Neutral Citation Number: [2021] EWHC 1543 (Ch) Appeal Ref. CH-2021-000113

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
CHANCERY APPEALS
ON APPEAL FROM THE ORDER OF MASTER PESTER DATED 29 APRIL 2021

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 8 June 2021

Before:

ROBIN VOS
(SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

- -

Between:

AHUJA INVESTMENTS LIMITED

Claimant

- and –

(1) VICTORYGAME LIMITED
(2) SURJIT SINGH PANDHER **Defendants**

- -

DAVID HOLLAND QC and EDWARD ROWNTREE (instructed by **Cardium Law Limited**) appeared for the **Claimant**
NICHOLAS TROMPETER QC (instructed by **SBP Law**) appeared for the **Defendants**

Hearing date: 25 May 2021
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 8 June 2021 at 3pm.

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The question in this appeal is whether two documents are within the scope of litigation privilege. In a Judgment given on 29 April 2021, Master Pester decided that they were not and made an Order that the Claimant, Ahuja Investments Limited, should produce the documents to the Defendants. Ahuja appeals against that Order.

2. Ahuja's underlying claim is for damages in respect of misrepresentations said to be made by the Defendants in the context of a property transaction. There are counterclaims by the Defendants.

3. An important issue in relation to the underlying claim is what Ahuja's solicitor at the time, Mr Jandu of Stradbrooks, knew and what he told Ahuja.

4. The two documents in question are a letter of claim written by Ahuja's current solicitors, Cardium Law Limited to Stradbrooks on 10 February 2020 in the form of a letter of claim under the pre-action protocol for professional negligence. The second document is a response from Stradbrooks' insurers dated 19 December 2020.

5. Ahuja says that, although the correspondence was under the pre-action protocol for professional negligence, the real purpose of the correspondence was to elicit information to be used in the present proceedings. The Defendants argue that, assessed objectively, that was not the dominant purpose of the correspondence.

Background facts

6. Ahuja had difficulty obtaining the conveyancing file for the relevant property transaction from Stradbrooks. Ultimately, it had to make an application for third party disclosure.

7. On 19 May 2020, in the context of discussions regarding the disclosure of Stradbrooks' conveyancing file, Ahuja's solicitors had advised the Defendants' solicitors that:-

> "… we have provided a letter of claim to Stradbrooks in regard to its negligence on this matter and we are currently engaged in the preaction protocol for professional negligence with the law firm appointed by Stradbrooks professional indemnity insurer. This is ongoing."

8. In the light of this, following Ahuja's disclosure, the Defendants made an application for disclosure of any correspondence relating to this potential claim.

9. Ahuja's solicitor, Mr Davies, made a Witness Statement on behalf of Ahuja in opposition to the application. To the extent relevant, this stated the following:-

> "64. Cardium Law reviewed the conveyancing file provided by Stradbrooks after the hearing on 20 November 2019 and (again without waiving privilege) advice was sought from Leading and Junior Counsel. Without waiving privilege, it was decided that further information was required from Stradbrooks and Mr Jandu with a view to the conduct of this claim and to assess Mr Jandu's potential as a witness. Following this, on account of his prior lack of co-operation and his conduct, it was decided that the only way in which Stradbrooks or Mr Jandu would give any substantive comment in relation to his involvement in matters relevant to this action was to threaten to issue proceedings against him.
>
> 65. Accordingly (and again without any waiver of privilege) on 10 February 2020 a letter in the form of a Letter before Action was sent to Stradbrooks. It must be emphasised that whilst, of course, the Claimant had approved the sending of this letter, no instructions had been given to issue proceedings against Stradbrooks. The dominant purpose of sending the Letter before Action was to obtain information relevant to these proceedings, which was not apparent from the conveyancing file. The Letter before Action made a series of statements and sought a response. It also mentioned the fact that these proceedings had been issued.
>
> 66. Stradbrooks did not provide its letter of Response in accordance with the requisite pre-action protocol. So as to further compel a response (again without waiver of any privilege) further letters were sent chasing a response...
>
> 67. Without any waiver of privilege, on 19 December 2020, a Letter of Response was received from solicitors instructed by Stradbrooks' professional indemnity insurer. This contained the information sought. At this stage, advice was again sought from Leading and Junior Counsel. The Claimant has not exchanged a statement [from] Mr Jandu.
>
> 68. The Claimant in this action has not issued proceedings against Stradbrooks and this firm has not been provided with instructions to issue proceedings."

10. Mr Trompeter, appearing on behalf of the Defendants, does not invite the court to go behind Mr Davies' Witness Statement and so I accept what he says at face value, as did the Master.

The Master's Judgment

11. In reaching his decision, the Master relied heavily on the Decision of Birss J in *Property Alliance Group v The Royal Bank of Scotland Plc (No. 3)* [2016] 4 WLR 3. The key part of the Master's Judgment is contained in the following extract:-

> "15. As I have said, I found that the answer to this question somewhat difficult. Ultimately, it does seem to me that the claim for litigation privilege is not made out. I say that because I accept that this is not on all fours with *Property Alliance Group v Royal Bank of Scotland*, because it is true that Birss J there stressed that the key factor was deception. I accept I do not see it as being a matter of deception on the part of the claimant in this case, but I have to look at the dominant purpose and the dominant purpose is not determined solely by what one party says it is.
>
> 16. In this respect, it seems to me that whilst *PAG* can be distinguished factually, it is in the same overall category in that seen from the claimant's point of view, all they were trying to do, via the course of conduct they had gone down, was elicit information, but seen as from Mr Jandu and Mr Jandu's insurer's point of view, it seems to me fairly obvious, that a professional negligence claim was being intimated against them, hence the response from the insurers. Even without any statement from Mr Jandu, I think I can safely infer that much.
>
> 17. So it seems to me that the court has to step back and not simply accept and say, "Well, this is all for the dominant purpose of use in this litigation", because you have to look at the other side of the coin."

12. As can be seen, the Master considered that, in determining the dominant purpose of the correspondence, he should look not only at the intention of Ahuja but should also take into account how the correspondence would have been seen from the point of view of Mr Jandu and Stradbrooks' insurers. This is where Mr Holland, on behalf of Ahuja, says that the Master went wrong.

Litigation privilege – legal principles

13. The requirements for litigation privilege were summarised by Lord Carswell in *Three Rivers District Council v. Bank of England (No.6)* [2005] 1 AC 610 [at 102] as follows:

> "Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the

> sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial."

14. There is no doubt in this case that adversarial litigation was in progress when the documents in questions came into existence. The key question is therefore whether the Master was wrong to conclude that the documents were not brought into existence for the sole or dominant purpose of conducting these proceedings.

Rationale for litigation privilege

15. It is appropriate to start with a reminder of the rationale for litigation privilege. This was briefly summarised [at 850D] by the Court of Appeal in *Lee v. South West Thames Regional Health Authority* [1985] 1 WLR 845 as follows:-

> "The principle is that a defendant or a potential defendant shall be free to seek evidence without being obliged to disclose the result of his research as to his opponent."

16. Aikens J expanded on this in *Winterthur Swiss Insurance Company v. AG (Manchester) Limited* [2006] EWHC 839 (Comm) explaining [at 68] that the rationale:-

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

17. The point was put rather differently by Lord Wilberforce in *Waugh v. British Railways Board* [1980] AC 521 where he observed [at 531B-E] that:-

> "a more powerful argument to my mind is that everything should be done in order to encourage anyone who knows the facts to state them fully and candidly – as Sir George Jessel MR said, to bare his breast to his lawyer: *Anderson v. Bank of British Columbia* [1876] 2 Ch. D. 644, 699. This he may not do unless he knows that his communication is privileged."

18. Mr Trompeter suggested, based on this formulation and on the comment of Aikens J in *Winterthur*, that the rationale for litigation privilege is therefore based on encouraging the person providing the information to speak freely so that, in this case, the focus should be on Stradbrooks and Mr Jandu (and their insurers) and not on Ahuja.

19. However, it is clear that Lord Wilberforce in *Waugh* was looking primarily at the relationship between the client and their lawyer and not at the position of a third party. In *Winterthur*, Aikens J referred to the need for communications between a person's lawyer and a third party to be kept confidential. It is clear to me that, in the context in which he said this, what he had in mind was that it was the litigant (or potential litigant) who should not fear that what is said or written might be disclosed. This is of course reinforced by the fact that the privilege is generally that of the litigant and not the third party. In *Lee*, the Court of Appeal referred to the comment of Hodson LJ in *Schneider v. Leigh* [1955] 2 QB 195 [at 202] that:-

> "It is essential to bear in mind that the privilege is the privilege of the litigant, accorded to him in order that he may be protected in preparing his case, and not the privilege of the witnesses as such."

20. Taking all of this into account, in my view, it is clear from the rationale underlying litigation privilege that the main focus should be on the position of the litigant who is claiming privilege in determining whether a claim to privilege should be upheld.

Dominant purpose

21. The key question in this appeal is whether the two letters in question came into existence for the dominant purpose of being used in these proceedings. This, in turn, raises the question as to how the dominant purpose should be ascertained.

22. It was the House of Lords in *Waugh* which decided that litigation privilege was only available where the dominant purpose for which the document was brought into existence was some actual contemplated litigation. All three of the judges who gave a substantive judgment relied on the conclusion of Barwick CJ in the Australian case of *Grant v. Downs* (1976) 135 CLR 674 [at 677] that:-

> "a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or conduct

> or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."

23. In relation to the determination of the dominant purpose, both parties referred to the decision of the Court of Appeal in *Guinness Peat Properties Limited v. Fitzroy Robinson Partnership* [1987] WLR 1027. In that case, a claim was made against a firm of architects in negligence. The architects wrote to their insurers to notify them of the claim. The question was whether it was the purpose of Fitzroy, being the author of the letter, or whether it was the purpose of the insurance company which was relevant. Relying on the comments of Barwick CJ in *Grant v. Downs*, the Court of Appeal decided that it was the purpose of the insurance company which was relevant as they were the person "under whose direction" the relevant letter had been brought into existence. As the purpose of the insurance company was to assess the potential litigation, litigation privilege was available. Slade LJ concluded [at 1037B] that:-

> "the dominant purpose of the McLeish letter must be viewed objectively on the evidence, particularly by reference to the intentions of the insurers who procured its genesis."

24. Pausing here, it is worth noting two points. The first is that it is clear from the conclusion of Barwick CJ in *Grant v. Downs* that the purpose which is relevant is the purpose of the person who was the instigator of the document in question. That may be the author of the document or it may be some other person.

25. The second point is that the purpose of the relevant person must be determined objectively based on all of the evidence including the subjective intention of the instigator. This was accepted in *Winterthur* where Aikens J confirmed [at 71] that:-

> "in deciding whether a communication is subject to "litigation privilege", the court has to consider objectively the purpose of the person or authority that directed the creation of the communication."

26. In *Winterthur*, Aikens J also quoted from the decision of Oliver LJ in *Re Highgrade Traders Limited* [1984] BCLC 151 [at 175B]. Aikens J noted [at 88] that:-

> "Oliver LJ also emphasised, however, that each case depended on its facts. He said that it was the task of the court, in each case "to determine the actual intention of the party claiming privilege and where it [the court] discerns a duality of purpose, to determine what is the dominant purpose".

27. As we have seen, the Master placed reliance on the decision of Birss J in *Property Alliance Group* ("*PAG"*) in reaching his conclusion that the letters were not privileged. In that case, the claim related to the mis-selling of swap contracts. The managing director of the claimant, Mr Russell sought a meeting with two former employees of RBS stating that the purpose of the meeting was for a quick catch up and to discuss possible future business opportunities. However, Mr Russell's real purpose in arranging the meetings was to try and obtain information in support of PAG's claim against RBS. To this end, he secretly recorded the meetings. The reason for misrepresenting the purpose of the meeting was that Mr Russell did not believe that the ex-RBS employees would meet him if they knew the true purpose of the meeting.

28. Birss J was referred the various authorities which I have already mentioned. The parties put forward different explanations as to the way in which an objective assessment of the purpose of the meeting should be assessed. RBS's submission (recorded at [31]) was that, in order to assess the purpose objectively, the court should look only at what passed openly between the parties and assess this "from the point of view of a dispassionate observer". The effect of this would be that Mr Russell's secret purpose was irrelevant.

29. Birss J rejected this submission, agreeing [at 33] with PAG that:-

> "the test is objective in the sense that the decision is one for the court not the parties. The decision is arrived at objectively, taking into account all the evidence. That includes evidence of what the persons involved say their intentions were. RBS's submission is in effect that the court is to imagine a sort of officious bystander. That seems to me to be unnecessarily complicated."

30. Ultimately, Birss J concluded that the dominant purpose of the meeting in that case was not to obtain evidence for the litigation. Given the reliance placed by the Master on the decision in *PAG*, it is worth setting out in full, the reasons given by Birss J [at 40-41] for the conclusion which he reached:-

> "40 Plainly, assessed objectively today, Mr Russell's purpose in arranging the meetings was to gather evidence for the litigation. Equally plainly, assessed objectively today, the purpose of the ex-RBS employees in attending the meeting was to catch up and discuss possible future business. I am bound to say that starting from just these facts, it does not make a lot of sense to pretend that one can distil a dominant purpose from these two clear but entirely divergent purposes.

> 41 In my judgment the critical point is that Mr Russell actively deceived Mr Jones and Mr Goldrick. Mr Russell induced them to attend and speak freely by representing to Mr Jones and Mr Goldrick that the meeting was a catch up and was concerned with the possible future business. Mr Russell knew or it was obvious to him that they were only likely to attend and speak on that basis. It is the existence of this deception which distinguishes the circumstances from the example of the solicitor taking a proof of evidence relied on by PAG. In this case Mr Russell cannot complain if the court concludes that the fair and correct way of assessing what the dominant purpose of the meeting was, is to look at it from Mr Jones and Mr Goldrick's point of view. If Mr Russell had not misled these two gentlemen then things might be different but that is not what happened."

31. It will be apparent that, despite the references earlier in his decision to the conclusion of Barwick CJ in *Grant v. Downs* and the decision of the Court of Appeal in *Guinness Peat*, Birss J, in his objective assessment, took account not only of the intentions of Mr Russell as the instigator of the meeting but also the intentions of the ex-RBS employees. However, he emphasised the critical relevance of the fact that the ex-RBS employees had been deceived by Mr Russell and that it was this deception which allowed him to assess the dominant purpose of the meeting from the point of view of the ex-RBS employees. Before going on to consider the parties' submissions based on these authorities, I should therefore mention two other authorities dealing with the question of deception to which I was referred.

32. The first is *Plummers Limited v. Debenhams Plc* [1986] BCLC 447. Debenhams had made a loan to Plummers and were considering taking proceedings to enforce their rights under the loan agreement. They commissioned a report from a firm of accountants as to the state of Plummers' business (which they were entitled to do under the terms of the loan agreement). However, they left Plummers with the impression that the purpose of the report was to consider whether to continue to support their business even though they had, in reality, decided to withdraw their support and enforce their rights.

33. Millett J accepted that the dominant purpose of the report was litigation. However, he went on to consider whether the party providing the information must be aware that it would be used for litigation. He commented [at 453h-i] that:-

> "I see no good reason in logic or principle for requiring a party to notify the other side that he is contemplating making a claim…or for restricting

> the privilege to documents obtained or brought into existence only after such warning has been given. There is no trace in any of the authorities of any such requirement, and I decline to introduce it."

34. He did however go on to say [at 459a-b] that:-

> "I assume, without deciding, that it is not open to a party to litigation to withhold the production of a relevant document by claiming that the purpose for which it brought into existence was to obtain legal advice in connection with contemplated litigation, when that purpose was deliberately concealed from the other party, and when the document contains and its conclusions are based on evidence obtained from the other party only by suppressing the purpose for which it was required."

35. Although the judge had decided that the truth had in that case been suppressed, he still concluded that the report was privileged. The reason for this was that the only effect of suppressing the truth was to avoid hostility on the part of Plummers. The information would however still have been obtained as Debenhams had a contractual right to it without any requirement to disclose the purpose for which it was sought.

36. The decision in *Plummers* was considered by HHJ Toulmin in *London Fire and Emergency Planning Authority (LFEPA) v. Halcrow Gilbert & Co Limited* [2004] EWHC 2340 (QB). Halcrow had applied for disclosure of a report prepared by a third party for LFEPA. When providing the information on which the report was based, Halcrow was told that the purpose of the report was to carry out a project audit. LFEPA, however, claimed that the dominant purpose of the report related to potential proceedings against Halcrow in connection with the relevant project.

37. HHJ Toulmin derived a number of principles from Millett J's decision in *Plummers* which he recorded [at 18] as follows:-

> "18…….
>
> (4) there is no affirmative duty on a party in requesting information from another party to disclose the purpose for which it is required…
>
> (5) … if a party deliberately misleads the other party as to the purpose for which the information is required, and that party provides the information, the requesting party cannot thereafter maintain the privilege.
>
> (6) I leave open the question of whether the principle in (5) applies even where a party is entitled to the information by reason of contract…"

38. In fact, HHJ Toulmin decided that the dominant purpose of the report was not litigation and so was not privileged on that basis. However, he went on to conclude [at 53] that, even if litigation had been the dominant purpose, the privilege had been lost. It is not entirely clear whether the judge reached his conclusion on the basis of estoppel or waiver (or both):-

> "…On the hypothesis that the report was *prima facie* entitled to litigation privilege, the Authority is estopped by representation from asserting the privilege by falsely representing to Halcrow that the purpose of the investigation was one for which privilege could not be claimed. Halcrow relied on the representation in agreeing to allow its employees to give detailed evidence to Mr Pickavance which otherwise it would not have done or been obliged to do. Put in the alternative, by making the representation on which Halcrow relies, they waived the right to assert the privilege"

39. Although Millett J in *Plummers* assumed a general principle not based on estoppel or waiver (having already concluded that there was no estoppel or waiver on the facts of that case), one important point to note in relation to both *Plummers* and *LFEPA* is that the information was obtained from the other party to the litigation and not from a third party. Neither of those cases say anything about whether deception or concealment in relation to the true purpose of a request for information from a third party might prevent the person requesting the information from successfully claiming privilege in relation to the information provided.

The parties' submissions

40. Mr Holland submits, on the basis of the decision of the Court of Appeal in *Guinness Peat*, that only relevant question is to determine the objective purpose of the instigator (in this case Ahuja, through its solicitor) of the correspondence. Based on Mr Davies' witness statement, he says it is clear that, despite the fact that the letter took the form of a letter of claim under the professional negligence pre-action protocol, the only purpose in obtaining the information was for use in the current proceedings.

41. As far as *PAG* is concerned, Mr Holland distinguishes this on the basis that, in this case, there was a clear request for information from Stradbrooks whereas, in *PAG*, the stated purpose of the meeting was not to collect any information at all but to discuss other matters. In effect, Mr Russell was trying to catch the ex-RBS employees off guard whereas, in this case, Ahuja's solicitors had made a formal request for information to

which they received a careful response from the solicitors acting for Stradbrooks' insurers.

42. Mr Holland also suggested that Stradbrooks would not in any event have been misled by the form of the request given that the letter requesting the information referred to the current proceedings. On this basis, he argues that Stradbrooks (and their insurers) must have known that any information they provided would have been used for the purposes of the proceedings.

43. Mr Trompeter on the other hand submits that it is clear from *LFEPA* that there is no requirement for any deception as to the information which is requested; the requirement for deception relates to the purpose of the request. On this basis, he submits that *LFEPA* cannot be distinguished from the present case.

44. Similarly, Mr Trompeter submits that *PAG* cannot be distinguished from the present case in that, in *PAG*, the third party was, as in the case, misled as to the Claimant's motivations for their action – in that case, the reason for the meeting.

45. Mr Trompeter agrees that, in accordance with *Guinness Peat*, the purpose of the communications must be assessed objectively. In this context, he draws attention to an alternative analysis of the *PAG* decision in Hollander, Documentary Evidence (13th edition) paragraph 18-08 where the author suggests that:

> "the objective purpose of the communications (the statements at the meeting) was reflected in the communications between the parties as to the reasons for the meetings rather than the undisclosed subjective purpose of the party making the recording."

46. Applying this principle to the present case, Mr Trompeter suggests that the letters have two purposes: the secret purpose of Ahuja in obtaining information for the proceedings and the open purpose of the letter of claim which was to obtain information for the purposes of a possible negligence claim against Stradbrooks. This

second purpose is, he submits, based not on an analysis of the intention or understanding of Stradbrooks or their insurers but is objectively ascertained from the nature of the letter in question. In these circumstances, he submits that, on the basis of the decision in *PAG*, the objective, open purpose must trump the secret purpose of the instigator.

Approach to analysing claims to privilege

47. Both parties referred me to the decision of Mrs Justice Moulder in *Skymist Holdings Limited v. Grandlane Developments Limited* [2019] EWHC 1834 (Comm). However, the main purpose of doing so was to draw attention to the principles set out by Hamblen J in *Starbev GP Limited v. Interbrew Central European Holdings BV* [2013] EWHC 4038 (Comm) at [11-13] which are cited at paragraph [67] of Moulder J's judgment. To the extent relevant, the principles are as follows:-

> "11. ……..
>
> (1) the burden of proof is on the party claiming privilege to establish it…
>
> (2) an assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The court will scrutinise carefully how the claim to privilege is made out…
>
> 12. In relation to the Court's approach to the assessment of evidence in support of a claim for privilege, it has been stated that it is necessary to subject the evidence "to "anxious scrutiny" in particular because of the difficulties in going beyond that evidence" – per Eder J in *Tchenguiz* at [52]. "The court will look at "purpose" from an objective standpoint, looking at all relevant evidence including evidence of subjective purpose" – *ibid.* 48(iv). Further, as Beatson J pointed out in the *West London Pipeline* case at [53], it is desirable that the party claiming such privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that the claim for privilege is designed to protect".
>
> 13. As was further stated by Beatson J in the *West London Pipeline* case at [86]:
>
> "(3) it is, however, difficult to go behind an affidavit of documents at an interlocutory stage of proceedings. The affidavit is conclusive unless it is reasonably certain from:-
>
> (a) the statement of the party making it that he has erroneously represented or has misconceived the character of the documents in respect of which privilege is claimed…
>
> (b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed that the affidavit is incorrect…

> (c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points…"

Discussion

48. It is clear from *Grant v. Downs*, *Guinness Peat* and *Winterthur* that, in assessing objectively the dominant purpose of the material for which privilege is claimed, it is the purpose of the instigator (in this case, Ahuja, through its solicitors) which is relevant (see the extracts from those cases cited at paragraphs [22], [23] and [25] above). In the light of these authorities, the fact that Birss J in *PAG* also looked at the purpose/intention of the third parties from whom the information was sought can, in my view, only be explained on the basis of the active deception which he found to be a "crucial" factor in reaching his decision. I deal with this further below.

49. Whilst it is necessary, in assessing the instigator's purpose objectively, to take into account all of the relevant evidence and not just the witness statement which has been prepared in support of the claim to privilege, the only other evidence which has been put forward by Mr Trompeter is the fact that the letter requesting the information took the form of a letter of claim under the professional negligence pre-action protocol.

50. I accept that this could be evidence that, looking at matters objectively, Ahuja's purpose was to consider a possible claim in negligence against Stradbrooks. This would, however, involve going behind Mr Davies' witness statement which is what Mr Trompeter has expressly said he does not intend to do. In any event, no other evidence has been put forward in support of this which would cast doubt on Mr Davies' explanation as to the reason why the request for information took the form of a letter of claim rather than a straightforward request for information relating to the current proceedings.

51. Looked at objectively, the purpose displayed by the form of the letter is simply one piece of evidence to be taken into account in determining what the purpose of Ahuja's solicitor (and therefore of Ahuja) was in writing the letter. It cannot itself amount to a separate purpose in the absence of any evidence that Ahuja had any intention of pursuing a possible claim for professional negligence against Stradbrooks.

52. In this context, I note that the application for disclosure of the relevant documents came about as a result of Ahuja's solicitors telling the Defendant's solicitors that they had

written a letter of claim to Stradbrooks under the pre-action protocol for professional negligence. This is evidence which might support a suggestion that Ahuja in fact had a second purpose in writing the letter rather than just obtaining information for the purposes of the present proceedings. However, as I say, Mr Trompeter did not try to argue that Ahuja in fact had any such purpose, let alone refer to this correspondence in support of such a submission.

53. In reality, what Mr Trompeter is inviting the court to do is to adopt the alternative analysis of the *PAG* decision referred to in paragraph 18-08 of Hollander (see paragraph [45] above) which is to determine the objective purpose of the letters by reference to the explicit purpose revealed on the face of the letter of claim rather than the undisclosed subjective purpose of the instigator of the letter.

54. This is, however, not the basis on which *PAG* was decided. The judge in that case assessed [at 40] the objective purpose of Mr Russell on the one hand and the ex-RBS employees on the other. Given the active deception on the part of Mr Russell, the judge decided [at 41] that the right way to assess the dominant purpose of the meeting was to look at it from the point of view of the ex-RBS employees.

55. Having considered all of the evidence, I am satisfied that, assessed objectively, the dominant purpose of Ahuja in bringing the correspondence into existence was to obtain information for use in the current proceedings.

56. Having decided that, the next question is whether there was any deception on their part and, if so, whether this changes that conclusion or prevents them from relying on litigation privilege.

57. Although I accept Mr Holland's submission that there was no deception in relation to the fact that information was being requested, based on Mr Davies' witness statement, there clearly was an element of deception in the sense that Ahuja wanted information

for the purposes of the present proceedings, anticipated that it would not get that information if it was requested on that basis, and so arranged for its solicitors to write a letter of claim under the professional negligence pre-action protocol with a view to obtaining the information which it was seeking. The clear purpose of the letter was to make Stradbrooks believe that a professional negligence claim was being considered

(when, in fact, it was not) and that it should therefore provide information in accordance with the professional negligence pre-action protocol.

58. Mr Holland suggested that, as the letter of claim referred to the present proceedings, Stradbrooks would have realised that the information provided would be used in these proceedings. If so, there would have been no deception. However, given the nature of the letter, I am not prepared to draw that inference.

59. It does not however follow from this that a claim to privilege cannot succeed. As I have already observed, *Plummers* and *LFEPA* were in both cases where the party who was deceived was the other party to the litigation rather than a third party. It is easy to understand why, as assumed (but not decided) by Millett J, there might be a principle which would prevent a claim to privilege where the other party to the litigation is induced to provide information which they would not have provided had they known the true purpose of the request and where the true purpose was deliberately concealed or suppressed.

60. It is not however established whether there is such a principle since Millett J did not need to decide the point (given his finding that Debenhams were in any event entitled to the information) and HHJ Toulmin in *LFEPA* had found that the dominant purpose of the report in that case was not litigation. In addition, even if litigation had been the dominant purpose, the judge framed his conclusion [at 53] on the basis of estoppel or waiver rather than a more general principle based on deception or misrepresentation.

61. To the extent that Mr Trompeter invites me to find that there is such a principle and to extend it to situations involving third parties rather than another party to the litigation, I decline to do so. The reason for this is that, in my view, the purpose of litigation privilege is to enable a litigant to obtain information which can be placed before their legal advisers for the purpose of pursuing their proceedings without having to worry that such information may have to be disclosed to the other party.

62. Whilst I do not condone the tactics used in this case to collect that information, having found that the dominant purpose of the correspondence was to obtain information for the purposes of these proceedings, there is in my view no principled reason why the protection of privilege should not be available in relation to that information. As

Hodson LJ said in *Schneider v. Leigh* [at 202] (see paragraph [19] above), the privilege is that of the litigant, not the third party.

63. It is true that, in *PAG*, the judge gave paramount importance to the objective purpose of the third parties in that case given the active deceit of the claimant's managing director, Mr Russell. However, given the authority of the House of Lords in *Waugh* and the Court of Appeal in *Guinness Peat*, both of which were derived from the conclusions of Barwick CJ in *Grant v. Downs* to the effect of the relevant purpose (albeit objective) is that of the instigator of the material, that decision must, in my judgment, be confined to its unusual facts which relate to the purpose of a meeting rather than documents and where the deception was not just as to the purpose for which information would be used but was as to whether the purpose of the meeting was to collect any information at all.

64. I should record that, unlike in *LFEPA*, I was not invited to consider whether privilege was unavailable as a result of the deception giving rise to some sort of estoppel or waiver. At first blush, it seems to me that there could be no estoppel as any representation was made to Stradbrooks and not to the Defendants. Had there been an implied waiver, it would I think be implicit that any such waiver would be limited to Stradbrooks and would not extend to a third party such as the Defendants.

65. My conclusion therefore is that, although there was an element of deception as to the purpose of the correspondence, this does not affect prevent Ahuja from claiming privilege in relation to the documents as the dominant purpose of the correspondence was to obtain information in relation to these proceedings.

66. In my view, the Master fell into error on two counts. The first is that he did not accept that there was any deception. As I have said, it is clear on the evidence that there was, although this related to the reason why the information was being requested rather than the fact of the request. However, for the reasons I have explained, that deception does not prevent the claim to privilege from succeeding.

67. The second point is that the Master considered that a second purpose was objectively established by looking at the correspondence from the point of view of Mr Jandu and his insurer whereas the only relevance of this is that it is part of the evidence which the

court has to take into account in determining whether, objectively, Ahuja's purpose was that outlined in Mr Davies' witness statement.

The Respondents' notice

Confidentiality

68. The Defendants argue that, in order to succeed in a claim for litigation privilege, the information must be confidential. In support of this, Mr Trompeter referred to the discussion in *Gotha City v Sotheby's* [1998] 1 WLR 114, at 118-119, per Staughton LJ. That passage however deals with legal advice privilege rather than litigation privilege. In the case of litigation privilege, the position may be more nuanced (see for example, the brief discussion in *PAG* at [37-38], although Birss J did not ultimately need to decide the point). I will however assume that there is a requirement for confidentiality.

69. Mr Trompeter points out that there is no confidentiality between opposing parties in litigation (other than in the case of without prejudice privilege). On this basis, he submits that, as the request was made in the form of a letter of claim under the professional negligence pre-action protocol, the information cannot be confidential as Ahuja and Stradbrooks were potentially opposing parties in litigation.

70. Mr Holland's response to this on behalf of the claimant is that, even if it is right that the correspondence should be treated as being between potential parties to litigation, it is still confidential as far as third parties are concerned.

71. There was very little in the parties' skeleton arguments on this point and it is not one that was developed in any detail in oral submissions. Both parties referred to the decision of Mrs Justice Moulder in *BGC Brokers LP v. Tradition (UK) Limited* [2019] EWHC 2590 (QB). However, all that case decided is that without prejudice communications incorporated into a settlement agreement with one of a number of defendants were not privileged as far as the other defendants were concerned. It says nothing about whether communications between parties to one set of proceedings can

have the required degree of confidentiality as far as a different party to another set of proceedings is concerned. In a sense, that is not surprising. It is quite an unusual case

where information obtained in relation to one set of potential proceedings had the dominant purpose of being used for another set of proceedings, as is the case here.

72. I note that, Moulder J rejected [at 51] the argument that, if the communication was not confidential from the point of view of the other party to the communication, the information would not be privileged even if it could be said that the information was confidential as far as the seeker of the information was concerned. However, again, this was in the context of privilege as between parties to the same litigation, as was also the case in relation to the authorities to which the judge was referred. This is reinforced by her observation [at 53] that a rule which resulted in information being available to some defendants but not others would be impractical.

73. In my judgment, both Ahuja and Stradbrooks would have considered the correspondence to be confidential as far as third parties (such as the defendants) were concerned. The fact that it was not confidential as between each other and could not therefore be subject to a claim for privilege in litigation between Ahuja and Stradbrooks does not, in my view, prevent Ahuja from maintaining a claim to privilege in these proceedings.

Evidence justifying privilege

74. Mr Trompeter refers to the principles set out in *Starbev* [at 12] (see paragraph [47] above) that the person asserting privilege must provide sufficient evidence in support of that claim. He submits that the evidence in this case is inadequate in that there is no evidence explaining what information was requested from Mr Jandu.

75. However, Mr Trompeter's own skeleton argument demonstrates that there is no substance in this complaint. It is apparent that the Defendants' reason for wanting to see the correspondence is that they believe it will show what Mr Jandu knew about the matters in question and what he says he told the Claimant. Clearly such information, if sought for the dominant purpose of these proceedings (as I have found) is within the scope of litigation privilege.

76. I do not therefore accept that the evidence supporting the claim for privilege is deficient as it could quite easily be inferred from the evidence available (and indeed has been inferred by the Defendants) what the information relates to.

Conclusion

77. In relation to the correspondence in question, taking into account all of the evidence and assessing the position objectively, the dominant purpose of Ahuja, as the instigator of the correspondence, was to obtain information for the purposes of these proceedings. The documents are therefore privileged and do not have to be disclosed to the Defendants.

78. This conclusion is not altered by the fact that Mr Jandu, Stradbrooks or their insurers may have been misled as to the purpose for which the information was being sought.

79. The correspondence has a sufficient degree of confidentiality in relation to the Defendants in order for a claim to litigation privilege to be maintained.

80. There is sufficient evidence as to the nature of the information contained in the correspondence for the claim to privilege to succeed.

81. I therefore allow the Claimant's appeal against paragraph 2.3 of the Master Pester's order dated 29 April 2021.