

JERSEY / JUDGMENT

Deripaska v Chernukhin and Navigator Equities Limited

[2021] JCA 206 (31 August 2021)

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Court of Appeal (Samedi) 31 August 2021 Before : George Bompas , Q. C., Helen Mountfield, Q. C., and Jeremy Storey, Q. C. Between Oleg Vladimirovich Deripaska Appellant And Vladimir Anatolevich Chernukhin Navigator Equities Limited Respondents Advocate D. M. Cadin for the Appellant. Advocate N. M. C. Santos-Costa for the Respondents. judgment of the court MOUNTFIELD JA: Introduction & Background to the Appeal 1. This appeal, against the Act of Court dated 11 February 2021 following the judgment of the learned Deputy Bailiff at Chernukhin and Anor v Deripaska and Anor

[2021] JRC 039 , concerns the law of privilege. The Respondents had served and filed three affidavits in the circumstances described below. The three affidavits contained statements about privileged matters. The Respondents had waived any privilege in the affidavits themselves and therefore in their contents, and so had therefore prima facie made a collateral waiver of privilege in relation to the matters referred to in the affidavits so as to be capable of being ordered to give disclosure of, and to produce for inspection, privileged documents relevant to those matters. 2. The questions before this Court on this appeal are: 2.1 Whether, as the Appellant contends, the Deputy Bailiff erred in holding that it was still open to the Respondents to avoid the collateral waiver by disavowing reliance on the statements concerning privileged matters; and if so 2.2 Whether, as the Appellant contends, he erred in concluding without giving reasons, or adequate reasons, that in those circumstances it was just to allow the Respondents to provide fresh affidavits for the three deponents, these being in terms of the original affidavits but amended so as to remove references to privileged matters. 3. Leave to appeal was granted by the Court of Appeal on 26 March 2021: Deripaska v Chernukhin and Navigator Equities Limited

[2021] JCA 086 . 4. The issues on this appeal arise in the context of proceedings in relation to enforcement of English arbitral awards issued in favour of the Respondents against the Appellant in the Island of Jersey. The detail of the lengthy litigation background is not material to the issues of disclosure which arise in this appeal. It is sufficient for these purposes to note that, after a hearing on 28 June 2019 on an ex parte application by the Respondents, and by an Act of Court dated the same day, the Royal Court ordered that

legal title to certain shares in EN+ Group plc (a company incorporated under the laws of Jersey) be immediately vested in the Viscount to hold to the order of the Court. 5. In December 2019, the Appellant served Particulars of Claim (amended on 17 March

2021) pursuant to which he contended that the Respondents and their lawyers had committed breaches of duties to the Court in relation to the 28 June 2019 hearing, and that these had led to the Court making the orders sought without there being any cross-undertakings in damages from the Respondents. These allegations were denied by the Respondents. The trial of this matter is currently listed for November 2021. 6. By an Act of Court dated 24 June 2020, the Royal Court ordered, so far as is material, that an application should be made to fix the trial date, and also the date of the pre-trial review (to be heard with an hour's time estimate not sooner than 28 days after the order), that absent further order discovery was not to be required, and that "signed dated and sworn witness statements of fact standing as evidence in chief" be exchanged within some five weeks, "witnesses to attend to be cross-examined, subject to the order of the Court at the pre-trial review" . 7. Pursuant to that order, the Respondents filed and served affidavits dated 7 August 2020 sworn by each of the First Respondent (Mr Chernukhin), Advocate Simon Hurry and Advocate Samuel Williams, these last two being the Advocates and partners in Collas Crill who had represented the Respondents at the hearing on 28 June 2019. These are the three affidavits referred to above. They each addressed, inter alia , the decisions made by the Respondents and their lawyers in relation to the conduct of that hearing, including the process by which it came about that the Respondents' Advocates did not offer, or raise with the Court the question of, any cross-undertaking in damages. Mr Chernukhin's affidavit also made reference to communications he had had with lawyers, and his understanding of advice, concerning the proposed changes to EN+ Group plc (namely, its " Redomiciliation " from Jersey to Russia) which were the immediate reason for the ex parte application of 28 June 2019. 8. When the Respondents filed and served these affidavits, they wrote a letter dated 7 August 2020 to the Appellant inviting him not to require Advocates Hurry and Williams to be cross-examined but to accept the evidence. This was on the basis that their sworn evidence demonstrated that their behaviour was beyond reproach and could not realistically be disputed. 9. On 12 August 2020 the Appellant issued a summons seeking to amend his pleaded claim against the Respondent to expand his contention that there had been a failure at the hearing of the ex parte application to give a proper explanation of the time it had taken to make the application and the urgency of the application. This amendment application was addressed and allowed in the Deputy Bailiff's judgment, although there is no appeal against his decision on the point. 10. By 14 August 2020 the hearing of the pre-trial review had been fixed for 19 August 2020. On 14 August 2020 the Respondents served a skeleton argument in advance of the hearing referring to the three affidavits filed and served the previous week. One of the matters raised in the skeleton argument was the question whether at the trial there should be cross-examination of Advocates Hurry and Williams, or whether their affidavit evidence should be accepted. It was said that the Appellant had declined the invitation in the letter referred to in paragraph

8 above, but without giving reasons, and that if the affidavit evidence were accepted as truthful "the only other conceivable line of questioning must be as to matters which are the subject of privilege" and that "That is plainly impermissible and attendance would serve no useful purpose, as the Advocates would be unable to answer any questions put to them in circumstances where privilege has not been waived by the direct or indirect clients ..." 11. In submissions before us, the Appellant's Advocate, Advocate David Cadin, described these contentions in the Respondents' skeleton as an attempt to get the Deputy Bailiff at the pre-trial review hearing to 'lean on him' to concede that this evidence should be unchallenged. If that was the purpose of the Respondents in their Skeleton there is no evidence before us to show that it was fruitful. 12. On 18 August 2020 the Appellant issued a second summons, returnable the following day on the hearing of the pre-trial review, seeking orders for discovery on the basis that the three affidavits had "waived privilege in relation to certain matters relating to the obtaining of" the orders on the ex parte application of 28 June 2019. The documents to be disclosed were described in sweeping terms, but broadly were those relating to or otherwise in connection with the Respondents' instructions and advice sought and given, over a period of nearly a year, in the dispute with the Appellant. (Later in this judgment we describe in a little more detail the material sought in the disclosure application.) 13. The Appellant's skeleton argument for the pre-trial review was also served on 18 August 2020. This put forward detailed argument in support of the Appellant's discovery application. It also contained the assertion that the Respondents' suggestion that there should be no cross-examination of the two advocates "rather highlights the fact that a waiver has occurred and in any event fairness dictates that the Advocates be cross-examined on their evidence". 14. The Deputy Bailiff did conduct a short hearing on 19 August 2020 and read, as preparation, the skeleton arguments from each party which referenced the three affidavits and the competing arguments on waiver. However, the substantive hearing of the pre-trial review was adjourned and heard over two days on 8 and 9 October 2020. 15. The Respondents responded to the Appellant's application for discovery by issuing a summons dated 30 September 2020 seeking leave to serve replacement evidence for all three witnesses. Red-lined versions were provided to show by comparison how the replacement affidavits differed from the three affidavits already served, and to demonstrate that the replacements were intended to withdraw reliance on any privileged material. 16. As already adverted to, the pre-trial review was heard over two days on 8 and 9 October 2020. The Deputy Bailiff dealt with the issue of waiver of privilege in some detail at paragraphs 45-91 of his judgment. 17. The Deputy Bailiff structured his judgment in the following way. At paragraphs 48-56, he set out the passages within the affidavits which were said to give rise to waiver of privilege. He then divided his analysis under two headings. At paragraphs 57-72, he addressed the question "Has there been a waiver of privilege?" and, at paragraphs 73-91, he addressed the composite second issue of "Can the clock be turned back? Can the Representors [Respondents] declare that they no longer rely upon the privileged material?" The Deputy Bailiff answered each of those questions 'yes', albeit also holding that the Respondents could be cross-examined by the Appellant on the content of the original drafts of the affidavits should he choose to do so. 18. The Respondents do not

seek to appeal the Deputy Bailiff's approach to the first issue he identified. That is, the Respondents accept his finding that privilege had been waived in the affidavits as originally filed and the statements made in them and that this would be inadvertently a collateral waiver of privilege as regards matters referred to, but they seek to uphold his second finding, that they may, nonetheless, replace them with the amended affidavits which they have proffered and upon which they now rely. 19. Nonetheless, to understand how the parties to this appeal put their case before us, it is necessary to understand the way the Deputy Bailiff analysed both questions before him. 20. In paragraph 57 of his judgment, the Deputy Bailiff noted that on the basis of *Café de Lecq Limited v R A Rossborough (Insurance Brokers) Limited*

[2011] JLR 182, this was an area of Jersey law where it was appropriate to refer to the law of England and English authority. In that case the then Bailiff, Sir Michael Birt, had pointed out that the Royal Court had previously applied English principles in relation to questions of privilege, and explained that in the Court's judgment "that is entirely appropriate as the general principles underlying civil litigation and the position of lawyers in that process are similar in England and Jersey". 21. In paragraphs 59-70, the Deputy Bailiff reviewed the authorities to which he had been referred concerning the question of waiver of privilege. In order to determine whether there had been such a waiver, he analysed the approach in the caselaw to two questions: first, whether what had been revealed was the substance, or gist, of advice, or merely its effect; and second, the relevance of the circumstances in which it was revealed. 22. As to that second question, the Deputy Bailiff cited the way the matter had been formulated by the English Employment Appeal Tribunal in *Brennan v Sunderland City Council*

[2009] ICR 479 at [64]: "has it simply been referred to, used, deployed or relied upon in order to advance the party's case?" In paragraph 63 of his judgment, the Deputy Bailiff quoted the EAT in *Brennan* (in paragraph 64 of its judgment), citing the observation of Waller LJ in *Dunlop Slazenger International Limited v Joe Bloggs Sports Limited*

[2003] EWCA Civ 901 that the principles were not altogether easy to discern "partly perhaps because of the vagueness of the language adopted - for example, sometimes reliance and deployment are used as separate terms and sometimes they appear to mean much the same thing and partly because the cases are necessarily fact sensitive". 23. We pause to interpolate here that this observation of Waller LJ in *Dunlop Slazenger* is applicable to the way the EAT in *Brennan* formulated the question as to the circumstances in which legally privileged material was revealed. It is difficult to tell from the syntax whether the words "referred to" are being distinguished from the words "used, deployed or relied upon to advance the party's case", or whether the distinction which the EAT intended to draw was between material having been "referred to, used, deployed" (treated as synonyms), by contrast to ("or") having been "relied upon in order to advance the party's case". 24. For reasons to which we will return, this unfortunate lack of clarity has led to an issue arising between the parties in the present case as to the findings made by the Royal Court and as

to whether it is open to the Respondents to argue before the Court of Appeal that the privileged material in the present case was not "deployed in court" (a phrase used in other cases) so as to give rise to an irretrievable collateral waiver of privilege. In this case the collateral waiver contended for is of privileged information, that is information about privileged matters, with the consequence that documents containing or referring to the information may be discoverable and open to inspection. In other cases the collateral waiver may be narrower, being limited to specific documents which, for example, may have been described or referred to in an affidavit. 25. Returning to the Deputy Bailiff's analysis, having reviewed the cases on the circumstances in which legal professional privilege can be said to have been waived, he set out his conclusions on this issue at paragraphs 71 and 72 of his judgment. 26. He concluded that in the circumstances of this case, the Respondents had indeed waived privilege in the affidavits and their contents, and that the statements in them waived privilege on the advice given as to the central issue in the [Appellant's] Particulars of Claim, namely the alleged failure on the part of the [Respondents] to provide an undertaking in damages. As to this the Deputy Bailiff expressed himself in the following terms: "71. The three affidavits refer expressly to advice received on this central issue. The reference (at paragraph 15 of Advocate Williams' affidavit, paragraph 22 of Advocate Hurry's affidavit and the various paragraphs of Mr Chernukhin's affidavit) is to the contents and not merely the effect of the advice that was being given and received. Mr Chernukhin in particular provides evidence as to the detail of the legal advice he was given at paragraphs 11 and 18 of his affidavit. These were not references to legal advice that were given casually or accidentally. They were deliberately included in the affidavits, in my view, in order to fortify Mr Chernukhin's case, in respect of these issues. Further, there can be no doubt that, in my view, this evidence was deployed and/or relied upon. These are statements prepared and disclosed for the purpose of trial. The fact that the witnesses have not yet given evidence does not, in my judgment, affect the fact that they have been relied upon in these proceedings. 72. Accordingly, there has been a waiver of privilege and, prima facie, all collateral material relevant to the matters referred to. This would, on the face of it, extend to much if not all of the material sought by the First Respondent in his summons. I may have reached a different conclusion on waiver had only the affidavits of Advocate Williams and Advocate Hurry have been before me." 27. Having concluded that there had been reliance on privileged material in the affidavits disclosed, consequently waiving privilege, the Deputy Bailiff went on to ask whether the clock could be 'turned back', by the Respondents declaring that they no longer relied upon the privileged material (paragraphs 73 to 92 of the judgment). 28. It is again important in order to understand what can properly be said to be in issue on this appeal, to understand the way that the Deputy Bailiff structured his thinking on this issue. 29. Firstly, in paragraphs 73 to 76, he summarised the positions of the parties before him. He recorded the Representors' (here, the Respondents') application to strike out references to the passages in which he had found that they had waived privilege. This submission was founded on the submission that, if the Respondents were no longer relying on the material, then there was no unfairness to the

First Respondent (the Appellant in this Court): " If the Representors are no longer relying on the privileged material, it is argued that they are no longer deploying it in any fashion. The Representors argue that we are not at trial, it is not too late to withdraw the offending parts of the affidavits and what can be undone should, if no unfairness arises, be undone." 30. He also recorded the counter-argument advanced by the Appellant, who submitted that as soon as the material had been served it had been 'deployed'. As the Deputy Bailiff summarised the submission, " the cat is out of the bag and the application to amend the affidavits is misconceived" . The Deputy Bailiff referred to the Appellant's reliance on the decision in *Café de Lecq* as authority for the proposition that, in the context of production of privileged documents on discovery, no question of turning the clock back could arise. The Appellant's Advocate also submitted that in any event he should be permitted to cross-examine the witnesses on what they had said in their original affidavits, which could not be 'unknown'. 31. The Deputy Bailiff then analysed the case law before him on what happened when legally privileged material had been served, and the competing positions on whether the cat was irretrievably 'out of the bag'. He drew particular attention to the decision in *General Accident Fire & Life Assurance Corporation Ltd v Tanter* (The Zephyr)

[1984] 1 WR 100 and the view expressed there by Hobhouse J (as he then was) that it was premature to rely upon the concept of collateral waiver until evidence had been "deployed in court" in the strict sense - namely relied on in the evidence (in that case, at trial). 32. Charles Hollander's analysis of this passage in the *General Accident* decision is set out in "Documentary Evidence" (13th ed, 2018) at paragraph 23-16: "... The significance of "deploying in court" is that once the material has been used in court in support of an application or at trial, it will be difficult to turn the clock back and thus retrieve the position. If the document has been read out in opening or relied upon in the course of evidence, and thus deployed in court, it will be too late to turn the clock back. If however, the document, affidavit or witness statement has been disclosed to the other side but not yet deployed in court, it is not too late to retrieve the situation. Thus if a party, having appreciated the consequences is concerned not to disclose further documents, so long as it is possible without prejudice to the other party to retrieve the privileged material and for him not to rely on it, he should be entitled to do so. Whether a party who has waived privilege in certain material before the trial should be required to produce the documents at that stage depends on the circumstances." (emphasis added). 33. The Deputy Bailiff then considered the position in *Café de Lecq* and some of the earlier English cases, before recording his conclusions on the linked issues of whether the Respondents could disavow their reliance on the statements about privileged matters disclosed in the affidavits they had served and filed (thus removing any duty of disclosure in relation to collateral material), and whether the Appellant could nonetheless refer to and cross-examine them on those affidavits, including the statements about privileged matters. His conclusion on this matter was set out in paragraphs 89-91 of his judgment: "89. Having regard to the fact that this material in this case has not been relied upon at trial, whether in a skeleton argument prepared for trial or in an opening speech or in evidence at trial, I have, on

balance, decided that it is fair for the Representors to be permitted to amend their affidavits so that they stand as amended as evidence in chief in this case. This material has not yet been referred to in open court or in a written opening speech, nor a skeleton argument prepared for the purposes of trial. In my view it is not too late for the clock to be turned back and accordingly notwithstanding my findings in relation to waiver and the collateral effect of such waiver, I do permit the Representors to amend their affidavits in the terms proposed. 90. As to the consequences I agree with the decision of Master Thompson in *Crociani v Crociani*

[2015] JRC 145 , although the decision was on different facts and with a different outcome as the affidavit in that case had not in the Master's opinion been deployed but had been filed with the Court and served on the other parties. In those circumstances, the Master observed at paragraph 50: "Although the affidavit had not been deployed, it had been filed with the court and served on the other parties. It was part of the Court record. The plaintiffs, as they had done in making the present application, were entitled to refer to the third affidavit and to rely on any parts of it in any subsequent court application, whether interlocutory or at trial." 91. By the same token, the [Appellant] is quite entitled to cross-examine the witnesses for the [Respondents] on what they have said in their affidavits as originally sworn if it is to his advantage to do so. It would be wholly artificial to expect the [Appellant] to put from his mind what he has learnt about advice given and received as disclosed by the affidavits filed by the [Respondents] by the three deponents in question on 7th August 2020. Accordingly, the [Appellant] is entitled to make such use of the affidavits originally filed by the [Respondents] as he thinks fit at trial. However, the [Respondents] will no longer be relying, or 'cherry picking' as the [Appellant] would have it, on all or any of the legal advice which they have received and thus no question of waiver of privilege would arise." 34. The Appellant lodged a Notice of Appeal on 10 March 2021 challenging the Deputy Bailiff's decision to allow the Respondents to serve amended affidavits (and thereby avoid the duty to give collateral disclosure of documents subject to legal professional privilege by having their witnesses give as their evidence in chief at the trial affidavits which did not contain statements waiving any privilege), and in particular to lodge these amended affidavits, which it is said themselves contain statements which waive privilege. 35. There is no cross-appeal by the Respondents. This appeal therefore proceeds on the basis that there was indeed a waiver of privilege by the serving and filing of the three original affidavits on 7 August 2020, and that if the Deputy Bailiff was right to allow the Respondents to serve amended affidavits, the Appellant may nonetheless cross-examine on the original affidavits if so advised. 36. On 22 July 2021, the Court drew the attention of the parties to the decision of the English Court of Appeal in *Rubin v Expandable Ltd & Another*

[2008] EWCA Civ 59,

[2008] 1 WLR 1099 . That case turned on the Civil Procedure Rules now in force as rules of court in England and Wales; but in considering the issue on the appeal in that case, the Court of Appeal (Rix and Jacob LJ and Forbes J) made reference to and appeared to draw assistance from the English Court's approach in the period before the introduction of the Civil Procedure Rules in 2000, an approach which recognised the possibility of a collateral waiver of privilege by reason of statements in a Court document not being made irretrievably and beyond withdrawal simply by the provision of the document. 37. The Appellant, in response, made submissions the gist of which was that Rubin was irrelevant to the present appeal. This was because, the Appellant submitted, the Deputy Bailiff had made an unappealed finding that the privileged evidence was "deployed and relied upon" and consequently privilege was waived. The Appellant submitted that both what he referred to as "the deployment finding" and what he called "the waiver and collateral waiver finding" were outside the scope of the appeal as there had been no cross-appeal by the Respondents challenging that finding. 38. The Respondents lodged further submissions saying that the reasoning in Rubin entirely supported the Deputy Bailiff's approach. They submitted that it was consistent with a flexible approach to the concept of a document having been "deployed in court" and affirmed that a party can withdraw references to written material - drawing attention to Rix LJ's observations on the speech of Brightman LJ (as he then was) in *Buttes Gas & Oil Co v Hammer* (No 3)

[1981] QB 223 at 268 C-D (see paragraph 58 below). The scope of the appeal 39. In the light of the Appellant's supplementary submissions, and in the absence of a cross-appeal, it is necessary for us first to address the scope of the appeal as a preliminary issue. Indeed, a central plank in the Appellant's submissions to us was that the absence of a cross-appeal is determinative of the appeal. 40. It is common ground that the Deputy Bailiff found that the three affidavits served on 7 August 2020 contained statements waiving privilege, because the privileged matters described in the affidavits were 'relied upon' in the witness statements and were not merely being referred to incidentally. It is also common ground that there is no appeal against this finding. 41. However, the Appellant's characterisation of the issue considered by the Deputy Bailiff in his judgment at paragraphs 71-72 as being a "deployment" issue and a separate "waiver" issue is not common ground. In our judgment, on a proper reading of the Deputy Bailiff's judgment, it is not correct. 42. It is clear that the Deputy Bailiff divided his analysis into two parts: firstly, whether there had been a *prima facie* waiver of privilege in the terms of the affidavits lodged on 7 August 2020, and secondly, whether (if, as he found, there had been) "the clock could be turned back" (as the Deputy Bailiff put it), or "the cat could be put back in the bag" (to use the Appellant's metaphor). 43. We do not agree with the Appellant's submission that the Deputy Bailiff made inconsistent findings in relation to the two parts of his analysis, finding in relation to the first that privilege had been waived (because the privileged communications had been 'deployed') but as to the second that 'the clock could be turned back' (because they had not yet been 'deployed in court'). 44. The reason the Appellant can plausibly make this inconsistency argument is because of the lack of linguistic clarity in the caselaw which we

analysed in paragraphs 22-24 of this judgment (above). On a proper analysis of the structure of his reasoning and the language used, the Deputy Bailiff drew a distinction

- which is to be found in the cases analysed in his judgment - between a document being 'deployed' in the sense of having been positively relied upon or advanced, by being disclosed or referred to in evidence served on the other side; and the document being 'deployed in court' - ie put into a skeleton argument or made the subject of evidence or oral submissions at a hearing. 45. Thus, in the relation to the first (and unappealed) strand of his analysis, the reason that the Deputy Bailiff regarded there as having been a prima facie waiver of privilege was because the affidavits served by the Respondents on 7 August 2020 did not merely refer to privileged communications, but sought to rely upon them as part of the argument. Accordingly, to allow them to stand as matters upon which the Respondents could positively rely would impermissibly allow them to 'cherry pick' which parts of (privileged) communications they would advance in support of their case and which they would not. In that sense, they had been relied upon or deployed. 46. But that does mean that it was not logically open to the Deputy Bailiff to conclude that the documents had not (yet) been "deployed in court " (in what Hollander at 23-16 calls "the strict sense"), as part of his reasoning on the second issue. Thus the finding in paragraphs 71-72 of his judgment that the privileged documents had been 'relied upon' is not dispositive of the second question, namely, whether or not it would be fair in the circumstances to allow the Respondents to elect to withdraw their positive reliance upon the statements about privileged matters instead of giving disclosure in advance of the trial, and to replace them with affidavits which did not make reference to that material. What was said in paragraphs 71-72 of the judgment is to be read in context with what was said in paragraph 89. When the Deputy Bailiff was considering the questions before him concerning the three affidavits, there had not been any occasion for the Court to make any decision by reference to the truth of the statements in the affidavits, while the Respondents had indicated, by their application to substitute amended affidavits, that they did not wish to have the three affidavits presented at the trial as the evidence of the three deponents. 47. Thus, we do not accept the Appellant's attempt to characterise the finding that the privileged material had been "deployed" as an unappealed finding that it had been "deployed in court". The Respondents are, therefore, properly entitled to submit that the Deputy Bailiff was correct to find that since the materials had not yet been "deployed in court" in the strict sense, they could withdraw reliance on those materials instead of granting disclosure of collateral privileged materials, provided that was a just result in the circumstances. That is because, for reasons which we analyse below, we do not accept that waiver of privilege, in the strict sense, is a one off, all or nothing, irrevocable exercise. Discussion on principles as to waiver of privilege 48. We have referred already to Café de Lecq (above) and agree that waiver of privilege is an area where consideration of principles applied in England and Wales can assist in relation to those to be applied in Jersey. 49. As a matter of public policy, the preservation of legal professional privilege is an important principle. There is a public interest in ensuring that communications between legal advisors and their clients may be frank and free and not

emerge into the public domain if litigation is subsequently pursued. This interest has been identified in many cases (notably in the decision of Elias J (as he then was) in the Employment Appeal Tribunal in the Brennan case cited above). Consequently, legal professional privilege is not to be taken as easily having been lost. 50. Nevertheless, there are circumstances in which privilege may be taken to have been waived; and if it is waived (in whole or in part) there is a public interest, which the Court will supervise, in ensuring that the extent of material disclosed presents a materially fair picture. Equality of arms - the essence of a fair trial - means that there must be no 'cherry-picking' of the material disclosed. Thus, circumstances frequently arise where a Court must determine whether (and how) there has been waiver of privilege and the extent of collateral disclosure obligations which may then arise to ensure that the evidential picture presented is not an unfairly partial one. As it is put in Matthews & Malek, "Disclosure" (5th ed, 2017) at paragraph 16.23 (recently cited in TMO Renewables Ltd v Reeves

- [2020] EWHC 789 (Ch) , Judge Jarman QC, at 20): "Where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood." 51. However, what fairness requires depends upon the circumstances in which privilege is lost. It may, for example, be lost by mistaken disclosure of a particular document, or mistaken understanding of the extent of disclosure obligations; or it may be by deliberate reliance on the fact and content of legal advice taken. 52. In *Serdar Mohammed v Ministry of Defence*
- [2013] EWHC 4478 (QB) at [14], Leggatt J (as he then was) sets out at least five legally distinct ways in which a right to assert privilege may be lost: " i) What might be called a 'true' waiver occurs if one party either expressly consents to the use of privileged material by another party or chooses to disclose the information to the other party in circumstances which imply consent to its use. Such a waiver may be either general or limited in scope. ii) Where a party waives privilege in the above sense by deliberately deploying material in court proceedings, the party also loses the right to assert privilege in relation to other material relating to the same subject matter: see eg *Great Atlantic Insurance Co v Home Insurance Co*
- [1981] 1 WLR 529. The underlying principle is one of fairness to prevent 'cherry-picking': see eg *Brennan v Sunderland City Council*
- [2009] ICR 479 , 483-4 at [16]. iii) Similarly, a party who by suing its legal advisor puts their confidential relationship in issue cannot claim privilege in relation to information relevant to the determination of that issue. Again, the governing principle is one of fairness: see eg *Paragon Finance v Freshfields*

[1999] 1 WLR 1183 . iv) Because privilege only protects information which is confidential, if the information concerned ceases to be confidential, privilege cannot be claimed. Where a party does an act which has the effect of making information public, this has sometimes been described as a waiver of privilege (Goldstone v Williams

(1899) 1 Ch 47), but it is more accurate to say that privilege cannot be claimed because confidentiality has been lost.

- v) Where a party comes into possession of privileged material by any means, and even if without the knowledge or consent of the other party, the receiving party is free to use such material subject to the equitable jurisdiction of the court to restrain a breach of confidence."
53. Given that the touchstone principle is to ensure a fair trial, we consider the distinction drawn by Leggatt J in *Serdar Mohammed* between 'true waiver' and 'loss of confidentiality' to be an important one. If, during the course of litigation, a party has disclosed a document to the other side which it could have kept confidential (in circumstances where this is not an obvious mistake triggering obligations on the other side's professional advisors to return it) then, in practical terms, the confidentiality in the document has been lost. The other side cannot 'unknow' what they know, and it would be artificial to say that they cannot now rely upon the content of the document so disclosed for their own purposes. 54. But the position is different, and more complicated, in relation to 'true waiver', ie where one party has sought to deploy in Court material which they could have chosen to keep privileged. 55. In that context, the principles (as summarised by the English High Court in *TMO Renewables* at 21) are as follows: " i) A mere reference to a privileged document does not of itself amount to a waiver of privilege, even If the document referred to is being relied on for some purpose. ii) Reliance in itself is not the test but whether the contents of the document are being relied on, rather than its effect. iii) Where the maker of a statement does not quote the contents of a privileged document, or summarise them, but simply refers to the document's effect, there is no waiver of privilege. iv) If statement makers go too far, they can be put to their election as to whether to leave in the reference and produce the document or take it out and retain privilege. v) If the document is referred to in order to persuade the court at an interlocutory stage to take a particular view of the merits of the case (eg an application for a freezing order or for summary judgment), this operates as a collateral waiver. vi) If use of the document can be shown to be made for a limited purpose only at the interlocutory stage, there may be no waiver." 56. Where there has been such 'true waiver' the issue then arises as to what flows from that, in order to ensure equality of arms between the parties. 57. The disclosing party did not have to deploy the privileged material; but if it does so, it must do so in a fair - that is materially complete - way. In those circumstances, reliance upon one document or statement may trigger a duty to disclose such underlying documents as are required to ensure that the full picture has been put before the Court in relation to the issue in relation to which there has been partial disclosure. But where such partial waiver has occurred, but the material not yet actively 'deployed', the Court may decide that the party which intended to rely on privileged material can instead withdraw that reliance. In other words, it can be put to its election as to whether to withdraw its reliance on privileged

material, or to disclose the whole of it. 58. As to the issue of election, the classic statement of the law is in the decision of a distinguished Court of Appeal (Denning MR, Donaldson & Brightman LJ) in *Buttes Gas*. In that case, Brightman LJ observed at 268C-D that while reference to a privileged document in a pleading did not in itself waive any legal professional privilege attached to it, it was 'equally clear' that a party could not rely on a privileged document so pleaded without waiving privilege on the whole of it, and 'sooner or later' would have to either decide whether to forego privilege or abandon reliance on it. 59. In the recent English High Court decision of *Waksman J in PCP Capital Partners LLP & Another v Barclays Bank Plc*

[2020] EWHC 1393 (Comm), it was noted at [47] that applications for documents based on waiver of privilege entailed (at least) two questions: whether there had been a waiver of privilege, and if so, whether it is appropriate to order production of privileged documents other than those to which reference had been made which was the foundation for the waiver. The learned judge also noted at

[48] that in deciding whether there had been waiver, the reference to legal advice must be sufficient, and "second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide". In that case, having concluded that there had in fact been a waiver of privilege by Barclays, the learned judge noted at [129] that it was accepted by PCP that if Barclays wished to avoid the consequences of the waiver, it could withdraw its reliance on the privileged material in question and in connection with it. Decision on the first ground of appeal 60. We can take our analysis of this issue quite shortly. In this analysis, having regard to the point made in *Café de Lecq* (referred to above), we take account of English authority as assisting in determining issues of privilege in Jersey. 61. There is a difference between considerations where confidentiality in what would otherwise be a legally privileged document has been lost by disclosure, and waiver of privilege in the strict sense, ie where a party places reliance on legally privileged material. In relation to loss of confidentiality, it will usually be the case that what is known cannot be unknown: if a party has chosen to disclose, or has inadvertently disclosed, material which it could have kept secret, the privacy and confidentiality has been lost, and the other side can make such use of that material as it sees fit. (The situation may be otherwise in relation to circumstances of theft, or fraud, or where the receiving party ought to have known that disclosure was not intended, but that does not arise here). 62. But it does not follow that there had been an irrevocable waiver of privilege in the content of the Respondents' legal advice leading inexorably to an obligation to disclose any collateral documents. 63. That is because 'waiver of privilege' in the strict sense is a positive reliance on privileged material. In that situation, the question is whether there has been some deliberate reference by one party to legal advice or legally privileged documents such as to amount to 'deployment', and the issue is whether, and to what extent, the other party can use that disclosure to trigger a disclosure obligation, or whether the evidential cat can be put back into the bag instead. 64. In the present case, the Deputy Bailiff found (in a factual finding which has not been appealed) that, in disclosing the affidavits of Advocates Williams

and Hurry, in conjunction with the affidavit of Mr Chernukhin explaining his reliance on that advice, privilege had been waived. 65. The issue then was what flowed from that as a matter of the law of privilege: whether the waiver was irrevocable and inevitably led to a disclosure obligation of all collateral documents relating to the legal advice given to Mr Chernukhin, or whether he could elect to withdraw his reliance on that advice so that no collateral disclosure obligation would arise. 66. In our view, it is not the law - as Advocate Cadin sought to persuade us on behalf of the Appellant - that the analysis is a strict two stage process, in which the Court asks a once-and-for-all question of whether privilege has been waived; and if so, the only further question which arises is the extent of any further collateral disclosure obligations. The flaw in this analysis, in our view, is to assume that loss of confidentiality in privileged material and waiver in the strict sense of reliance are inevitably linked. 67. As to confidentiality, the Deputy Bailiff correctly held that, the Respondents having served the three original affidavits of Advocates Williams and Hurry and Mr Chernukhin, the Appellant could rely upon them since confidentiality in their contents had been lost. The Appellant could not unknow what was said in the three affidavits, and could make such use of that at trial as he thought fit. 68. But the issue of waiver - ie an intention on the part of the Respondents positively to deploy the documents in Court - is different. The caselaw analysed by the Deputy Bailiff, in particular the decision of Hobhouse J (as he then was) in *General Accident*, (and the decision of the Court of Appeal in *Buttes Gas*) are authority for the proposition that even where there has been a waiver of privilege by 'use' or 'deployment' or 'reference to' or disclosure of privileged material, the question of what to do about this, at least until after there has been 'deployment in court' in the strict sense, is a question of fairness. 69. In the conduct of this exercise, the importance of the principle of protecting legal professional privilege and the giving and taking of private legal advice must be weighed against the unfairness to the other party if this is done in a partial way 'cherry picking' some parts of advice but not disclosing others. 70. The question of fairness also arises in relation to whether the party which has sought to rely on privileged material can change its mind. If there has been a partial disclosure of that which would otherwise be privileged, it may be possible nonetheless to turn the clock back (or 'put the cat back in the bag') if this is done before the matter reaches trial. Whether this can be done is a question of what fairness demands in the particular circumstances of an individual case. While it is likely to be more difficult after the evidence has been "deployed in court" in the strict sense and at that point, it may be that the position cannot be retrieved, at least not without unfairness to the other party. (It is significant, however, that in *Buttes Gas*, cited in *Rubin*, the Court of Appeal contemplated that this might lead to an abandoned trial, with the party at fault having to pick up the costs: so even when material has been "deployed in court", it is not literally impossible for the cat to be put back in the bag, though it is unlikely that this could be done on the balance of injustice). 71. Advocate Cadin sought to persuade us that *Buttes Gas* was an old case which had fallen into desuetude as a result of more modern approaches to active case management. But while the application of the fairness principle as to whether and when the evidential cat may be put back in the bag is now likely to arise for determination at an earlier stage of proceedings, given the modern approach to

case management, nothing leads us to believe that the principle in *Buttes Gas*, which is authority of a distinguished Court of Appeal, no longer stands. That is, the touchstone for determining the consequences of a waiver of privilege is one of fairness; and the party seeking to deploy privileged material may, provided this does not result in a material injustice, either withdraw that reliance or make full disclosure in relation to it. 72. We were referred to Thanki, "The Law of Privilege", 3rd ed., 2018. As the editor observes at 5.47 - 5.51: "Ultimately, the key issue is whether the clock can be turned back. Once the document has been relied on in opening, deployed in evidence, or (in most cases) relied on at an interlocutory hearing, it will be too late to resist the effects of collateral waiver....[In Rubin] there was no automatic waiver of privilege simply because a document was mentioned in a witness statement...[Any automatic waiver] will depend on the extent to which the contents of the advice are being relied on rather than merely the effect of the document. If there is any doubt about the matter, provided the document in question has not already been deployed in court, it should be possible for the [waiving] party to delete the relevant references and elect to preserve privilege, in light of the fact that, following [Rubin], there is no automatic waiver. However, if the party expressly [referring to] a privileged document wishes to continue to rely on it then there will come a point when the document would have to be produced". 73. If there were any doubt as to the continuing application of the approach indicated in *Buttes Gas*, not only had it been referred to with seeming approval by the Court of Appeal in the Rubin case (above), but this right to elect was confirmed recently in *TMO Renewables* at [21] (see also *Matthews & Malek* at 16.23 and 16.26). It was also accepted as being the legal position in major commercial litigation in another 2020 Commercial Court case, *PCP Capital* cited before us by the Appellant. And we note the approach taken by Master Thompson in *Crociani v Crociani* cited by the Deputy Bailiff in paragraph 90 of his judgment (quoted above). 74. The idea of an automatic and irrevocable waiver having been made at an early stage in proceedings, even before any deployment in Court, would be inconsistent with the required non-mechanistic approach advocated by Commissioner Page in *Jersey Financial Services Commission v AP Black (Jersey) Limited*

[2003] JLR 609, following *Vista Maritime Inc v Sesa Goa*

[1997] CLC 1600, *Mance J* (as he then was). The Commissioner drew from *Mance J*'s judgment, among other points, the point that such an approach must reflect the position as it stands today on the basis of the relevant party's intention as it is now (paragraph 12(c) of the Commissioner's judgment), and because disclosure of privileged material is not an irreversible step, and convenience or fairness may require the clock to be turned back (paragraph 12(d) of the Commissioner's judgment). And at paragraph 14 of his judgment the Commissioner relied on these points in reaching his conclusion. 75. In the present case the Deputy Bailiff held that the material in which privilege had been waived had not yet been "deployed in court" in the strict sense. This was obviously correct, as there had never been (and still has never been) an occasion when the Court had been presented with the three affidavits and invited to make a substantive determination by reference to the evidence contained in them. Already at the first hearing of the pre-trial review the Court

was concerned with the character of the three affidavits and the question of privilege; and by the time of the substantive hearing of the pre-trial review the Respondents were seeking to withdraw them as evidence to be given at the trial by the three deponents and to rely on the amended affidavits instead. The Deputy Bailiff went on to hold that justice could be served by permitting the Respondents to abandon their reliance on the three affidavits. There was no error of law in that finding, and consequently the Appellant's appeal on that basis fails. The second ground of appeal 76. This brings us to the second ground of appeal: whether the Deputy Bailiff erred in allowing the amended affidavits to be lodged in any event, and whether the Deputy Bailiff's judgment is open to appeal on the basis that it was unreasoned as regards the amended affidavits. The submissions 77. The Appellant contends at paragraphs 6-8 of his Grounds of Appeal dated 10 March 2021 that the three amended affidavits continue to waive privilege and so the Deputy Bailiff was wrong in law to allow the Respondents' application of 30 September 2020 for permission to file and serve amended affidavits. He also contends at paragraphs 9-10 that, if the amended affidavits are to be allowed, the Deputy Bailiff ought to have ordered the Respondents, in accordance with paragraphs 2.1(a) and (b) of the Appellant's summons of 18 August 2020, to give discovery of all documents relating to the Respondents' and Clifford Chance's instructions to Collas Crill, the Respondent's lawyers in Jersey prior to the hearing on 28 June 2019, and also the advice sought by the Respondents and/or given by the lawyers (between 18 June and 20 November 2019), in relation to the form that the proceedings should take, to the need for and giving of any cross-undertaking in damages, and to the proposed redomiciliation of EN+ Group Plc from Jersey to Russia (between 16 August 2018 and 28 June 2019). 78. The Appellant also complains at paragraph 5 of his Grounds of a serious procedural irregularity because the Deputy Bailiff failed to state his reasons. 79. First, we address the alleged procedural irregularity. In Advocate Cadin's written contentions of 17 May 2021 his only reference to this issue is at paragraph 4.2(b) which does no more than repeat paragraph 5 of the Grounds of Appeal. 80. The Deputy Bailiff set out in his judgment the details of the amended affidavits at paragraphs 53 (Advocate Williams), 54-55 (Advocate Hurry) and 56 (Mr Chernukhin). His reason for doing so was to identify whether the amended affidavits still amounted to a waiver of privilege (paragraphs 46 and 52). He directed himself at paragraphs 57-70 on the relevant principles applicable to waiver, whether in relation to the original or the amended affidavits. 81. The Deputy Bailiff's decision and reasons on this issue are to be found at paragraphs 89 and 91 of his judgment: "... I have, on balance, decided that it is fair for the [Respondents] to be permitted to amend their affidavits so that they stand as evidence in chief in this case...and accordingly notwithstanding my findings in relation to waiver and the collateral effect of such waiver, I do permit the [Respondents] to amend their affidavits in the terms proposed....the [Respondents] will no longer be relying on, or "cherry picking" as the [Appellant] would have it, on all or any of the legal advice which they have received and thus no question of waiver of privilege would arise." 82. Paragraph 3 of the Act of Court dated 11 February 2021 recorded that the Respondents are to be given leave to amend the three affidavits in the terms proposed "so as to permit the [Respondents] to cure the...

waiver of privilege". 83. Although it might have been preferable for fuller reasons to be given, we bear in mind that this was a discretionary case management decision consequential on the Deputy Bailiff's findings in relation to the unamended affidavits. The level and particularity required in a judgment depends upon the circumstances, in particular the nature of the submissions made, and the decision required. If it can be seen that there are grounds on which the judge would have been entitled to reject the appellant's argument, the Court of Appeal should assume he or she acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion: *Eagil Trust Co Ltd v Pigott-Brown*

[1985] 3 All ER 119 CA per Griffiths LJ at 122d-e. 84. Of the seven passages in the three affidavits relied upon at paragraph 6 of the Appellant's Grounds, only paragraphs 19 and 22 of Advocate Hurry's affidavit were the subject of any detailed submissions below and then in support of a different proposition, namely that the amended affidavit was misleading, not that it waived privilege (see page 89 of the transcript for 8 October 2020 and page 36 of the transcript for 9 October 2020). The Respondents' submission was that the amended affidavits cured the potential waiver of privilege, the Appellant's that they did not. 85. We are also bound to observe that, although the judgment was supplied in draft on 2 February 2021, the Deputy Bailiff was not invited to further explain his reasoning at the hearing on 15 March 2021 or otherwise, as is required for an appellant to rely upon a lack of reasoning before the Court of Appeal: *English v Emery Reimbold & Strick Ltd*

[2002] EWCA Civ 605,

[2002] 1 WLR 2409 . 86. In those circumstances we reject any suggestion that there has been any procedural irregularity. We turn next to the substance of Ground 2. 87. There is no challenge by the Appellant to paragraphs 5, 6, 8, 11 or 16 of Mr Chernukhin's amended affidavit (only to paragraphs 12 and 18). The Appellant also maintains that paragraphs 20 and 22 of the amended affidavit of Advocate Hurry waive privilege. Finally, the Appellant claims that paragraphs 9, 12 and 13 of Advocate Williams' amended affidavit waive privilege. 88. Advocate Cadin submitted that the relevant paragraphs of the Advocates' affidavits refer to their 'thought processes' when formulating and drafting the Representation of 28 June 2019 and their submissions at the hearing. These references to 'lawyers' working papers' amount to a waiver of litigation or legal advice privilege: Passmore, " Privilege ", 4th ed., at 2-194 to 2-195 and Thanki at 2.56. 89. As for the remaining paragraphs of the affidavits, Advocate Cadin submitted that the amendments are merely semantic ('form over substance') because they continue to maintain that (a) the advocates requested and obtained a cross-undertaking in damages from Mr Chernukhin , although Advocate Hurry took a deliberate decision not to offer such an undertaking to the Court and (b) Mr Chernukhin had received advice about the proposed redomiciliation and its effect, thereby referring to confidential communications between lawyer and client. 90. In essence, the Appellant argued that as the substance or content of instructions to and legal advice from lawyers has been revealed and relied upon, there has

been a waiver of collateral material and discovery should be ordered if the amended affidavits are allowed to stand. Just as the Deputy Bailiff had found a waiver of privilege and of all collateral material in the unamended affidavits, he erred in not making a similar finding in relation to the amended affidavits. The references have been included deliberately in order to fortify the Respondents' defence to the Appellant's claim. Advocate Cadin contended that the trial judge would be left with a partial and misleading picture if the amended affidavits were allowed to stand as the relevant evidence in chief and discovery is not ordered. Decision on the second ground of appeal 91. We begin by reminding ourselves, as the Deputy Bailiff did at paragraph 66 of the judgment, that "the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and

- (c) the particular context of the case in question. This is an acutely fact-sensitive exercise." 92. We also bear in mind that the Deputy Bailiff has allowed the Appellant to make such use of the affidavits originally filed by the Respondents (for example, the deletions therefrom) as he thinks fit at trial. 93. In light of the above and the Respondents' continuing disavowal of reliance on any privileged material, and subject to what we say at paragraph 96 below, we do not accept that there has been any waiver of privilege in the amendments sought. There has been no express reference to privileged material or positive reliance on the content of legal advice or other privileged material. 94. The amended affidavits of the advocates do no more than refer to the fact or effect of legal advice (which is not a waiver of privilege: see, for example, *Matthews & Malek* at 16.23; *Thanki* at 5.39; and two unreported decisions of the English Court of Appeal in *Government Trading Corporation v Tate & Lyle International Ltd*

[1984] WL 283024 and *Marubeni Corporation v Alafouz*

[1986] WL 408062, as well as *PCP Capital*

- [48] - [49], cited extensively by the Deputy Bailiff). Further, the Respondents have informed the Court that they are not now relying on the content of any privileged communications to advance their case, whatever the position may have been in September 2020. Paragraph 22 of Advocate Hurry's amended affidavit is careful not to state the instructions received from his client. We agree with the Respondents that Advocate Cadin's resort to 'thought processes' and 'euphemisms' betrays the weaknesses in the Appellant's submissions. Ms Berard's affidavits are not privileged, neither are publicly available practice notes or pro forma precedents. 95. The same goes for Mr Chernukhin's amended affidavit. This contains no more than narrative statements of fact about his own understanding and confirmation of his legal team's readiness to provide a cross-undertaking in damages if required. Again there is no reliance on the contents of any privileged communications. 96. We did have two concerns in relation to the amended affidavit of Mr Chernukhin. The first arises from paragraph 12 where he states "As before, my understanding was that there [were] no immediate concerns about the Redomiciliation or the impact that it might have on the value

of the underlying collateral". The second concern was in relation to paragraph 18: "Had an undertaking been required, I confirm that one would have been given, and that my legal team was in a position to do so at the hearing held on 28 June 2019". This may amount to a reference to communications between lawyer and client. It is very common for an advocate to inform a Court that he or she is instructed to give a cross-undertaking. We do not believe this would amount to a waiver of privilege, either because only the effect of the discussion is being referred to or because the discussion is not being relied upon. 97. As Waksman J observed in PCP Capital at [48] "it is not easy to find a succinct and clear definition of when [waiver] arises, going beyond general statements to the effect, for example, that the party alleged to have waived them has deployed them in some way as part of its case. But on any view in my judgment, first, the reference to the legal advice must be sufficient...and, second, the party waiving must be relying on that reference in some way to support or advance his case on an issue that the court has to decide". It would be surprising if the advocate's statement as postulated above was a waiver, but a statement from the advocate that he or she offered an undertaking on behalf of the party was not. As a result we have concluded that there is nothing in paragraph 18 which constitutes a waiver of privilege. 98. To meet the first concern in paragraph 12 Advocate Santos-Costa invited the Court, if necessary, to turn back the clock a second time and allow the Respondents to delete the offending words. We reject the Appellant's surprising submission that the Respondents must not be given an opportunity to re-amend the affidavit of Mr Chernukhin. It is obviously fair to the Respondents to allow them this opportunity and is in accordance with *Matthews & Malek* at 16.23 and 16.26, and *Thanki* at 5.33, 5.36-5.38 and 5.51.

Conclusion

99. The appeal is dismissed. The Advocates should agree a draft order, which should recite the Respondents' express disavowal of any intention to rely upon any privileged material at trial and record that the Appellant shall be entitled to make such use of the affidavits originally filed on 7 August 2020 and then amended on 30 September 2020 as he thinks fit at trial. 100. We are provisionally minded to order that the Respondents should have the costs of this appeal, to be assessed if not agreed. If, however, any party wishes to contend for a different order, we will consider on the papers any written submissions made within fourteen days from the handing down of this

judgment.

We would expect the parties to co-operate so that there should be a single exchange of written

submissions.

Authorities *Chernukhin and Anor v Deripaska and Anor*

[2021] JRC 039 . *Deripaska v Chernukhin and Navigator Equities Limited*

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