Neutral Citation Number: [2019] EWHC 914 (Chd))

Case No: BL-2018-000281

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

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

Date: 9th April 2019

Before :

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT

- -

Between :

UTB LLC	**Claimant**
- and -	
SHEFFIELD UNITED LIMITED	**Defendant**
HRH PRINCE ABDULLAH BIN MOSAAD BIN ABULDAZIZ AL SAUD	**Third Party**
	Fourth Party
YUSUF GIANSIRACUSA	

Claim No:
CR-2018-003995

AND IN THE MATTERS OF BLADES LEISURE LIMITED
AND IN THE MATTER OF S.994 OF THE COMPANIES ACT 2006

BETWEEN:	**Petioner/Applicant**
SHEFFIELD UNITED LIMITED	
-and-	**Respondents**
(1) UTB LLC	
(2) UTB 2018 LLC	
(3) HRH PRINCE ABDULLAH BIN MOSAAD BIN ABULDAZIZ AL SAUD	

(4) YUSUF GIANSIRACUSA
(5) HRH PRINCE MUSA'AD BIN KHALID M BIN ABDULRAHAMAN AL SAUD
(6) BLADES LEISURE LIMITED

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Mr Paul Downes QC, Ms Emily Saunderson and Mr Luke Krsljanin (instructed by **Shepherd & Wedderburn LLP**) for the **Sheffield United Limited**
Mr Robert Weekes (instructed by **Jones Day**) for **UTB (as defined below)**

Hearing dates: 3rd and 4th April 2019
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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.

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Sir Geoffrey Vos, Chancellor of the High Court

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This judgment concerns three issues. The first issue relates to the circumstances in which the court should apply the provisions of the new Practice Direction 51U ("PD51U") relating to the "Disclosure Pilot for the Business and Property Courts" (the "Pilot").

2. The second issue before the court concerns the amendments that Sheffield United Limited ("SUL") should be permitted to make to its Defence and Counterclaim in what has been described as the "Main Action", and to its Petition in the claim it makes under section 994 of the Companies Act 2006.

3. The third and most contentious issue is the question of whether, and in respect of which documents, the UTB parties (namely UTB LLC, UTB 2018 LLC, Prince Abdullah and Mr Yusuf Giansiracusa) should be permitted to assert legal professional privilege. This issue also raises some more minor further applications for extended disclosure.

4. I heard argument on the pre-trial review in this case on the 3rd and 4th April 2019. I reserved judgment on these three issues for just a few days, because both parties were concerned to hold their expedited trial date. The 25-day trial of the Main Action, an additional claim for conspiracy brought by SUL against the UTB parties, and the Petition is fixed to start before Fancourt J in the first part of May 2019.

5. The matter was listed before me rather than the trial judge, because SUL was asking the court to look at some of the privileged documents in order to determine its application, and it was not thought appropriate that the trial judge should undertake that exercise. I should say at once that the suggestion that I should look at any of the allegedly privileged material was initially resisted by Mr Robert Weekes, counsel for the UTB parties. Ultimately, however, at lunch-time on 4th April 2019, under what might be described as some persuasion from the court, exercised avowedly in order to cut the gordian knot, the UTB parties relented and agreed that I should look at two redacted email exchanges of 10th and 15th November 2017 respectively (the "Redacted Documents") so that I could judge for myself whether the privilege asserted was justified or not. I will return to that issue in due course.

6. This dispute has generated thousands of pages of inter-solicitor correspondence, and a dispiriting volume of mistrust. As I said repeatedly in the course of argument, the parties will need to keep proportionality in the forefront of their minds as matters proceed. The Business and Property Courts are indeed willing and able to resolve the most complex of commercial disputes. But the parties must focus on the issues that require resolution, and not allow themselves to take every point, however small, nor to permit their mistrust of their opponents to become the driving force behind the litigation. There is, I am afraid, a danger of that here. The court expects the parties to cooperate to allow it to achieve a just, expeditious and proportionate resolution of the real commercial issues that separate them. Court proceedings are not a stage for a grudge match.

7. It is vitally important that the central legal and factual issues that divide the parties are identified and agreed, so that the trial judge is able to focus on what he has actually to resolve, and can do so justly and openly despite the unfortunate hostility that seems to have developed.

Factual background

8. The facts of this dispute can best be taken from paragraphs 1-16 of Fancourt J's judgment of 29th June 2018 at [2018] EWHC 1663 (Ch), which are reproduced below. I will adopt all his abbreviations, save that I will use "SUL" rather than "Sheffield" to refer to Mr Paul Downes QC's client.

9. Fancourt J described the background as follows:-

> "1. This is my judgment on an application for interim injunctive relief made by Sheffield United Ltd ("Sheffield") against UTB LLC ("UTB"). Sheffield and UTB each own (or, in the case of UTB, own or control) 50% of the shares in Blades Leisure Ltd ("Blades"). Blades owns all the shares in The Sheffield United Football Club Ltd ("FC"), which in turn runs the football club of that name.
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> 2. Sheffield is a subsidiary company in the Scarborough Group of Companies, owned and controlled by Kevin McCabe and his family. Sheffield owns the football ground at Bramall Lane and the football club's academy ("the Properties"). Mr McCabe has long been associated with the football club and invested much money in it.
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> 3. On 30 August 2013, Mr McCabe and his companies reached agreement with Prince Abdullah Bin Mosaad Bin Abdulaziz Al Saud ("Prince Abdullah") for him, through UTB, to invest £10 million in the football club, by subscribing for 50% of the shares in Blades at that premium.
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> 4. The agreement is in the form of an Investment and Shareholders' Agreement ("the ISA"). Voting and board control of Blades and its subsidiary, FC, is evenly shared between the two shareholders. Neither has a casting vote. Clause 10 of the ISA specifically provides for what happens if, on any important business matter, there is deadlock in the affairs of Blades. Failing reasonable attempts in good faith by the principals to resolve the matter, either shareholder may serve notice on the other offering to buy out the other's shareholding at a specified price. The offeree may either accept and sell or serve a counternotice to buy the offeror's shareholding at the same price, in which case the offeror is bound to sell.
>
> 5. Clause 6.1 of the ISA recognises that Blades may require further finance to fund its and FC's projected cash

requirements. The shareholders are given the right, once in any six-month period, to subscribe for extra shares at a premium calculated on a basis that effectively valued Blades at about £20 million. That right is subject to pre-emption provisions giving the other shareholder the right to subscribe for an equal number of new shares.

6. By clause 9 of the ISA, Blades undertook to each of its shareholders, and the shareholders agreed so far as they could, to procure that Blades did certain things. These included, at clause 9.1.5 that Blades and its subsidiaries should be properly managed and comply with the law and the regulations of the Football Association and the Football League, and at clause 9.1.10 that none of the matters listed in schedule 4 to the ISA should occur without the consent of a majority (in some cases a super majority) of shareholder votes. These included the making of any loan and the borrowing of any money in excess of £25,000 in aggregate.

7. Clause 9.1.12 of the ISA provides that if any shareholder acquires more than 75% of the entire issued share capital of Blades, FC is obliged to exercise its property call options ("the FC Options"). The important one of these entitles FC to purchase from Sheffield the Properties at their market value with vacant possession. The Properties are in fact let to FC on long leases at a reduced rent, so exercise of the options would confer a very substantial financial benefit on Sheffield.

8. Clause 11 of the ISA gives each shareholder the right, during specified option periods, to make an offer for the other shareholder's shares, in similar terms and with the same consequences as under the clause 10 provisions.

9. In recent years, the fortunes of the football club have improved, after some bad years previously. It was promoted last season to the Championship Division of the Football League and finished its first season there in a creditable 10th place. It has ambitions to regain its place in the Premier League, which – it goes without saying – would make an enormous difference to its profitability. As it stands, FC is consistently loss making and depends for its survival on financial subsidy from Blades. Blades in turn depends on large contributions from its shareholders.

10. By the end of 2017, relations between Prince Abdullah and Mr McCabe had deteriorated to the point that Mr McCabe wanted to put an end to the joint venture basis on which Blades operated and was even willing to give up his involvement in the football club. Sheffield therefore served notice on UTB on 29 December 2017 pursuant to clause 11 of the ISA, offering to buy UTB's shares for £5m. Mr McCabe knew that that was a

low price. He expected UTB to serve a counternotice to buy Sheffield's shareholding at the same price. The low price for its own shares would be compensated, Mr McCabe believed, by the fact that UTB and Sheffield would thereupon become bound to cause FC to exercise the FC Options, thereby realising the full market value of the Properties (estimated to be about £20 million) for Sheffield.

11. As Mr McCabe expected, UTB did indeed serve a counternotice, but before it did so it transferred 80% of its own shareholding to another corporate vehicle, UTB 2018, LLP. As a result, when the counternotice was served, UTB claimed that it did not then own more than 75% of Blades' shares and so the FC Options did not have to be exercised. Indeed, UTB took steps to ensure that FC did not purport to exercise them. If effective, this manoeuvre would mean that UTB was entitled to purchase all Sheffield's shares at a low price and retain the benefit of the under-rented long leases of the Properties, with Sheffield not being able to realise their full value.

12. This unsurprisingly caused consternation and considerable upset for the McCabes and Sheffield. They felt that they had been tricked out of their entitlement. The parties fell out badly.

13. UTB issued proceedings claiming specific performance of the share sale at £5m and a declaration that the FC Options were not exercisable. Sheffield defended that claim and counterclaimed a declaration that UTB was obliged to cause FC to exercise the FC options. Sheffield also brought an additional claim against UTB, Prince Abdullah and others for damages for lawful or unlawful means conspiracy. These would represent the loss of value of the Properties in the event that UTB's claim for its relief succeeded. More recently, Sheffield has issued a petition under section 994 of the Companies Act 2006, seeking relief against UTB, UTB 2018, Prince Abdullah and others for unfairly prejudicial conduct. The specific relief sought is an order that the option notice and the counternotice are to be treated as void and an order that UTB (and UTB 2018) sell their shares to Sheffield at a fair price.

14. Sheffield's stance in the litigation viewed as a whole was clarified by Mr Downes QC at the hearing. He confirmed that Sheffield seeks to defeat UTB's claim to its shares, and seeks to acquire UTB's shares, with the result that Sheffield either remains a 50% shareholder or takes full control of Blades. As a fall-back position, if UTB's claim for specific performance succeeds and the section 994 petition fails, Sheffield seeks to enforce the FC Options. As a final fall-back position it claims damages.

> 15. All the proceedings are hotly contested. It is therefore impossible to say, until trial of the various claims, whether UTB or Sheffield will emerge as the person in control of Blades and so in control of the football club, if either does. In the meantime, FC has a need for continuing financial support. The professional business managers of the football club (who are accepted to be independent of both sides in the litigation) have produced a cash flow that, on certain assumptions about what may happen this summer, indicates that up to £10 million is needed by the club between 1 July 2018 and January 2019 to keep it afloat. That £10 million however includes a substantial amount, over £7 million, to fund activity in the current transfer window (i.e. the purchase of new players and the additional wage costs resulting from it). It allows only £600,000 as income from player sales. Both sides accept that there is one player sale that is likely to happen that could itself fund the cash requirement for the forthcoming season if a significant part of the fee is paid up front rather than deferred.
>
> 16. There is disagreement as to whether such expenditure on new players is necessary or discretionary. Sheffield says that in real and practical terms it is necessary, to maintain and improve the standards of the football club and its prospects of further promotion and to honour an assurance previously given to the club's manager that an additional £2 million would be available in the transfer window to improve the squad. UTB says that in purely financial terms it is not necessary and that in any event the cash flow properly analysed does not show that the injection of further capital is needed to fund such expenditure".

10. Fancourt J did not deal in the passages set out above with the part of the story that relates to what has become known as the 'Charwell Loan' of £3 million made by Charwell Investments Limited ("Charwell") to Blades pursuant to an agreement dated 9th February 2017. SUL allege in their skeleton before me as follows:-

> "[SUL] says in its Petition that the inference to be drawn from [pleaded matters] is that the Charwell Loan was a means by which Dr Rakan and Prince Abdullah disguised a payment of £1.5m from Charwell to UTB …, and that in the circumstances, the payment amounted to a bribe … Alternatively, SUL says that the arrangements and understandings between Dr Rakan and Prince Abdullah are unclear, and are at best suspicious and at worst redolent of corruption such that they are liable to bring Blades and SUFC into disrepute …".

First issue: The application of PD51U - the Disclosure Pilot for the Business and Property Courts ("B&PCs")

11. The issue with which this part of the judgment is concerned is the question of the circumstances in which the new PD51U relating to the "Disclosure Pilot for the B&PCs" applies.

12. It is now common ground that the application for disclosure that was made in this case on 14th March 2019 must be dealt with under PD51U, but that was not the case when the application was called on for hearing on 3rd April 2019. At that stage both the UTB parties and SUL had assumed that CPR Part 31 applied to this application because an order for standard disclosure had already been made in these proceedings before 1st January 2019, when the Pilot commenced.

13. Paragraph 1.2 of PD51U makes it clear that "the pilot applies [from 1st January 2019] … to existing and new proceedings in the B&PCs".

14. Mr Downes told me that practitioners were under the impression that PD51U did not apply to proceedings in which an existing order for disclosure had been made before 1st January 2019. That is a mistaken view as paragraph 1.2 makes clear. It is right to say, however, as paragraph 1.3 provides, that "[t]he pilot shall not disturb an order for disclosure made before [1st January 2019]".

15. Mr Downes also, however, drew my attention to the new edition of the White Book (published coincidentally just before 3rd April 2019) at CPR Part 51.2.10 which says that "[t]he pilot does not apply to any proceedings where a disclosure order had been made before it came into force unless that order is set aside or varied". It seems to me that that part of that sentence is wrong.

16. The Pilot was deliberately put in place without transitional provisions so that it would apply to all existing proceedings (apart from those specifically excluded) even where an initial disclosure order had been made. It seems to me that the note is a misunderstanding of paragraph 1.3 of the Pilot that provides that "[t]he pilot shall not disturb an order for disclosure made before [1st January 2019] … unless that order is varied or set aside". Plainly, it is one thing to say that a pre-existing order will not be disturbed by the commencement of the Pilot, and quite another to say that the Pilot is not applicable to any proceedings where a disclosure order has already been made. Only the first is correct.

17. To be clear, I am quite satisfied that the Pilot was intended to apply and does apply, to all relevant proceedings subsisting in the Business and Property Courts, whether started before or after 1st January 2019, even in a case where a disclosure order was made before 1st January 2019 under CPR Part 31.

18. It is worth noting also in this connection that Mr Edwin Johnson QC, sitting as a Deputy Judge of the High Court, came to the same conclusion in *White Winston Select Asset Funds LLC v. Mahon* (2019), 23/01/2019, unreported, where he said that the court had power in these circumstances to make an "equivalent" order to that under CPR Part 31.12.

19. The next question is how the new PD51U should be interpreted in the light of that being the position. Mr Downes drew attention to the fact that paragraph 18.2 of PD51U provides that "[t]he party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate". Paragraph 18.1, of course, provides that "[t]he court may at any stage make an order that varies an order for Extended Disclosure" and that "[t]his includes making an

additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure".

20. It is useful also to record the provisions of paragraph 6 of the PD concerning Extended Disclosure, since this shows the parameters that are now applicable to cases of this kind:-

"6. **Extended Disclosure**

6.1 A party wishing to seek disclosure of documents in addition to, or as an alternative to, Initial Disclosure must request Extended Disclosure. No application notice is required. However, the parties will be expected to have completed the Disclosure Review Document pursuant to paragraphs 7 and following below.

6.2 The court will determine whether to order Extended Disclosure at the first case management conference or, if directed by the court, at another hearing convened for that purpose or without a hearing.

6.3 Save where otherwise ordered, Extended Disclosure involves using Disclosure Models (see paragraph 8 below) after Issues for Disclosure have been identified (see paragraph 7 below). The court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

6.4 In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—

(1) the nature and complexity of the issues in the proceedings;
(2) the importance of the case, including any non-monetary relief sought;
(3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
(4) the number of documents involved;
(5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
(6) the financial position of each party; and
(7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

6.5 A request for Extended Disclosure must specify which of the Disclosure Models listed in paragraph 8 below is proposed for each Issue for Disclosure defined in paragraph 7 below. It is for the party requesting Extended Disclosure to show that what is sought is appropriate, reasonable and proportionate (as defined in paragraph 6.4). Where Disclosure Model D or E is proposed parties should be ready to explain to the court why Disclosure Model C is not sufficient".

21. Two models in paragraph 8 of the PD are particularly relevant to this case:-

"*Model C: Request-led search-based disclosure*

> (1) The court may order a party to give disclosure of particular documents or narrow classes of documents relating to a particular Issue for Disclosure, by reference to requests set out in or to be set out in Section 1B of the Disclosure Review Document or otherwise defined by the court.
>
> (2) If the parties cannot agree that disclosure should be given, or the disclosure to be given, pursuant to a request, then the requesting party must raise the request at the case management conference. The court will determine whether the request is reasonable and proportionate and may either order the disclosing party to search for the documents requested, refuse the request, or order the disclosing party to search for a narrower class of documents than that requested. Any appropriate limits to the scope of the searches to be undertaken will be determined by the court using the information provided in the Disclosure Review Document".
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> "*Model E: Wide search-based disclosure*
>
> (1) Under Model E, a party shall disclose documents which are likely to support or adversely affect its claim or defence or that of another party in relation to one or more of the Issues for Disclosure or which may lead to a train of inquiry which may then result in the identification of other documents for disclosure (because those other documents are likely to support or adversely affect the party's own claim or defence or that of another party in relation to one or more of the Issues for Disclosure).
>
> (2) Model E is only to be ordered in an exceptional case.
>
> (3) Each party is required to undertake a reasonable and proportionate search in relation to the Issues for Disclosure for which Model E Disclosure has been ordered. …".

22. It seems to me that the standard disclosure ordered in this case has been interpreted by the parties as if it were Model E wide search-based disclosure. The problem is that, because the parties mistakenly thought that PD51U did not apply, they gave no advanced thought to the production of "Issues for Disclosure", or to the requirements of PD51U more generally. Fortunately, lists of issues have now been produced that are sufficient to enable the court to deal with the applications that have been made. They have not, however, yet been agreed and that will need to happen very soon. I will say more about this aspect after this judgment.

23. I should make it clear, however, that parties to cases like this, who want to apply to the court for Extended Disclosure under PD51U, should give detailed thought to the new rules and specifically to the way in which they will affect their application.

24. Finally, in this connection, I would like also to make it clear that the fact that paragraph 18 and other paragraphs of PD51U refer to concepts (like "Extended Disclosure" and "Issues for Disclosure") that did not exist before 1st January 2019, does not make the disclosure pilot any less applicable to cases subsisting in the Business and Property Courts after that date. The court will interpret the new PD51U in a way that makes it work as effectively in relation to applications for disclosure in proceedings issued after 1st January 2019 as it will in relation to further applications

for disclosure made in cases where disclosure was already ordered under CPR Part 31 before that date.

25. For the reasons I have given, I will be dealing with this application for disclosure, which was made after 1st March 2019, under PD51U. The original orders for standard disclosure were made under CPR Part 31 before 1st January 2019.

26. I move now to consider briefly the application to amend, in respect of which there was, eventually, some common ground.

Second issue: SUL's application to amend

27. There was a measure of agreement at the outset on this issue in the sense that the UTB parties agreed three proposed amendments proposed by SUL.

28. First, the UTB parties agreed that SUL could amend the prayer to its Defence and Counterclaim, on condition that Mr Downes explained to Mr Weekes by letter the supposed legal effect of the amendment. He agreed to do so.

29. Secondly, the UTB parties agreed that SUL could add new paragraphs 40A and 40B to its Petition concerning what Mr Giansiracusa is alleged to have said to a Mr Stephen Bettis, the chief executive officer of FC.

30. Thirdly, it was accepted that SUL should be at liberty to amend its non-admission (in paragraph 36 of its Defence and Counterclaim) of paragraph 7 of UTB's Particulars of Claim, to make that non-admission into a denial.

31. There the agreement ended until the middle of the second day of the hearing when a little more agreement was reached after Mr Downes decided not to pursue the contested amendments. I am going, nonetheless, to deal briefly with them, because they underlie another application that he has not withdrawn, namely the application for disclosure of financial information concerning Prince Abdullah. The originally contested amendments all concerned the solvency of UTB and Prince Abdullah.

32. SUL wished to amend paragraph 36 of its Defence and Counterclaim dated 27th March 2018 so as to give the following particulars of denial of UTB's allegation that UTB "is willing and able to pay the price stated in the Option Notice" dated 29th December 2017 (namely £5 million):-

> "36. The first sentence of paragraph 7 of the Particulars of Claim is denied. In particular:-
>
> a. UTB has been unable, or refused, to confirm that the sum of £5 million, which would be required to be transferred for completion, remains available to meet an adverse costs order in the event that the claim herein fails.
>
> b. In or about June 2018, UTB was unwilling or unable to provide working capital to the Company by way of a mutual loan solution, despite the perceived need for the same, despite SUL's request for the same, and without providing any or any adequate reasons for such refusal or failure.

> c. On or about 9th February 2017, Prince Abdullah procured a loan of £3m from [Charwell], a company SUL believed was owned and controlled by Dr Rakan Al Harthy ("Dr Rakan"). SUL believed that the loan was made in anticipation that Dr Rakan, or a company owned and/or controlled by him, would become an investor in Blades and that the [Charwell Loan] would then be converted to equity. This did not occur. The Charwell Loan was due to be repaid by 30th April 2018. UTB was obliged to pay £1.6 m of the Loan. It failed to do so by the due date. UTB was subject to a demand from Charwell on 30th April 2018 for repayment of £1.5m. On 8th May 2018, Shepherd and Wedderburn ("S&W", on behalf of SUL) wrote to Jones Day (on behalf of UTB) asking whether UTB had repaid the sum of £1.5m to Charwell in accordance with the demand and whether and how the apparent prepayment of £100,000 had been effected. On 9th May 2018, Jones Day responded refusing to answer these requests until S&W stated how these matters could be relevant to the Main Claim. SUL now understands that UTB obtained an extension of time for repayment of the £1.5m until about 25th June 2018".

33. SUL also wished to amend its Petition to insert a new paragraph 65 under the heading "the Court's Exercise of its Discretion":

> "65. In considering whether to exercise its discretion in order to make the order sought at paragraph (2) below, the Court should take into account the following matters, in addition to those pleaded above:
>
> a. The Company has historically been a loss-making business. The annual losses shown by the Company's statutory accounts since 2013 (prior to which time it was a dormant company) are as follows:-
>
> i. Year ending 30th June 2013: loss of £4,720,465 (as recorded in the subsequent years accounts)
>
> ii. Year ending 30th June 2014: loss of £4,452,118
>
> iii. Year ending 30th June 2015: loss of £2,922,199
>
> iv. Year ending 30th June 2016: loss of £7,759,740
>
> v. Year ending 30th June 2017: loss of £5,663,977
>
> vi. Year ending 30th June 2018: loss of £2,007,340
>
> b. The Company is entirely reliant on investor support, and is otherwise unable to fulfil its aims and functions pleaded above.
>
> c. There is reason to believe that the First Respondent does not have assets or, alternatively, does not have sufficient assets to provide the necessary support. In particular, the Petitioner relied on the following:
>
> i. In the Main Claim, the First Respondent has asserted that it is both "willing" and "able" to pay the sum of £5

million to the Petitioner in respect of the latter's shares: see paragraph 7 of the Particulars of Claim in the Main Claim, at Annex A. However, in correspondence, the First Respondent has been unable, or refused, to confirm that the sum of £5 million, which would be required to be transferred for completion, remains available to meet an adverse costs order in the event that the Main Claim fails.

ii. In or about June 2018, the First Respondent was unwilling or unable to provide working capital to the Company by way of a mutual loan solution, despite the perceived need for the same, despite SUL's request for the same, and without providing any or any adequate reasons for such refusal or failure.

iii. Paragraphs 42-55 above are repeated. As detailed therein, the First Respondent was unable to repay its component of the Charwell Loan when it fell due, and it refused to answer questions from the Petitioner about whether it had made such repayment. The Petitioner now understand that the First Respondent obtained an extension of time for repayment of the loan until about 25th June 2018.

iv. See paragraph 36 of the Amended Defence and Counterclaim at Annex A.

In light of the foregoing, it is to be inferred that the First Respondent (and insofar as may be relevant the Third, Fourth and Fifth Respondents) was (or were) and is (or are) not in a financial position to pay the completion monies as pleaded in Paragraph 7 of the Particulars of Claim. Further and alternatively, the First Respondent (and insofar as may be relevant the Third, Fourth and Fifth Respondents) is in such a financial position that it is unable and in future likely to be unable to provide the necessary support required by the Company."

The law on permission to amend at a late stage

34. There is no need in the circumstances to deal with the legal position at length. Suffice it to say that in *Nesbit Law Group LLP v. Acasta European Insurance Company Limited* [2018] EWCA Civ 268, the Court of Appeal sought to summarise the position as follows:-

> "41. The principles relating to the grant of permission to amend are set out in *Swain-Mason* and in a series of recent authorities. The parties referred particularly to Mrs Justice Carr's summary in *Quah Su-Ling v. Goldman Sachs International* [2015] EWHC 759 (Comm) at paragraphs 36-38 of her judgment. In essence, the court must, taking account of the overriding objective, balance the injustice to the party

> seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it …".

Discussion of the application for permission to amend

35. Mr Downes's submission was that he was entitled to particularise his denial of the fact that UTB was ready able and willing to complete the sale of the Blades' shares by particularising instances of its presumed inability to pay debts at other times in other circumstances. Mr Weekes submitted that the particulars given were objectionable, not only because the whole issue was irrelevant to the issues in the Main Claim, but because the draft amendment to the pleading either did not support the allegation or was inconsistent with other pleadings and/or decisions.

36. Mr Weekes pointed to three inconsistencies that I should mention as they affect other aspects of the case. First, he said that the draft paragraph 36a of the Defence and Counterclaim, which pleads that UTB has refused to confirm that the £5 million remains available to meet an adverse costs order, is not supportive of the plea that UTB is not able to complete the share purchase. Secondly, Mr Weekes said that paragraph 36b was inconsistent with paragraph 15 of Fancourt J's judgment of 29th June 2018 concerning FC's need of continuing financial support. Thirdly, he said that paragraph 36c was inconsistent with SUL's pleading elsewhere that Prince Abdullah had no obligation to repay the Charwell Loan. Here, SUL said that the failure actually to repay was evidence of an inability to repay. This was, in effect, said by Mr Downes to be an alternative case. Finally, Mr Weekes submitted that paragraph 36c was inconsistent with the pleading elsewhere that Dr Rakan actually owned Charwell. It was said in this proposed amendment that SUL believed that he owned Charwell. Mr Downes accepted that he should amend paragraph 42 of the Petition to reflect what was proposed here, namely that SUL believed that Dr Rakan owned Charwell.

37. Mr Weekes argued that the same objections arose to paragraph 65c that was proposed to be added to the Petition.

38. The other pleading as to the financial position of FC and the fact that it is reliant on investor support was less vigorously opposed.

39. Mr Weekes objected most strongly to the final paragraph of the amendment to paragraph 65 of the Petition which asked the court to infer from the facts pleaded that UTB (and insofar as may be relevant the other UTB parties) was or were, and is or are, and will not be, in a financial position to pay the completion monies. He submitted that that plea went to no issue in the Petition since SUL only sought an order that it be permitted to buy the shares in Blades held by UTB, not the other way around.

40. In the result, Mr Downes suggested that he would not persist with his application to amend if the UTB parties conceded that SUL was entitled to a buy-out order against UTB should it (SUL) establish unfair prejudice. Mr Weekes resisted this approach on the ground that the court has a panoply of possible remedies once it finds unfair

prejudice established, and the UTB parties could not bind themselves at this stage not to resist a buyout order in favour of SUL. His point was that UTB was not seeking a buyout order in its own favour in the Points of Defence to the Petition.

41. In my judgment, as I said during the argument, the application for permission to amend ought to be allowed insofar as it relates to the draft pleading at paragraphs 65a and 65b, but not otherwise for the following reasons.

42. The issue as to the Prince's financial substance would open a whole new issue in the case, which has not previously been raised, just a few weeks before trial. The pleading at paragraphs 65a and b, however, properly raises the loss-making nature of SUL and its need for future financial support which are not controversial but may be relevant to the orders that would be appropriate in the Petition. The evidence supporting these points is not likely to be additional to what is available already.

43. I do not think that issue of Prince Abdullah's financial substance will advance or affect the central issue in the litigation about the propriety of what UTB did in divesting itself of 80% of its shares in Blades with the alleged consequences (a) that the Property Options were not triggered and (b) that FC did not have to acquire from SUL the properties used by FC.

44. I doubt in any event that the court will ever be able to get to the bottom of Prince Abdullah's finances. He has plainly been able to produce monies at various stages of this saga and may well do so again. Whether he does so from his own resources or from elsewhere is peripheral to the real issues in the case.

45. Finally, this is, as I have said, an expedited trial that must be kept within bounds.

46. The amendments I allow, therefore, are:-

    (1) The non-admission in paragraph 36 of SUL's Defence and Counterclaim to become a denial.

    (2) Paragraphs 40A and B, regarding Mr Stephen Bettis, to be added to the Petition.

    (3) The first 3 lines and sub-paragraphs 65a and 65b in the Petition.

    (4) An amendment to paragraph 42 of the Petition to plead that Dr Rakan was believed by SUL to own Charwell.

    (5) An amendment to the prayer to SUL's Defence and Counterclaim, on condition that Mr Downes explains to Mr Weekes by letter the supposed legal effect of the amendment.

47. The remaining amendments, had they been persisted in by SUL, would not have been allowed.

Third issue: SUL's applications for disclosure

48. SUL has sought disclosure of 5 main categories of documents:

(1) First and most importantly, SUL wants disclosure of correspondence for which privilege has been claimed passing mainly between Mr Giansiracusa and Prince Abdullah at critical periods in the chronology. There are, I am told, some 500 such documents, about 30 in the time in January 2018 when UTB transferred 80% of its shares in Blades to UTB 2018 LLC. In addition, SUL seeks disclosure of the two Redacted Documents to which I have already referred (email exchanges between Mr Giansiracusa and Prince Abdullah on 10th and 15th November 2017).

(2) Secondly, SUL wants disclosure of documents for which privilege is claimed passing between Mr Giansiracusa and Prince Abdullah in relation to the Management and Corporate Governance of Blades.

(3) Thirdly, SUL wants disclosure of any further documents not hitherto disclosed concerning a crucial strategy meeting in Riyadh on 10th January 2018.

(4) Fourthly, SUL seeks disclosure of Prince Abdullah's and Mr Giansiracusa's passports. Further SUL seeks information relating to Prince Abdullah's scheduling arrangements, namely the sources for the information in his calendars provided to his private secretary.

(5) Fifthly, SUL seeks disclosure of Prince Abdullah's financial information showing his assets and liabilities as reflected in contemporaneous documents such as bank statements, accounts, and details of properties that he owns, as well as correspondence between Prince Abdullah and his accountants and bankers.

Background facts relevant to the disclosure application

49. Mr Giansiracusa has been working in Saudi Arabia for 25 years. He is an attorney admitted to the District of Columbia Bar (and an inactive member of the California Bar). He has been a mergers and acquisition partner in Jones Day's Riyadh office since 2011. He regards Prince Abdullah as having been his "friend and client" since the early 1990s. On 4th August 2017, Mr Giansiracusa was appointed as a director of Blades and FC.

50. Prince Abdullah has entered into various retainers with Jones Day dating back to 2017. Mr Weekes explained that clients of Jones Day are regarded as clients of its global firm, rather than as clients of individual Jones Day offices.

51. Mr Daniel Travers is a solicitor in the Global Disputes department of Jones Day's London office. He was made a partner in January 2019. He has been personally involved in conducting and reviewing the UTB parties' disclosure both as an associate and then as a partner.

52. 107 trial bundles have been agreed of which 71 contain the documents that have been disclosed arranged in chronological order.

53. On 19th November 2017, Mr Giansiracusa sent Mr McCabe an email that has been described variously as abusive and intemperate. It was copied to Prince Abdullah and Stephen Bettis amongst others. It included the following passages pleaded by SUL:-

> "Your petulant response ... your duplicitous interference in Simon Ratcliffe's appointment as CFO... what can I call it? A deception? A fraud? A manipulation? ... having so blatantly attempted to deceive your partner... So yes, you may have been besmirched but only by your own unclean hands ... your seemingly uncontrollable insistence on meddling .... I have not investigated how many privacy and data protection laws you have violated and caused the employees of SUFC to violate through your bullying and extraordinary sense of entitlement but it must end. It is corrosive of morale at the Club, almost certainly illegal and something I feel compelled as a member of the board to go on record as opposing... your blather regarding leadership and inspiring the troops irrelevant ... you have no troops to lead at the Club
>
> ... I have come to learn that the people of Sheffield don't very much like you but that bit of information did not take long to learn and was offered up freely with little prompting by pretty much anyone I might ask ...
>
> … You're something of a bully, as I'm sure you know. Yours are the tactics of someone who refuses to compromise yet lacks the intellectual integrity make the argument ... you can't be trusted to keep your word. Not honouring your promises has consequences.
>
> I don't know why bullying and having no regard for the truth go together but it seems to be all too often the case ... To now reserve to yourself the right to determine when the mandate will commence is at best disingenuous and at worst bad faith. The back- and-forth regarding Jan van Winkel [sic] reflects similar vacillation and inconsistency.
>
> When a person has integrity, when his word is his bond, a handshake is enough ... When a person manipulates facts to serve his purpose, promises one thing and then does another and in general, openly and notoriously flouts the truth ... your own weak grasp on honesty to blame for the fact that we want everything in writing ...
>
> … This repeated obstructionism for the most specious of reasons is neither professional nor the conduct of a genuine partner."

54. On 10th January 2018, a UTB strategy meeting took place in Riyadh. It was attended at least by Mr Giansiracusa, Prince Abdullah and his son-in-law, Prince Musa'ad, Jim Phipps, a US attorney, an ex-director of UTB, Tareq Hawasli, one of the Prince's associates, Jan Van Winckel, the Prince's proposed nominee to the technical (football) commitee, and Ahmad Al-Taher, Prince Abdullah's PA.

Mr Travers' evidence

55. I cannot recite the contents of all Mr Travers' evidence in this judgment. It suffices to set out the passages that were the subject of SUL's closest attention in relation to the disclosure exercise that Mr Travers has undertaken, as follows:-

"26. Given the issues in dispute in these proceedings and the role of Mr Giansiracusa in relation to those issues, Jones Day has been particularly astute, throughout the disclosure process, to ensuring that communications involving him which are not covered by legal advice privilege or litigation privilege are disclosed to SUL. In total 518 documents (not including emails to which Mr Giansiracusa was copied) sent by or to Mr Giansiracusa have been disclosed (including 271 communications involving Prince Abdullah). My Firm's document review process expressly took this issue into account, particularly when contemplating privilege issues.

…

29. So as to avoid a protracted debate over what might be inferred from the words "in relation to matters of the management and governance of Blades [which] are subject to litigation privilege", I confirm that since receiving the Application I have personally reviewed again all of the documents identified as being relevant to these proceedings but privileged for the period from 29 December 2017 to 31 January 2018 (more than 200 documents) with a focus in particular on any that relates to the management and governance (applying that concept broadly). This includes not only documents which attract litigation privilege, but also legal advice privilege, and (since, as I have explained, documents relating to the "management and governance of Blades" were not separately tagged) this set comprises all the documents over which privilege has been maintained for that one month period. In this regard:

29.1 I have not re-reviewed any documents for this purpose before 29 December 2017 given litigation privilege was not applied to documents before that date (save for the discrete issue in 2016 referenced in paragraph 28.1 above);

29.2 I applied a cut-off date of 31 January 2018 for the purposes of proportionality given that, not only do the issues in dispute in these proceedings pre-date February 2018 (I note in this regard SUL refers to important periods of time being March to May 2017, July 2017, October 2017, December 2017 and January 2018 (Sewell 10; paragraph 26)), but also the total number of responsive but privileged documents from 29 December 2017 onwards is over 1500 (as one would expect given proceedings were issued, on 9 February 2018).

29.3 I am satisfied that all of the documents are privileged.

…

46. I can confirm that when lawyers from Jones Day reviewed documents for the purposes of disclosure, including communications passing between Prince Abdullah and Mr Giansiracusa, they applied privilege strictly in accordance with the classes of documents identified in the disclosure statements that I refer to below.

…

52. Mr Giansiracusa has been a lawyer for over 25 years. He is a member of the DC Bar, an (inactive) member of the California Bar and is registered in Saudi Arabia as a legal Advisor (albeit not licensed by the Ministry of Justice). I understand from Mr Giansiracusa that while he was only instructed by Prince Abdullah in relation to SUFC in early 2017 (paragraph 17 of the. second witness statement of Mr Giansiracusa ("**Giansiracusa 2**")) he has shared a continuous attorney-client relationship with Prince Abdullah since 1994. I would dispute any suggestion that Mr Giansiracusa is not first and foremost a lawyer or that the majority of his interactions with Prince Abdullah were anything other than those of client/lawyer.

53. As I note above, Jones Day has been well aware from the outset of these proceedings of the different capacities in which Mr Giansiracusa was involved in the events in dispute in this case. It is accepted that not all of Mr Giansiracusa emails were sent or received for the purposes of giving or receiving legal advice and numerous emails sent to, or received by Mr Giansiracusa have been disclosed by UTB (see paragraph 26 above).

54. In particular, it is acknowledged that from 4 August 2017 Mr Giansiracusa was also sending and receiving emails in his capacity as a director of Blades and SUFC. Before that date, I would note, however, that, as Mr Giansiracusa explains in evidence filed in these proceedings "*any duties and obligations [he] had were owed to Prince Abdullah and/or his corporate entities as [Mr Giansiracusa's] principal*" (Giansiracusa 2, paragraph 6). That is not to suggest that simply because Mr Giansiracusa was acting in the capacity of lawyer that his communications (whether to Prince Abdullah or otherwise) attract privilege, and the disclosure review team was very much cognisant of that fact. Mr Giansiracusa goes on to explain in his evidence, and I can confirm, that for the avoidance of any doubt Prince Abdullah (as well as UTB and UTB 2018) is a client of Jones Day. Mr Giansiracusa was involved as a lawyer, just not exclusively so when he was also a director of Blades and SUFC from 4 August 2017. When he was giving legal advice to Prince Abdullah that was pursuant to Prince Abdullah's engagement with Jones Day.

55. Addressing the points made, on behalf of SUL in this regard:

55.1 I can confirm to the Court that Prince Abdullah has entered into a number of engagements with the Firm over the years and is a client of the Firm. Contrary to what SUL says (Sewell 10, paragraph 69(b)), he is not a client of "*JD's London office*" Jones Day is a global partnership and clients are not clients of particular offices. The fact London-based lawyers advised (and continue to advise) Prince Abdullah does not mean Mr Giansiracusa was not advising him.

55.2 Mr Sewell's suggestion ((Sewell 10, paragraph 45) that because. other lawyers from Jones Day advised (and continue to advise) Prince Abdullah, that implies that Mr Giansiracusa was not (and is not) providing legal advice is incorrect. My Firm will often use lawyers from multiple jurisdictions when advising a client.

55.3 Mr Sewell refers to a specific letter from my Firm which, he says, evidences that "*for at least a substantial part of [Mr Giansiracusa's] involvement in the facts giving rise to the case, Mr Giansiracusa was not acting as a lawyer*" (Sewell 10, paragraph 62). This is not correct. What the letter in fact says is that "*any actions of conduct by Mr Giansiracusa "**as a director of and prospective 30% shareholder in Blades***" are undertaken by him in a personal capacity and, in this regard, have no connection with this Firm (or any of its partners or employees" [**PAS10/469**] (emphasis added). That is accurate. It does not mean that Mr Giansiracusa could not also be providing legal advice to Prince Abdullah as his lawyer at this time.

55.4 Mr Sewell describes Mr Giansiracusa as a "*commercial agent and intermediary*" rather than a lawyer (Sewell 10, paragraph 47). It is not clear to me what that is intended to convey. Mr Giansiracusa acted on commercial matters as a lawyer. He was involved in prospective transactions, i.e. Project Delta, as UTB's and Prince Abdullah's lawyer and in that capacity provided his principals with legal advice.

55.5 Mr Sewell goes onto suggest that in correspondence with Mr McCabe in April 20l7, Mr Giansiracusa did not suggest that he was acting as a lawyer and he appeared to distinguish himself from Jones Day's lawyers in London (Sewell l0; paragraph 49). I believe that this is a non sequitur. Mr Giansiracusa was not a lawyer in Jones Day's London office. By referring to those lawyers, it does not follow that he was making any representation that he was not providing (or would not provide) any legal advice. Nor do I believe that any inference can be drawn from the fact that he did not introduce himself as a lawyer in all of his correspondence with Mr McCabe and/or SUL.

55.6 In the balance of the section of Sewell 10 addressing this issue, Mr Sewell repeatedly makes the same point: Mr Giansiracusa was communicating with SUL about corporate and/or commercial matters and there were aspects of his work that meant certain of his communications do not attract privilege. That is accepted. Mr Giansiracusa was indeed involved in certain day-to-day aspects of the club, particularly after being appointed to the Board of SUFC, and his communications relating to those aspects would not be privileged, save for if he advised Prince Abdullah on specific legal points arising from those day-to-day issues were they to arise. Generally, it does not follow that Mr Giansiracusa could not be advising Prince Abdullah and/or UTB on legal matters at the same time.

55.7 Mr Sewell suggests that my firm has provided contradictory explanations for an alleged absence of communications between Prince Abdullah and Mr Giansiracusa from around the time SUL issued its Call Option Notice (Sewell 10, paragraphs 66-67). This is incorrect. The position is as follows:

55.7.1 The review of documents revealed no emails between Mr Giansiracusa and Prince Abdullah immediately following service by SUL, i.e. during the last few days of December 2017 (unsurprising given Mr Giansiracusa was on holiday at the time as has been explained to SUL); and

55.7.2 There were emails between Price Abdullah and Mr Giansiracusa (as well as other lawyers from this Firm, me included) in January 2018, but these are subject to legal privilege and/or litigation privilege. For the avoidance of doubt, all such emails were part of the review I carried out after receiving the Application which I have described above.

55.8 Mr Sewell also suggests (Sewell 10, paragraph 67) that: "*JD do not state that they themselves have ascertained that there were indeed no emails [in the period immediately following service of the Call Option Notice], but appear to advance this point on the basis of instructions and/or generalisations*." The correct position is that if there were any emails, these would have been captured through the imaging of devices and emails and reviewed.

56. In summary:

56.1 In reviewing documents. for the purposes of determining whether (and what type of) privilege applied, my Firm was well aware or Mr Giansiracusa's role as a Director of Blades and SUFC and cautious in applying privilege as a result. Having recently re-reviewed the documents in question, I can confirm that I carried out the review well aware that the mere fact that a person may be qualified as a lawyer does not mean that all communications involving that person are automatically covered by legal advice privilege (Sewell, 10, 69(a)). That is clear from the number of Mr Giansiracusa's communications which have been disclosed.

56.2 The fact that Mr Giansiracusa was a director of Blades and SUFC from 4 August 2017, or was otherwise involved in commercial aspects relating to the club, does not, with respect, mean he cannot have been giving legal advice to Prince Abdullah and UTB on legal matters. At all material times, Prince Abdullah and Mr Giansiracusa were in a client/lawyer relationship."

…

(a) Mr Giansiracusa's email dated 19 November 2017, and the alleged deliberate strategy of acting in a hostile and provocative manner

61. Mr Giansiracusa explains the background of this email of 19 November 2017 (the "**19 November email"**), in his witness statement for trial (Giansiracusa 2, paragraphs 156 to 162). Mr Giansiracusa explains that the email was sent in the wake of Mr McCabe, on behalf of SUL (and while not a director of SUFC), making unilateral demands of the Head of Human Resources in relation to the instruction of a new CFO to SUFC. This was a matter reserved to UTB under the ISA. Specifically, Mr Giansiracusa was responding to an email from Mr McCabe accusing him of being "*a gentleman who certainly lacks grace and has of yet learnt so little as to understanding of Sheffield United FC"* before telling Mr Giansiracusa to "*show [your] legal skills and pursue an action* (pages 223-225). There was no intention on the part of Mr Giansiracusa to anger and/or humiliate SUL. He was protecting UTB's legal rights under the ISA and responding to an aggressive and provocative email from McCabe".

The submissions concerning disclosure

56. On the first day of the hearing Mr Downes submitted that, once it was acknowledged that Mr Giansiracusa was acting as Prince Abdullah's man of business, legal advice privilege could not be claimed for any of his communications at all. He submitted that there had to be independence between the attorney and the client, so that the attorney was not also the client. On the second day, he referred to Lord Denning M.R's judgment in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners HL* [1972] 2 QB 102 at page 129 ("*Alfred Crompton*"), where he said:-

> "It does sometimes happen that such a legal adviser [one employed by the client] does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it. He must be as independent in the doing of right as any other legal adviser."

57. Mr Downes pointed to six critical periods of time, in which he submitted there was a surprising lack of documents:-

(1) July 2017, when UTB assumed liability for £1.6m of the Charwell Loan;

(2) October 2017 when the parties fell out over key issues and held an important joint board meeting;

(3) November 2017 when the temperature rose as a result of Mr Giansiracusa's 19th November email;

(4) December 2017, when SUL served its call option notice;

(5) January 2018, when the decision to serve a counter-notice was made; and

(6) April/May 2018 when the Charwell loan fell due and the Prince could not come up with the money; he says he was constantly chased, but there are few emails disclosed.

58. Mr Downes then made essentially eight points in support of the application for disclosure of the first and second categories of documents sought:

(1) First, he submitted that Mr Travers' evidence as to the exercise he had undertaken was not as robust as UTB suggested.

(2) Secondly, he pointed to examples of what had been said in the correspondence between solicitors that threw some doubt on whether an appropriate approach had been taken to the claim for privilege. Mr Travers had suggested that it was "likely" that privilege would apply without explaining why that was the case.

(3) Thirdly, Mr Downes submitted that there were no notes of the Riyadh meeting on 10th January 2018 which had been called specifically to take a very important commercial decision. All that had been disclosed was a manuscript list of the attendees from Mr Giansiracusa's notebook.

(4) Mr Downes's fourth point was that Mr Travers had said at paragraph 55.7.2 of his statement that emails he had re-reviewed between Prince Abdullah and Mr Giansiracusa in January 2018 were "subject to legal privilege and/or litigation privilege". That statement failed to take account of the fact that there was no dispute in existence until after 29th January 2018 when the counter-notice was served.

(5) Fifthly, SUL criticised Jones Day's second lengthy letter of 22nd February 2019 insofar as it claimed privilege for documents surrounding a telephone call with Mr Hossam Alsaady, the broker who acted for Charwell in relation to the Charwell Loan.

(6) Sixthly, Mr Downes submitted that UTB was mistaken to seek to claim litigation privilege in relation to management and governance documents preceding the litigation.

(7) Seventhly, Mr Downes made the point that the second Redacted Document looked as if it was Mr Giansiracusa's draft letter aimed at "putting Mr McCabe back in his box", and that was far from being legal advice. Accordingly, the redaction was strongly arguably not properly made on the grounds of Legal Advice Privilege. He relied particularly on Lord Scott's approval in *Three Rivers District Council v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610 ("*Three Rivers (No 6)*") at page 651 of what Taylor LJ had said in *Re Balabel* [1988] 1 Ch 317 ("*Balabel*"), namely that "to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide".

(8) Mr Downes's eighth point was that it was wrong to say, as UTB implied, that anything that comes from a legal advisor must be legal advice. Prince Abdullah's evidence for the trial was that Mr Giansiracusa was more than a lawyer. Mr Travers was applying, according to his own correspondence, the wrong test: it was not enough simply to say that he understood that Mr Giansiracusa may not have been acting as lawyer. He had to ask whether legal advice had been given in the document for which privilege was claimed. The difficult distinction was between legal and business advice.

59. Mr Downes then made 7 further submissions as follows:-

(1) UTB has the burden of proving privilege and the claim to privilege has to be made with particularity, but it has not been so claimed in this case: see paragraph 53 of Beatson J's judgment in the *West London Pipeline and Storage Limited v. Total UK Limited* [2008] 2 CLC,

("*West London Pipeline*") approved by the Court of Appeal in *WH Holding Ltd v. E20 Stadium LLP* [2018] EWCA Civ 2652 ("*WH Holding*") at paragraph 35.

(2) Here, Mr Giansiracusa has become Prince Abdullah's man of business. It is not, therefore, implausible to suggest that the wrong call has been made. In these circumstances, the judge should ask, as Lord Scott said in *Three Rivers (No 6)*, "whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law".

(3) Thirdly, SUL submits that there has been no evidence from either Mr Giansiracusa or Prince Abdullah.

(4) Fourthly, there was no written retainer between Mr Giansiracusa and Prince Abdullah. It is said that the Prince Abdullah's relationship with Mr Giansiracusa goes back to 1994, but there are no documents evidencing that.

(5) Fifthly, Mr Giansiracusa gave instructions on behalf of UTB, as could be seen when Mr Kiff of Jones Day sought instructions from him.

(6) Sixthly, Mr Giansiracusa was the proposed recipient of 30% of shares in Blades, so that he acquired a personal interest. Paragraph 18.1 of the SRA rules required Mr Giansiracusa to refuse to act without independent legal advice when there is a gift. Even though Mr Giansiracusa is not an English solicitor, it is improbable that he was giving legal advice.

(7) Seventhly, even though SUL accepts that advice from a foreign lawyer on foreign law is privileged, and that in a dispute with an international element, where a foreign lawyer gives mixed English and foreign law advice, that is also privileged, nonetheless advice given by an unqualified lawyer does not attract privilege (see *Prudential v. Pandolfo* [2010] EWCA Civ 1094 ("*Pandolfo CA*") per Lloyd LJ at paras 73, 75 and 82, and *Prudential PLC and Prudential (Gibraltar) Ltd v. Special Commissioner of Income Tax and Philip Pandolfo (HM Inspector of Taxes)* [2013] UKSC 1 ("*Pandolfo SC*") at paragraph 32). Even though *IBM v. Phoenix International (Computers) Ltd* [1995] 1 All ER 413 ("*IBM*") is against SUL on this point, the court should not follow that case.

60. Finally, Mr Downes submitted that the court should exercise its general discretion to inspect the documents to ascertain whether they were indeed privileged. There is no need to establish with reasonable certainty that there is a doubt over the claim to privilege. It was submitted that the documents about the rationale for the steps that were taken by the UTB parties were at the heart of SUL's conspiracy case. The relevance, in any event, of the privileged documents had been conceded as they had been listed for disclosure. There were powerful reasons to deal with disclosure now and not to wait until the cross-examination began. Mr Downes submitted that the court should first look at the 2 Redacted Documents, then require UTB to produce a

list of some 500 allegedly privileged documents, and finally allow SUL to select 20 from that list for the court to inspect.

61. After SUL completed its submissions, the UTB parties agreed as I have said, that I should inspect the Redacted Documents. I did so before the UTB parties completed their submissions. I did not however disclose in open court or to the parties either the allegedly privileged material itself or my views about it.

62. Mr Weekes rebutted each of Mr Downes's submissions. He submitted that the application should be viewed in context, and that the court needed to understand the issues for trial. Paragraph 14.3 of PD51U could only apply if there was a reason for believing privilege had been improperly claimed. The application was disproportionate. There were 71 chronological files and privilege was claimed for some 518 documents sent to or by Mr Giansiracusa, and 271 between Mr Giansiracusa and Prince Abdullah.

63. Mr Weekes relied on what Taylor LJ had referred to as the continuum of legal advice in *Balabel* at page 330 that "[w]here information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach", and "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context". Advice given by a foreign lawyer on English law was privileged, as demonstrated by both *IBM* and *Pandolfo CA* and *SC*. Mr Travers had given a comprehensive account of how he had acted to ensure that the claims to privilege were sustainable. Even though the legal burden was on UTB to prove privilege, the evidential burden passed to SUL once it had been provided with Mr Travers's evidence. Mr Giansiracusa was seen as the client of Jones Day after April 2018, because SUL had sued him.

64. Paragraph 14.1 of PD51U allowed privilege to be claimed in documents as a class. A paragraph 16.2 redaction had to include an explanation, but that had been provided: see Jones Day's redaction schedule.

The legal principles applicable to the disclosure application

The principles under the disclosure pilot

65. The principles applicable under PD51U are clearly stated and must be applied by the court. So far as they apply to this application and have not already been set out, they are as follows:-

> "**3.2** Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court—
>
> > (1) to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings;

(2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties;

(3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;

(4) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and

(5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained.

3.3 The duties under paragraph 3.1 and 3.2 above are continuing duties that last until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.

3.4 Where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make. …

7.3 Issues for Disclosure means for the purposes of disclosure only those key issues in dispute, which the parties consider will need to be determined by the court with some reference to contemporaneous documents in order for there to be a fair resolution of the proceedings. It does not extend to every issue which is disputed in the statements of case by denial or non-admission.

7.4 The claimant should seek to ensure that the draft List of Issues for Disclosure provides a fair and balanced summary of the key areas of dispute identified by the parties' statements of case and in respect of which it is likely that one or other of the parties will be seeking Extended Disclosure. …

14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within its obligations of Initial Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to—

(1) describing the document, part of a document or class of document; and

(2) explaining, in the Disclosure Certificate, the grounds upon which the right or duty is being exercised.

A claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with.

> **14.2** A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.
>
> **14.3** The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty. …
>
> **16.1** A party may redact a part or parts of a document on the ground that the redacted data comprises data that is—
>
> (1) irrelevant to any issue in the proceedings, and confidential; or
>
> (2) privileged.
>
> **16.2** Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement".

Legal Advice Privilege

66. Mr Downes relied on *Blackpool Corp v. Locker* [1948] 1 KB 349 where the question was whether communications from a town clerk, who was also a solicitor, were privileged. Scott LJ said this about communications between the Town Clerk and the Minister:-

> "c) the communications between the town clerk and the Minister there described are obviously not privileged because (i.) they are not "professional communications of a confidential nature in view of this action, whilst it was anticipated and since its commencement"; (ii.) the town clerk was acting as an officer of, not as the solicitor to, the corporation, in its capacity of delegate of statutory powers from the Ministry of Health; and when so acting he was representing his corporation in an executive and not in a professional capacity; (iii.) the corporation's cause of action rested entirely on those very circulars".

67. Lord Scott said the following at paragraph 38 of *Three Rivers (No 6)* after citing the passage already quoted from *Balabel:*

> "If a solicitor becomes the client's 'man of business', and some solicitors do, responsible for advising the client on all matters of business, including investment policy, finance policy and other business matters, the advice may lack a relevant legal context. There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. In cases of doubt, the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client under either private law or under public law. If it does not, then, in my opinion, legal advice privilege

> would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for the legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one".

68. As Lord Carswell held in *Three Rivers (No. 6)* at paragraph 111 what was privileged was:

> "all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice … notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client".

Communications between a foreign lawyer and a client

69. Communications between a client and a lawyer qualified in a different jurisdiction can be subject to legal professional privilege. For present purposes, it is sufficient that SUL accepts that in a dispute with an international element, where a foreign qualified lawyer gives mixed English and foreign law advice, that advice can attract legal advice privilege (*Pandolfo SC* at paragraph 32). *IBM* does not say anything different. The passage relied upon just emphasises the point (at page 429) that the advice there was "advice of foreign lawyers acting as lawyers to be used by [the client] to decide what strategy to adopt in carrying on business". Precisely the same position seems to apply in this case.

Inspection

70. The Court of Appeal held in *WH Holding* that inspection of documents by a court is a matter of broad discretion. At paragraph 39 the Court held:-

> "39. It seems to us that, contrary to Beatson J's narrow formulation contained in [86(3) and (4)(c)] of the *West London Pipeline* case, as the Court of Appeal identified in both the *Birmingham and Midland Omnibus* and the *Westminster Airways* cases the power to inspect a document is a matter of general discretion. That was also the approach of Lord Denning MR in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1971] 2 QB 102 at 130D-H. It is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied. The need for "reasonable certainty" appears to have sprung from the earlier case of *Attorney-General v Emerson*, which was concerned with the position prior to the introduction of the express power of inspection in November 1893 and which was followed in *Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co*.
>
> 40. The court may inspect the documents in relation to which privilege is claimed in order to see whether the test has been correctly applied, **although it should be cautious about doing so and should be alive to the dangers of looking at documents out of context**. The discretion must be exercised in

> accordance with the overriding objective, which requires balancing dealing with cases justly, proportionately and at proportionate cost and allocating an appropriate share of the court's resources. Among the factors which will be relevant to the exercise of the discretion are (a) the nature of the privilege claimed (b) the number of documents involved and (c) their potential relevance to the issues" (emphasis added).

Iniquity Exception

71. An order displacing legal professional privilege on account of this exception will only be made "in very exceptional circumstances", as held in *Derby v. Weldon (No. 7)* [1990] 1 WLR 1156 at pages 1159 and 1173 by Vinelott J. The exception can only be used where there is a "very strong" prima facie case of fraud (see Longmore LJ in *Kuwait Airways Corporation v. Iraqi Airways Company (No. 6)* [2005] EWCA Civ 286, [2005] 1 WLR 2734 at para 42, and *Gamlen Chemical Co (UK) Ltd. v. Rochem (No. 2)* [1980] 124 SJ 276 per Goff LJ). SUL did not press the applicability of the exception in oral argument. In my judgment, it was right not to do so.

Discussion of the request for the court to inspect the allegedly privileged documents

72. In my view, the court should, as Sir Terence Etherton MR said in *West Ham* "be cautious about [inspecting privileged documents] and should be alive to the dangers of looking at documents out of context". This caution applies with even greater force under paragraph 14.3 of PD51U, which provides for a test of necessity. Inspection is to be undertaken only "if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty".

73. I was initially very reluctant to inspect because I was concerned that I would not have adequate context to judge the claim for privilege. I was conscious that there were vast numbers of documents in the trial bundles with which I would be unfamiliar, which might put a different complexion on the claim to privilege one way or another. All that said, however, ultimately I decided to inspect the Redacted Documents because:-

    (1) I thought it was necessary to cut the gordian knot. There was not the luxury of time before the lengthy expedited trial was due to begin and neither side wanted to delay the trial.

    (2) The 2 Redacted Documents were SUL's best case, and I felt that if they were obviously not privileged, it would be possible to see that the disclosure exercise had not been conducted properly, and *vice versa*.

    (3) I could see no other way of testing SUL's submissions in a way that stood a good chance of providing a useful insight into the process that Jones Day had undertaken.

    (4) I decided that it was necessary for the just disposal of the proceedings, and also that it was a reasonable and proportionate course to adopt.

74. I will come to the outcome of the inspection in due course. It is better first to deal with the arguments advanced on their merits.

The Pilot

75. Before doing so, however, I should note that the introduction of the Pilot was intended to effect a culture change. The Pilot is not simply a rewrite of CPR Part 31. It operates along different lines driven by reasonableness and proportionality (see paragraph 2 of PD51U), with disclosure being directed specifically to defined issues arising in the proceedings.

The first two categories: (1) Correspondence for which privilege has been claimed passing mainly between Mr Giansiracusa and Prince Abdullah at critical periods in the chronology, and the Redacted Documents, and (2) Documents passing between Mr Giansircusa and Prince Abdullah in relation to the Corporate Governance of Blades

76. In deciding whether to allow Extended Disclosure, the court has to consider whether the application is "reasonable and proportionate having regard to the overriding objective" (see paragraph 6.4 of PD51U). Each of the factors in that paragraph is to be given weight. In this case, which is obviously a complex and important one, the factors that have particular significance are "(3) the likelihood of documents existing that will have probative value in supporting or undermining [one party's case] … (4) the number of documents involved … and (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost". These provisions provide a necessary backdrop to the application under paragraph 14.2 challenging the claim to privilege.

77. In addition, it is important to note that Mr Travers has acted under the continuing obligations to the court found in paragraph 3.2 of PD51U (or their equivalent predecessors), namely "(4) to act honestly in relation to the process of giving disclosure … and (5) to undertake a review to satisfy [himself] that [the claims of the UTB parties] to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained". His evidence must be viewed in that light.

78. The requirements for the parties to cooperate and to act with proportionality are of the greatest importance under PD51U. I emphasise them here, because, as I shall explain, I have been left with some doubt as to whether either side has taken them sufficiently seriously in this case:-

    (1) Paragraph 18.2 of PD51U provides that "[t]he party applying for an order under paragraph 18.1 must satisfy the court that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate".

    (2) Para 3.2(3) provides that there is an obligation "to liaise and cooperate with the legal representatives of the other parties … so as to promote the reliable, efficient and cost-effective conduct of disclosure".

    (3) Para 7.3 emphasises that the Issues for Disclosure are "only those key issues in dispute" and "does not extend to every issue which is disputed in the statements of case by denial or non-admission".

(4) Para 6.3 makes clear that the court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.

79. Extended disclosure is not, therefore, something that should be used as a tactic, let alone a weapon, in hard fought litigation. It is all about the just and proportionate resolution of the real issues in dispute. Thousands of documents have already been disclosed and placed in 71 chronological bundles for trial. Hundreds of communications between Mr Giansiracusa and Prince Abdullah have been disclosed without any claim for privilege. Mr Travers has explained in detail the exercise he has undertaken in order to comply with his disclosure obligations, and to re-check that process when it was challenged by SUL. The costs of the process will undoubtedly have already been very substantial.

80. I note in this connection that Fancourt J has already had cause in paragraphs 21-2 of his judgment of 29th June 2018 to refer to the fact that "this litigation is being used, by both parties to an extent, to seek to apply commercial pressure to the other, and not simply to resolve the issues that are raised in it" and to "the regrettable appearance of game-playing or pointless obduracy on one or both sides".

81. The question I have to decide against all that background boils down to whether the UTB parties have made good their claim to privilege in respect of the documents in these categories, or whether SUL's claim should prevail. SUL says that there is reason to believe that Mr Giansiracusa's role at the relevant times, and in being a party to the documents for which privileged is claimed, was as Prince Abdullah's "man of business", rather than as his lawyer, so that privilege has been improperly claimed.

82. I should say that I have read the evidence and documents that have been put together for this hearing with great care. I cannot, however, pretend to have seen even a small proportion of what will be available to the trial judge. Nonetheless, it is important, as Mr Downes submitted, to "lance the boil" so that the trial will not be disrupted by repeated applications for disclosure.

83. First, I do not accept that the party claiming privilege has to make that claim with particularity in relation to each document for which privilege is claimed. Paragraph 14.1 of PD51U provides that "[a] claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with". It is fair to say, however, that particular circumstances may make it desirable for a clear explanation of the claim to be provided. It is all about the collaborative exercise of giving disclosure on which PD51U concentrates.

84. I have taken the clear view that Mr Travers both in his evidence and in his correspondence has tried his best to explain why privilege has been claimed, has produced a redaction schedule, and has given adequate details of the exercise he has undertaken to check the work of his legal team at Jones Day.

85. Despite the obvious suspicion that underlies SUL's approach and this application itself, I do not think that most of SUL's criticisms are substantial. They have concentrated on small points that do not seem to me to add up to very much. In a case of this size, and with solicitors' correspondence running to thousands of pages, it is

always possible to pick holes. I have looked at the holes that have been picked and have not been persuaded that they make out a good case in support of the proposition that privilege has been wrongly claimed. Of course, Mr Travers, like any hard-pressed lawyer, has sometimes been guilty of infelicities of expression. He may even have made errors. But I am not satisfied that, overall, he has undertaken the process of giving disclosure on behalf of the UTB parties and claiming privilege for them on a false or even a wrong basis.

86. Specifically, I think Mr Travers had in mind the difference between legal advice privilege and litigation privilege, and tested Mr Giansiracusa's communications by the more exacting standard of legal advice privilege, at least until the litigation began. I do not need, I think, to decide when precisely litigation privilege became available, but it may well have been a little time before the proceedings were issued.

87. In essence, I think that SUL has sought to construct an edifice of mistrust as to the disclosure process from small and often insignificant building blocks. SUL has not been able to point to any really substantive cause for suspicion, save for the very allegations it makes in the proceedings against UTB and Prince Abdullah. Mr Downes's fourth, fifth and sixth points were squarely in this category. As I have already implied, the fact that Mr Travers may have said at times that documents are covered by "legal advice privilege and/or litigation privilege", does not in this case signify a failure properly to consider the position.

88. The main points that Mr Downes made in his oral submissions provide further examples of SUL's suspicious approach. He pointed to the fact that there was no evidence on the application from Mr Giansiracusa and Prince Abdullah. That was not surprising since it was the process undertaken by Mr Travers that was under attack, and there are lengthy witness statements from both of them for the trial. SUL pointed to the absence of a written retainer between Mr Giansiracusa and Prince Abdullah. One would not expect such a retainer, when the Prince has retained Jones Day as his lawyers. Mr Downes complained that Mr Giansiracusa gave instructions on behalf of UTB – that was hardly remarkable when SUL had sued him personally and he was so intimately involved in the proceedings. It was said that Mr Giansiracusa was not independent as it was intended that he receive a personal shareholding in Blades, so that he could no longer act as a lawyer under SRA rules. But Mr Giansiracusa was not bound by the SRA rules.

89. SUL sought to make a complex argument as to the nature of the legal advice Mr Giansiracusa was giving. Plainly, he was giving advice in the twilight area between the legal effect of the agreements between the parties and the financial consequences of particular courses of action under those agreements. That is why Lord Scott's test had to be applied (see below). But SUL accepted that a foreign lawyer's advice can be privileged even if it is mixed English and foreign law advice. That was clearly the position here in relation to any legal advice that Mr Giansiracusa was giving Prince Abdullah. Prince Abdullah operates under the Saudi legal system, but has entered into English law agreements with SUL. There was no reason in theory why he would not want and value legal advice from a local lawyer in relation to the English law agreements he had entered into.

90. I come then to deal with the essential point made by SUL, which was that Mr Giansiracusa was acting as a "man of business" rather than a lawyer at the relevant

times. I accept that he was acting as both, and that the difficult exercise explained by Lord Scott as applicable in the marginal case in paragraph 38 of *Three Rivers (No. 6)* has to be undertaken. There is, in this case, "no way of avoiding the difficulty [of deciding] whether the … giving of advice by [Mr Giansiracusa] does or does not take place in a relevant legal context so as to attract legal advice privilege". Of course, as Lord Scott suggested, the court should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client, but that cannot be done without seeing the documents. It was, therefore, in this case, useful to have been able to look at the Redacted Documents.

91. I should say, however, that I take from Mr Travers's evidence that he was well aware of the need to distinguish between actions that Mr Giansiracusa undertook as a lawyer for Prince Abdullah and actions he undertook as a director or shareholder or as Prince Abdullah's business advisor.

92. It is important also to understand that the 6 time periods that Mr Downes particularly referred were all time periods where critical business decisions had to be made in a legal context. The most important time period was from November 2017 to the end of January 2018 when the relationships deteriorated and both sides were considering their rights under the ISA. It is in this period that the Redacted Documents were created.

93. In my view, the strongest point made by SUL related to the emails in the Redacted Documents, because they looked, without viewing the redactions, like documents that related to business decisions and business relationships concerning FC. The emails involved Jan Van Winckel, Prince Abdullah's nominee to the technical (football) committee. Moreover, there seemed to be some basis for Mr Downes's submission that the 15th November 2018 redactions included a draft letter aimed at "putting Mr McCabe back in his box", just days before the 19th November 2019 email itself.

94. Before looking at the redactions, however, I had seen in other documents Mr Giansiracusa's tendency to relate issues back to the legal agreements between the parties. Having looked at the redactions, I am satisfied that the claim to legal advice privilege is valid in respect of both the Redacted Documents. Lawyers frequently draft letters and evaluate legal options for their clients as part of the continuum of their advice in relation to the assertion of rights under, and claims that there have been breaches of, legal agreements. That was the situation here.

95. I do not think that SUL was right to suggest that Mr Travers was assuming that anything that came from a legal advisor had to be legal advice. Acknowledging Mr Giansiracusa's multiple roles, I take the view that there are no substantial grounds for doubting that Mr Travers and Jones Day have done their best to carry out the disclosure exercise properly. There is no basis for suggesting as Mr Downes did, that they were applying the wrong test.

96. I have not, of course, looked at the 500 or so other documents for which privilege is claimed in these two categories. I do not propose to do so. It is neither reasonable nor proportionate nor necessary to do so in the circumstances that I have described.

97. There is another series of reasons why I regard this application as outside the spirit and letter of PD51U. I cannot see how the documents identified, even if not

privileged, would be likely significantly to advance SUL's legitimate case. I understand that SUL is running a case of conspiracy against the UTB parties, but the central allegation is that UTB was not at liberty lawfully to divest itself of shares in Blades so as to avoid triggering the FC Options. If that allegation succeeds, none of the history will matter. The proportionate resolution of the pleaded issues in these claims requires a dedicated focus on what really matters; and what really matters, as I say, is whether or not UTB was entitled lawfully to do what it did.

98. I have, therefore, concluded that SUL is not entitled to challenge the claims to privilege in relation to the first two categories of disclosure that it seeks.

The third category: Any further documents concerning a crucial strategy meeting in Riyadh on 10th January 2018

99. I can deal with this category briefly. SUL submitted, as I have said, that it was suspicious that there were no notes of the Riyadh meeting of 10th January 2018, when the meeting was called to take a very important commercial decision concerning the service of the counter-notice. SUL pointed to the number of attendees and suggested that somebody must have made a note. Here Mr Downes seeks, once again, to descend into the process of disclosure.

100. It is clear from the evidence that the UTB parties have already made reasonable searches for documents in this category. They have asked Mr Giansiracusa, Prince Abdullah, and his personal assistant and others that attended the meeting. It is not proportionate to require greater efforts to be made. Mr Downes will be able to cross-examine about whether notes were made that have not been produced. If they were, and are relevant, it would be potentially damaging to UTB's case.

101. For present purposes, further interrogation is not "reasonable and proportionate having regard to the overriding objective". I cannot see how the discussions at the Riyadh meeting would be likely to affect the outcome, when the central issue is, as I have said, whether UTB was lawfully entitled to do what it did. Motives or intentions may have some relevance to the conspiracy or "trickery" case, but even those aspects are likely to be judged from actions rather than lengthy discussions as to what might possibly be done.

102. I have concluded that this category of extended disclosure should be refused under PD51U.

The fourth category: The passports and information relating to Prince Abdullah's scheduling arrangements, namely the sources for the information in his calendars

103. Mr Downes did not press these categories of disclosure very hard, once he saw which way the judicial wind was blowing. He was unable to explain how tracking Prince Abdullah's movements was likely to advance his case. In my judgment, such documents would be most unlikely to have any real probative value or to advance the resolution of the essential matters in dispute.

104. I refuse the application for extended disclosure of these documents.

Prince Abdullah's financial information showing his assets and liabilities

105. I have already refused SUL's application to amend to plead an allegation relating to Prince Abdullah's want of means. I took the view that the exploration of Prince Abdullah's financial substance would be unlikely to assist in the resolution of the central issues in the case.

106. In Fancourt J's judgment of 29th June 2018, he expressed the view that "[e]ach side can comfortably afford to provide the necessary funding to keep Blades and FC afloat". Yet SUL wishes to extend the scope of the trial to include Prince Abdullah's means, apparently in order to advance its bribery case. I do not regard this application as reasonable, proportionate or necessary for the just and fair resolution of the issues.

107. In refusing this application, I have also had regard to paragraph 6.4 of PD51U, factor (3), namely the likelihood of documents existing that will have probative value in supporting or undermining [one party's case], and factor (7), namely the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost.

108. I refuse the application for extended disclosure of this category of documents.

Conclusions

109. I will allow SUL's application to amend to the limited extent identified in paragraph 46 above, and refuse its application for further disclosure. The UTB parties have, in my judgment, made good their claim to legal professional privilege in the first and second categories of documents.

110. I will conclude this judgment by reminding the parties once again about the need for proportionality in this litigation. The court is not likely to look favourably on further disclosure applications in this case. It is imperative that the expedited trial of these matters is, as I have said, kept within bounds. As paragraph 6.3 of PD51U provides, the court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure. Paragraph 7.3 of PD51U provides that only the key issues in dispute are Issues for Disclosure, and disclosure issues do not extend to every issue which is disputed in the statements of case. Proportionality needs to engaged at every stage of the process.

111. In my judgment, none of SUL's disclosure applications satisfied the requirements of paragraph 18.1 of PD51U to the effect that the orders sought were "necessary for the just disposal of the proceedings and [were] reasonable and proportionate".

112. The parties need, as matters progress, to consider very carefully their continuing obligations under paragraph 3.2(3) of PD51U "to liaise and cooperate with the legal representatives of the other parties … so as to promote the reliable, efficient and cost-effective conduct of disclosure", and indeed the trial of the action more generally.

113. I will hear the parties on the remaining matters raised at the Pre-Trial Review, and as to costs.