OUTER HOUSE, COURT OF SESSION

[2019] CSOH 24

CA81/18

OPINION OF LORD DOHERTY

in the cause

(FIRST) JOHN LOUIS BULLOUGH; and (SECOND) GEORGINA DOROTHEA MARY BULLOUGH

Pursuers

against

THE ROYAL BANK OF SCOTLAND PLC

Defenders

Pursuers: Tariq; MBM Commercial LLP
Defenders: Lindsay QC, JNM MacGregor; Addleshaw Goddard LLP

12 March 2019

Introduction

[1] On 5 December 2018 the defenders were granted commission and diligence to recover certain documents specified in calls in the defenders' specification of documents no 19 of process. The motion for commission and diligence was not opposed by the pursuers, but they indicated that legal advice privilege would be insisted upon in relation to certain of the calls. The pursuers have now produced documents in three sealed confidential envelopes (numbers 22, 23 and 24 of process). The defenders have enrolled a

motion for the envelopes to be opened up. The motion is opposed by the pursuers, who claim that the documents are protected by legal advice privilege.

Background

[2] In this commercial action the pursuers seek reduction of a personal guarantee granted by them to the defenders on 18 January 2008 ("the First Personal Guarantee"). They also seek reduction of a further personal guarantee granted by them to the defenders on 3 August 2011 ("the Third Personal Guarantee"), and interdict against the defenders enforcing those guarantees or seeking to exercise the powers of a heritable creditor in terms of a standard security granted by them in favour of the defenders on 24 January 2007. For present purposes it is only necessary to discuss the pursuers' case for reduction of the First Personal Guarantee.

[3] The pursuers are spouses. Between 1982 and 2008 McEwens of Perth Limited ("MoPL") was a family company the shareholders of which were members of the Bullough family. The pursuers aver that in 2008, using a separate company McEwens Direct Limited ("MDL"), they acquired shares in MoPL from the first pursuer's father as part of a management buyout ("MBO") by them of MoPL. The MBO involved MoPL and MDL refinancing loans with the defenders. The borrowing was to be secured *inter alia* by a personal guarantee granted by the pursuers in respect of the liabilities of MoPL and MDL up to the aggregate sum of £750,000. On 18 January 2008 the pursuers signed the First Personal Guarantee.

The pursuers' averments

[4] The pursers aver:

"2. ...Since the Bulloughs owned MoPL they had always banked with the Defenders. The Defenders' Ken Anderson was the Relationship Manager for MoPL appointed by the Defenders. As a Relationship Manager, Mr Anderson's role was to develop relationships of trust with the Defenders' customers. MoPL, the First Pursuer and his father had a close working relationship with Mr Anderson. He was highly trusted by them. In particular, the relationship of trust between Mr Anderson and the First Pursuer's father had existed for decades. At times, Mr Anderson almost served as a *de facto* board member of MoPL because of his advice and input into MoPL's decision-making. The First Pursuer and his father considered that Mr Anderson and they were working together for the common interests of MoPL. This relationship was established because of Mr Anderson's formal role as their Relationship Manager but more significantly, because of the close relationships cultivated by him with MoPL, the Pursuers and the First Pursuer's father over the years...

3. ...'MDL' ...[is] referred to together with 'MoPL' as the 'Group'...

...

10. The Pursuers had expressed their unease about signing the First Personal Guarantee to Mr Anderson, whom they highly trusted and thought was sensitive to their interests....On or around 18th January 2008, at the settlement meeting for the Management Buy Out, Mr Anderson advised the First Pursuer about the signing of the First Personal Guarantee. **The fact that Mr Anderson took it upon himself to advise the Pursuers of the consequences of the First Personal Guarantee is vouched by the contemporaneous records of the settlement meeting taken by Mr Hutcheson solicitor. The copy attendance note of Mr Hutcheson is produced. The note has been redacted to exclude material that is covered by legal advice privilege which, for the avoidance of doubt, is not waived.** Mr Anderson explained that the defenders would exhaust all rights under the Group's securities before enforcing the First Personal Guarantee against the Pursuers. He explained that the Defenders would never take the Pursuers' home (ie the security subject in the Standard Security) which had been given as security in support of the First Personal Guarantee. When asked if the Defenders would commit this to writing, Mr Anderson laughed and said words to the effect that *'I can't do that'*. However, Mr Anderson explained to the pursuers that it was the Defenders' usual practice to exhaust all rights under the Group's securities before enforcing any personal securities. The Second Pursuer was particularly nervous about signing the First Personal Guarantee and the security being given over the Pursuers' home. Mr Anderson told her that the Defenders would never go so far as to take the Pursuers' home. Mr Anderson sought to re-assure the Pursuers and, in particular, her with words to the effect that the First Personal Guarantee was '*just a box-ticking exercise, the Bank will never take your home*'. Mr Anderson's representations to the Pursuers were false. In terms of the contractual documents, there was no obligation on the Defenders to exhaust all rights under the Group's securities before enforcing the First Personal Guarantee against the Pursuers. In terms of the contractual documents, the Defenders may attempt to take the Pursuers' home as the Standard Security had

been granted over the security subjects in the Defenders' favour. The signing of the First Personal Guarantee was not '*just a box-ticking exercise*' as part of the Management Buy Out but an important matter which exposed the Pursuers to personal risk in the event of the Group's default. To the best of the Pursuers' knowledge, it was not the Defenders' usual practice to exhaust all rights under the Group's securities before enforcing any personal securities. In the event of a default, the Defenders' practice was that it would take whatever steps were necessary to minimise its loss, including calling up personal securities if needed without exhausting the Group's securities. In these circumstances Mr Anderson failed to advise the Pursuers of the true consequences and risks of signing the First Personal Guarantee. Although guarantors such as the Pursuers are expected to look after their own interests and to make such enquiries as they consider necessary or appropriate, where the Defenders make some representation to the potential guarantors, either spontaneously or in response to a question, that representation must be full and fair. In the present circumstances when Mr Anderson sought to advise the Pursuers of the consequences of the First Personal Guarantee, it was incumbent upon him to ensure that his representations on the nature of the First Personal Guarantee were full and fair. In the process of re-assuring the Pursuers about the signing of the First Personal Guarantee Mr Anderson made representations which were not true and fair. He ought not to have misled the Pursuers by failing to advise of the true consequences of signing the First Personal Guarantee. The First Pursuer relied on Mr Anderson's misrepresentations. He did so because he trusted Mr Anderson. He was induced to sign the First Personal Guarantee by Mr Anderson's misrepresentations...

11. The Second Pursuer was a party to Mr Anderson's misrepresentations. The Second Pursuer also relied on Mr Anderson's misrepresentations. The Second Pursuer also trusted and relied upon the judgement of the First Pursuer. He was prepared to sign the First Personal Guarantee. In these circumstances, she was also induced into signing the First Personal Guarantee by Mr Anderson's misrepresentations...

12. *Separatim* there was a duty on the Defenders to act in good faith in the transaction. This entailed duties to warn the Second Pursuer as the potential cautioner of the consequences of entering into the proposed First Personal Guarantee and to advise her to take independent advice. The Defenders did not comply with the substance of those duties. The Second Pursuer was aware that the First Pursuer, her spouse, was prepared to sign the First Personal Guarantee. She trusted and was influenced by his judgment (which had itself been influenced by the misrepresentation of Mr Anderson). The Defenders were aware of the spousal relationship between the Pursuers. The Defenders were also aware that this was a family business and the Second Pursuer was not an experienced businesswoman. In these circumstances, the Defenders requested that the Second Pursuer take independent legal advice before signing the First Personal Guarantee. **She was taken into another room by Iain Hutcheson, solicitor, who explained the First Personal Guarantee**. This was done in circumstances that many individuals, including her spouse, parents-in-law, lawyers and the Defenders, were in another room waiting for her to consent to the First Personal Guarantee so that the Management Buy Out

could be completed at the settlement meeting. The circumstances of the cursory offer of independent legal advice was such that the Second Pursuer felt that she had no choice but to agree to the First Personal Guarantee. The Defenders accordingly breached their duties of good faith to the Second Pursuer...

13. In these circumstances, the Pursuers are entitled to decree of reduction of the First Personal Guarantee on the basis of (i) Mr Anderson's misrepresentation made on behalf of the Defenders about the consequences of signing the First Personal Guarantee which induced the pursuers to enter into the First Personal Guarantee; and (ii) the breach of the duties of good faith owed by the Defenders to the Second Pursuer arising from the circumstances in which she was offered independent legal advice at the settlement meeting..."

The averments in bold font (but not the italicised averments) represent my own emphasis.

The redacted attendance note

[5] The pursuers have lodged a redacted version of Mr Hutcheson's attendance note relating to the meeting of 18 January 2008 in the following terms (redactions are denoted xxx):

"

THORNTONS
ATTTENDANCE NOTE

Date:	18/01/2008	Client No:	BU22366.0001
Originator:	Iain Hutcheson	Time Engaged:	8:00 am – 1.30pm (including travelling)

Meeting

Client Name: Mr John Bullough
Client Matter: Bulloughs (Scotland) Limited – MBO

IHH, EKM, and LKB attendance in Perth office settling the above.

9 am – 9.45 am

IHH, EKM, and LKB attendance in Perth office with John and Georgina Bullough, along with Ken Anderson (RBS).

KA tabling a personal guarantee to be signed by each of JB and GB.

KA understood that JB was waiving his right to take legal advice in respect of the personal guarantee, and JB agreeing to this.

JB, therefore, signing the personal guarantee, with KA as witness, KA having gone over the main terms of the personal guarantee.

KA had indicated that the bank would usually exhaust all rights under the company's securities before looking to enforce the personal security. However, upon enquiry by IHH, KA confirming that the bank would not be prepared to confirm this in writing. XXXXXXXXXXXXXXXXXXXXXX

With regard to Georgina Bullough, she would require legal advice, and IHH, thereafter, in meeting with her separately to go over the terms of the personal guarantee.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

GB prepared to sign the personal guarantee and thereafter having same signed; IHH witnessing.

(SEE RBS letter to Thorntons of 17 January regarding the guarantee, and also the schedule of liabilities/security.)

Thereafter, IHH and GB joining the meeting together with Ian Williams (Campbell Dallas), Mr & Mrs Bullough Senior, Blackwood Hodge, and Stewart Murray, Andrew Mitchell and Judith Clark (from ACH).

Having all documentation signed and completing transaction - subject to money transfers on 21 January."

The First Personal Guarantee

[6] At the top of page 1 of the First Personal Guarantee there was the following statement in bold block capital letters:

> "THIS IS AN IMPORTANT DOCUMENT. YOU SHOULD TAKE INDEPENDENT LEGAL ADVICE BEFORE SIGNING AND SIGN ONLY IF YOU WANT TO BE LEGALLY BOUND. IF YOU SIGN AND THE BANK IS NOT PAID YOU MAY HAVE TO PAY INSTEAD OF THE DEBTORS..."

At the end of the document Mr Hutcheson signed the following docquet:

> "I confirm that I am a solicitor acting for Lady Georgina Bullough and that prior to the execution of this deed I explained its nature, content and effect and the practical

implications of signing it to Lady Georgina Bullough and she informed me that she wished to proceed with the transaction."

The defenders' averments

[7] The defenders call upon the pursuers (Ans 10) to produce an unredacted version of Mr Hutcheson's attendance note, and "to make relevant and specific averments in relation to the legal advice they were provided with before they signed the First Personal Guarantee." They aver (Ans 11) that the second pursuer received advice from Mr Hutcheson, and they make a further call upon the second pursuer "to make relevant and specific averments in relation to the legal advice she received before she signed the First Personal Guarantee." They further aver (Ans 12) that the second pursuer indicated to the defenders on 17 January 2008 that she wished to receive advice from Thorntons Law LLP, and that she was duly provided with advice from that firm before signing the First Personal Guarantee.

Commission and diligence to recover documents

[8] Calls 1 and 2 (iv) of the defenders' specification were in the following terms:

"1. The attendance note completed by Mr Iain Hutchison, solicitor, in relation to a meeting that took place on 18 January 2008 concerning the proposed personal guarantee to be granted by the Pursuers to the Defender.

2. All books, files, records, reports, correspondence, letters, faxes, emails, notes, memoranda and other similar documents relating to the proposed personal guarantee to be granted by the Pursuers to the Defenders (which was eventually granted on 18th January 2008 by the Pursuers), in order that excerpts may be taken therefrom at the sight of the commissioner of all entries showing or tending to show:

...

(iv) Legal advice provided to the Second Pursuer in relation to the nature of the proposed personal guarantee and the obligations set out therein."

Witness summaries

[9] On 4 December 2018, the day before a procedural hearing, the pursuers lodged a supplementary list of witnesses and witness summaries (17 of process). The witness summary for the first pursuer indicates:

> "John Bullough will speak to...the nature and extent of the discussions with Mr Anderson, regarding the misrepresentations made to him about the consequences of signing the First Personal Guarantee; and the basis for his decision to enter into the First Personal Guarantee..."

The witness summary for the second pursuer notes:

> "Georgina Bullough will speak to the circumstances in which she received legal advice during the settlement meeting in which she signed the First Personal Guarantee; the nature and extent of the discussions with Mr Anderson, regarding the misrepresentations made to her about the consequences of signing the First Personal Guarantee; and the basis for her decision to enter into the First Personal Guarantee..."

The witness summary for Mr Hutcheson states:

> "Iain Hutcheson was a solicitor present at the meeting in which John and Georgina Bullough signed the First Personal Guarantee. He is the author of the redacted attendance note which has been produced and is relied upon in Articles 10 and 11 of Condescendence. He will speak to his attendance at the meeting, and the attendance note recording that meeting, which took place on 18 January 2018 with John and Georgina Bullough and Kenneth Anderson in attendance; and the circumstances in which Georgina Bullough received legal advice during the settlement meeting before signing the First Personal Guarantee."

In terms of the court's interlocutor of 5 December 2018 the court appointed the parties to exchange and lodge, if so advised, revised lists of witnesses and witness summaries by 19 March 2019. Full witness statements or affidavits are to be lodged not later than 9 April 2019. A proof before answer is due to commence on 11 June 2019.

Counsel for the defenders' submissions

[10] Mr Lindsay submitted that the confidential envelopes should be opened up. The pursuers were not entitled to maintain legal advice privilege in relation to the documents within the envelopes. The second pursuer had impliedly waived legal advice privilege in relation to any advice which she had received (and if the first redaction related to legal advice to both pursuers, the first pursuer had also impliedly waived privilege in relation to that advice).

[11] The second pursuer had disclosed that she had received independent legal advice from Mr Hutcheson (art 11). She also averred that he had explained the First Personal Guarantee to her (art 12). That was an averment as to the content of the legal advice which was given, and there had been an implied waiver of legal advice privilege in relation to that advice. The pursuers relied upon the circumstances at the time of signature, but the legal advice given was part of, and inseparable from, those circumstances. It would be unfair to the defenders if they were unable to place before the court the whole circumstances, including the legal advice which the pursuers received. Reference was made to *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation and Others* 2011 SC 534, per the Opinion of the Court delivered by Lord Reed at paragraph 48.

[12] The pursuers' reliance upon, and production of, the redacted attendance note involved partial disclosure of what had taken place at the meeting. The single subject matter of the note was the circumstances in which the First Personal Guarantee was signed. Neither pursuer ought to be able to pick and choose what to disclose from those circumstances. That would be cherry picking which would be misleading and unfair to the defenders. The pursuers' assertion in the pleadings that privilege was not waived by the production of the attendance note was not determinative of the issue. Whether or not there

had been implied waiver required to be determined objectively. The parts of the note which had been redacted were not severable (*Belhaj and Boudchar* v *DPP and Others* [2018] EWHC 514 (Admin), per the joint judgment of Irwin LJ and Green J at paras 12-15; cf *Mirza* v *Salim* 2012 SCLR 460, per Lord Malcolm at paras 20-21). Moreover, the first redaction appeared to concern something said during the open part of the meeting and to have been related in some way to what Mr Anderson had said. Even if that redaction related to legal advice, if it was given openly at the meeting it was not confidential and was not privileged (*Serdar Mohammed* v *MOD* [2013] EWHC 447 (QB), per Leggatt J at paragraph 14; *Belhaj and Boudchar* v *DPP and Others*, *supra*, at para 15).

Counsel for the pursuers' submissions

[13] Mr Tariq submitted that the second pursuer was entitled to claim legal advice privilege in respect of the documents in the confidential envelopes. There had been no implied waiver of the privilege by reason of the pursuers' averments or as a result of production of the redacted attendance note.

[14] This was not a case where there had been any disclosure by the pursuers of the content of legal advice. The pursuers' averment that Mr Hutcheson explained the First Personal Guarantee to the second pursuer confirmed the fact that legal advice had been given, but it did not disclose its content (*Phipson on Evidence* (19th ed.), para 26.05; *Brennan* v *Sunderland City Council* [2009] ICR 479, per Elias J at para 64). The averment said no more than Mr Hutcheson's docquet had said. Since there had been no disclosure at all of the content of the advice there was no question of there having been partial and misleading disclosure. Reference was made to *Phipson on Evidence*, paragraphs 26.02 and 26.05; *Wylie* v *Wylie* 1967 SLT (N) 9; *Belhaj and Boudchar* v *DPP and Others*, *supra*, at paragraphs 13 and 14:

Scottish Lion Insurance Co Ltd v *Goodrich Corporation and Others*, *supra*, at paragraph 48. Privileged material had not been deployed by the pursuers. The pursuers were not seeking to rely on the content of the legal advice which had been given or to put it in issue. The pursuers were not suggesting that the legal advice given had been cursory, or other than competent and appropriate.

[15] The redacted attendance note had been produced to vouch Mr Anderson's representations. The first redaction related to legal advice which Mr Hutcheson gave to both pursuers concerning those representations. While eleven years after the event the pursuers were not in a position to say whether that advice had been imparted in the main meeting room or in a "break-out" room, Mr Tariq confirmed that it had been provided to the pursuers privately and confidentially, outwith the hearing of Mr Anderson. The second redaction concerned legal advice given privately to the second pursuer.

[16] The attendance note dealt with two different and distinct matters, which were clearly severable. The first was what Mr Anderson had said. That was not material which was protected by legal advice privilege (Ritchie, *Law, Practice and Conduct for Solicitors* (2nd ed.), para 26.05, at pp. 114, 117-8). The second was the legal advice which Mr Hutcheson had given privately, the advice in the first redaction being given to both pursuers, and the advice in the second redaction having been given to the second pursuer.

Decision and reasons

The law

[17] Clear and helpful summaries of the law relating to waiver of legal professional privilege are provided by an Extra Division of the Inner House chaired by Lord Reed in *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation and Others*, *supra*, and by a Queen's

Bench Divisional Court (Irwin LJ and Green J) in *Belhaj and Boudchar* v *DPP and Others*, supra. In *Scottish Lion* the court observed:

> "44 Legal professional privilege is of undoubted importance: see, for example, the discussion in *Three Rivers District Council* v *Governor and Company of the Bank of England (No 6)* [[2005] 1 AC 610]. It can however by overridden by statute, and it can be waived by the person entitled to assert it...
>
> 45. As Lord Keith of Kinkel remarked in *Armia Ltd* v *Daejan Developments Ltd* [1979 SC (HL) 56](p 72), the topic of waiver may arise in a number of guises in a variety of contexts. The term connotes the giving up or abandonment of a right. The abandonment may be express, or it may be inferred from the facts and circumstances of the case. There was no express waiver in the present case. The question that we have to determine is whether waiver is to be inferred.
>
> 46. In order to answer that question, it is necessary to begin by understanding the nature and purpose of privilege. Privilege is the name given to a right to resist the compulsory disclosure of information (*B* v *Auckland District Law Society* [[2003] 2 AC 736], per Lord Millett, para 67). It exists in order to maintain the confidentiality of the information in question. It follows that privilege will be lost if the information in question ceases to be confidential...Waiver of privilege can be distinguished from loss of privilege (see, eg *B* v *Auckland District Law Society*, paras 68, 69). It will arise, as we have explained, in circumstances where it can be inferred that the person entitled to the benefit of the privilege has given up his right to resist the disclosure of the information in question, either generally or in a particular context. Such circumstances will exist where the person's conduct has been inconsistent with his retention of that right: inconsistent, that is to say, with the maintenance of the confidentiality which the privilege is intended to protect.
>
> 47. There are two further points which it is important to understand. First, waiver does not depend upon the subjective intention of the person entitled to the right in question, but is judged objectively (*Armia Ltd* v *Daejan Developments Ltd*, per Lord Keith of Kinkel, p 72). Waiver of legal professional privilege, in particular, is determined on an objective analysis of the conduct of the person asserting the privilege (see, eg *Great Atlantic Insurance Co* v *Home Insurance Co and ors* [[1981] 1 WLR 529]). Secondly, privilege may be taken to have been waived for a limited purpose without being waived generally: in other words, the right to resist disclosure may be give up only in relation to a particular context...
>
> 48. Whether the conduct of a person entitled to the benefit of privilege has been inconsistent with the maintenance of confidentiality, either generally or for a limited purpose, is dependent upon the relevant circumstances. The question has most often arisen in circumstances which are different from those of the present case. One such circumstance is where a person sues his legal advisers and seeks to rely on the privilege to prevent them from adducing evidence relevant to their defence. In such a case, the privilege is taken to have been waived because of 'the unfairness of both

> opening the relationship by asserting the claim and seeking to enforce the duty of confidence owed by the defendant' (*Nederlandse Reassurantie Groep Holding NV* v *Bacon and Woodrow* [[1995] 1 All ER 976], per Colman J, p 986: a passage approved in *Paragon Finance plc* v *Freshfields* [[1991] 1 WLR 1183], per Lord Bingham of Cornhill CJ, p 1191). Another type of situation where the question has often arisen is where a party to legal proceedings seeks to rely upon part of a confidential document (or sequence of related documents), but asserts privilege so as to prevent disclosure of the remainder. In such a case, the privilege may be taken to have been waived on the basis that 'a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result' (*Paragon Finance*, per Lord Bingham of Cornhill CJ, p 1188). As these *dicta* indicate, where proceedings require to be conducted fairly, considerations of fairness may bear on an assessment of whether a person's conduct in relation to those proceedings has been inconsistent with the maintenance of confidentiality, and whether he must therefore be taken to have waived privilege..."

In *Belhaj and Boudchar* v *DPP and Others* the court stated:

> "14 ...[I]t is clear that cherry picking concerns a policy or strategy by the client to use legal advice in a selective manner to obtain a forensic advantage, or an approach which might risk such arising.
>
> 15. This was how the test was understood by Leggatt J (as he then was) in *Serdar Mohammed* v *MOD* [2013] EWHC 447 (sic) [4478](QB) where he summarised the principles in the following way (see paragraph 14):
>
> > 'i) What might be called a 'true' waiver occurs if one party either expressly consents to the use of privileged material by another party or chooses to disclose the information to the other party in circumstances which imply consent to its use. Such a waiver may be either general or limited in scope.
> >
> > ii) Where a party waives privilege in the above sense by deliberately deploying material in court proceedings, the party also loses the right to assert privilege in relation to other material relating to the same subject matter: see eg *Great Atlantic Insurance Co* v *Home Insurance Co* [1981] 1 WLR 529 . The underlying principle is one of fairness to prevent 'cherry picking': see e.g. *Brennan* v *Sunderland City Council* [2009] ICR 479 , 483-4 at [16].
> >
> > ...
> >
> > iv) Because privilege only protects information which is confidential, if the information concerned ceases to be confidential, privilege cannot be claimed. Where a party does an act which has the effect of making information public, this has sometimes been described as a waiver of privilege (see eg *Goldstone* v *Williams* (1899) 1 Ch 47), but it is more accurate to say that privilege cannot be claimed because confidentially has been lost...'

> 16 Applying these principles to the present case it is not contended that the Defendant has engaged in any tactical deployment of the legal advice. In our view Leggatt J was correct in his construction of *Great Atlantic*. "Cherry picking" is concerned with knowing, deliberate, deployment resulting in partial disclosure. Absent such an intention, the issue of cherry picking does not arise."

The conduct upon which the defenders rely to establish implied waiver

[18] The defenders maintain that the pursuers have impliedly waived their respective rights to insist upon legal advice privilege. In relation to both pursuers, the defenders rely upon the production of the redacted attendance note. In relation to the second pursuer, they also rely on the averment that Mr Hutcheson "explained the First Personal Guarantee" to her.

[19] If the averment that Mr Hutcheson explained the First Personal Guarantee to the second pursuer was an implied waiver of her legal advice privilege, then it seems to me that Mr Hutcheson's declaration at the end of that deed would also have been such a waiver: it was to similar effect (and there is no suggestion that Mr Hutcheson was not authorised by the second pursuer to make the declaration). However, counsel for the defenders did not found on the declaration. Nor did he advance any submission based upon the proviso to section 1 of the Evidence (Scotland) Act 1852 and the terms of the witness summaries for the first pursuer, second pursuer and Mr Hutcheson (cf *Whitbread Group plc* v *Goldapple Ltd* 2003 SLT 256). That may have been because none of the summaries flagged up an intention to rely upon, or otherwise explore, the content of the legal advice which was given. In the case of the first pursuer's summary, there is no mention at all of legal advice, but it is said that he will speak to "the basis for his decision to enter into the First Personal Guarantee". The second pursuer's summary states that she will speak to "the circumstances in which she received legal advice during the settlement meeting in which she signed the First Personal

Guarantee ... and the basis for her decision to enter into the First Personal Guarantee". Mr Hutcheson's summary indicates that he will speak to his attendance recording the meeting between the pursuers and Mr Anderson "and the circumstances in which Georgina Bullough received legal advice during the settlement meeting before signing the First Personal Guarantee". While there is undoubtedly a degree of vagueness about the references in the summaries to "the circumstances" in which the second pursuer received legal advice, and "the basis" for each pursuer's decision to enter into the First Personal Guarantee, in my opinion there is no clear indication in the pleadings or in the summaries that the pursuers intend to rely upon or otherwise deploy the content of privileged legal advice.

Implied waiver?

[20] Whether conduct gives rise to implied waiver is to be determined objectively (*Armia Ltd* v *Daejan Investments Ltd* 1979 SC(HL) 56, per Lord Keith of Kinkel at page 72. Waiver of legal professional privilege is determined on an objective analysis of the conduct of the person asserting the privilege (*Scottish Lion*, para 47). Thus, though when the pursuers produced the redacted attendance note and referred to it in their pleadings they also averred that they were not waiving legal advice privilege, that is not determinative of the issue. The subjective intention of the party whose conduct is being examined is one of the matters of which account may be taken, but the whole circumstances have to be looked at to determine whether waiver is to be inferred (and if so, for what purposes). In some cases the subjectively expressed intentions anent waiver of the person entitled to privilege may be a material factor in the objective analysis of the relevant conduct (see eg *R (Belhaj and another)*

v *DPP (No 2)* [2018] 1 WLR 3602, per the joint judgement of Irwin LJ and Green J at paragraphs 13 and 35).

[21] I turn to consider the circumstances here. I have to assume for present purposes that, unless waiver does fall to be inferred, the redacted material and the other documents in the confidential envelopes are privileged (see eg *Scottish Lion Insurance Co Ltd* v *Goodrich Corporation and Others*, *supra*, at para 50).

[22] The pursuers' averment that Mr Hutcheson explained the First Personal Guarantee to the second pursuer, and the terms of the redacted note, both disclose that legal advice concerning the guarantee was given to the second pursuer by Mr Hutcheson, but they say nothing about the content of that advice.

[23] On a proper analysis it seems to me that the attendance note does not deal with a single topic. It contains three different subject matters, *viz* the record of what was said and done at the meeting in the presence and hearing of all of the participants; a note of the fact that confidential legal advice was given to the second pursuer; and notes recording the terms of legal advice given to the second pursuer (and, it seems, in relation to the first redaction, also to the first pursuer). On the face of things, it is arguable the first and second mentioned parts of the note were not privileged – they were not a record of the terms of confidential legal advice given to either pursuer. Be that as it may, in my view it is clear that the last mentioned subject matter is distinct and severable from the parts of the note which have been disclosed.

[24] In my opinion neither the making of the averment (that the guarantee was explained to the second pursuer by Mr Hutcheson) nor the production of the redacted note involve either pursuer relying upon or otherwise deploying any part of the legal advice which he or she was given by Mr Hutcheson. There has not been partial disclosure, or cherry picking, of

the contents of legal advice. The situation here seems to me to be very different from the position in cases such *Wylie* v *Wylie* and *Great Atlantic Insurance Co* v *Home Insurance Co*. There is no indication that the pursuers are employing a strategy of using legal advice in a selective manner to obtain a forensic advantage, or that the conduct complained of gives rise to a risk that they will obtain such an unfair forensic advantage.

[25] I recognise, of course, that causation is likely to be in issue at the proof (eg whether (if established) Mr Anderson's representations and/or the alleged breaches of duty by the defenders caused the pursuers to enter into the First Personal Guarantee). It may be anticipated that the defenders will seek to place great store in the fact that Mr Hutcheson explained to the second pursuer the guarantee's "nature, content and effect and the practical implications of signing it". There is no indication at present that the pursuers propose to challenge that, or to qualify it in any way. On the facts, I do not regard the pursuers' insistence upon legal advice privilege as being productive of unfairness. The working assumption at the proof is likely to be that competent and appropriate legal advice was given to the second pursuer (and to the extent that legal advice was given to the first pursuer, that it was also competent and appropriate). I do not understand the pursuers to suggest otherwise.

[26] In the whole circumstances, looking at the facts objectively, I am not satisfied that the pursuers have impliedly waived the right to insist upon legal advice privilege in respect of the documents which the defenders seek to recover. I am not persuaded that the conduct from which the defenders seek to infer waiver is inconsistent with the pursuers continuing to assert privilege. Nor am I persuaded that the combination of that conduct and the assertion of privilege is likely to result in unfairness to the defenders, or to mislead them or

the court. I do not think that the pursuers' conduct is inconsistent with the reservation of legal advice privilege which they made when they produced the redacted attendance note.

Disposal

[27] The defenders' motion is refused *in hoc statu*. The refusal is *in hoc statu* rather than *simpliciter* because I recognise that my decision is based upon the material available so far (*cf Brennan v Sunderland City Council*, *supra*, per Elias J at para 82). It is possible that the position may require to be revisited if there is a material change of circumstances (eg if part of the terms of the legal advice is relied upon or deployed by the pursuers in witness statements or affidavits, or in oral evidence at the proof).