Neutral Citation Number: [2020] EWHC 1179 (QB)

Case No: QB-2020-000370

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
(via Microsoft Teams)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 7th May 2020

Before:

MR JUSTICE WARBY

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Between:

(1) SIR FREDERICK BARCLAY **(2) AMANDA BARCLAY**	**Claimants**
- and -	
(1) ALISTAIR BARCLAY **(2) AIDAN BARCLAY** **(3) HOWARD BARCLAY** **(4) ANDREW BARCLAY** **(5) PHILIP PETERS**	**Defendants**

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MR. HEFIN REES QC, MS. TAMARA OPPENHEIMER QC and **MR. CLEON CATSAMBIS** (instructed by **Brown Rudnick LLP**) appeared for the **Claimants.**

MS. HEATHER ROGERS QC, MR. AIDAN EARDLEY and **MR. JONATHAN PRICE** (instructed by **Signature Litigation LLP**) appeared for the **Defendants.**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE WARBY:

Introduction

1. This is a dispute involving two branches of the Barclay family. The heads of those branches are the twins, Sir Frederick and Sir David Barclay. They are well-known figures who established a considerable business empire, including The Ritz Hotel in London, and the Telegraph Media Group.

2. The claimants are Sir Frederick and his daughter, Amanda. The first four defendants are three of Sir David's sons and one of his grandsons. They are therefore nephews and a great-nephew of Sir Frederick, and cousins of Amanda. The fifth defendant is the director of a number of family companies.

3. By the action, the claimants seek relief in respect of alleged infringements of their rights of confidentiality and privacy. Their complaint is that the defendants were party to a scheme, lasting many weeks, to make covert recordings of conversations held between the claimants in the conservatory of The Ritz Hotel, about commercial and personal matters, which were of a very confidential and/or private nature and to use those recordings for personal gain or advancement, to the prejudice of the claimants.

4. The claimants discovered evidence of such a scheme on 13th January 2020. On 30th January, they issued these proceedings. Doorstep Delivery-Up Orders ("DDOs") were made against the defendants after hearings on 5th February 2020 before Freedman J, and on 12th February 2020 before me. The DDOs were made without notice to the defendants. They provided for a Supervising Solicitor ("Supervisor") to attend service of the orders, and required the defendants to deliver up to the Supervisor various items, including covert recordings and transcripts of them, defined in the orders as "the Listed Items". That order was carried out.

5. When the matter came before me on the return dates of the DDOs, the claimants were seeking, among other things, inspection of the Listed Items. The defendants indicated that they had, or might have, objections to inspection of some of the Listed Items ("Objections") based on legal professional privilege ("LPP").

6. This aspect of the return date hearing was adjourned, with directions to allow for the identification of such Objections, their vouching by evidence, and their resolution at what was then envisaged as a two-day hearing. This was to have been that two-day hearing. In the event, the great majority of the material sought has been provided, and the Objections, when they came, were very limited in scope. They are conventional objections to the inspection of documents of a confidential character, brought into existence for the purpose, or dominant purpose of these proceedings. The claimants have characterised them as "Residual Objections". Given the scale and scope of the objections that were indicated at the outset as potentially being raised, that is not, in my judgment, an unfair characterisation, and I shall adopt it.

The issues today

7. At the start of this hearing, five issues remained live. They were these:

(1) First, the extent to which it is necessary for the defendants to particularise the Residual Objections. The defendants had agreed to provide further particulars, but not to the extent that were sought by the claimants.

(2) Secondly, the means by which the court should provide protection for information, contained in Listed Items, which is protected by the claimants' own rights of confidence and LPP. Again, the defendants had agreed to a form of order, but not one that went as far as the claimants sought.

(3) Thirdly, whether the court should make any, and if so what, order as to the costs of the issues that the defendants have raised about LPP and, as the claimants put it, "their conduct generally with respect to this litigation". The claimants seek orders for some costs to be paid and assessed forthwith on the indemnity basis, and for others to be paid immediately. That is hotly disputed.

(4) Fourthly, there was an issue about directions in relation to certain additional Listed Items. These were items, the existence of which was brought to light only recently, and directions were sought as to how they should be dealt with.

(5) Finally, there was the matter of directions in relation to an application notice of the defendants, dated 24 February 2020, and time for service of the defence.

8. By the start of the hearing, the areas of dispute had narrowed a great deal and, as I shall explain as I deal with the issues in turn, I can deal with most of them quite shortly, but there is a major dispute about costs. The nature of that dispute means that in order to explain my conclusions I need to give a little more detail about the issues and the procedural history.

The issues in the action: an outline

9. The claimants' case is that this was “commercial espionage on a vast scale” (those words are taken from the skeleton argument for this hearing). Counsel summarised their clients' case on the facts in the following way:

> "The Recordings ... captured over 1,000 separate conversations over a period of months. They run to 94 hours of audio recordings. A separate Wi-Fi bug was also used, which had been supplied by Quest Global Limited ('Quest'), a private investigations firm ... who invoiced for 405 hours of their time to listen and transcribe the recordings, which transcripts were then shared amongst the defendants and others. When transcribed by the [Supervisor] and the C's solicitors ... the Recordings run to over 2,800 pages. The recordings captured private, confidential, personal and C's privileged conversations with Cs’ lawyers, C2's trustees, bankers and business people."

10. For the defendants, Ms. Rogers has responded briefly to the way in which the claimants' case was put in the skeleton argument. She has stressed that this is a dispute between family members which the defendants consider it is unfortunate to have canvassed in

public. She emphasises that it is not asserted in this claim that Sir Frederick has any interest in the family Group. The Particulars of Claim, although they assert that both claimants have suffered loss and damage, give no details of what that loss and damage may be, she says. It is accepted by the defendants that the claimants were covertly recorded, but nothing is being said, at the moment, when a Defence is yet to be served, about precisely what the defendants did and why. This is not a case, emphasises Ms. Rogers, in which private information has been obtained and widely disseminated to the press; it is not that kind of case at all. It is therefore pitching it too high to suggest, as the claimants do in their written argument, that there has been widespread dissemination to third parties.

11. Ms. Rogers makes a number of points of detail in rebuttal of contentions that the first defendant has shared information from the covert recordings for the purposes of his estate agency business, and for household purposes. Her overall position is that the presentation of the case in the skeleton argument has been subject to what she calls "heavy spin". She stresses, also, that the defendants have given undertakings to the court not to use information derived from the Listed Items, with the consequence that the information is not being used, or for that matter disseminated. Those undertakings were given to the court on 24th February 2020.

The relevant procedural history: more detail

12. The DDOs made by Freedman J and by me both contain provision requiring the respondents, upon service of the order, to hand over immediately to the Supervisor:

> "Any of the items listed in schedule A ... which are in his possession and/or his control."

13. These were defined as "Listed Items". Schedule A listed the following, among others:

> "Any recording, audio or visual, of the applicants (or either of them) made or obtained without the applicants' express consent (the 'Covert Recordings') ... any transcripts of the Covert Recordings ... any documents pertaining to (1) the making and (2) the use of the Covert Recordings, and ... any WhatsApp messages pertaining to (1) making or (2) use of the Covert Recordings, including distribution of the Covert Recordings or the information therein."

14. The last of those categories arose from the fact that there was evidence that the first four defendants had established a WhatsApp group to discuss the use of dissemination of the covert recordings.

15. When the DDOs were executed the defendants were able to, and they did, take legal advice before providing documents to the Supervisor. The first defendant was advised by a firm called Weil Gotshalk. They expressly confirmed at the time that there was no claim to LPP in the recordings or transcripts.

16. At the hearings on the return dates on the 18th and 19th February 2020, the first defendant and counsel then appearing for the defendants resisted the handing over of items in reliance on LPP. The claimants' position was that those arguments were baseless and unsustainable. Mr. Rees submitted, at the hearing on 12th February, that:

> "Principles of litigation privilege are simply not engaged at all. This is not a complicated issue; it is an attempt to delay the inevitable, which is receipt of the transcripts by those instructing me from the supervising solicitor."

The issue was also addressed in some detail in the claimants' skeleton arguments for the hearings in February.

17. Having heard argument in rather more detail on the 18th and 19th February, I described the defendants' arguments, as they then stood, as being, "at the margins of what is fanciful", and, as "flimsy evidentially, legally ambitious and ... on the face of it weak, legally and factually", but I was not prepared to dismiss those submissions summarily. As I understood it, the defendants were not asserting definitive claims to privilege, but wished to have more time to make an informed decision on the issue. I considered that appeared to be a reasonable stance to take, conscious as I was that there could be limits on the instructions which the defendants' legal team had been able to take, on the detail of the matter.

18. Paragraph 16 of the order that I made on 19th February 2020 therefore provided for the adjournment of the remainder of the return date applications, in accordance with directions that provided for the two-day hearing that I have mentioned, to be fixed in a period between 21st April and 7th May 2020, that is today, for

> "… the determination of the defendants' objections, if any, to inspection of the listed items."

Paragraph 16 went on to provide that:

> "... by 4 p.m. on 9 April 2020 each defendant shall, (a) to the extent that he objects to inspection of a listed item serve a witness statement, stating any right to withhold inspection of some or all of the listed items and the grounds on which he claims that right in accordance with CPR 31.19(3) ... (b) provide the claimants with copies of any listed items in relation to which there is no written objection ... (c) serve any other evidence in response."

19. On 9th April, the deadline set for the defendants to state and verify their objections to inspection, the defendants' solicitors wrote a letter, which enclosed a large number of copy documents and, by way of service, a witness statement of Mr. Abdulali Jiwaji, describing the defendants' rights to withhold inspection of certain Listed Items. The copy documents provided consisted, in broad summary, of all those of which the claimants had been seeking inspection. They included all the recordings and all the transcripts which had been sought.

20. The claimants' skeleton argument for this hearing describes this outcome as: "A comprehensive and last-minute volte-face" in which

> "The Ds abandoned almost the entirely of their claims to privilege; and disclosed virtually all of the listed items to the Cs ...".

21. The grounds for the Residual Objections are set out in the witness statement of Mr. Jiwaji, which describes the documents of which inspection is now being withheld in these terms:

> "The defendants are entitled to withhold from inspection listed items which comprise communications passing between the defendants (or any defendant or any combination of defendants) and their legal advisers, together with instructions, opinions, drafts, attendance notes, memoranda and working papers prepared by the defendants (or any defendant or any combination of defendants) or their legal advisers, which are confidential in nature and which came into existence for the purposes of giving legal advice and/or the dominant purpose of which was to provide legal advice in relation to adversarial proceedings, having been communicated after such proceedings were contemplated ... the defendants are entitled to withhold the documents referred to ... because those documents are privileged (with regard to the established principles of legal professional privilege) and confidential."

The claimants regarded this claim as wholly inadequate, and that was the basis for their application for further particulars of the residual privilege claim.

22. The defendants' solicitors' letter of 9th April 2020 closed in this way:

> "In the light of the enclosed witness statement and the copy documents with this letter, we do not consider that there is any necessity to proceed with the hearing referred to in paragraph 16(b) of the order. We invite the claimants' agreement to vacate the listed hearing date. We ask that your confirmation in this respect is given promptly."

23. That has not happened, but the five matters that I have mentioned have been raised, debated in correspondence, and brought before me at a hearing which lasted all of yesterday, and is now continuing into a second day.

24. Before coming to those issues, I need to mention one other topic that was dealt with at the return date hearings, and is relevant to today, namely, the filtering out of the recordings of third-party data. The DDOs contained definitions of what the defendants were required to deliver up. I have already quoted the definitions of Covert Recordings and other parts of Schedule A. At the hearing on 19th February, counsel for the

defendants made the point that the defendants were not obliged to hand over the Raw Audio, as it had come to be known. Counsel referred to:

> "… the more likely problem and the reason to delay inspection of the 50 hours in the possession of Quest is the problem of third-party data which is not disclosable. It does not fall within the delivery up order. The delivery up order is only for conversations involving one or other of the applicants. Because, as I explained, these recordings were taken in a semi-public place, there is a risk ... that on those 50 hours of recordings there may be some third party stuff that has to come out before it is handed over."

25. The upshot of that objection was a proposal from Mr. Rees, on behalf of the claimants, which was in the event adopted. He said that the claimants were obviously not interested in third party data, and he proposed a sifting process, whereby the Supervisors could listen to the audios and exclude third-party conversations. An order to that effect was made and embodied in paragraphs 4 and 5 of the order of 19th February.

26. The Supervisors then went forward and carried out that exercise. In the course of doing so, they identified the fact, which is now agreed, that the recordings contained a deal of information which was the claimants' confidential and legally privileged information. Accordingly, steps had to be taken to identify and sift that out. The Supervisors have now provided a report which is before the court today, explaining what happened. It explains that they also prepared transcripts of the recordings. That, naturally enough, was also a very expensive process. The figures are given in the evidence of Ms. Colston of the claimants' solicitors. There are four items:

> "1. Audio review of all c. 10,100 files to determine which are covert recordings. Fee, excluding VAT, £139,488.50.
>
> 2. Transcription of the covert recordings, £323,502.50.
>
> 3. Redaction of third party only discussions on the covert recordings, £4,067.50.
>
> 4. Simultaneous service of electronic copies of the covert recordings on the claimants' and defendants' solicitors, £4,203.00."

The total amount, excluding VAT, is £471,271.50, and including VAT £565,525.80.

27. I should make clear that item 3 is a very limited in scope. The rubric under that item says this:

> "This time covers PM's instruction of Anexsys to redact the non-covert recordings and ensuring appropriate confidentiality measures have been put in place ...."

The principal matter in relation to the audio review was item 1, covering review by PM, the Supervisor, of all the audio files delivered up.

28. On 30th April 2020, that is a week ago, the defendants' solicitors, in the course of a long letter, made the point that they did not require the recordings themselves to be redacted, "as it would only increase costs".

The first issue: particularisation of the residual objections

29. This is now the subject of an agreed draft order, the terms of which have been explained to me and which I approve. It sets out a mechanism for the defendants to give further details of the basis on which the residual objections are founded. A change was proposed in the course of the hearing yesterday to cover a situation that had not been catered for concerning the role of Weil Gotshalk. The principles on which that proposed change was put forward did not appear to be in dispute and, as I understand it, that will have been given effect in appropriate wording. I have before me at the moment revised draft orders, which I will turn to in a moment.

Issue 2: protection of the claimants' LPP

30. That has also been the subject of agreement. A draft order catering for it was largely agreed at the start of the hearing yesterday. I believe I am right in saying that the loose ends have now been tied up and I will be able to approve the detail of the way in which that has been done.

Issue 4: directions in relation to additional Listed Items

31. These are the directions required because of the belated discovery of items held by Quest, which had not previously been identified. They are defined as "The additional Quest-held items". A regime to deal with these has been agreed and incorporated in the draft order, which I approve. It provides for these items to be delivered up, but allows them to be reviewed beforehand by the defendants' solicitors, in fairly short order, for two purposes: (1) to check whether any transcripts held in this category are Listed Items; and (2) to check certain messages, to ensure that if they are within the definition of Listed Items, they are reviewed for LPP before they are handed over.

Issue 5: directions in relation to the application notice of 24th February and the time for service of the defence

32. These matters have now been agreed, and I order that time for service of the defence be extended until 5th June 2020; and that there be an order, in terms that are now mostly agreed and mostly approved by me, restricting third party access to statements of case and other documents on the court file, in so far as they contain information about the defendants' phone numbers and beneficial interests in trusts.

33. That second aspect of this part of the order is based on the proposition that the information in question is private or confidential in nature, or both; and secondly that its disclosure would be potentially harmful, without any corresponding or proportionate benefit to the public. Under this order, non-parties will be able to obtain, or be provided with, versions of the documents which have been redacted to remove the private or confidential information. The order will provide for any party affected to have liberty to apply to vary or discharge that part of the order.

Issue 3: costs of the LPP issues and other matters

The application

34. The application in its original form was for an order in the following terms:

> "Ds shall pay C's costs of and incidental to the Privilege Claims, which, for the avoidance of doubt, shall include:
>
> (1) the costs of the hearing of 6 and 7 May 2020
>
> (2) the costs associated with the review by the Supervising Solicitors of the Raw Audio ...
>
> (3) the costs associated with dealing with the Privilege Claims; and
>
> (4) the costs associated with the order dated 6 April 2020, to enable the D1 to inspect the D1 transcripts as defined therein
>
> to be the subject of detailed assessment forthwith on the indemnity basis."

The claimants also asked for a payment on account of those costs.

35. As presented in submissions to me, the matter has been put a little differently. The costs of this hearing are, of course, for determination after I have resolved the two main limbs of this application. They are these: (1) In relation to the LPP claims, the claimants seek an order for those costs on the indemnity basis, with detailed assessment forthwith, pursuant to CPR 47.1. (2) Separately, and in addition, the claimants seek an order for immediate payment of the entire costs of the Supervisor's review of the Raw Audio. Alternatively, the claimants seek an order for a detailed assessment of those costs, with a substantial interim payment on account.

36. This revised approach gives due recognition to the fact that the costs of the Raw Audio review are not, or at least not exclusively, attributable to any claim by the defendants to the benefit of LPP.

Issues/submissions

37. The rival positions can be broadly summarised in this way: the claimants submit, first of all, that LPP is a discrete issue on which they have won, and the defendants have lost. It follows from normal principles that they should have a costs order in relation to those issues. Further, they submit, the LPP claims were misconceived. Mr. Rees describes them as a "try-on". They should never have been raised, or, at best, they should have been swiftly abandoned, argue the claimants. Substantial sums have been incurred on issues that have now become history. The costs should be dealt with now, and on the basis that the defendants' conduct is well outside the norm.

38. As for the Raw Data review, the claimants submit, that this is all down to the intransigence of the defendants, who insisted on it as a way of delaying the proceedings. Again, they submit, this is an identifiable area of costs, which the second claimant has incurred and has paid, or will have to pay for, and should be dealt with now.

39. The defendants submit that the applications for costs are premature, and inappropriate for determination at this stage. Further, they are too broad, unwarranted on their merits, and overblown. The defendants' overall submission is that the claims are either misconceived, or, to the extent that they are not, should be dealt with by orders for costs in the case.

Decision and reasons

40. I am not attracted by the idea that a decision on these costs should be avoided or ducked by making all or any of them costs in the case. The result of that would be to make the identity of the paying party, in respect of the costs under discussion, dependent on the wholly separate and distinct question of who wins the litigation as a whole. That would not be a just or convenient outcome; it would be an arbitrary basis on which to determine the allocation of these costs. Nor would it be satisfactory to take the alternative way out of an immediate decision, namely to reserve the costs decision to a future occasion. To be fair, nobody has advocated that approach. Its drawbacks are obvious.

41. These are substantial, discrete issues, on which the parties have had a full opportunity to prepare and submit evidence, and to make detailed submissions, both in writing and orally at this substantial hearing. In my judgment, it is appropriate to confront them now on their merits.

42. In saying that, I have borne in mind the submission of Ms. Rogers that I should not make findings about the LPP issues, or at least not findings about the contentions advanced by the claimants, because I would thereby be resolving issues that are raised by the claimants' pleaded case and are matters for trial. I do not agree with that argument for several reasons.

43. First, I do not accept that I would be deciding triable issues. The pleaded claim is contained in the section of the particulars of claim headed "Causation and remedies". Paragraph 65 pleads that the claimants have suffered injury to their dignity, and their autonomy, and significant anxiety and distress. Details are given, and in paragraph 65.10, the following is said:

> "The claimants' distress is being unnecessarily prolonged by the unparticularised and legally unsustainable claims to privilege, asserted by the defendants, over items that they would otherwise have been obliged to deliver up to the Supervising Solicitor."

That paragraph asserts that the claimants have been distressed by the conduct of the defendants in relation to LPP. The main issues would seem to be whether the alleged distressed has been suffered, and, if so, whether it was reasonable. I am not reaching any decisions about those matters.

44. Ms. Rogers would take issue with the word "claims" in the words that I have quoted, as she submits that the LPP issue was floated, not definitively asserted. However, the first key assertion made in the passage I have quoted is that the LPP claims are legally unsustainable. That cannot realistically be contested, in the light of the history. At any rate, it is a matter of law.

45. Paragraph 65.10 of the Particulars of Claim also asserts that the claims to privilege were unparticularised. That is hardly the biggest issue in the case, but my decision now does not preclude a dispute at trial about that, if the defendants see fit to raise it.

46. However, in any event, I do not accept that there is a general rule that an issue that arises for decision at an interim stage cannot be resolved because there is or might be an overlap with an issue for trial. Provided a fair procedure is adopted, I see no difficulty.

47. I propose, therefore, to determine finally the merits of the arguments on these elements of the costs so far, and to make appropriate orders. My conclusions are these:

> (1) There should be and will be an order now for the defendants to pay the claimants' costs of and caused by the defendants' conduct in raising and keeping alive the question of whether Listed Items might be privileged from inspection on the grounds of LPP;
>
> (2) the costs in question should and will be subject to detailed assessment forthwith;
>
> (3) as a matter of discretion, I will not order assessment on the indemnity basis; the assessment will be on the standard basis;
>
> (4) there should be, and there will be, an order for the defendants to pay costs in relation to the Supervisor's review of the raw data. It will not be an order for the payment of the entire sum claimed in respect of that review. I will order payment in respect of items 1, 3 and 4, but not item 2, and there will be provision for the defendants to contest at a detailed assessment, if so advised, the reasonableness of the sums claimed.

48. My reasons are these.

49. Generally, the starting point is that the court has a discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. The discretion is a broad one, to be exercised in the light of the particular circumstances of the case. There are certain guiding rules and principles to which I have to have regard. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party: CPR 44.2(2)(a). The principles also include the general rule that parties pay as they go; costs decisions should not be deferred but dealt with as the litigation progresses, unless there is a good reason to do otherwise. There is also the need to have regard to the conduct of the parties, and whether it is reasonable.

The LPP issues

50. The claimants are, without doubt, the successful party in relation to the issue of LPP and that, in my judgment, means my starting point should be an order in their favour. I can make a different order, but I am not persuaded there is any reason to do so. On the contrary, the issues raised about whether LPP protects any of the Listed Items are various but not hard to identify or define. The questions have been raised, investigated, argued about, and then for the most part abandoned by the defendants. That aspect of

the case is over. It is easy, in this case, to identify the successful parties in relation to that question, and there has been no dispute that the defendants are the unsuccessful parties. I am not convinced that there will be any real difficulty in identifying the costs which fall within the description I have given.

51. The general rule is that the time for detailed assessment is at the end of the proceedings, but the court can make a different order: see CPR 47.1. In this case, I accept Mr. Rees' submission that there is no good reason why the claimants should have to wait many months before being able to have their costs assessed, and there is a good reason why they should have their costs assessed now. I accept that an earlier detailed assessment would have no material impact on the timetabling of the underlying proceedings, and would not cause the defendants any unfair prejudice.

52. There is little authority on this point, but I have been referred to the decision of Aikens J (as he then was) in *Greencore (UK) Holdings Plc v Elementis Plc* [2005] EWHC 2139 (Comm). That decision lends some support to the submissions I have identified. Granted, this decision was made after the trial of preliminary issues in the case, but I do not regard that as a distinction of principle, given the analysis that I have set out. In this case, as in *Greencore*, there is no risk that if a costs order was made the other way in future the claimants would be unable to meet it.

53. The principles governing the grant of an order for assessment on the indemnity basis are well-known. Inevitably, I have been referred to the decision of the Court of Appeal case in *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ 879, which strangely remains unreported. At [19], Lord Woolf CJ made clear that the norm is for the court to order costs on the standard basis, unless it considers it unjust to do so. An indemnity costs order may be made where there is some conduct or some circumstance which takes the case out of the norm, and justifies such an order. This is a matter for judgment and, if the court concludes the case is outside the norm, for discretion.

54. My view is that my initial, provisional assessment of the merit of the LPP claims that were floated at the hearings in February has proved correct. They were evidentially flimsy and legally ambitious. They were, also, speculative in nature at that time. That, in my view, is because those advising and representing the defendants did not have, or did not consider that they had, a full factual picture so as to enable them confidently to form a view, and give definitive advice. However, it is fair to say that the nature of the claims put forward over time has been various, and rather muddled.

55. On full analysis, the conclusion has evidently been reached that there is no, or no adequate, basis for claiming privilege on any of the grounds floated earlier. I am sure that conclusion is right.

56. I do not consider it necessary, or indeed appropriate, to engage in any detailed analysis of the legal principles that have been analysed by Ms. Oppenheimer QC for the claimants in her able written and oral submissions. The learning on the scope of the principle in *Lyell v Kennedy (No.3)* (1884) 27 Ch D 1 does not need any addition from me. I shall confine myself to three points.

    (1) First, it is perfectly clear, and has been conceded from the outset by those representing the defendants, that no claim could be made that the covert recordings

themselves were protected by LPP. There is clear and unquestioned authority to that effect in the form of *Property Alliance Group v Royal Bank of Scotland plc (No.3)* [2016] 4 WLR 3 (Birss J).

(2) Secondly, so far as I can see, the only basis on which it was or ever could have been contemplated that a valid privilege claim might exist is the *Lyell v Kennedy* exception. That is an exception to the effect that legal advice privilege may protect documents that are not privileged in themselves, but which have been selected or marked up in a way that would tend to give away the trend of legal advice. As the Court of Appeal held in *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479, this principle can only apply to selections or markings up of other people's documents. As Eady J observed in *Imerman v Tchenguiz* [2010] Lloyd's Rep PN 221, cases where such a selection or marking up does or may in reality reveal advice are very rare indeed. In principle, of course, the burden lies on the party claiming such a privilege to establish it evidentially.

(3) Thirdly, at the very lowest, it is fair to say that once the matter was investigated on the facts, there seems never to have been any sufficient evidential basis to suppose that the *Lyell v Kennedy* exception could apply. On 13th February, the fifth defendant, Mr. Peters, explained to the Supervisor his purposes in highlighting the D5 transcripts. The record says this:

> "The highlighting was done" -- my emphasis -- *"for him personally* to make things 'jump out' to him, and that he highlights stuff to retain stuff." Mr. Peters made clear that the highlights "are regarding banking and finance matters".

As early as 17th February 2020, the first defendant made a statement explaining what his annotations on the D1 transcripts were for. He said this:

> "They are likely to contain annotations made by me. These may be mainly to correct names or fill in what may have been inaudible to the transcriber, with highlighting of parts that I considered most significant."

No evidence has been served since then that changes the picture and, for what it is worth, Mr. Rees has asserted that his own review of the D1 transcripts has borne out what D1 himself had said.

57. Those factors are enough to take this case well outside the norm. I have considered whether, as Ms. Rogers submits, the time it took to drop these contingent or half-formed claims was reasonable in all the circumstances. She has pointed to a range of factors, including the great many other matters that have had to be dealt with in this litigation, and the impact of the Covid-19 pandemic. I have given those matters careful consideration. I do not wish to be thought to be playing them down in any way. But I have not been persuaded that in all the circumstances they represent, either individually or collectively, an adequate explanation for taking many, many weeks to bring an end to the inquiry into this potential ground of objection to inspection. Contrary to the

evidence of the defendants' solicitor, I do not consider that the inquiry was or should have been a complex one.

58. Having said that, as a matter of discretion, as I have already indicated, I do not consider it would be unjust to require the claimants to undertake the burden of satisfying a costs judge the costs incurred were proportionate and reasonable. Without casting aspersions on anyone in this case, it is important for the court to keep in mind that in litigation of this kind, in particular, interim "wins" can be sought, and might be used, as negotiating tools or levers. There is nothing inappropriate about that, as a matter of principle, but it is important to bear in mind the need to look at these issues in a balanced way, asking if justice requires an order such as that which is sought.

59. Standing back from the detail, in my judgment, it would not be appropriate to release the claimants from the normal discipline of demonstrating that their costs of dealing with these matters are proportionate and reasonable.

60. I turn briefly to the Raw Data. My starting point here is that I am concerned with recordings that were made at the instigation of, or by, the defendants, and were not authorised by any of those whose conversations were recorded. It is admitted that the claimants did not know of, or consent to, the recordings. Unless the third-party conversations include anything said by the defendants, in the knowledge that they were being recorded, the same is true of everybody else whose information was recorded.

61. Secondly, the entire sifting exercise was driven by a position adopted by the defendants, that a sift was necessary. There were other positions that could have been taken, both at the hearing before me in February, and after that. As I pointed out during that hearing, the incidental disclosure of third-party information is the daily business of disclosure of documents and information for the purposes of litigation. A sift process of the kind that was engaged in here is well outside the norm, to coin a phrase. Although it was correct to say that the form of the order made did not oblige the defendants to disclose third- party data, the defendants did not have to take the stance they did as to how that should affect the working out of the claimants' rights in the interim.

62. To the extent, therefore, that these costs reflect conduct undertaken in compliance with paragraphs 4 and 5 of the order made on 19th February, and are reasonable, it seems to me that they should be paid by the defendants in any event. It may be that the costs are reasonable. I bear in mind, of course, that these are disbursements; but a paying party is entitled in principle, as I understand it, to contest the scale of the sums incurred, even if they are disbursements. As I have said, therefore, I will give directions to allow a challenge to their quantum.

63. I also accept Ms. Rogers' submission that I should distinguish between the costs of the sifting exercise and those of creating transcripts. It may be that in due course it will prove, or be determined, that the creation of the transcripts was a necessary, or at least a worthwhile exercise; it may, for instance, have saved other expense. There is, as it seems at the moment, no need now for any redacted recordings. That seems to be a consequence of the existence of the transcripts created by the Supervisor; but the sums at stake here are very large indeed. The picture is not wholly clear at the present time and, in my judgment, that aspect of the matter does not need to be resolved immediately and it is not appropriate to resolve it immediately either.

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