

High Court of Justice
Business and Property Courts in Manchester
Paul Clements ('Claimant') and Adam Frisby ('Defendant')

CASE NOTE

Introduction:

[This](#) case deals with the law of waiver of privilege and its scope.

The High Court ruled that the Claimant had waived privilege when in his witness statement he tried to explain his delay to bring the claim, an issue identified for disclosure, by referring to his solicitors having taken time to progress with it and the reasons behind the same.

Previously, courts have applied the content/effect distinction which meant that privilege will only be waived if reference was made to the “contents” of the legal advice and not its “effect”. In **PCP Capital Partners LLP v Barclays Bank Plc**¹, the Court had held that this distinction could not be applied “mechanistically”, and the context and purpose of reliance had to also be looked into. This will be a fact-sensitive exercise.

The High Court agreed with the findings in *PCP Capital Partners* (supra) and other cases and rejected the idea that a reference to the subject matter of a privileged communication by a party, as opposed to details of its contents, is unlikely to be viewed as a waiver. The Court recognised that there may be a waiver of privilege if a party seeks to advance a “positive case” on an issue for determination by relying on any privileged communication which was the case here.

Background of the Dispute:

The dispute relates to a fashion business - In the Style Fashion Limited (“**In the Style**”) started by the Defendant, Adam Frisby.

The Claimant, Paul Clements, alleges that the business plan for In the Style was conceptualized by him in 2013 and that he had disclosed the plan to Frisby after engaging him to test and execute it.

Clements contends that Frisby misused the position and developed the plan through his own company. Aggrieved by this, Clements filed the claim in December 2020, seeking amongst other things a declaration that Frisby’s interest in In the Style is held in trust for him.

Frisby rebuts the allegation by claiming that he built the company from 2013 without any involvement or input from Clements. He claims that the fact Clements did not take any steps to pursue the claim for several years showed his lack of involvement. Accordingly, Clements’ knowledge of the existence of In the Style and inaction in bringing the claim before December 2020 was made an issue for disclosure.

In its witness statement, Clements states that he had only discovered “In the Style” in 2016. This led him to seek legal advice from several firms in 2017 and ultimately, he engaged David Blank Furniss (“**DBF**”) in June 2019. He then states in *para 45* of his witness statement that “**DBF then took time to make progress with my claim, primarily because they felt that the business Fashion did not look at all valuable and did not appear to present a target worth pursuing. Nevertheless, a letter of claim was produced and dated 22 December 2020.**”

Frisby contended that the above statement was made to explain Clements’ delay in pursuing the claim and in doing so he had waived privilege in relation to the advice and any other documents relating to

¹ [2020] EWHC 1393 (Comm)

why DBF took time to proceed with the claim. Frisby accordingly sought disclosure of all these documents.

Central Issues

The central issue was whether Clements waived privilege in respect of DBF's advice and if it did, to what extent i.e., how wide was the waiver?

Waiver of Privilege

The law of waiver:

The High Court analysed the law of waiver as set out in several previous cases including *PCP Capital Partners LLP v Barclays Bank PLC*², *Brennan v Sutherland City Council*³, *PJSC Taftnet v Bogolyubov*⁴, *Jet2.com Ltd v Civil Aviation Authority*⁵ and *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones*⁶ and broadly agreed with the following:

- There is no succinct or clear definition of when waiver occurs.
- Previous case law distinguishes between (i) a “purely narrative reference” and “effect of legal advice” and (ii) “content” of the legal advice, where reference to the latter resulted in waiver and not the former.
- The Court referred to *PCP Capital Partners* (supra), wherein it was observed that the distinction cannot be applied “mechanistically” and aspects of whether there is reliance on the privileged communication, purpose of the reliance and context in each case will also need to be investigated. The Court agreed that this is a fact sensitive exercise and will need to be determined in context and issues of the case.
- The Court referred to *Brennan* (supra) and noted that the question of waiver will depend on two factors:
 - (a) What is the nature of what has been revealed? Is it the gist, contents, or effect?
 - (b) Has it been referred to, used or deployed, or relied upon in order to advance a party's case?

The scope and extent of waiver:

The Court applied *Fulham* (supra) and agreed that:

- Once waiver is established, the extent of disclosure is determined by first identifying the “issue” or “transaction” which concerns the waiver.
- Once the transaction is identified, all privileged materials falling within that issue are required to be produced.
- Additional principles of fairness will then come into play if it is clear from the disclosure that is made that it is in fact a part of a bigger picture and fairness requires further disclosure.

Decision

Applying these principles, the Court was satisfied that there had been a waiver of privilege in respect of matters referred to in para 45 in as much as there was a:

(a) “clear reference” to content of the advice, particularly DBF's feeling that “*business fashion did not look at all valuable and did not appear a target worth pursuing*”; and

(b) reliance was being placed on the content to explain inactivity in progressing with the claim which had been made an issue for disclosure.

² [2020] EWHC 1393 (Comm)

³ [2009] ICR 479

⁴ [2021] 1 WLR 1612

⁵ [2020] QB 1027

⁶ [2006] EWHC 158 (Ch)

Further, the Court identified the 'transaction' for the purposes of determining the scope of waiver to be limited to the correspondence and other documents related to "*business fashion did not look at all valuable and did not appear a target worth pursuing*" and this as the reason why DBF took time to progress its claim and did not go beyond the same.

Although para 45 (supra) used the word "primarily" meaning that there could be other reasons why there was a delay, the Court only extended the scope of the waiver to what was specifically written in the statement and relied upon to support Clements' response in connection with the inactivity.

Comment

This case shows why determining whether there has been a waiver of privilege is not straightforward. The issue will turn on the context of each case and will accordingly be nuanced and fact sensitive. The Court has emphasised on the need to identify whether the reliance on legal advice has been made with the purpose of advancing a party's case. If that is the case and the reliance is a continuing one and affects the merits of the case, there would be a risk of waiver.