been Grandlane's previous solicitors... From the papers it was clear that Grandlane were at the very least going to have to prepare to and most likely run an adjudication. Therefore, when Mr Deinis came to see me I was already of the view that an adjudication would need to be commenced and therefore litigation was contemplated and the dominant purpose of the meeting was to discuss litigation...” [Emphasis added]

110. At paragraph 34 of Mr Bailey's third witness statement he states:

“Grandlane was at real risk of having an adjudication commenced against them by PTP and therefore the sole purpose of the meeting was to discuss litigation”. [Emphasis added]

111. It was submitted on behalf of Skymist that it is evident from these paragraphs that Grandlane was at risk of having an adjudication commenced against them by PTP and (to the extent that) the meeting on 18 May concerned litigation between PTP and Grandlane, not Grandlane and Skymist, privilege cannot be asserted.

112. It was submitted by counsel for Grandlane that whilst the parties did discuss the threat of inter partes litigation, the parties agreed very early on that they should team up and collectively bring a claim against Skymist to attempt to compensate their loss. It was submitted that therefore, the dominant purpose of these meetings was the litigation that should be collectively brought against Skymist and that the possibility of a claim between PTP and Grandlane was merely a subsidiary topic discussed.

113. Mr Bailey's evidence (paragraph 37):

"...from the very outset it was always known that Skymist would not pay without the pursuit of a legal claim and that adjudicating was almost inevitable. Therefore, from the moment my firm was instructed we knew that we were preparing for litigation and getting the papers ready to ensure that a dispute had crystallised and therefore that an adjudication could be commenced at the earliest moment. Something that is normal practice in adjudication. Adjudication is not like any other form of litigation because in the time it might take a party simply to plead its defence in court proceedings parties in adjudication will have reached the end of the process and have a decision. It is quick, there is no time for discussion of other issues, you simply have to get on with the work and fight the adjudication..."

114. The email exchanges from November 2017 to May 2018 summarised above show the preparatory steps to the claim against Skymist. It does not show Grandlane having to meet the case against PTP as the dominant purpose of this correspondence. Rather it demonstrates the way in which Grandlane and PTP were working together to establish the claim against Skymist. This is supported by the subsequent correspondence which evidences the two parties working closely together to bring the adjudication against Skymist and thereafter seeking to enforce the award.

115. Whilst the evidence of Mr Bailey (at paragraphs 32 and 34 of his third witness statement), is not entirely clear with regard to the meeting of 18 May, the court looks at "purpose" from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose and referring to such contemporary material as it is possible to do so. From the contemporaneous emails referred to above, it is clear that in the months from the termination of the contract leading up to the meeting, the claim against Skymist predominated. I note in particular the email exchange on 18 March 2018 from Grandlane to PTP:

"our solicitors are now preparing structure for the joint claim, they have confirmed that's easy done. We need to agree on legal costs between ourselves and possibly proceed with the claim". [Emphasis added]

And PTP's response the same day:

"we appreciate your solicitors preparing a joint claim [against Skymist]. We can also appreciate this will keep the costs down as costs can be shared. Can we meet or if you can come to our office tomorrow to discuss this will be the best way forward so that we can understand the proposal for the joint claim"
[Emphasis added]

116. Taking a realistic view therefore of the meeting on 18 May, it seems to me that although the claim against Grandlane by PTP was (on the evidence of Mr Bailey) an issue at that meeting, the issues of the claim by PTP and the claim against Skymist

cannot be said to be of “equal” importance nor in my view can it be said that neither predominated. Looked at objectively it seems to me that, on the evidence, the dominant purpose of the meeting and thus the notes of such meeting were for the purposes of the litigation against Skymist and accordingly are privileged.

Periods challenged by Skymist

117. It was submitted on behalf of Skymist that in the period between the Notice being served (7 September 2018) and the Response (17 September 2018), the dominant purpose of the correspondence would not have been litigation. Skymist also challenged the periods 6 July 2018 to 19 July 2018, 17 October to 31 October 2018 and to 17 November 2018.

118. The evidence of Mr Bailey (paragraph 38), was that during the period between the Notice and the Response:

“ "the whole purpose was the litigation as the Referral was being drafted and PTP who had a large stake in the adjudication, were actively involved in the drafting of the Referral and the provision of the supporting information to support the claim. PTP were also actively interested in knowing what was going on as Skymist challenged the nomination of Mr Silver as adjudicator". We therefore had "privileged discussions with PTP regarding the redrafting of the Notice of Adjudication and the Referral to take account of the changed circumstances... All effort was focussed on the adjudication process and all correspondence was with the dominant purpose of adjudication".

119. The focus on particular periods challenged by Skymist seemed to change from Mr Bagshaw’s witness statement to oral submissions. However, in response to Skymist’s argument that it is possible to demarcate the time periods of adjudication and that communications made during certain periods would fall outside of litigation privilege, Mr Bailey’s evidence was (third witness statement paragraph 3a):

“when you are in adjudication there is not the time to have witnesses and experts in separate silos.”

120. The argument was put by Skymist that all correspondence after the submission of the final submission on 24 October 2018 was not entitled to litigation privilege (paragraphs 44/45 Mr Bagshaw’s second witness statement).

121. Mr Bailey’s evidence (third witness statement at paragraph 41) was that:

“ "it was not...the final submission as Skymist would make two further submissions on 30 October and 2 November which needed to be discussed with PTP as well as Grandlane".

122. This is reflected in the emails which are set out further in this judgment. It was also explained that at the CMC for the Part 8 proceedings on 19 October 2018, Skymist

had been given a direction that it must notify the court by the 19 October if they wanted the case to be listed (Mr Bailey third witness statement, paragraph 41).

123. The evidence of Mr Bailey (paragraph 41) was that:

“Grandlane was well aware, from the conduct of Skymist throughout the adjudication, that it was going to have to defend the Part 8 proceedings and even if Skymist did not proceed with the Part 8 that Skymist would force it to enforce the adjudicator's decision”

Conclusion on privilege

124. In light of these contemporaneous documents and the witness evidence, and for the reasons discussed, I find that throughout the period from 6 July 2018 to 17 November 2018, when the award was sent, through the period of enforcement of the award to 29 March 2019, the dominant purpose of the communications between PTP and Grandlane was seeking or obtaining evidence or information to be used in or in connection with the proceedings brought against Skymist. Accordingly, for the reasons set out above, Grandlane has satisfied the court that it is entitled to assert privilege over the documents identified by it and I decline to make the order sought that Grandlane provide all documents in relation to which it has asserted privilege.

Was there an “adequate explanation”?

125. The order of Teare J required Grandlane to provide an “adequate” explanation of the privilege relied upon, including the nature of the privilege and the facts relied upon.

126. The evidence of Mr Bailey (paragraph 16 of his second witness statement). is that:

“As the vast majority of the emails are in respect of the same issues the facts are the same. However, in order to give a fuller picture of the facts upon which each email is privileged the list of documents includes the heading of each email, which identifies the issues to which it relates within the various pieces of litigation.”

127. In his third witness statement Mr Bailey states that he carried out a further review of the correspondence in the schedule 22 October to 12 November comprising some 56 emails. He gives a detailed explanation of those emails in a table and states (paragraph 43):

“nothing in these chains is any issue beyond the adjudication. This was an incredibly hard fought adjudication where the only focus was on trying to win the adjudication for the client as in all forms of litigation. ”

128. In my view there was an adequate explanation and claim to privilege, it was not necessary or practicable to go further to identify the detailed subject matter within the correspondence. Nothing further is required.

Conclusion on application

For the reasons discussed, on the evidence before the court, the application is dismissed.