Claim number: CL-2022-000264

NCN [2024] EWHC 675 (Comm)

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

Friday 15 March 2024

BEFORE:

HIS HONOUR JUDGE PELLING KC sitting as a Judge of the High Court

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BETWEEN:

BM BRAZIL 1 FUNDO De INVESTIMENTO EM PARTICIPACOES MULTISTRATEGIA
BM BRAZIL 2 FUNDO De INVESTIMENTO EM PARTICIPACOES MULTISTRATEGIA
ANRH COOPERATIEF U.A.

Claimants

- and -

SIBANYE BM BRAZIL (PTY) LIMITED
SIBANYE STILLWATER LIMITED

Defendants

- - - - - -

MR ANDREW SCOTT KC and MS GAYATRI SARATHY (Instructed by Kirkland & Ellis LLP, 30 St Mary Axe, London EC3A 8AF) appeared on behalf of the Claimants.

MR JAMES MacDONALD KC and MR THOMAS PAUSEY (Instructed by Clifford Chance LLP, 10 Upper Bank Street, London E14 5JJ**)** appeared on behalf of the Defendants.

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JUDGMENT
APPROVED

- - - - - -

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Friday 15 March 2024

JUDGMENT

(14.00)

JUDGE PELLING:

1. This is an application made by an application notice sealed on 24 January 2024 which sought relief in the terms of a draft order attached to it. The issues encompassed in paragraphs 1(a) and (b) of the draft order had been resolved by agreement and the issue that arises in relation to paragraph (c) remains live only in relation to a single paragraph contained in a witness statement where it is said that there has been a waiver of legal professional privilege sufficient to enable documents for which privilege has been claimed to be disclosed.

2. The general background in relation to this claim is not seriously in dispute and I can summarise it relatively shortly. The action is concerned with a share purchase agreement which the defendant entered into with the claimant to acquire all the shares in companies that owned a nickel mine in Brazil known as the Santa Rita Nickel Mine. The litigation is concerned with what is referred to in the pleadings as a "*geotechnical event*" which is said to have occurred in or about November 2021 and which was relied upon by the defendant as a material adverse event within the meaning of the share purchase agreement and by reference to which the defendants purported to terminate the agreement. A central issue in the dispute is whether the geotechnical event, which, as I understand it, is the subject of extensive technical expert evidence, could be properly characterised as a material adverse event so as to enable the defendants lawfully to terminate the relevant agreement. It is against that background that the issue I now have to determine arises.

3. Witness statements have been exchanged between the parties in the usual way for the purpose of a trial which is due to take place later this year. One of the witness statements is from a Mr Neal John Froneman and is dated 8 September 2023. Originally, there were a number of paragraphs which were said to give rise to a waiver of privilege but these allegations were abandoned by the claimant (without prior notice) at the start of this hearing. There remains, however, a single waiver issue that I have to resolve. It relates principally to the last two sentences in paragraph 83 of Mr Froneman's witness statement.

4. The relevant context for this application is a narrative record within the witness statement that appears under the sub-heading "*Decision to Terminate*." It is necessary now that I set out paragraphs 82, 83 and a portion of 84 so as to establish the relevant context:

> "82. Once I had come to the firm view that we were entitled to terminate the contracts based on the geotechnical event, I prepared a communication to the board seeking their support for this decision by email which I sent on 23 January 2022.
>
> 83. Without waiving privilege over the contents of the advice, this included legally privileged advice which was prepared by Lerato Legong of Clifford Chance LLP for the board. I also

> called some of the directors and discussed the decision. For example, Harry Kenyon Slaney had some questions which included about the technical materials we had provided and then remembered that we spoke on the phone to discuss his questions. I also agreed with the company chairman, Dr Vincent Malfay, and the chair of the IC, Rick Memal. The board members were unanimous in their support to terminate the acquisitions under the material adverse effect provision. They understood we should not go through with the transaction.
>
> 84. It is not unusual for the Sibanye Stillwater board to take decisions by email. We are a digital first company so most of our meetings are virtual with only two face to face board meetings on an annual basis. As such, many of our board approvals are obtained by email on a round robin basis while making sure that the board is fully appraised and can, therefore, make an informed decision. Our memorandum of incorporation allows for this type of approval but where the chairman detects some dissent, he will normally call a board meeting with the aim of getting consensus. In that case this was not necessary."

The claimant contends that the final two sentences of paragraph 83, that is to say, "*The board members were unanimous in their support to terminate the acquisitions under the material adverse effect provision. They understood we should not go through with the transaction*," constitutes a waiver of the legal professional privilege which has been asserted in any email responses to the email of 23 January 2022. In support of that proposition, the claimants maintain that the two sentences together constitute a reference to material which would otherwise be legally privileged and that that constitutes a waiver sufficient to entitle the claimants to have access to the emails over which privilege has been asserted.

5. Before turning to the issues that matter, it is appropriate to start with a summary of the relevant legal principles. At the front and centre of the claimants' application is the reliance which the claimant places on the decision of the Court of Appeal in Great Atlantic Insurance Company v Home Insurance & Others [1981] 1 WLR 529. The key point for present purposes that the claimants seeks to rely upon from the leading judgment in that case is the proposition that once a reference has been made or read to a court from an otherwise privileged document, then the effect of that is to require the whole of the document to be made available to be reviewed by the other parties in the interests of fairness. The relevant part of the judgment for these purposes is to be found at page 536 starting at B where Templeman LJ (as he then was) said this:

> "The second question is whether the whole of the memorandum being a privileged communication between the legal adviser and the client, the plaintiffs may waive privilege with regard to the first two paragraphs of the memorandum but assert privilege over the additional matter .... In my judgment, the simplest, safest and most straightforward rule is that if a

> document is privileged then privilege must be asserted, if at all, to the whole document unless the document deals with separate subject matters so that the document can in fact be divided into two separate and distinct documents, each of which is complete."

6. Although that is the focus of attention so far as the claimants are concerned, in my judgment, that summary of the relevant legal principles has to be put in its relevant context. The principles which apply in this area (of which those set out by Templeman LJ form part) were summarised comprehensively by Waksman J in PCP Capital Partners LLP & Anr v Barclays Bank Plc [2020] EWHC 1393 at [47] and following. The point which was made on behalf of the defendants as a preliminary point in relation to the reliance by the claimants on Great Atlantic Insurance is that before ever one gets to the point where the Great Atlantic Insurance principle is applied, it is first necessary to demonstrate that there has been a waiver. That is precisely this point that was acknowledged by Waksman J in his summary of the relevant legal principles that apply. I respectfully agree with that analysis.

7. Subject to that point, the summary that Waksman J offered is one that I can set out in full for present purposes as being an accurate summary of the relevant legal principles. He summarised these as follows:

> "(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."

Waksman J added at paragraphs 48 and 49:

> "As to the question of waiver itself, 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. But on any view, in my judgment, first, the reference to the legal advice must be sufficient (a point I return to below) 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.
>
> I give two examples of what is clearly not waiver. First, a purely narrative reference to the giving of legal advice does not constitute waiver. This is because, on any view, there is no reliance upon it in relation to an issue in the case. Nor does a mere reference to the fact of legal advice along these lines, '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.' The corresponding point is that if that latter expression is used, then there will be waiver."

It follows that there cannot, generally speaking, be a waiver of legal professional privilege on the basis of an inferred reference to legal advice and, before a relevant waiver can be found to have occurred, it is necessary for a court to be satisfied not only that there has been a sufficient reference to the legal advice in respect of which a waiver is claimed but also that the party waiving must be relying on that reference in some way to support or advance their case on an issue that the court has to decide.

8. There were references to a number of other authorities in the course of the arguments and I mean no disrespect when I do not refer to all of them because in most cases they were fact-sensitive applications of the general principles, summarised by Waksman J that I have referred to earlier. I fully accept the claimant's submission that it was not open to Waksman J to depart from the decision of the Court of Appeal in Great Atlantic. In my judgment, he did not do so; to the contrary, his summary of the applicable general principles, fully encapsulated the point which was made in Great Atlantic and which is relied upon by the claimants.

9. It is against that background that I return to the final two sentences of paragraph 83 of the witness statement. The first question I have to resolve is whether either/or both of the last two sentences of that paragraph contain a reference to legal advice that is sufficient in the circumstances. What is sufficient in any particular case is an acutely fact sensitive question. In my judgment, it is plain that neither sentence contain any such reference. The two sentences concerned recite as a matter of record that the board

were unanimous in their support to terminate the acquisitions under the material adverse event provision and that they should not go through with the transaction. Neither sentence refers to legal advice. The fact that earlier in the same paragraph there had been reference to legally privileged advice and the fact that in responding to the request for support there may have been reference to that legal advice is nothing to the point. The part of this evidence on which the claimants rely is simply evidence that the board unanimously decided that they would terminate and, in my judgment, that is not sufficient (or indeed any) reference to the legal advice to result in a waiver of privilege.

10. In any event, even if that is wrong, there is no attempt whatsoever in paragraph 83 generally or in the final two sentences of that paragraph in particular to rely upon the legal advice that is referred to in the first sentence of that paragraph for the purpose of advancing the defendants' case on any point that arises. The sentences the claimants rely on record simply that the board members decided unanimously to terminate or support the termination of the relevant agreement under the material adverse effect provision. It goes to no other issue and is no more than a narrative based on recollection. In that regard, I draw attention to the fact, as did the defendants, that in the annex to the witness statement various documents are referred to which the witness was shown at the time when his statement was being prepared. It does not include any of the email responses for which disclosure is being sought.

11. In the result I conclude that waiver of privilege has not been established and that it would not be appropriate to order disclosure on the basis of waiver and I decline to do so.

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