

Neutral Citation Number: [2020] EWHC 3225 (Comm)

Case No: CL-2016-000172

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

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

Date: 24 November 2020

Before :

Mrs Justice Moulder

Between :

PJSC TATNEFT	<u>Claimant</u>
- and -	
(1) GENNADIY BOGOLYUBOV	<u>Defendant</u>
(2) IGOR KOLOMOISKY	
(3) ALEXANDER YAROSLAVSKY	
(4) PAVEL OVCHARENKO	

David Railton QC, Henry King QC and James Sheehan (instructed by **Debevoise & Plimpton LLP**) for the **Claimant**
Ewan McQuater QC and Matthew Parker (instructed by **Enyo Law**) for the **First Defendant**
Mark Howard QC, Ruth den Besten and Tom Ford (instructed by **Fieldfisher**) for the **Second Defendant**
Ken MacLean QC and Owain Draper (instructed by **Mischon de Reya**) for the **Third Defendant**
Marcus Staff (instructed by **Sherrards**) for the **Fourth Defendant**

Hearing dates: 24th November 2020

JUDGMENT

Mrs Justice Moulder

Tuesday, 24 November 2020

Judgment by **MRS JUSTICE MOULDER**

1. This is the court's judgment on the application by the second defendant dated 9 November 2020 as to:
 - (i) whether or not there has been a waiver of privilege in respect of matters identified and, if so, the scope of such waivers;
 - (ii) if there has been a waiver of privilege, the second defendant seeks a declaration to that effect and, in respect of certain of the matters identified, an order for inspection of documents withheld.

Background

2. This is an application which has been made partway through this ten-week trial, the trial having commenced on 12 October 2020. The trial is being held remotely and the application was therefore also heard remotely, but the court had the benefit of full written and oral submissions from leading counsel over the course of an entire day.
3. It is not necessary to set out the background to the proceedings. To the extent that it is necessary to refer to what is an issue in the proceedings, this is dealt with at the appropriate section of the judgment below.
4. In this judgment I shall refer to the submissions on behalf of the second defendant as "the defendant" for convenience, but references more broadly to the defendants are to the four defendants in these proceedings.

Timing of Application

5. As a preliminary point it is worth noting why the application is said to have arisen at this stage.
6. The defendant's explanation as to why this application has only been made at this stage is that it is asserted that it is only during the course of the trial that a lack of clarity has emerged as to where Tatneft has drawn the lines as to the waivers of privilege. It was submitted for the defendant that

in some instances Tatneft has accepted that privilege has been waived, but the defendant asserts that the actual waiver is broader in scope. The defendant therefore seeks rulings from the court as to whether the privilege has been waived and, if so, the scope of the waiver.

7. In correspondence Tatneft has confirmed that in relation to the first category of documents in issue, an alleged waiver of prejudice in all communications between S-K and Tatneft in the period October 2007 to March 2012, no documents have been withheld from inspection on the basis of privilege in respect of the period October 2007 to December 2010.
8. The defendant nevertheless seeks a declaration from the court which, it submits, will then entitle it in closing submissions to ask the court to draw adverse inferences from the failure to produce such documents.
9. The claimant submits that the application is inexplicably late because it depends primarily on evidence which was served and deployed in interlocutory proceedings in 2016 and that it was clear by the PTR that Tatneft intended to call the relevant witnesses at trial: for example, one of the issues at the PTR was that the defendants challenged the length of Tatneft's witness statements as exceeding the permitted limits.
10. It was accepted for the claimant that the timing of the application is not a reason to dismiss the application. However, it was submitted that the court is entitled to view "with considerable scepticism" the arguments now made that privilege has been waived in documentation covering extensive periods when inspection of such documentation had never previously been sought on this basis.
11. Notwithstanding the reliance which is now sought to be placed by the defendant on certain paragraphs of the claimant's opening submissions, both written and oral, for trial, I am surprised that this application alleging wide-ranging waiver arising out of statements in witness statements, some dating back to 2016, was only made during the trial. Privilege is a topic which had clearly been considered by the defendant in the lead-up to the trial, as is evident from the application

which was heard at the PTR and for which I gave judgment in September, albeit that I accept that the legal basis for asserting that privilege, namely that privilege did not attach to communications between Tatneft and members of its legal department, was different.

12. However, given the acceptance that the timing of the application is not a reason to dismiss the application, it seems to me to be unnecessary to consider the authorities to which I was referred in this regard. I propose therefore to concentrate on the substantive issues.

Matters in issue

13. The alleged waiver of privilege is asserted in respect of the following communications:
- (i) (a) all communications between S-K and Tatneft in the period October 2007 to March 2012;
(b) all communications between S-K's legal advisers and Tatneft's legal representatives or Ukrainian counsel in the period 1 June 2009 to 31 March 2010 in connection with the recovery of the oil monies from S-K's contractual debtors or from third parties;
 - (ii) legal advice received by Tatneft in relation to the purpose, entry and/or approach of the second criminal complaint;
 - (iii) in the analyses, reporting and advice provided to Tatneft up to August 2012 by its legal representatives concerning (a) the products of the first and second criminal complaint, (b) more generally concerning the scheme or the persons responsible for it as to what and when was learnt in relation to the Oil Payment Siphoning Scheme and/or the defendants' involvement;
 - (iv) in the legal advice prior to S-K's liquidation in May 2015 as to the reasons for and/or scope of the assignment of claims by S-K to Tatneft.

Relevant legal principles,

14. Although both counsel refer to there being common ground in relation to the relevant legal principles, it was apparent that there was a significant difference in the approach of the parties

and it is necessary to resolve that difference in order to establish the relevant principles which govern the determination of this application.

15. It was submitted for the claimant that the principles set out by Mr Justice Waksman in *PCP Capital Partners v Barclays Bank* [2020] EWHC 1393 (Comm) provided a "useful recent summary", whereas it was submitted for the defendant that the matter was "comprehensively considered" in that case.
16. Although the claimant referred the court to various authorities for the principles underlying legal professional privilege, it seems to me that the statement by Mr Justice Waksman of what he described as "overarching points" adequately set out the relevant context. At paragraph 47 of his judgment:

"I begin with a number of overarching points.

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

(2) Generally, privileged documents cannot be ordered to be provided in litigation by the party whose privilege it is unless this is as a result of a waiver;

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

(4) Applications for documents based on a waiver of privilege entail at least the two following fundamental questions:

(a) Has there been a waiver of privilege?

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

(5) The concept of fairness underpins the rationale for having a concept of waiver which can then entail the production of further privileged documents. This is because if the party

waiving is, by the waiver thereby creating a partial picture only of the relevant legal advice, it is unfair to the other party to allow him to 'cherry pick' in this way.

(6) That said, it is also clear that the question of whether or not there has been a waiver is not to be decided simply by an appeal to broad considerations of fairness."

17. Against that background, the court then has to determine when a waiver will arise and, as stated by Mr Justice Waksman at paragraph 48:

"... it is not easy to find a succinct and clear definition of when it arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case".

18. The cases are not easy to reconcile and I note the observation of Mr Justice Elias, as he then was, in *Brennan v Sunderland City Council* UKEAT 349/08 at 65, the case considered by Mr Justice Waksman in *PCP*:

"It is an error to treat the earlier authorities as if the words falling from the judicial lips had the sanctity of statute."

19. At [48] of his judgment Mr Justice Waksman stated that;

"... first the reference to the legal advice must be sufficient ... and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide".

20. At [49], Mr Justice Waksman stated that a purely narrative reference does not constitute a waiver as this would not involve reliance in relation to an issue in the case.

21. Mr Justice Waksman then discussed the distinction which has been drawn in previous authorities between the content and the effect of advice and concluded that, even if only the conclusion of the advice is stated, nevertheless privilege may have been waived.

22. At [60] he said:

"... the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is, and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver."

23. The claimant sought to put a gloss on this approach by reference to two authorities, *Expandable v Rubin* [2009] BCC 443 and *Thomas Pink v Victoria's Secret UK Limited* [2014] EWHC 1955 (Ch). In its written skeleton, the claimant referred the court to *Expandable* at [34] as authority for the proposition that the mere reference to the subject matter of a letter does not waive privilege in its contents unless they are themselves disclosed. In oral submissions, this was tempered and it was submitted that it was not the position of the claimant that there could never be a waiver, but that it showed the "*judicial mindset*" that a reference to the subject matter of a communication is "*most unlikely*" to be a sufficient reference.
24. One of the issues in that case was whether Mr Rubin had waived privilege in relation to a solicitor's letter sent to Mr Rubin which was mentioned in a witness statement of Mr Rubin. The letter drew attention to various discrepancies in the loan agreement.
25. Mr Justice Patten said at [34]:
- "... I am also satisfied that there was no waiver of privilege ... To set out the subject matter of a letter is not to waive privilege in its contents unless they are themselves disclosed."*
26. However, Mr Justice Patten then went on at [35] to refer to the judgment in *Atlantic and Great Lake Steamship Corporation (No 2)* and the distinction made between "reference" and "deployment of material" which would otherwise be privileged. At [39] of the judgment he concluded:

"Mr Lightman submits that this is a deployment case, not one of mere reference, but I disagree. The contents as such of the letter were not disclosed in full, nor were they as such relied upon. The reference to the letter detailing discrepancies was simply made to describe the purpose and effect of the document, nothing more..."

27. In my view, therefore, it is clear that the statement at [34] that to set out the subject matter is not to waive privilege in its contents was only part of the reasoning and the judgment, properly analysed, shows that the test that was being applied as to whether privilege had been waived included whether the letter was relied upon or whether the reference was simply to describe the purpose and effect of the document.
28. I do not therefore agree that a reference to the subject matter of a communication will always be viewed as not having waived privilege or even that it can be said to be most unlikely and in my view, the law is as stated by Mr Justice Waksman and set out at [60] of his judgment quoted above, the question is whether there has been reliance and that is a fact-sensitive exercise.
29. This is also consistent with the approach taken by Mr Justice Males, as he then was, in *Mid-East Sales v United Engineering* [2014] EWHC 892, referred to at [79] to [83] of the judgment in *PCP*. Having referred to *Hollander on Documentary Evidence*, where the authors noted a distinction between a reference to the fact of legal advice and reliance on the contents of that advice, Mr Justice Males said:
- "That distinction reflects a policy not to hold that there has been a waiver without good reason and to confine cases of waiver to cases where the party said to have waived is relying on the content of the legal advice for some purpose. Sometimes the distinction is drawn between reference to legal advice and deployment of it. The overriding principle is one of fairness, that if the content of legal advice is deployed or relied upon in order to advance a party's case, then fairness may require that disclosure of that advice be made available so that the court can properly assess that assertion."*

30. As to the *Thomas Pink* case, the claimant submitted that this also showed the judicial mindset, that a mere reference to the subject matter of a communication does not amount to a sufficient reference to waive privilege.

31. Again, however, it seems to me that the test which the judge applied in that case is set out at [14] of the judgment:

"...has the revealed matter been deployed to advance a party's case or has it simply been referred to in a way which falls short of reliance and deployment?"

32. On the facts of that case, the judge held at [16] that there was "*no attempt to refer to the content of the communication beyond its subject matter*" and "*... no attempt by the claimant ... to deploy the content of the communication. What is being relied on is not the communication ... but the evidence as to the incident ...*"

33. In other words, again the test that was being applied was whether or not there had been reliance and the purpose of that reliance in the context of the particular case.

34. In his judgment in *PCP* Mr Justice Waksman considered the authorities, including *Brennan v Sunderland City Council* upon which the claimant also relies, and I note the observations of Mr Justice Elias at paragraphs 64 to 67 of the judgment:

"64. Typically ...the cases attempt to determine the question whether waiver has occurred by focussing on two related matters. The first is the nature of what has been revealed; is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed; has it simply been referred to, used or deployed or relied upon in order to advance the party's case?... the principles are not altogether easy to discern partly perhaps because of the vagueness of the language adopted- for example sometimes reliance and deployment are used as separate terms and sometimes they appear to mean much the same thing- and partly because the cases are necessarily fact sensitive.

65. *It is an error to treat the earlier authorities as if the words falling from judicial lips had the distinction which Mr White submits represents the law. Plainly the fuller the information provided about the legal advice, the greater the risk that waiver will have occurred. But we do not think that the application of the waiver principle can be made to depend on a labelling exercise, particularly where the categories are so imprecise. The concepts shade into each other, and do not have the precision required to justify their employment as rigid tests for defining the scope of waiver.*

66. *Having said that, we do accept that the authorities hold fast to the principle that legal advice privilege is an extremely important protection and that waiver is not easily established. In that context something more than the effect of the advice must be disclosed before any question of waiver can arise.*

67. *However, in our view, the answer to the question whether waiver has occurred or not depends upon considering together both what has been disclosed and the circumstances in which disclosure has occurred. As to the latter, the authorities ...strongly support the view that a degree of reliance is required ...but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available. A court might, for example, find it difficult to say what side of the contents/effect line a particular disclosure falls, but the answer to whether there has been waiver may be easier to discern if the focus is on the question of whether fairness requires full disclosure.”*

Negative Assertions

35. A particular issue in this case is the question of whether privilege can be waived in relation to a negative assertion.
36. It was submitted for Tatneft that one could not meaningfully apply the test of whether there is any reliance on privileged material to a situation where the witness says that a particular matter was

not discussed at all. It was submitted that if a witness said "I never actually took any advice from my solicitor between 2010 and 2015 as to my rights under the contract", it would be a nonsense to suggest that they thereby waived privilege in all instructions given to them and all advice received from the solicitor over that five-year period.

37. It was submitted that this was different from the situation in *PCP*, where Barclays had placed extensive reliance on the content of the legal advice given to it by its lawyers. In that case it was a positive statement that the lawyers were approving what was being done as lawful.

38. It was submitted for the defendant that the test is whether you are relying on the contents of the legal advice and for what purpose and this can support a negative proposition. The defendant relied on *Mid-East Sales* as support for this, submitting that this was a case where a party asserted that he was not told something by his solicitor.

39. *Mid-East Sales* was summarised and considered by Mr Justice Waksman at [79]. It was a case where the defendant, Mr Mumtaz expressly referred to legal advice, by stating that:

"Acting on the advice of IA Solicitors, the claim form and enclosures were returned to the British High Commission ..."

40. In a witness statement Mr Mumtaz said:

"... I will ... demonstrate that it was as a result of IA Solicitors' advice that the second defendant took the steps it did in responding to the claim form."

41. Mr Justice Males said at [18]:

"It seems to me these two statements, taken together, do cross the line from reference to deployment. They make a case that the second defendant was acting on legal advice in responding to the claim form in the way that it did. That can only be relevant because the second defendant seeks to rely on that as a factor going to the exercise of the court's discretion. I can see no other reason why the reference to acting on legal advice should have been included ... Now

that the second defendant has invited the court to exercise its discretion on the basis that it was acting on legal advice, it may be highly relevant to know what that advice was."

42. It seems to me that that was a case where there was clearly a sufficient reference to legal advice and there was reliance on that advice. The defendant was making a case based on the legal advice, the assertion being that the advice was incorrect. Whilst it can therefore be said that there was reliance on the negative proposition that something did not happen, that is that the defendant was not given the correct advice, it is not in my view analogous to the situation where a party has not chosen to put forward a positive case in reliance on the advice, but only in response to a case advanced by the other party that says that no advice was given.
43. The defendant also relied on the decision in *MAC Hotels v Rider Levett Bucknall* [2010] EWHC 767 (TCC), in which it was submitted that a reference to a consultant's report was made in order to suggest that the report did not tell the claimant that he had a fraud claim against the contractor so that it was a "we did not discuss" case.
44. It was submitted for the defendant that privilege can be waived in communications which are relied on whether to support a positive proposition, "This is what my lawyers told me", or to support a negative proposition, "The lawyers did not tell me".
45. However, the defendant appeared to accept that there are limits in the case of the negative proposition, submitting that privilege would be waived where a party is saying that he did not tell his lawyer something on an occasion where he would have been expected to do so.
46. This is a distinction which has not been recognised in the authorities.
47. In my view, on the authorities, the question for the court is for what purpose the communication is being referred to. There is therefore, in my view, a distinction to be drawn between reliance on legal advice where a party has chosen to put forward a positive case in reliance on that advice, and this may include a negative proposition, such as "I discussed my divorce but did not discuss the house sale", and a situation where the party in response to a case advanced by the other party

denies an assertion made by the other party, "I did not discuss the house sale with my lawyer". When one considers the rationale for privilege, it must be correct that no waiver of privilege can occur by responding to an assertion by the other party as to the contents of an otherwise privileged communication. In that sense it seems to me there has been no voluntary disclosure.

Scope of waiver

48. If there has been a waiver, the court must then consider the scope of the waiver. It was common ground that in considering the scope of the waiver, it is necessary to identify the issue or transaction with which the waiver is concerned. The court was referred to *PCP* at [85] to [86] and to the recent decision of the Court of Appeal in the *R (Jet2.com) v Civil Aviation Authority* [2020] EWCA Civ 35 at [111]-114].

49. In *PCP* it was said:

"85. If waiver is established, then, and only then, the question of whether further privileged documents should be provided arises. Here the position was much less controversial between the parties as to the law. In essence, the court has to decide the issue or 'transaction' which the waiver was concerned with. Once that has been identified, then all the privileged materials falling within that issue or transaction must be produced. There may be no more if on a proper analysis the transaction itself was limited to the privileged material already referred to. The identification of the transaction should be approached realistically so as to avoid either artificially narrow or wide outcomes.

86. The transaction analysis itself is driven by the concept of fairness. It is why one has to ascertain the transaction, because then that establishes the playing field, as it were. If the playing field is in truth wider than the documents which have been referred to so far, then it is not level as far as the non-waiving party is concerned because disclosure has in truth been only partial."

50. In *Jet 2* the Court of Appeal said:

111. *The relevant principles are uncontroversial. Although the voluntary disclosure of a privileged document may result in the waiver of privilege in other material, it does not necessarily have the result that privilege is waived in all documents of the same category or all documents relating to all issues which the disclosed document touches. However, voluntary disclosure cannot be made in such a partial or selective manner that unfairness or misunderstanding may result (Paragon Finance plc v Freshfields [1999] 1 WLR 1183 at page 1188D per Lord Bingham CJ).*

112. *Collateral waiver of privilege allows for documents and other material that would otherwise be non-disclosable on public interest grounds, to be required to be disclosed even though the individual with the right to withhold disclosure objects. The courts have therefore imposed certain constraints on collateral waiver.*

113. *The starting point is to ascertain “the issue in relation to which the [voluntarily disclosed material] has been deployed”, known as the “transaction test” (General Accident Fire and Life Assurance Corporation Limited v Tanter [1984] 1 WLR 100 at 113D per Hobhouse J), waiver being limited to documents relating to that “transaction” subject to the overriding requirement for fairness. The “transaction” is not the same as the subject matter of the disclosed document or communication, and waiver does not apply to all documents which could be described as “relevant” to the issue, in the usual, Peruvian Guano sense of the term as used in disclosure (Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company (1882) 11 QBD 35).*

114. *In Fulham Leisure Holdings Limited v Nicholson Graham & Jones [2006] EWHC 158 (Ch); [2006] 2 All ER 599 at [18], having reviewed the relevant authorities, Mann J described the approach thus:*

”18. What those citations show is that it is necessary to bear in mind two concepts. First of all, there is the actual transaction or act in respect of which disclosure is made. In order to identify

the transaction, one has to look first at what it is in essence that the waiving party is seeking to disclose. It may be apparent from that alone that what is to be disclosed is obviously a single and complete 'transaction' — for example, the advice given by a lawyer on a given occasion.... [O]ne is in my view entitled to look to see the purpose for which the material is disclosed, or the point in the action to which it is said to go.... Mr Croxford [Counsel for the claimant, which sought to rely on LAP] submitted that the purpose of the disclosure played no part in a determination of how far the waiver went. I do not agree with that; in some cases it may provide a realistic, objectively determinable definition of the 'transaction' in question. Once the transaction has been identified, then those cases show that the whole of the material relevant to that transaction must be disclosed. In my view it is not open to a waiving party to say that the transaction is simply what that party has chosen to disclose (again contrary to the substance of a submission made by Mr Croxford). The court will determine objectively what the real transaction is so that the scope of the waiver can be determined. If only part of the material involved in that transaction has been disclosed then further disclosure will be ordered and it can no longer be resisted on the basis of privilege.

19. Once the transaction has been identified and proper disclosure made of that, then the additional principles of fairness may come into play if it is apparent from the disclosure that has been made that it is in fact part of some bigger picture (not necessarily part of some bigger 'transaction') and fairness, and the need not to mislead, requires further disclosure. The application of this principle will be very fact sensitive, and will therefore vary very much from case to case....”

The purpose of the voluntary disclosure, which has prompted the contention that privilege in other material has been collaterally waived, is therefore an important consideration in the

assessment of what constitutes the relevant "transaction" (see also Dore v Leicestershire County Council [2010] EWHC 34 (Ch) at [18]-[19] also per Mann J).

51. Notwithstanding the very recent, albeit obiter, consideration by the Court of Appeal in *Jet2*, the claimant referred the court to other authorities. In particular it was submitted for Tatneft that the label "issue" is apt to mislead because the cases have consistently taken a restrictive approach to the scope of a waiver. The claimant referred to *Passmore on Privilege*, 4th Edition (2020), at paragraph 7-409:

"... the court will usually look to see that everything has been disclosed in respect of what it has come to call 'the transaction' or 'the issue' to which the originally disclosed material is judged to be relevant. This misleadingly suggests that the consequences of this 'knock-on waiver' could be extensive, whereas in fact they tend to be limited."

52. It was submitted for Tatneft that it is clear that the transaction or issue does not mean all communications on the same topic. The court was referred to *Holyoake v Candy* [2017] EWHC 387 (Ch) at [51].

53. In *Holyoake*, Mr Justice Nugee considered the reference to "transaction" or "issue" by Mr Justice Mann in the *Fulham* case considered by the Court of Appeal in *Jet2*, which in turn led to a consideration of Mr Justice Hobhouse in *General Accident Fire and Life Assurance Corporation v Tanter*. At [35] of his judgment Mr Justice Nugee said:

"With that digression, I can return to what Mann J meant in Fulham at [11], when he said that you first have to identify the transaction in respect of which disclosure is being made. Unless he is consciously taking a different view to Hobhouse J, he means the actual communication in which privilege is waived. I do not read him as taking any different view from Hobhouse J. When, therefore, at [18] he says, 'First of all there is the actual transaction or act in respect of which disclosure is made', he means the same as Hobhouse J does when he says it is what somebody said on a particular occasion."

54. However, Mr Justice Nugee went on to say at [37]:

"It is true that Mann J goes on to say at [18] that, '... in order to ascertain whether that is in fact correct one is in my view entitled to look to see the purpose for which the material is disclosed, or the point in the action to which it is said to go', but on the facts of this case it does not make any difference."

55. In my view, therefore, it seems that Mr Justice Nugee was not taking a different approach in principle when he said that the transaction was limited to what was said on a particular occasion and, in any event, the approach taken by Mr Justice Mann has now been endorsed by the Court of Appeal in *Jet2*, as referred to above.

Issues for determination

56. Turning then to the matters in dispute, there are three questions: firstly, has privilege been waived; secondly, if it has been waived, the scope of the waiver; and thirdly, whether an order for disclosure should be made.

57. I propose to deal with the four matters raised in the order of the oral submissions made by the defendant.

The legal advice received by Tatneft in relation to the purpose, entry and/or approach of the second criminal complaint

58. The outline background facts are that the second criminal complaint was lodged in December 2011 jointly by S-K and Tatneft. In February 2012 the second criminal case against the top managers of the intermediaries was terminated. In March 2012 Tatneft's criminal lawyers gained access to the files of the criminal case and in the summer of 2012, according to Mr Syubaev, Tatneft learnt the results of the review.

59. In issue is the evidence of Mr Syubaev, a member of the management board of Tatneft, in particular paragraphs 84 to 86 of his witness statement dated 16 September 2016, of which the key passages are said by the defendant to be as follows.

84: *"...Tatneft still had no information on how and where the money disappeared from the intermediaries, or indeed who exactly was involved in orchestrating its disappearance or benefiting from it. At this moment it became clear that it was necessary to investigate the role of the top managers as soon as possible so Tatneft's criminal attorneys recommended that we promptly file a relevant complaint with the investigation authorities.*

85. *As advised by criminal attorneys, Tatneft approached S-K as its commission agent with a request to act as our joint complainant. I can say for certain that the complaint was prepared by Tatneft's criminal attorneys ...*

86. *...None of the Defendants were named in our and S-K's joint complaint. Although as I say above Tatneft had been able in its pleadings in the BIT arbitration in late 2009 to identify Privat, Mr Kolomoisky and Mr Ovcharenko as possible culprits, we did not have enough information either at that time or in late 2011 to be sure enough that it was them to enable us to name them as potentially responsible for the oil siphoning and we did not do so in our and S-K's joint complaint..."*

60. It was submitted for the defendant that in these paragraphs Tatneft has chosen to adduce and rely on evidence referring to the content of legal advice received by Tatneft in relation to the purpose, entry and/or approach of the second criminal investigation. It was submitted that in relation to paragraph 84 Tatneft was seeking to convey that the second criminal investigation was triggered by and specifically filed on the recommendation of Tatneft's lawyers and, further to advice, that Tatneft still had no information on how and where the money disappeared from the intermediaries or who exactly was involved in orchestrating its disappearance and at this moment it was necessary to investigate the role of the top managers.
61. It was submitted for the defendant that the word "so" was of critical importance. It was drawing the connection between the absence of information and the advice to file the complaint. It was submitted that it was clear that what Tatneft was saying was based upon what the criminal

attorneys recommended. It was submitted for the defendant that this evidence is relied on by Tatneft to support its case on limitation, in particular that Tatneft lacked knowledge and to explain that the purpose of the second criminal complaint was to investigate the top managers that were believed to have stolen the funds. It was submitted that it is also relied upon to show the limited cooperation and sharing of information and that, by filing the complaint, Tatneft and S-K did all that they reasonably could at the time.

62. It was submitted for Tatneft that the formulation of the proposed waiver is wide and unclear. It was submitted that all that paragraph 84 says about legal advice is that the second criminal complaint was filed on the basis of legal advice.
63. As stated by Mr Justice Waksman in *PCP*: "... *first [to establish a waiver], the reference to the legal advice must be sufficient ... and second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide*".
64. It was submitted for the defendant that these statements have been "carefully crafted" by Tatneft's lawyers and it was unrealistic to say reliance as suggested by the defendant was not intended.
65. I agree with Tatneft's submission that the defendant seeks to change what is actually said by Mr Syubaev in his witness statement and, although it may be carefully crafted, you cannot rewrite what is being said to read that Tatneft received advice that there was no information and that it was necessary to investigate the role of top managers. Even when one focuses on the word "so", it does not lead to the conclusion that the substance of the advice is that the lawyers advised Tatneft to file the criminal complaint because there was no information about who was responsible.
66. As Mr Justice Waksman said in *PCP* at 49:
"... 'My solicitor gave me detailed advice. The following day I entered into the contract'. That is not waiver, however tempting it may be to say that what is really being said is 'I entered into the contract as a result of that legal advice'."

67. It was submitted for the defendant that this issue was similar to the position in *Mid-East Sales* and that, having done something on the basis of legal advice, it was inappropriate not to see what that advice was. However, unless the defendant can show that there has been a waiver, the scope of the waiver does not arise and the defendant cannot justify waiver based on considerations of general fairness.
68. In *Mid-East Sales*, the court, having found that there was reliance, then concluded that it was necessary for the communications to be disclosed. Here, in my view, there is no waiver arising out of paragraph 84.
69. In relation to paragraph 85, it was submitted for the defendant that what Tatneft put forward is that, in approaching S-K as its commission agent with a request to act as a joint complainant on this particular occasion, this was further to and necessitated by the lawyers' advice to Tatneft.
70. It was submitted for Tatneft that even if it is a reference to legal advice, it is not relying on the fact that its approach to S-K to act as joint complainant was taken on the basis of legal advice.
71. I agree with Tatneft's submissions. In my view, this evidence is not being relied upon to advance an issue in the case. It is similar to the position in *Brennan* at [69].
72. In relation to paragraph 86, it was submitted for the defendant that what objectively Tatneft has put forward is that the joint criminal complaint was drafted by Tatneft's legal representatives and did not mention the defendants because the legal representatives' advice was that they did not have enough information to enable them to name the defendants as being potentially responsible for the oil siphoning in the joint complaint. It was acknowledged for the defendant that there is no reference in this paragraph to legal advice, but it was submitted that paragraph 86 cannot be read in isolation, but must be read together with paragraphs 84 and 85.
73. It was submitted for the defendant that this evidence is being relied upon to advance Tatneft's case on limitation and to be supportive of Tatneft's position that Tatneft and S-K lacked knowledge.

The defendant pointed to Tatneft's opening and skeleton that S-K lacked knowledge and requested the investigation. The defendant quoted from Tatneft's oral opening:

"[The matter set out on the face of the criminal complaint] was in essence the limit of S-K's knowledge at the time. S-K was not aware of the change of control of the intermediaries in 2009 or who might be behind it, and as the complaint reveals, it was thought then, wrongly in fact as it turned out, that the management of the intermediaries had stolen the funds. But the purpose of the complaint was to see if the investigators could find out what had happened to the funds."

74. It was submitted for Tatneft that this is an attempt to rewrite the evidence. There is no reference in the paragraph to lawyers or legal advice and reference to the opening oral and written submissions cannot ground an entitlement where they are not referred to.

75. Even if the relevant paragraphs are read together, in my view there is no reference to legal advice that they did not have enough information to name the defendants and, as in the case of paragraph 84 discussed above, the evidence cannot be rewritten to achieve that and thus establish a waiver.

76. For these reasons I find that there has been no waiver in respect of this matter.

The analysis, reporting and advice provided to Tatneft up to August 2012 by its legal representatives concerning (a) the products of the first or second criminal complaints, (b) more generally concerning the scheme or the persons responsible for it as to what and when was learnt in relation to the Oil Payment Siphoning Scheme and/or the defendants' involvement

77. The next issue is whether privilege has been waived in the analysis, reporting and advice provided to Tatneft up to August 2012 by its legal representatives concerning (a) the products of the first or second criminal complaints, (b) more generally concerning the scheme or the persons responsible for it as to what and when was learnt in relation to the Oil Payment Siphoning Scheme and/or the defendants' involvement.

78. The evidence relied upon for the waiver are Mr Syubaev's evidence, again in his 2016 witness statement at paragraphs 87 and 88:

"87. In February 2012 the criminal case against the top managers of the Ukrainian intermediaries was terminated because it was determined they had not been implicated in the theft. We were none the wiser as to who exactly was responsible, although of course we continued to have the same suspicions. We did not share those suspicions with S-K since there was no point in doing so because S-K had already done all it could and was obliged to do pursuant to the 2007 commission agency agreement to recover the oil debts, and also because the BIT arbitration was anyway ongoing and we were hoping to recover those sums as part of an award against Ukraine.

88. Starting early March 2012 Tatneft's criminal attorneys, relying on Tatneft's status of an aggrieved party, gained access to the files of the terminated criminal case. Towards summer 2012 I was informed by Tatneft's lawyers that further to the detailed analysis of those files Tatneft learnt the fate of the oil payments owed to us -- they had been siphoned from Taiz and Tekhnoprogress through a sophisticated fraudulent scheme orchestrated by Pavel Ovcharenko and Privat Group represented by Igor Kolomoisky. The scheme involved Privat gaining control over the Ukrainian intermediaries, siphoning oil payments from accounts of Taiz and Tekhno-Progress, purchasing non-marketable shares of Ukrainian companies for the money paid by UTN for the oil and further bankruptcy of the intermediaries on a fictitious basis."

79. It was accepted by Tatneft that this amounts to a waiver of privilege, but it was submitted that the scope of the waiver is limited to what the lawyers told Mr Syubaev that they had learnt from the review of the second criminal complaint files.

80. It was submitted for the defendant that what objectively Tatneft has put forward is not limited to what allegedly was said to Mr Syubaev by the lawyers on a particular occasion in the summer of 2012, but rather purports to give an account of the content of the legal analysis undertaken on behalf of Tatneft and the information learnt and imparted to Tatneft by the lawyers from this.

81. It was submitted that it was clearly the analysis of the second criminal complaint and the defendant referred the court to paragraph 383 of the claimant's skeleton for trial:

"It was after this [that is the termination of the second criminal investigation] ... Tatneft -- but not S-K -- was given access to the Second Criminal Case file, which gave the first proper indication as to what had happened. Again, there is no reason why Tatneft would have told S-K about this, and it did not..."

82. The defendant also referred to paragraph 423 of the claimant's skeleton for trial.

"Tatneft was shown some limited materials by the investigator from time to time. But it was not until early 2012 that Tatneft was given full access to the Second Criminal Case file. There followed a painstaking review of some of the extensive materials ... The materials provided to Tatneft gave the first proper indication of the Scheme now known to have taken place. In particular, it was documents from the criminal investigation which revealed what had happened to the oil monies, namely that they had been siphoned off through a series of apparent share sale and purchase transactions..."

83. It was submitted for the defendant that, given the reliance on what had been learnt by Tatneft, the transaction must extend to the analysis, reporting and advice provided to Tatneft concerning both the products of the first and second criminal complaints and, more generally, the scheme or the persons responsible for it, otherwise it was submitted the court will only have a partial picture of the transaction.

84. For Tatneft it was submitted that there has been a waiver of privilege, but the question is the scope of the waiver. The claimant referred to Mr Justice Nugee in *Holyoake v Candy*: the transaction is *"... the actual communication in which privilege is waived ... what somebody said on a particular occasion."* In this case it was submitted the transaction to which Mr Syubaev had referred is the communication in the summer of 2012 from Tatneft's lawyers to Mr Syubaev by which they informed him of what they learnt from their review of the second criminal complaint files.

85. As discussed above, I do not accept the proposition that the transaction is necessarily the actual communication, what was said on a particular occasion. As stated in *Jet2*, in order to identify the

transaction, one has to look first at “*what it is in essence that the waiving party is seeking to disclose. It may be apparent from that alone that what is to be disclosed is obviously a single and complete transaction; for example, the advice given by a lawyer on a given occasion*”.

86. As also set out in *Jet2* at [114], the purpose of the voluntary disclosure is an important consideration in the assessment of what constitutes the relevant transaction. The identification of the transaction must be approached realistically to avoid either artificially narrow or wide outcomes: *PCP* at [85].
87. Further, as stated by the Court of Appeal in *Jet2* referring to *Paragon Finance*:
"Although the voluntary disclosure of a privileged document may result in the waiver of privilege in other material, it does not necessarily have the result that privilege is waived in all documents of the same category or all documents relating to all issues which the disclosed document touches. However, voluntary disclosure cannot be made in such a partial or selective manner that unfairness or misunderstanding may result."
88. If one asks the question in this case of what the disclosing party is seeking to disclose, the purpose of the reference to the legal advice is to demonstrate what has been learnt through the investigation and to support Tatneft's case that this was all that they had learnt.
89. It was submitted for the defendant that unless the broad waiver is ordered, the court will only have a partial picture of the transaction. However, as stated above, not all documents which can be described as relevant will fall to be disclosed.
90. In this case, I do not accept that the scope of the waiver extends beyond the communications reporting the outcome and the advice provided in 2012 of the product of the second criminal complaint and the scope of the waiver does not extend, in my view, to the underlying materials.
91. The waiver is not, in my view, limited to advice on the particular occasion referred to. The transaction extends to all advice given as to the product of the second criminal complaint, although I understand Tatneft's position to be that there are no such communications which have

been withheld. I do not accept that the scope of the waiver -- that the transaction extends to the product of the first complaint.

92. Does the waiver extend more generally to the scheme or the persons responsible for it? It was submitted for the defendant that fairness dictates that the waiver must extend to this. It was submitted that the purpose of the disclosure of the legal advice was to show that the information received of itself was not enough and the key point in time was the evidence in the BIT arbitration.
93. I accept that this evidence is part of a bigger picture. However, I remind myself that legal professional privilege is regarded as a fundamental right of the client whose privilege it is. The loss of that right through waiver is therefore to be carefully controlled. Where there has been a waiver, the concept of fairness can entail the production of further privileged documents if, by the waiver, the party is creating a partial picture only of the relevant legal advice, such that it would be unfair to allow the party to "cherry-pick" in this way. However, in my view, the need to avoid partial or selective disclosure does not mean that in this case the waiver extends to all communications relating to the scheme and persons responsible for it. That, in my view, would be an artificially wide outcome from a waiver of communications relating to the outcome of the second criminal complaint.

The legal advice given prior to S-K's liquidation in May 2015, as to the reasons for and/or the scope of assignment of claims by S-K to Tatneft

94. The next issue is whether privilege has been waived in the legal advice given prior to S-K's liquidation in May 2015, as to the reasons for and/or the scope of assignment of claims by S-K to Tatneft. The evidence in issue is paragraph 82 of the witness statement of Mr Maganov dated 29 April 2020:

"As I mentioned earlier, in late 2014 and early in 2015, I became aware that S-K was in serious financial difficulties. I recall a conversation with Mr Korolkov in the autumn of 2014 ... I

discussed [the liquidation of S-K] with Mr Syubaev, who was working with Akin Gump. They concluded that if S-K were to be liquidated, all claims S-K had would need to be transferred to Tatneft. This specifically included the claims against the four individual defendants."

95. It was submitted for Tatneft that what is sought by the defendant is far too wide, it goes beyond what Mr Maganov was told by Mr Syubaev in the autumn of 2014, it is not limited to Akin Gump, but extends to all legal advice and goes beyond the time of the conversation. It was submitted that this was a narrative reference and does not constitute a waiver, that Tatneft was not relying on what Mr Maganov was told by Mr Syubaev for an issue in the case and the evidence does not say that Tatneft signed the agreement on the basis of legal advice.
96. It was submitted for the defendant that this was not a narrative reference but a reference to the content of legal advice. Its purpose was to improve Tatneft's case as to the subjective intention to receive assignments of particular claims and to establish that there had been no impropriety. The scope of the transaction is the legal advice provided as to the reasons for, and the scope of the assignment of the claims.
97. The purpose and nature of the voluntary disclosure are crucial. In my view, it is clear that the reference to "they concluded" is a reference jointly to Akin Gump as well as Mr Syubaev and the reference is to advice that the claims "needed to be transferred". In my view, the purpose of the reference is to rely on the legal advice in relation to issues in the case, notably issues 34 and 37, 34 relating to what claims on a proper construction were (purportedly) assigned, and issue 37, was the assignment a device to circumvent limitation and invalid on that basis.
98. In my view it is clear that privilege has been waived.
99. The question therefore is the scope of the waiver and what is the transaction. It was submitted for the claimant that it only extends to the advice on the single occasion. In my view, the scope of the waiver is broader and extends to all the advice given by Akin Gump in relation to the reasons for and the scope of the assignment. However, the transaction is not the same as the subject matter of

the disclosed document and privilege is not necessarily waived in all documents of the same category. Accordingly, in my view, the whole of the Akin Gump advice in relation to the reasons for and scope of the assignment must be disclosed, but it does not extend beyond this to any other legal advice from other lawyers which might be said to be relevant.

100. As noted above, disclosure cannot be made in a partial or selective manner such that unfairness or misunderstanding may result. In order to avoid cherry-picking, it seems to me that the scope of the waiver is not limited in time but is limited by reference to the subject matter and the giver of the advice, ie Akin Gump.

All communications between S-K and Tatneft in the period October 2007 to March 2012

101. Turning then to the final matter, all communications between S-K and Tatneft in the period October 2007 to March 2012. It was submitted for the defendant that Tatneft had served and relied at trial upon evidence that addresses the scope and content of communications between Tatneft and S-K legal representatives between October 2007 and March 2012. This material is said to be set out at annex 1 to the defendant's skeleton for the application and a copy of that annex is attached to this judgment.
102. It was submitted for the defendant that Tatneft is relying on all this evidence to support their case as to limited knowledge of the scheme and that such knowledge as they had was not shared. It was therefore submitted for the defendant that privilege had been waived in all communications between Tatneft and S-K.
103. For Tatneft it was accepted that there had been a waiver, but only in respect of the period from September 2009 to March 2010 and only in relation to the enforcement in Ukraine.
104. For the defendant it was submitted that the scope of the waiver is broader and extends to all communications from October 2007 to March 2012.

105. Tatneft has confirmed that there are no documents evidencing communications between S-K and Tatneft legal representatives in the period October 2007 to December 2010 that have been withheld from inspection on the basis of privilege.
106. Although the defendant submitted that the court should assess the issue of reliance on this evidence as a whole, it seems to me that the court needs to examine carefully whether there is a sufficient reference to legal advice and this does require an analysis of the evidence relied on by the defendant and set out in annex 1. This is in accordance with the approach adopted by Mr Justice Waksman in *PCP* and also by Mr Justice Morgan in *Digicel v Cable & Wireless* [2009] EWHC 1437 (Ch), a case considered by Mr Justice Waksman and referred to at [74] of his judgment.
107. In *Digicel*, Mr Justice Morgan was dealing with a not dissimilar fact situation, where it was sought to rely upon the effect of the witness statements taken together rather than a particular reference. Mr Justice Morgan said at 27:
- "...Even if the suggested inference were appropriate, I do not see how it could be said that as a result of that inference the witness statement contains a reference to the contents of the legal advice. There needs to be a reference -- and I stress the word 'reference' -- to the contents of the legal advice for there to be the beginnings of a case as to waiver by deployment by the defendants."*
108. I also note his observations at [41], in summary, that fairness is not the touchstone and, although legal advice would be highly relevant, an order in relation to waiver must be in accordance with legal principle. Privilege is not lightly to be overridden by an over-readiness on the part of the court to find a waiver of privilege.
109. The defendant grouped the references in the annex by reference to subject matter. The first was the BIT arbitration which it was submitted was described at paragraphs 1, 2, 5, 6, 12 and 21.

110. It was submitted that Tatneft had deployed evidence whose purpose was to say that there was no cooperation or free flow of information between Tatneft and S-K in relation to BIT.
111. Dealing with the paragraphs identified, paragraph 1 of the annex is a reference to paragraph 102 of Mr Gubaidullin's witness statement. In essence Mr Gubaidullin denies that there was a free flow of information between S-K and Tatneft in the build-up to the BIT arbitration and states that the cooperation went no further than the provision of documents by S-K to Tatneft, including through the lawyers when requested by Tatneft.
112. Paragraphs 5 and 12 of the annex refer to paragraphs 117 and 179 of Gubaidullin respectively and are to similar effect as paragraph 102. Paragraph 117 is a denial that Tatneft did anything other than hand over documents when asked. Paragraph 179 is a reference that Tatneft's lawyers asked on a periodic basis for copies of documents.
113. Even if this evidence is given in part in support of Tatneft's case on knowledge and relied upon by Tatneft as part of its overall case that S-K did not have the requisite knowledge, the fact that there were stated to be communications between the lawyers in relation to the supply of documents does not, in my view, amount in the circumstances and on the authorities to a sufficient reference to legal advice for waiver to arise. A statement that documents were provided on request is not sufficient reference to open up the contents of those communications. It is a mere reference to the fact of the communication.
114. Paragraph 2 of the annex is a reference to paragraph 108 of Mr Gubaidullin's witness statement. In summary, he denies that S-K cooperated with Tatneft and states that there were some discussions between the lawyers but these did not involve the BIT arbitration. Here there is a reference to discussions between the lawyers, but it takes the form of a denial that the BIT arbitration was discussed.
115. As counsel for Tatneft observed, it would be an odd result if by responding to an assertion that a matter was discussed and denying it, this were to have the effect of privilege was thereby waived.

Although a negative assertion, it is not the same as the position in *Mid-East Sales*, where the defendant was relying on the positive, albeit wrong, advice of his lawyers. Analysed in accordance with the authorities, it seems to me that this is an example where, when viewed through the prism of whether there is reliance, there is no positive case being put forward based on the legal advice.

116. Paragraph 6 of the annex, paragraph 120 of Gubaidullin, here there is a denial that Mr Abdullin discussed the arbitration with Tatneft's lawyers. However, in my view, the evidence then goes further in that there is a positive assertion that there was assistance provided to S-K on the recovery of the contractual indebtedness, but it is asserted that Tatneft's assistance was limited in scope. It is positively asserted that assistance was only provided in terms of the recovery of the contractual indebtedness for the supplied oil. The purpose of the evidence, it seems to me, is to rely on that evidence in respect of an issue in the case, namely limitation and knowledge. In my view, therefore, this crosses the line from a reference to legal advice to reliance upon the content of the material and I consider below the scope of this waiver.
117. Paragraph 21 of the annex, paragraph 30 of Mr Aleksashin's witness statement, positively states that there is no discussion about recovery other than S-K in respect of the arbitration or UTN.
118. In my view this again crosses the line from narrative to deployment.
119. In relation to the criminal investigation, paragraphs 13 and 24 of the annex, which are paragraphs 195 of Mr Gubaidullin's witness statement and 39 of Mr Aleksashin's witness statement, this topic is dealt with separately below. But in relation to these specific paragraphs, paragraph 195 of Mr Gubaidullin's witness statement refers to communications, namely that Mr Abdullin told Mr Gubaidullin that criminal proceedings had been initiated and S-K was not recognised as an injured party, otherwise it is a negative statement that no updates on the criminal investigation were sought or received.

120. It was submitted for Tatneft that there is no relevant reliance and it is just the communication of information. It was submitted for the defendant that the court should take a broader approach. It seems to me that there is no relevant reliance in respect of an issue in the case on the communication that legal proceedings had been initiated.
121. As to paragraph 39 of Mr Aleksashin's witness statement, in summary he says he was contacted by the investigator and had discussions with him. There is no detail given of the discussions and, in my view, no reliance on the content of those discussions. In my view this is a purely narrative reference to the giving of legal advice which does not constitute a waiver.
122. The third category in the annex was said to be evidence about the extent of cooperation between lawyers to maximise recovery and how best to recover the monies. The defendant pointed to paragraphs 2 and 3 of the annex in relation to cooperation between the lawyers and, in particular, discussions about the pursuit of the Tatarstan and Ukrainian proceedings; paragraphs 7, 8, 22 and 23.
123. I have already dealt with paragraph 2 above. In relation to paragraph 3, this is a reference to paragraphs 111 to 112 of Mr Gubaidullin's witness statement. These paragraphs include statements that there were regular discussions between Mr Abdullin and Mr Aleksashin on behalf of S-K and the lawyers for Tatneft. It is said that there were regular calls to brainstorm ideas, discuss options as to how best to recover the money owed to S-K and ultimately to Tatneft. It is said that the cooperation, in trying to find the best options for S-K to recover the contractual indebtedness of the supplied oil, continued until the beginning of 2010.
124. It was submitted for Tatneft that this evidence, along with the other paragraphs in Mr Gubaidullin's witness statement, contain no reference to the content of any privileged communications, but only to the subject matter or scope of the communications between Tatneft and S-K. It seems to me that this is not a purely narrative reference. It refers to the content of discussions and is deployed or relied upon to advance Tatneft's case that there was no exchange of

information between S-K and Tatneft. In my view, therefore, privilege has been waived in relation to these paragraphs and the issue is the scope of that waiver.

125. Paragraphs 7 and 8 relate to paragraphs 124 and 128 of Mr Gubaidullin's witness statement. Mr Gubaidullin refers to the cooperation between S-K and Tatneft's lawyers and that Mr Abdullin told him that S-K's lawyers were updating the lawyers about the progress of the proceedings. In my view this is essentially a narrative reference which is not relied upon. The same, in my view, can be said in relation to paragraph 128 of Mr Gubaidullin's witness statement, which states that Mr Abdullin approached Ms Savelova for help in finding a Ukrainian law firm to represent S-K.

126. Paragraphs 22 and 23 relate to paragraphs 32 and 35 of Mr Aleksashin's witness statement. Of particular relevance are the statements that:

"During the 2007/2008 period, S-K and Tatneft's lawyers were in contact, but this was only in relation to S-K's claim against UTN ...

"By summer 2009, the cooperation between Tatneft and S-K's lawyers was much more limited."

127. It was submitted for Tatneft that this is no more than a reference to the subject matter of communications. I agree that there is not a sufficient reference to legal advice.

128. As to the remaining paragraphs of the annex, these were not addressed in detail in the submissions, but in my view in paragraphs 15, 16, 18, 19 it is clear that there are not sufficient references to legal advice. and in respect to paragraph 25, there is in my view no reliance.

129. As to paragraphs 11 and 17 of the annex, which are paragraph 172 of Mr Gubaidullin and paragraph 74 of Mr Syubaev, I deal with these below as the claimant accepted that there had been a waiver and the question is the scope of the waiver.

130. However, I first need to address the broader argument advanced by the defendant, that the court should look at the totality of the evidence in annex 1, and it was submitted that it is clear from the opening submissions, both written and oral, that Tatneft is relying on this evidence as to the contents of the communications between S-K and Tatneft in advancing its case on limitation. It

was submitted for the defendant that Tatneft and S-K have therefore waived privilege in respect of any communications between them relating to the recovery of the oil monies or pursuit of any third parties.

131. The defendant relied in particular on paragraph 172 of Mr Gubaidullin's witness statement and paragraph 401 of the claimant's opening skeleton for trial as well as paragraph 387.

132. Paragraph 172 of Mr Gubaidullin's witness statement stated:

“The S-K Legal Department addressed Tatneft’s Legal Department with a query to analyse the potential outcome of the enforcement proceedings in Ukraine in order to recover the rest of the indebtedness from assets of UTN located in Ukraine. Mr Abdullin and Mr Aleksashin informed me that the local Ukrainian counsel was dealing with it. As I know the bundle of documents requested by the local counsel in order to initiate the enforcement proceedings in Ukraine was gathered and sent to him. At that time, however, Tatneft’s lawyers, the S-K Legal Department and the local counsel having analysed the situation came to a joint opinion – the enforcement of the Russian decision in Ukraine was hopeless at that time: first, due to political situation in Ukraine; and second, due to the existence of a conflicting Ukrainian court decisions invalidating the 2008 Assignment Agreement. It was a decision taken by S-K and approved by Tatneft’s lawyers not to pursue further the enforcement of the decisions because there were no prospects.”

The relevant passages from Tatneft’s skeleton are:

401 *“During late 2007 and 2008, S-K was in communication with Tatneft regarding the recovery steps it was taking against Avto and UTN. S-K also sought, and received, Tatneft’s assistance with some of those steps. This co-operation thus had specific reasons behind it. There is no basis on which to extrapolate, as the Defendants seek to do by way of inference that such co-operation in respect of recovery action continued in the same way for years on end or in relation to matters outside the scope of the commission agency relationship. In fact, as the evidence will show and as one would expect, such co-operation ceased once the rationale for it fell away.”*

387 *“The Defendants...[invite] the Court to infer that Tatneft would have told S-K everything it knew. The Court will hear directly from representatives of Tatneft and S-K, whose evidence that this is not what happened is consistent with the contemporaneous documents. There is thus no need, and no room, for resort to inferences.”*

133. It was submitted in relation to paragraph 387 that Tatneft was positively advancing that the witnesses it will call have provided a comprehensive account of the content of the contemporaneous communications between S-K and Tatneft and that a complete record of the contemporaneous documentation evidencing communications has been put before the Court. The defendant submitted that the claimant had relied upon evidence that "addresses the scope and content of communications between Tatneft and S-K's legal representatives".
134. As stated by Mr Justice Waksman in *PCP*, first, the reference to the legal advice must be sufficient and, second, the party waiving it must be relying on that reference in order to advance its case on an issue the court has to decide.
135. In relation to paragraph 387 of the skeleton, I agree that this is not a waiver. There is no express reference to legal advice and, in my view, the submission in the opening skeleton is merely a statement that the court will hear evidence from the witnesses. It cannot be inferred that all privilege is thereby waived. There is no specific reference to legal advice and there is insufficient to infer a waiver.
136. As to paragraph 401 of Tatneft's opening skeleton, it was submitted that Tatneft is relying on the contents of the communications, including maintaining that information pertaining to the elements of the siphoning scheme was not shared with S-K and in maintaining that cooperation between Tatneft and S-K was limited.
137. It was submitted for Tatneft that there is no reference in paragraph 401 to lawyers or their communications. I agree with that submission. In my view there cannot be said to be expressly or impliedly sufficient reference to legal advice to amount to waiver. Accordingly I reject the

submission that a waiver has occurred on the basis of the submissions made by Tatneft and the totality of the evidence set out in the annex. I have considered in detail above the particular paragraphs in the annex and there are only limited instances where, in my view, there is sufficient reference to legal advice and reliance on that advice in relation to an issue to be determined to conclude that a waiver has occurred. The submission of a broader waiver has not, in my view, been made out.

138. Turning finally then to the scope of the waiver in relation to paragraphs 111 to 112, paragraph 120, paragraph 172 of Mr Gubaidullin's statement, paragraph 74 of Mr Syubaev and paragraph 30 of Mr Aleksashin. It was accepted for Tatneft that there had been a waiver in respect of paragraph 172 of Mr Gubaidullin's statement and paragraph 74 of Mr Syubaev in relation to enforcement of the Tatarstan judgment in Ukraine, but it was submitted that the scope of the waiver should be limited to the period September 2009 to March 2010.
139. Applying the principles identified in *Jet2*, what is disclosed by paragraph 172 of Mr Gubaidullin's statement and paragraph 74 of Mr Syubaev, in my view, is the advice in relation to the enforcement of the Russian decision in Ukraine. The purpose of the disclosure, in my view, is to identify a limited circumstance in which there was cooperation between S-K and Tatneft. The period in my view starts with the S-K enforcement of the judgment in September 2009 and continues until March 2010.
140. In relation to paragraphs 111 to 112 and paragraph 120 of Mr Gubaidullin as well as paragraph 30 of Aleksashin, in relation to this evidence it seems to me that the transaction is the steps taken in relation to the recovery of the contractual indebtedness in the period from the end of 2007 to March 2010. I do not accept that the transaction should be extended to all communications, including recovery from third parties. Third parties are not referred to and the waiver, in my view, the transaction, does not extend to all matters.

141. There is no basis, in my view, to extend the scope of the waiver beyond March 2010 and I do not accept that any consideration of fairness requires the extension of the scope to a further period of time.
142. As to the orders, it seems to me that the parties should be capable of reaching an agreement as to the form of order, given that in the majority of cases I believe that no order for disclosure will be appropriate, confirmation having been provided by Tatneft in relation to the documents which they say already have not been withheld.

Annex

Tatneft has served and relied at trial upon evidence that repeatedly addresses the scope and content of the communications between S-K and Tatneft’s respective legal representatives between October 2007 and 2010 and indeed positively advanced the position in its Opening Skeleton that a complete account of the content of such communications has been provided¹. Thus, for example:

1. At paragraph 102 of Mr Gubaidullin’s witness statement, he asserted that:

“...if by referring loosely to “cooperation” Ms Boulton is seeking to suggest that there was a free-flow of information backwards and forwards between S-K and Tatneft in the build up to the BIT arbitration, that simply was not the position...sometime in 2008 Tatneft’s lawyers could on a periodic basis ask for a copy of this or that document relating to the oil supplies, but the S-K Legal Department did not know for what purpose Tatneft required those documents. As I explain below, nobody at S-K was aware of the existence of the BIT arbitration until this information appeared in press in spring 2008. It may well be the case that some of the documents provided to Tatneft were used in the BIT arbitration but that was not something known by S-K. Therefore, the “cooperation” in connection with the BIT arbitration, as mistakenly alleged by Ms Boulton went no further than S-K providing copies of documents to Tatneft as and when Tatneft requested it. Tatneft did not inform me or anyone at S-K that they were about to embark on the BIT arbitration.”

2. At paragraph 108 of Mr Gubaidullin’s witness statement, he asserted that:

“...Ms Boulton is not correct when she says that S-K cooperated with Tatneft in relation to the BIT arbitration if she means that we did anything other than simply hand over documents when Tatneft asked us. We were not even told what use if any the documents were to be put to. There were some discussions as between lawyers of S-K and Tatneft on steps that might be available to maximise the recovery of the contractual indebtedness but these discussions did not involve any mention of the BIT arbitration, since it was out of the scope of cooperation between Tatneft’s lawyers and our Legal Department.”

3. At paragraph 111-112 of Mr Gubaidullin’s witness statement, he asserted that:

“Once it became clear that UTN was not going to voluntarily pay for the supplied oil at the end of 2007, Mr Abdullin as Head of the S-K Legal Department approached Ms Savelova and discussed the possibility of Tatneft’s lawyers providing legal assistance to S-K and potential cooperation between the S-K Legal Department and Tatneft’s lawyers. The purpose of this would be analysing the difficulties faced by both companies in recovering payments for the supplied oil...In the end of 2007, or the beginning of 2008, as a result of and further to that initial discussion mentioned above, there were regular discussions between Mr Abdullin, lawyers from the S-K Legal Department, Mr Vadim Aleksashin (who as I mentioned was S-K’s attorney, with whom S-K worked on a regular basis and who was instructed to assist with the debt recovery efforts) and Tatneft’s lawyers. There were regular calls to brainstorm ideas

¹ See paragraph 387.1 of Tatneft’s Opening Skeleton.

and discuss options as to how best to recover the money owed to S-K, and ultimately to Tatneft in the circumstances where only Taiz and Teckhnoprogress had direct contractual relationship with UTN. That professional support was beneficial to S-K as it could benefit from the larger legal resources of Tatneft, both in terms of numbers and experience, which Tatneft had in general and with regards to peculiarities of the Ukrainian legal landscape with which Tatneft already had been acquainted, in comparison to the S-K Legal Department. The cooperation was also beneficial to Tatneft, as by assisting SK in the analysis of potential steps which could have been undertaken by S-K to recover the contractual indebtedness for the oil it was essentially assisting itself as S-K would have the obligation to pay any money it recovers under the S-K/Avto Contract to Tatneft under the 2007 Commission Agreement (bar its own commission fee). That cooperation, in trying to find the best options for S-K to recover the contractual indebtedness for the supplied oil, continued until the beginning of 2010.”

4. At paragraph 116 of Mr Gubaidullin’s witness statement, he asserted that:

“Tatneft’s lawyers provided professional assistance to the S-K Legal Department in terms of analysis of the steps S-K could undertake in order to recover the contractual indebtedness. The assistance was of limited nature and in any way it does not follow from such assistance that Tatneft gave instructions to S-K to enter into the 2008 Assignment Agreement or arranged it. S-K as an independent entity entered into the agreement upon its own will and exercising its own rights in conjunction with its obligations under the 2007 Commission Agreement and considering interests of the principal, Tatneft. Moreover, I recollect that in the course of the above communication there were some hot disputes between the legal teams, that were eventually resolved as we found a compromise...”

5. At paragraph 117 of Mr Gubaidullin’s witness statement, he asserted that:

“...With respect to this arbitration [the BIT Arbitration] we did not do anything other than simply hand over documents when Tatneft asked us. When we did that we had no knowledge of how and when Tatneft will use them and why it needs them. Apart from that cooperation there was no cooperation in connection with the BIT arbitration (if one can even call it “cooperation”) between Tatneft and S-K.”

6. At paragraph 120 of Mr Gubaidullin’s witness statement, he asserted that:

“Mr Abdullin did not discuss the international arbitration with Tatneft’s lawyers. That was so for a number of reasons. First, the assistance of Tatneft’s lawyers was provided to S-K upon the S-K Legal Department’s request to consult it on the recovery of the contractual indebtedness from the Ukrainian buyer. Tatneft’s assistance was considered by the S-K Legal Department reasonable and in the very best interests of both, S-K and Tatneft. Tatneft’s legal assistance was limited in scope: the assistance was only provided in terms of the recovery of the contractual indebtedness for the supplied oil...Mr Abdullin told me that within the interaction between S- K’s Legal Department and Tatneft’s lawyers starting from around the end of 2007 and until the beginning of 2010 S-K’s Legal Department provided Tatneft’s lawyers, at their request, with some documents relating to the oil supplies to UTN. He did not

know whether those documents were used by Tatneft in the BIT arbitration or not, probably some of them could have been used.”

7. At paragraph 124 of Mr Gubaidullin’s witness statement, he asserted that:

“As a result of the cooperation between the S-K Legal Department and Tatneft’s lawyers, Tatneft’s lawyers were aware of the commencement of the proceedings from conversations with the S-K Legal Department. In addition, Mr Abdullin told me that he or other members of his team in the Legal Department were updating the Tatneft’s lawyers about the progress of the proceedings.”

8. At paragraph 128 of Mr Gubaidullin’s witness statement, he asserted that:

“When S-K received the Ukrainian court papers with the Ukrainian claim, Mr Abdullin approached Ms Savelova and asked her to help us in finding a reliable Ukrainian law firm to represent S-K in these proceedings. Mr Abdullin asked for Tatneft’s assistance since he knew they already had relevant experience in litigation in Ukrainian courts and, therefore, could recommend a reputable Ukrainian law firm.”

9. At paragraph 142 of Mr Gubaidullin’s witness statement, he asserted that:

“The S-K Legal Department and Tatneft’s lawyers continued their cooperation and jointly analysed the options S-K had to recover the debt from Avto and UTN by enforcing the judgements S-K obtained. The conclusion of that analysis in terms of enforcement of the Moscow ICAC decision was that the prospect of successful enforcement in Ukraine was minimal, almost non-existent. And since both S-K and Tatneft were aware that Avto did not have any funds to cover the debt, enforcement of the judgement against Avto was commercially not reasonable for S-K and a waste of time.”

10. At paragraph 150 of Mr Gubaidullin’s witness statement, he asserted that:

“...both the S-K Legal Department and Tatneft’s lawyers had an understanding that taking into account the advice given by our Ukrainian counsel, the Ukrainian reality, the political pretext of the proceedings and Tatneft’s experience in the Ukrainian courts, there was nothing more that S-K could undertake in the battle for the validity of the 2008 Assignment Agreement in Ukraine. There was also an understanding that the Ukrainian proceedings were most likely initiated by UTN to block the chances of S-K for recovery of the debt from UTN in Ukraine, since the existence of the conflicting Ukrainian court decisions could have become an obstacle to enforce a conflicting judgement of the court of another country in Ukraine.”

11. At paragraph 172 of Mr Gubaidullin’s witness statement, he asserted that:

“The S-K Legal Department addressed Tatneft’s Legal Department with a query to analyse the potential outcome of the enforcement proceedings in Ukraine in order to recover the rest of the indebtedness from assets of UTN located in Ukraine. Mr Abdullin and Mr Aleksashin informed me that the local Ukrainian counsel was dealing with it. As I know the bundle of

documents requested by the local counsel in order to initiate the enforcement proceedings in Ukraine was gathered and sent to him. At that time, however, Tatneft's lawyers, the S-K Legal Department and the local counsel having analysed the situation came to a joint opinion – the enforcement of the Russian decision in Ukraine was hopeless at that time: first, due to political situation in Ukraine; and second, due to the existence of a conflicting Ukrainian court decisions invalidating the 2008 Assignment Agreement. It was a decision taken by S-K and approved by Tatneft's lawyers not to pursue further the enforcement of the decisions because there were no prospects.”

12. At paragraph 179 of Mr Gubaidullin's witness statement, he asserted that:

“...sometime in 2008 Tatneft's lawyers could on a periodic basis ask for a copy of this or that document relating to the oil supplies, but the S-K Legal Department did not know for what purpose Tatneft was requesting those documents.”

13. At paragraph 195 of Mr Gubaidullin's witness statement, he asserted that:

“At the beginning of 2012 Mr Abdullin let me know that criminal proceedings had been initiated as a result of the joint request and that S-K was not recognised as the injured party in the investigation, but Tatneft was. As I understood it he got this information from the investigator when he called him to get an update on the investigation. Then I did not hear anything further about that investigation. I do not remember personally seeking particular updates from Tatneft on how that investigation was going, and I did not receive any.”

14. At paragraph 54 of Mr Syubaev's witness statement, he asserted that:

“Since Tatneft had bigger legal resources as compared to S—K and Tatneft had an ultimate interest in S-K getting the money for the oil Tatneft of course was taking part in the analysis of the unusual situation with the UTN's debt. As I already mentioned above for these purposes starting late 2007 Tatneft's lawyers helped S-K's lawyers to analyze the situation with the debt and to find the most efficient solution to have it resolved. One of the possible solutions for S-K was to enter into an assignment agreement to have the claims against UTN transferred to S-K and proceed against UTN in court, both of which were indeed performed by S-K. It was not Tatneft's decision that S-K shall proceed with the assignment. As far as I was informed by Maria Savelova, Tatneft had no role in the assignment of claims against UTN other than provision of legal assistance to S-K in terms of analysing the possibility of such assignment to S-K. Tatneft's decision to provide legal assistance to S-K's lawyers was obviously driven by the fact that it was important for Tatneft to receive payment for the oil, which it would have done, had S-K managed to recover it from UTN (and which it did indeed in respect of part of it).”

15. At paragraph 64 of Mr Syubaev's witness statement, he asserted that:

“...since Tatneft did not have confirmation from S-K of the payments, it assumed that the payments probably had not been made by UTN. We assumed that Ovcharenko most likely would have had to authorise the alleged payments but had no idea who Ovcharenko was acting for, on his own, for Tatneft (to cover the debt for oil supplied) or for third parties.

Tatneft did not inform S-K of the alleged payments supposedly made by UTN since the information in possession of Tatneft was unofficial and Tatneft had no proof that the payments were actually made by UTN. This information in any way did not affect S-K's performance of obligations under the 2007 commission agency agreement since S-K by that time already obtained a judgement of the Russian court awarding it full recovery of payments for oil supplied from UTN..."

16. At paragraph 69 of Mr Syubaev's witness statement, he asserted that:

"As a result, Tatneft did not have clear understanding of the events. It meant that the intermediaries could have been acquired by persons representing either Privat or Naftogaz or its individual officers, or the new managers of the intermediaries themselves, and the latter could be acting either for themselves or for third parties, like former managers of UTN V.M. Matytsin and VA. Demekhin. I can say that we did not share our suspicions with S-K since there was no point — it had already done what it could by getting the judgment against UTN and pursuing enforcement as far as possible."

17. At paragraph 74 of Mr Syubaev's witness statement, he asserted that:

"As the debt was recovered only in part, it is logical that the enforcement of the Russian judgement in Ukraine where UTN'S major assets were located was considered by S-K. Lawyers of Tatneft and S-K jointly looked into the situation. As I was informed by Savelova S-K's lawyers again sought assistance from Tatneft's lawyers on this issue. As I remember, Tatneft even sought advice from a Ukrainian law firm. The forecast was pessimistic. As there was a conflicting judgment of a Ukrainian court which invalidated the 2008 Assignment Agreement, and given the fact that the Ukrainian courts were corrupt and influenced by political considerations which Tatneft had already felt during the fight for UTN's shares, S-K and Tatneft jointly decided not to seek enforcement of the Russian court judgment in Ukraine."

18. At paragraph 75 of Mr Syubaev's witness statement, he asserted that:

"I shall say that S-K did its best to perform its obligations under the 2007 commission agency agreement and generally had exhausted all of its opportunities to recover the contractual debt from UTN. So Tatneft, independently of S-K, continued to look into the options to recover the oil money from UTN. In this regard I want to reiterate that the relations of Tatneft and S-K were clearly defined in the 2007 commission agency agreement. Arbitration proceedings initiated by Tatneft against Ukraine and the involvement of Tatneft in criminal proceedings in connection with the takeover of UTN and misappropriation of oil were outside the scope of the 2007 commission agency agreement. Those steps were designed to hold the third parties liable rather than to recover the contractual debt from a foreign buyer; i.e. they had nothing to do with performance by S-K under the 2007 commission agency agreement. Thus, Tatneft never deemed it necessary to keep S-K posted of such steps, and it never did."

19. At paragraph 87 of Mr Syubaev's witness statement, he asserted that:

“In February 2012 the criminal case against the top managers of the Ukrainian intermediaries was terminated because it was determined they had not been implicated in the theft. We were none the wiser as to who exactly was responsible, although of course we continued to have the same suspicions. We did not share those suspicions with S-K since there was no point in doing so because S-K had already done all it could and was obliged to do pursuant to the 2007 commission agency agreement to recover the oil debts, and also because the BIT arbitration was anyway ongoing and we were hoping to recover those sums as part of an award against Ukraine.”

20. At paragraph 29 of Mr Aleksashin’s witness statement, he asserted that:

“Following enforcement against the UTN Tatneftprom shares in 2009, it was apparent to us at S-K that the bailiffs could hardly recover anything in Russia because UTN was not understood to have other assets there. At the time, Mr Abdullin and I discussed (internally, with our Ukrainian counsel, and separately with Tatneft) whether S-K should attempt enforcement in Ukraine. S-K analysed the prospects of enforcing a Tatarstan court ruling in Ukraine. Following this (and consultation with S-K’s Ukrainian counsel), S-K concluded that it made no sense to attempt the enforcement of the Tatarstan court ruling in Ukraine given the political situation in Ukraine at the time, and the prior rulings of the Ukrainian courts to the effect that the assignment agreement was invalid.’

21. At paragraph 30 of Mr Aleksashin’s witness statement, he asserted that:

“In 2009, I was contacted by Ms Savelova from time to time and other members of the Tatneft legal team to provide documents. I did not know why Tatneft might have needed those documents. I had no discussions with the Tatneft lawyers about Tatneft’s intentions regarding recovery and about its litigation strategy. I did not know anything about this. When I communicated with anyone from Tatneft, it only related to matters pertaining to S-K’s recovery efforts in relation to Avto or UTN. I was never involved in discussions regarding Tatneft’s activity. It never occurred to me to ask any questions to Tatneft on the subject since I did not have any reason to do so...”

22. At paragraph 32 of Mr Aleksashin’s witness statement, he asserted that:

“During the 2007-2008 period, S-K and Tatneft’s lawyers were in contact, but this was only in relation to SK’s claim against UTN. Tatneft’s lawyers had some input on the formulation of S-K’s claim against UTN. Tatneft’s legal team had special expertise in UTN related matters, and they had a better understanding of the particulars of litigating against UTN.”

23. At paragraph 35 of Mr Aleksashin’s witness statement, he asserted that:

“By summer 2009, the cooperation between Tatneft and S-K lawyers was much more limited. S-K had done all it could in the proceedings against Avto and against UTN, so there was little occasion to work together on further recovery-related matters...”

24. At paragraph 39 of Mr Aleksashin’s witness statement, he asserted that:

“In 2011 and possibly 2012, I was contacted by the investigator and had discussions with him... Afterwards, I did not contact the investigator or Tatneft to find out any further information.”

25. At paragraph 40 of Mr Aleksashin’s witness statement, he asserted that:

“At that time, other than Tatneft’s and S-K’s requests to investigate involvement of the intermediaries’ directors, I did not know which specific individuals were being investigated beyond the general directors of Taiz and Tekhnoprogress. I had not heard of any of the Defendants before except for Mr Ovcharenko (who I knew was the Chairman of UTN’s Management Board, who was involved in the raid) and Mr Kolomoisky (who I only knew from the media to be a Ukrainian oligarch). At the time, I was not even aware that the defendants in this litigation had been involved in the theft, and I only learned of this when Mr Gubaidullin reported on his meeting with Ms Savelova in 2013. It was only then that I learnt of Mr Kolomoisky, Mr Ovcharenko, Mr Yaroslavsky and Mr Bogolyubov’s involvement.”