EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 126 of 2014

BETWEEN:

BARCLAYS BANK PLC

Claimant

-and-

(1) RED OAK OPERATIONS LIMITED
(2) DILIP MEHTA

Defendants

Appearances:

Mr Andrew Willins and Ms Olwyn Barry for the Defendants/Applicants
Mr Mark Forte for the Claimant/Respondent

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2016: November 10, 11
November 16.
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JUDGMENT

Introduction

[1] **Davis-White QC J (Ag)**: I have before me an application for specific disclosure by the defendants brought by Notice of Application dated 26th October 2016. I have dealt separately with an application for specific disclosure by the claimant, Barclays Bank plc ("Barclays") and need say no more about it. The current

application is supported by a witness statement of Mr Christopher Berry of Edwin Coe LLP, the defendants' English solicitor made on 25th October 2016. The affidavit in opposition is made by Ms Shen Lin Lam, legal counsel to Barclays and made on 9th November 2016. It is her 2nd affidavit in the proceedings.

[2] The defendants were represented by Mr Andrew Willins and Ms Olwyn Barry. Barclays was represented by Mr Mark Forte. I am grateful to the advocates for their skeleton arguments and their focussed and sensible approach to the issues in the application before me.

[3] The claim, now set out in an amended Statement of Claim dated 26th May 2016, was commenced in September 2014 and is due to come on for trial in 2017. Central to the claim are the activities of a Jagdish Kale ("Mr Kale"). Mr Kale was employed by UBS Singapore ("UBS") from about 2002 until November 2009, when he resigned. He was subsequently employed by Barclays between February 2010 and 29th January 2013. Whilst employed at UBS Mr Kale had worked in the private wealth management division. In that capacity he had responsibilities regarding the first defendant, Red Oak Operations Limited ("Red Oak"). In the proceedings it is alleged by Barclays that Red Oak is an investment vehicle ultimately for members of the Mehta family which owns the Rosy Blue group of companies, which carries on a well-known diamond manufacturing business. The ultimate ownership of Red Oak is in issue but the defendants accept and aver that the second defendant, Mr Dilip Mehta has been given a power of attorney by Red Oak and that the same applies as regards his nephew, Russell Mehta.

[4] Put shortly, Barclay's case is that in about 2010 Red Oak advanced a spurious claim in bad faith against Mr Kale, while he was employed at Barclays, to the effect that he was responsible for unauthorised trades carried out on Red Oak's account whilst he was at UBS. Barclays say that his authority was a general one to conduct trades without the need for specific authorisation for each one. This

case is denied by the defendants who say that the claims were valid and raised in good faith and that Mr Kale had no such general authority from Red Oak.

[5] It is common ground that in or about May 2010 Mr Kale made an oral settlement agreement with Red Oak in relation to the claim that I have referred to and that thereafter he made a number of substantial payments to Red Oak. The settlement was then set out in a settlement deed dated 9th September 2010 (the "Settlement Deed"). A total of just over US$14 million was agreed to be paid by Mr Kale to Red Oak, a sum of just over US$7million falling due immediately (but in fact paid earlier in tranches) and the remainder, mainly in US$1million tranches, to be paid by 1st December 2011. Further payments were then made.

[6] Barclays say that the payments in question were paid from accounts of clients of Barclays, either using funds transferred to such accounts by way of overdraft facility or by the obtaining of a short term loan from Barclays. In effect, say Barclays, the payments to Red Oak were made by Mr Kale in breach of his fiduciary duties owed to Barclays. The total loss to Barclays is asserted to be just over US$10 million. So far as Red Oak is concerned it is alleged that Red Oak, when it received relevant sums, actually knew that the payments were traceable to breaches of fiduciary duty by Mr Kale or that it is unconscionable for it to retain the sums (a "knowing receipt" claim). So far as Mr Dilip Mehta, the second defendant, is concerned, Barclays allege that he knowingly assisted or procured Mr Kale to commit the relevant breaches of fiduciary duty involved in the making of the payments in question. He is alleged by Barclays to be the directing mind and will behind Red Oak. In addition it is alleged that the defendants conspired together by way of an unlawful means conspiracy to damage Barclays. In the case of each cause of action it is a key part of Barclays' case that the Settlement Deed was the purported compromise of what was pursued by Red Oak as, and known to be, a spurious claim, advanced at a time when Mr Kale was working at Barclays.

[7] However, the fraud by Mr Kale which is alleged to involve the defendants is not the only fraud which he is alleged to have been involved in. The matter is set out briefly in the first witness statement of Mr Christopher Berry at paragraph 10. He says as follows,

> "*Further, according to Barclays,* [the monies alleged to be stolen by Mr Kale from clients of Barclays and paid to Red Oak]*… formed part of an elaborate and substantial banking fraud which occurred at its Singapore office whereby hundreds of unauthorised transactions were effected, by means of forged documents and the evasion of controls, in the period from 2010 to 2013 across 11 client accounts totalling approximately US$43.7 million. Barclays has since brought proceedings against Mr Kale in Singapore in respect of that fraud. These proceedings culminated in a judgment by consent against Mr Kale in Singapore for US$ 26,565,140 in respect of the unauthorised transactions*."

[8] Lying behind much of the application is a desire by the defendants to find out more about the fraudulent transactions conducted by Mr Kale which do not impact directly upon them (the "*Other Frauds*"). So far as the fraudulent transactions of Mr Kale resulting in payments to Red Oak are concerned, Ms Shen confirms that Barclays has already disclosed documents which evidence the fraudulent activity including

> "*(i) forged payment instructions and internal correspondence which evidence how the transfer was purportedly authorised (ii) screenshots from Barclays' internal payment system and client account statements evidencing where the payment came from and how it was financed, and (iii) payment receipts with corresponding reference numbers evidencing the transfer from Barclays to the Defendants' accounts*".

As I explain below, the defendants do not seek, at least at this stage, specific disclosure of the like documents in relation to the frauds of Mr Kale which are not part of Barclays' case against them. However, in relation to certain of the categories below they say they are entitled to the relevant documents which may disclose Barclays' case in relation to such frauds. This, it is said, is a proportionate way of obtaining information rather than the, I assume, disproportionate approach of seeking disclosure of the relevant documents evidencing the frauds themselves.

[9] As explained to me by Mr Willins, the bases of an application for specific disclosure of documents which may touch upon the Other Frauds are as follows:

(1) First, Mr Kale has been identified by Ms Shen as a witness for Barclays. Mr Willins submits that evidence about the Other Frauds goes to Mr Kale's credibility and should be disclosed. It is unfair that Barclays should rely upon Mr Kale as their witness, and yet at the same time avoid disclosing the full extent and manner of the frauds that they say he committed upon them.

(2) Secondly, Barclays' case is that the Defendants should have known that the payments (or many of the payments) they received, purportedly from Mr Kale, were ones in fact obtained from Barclays. In those circumstances, the defendants are entitled to explore and understand how the entirety of Mr Kale's frauds were committed, and apparently not discovered by Barclays for some time. If Mr Kale was able to confound the rigorous procedures put in place by Barclays, then how, asks Mr Willins, could the defendants have guessed at that?

(3) Thirdly, the defendants' case is that the Settlement Deed was a genuine compromise of genuine claims. Mr Kale, they say, whilst at UBS, conducted unauthorised trades on their account, or that of Red Oak. So far as his activities at Barclays were concerned, if they were similar to those whilst he was at UBS, as alleged by the defendants in relation to Read Oak, then that would support the defendants' case.

[10] I will deal with the question of the Other Frauds, in relation to the specific categories of disclosure that are now sought. As a general matter, at this stage I say the following with regard to Mr Willins submissions:

(1) First, Barclay's case regarding the Other Frauds, which is not as part of their pleaded case in these proceedings, is fairly clear. It is necessary

to guard against the expansion of this case into collateral areas which are of limited relevance. The scale of the fraud of Mr Kale is obviously relevant to his credibility but I am not persuaded that the disclosure of the precise details of, or method by which he committed the Other Frauds, takes the question of his credibility as a witness significantly further.

(2) Secondly, neither Barclays' case nor the defendants' case, is that they, the defendants, had any knowledge of the details of Barclays' systems and controls and either knew or should have known (or the opposite) that they could be or had been evaded by way of the Other Frauds. Barclays' case is, in very broad terms, (and the following does not exhaustively state all matters relied upon), that the defendants knew of a very serious risk that Mr Kale might "rob Peter to pay Paul"; that he did not have the sums required to meet the sums due under the Settlement Deed; that they would have known roughly what he earned and that it was or must have been obvious to them that it would not be enough to enable him to fund the cash payments required; that Mr Kale would not have been able to build up free assets worth anything like the sums required to be paid under the Settlement Deed; that they knew the source of the payments as accounts at Barclays not in Mr Kale's name; and that they knew their claim against Mr Kale was spurious. It does not seem to me that it is necessary for the defendants to understand precisely how the Other Frauds were committed. So far as concerns the frauds said to involve the defendants, as I have said, disclosure has been made in relation to them.

(3) Thirdly, the defendants have already had disclosed to them a consent judgment in proceedings in the High Court of the Republic of Singapore brought by Barclays against Mr Kale. The consent judgment under which "*By consent it is this day adjudged as follows*" contains a number of paragraphs, the first of which is that:

"*1. The Defendant had:*

(a) entered into transactions without the authorisation and/or knowledge of the relevant customer of the Plaintiff; and

(b) failed to make transfers and/or carry out trades which the relevant individual or corporate clients of the Plaintiff had instructed the Defendant to make or carry out.

(collectively, "Transactions")."

The consent judgment provides that the defendant is to pay the plaintiff USD 26,244,820 as damages for the loss suffered by Barclays.

It seems to me unnecessaryfor the defendants to be given disclosure in relation to the precise method of execution of the Other Frauds.

[11] I now turn to the claim for specific disclosure which falls under five heads. For convenience I take them out of order. They are as follows allocating category numbers to reflect the order in which they appear in the Notice of Application:

(1) Category 5: a list of the unauthorised transactions entered into by Mr Kale containing the transaction numbers and monetary value of each transaction;

(2) Category 3: the notes and digital recording of the meeting of 31 January 2013 between Mr Kale and Miss Galvin;

(3) Category 2: the KPMG Report;

(4) Category 1: all documents deployed in the Singapore proceedings case S. 127/2013 including the pleadings, Orders, exhibits, skeleton arguments and all other documents lodged with the court;

(5) Category 4: all correspondence between the Claimant and its Regulators in relation to Mr Kale's unauthorised trading on client accounts between January 2013 and 29 September 2014.

The Law

[12] Under EC CPR 28.5:

"(1) An order for specific disclosure is an order that a party must do one or more of the following things-

(a) disclose documents or classes of documents specified in the order;

(b) carry out a search for documents to the extent stated in the order;

(c) disclose any document located as a result of that search.

.....

(4) an application for specific disclosure may identify documents-

(a) by describing the class to which they belong; or

(b) in any other manner.

(5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings"

[13] "Direct relevance" is dealt with by EC CPR 28.1 (4) as follows:

"(4) for the purposes of this part a document is "directly relevant" if-

(a) the party with control of the document intends to rely on it;

(b) it tends to adversely affect that party's case; or

(c) it tends to support another party's case,

but the rule of law known as "the rule in Peruvian Guano" does not apply."

Under EC CPR 28.4, standard disclosure is limited to documents which are "directly relevant" to the matters in question in the proceedings.

[14] A question arises as to whether specific disclosure is also limited to documents which are so "directly relevant". I was referred to the case of *Yao Juan v Kwok Kin Kwok*[1] a decision of Leon J given on 13 November 2015. The version shown to me is described as being "*Amended judgment (as of 25 May 2016) judgment amended by consent (only as to form) to reflect changes as agreed between the Claimant and the First Defendant*". In his judgment, Leon J ordered disclosure of certain documents on the basis that they were "directly relevant". However he went on (obiter) to say that if he was wrong about that, but correct that the court is not restricted by EC CPR 28.5(5) to ordering the disclosure of "directly relevant" documents, then he would have ordered their disclosure based on his consideration of the factors set out in EC CPR rule 28.6, which matters I shall come onto. In so doing, he referred back to his earlier analysis of the relevant rules. In that analysis he noted the use of the word "may", in rule 28.5(5), which he said "appears to be significant" and contrasted it with the use of the word "must" in EC CPR 28.6. In paragraph [32] of his judgment he said as follows:

> *"[32] On its face this wording appears to leave it open for specific disclosure to include documents that go beyond documents that are "directly relevant "within the meaning of Rule 28.1(4) so long as they do not include documents the production of which would be only because they are "train of enquiry" documents, which Rule 28.1 precludes when it dis-applies "the rule in Peruvian Guano"."*

[15] With great respect, I have three difficulties with this analysis. First, it seems to me that, if specific disclosure can include documents that go beyond documents that are "directly relevant", then it can include documents relevant under "the rule in Peruvian Guano". That rule forms part of the definition of documents that are "directly relevant". If specific disclosure is not limited to documents that are "directly relevant", then there is no requirement to exclude documents which fall

[1] BVIHV(COM) 2013/0162.

within the rule in Peruvian Guano. Secondly, without determining the point at this stage, I am far from certain that there is some intermediate category of documents which falls between those which are "directly relevant" and those falling within the rule of Peruvian Guano. The so-called Peruvian Guano rule, extracted from the case of that name, relates to documents which are "indirectly" relevant, giving rise to lines of enquiry which might assist or damage a relevant party's case. Thirdly, I do not consider that the word "may" used in EC CPR 28.5(5) is permissive in the sense that the court "may" or "may not", at its discretion, limit specific disclosure to documents which are directly relevant. In my assessment, in its context the word "may", means "shall" in the sense of delineating the scope of the court's power. This follows from the use of the words "may…only". Accordingly, in my judgment, documents ordered to be disclosed by way of specific disclosure must be directly relevant. However, if I am wrong about this, it would, in my view, be an exceptional case where documents that were not "directly relevant" should be ordered to be disclosed by way of specific disclosure. I raised this issue with the advocates before me, and understood them to agree that the rule is to be read in the manner that I have set out, that is as limiting specific disclosure to documents that are "directly relevant". I have not therefore heard contested argument on the point.

[16] EC CPR 28.6 deals with the criteria for ordering specific disclosure. It provides as follows:

"*28.6*

(1) when deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

(2) The court must have regard to-

(a) the likely benefits of specific disclosure;

(b) the likely cost of specific disclosure;

(c) *whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order*"

The question of financial resources does not arise on the facts of this case. I need consider no further the remainder of the rule dealing with that factor.

Category 5: list of unauthorised transactions

[17] The fifth category seems to me not really to be a matter of specific disclosure about rather a request for information falling within EC CPR Part 34. No point was taken on this and I am prepared to treat the application as one for information under CPR part 34. On the morning of the second day of the hearing before me, Mr Forte for Barclays volunteered the provision of further information regarding the entirety of the transactions said to have been fraudulently carried out in relation to Barclays by Mr Kale. They included the date of each transaction and the amount of the transaction in question by reference to the list of unauthorised transactions executed by Mr Kale as annexed as Schedule one to the Singapore consent order, this document already having been disclosed. Mr Willins was, as I understand it, content with the information to be provided by reference to this schedule 1. However, without requiring the specific identity of clients to be revealed, he said that it was also necessary for the defendants to be able to tell from the relevant transaction whether the same client or not was involved so that the extent of the fraud by reference to particular clients of Barclays could be identified by the defendants. He suggested for these purposes that Barclays might identify the relevant client by consecutive letters of the alphabet. Mr Forte was unable to take instructions on this request. This, of course, goes further than the relief sought in the Notice of Application, but no point was taken in this respect. In my judgment, the information proffered by Mr Forte with the additional information sought by Mr Willins that I have just outlined should be provided by Barclays to the defendants and I so order, the relevant form of order being something that I would invite the

parties to agree. The extent of Mr Kale's fraud and his credibility are matters, it seems to me, which are an issue and I consider that it is necessary that the details identified should be provided within the meaning of EC CPR 34.2(2).

Category 3: the notes and digital recording of the meeting of 31 January 2013 between Mr Kale and Miss Galvin;

Category 2: the KPMG Report

[18] To understand these two categories it is necessary to set out the chronology in more detail. In summary the position was agreed to be as follows:

28.01.13 Complaint to Barclays by client of unauthorised transfer of money from its account to a 3rd party account. (This transaction being one not resulting in any payment to Red Oak).

[Kale had held meeting with client to explain money returned to client account and that it had been paid away in error. The client was not satisfied with this explanation, hence the complaint.]

29.01.13 Mr. Kale was suspended

[unknown] Initial meeting with Kale and Barclay's investigator: Kale says the money was paid away in error,

[unknown] Matter referred by Barclays Legal and Compliance to Fraud Investigation team.

31.01.13 Recorded meeting Ms Galvin and Mr Kale. A member of Barclays Legal Team attended the interview. Mr Kale admits fraud in relation to client payment transfer instruction.

31.01.13 KPMG instructed by Clifford Chance on behalf of Barclays to analyse and review transactions in order to enable Bank to bring proceedings against Kale. Project ascribed name "Project Marina".

01.02.13 Police Report to Singapore police regarding complaint on 31.03.16 confirming initial interview of Kale and the subsequent interview with Ms Galvin. Incident recorded as taking place 7.1.13 to 29.1.13. Note of report records interview where Kale asserts error and the further interview on 31.01.13 where he admits the fraud in relation to that transaction. Investigation said to be ongoing, with approximate fraudulent loss to Bank identified at that stage as £4.1m and $2.1m of unknown currency. Handed over to the Police is a folder containing instructions from clients relating to two transfers of US$11,710,000 and GBP 4,183,951.19.

06.02.13 Kale leaves Barclays' employment

07.02.13 Preliminary Assessment by KPMG: used in evidence in Singapore proceedings against Mr Kale. Assessment is addressed to Head of Wealth Management Mr Didier Van Daeniken in Singapore. Mr Daeniken is an intended witness in these proceedings and has made an affidavit in a second set of BVI proceedings against Red Oak (inter alia) in relation to the matters the subject of the current proceedings. Throughout the Assessment refers to Mr Kale as "the Defendant".

08.02.13 Injunction granted in Singaporean proceedings against Mr Kale using the KPMG Assessment in evidence

[19] In relation to both category 2 and category 3, there is a clear assertion of privilege, whether litigation privilege and/or, in the case of category 3, legal advice privilege, by Miss Shen in her affidavit. Mr Willins submits that I should not accept the assertions of privilege contained in Miss Shen's affidavit. In this context, I was referred to the case of ***West London Pipeline and Storage Ltd v Total UK Ltd,***[2] a case arising out of the well-known explosion and fire at the Buncefield Oil

[2] [2008] EWHC 1729 (Comm).

Terminal in Hertfordshire in December 2005. In summary, Beatson J identified four options open to the court when minded to go behind an affidavit in this context. First, "*it may conclude that the evidence in the affidavit does not establish that which seeks to establish, i.e. that the person claiming privilege has not discharged the burden that lies on him*" and therefore order disclosure or inspection. Secondly, it may "*order a further affidavit to deal with matters the earlier affidavit does not cover or on which it is unsatisfactory*". Thirdly, it may inspect the documents. Fourthly, it may order cross examination of the deponent (see paragraph [74]). So far as inspection is concerned, Beatson J concluded that "*inspection should be a solution of last resort, in part because of the danger of looking at documents out of context at the interlocutory stage. It should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or not to be trusted with the decision-making, or there is no reasonably practicable alternative*." As regards, the power to order cross- examination, Beatson J, decided that under the English procedural regime, even if there is no longer a jurisdictional bar to ordering cross- examination of the deponent on his affidavit in this context, the exercise of that power should be reserved for extreme cases where there is no alternative relief. On this application I was not invited to consider whether either of the third or fourth options identified by Beatson J. should be undertaken by me. Accordingly I did not have to consider whether the decision of Beatson J on these two issues in the English context should be transposed without more into the BVI context. On the face of things I would have expected the principles to be similar. However I have found his summary of the position, which I further shorten for present purposes, to be of great assistance. Reference should be made to paragraph [86] of his judgment for its full terms. For present purposes I can summarise as follows:

"(*1*) *The burden of proof is on the party claiming privilege to establish it: see* <u>*Matthews & Malek on Disclosure*</u> *(2007) 11-46 and paragraph [50] above. A claim for privilege is an unusual claim in that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's*

cause. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: Bank Austria AKT v Price Waterhouse; Sumitomo Corp v Credit Lyonnais Rouse Ltd (per Andrew Smith J).

(2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and/or evidence of a fact which may require to be independently proved: Re Highgrade Traders Limited; National Westminster Bank plc v Rabobank Nederland.

(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 statements 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: Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co, per Lord Esher MR and Chitty LJ; Lask v Gloucester Health Authority.

(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: Nielsen v Laugharane (the Chief Constable's letter), Lask v Gloucester Health Authority (the NHS Circular) and see Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co, per A L Smith LJ.

(c) the other evidence before the court that the affidavit is incorrect or incomplete on the material points: Jones v Montivideo Gas Co; Birmingham and Midland Motor Omnibus Co-v London and North West Railway Co; National Westminster Bank plc v Rabobank Nederland.

(4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection is established, there are four options open to it."

He then goes on to identify the four options that I have referred to.

[20] As regards the tape recording of the interview on 31 January 2013, and any note of the same, the short point argued before me was one of privilege. Ms Shen says in her affidavit that the same are subject to litigation privilege on the basis that their purpose was the collecting of evidence in contemplation of litigation and for Barclays counsel and (legal advice privilege) to provide legal advice. Mr Berry (and Mr Willins) say that the investigation was at too early a stage for it to be said that litigation advice was the main or dominant purpose of the interview. Mr Forte says that in the context of an urgent injunction on 8 February that the evidence was obtained for the purposes of litigation advice obviously makes sense. He also says that in any event the interview and notes and records of it are covered by normal legal advice privilege. A lawyer was there and present, clearly so as to assess the evidence and give advice. It does not take too much supposition to infer that the advice ultimately sought to be taken was whether to bring proceedings, whether to report to the police, the regulatory impact and whether to report to the regulator and so on. In my view it is unnecessary for me to determine whether litigation privilege applies: quite clearly in my view legal advice privilege does apply. In that context I was referred to cases such as *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No 2)*[3]; *Balabel v Air India*[4] and *Property Alliance Group Limited v Royal Bank of Scotland plc*.[5] I did not understand Mr Willins really to challenge the legal advice privilege aspect of the matter. In my view there are no grounds to go behind the statement of Ms Shen in this respect on any of the sort of bases identified by Beatson J. Although it is unnecessary for me to

[3] [1972] 2 ALL ER 353.
[4] [1988] 1 Ch 317.
[5] [2015] EWHC 3187 (Ch); [2016] 1 WLR 992.

decide, my judgment is that the same is true as regards the claim for litigation privilege. I should also note that neither advocate identified any impediment to the privilege arising by virtue of the Court of Appeal decision in the *Three Rivers* case insofar as the communications were "in house". I was referred only to the House of Lords decision.

[21] I should note that since preparing this judgment, which included the immediately preceding paragraph, and sending it to the parties in draft, I have had the benefit of reading the decision of Chief Master Marsh in *Astex Therapeutics Ltd v Astrazeneca Ab (2016)*.[6] He decided, based upon the Court of Appeal decision in *Three Rivers DC v Bank of England (Disclosure) (No.3),*[7] that attendance notes made by in-house or external lawyers of conversations with employees could not be the subject of legal advice privilege where they had been made by way of seeking information from employees pursuant to the review of a contract which had subsequently given rise to a dispute. On the evidence he was not satisfied that litigation privilege applied. The basis for his decision regarding legal advice privilege was that that privilege was not apt to cover an information-gathering exercise of the type which would normally be conducted in relation to litigation, but undertaken before a dispute was in reasonable contemplation. I have considered whether I should reconvene the hearing for further argument but in light of my clear conclusion that the material is covered by litigation privilege in any event I concluded that it would simply waste time and costs were I to do so. It does mean however that it cannot be assumed that the court would hold, on full argument, that legal advice privilege applied in the circumstances of the interview in this case.

[22] However, although this was not mentioned in Mr Berry's witness statement (but the police report was), Mr Willins, in his skeleton argument advanced, for the first time, a case that privilege ceased to apply because of disclosure to the police.

[6] [2016] EWHC 2759 (Ch).
[7] [2003] EWCA Civ 474.

Although he asserted that the tape and/or notes of the interview "must" have been disclosed to the police, as I understood, he accepted that there was no evidence of this fact and the point had not previously been raised. In my view it was too late to raise it when Barclays had no opportunity to file evidence in relation to the same. Although the onus may be on the person claiming privilege to establish the same, where the person challenging the claim seeks to rely upon waiver based on facts known to him it seems to me that he is obliged to raise the issue sufficiently to give the claimant to privilege an opportunity to deal with the same. Therefore Mr Willins is left with the proposition that privilege is waived because the substantive content of the interview had been revealed to the police (or, he might have said, to the defendants through disclosure to them of the police report). At the hearing I was provided with an extract from *Matthews and Malek* on disclosure dealing with the proposition that for legal advice or litigation privilege to come into being the relevant communications must have been made on a confidential basis. However, that did not seem to me to deal with the question of subsequent loss of the privilege. After the hearing, and at my request, I was provided with extracts from *Matthews & Malek* and especially Chapter 16 on loss of privilege. That confirmed my suspicions that the position was not so straightforward. I do not know whether there is a specific statutory regime in place in Singapore akin to that in England under the Criminal Procedures and Investigations Act 1996. However, I am satisfied that for the moment I should apply the principle illustrated by the decision in ***British Coal Corporation v Dennis Rye (No 2)***[8] where it was held that privileged documents handed (by the future plaintiffs) to the police to assist with their investigations, and subsequently supplied to the defendants pursuant to the Attorney General's Guidelines, did not result in privilege being waived for subsequent civil proceedings brought by the plaintiffs against the defendants. As stated by Neill LJ:

> "*In my judgment the action of the plaintiff in making documents available for the purpose of the criminal trial did not constitute a waiver of the privilege to which it was entitled in the present civil proceedings. Its action*

[8] [1988] 1 W.L.R 1113.

in regard to both the Category A and the Category B. documents was in accordance with its duty to assist in the conduct of the criminal proceedings, and could not properly be construed as an express or implied waiver of its rights in its own civil litigation. Indeed, it would in my view be contrary to public policy if the plaintiff's action in making the documents available in the criminal proceedings had the effect of automatically removing the cloak of privilege which would otherwise be available to it in the civil litigation for which the cloak was designed."

In ***Goldman v Hesper***,[9] the ***Dennis Rye*** case was described as being an example of the proposition that it is possible to waive privilege for a specific purpose and in a specific context only. Accordingly, I decline to order disclosure of any notes or tape-recording of the interview in question. I so decline on the basis that they are privileged and that any disclosure of the same that has taken place to the police does not amount to waiver save for the purposes of the police investigation (and possibly any criminal proceedings thereafter following).

[23] So far as KPMG is concerned, the defendants seek the "final" version of the KPMG Report produced in Project Marina. The evidence of Ms Shen is that, following the seven paragraph letter from KPMG deployed in the Singapore proceedings, KPMG produced "*a draft report (the final version was never completed) which is subject to litigation privilege as it came into existence for the sole purpose of collection of evidence for use in the Singapore litigation and is confidential as it has not entered the public domain*." The defendants through Mr Berry asserted that it could not be said that the dominant purpose of KPMG's work was litigation because they had been asked to carry out a wide-ranging investigation into what had happened. This description is derived from paragraphs 1 and 3 of the letter of 7 February 2013 which are as follows:

"*1) Background*

[9] [1988] 1 WLR 1238.

KPMG Services PTE Ltd was appointed by Barclays Bank plc (the "Bank") through its solicitors to investigate a suspected fraud by one of its employees (the "Defendant").

……

3) Work carried out

we carried out the following scope of work and the review is still ongoing:…"

There was then listed under paragraph 3, six categories of work including for example obtaining and analysing computer and communication devices conducting data analytics of fund movements reviewing and collating documentation and so on. In my judgment, as confirmed by Ms Shen and as is on its face clear from the import of the letter of 7 February 2013, KPMG was engaged primarily if not solely for litigation purposes and subject to any question of waiver their work product and communications between them and the bank or its agents is privileged. Again, there is nothing in the evidence which causes me to doubt Ms Shen's evidence and assertion to the effect that the matter was covered by privilege when it came into being.

[24] The second argument of the defendants, this time foreshadowed in the witness statement of Mr Berry, is that privilege has been waived by waiving privilege over the 7 February 2013 letter. This is on the basis that both reports were "part of the same exercise". In this respect Mr Willins relied on cases such as ***Great Atlantic Insurance Co v Home Insurance Co***[10] and ***Fulham Leisure Holdings Ltd v Nicholson Graham & Jones.***[11] The facts of the ***Great Atlantic Insurance*** case are not directly relevant, they deal with circumstances where waiver took place as regards part of a document, by it being read out in court, and whether it was possible to treat the document as dealing with "*entirely different subject matters or different incidents*" so that it could in effect be treated as two separate memoranda

[10] [1981] 1 WLR 529
[11] [2006] EWHC 158 (Ch); [2006] P.N.L.R. 23.

dealing with separate subject matter. However the ***Fulham Leisure*** case is, on its facts more relevant. There the claimant's claim was for professional negligence against its former solicitors, NGJ, who had acted for it when it purchased an interest in Fulham Football Club. The alleged negligence was permitting completion of the transaction on a footing giving minority shareholders greater rights than they should have had and not drawing this to the attention of the claimant. Subsequently, the claimant instructed a range of different lawyers to advise it on trying to sort out the position over a period of four months. Part of the claim against NGJ was in respect of the legal fees so incurred. Some of the relevant advice by the successor lawyers was disclosed, being referred to in the pleadings and witness statements. The question was whether there should be disclosure of the entirety of the legal advice given during the four-month period. Mann J, building on the then extant authorities, identified that the relevant process should be as follows (see paragraph [11]):

"i) One should first identify the "transaction" in respect of which the disclosure has been made.

ii) That transaction may be identifiable simply from the nature of the disclosure made-for example, advice given by counsel on a single occasion.

iii) However, it may be apparent from that material, or from other available material, that the transaction is wider than that which is immediately apparent. If it does, then the whole of the wider transaction must be disclosed.

iv) when that has been done, further disclosure will be necessary if that is necessary in order to avoid unfairness or misunderstanding of what has been disclosed."

[25] Mr Willins' submission was that the transaction in question was "Project Marina". Alternatively, he said that "fairness" required the disclosure of the "final" report. I am against him on both points. Commercially and from the viewpoint of KPMG it may be correct to say that "Project Marina" was "one transaction". However, in my

view this is not the “transaction” for the purposes of identifying waiver of privilege in this case. In my assessment in this case, the transaction in question is the, then, preliminary findings of KPMG, as relied upon by Barclays and deployed by them in evidence in the Singaporean proceedings. True it is, that KPMG did further work for Barclays. However, for the purposes of waiver of privilege, their findings on later occasions are not part of the same “transaction”. Put another way, communications between a witness and the lawyers of a party to litigation are normally privileged. The fact that a finalised witness statement is put forward and relied upon by a party in the proceedings, does not mean that the entirety of earlier communications and draft witness statements are released from the umbrella of privilege because they are part of the same “transaction”. The same would be true of later communications and drafts. Of course, in that situation, there may be reasons why further material or facts might have to be disclosed. That would arise not because of any waiver of privilege but because of the duties of parties not to mislead the court (and in a lose sense “fairness”). In this particular case, KPMG produced a document containing information for use on a specific occasion. It is quite clear what that was. Furthermore, there is no unfairness in the defendants being aware of the evidence of KPMG relied upon at an early stage of the Singaporean proceedings and yet not receiving subsequent work product of KPMG. To the extent KPMG later relied upon primary material which is relevant to these proceedings the same will have been disclosed. There is no danger that the defendants will be “misled” by the revelation of the early work product, they know that is all that it was. The disclosure that was made was, as I have said, of a specific work product for use on a specific occasion. Barclays are not deploying the same in this case as being their case as to what the relevant fraud and losses were so there is no unfairness in them not revealing the (incomplete) further work of KPMG, which incomplete work might itself be misleading. KPMG may have gained knowledge after 7 February 2013 as matters progressed but their work product thereafter so far as produced to Barclays was for a different purpose and was a different "transaction”.

[26] For completeness I should mention that Mr Willins also relied in this context upon *Harmony Shipping Co SA v Saudi Europe Line Ltd*.[12] That is a case regarding the principle that there is no property in a witness. I did not find it assisted me on the point that I had to decide.

[27] Even if I am wrong about this question of waiver, I should make clear that my view is that disclosure should in any event be limited to those parts of the KPMG draft report which deal with the transactions involving Red Oak and not the entirety of the fraud committed by Mr Kale. That is on the basis of an application of the criteria in EC CPR 28.6. As I have said however, my judgment is that the document is and remains privileged and accordingly I do not order its disclosure.

Category 1: all documents deployed in the Singapore proceedings case S. 127/2013 including the pleadings, Orders, exhibits, skeleton arguments and all other documents lodged with the court;

[28] As regards this category of documents, it is said by Mr Berry that this class of document is "*directly relevant to understanding the fraud perpetrated by Mr Kale, his ability to disguise his fraudulent activities three years, whether the defendants were or should have been aware of it, and to what extent (if any) the defendants procured Mr Kale to undertake unauthorised transactions."* Mr Willins elaborated on this and identified the three separate bases of relevance I have referred to in paragraph [9] above. In my view, applying the criteria in EC CPR 28.6, disclosure is only necessary of that material bearing directly on the fraud of Mr Kale in which the defendants are said to be implicated, and not the entirety of the fraudulent transactions that he is said to have carried out whilst at Barclays as, for example, set out in the consent order in the Singaporean proceedings. That raises one further question which is whether Mr Kale's assets and liabilities are relevant to that case. Ms Shen says that the materials have been considered but that, other

[12] [1979] 1 W.L.R. 1380.

than certain documents that were disclosed: "*the remainder of the documents in the Singapore proceedings relate primarily to Mr Kale's assets and account details, which are not relevant to this claim*". In argument I raised the issue of whether Mr Kale's actual assets, as opposed to the defendant's appreciation of Mr Kale's assets and means, was an issue. Having considered the matter further, including the pleadings, I am satisfied that the question of his assets (and liabilities) is relevant to the case made against the defendants that they knew or should have known what they were or of their limited nature and accordingly I consider that documents going to that issue should, as a generality, be disclosed.

[29] However, there is a more overriding objection raised by Barclays. Ms Shen in her affidavit says that the court documents are subject to a sealing order, granted on the basis of banking secrecy considerations and that therefore disclosure is prevented. However, it is clear that permission was obtained from the High Court for the disclosure of the consent order. Further the only secrecy injunction is one lying on Mr Kale. It seems to me that, rather like privilege, the onus is on Barclays to make out its case in this respect. I am not satisfied on the evidence that the fact that the court file has been sealed is a complete impediment to the release of the documentation otherwise on the court file (or indeed that it necessarily covers all the material identified in the request, such as Skeleton arguments). I would therefore expect Barclays to make an application to the Singapore court to lift any prohibition on disclosure. I will leave for further argument the question of the appropriate form of order, whether to make such an order with some form of disclosure required of the application for unsealing (if unsuccessful) or whether I should adjourn this part of the application before me pending further evidence.

<u>Category 4: all correspondence between the Claimant and its Regulators in relation to Mr Kale's unauthorised trading on client accounts between January 2013 and 29 September 2014.</u>

[30] So far as correspondence between the regulator and Barclays is concerned, Mr Berry for the defendants asserts that this will be relevant to understanding the fraud perpetrated by Mr Kale, his ability to disguise his fraudulent activities for three years, whether the defendants were or should have been aware of it and to what extent (if at all) that the defendants procured him to undertake unauthorised activities. This mirrors the asserted grounds of relevance to the material generated within the Singaporean proceedings. Again, Mr Willins' expanded relevance submissions set out in paragraph [9] above apply. Applying the criteria in EC CPR rule 28.6, I consider that prima facie such correspondence should be disclosed insofar as it bears upon (a) Mr Kale's assets/liabilities and/or (b) the specific transactions relating to transfers of funds to the defendants or either of them or (c) the allegations that the claims brought by Red Oak against Mr Kale and any resulting settlement thereof were spurious or on a false basis. I therefore reject the submission of Ms Shen that disclosure of this category is not necessary. However Ms Shen raises a further point.

[31] The further point raised by Ms Shen as regards this category of disclosure is that Barclays "may" be precluded from disclosing it. In this respect I have been referred to the Singaporean Official Secrets Act (revised Edition 2012). Having looked through that it is difficult to see how it could apply to the regulator/bank correspondence in this case. I was also referred to s46 of the Banking Act which (broadly) prohibits disclosure of any report produced by the regulator. It is submitted that reports to the regulator must also be covered by this provision. On the face of things I am not satisfied that this can be correct. Accordingly, I am unpersuaded on the evidence before me that this impediment is made out. However, it would be wrong for me to order any disclosure that is prohibited by Singaporean law, therefore any order I make needs to deal with the possibility that disclosure is prohibited. Again, I will hear further submissions from the parties as to the appropriate mechanism to achieve this, if they are unable to agree the same.

[32] In the light of this judgment I invite the parties to agree a form of order and will hear further submissions on that same and other matters arising such as costs.

Malcolm Davis–White QC (Ag)
Commercial Court Judge