Neutral Citation Number: [2008] EWCA Civ 59

Case No: A2/2007/1881

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
MR JUSTICE PATTEN
2007/1881

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2008

Before :

LORD JUSTICE RIX
LORD JUSTICE JACOB
and
MR JUSTICE FORBES

- -

Between :

EXPANDABLE LIMITED & ANR	**Appellants**
- and -	
RUBIN	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
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Official Shorthand Writers to the Court)

Mr Daniel Lightman (instructed by **Messrs Goldkorn Mathias Gentle**) for the **Appellant**
Mr Hermann Boeddinghaus (instructed by **Messrs Edwin Coe**) for the **Respondent**

Hearing dates : 21st January 2008

- -

Judgment
As Approved by the Court

Lord Justice Rix :

1. What is involved in a document being "mentioned" in a statement of case or witness statement or the like? If a document is so mentioned, has privilege against its inspection been waived? These are the two questions which arise on this appeal. The provisions of CPR Part 31 are in issue.

2. The circumstances in which these questions arise do not much matter, but they are briefly these. Mr David Rubin, the respondent, is the supervisor of a failed IVA of the debtor Mr Martin Clarke, who is now a discharged bankrupt. There is a dispute as to whether Mr Rubin should transfer to the debtor's trustees in bankruptcy some £684,000 in his hands which represent the debtor's share of the sale and development of some land in Hendon, London (the "Hendon project"). A claim has in turn been made to that sum by Expandable Limited and Prime Trust Corporation Limited, two Gibraltar companies, who are appellants in this appeal (the "companies"). They say that in return for the advance to the debtor in 2001 of £245,000, they were to receive a secured 50% interest in the debtor's profit from the Hendon project. The debtor acknowledges the advance of the £245,000 from a Mr Robert Noonan, a Gibraltar resident, but not a proprietary interest by the companies in the project proceeds.

3. At one time Mr Rubin considered that it was not possible for him to reject the claim outright and he therefore sought the determination of the court under an application under section 363 of the Insolvency Act 1986. However, in due course he came to the conclusion that there was no proper basis for the companies' claim and that he did not need the assistance of the court. It was eventually agreed that the section 363 proceedings should continue but with the companies having carriage of the application as claimants in it. They are now appellants in this court, and Mr Rubin is the respondent.

4. In the course of Mr Rubin's enquiries into this matter, his solicitors, Messrs Edwin Coe, had interviewed the debtor. In particular, a Mr Ali Zaidi of that firm had interviewed the debtor on 19 December 2005. Mr Rubin referred to that interview in his second witness statement dated 21 February 2007. He said:

> "22. I confirm that the above-mentioned documents represent the totality of my written communications with the Debtor (including those of my Solicitors on my behalf) concerning the issue of the Expandable claim…
>
> 23. In particular it will be noted that there are several inconsistencies between

> Mr Clarke's note to me and what he told Mr Zaidi…I think it right I draw the Court's attention to the fact that after Mr Zaidi had interviewed Mr Clarke he [Mr Zaidi] *wrote to me enclosing a copy of his note of the meeting and drawing my attention to the discrepancies* (which, by the way, I did not think in any way assisted Prime/Expandable Trust with their claim)" (emphasis added).

5. The words emphasised are the basis of the dispute on this appeal. It is recognised that Mr Zaidi had enclosed his notes of interview under cover of a letter to Mr Rubin in which, as Mr Rubin said in his statement, Mr Zaidi had drawn attention to discrepancies between what the debtor had said at the December 2005 interview and what the debtor had said in his own note to Mr Rubin on an earlier occasion. The companies have disclosure of those notes of interview and of the debtor's own note to Mr Rubin. What they seek further is Mr Zaidi's covering letter. They plainly want to be able to determine for themselves whether the debtor's inconsistencies do or do not assist them in their claim to the funds held by Mr Rubin. In practice, however, it must be doubtful how disclosure of the covering letter would tell them anything more than they already have in the form of the underlying material.

6. It is nevertheless common ground that privilege would, subject to the arguments raised below and again on this appeal, attach to the solicitor's letter that Mr Zaidi had sent to his client, Mr Rubin. It is submitted, however, that such privilege has been waived and lost by mention of the letter in Mr Rubin's witness statement.

7. On 9 March 2007 the companies' solicitors, Messrs Goldkorn Mathias Gentle ("GMG"), wrote to Edwin Coe to request a copy of Mr Zaidi's letter, claiming a right of inspection pursuant to CPR 31.14(1)(b). On 26 March 2007 Edwin Coe replied to say –

> "The document you have requested is privileged and there has been no waiver of that privilege simply by reference to it in a witness statement."

On 28 March 2007 Edwin Coe again wrote:

> "As we have stated previously, mere reference to a document in a witness statement does not in itself waive privilege."

8. On 5 April 2007 the companies applied for disclosure of the covering letter, citing inter alia a right of inspection under CPR 31.15. Their application came before Registrar Simmonds who, in a reserved judgment dated 21 June 2007, refused it. He held that "he

wrote to me" did not amount to mention within the meaning of CPR 31.14. Even if it did, he observed "in passing" that such mention would not have waived privilege. He did not elaborate that second point, but as to the first he said this:

> "The communication is imprecise. It does not say whether it is a letter or email. It is not mentioned by date. The wording is explanatory of process rather than being mentioned in a specific and direct form."

9. There was an appeal by the companies to Patten J, whose judgment was given on 24 July 2007, [2007] EWHC 2463 (Ch). He came to the same conclusions. He referred to the corresponding provisions under RSC Order 24, rule 10 and to relevant jurisprudence, and rejected the submissions made by Mr Daniel Lightman on behalf of the companies that the detailed provisions of CPR Part 31 demonstrated a fundamental change in approach. He agreed with Registrar Simmonds that there had been no mention of any document in the witness statement and that even if there had, there had been no waiver of privilege. As to the first point, he said –

> "33. As Mr Registrar Simmons pointed out, the term "wrote" could connote a number of different types of document, not just a letter, nor were the contents of the letter relied on in themselves."

10. As for waiver of privilege, Patten J rejected the submission that the general provisions of CPR 31.19 relating to a claim for privilege did not apply equally to documents for which there might otherwise be a right of inspection by reason CPR 31.14. He referred to *Buttes Gas and Oil Company v. Hammer (No3)* [1981] QB 223 (CA), decided under the old law, for the proposition, which he considered to remain good under the CPR regime, that bare reference to a document in a pleading did not waive any privilege attached to it. In as much as it was also submitted to him that Mr Rubin's witness statement had gone beyond bare mention and amounted to a deployment of the contents of the covering letter and on that broader ground amounted to a waiver of privilege, he decided otherwise.

11. The appeal to this court is now a second appeal, for which permission has been given by Sir John Chadwick, who correctly observed that important points of principle or practice were involved in the interpretation and application of Part 31. However, he refused permission to appeal on the separate ground that, even if there was mention of a document but no automatic waiver of privilege, nevertheless there had been waiver in this particular case. We are therefore concerned only with the two issues: (1) Was a document mentioned in Mr Rubin's witness statement for the purposes of CPR 31.14? (2) If so, was that an automatic waiver of privilege?

The provisions of CPR Part 31

12. The focus of Mr Lightman's submissions for the companies is on CPR 31.14 and 31.15, but it is necessary to see those provisions in a wider context within Part 31 as a whole. Thus Part 31 provides –

> "31.1–(1) This Part sets out rules about the disclosure and inspection of documents…
>
> 31.2 A party discloses a document by stating that the document exists or has existed.
>
> 31.3–(1) A party to whom a document has been disclosed has a right to inspect that document except where –
>
> …
>
> (b) the party disclosing the document has a right or a duty to withhold inspection of it;…
>
> 31.4 In this Part –
>
> "document" means anything in which information of any description is recorded…
>
> 31.10–(1) The procedure for standard disclosure is as follows.
> (2) Each party must make, and serve on every other party, a list of documents in the relevant practice form…
> (4) The list must indicate –
>
> (a) those documents in respect of which the party claims a right or duty to withhold inspection…
>
> (Rule 31.19(3) and (4) require a statement in the list of documents relating to any documents inspection of which a person claims he has a right or duty to withhold.)…
>
> 31.12–(1) The court may order specific disclosure or specific inspection…
>
> 31.14–(1) A party may inspect a document mentioned in –
>
> (a) a statement of case;
> (b) a witness statement;
> (c) a witness summary; or
> (d) an affidavit
> (e) [Revoked]
>
> (2) Subject to rule 35.10(4), a party may apply for an order for inspection of

any document mentioned in an expert's report which has not already been disclosed in the proceedings.
(Rule 35.10.4 makes provision in relation to instructions referred to in an expert's report.)

31.15 Where a party has a right to inspect a document –

(a) that party must give the party who disclosed the document written notice of his wish to inspect it;

(b) the party who disclosed the document must permit inspection not more than 7 days after the date on which he received the notice; and

(c) that party may request a copy of the document…

(Rules 31.3 and 31.14 deal with the right of a party to inspect a document.)…

31.16–(1) This rule applies where an application is made to a court under any Act for disclosure before proceedings have started…

(4) An order under this rule must –

…

(b) require him, when making disclosure, to specify any of those documents –

…

(ii) in respect of which he claims a right or duty to withhold inspection…

31.17–(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party…

(4) An order under this rule must –

…

(b) require the respondent, when making disclosure, to specify any of those documents –

…

(ii) in respect of which he claims a right or duty to withhold inspection.

31.19–(1) A person may apply, without notice, for an order permitting him to withhold disclosure of a document on the ground that disclosure would damage the public interest…

(3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document must state in writing –

(a) that he has such a right or duty; and

(b) the grounds on which he claims that right or duty.

(4) The statement referred to in paragraph (3) must be made –

(a) in the list in which the document is disclosed; or

(b) if there is no list, to the person wishing to inspect the document.

(5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld…

(8) This Part does not affect any rule of law which permits or requires a document to be withheld from disclosure or inspection on the ground that its disclosure or inspection would damage the public interest…

31.21 A party may not rely on any document which he fails to disclose or in

respect of which he fails to permit inspection unless the court gives permission.

31.22–(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where…"

13. CPR 31.14(2) cross-refers to CPR 35.10(4). CPR 35.10 is concerned with the contents of experts' reports and provides in part:

"(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.
(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions –
(a) order disclosure of any specific document; or
(b) permit any questioning in court, other than by the party who instructed the expert,
unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete."

14. Thus, in brief: the definition of "document" is very broad; the rules distinguish between disclosure and inspection; disclosure gives a right of inspection, but in general subject to savings in favour of the public interest and of privilege (rule 31.19). Mention of a document within rule 31.14 appears to be treated as a species of disclosure giving a right of inspection. However, there is no cross-reference in rule 31.14 to rule 31.19, in the way that there is in rule 31.3 (and, implicitly, in rule 31.16(4)(b) and rule 31.17(4)(b)(ii)). Even so, the question of privilege is, obliquely, addressed in rule 31.14 by means of the cross-reference to CPR 35.10(4) in relation to documents mentioned in an expert's report, but not otherwise. Rule 31.14 was amended in 2001 by the introduction of rule 31.14(2) and the deletion of reference to an expert's report in rule 31.14(e). However, this amendment appears to have been more a matter of form than substance, because rule 31.14(e) had previously provided –

"subject to rule 35.10(4), an expert's report.
(Rule 35.10(4) makes provision in relation to instructions referred to in an expert's report)"

The previous regime under RSC order 24, rule 10

15. Because much of the jurisprudence considered by the judge below and cited again in this court concerned the previous regime under RSC order 24, rule 10, it is necessary to set out the terms of that rule:

> "10.–(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any party in whose pleadings, affidavits or witness statements reference is made to any document requiring him to produce that document for the inspection of the party giving notice and to permit him to take copies thereof.
> (2) The party on whom a notice is served under paragraph (1) must, within four days after service of the notice, serve on the party giving the notice a notice stating the time within seven days after the service thereof at which the documents, or such as them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds."

16. RSC order 24, rule 9 was the general rule which provided for inspection of documents referred to in a list, and rule 11 was the rule which provided for a court order for the production for inspection of any documents which a party was required to produce under either rules 9 or 10. Rule 11(1) expressly contemplated that the party of whom production was expected could object to such production, for it provided that –

> "11.–(1) If a party…objects to produce any document for inspection…then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order for the production of the documents in question…"

Rule 13(1) there mentioned stated that no order for production of any documents should be made unless the court was of the opinion that the order was necessary for disposing fairly of the case or for saving costs (see also rule 8 to similar effect). Rule 11(1) did not expressly cross-refer to rule 13(2), which nevertheless in general terms recognised a claim of privilege against production for inspection. Rule 5 had meanwhile provided that a claim for privilege "must be made in the list of documents with a sufficient statement of the grounds of privilege".

17. It may be observed that RSC order 24, rule 11, unlike CPR 31.14 or 31.15, makes express reference to a claim for privilege being made in answer to a notice to inspect a document under rule 10. It may also be observed that RSC order 24, rule 10 uses the language of "reference is made to any document", whereas CPR 31.14 speaks of documents "mentioned in" witness statements and the like. Whatever might be the significance, if any, of the latter change, it may also be noted that the heading of CPR 31.14 retains the language of reference, thus – "Documents referred to in statements of case, etc".

Issue (1): was there mention of a document in Mr Rubin's witness statement?

18. On behalf of the companies, Mr Lightman submitted that the language "he wrote to me enclosing a copy of his note of the meeting and drawing my attention to the discrepancies" mentioned a document, namely Mr Zaidi's covering letter. He was content to assume that the test developed under RSC order 24, rule 10 of asking whether there had been a "direct allusion" to a document still remained the correct test. On behalf of Mr Rubin, however, Mr Hermann Boeddinghaus submitted that such a test excluded any documents which might merely be inferred but had not been specifically identified. Although it might be possible to infer, even to a high degree of probability, that Mr Zaidi had written a letter, nevertheless no letter was mentioned or referred to as such, and for all one knew Mr Zaidi had written not a letter but an e-mail.

19. We were referred by the parties to the following jurisprudence. In *Dubai Bank Ltd v. Galadari (No 2)* [1990] 1 WLR 731, where RSC order 24, rule 10 was in issue, the language being considered was "instrumental in setting up a discretionary trust", "with a guarantee" and "by virtue of a mandate from the account holders". Did these phrases refer to documents? This court held that there was no such reference in the first phrase, since in its context that merely referred to the setting up of a trust, not the actual execution of a document; but that the second and third phrases did refer to documents by way of guarantee and mortgage respectively. Slade LJ, who gave the judgment of the court, reasoned the matter as follows. First, he acknowledged that a reference might be compendious rather than to individual documents (at 738C). He then contrasted the case where a transaction is referred to and a document is specifically mentioned. In the former case, such as in the phrase "the property Blackacre was conveyed by A to B", it may be more or less certain that the transaction was effected by a document, but even so none had been referred to. Counsel had made "the broad submission that, if an affidavit refers to a transaction which on the balance of probabilities will have been *effected* by a document, that must involve a reference to such document for the purpose of the rule", but Slade LJ said that that broad submission could not be accepted, and continued (at 739A):

> "It seems to us to involve reading the phrase "reference is made to any document" as including *reference by inference*. This we do not regard as the natural and ordinary meaning of the phrase. To our minds, the phrase imports the meaning of a *direct allusion* to a document or documents."

He also spoke of "the real difference between a reference to the effect of a document and the contents of a document" (at 739H). It would appear that the latter would come within the rule.

20. It appears therefore that a reference to a conveyance, guarantee, mandate or mortgage (another example given by Slade LJ at 740F) would be a reference to a document, as

would reference to the contents of such documents: but that mere reference to the *effect of* some transaction or document, such as to say that a property was conveyed or that someone had guaranteed a loan would not be sufficient.

21. Two decisions at first instance on CPR 31.14 and its phrase "a document mentioned in" have been drawn to our attention. In *Vardinoyannis v. Ansol Ltd* (unreported, 23 May 2001) Blackburne J had to consider the significance of the fact that a deponent had deleted earlier references to documents in an affidavit. He referred to *Dubai Bank v. Galadari (No 2)* and commented that he did not consider that there was any material difference between the expression "reference is made to a document" in RSC order 24, rule 10 and the expression "a document mentioned" in CPR 31.14. In *Rigg v. Associated Newspapers* [2003] EWHC 710 (QB), [2003] All ER (D) 97 Gray J was concerned with a defence which had set out at length and in quotation marks the contents of an interview which the defendants' journalist had conducted with the claimant. It was submitted that thereby mention had been made of the journalist's interview notes, inspection of which was therefore sought. However, Gray J, adopting Slade LJ's test of direct allusion, held that any such notes (to which reference had in fact been made in correspondence) were not directly alluded to in the defence. Gray J said (at para 13):

> "There is no reference in the Defence to the notes as such and certainly no direct and specific reference…It does not appear to me that quoting from a document amounts to mentioning or directly alluding to it."

22. As often in this area, some fine distinctions may arise. Thus it appears to make all the difference whether the reference is to the fact or effect of a guarantee or to the guarantee itself. Slade LJ contemplated that reference to the contents of a document would be within the previous rule, but Gray J considered in *Rigg* that quoting from a document was not the same as mentioning or directly alluding to it.

23. I am content to assume that there is no effective or substantive difference in the meaning of the previous and the present rule. I am content to adopt the test of direct allusion as an elucidation of the present rule's language which speaks of "mentioned". Nevertheless, the rule is in terms of "mentioned", and any gloss can only be by way of elucidation. I am inclined myself to think that the change in the rule's language from "reference is made" to "mentioned" does underline two matters. The first is to confirm the test of "direct allusion" or, to use another gloss used by Slade LJ, "specifically mention". This is because the expression "refer" or "reference" is ambiguous between a direct or an indirect reference. *Dubai Bank v. Galadari (No 2)* determined that the reference must be direct or specific: hence "specifically mention" and "direct allusion". I think this is underlined by the current expression "mentioned".

24. The second matter is that, subject to my first comment, the expression "mentioned" is as general as could be. This is not to my mind intended to be a difficult test. The document in question does not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be mentioned. Subject to Mr Lightman's second point, that the mention of a document within CPR 31.14 amounts to automatic and absolute waiver of privilege in it, which if correct would give to that rule a most important effect, I do not see why there should be need for a strict approach to a request for inspection of a specific document mentioned in one of the qualifying documents. The general ethos of the CPR is for a more cards on the table approach to litigation. If a party thinks it worthwhile to mention a document in his pleadings, witness statements or affidavits, I do not see why, subject as I say to the question of privilege, the court should put difficulties in the way of inspection. I look upon the mention of a document in pleadings etc as a form of disclosure. The document in question has not been disclosed by list, or at any rate not yet, but it has been disclosed by mention in what, for the purposes of litigation, is another important and formal category of documents. If so, then the party deploying that document by its mention should in principle be prepared to be required to permit its inspection, and the other party should be entitled to its inspection. What in such circumstances is the virtue of coyness?

25. In the present case, the expression which we have to consider begins "he wrote to me". The courts have not before had to consider such a formula for these purposes. Registrar Simmonds and Patten J considered that this expression fell on the wrong side of the line. However, in my judgment "he wrote" is not a mere reference to a transaction otherwise to be inferred as effected by a document, as in "he conveyed" or "he guaranteed", but is a direct allusion to the act of making the document itself. It is the same as saying "he wrote a writing". Suppose the question was whether there had been a direct allusion to a telephone call in the expression "I telephoned him that day": in my judgment it would make no difference whether the expression was "I telephoned him" or "I made a telephone call to him", in either case there would be a direct allusion to the telephone call. Suppose the expression was "I recorded and transcribed our telephone call that day": there would be a direct allusion to the transcript in question. If in *Rigg* the defence had said that the journalist had "written up the interview", there would have been a direct allusion to that document. In all these expressions, the making of the document itself is the direct subject matter of the reference and amounts in my judgment to the document being "mentioned". "Document" is defined as "anything in which information of any description is recorded". If one then asks whether the expression "he wrote to me…drawing my attention to the discrepancies" makes mention of "anything in which information of any description is recorded", I would find it hard to explain why it does not. I observe that Mr Rubin's solicitors had just the same reaction, because they twice wrote in terms which, while denying any waiver of privilege, accepted that there had been reference to a document in the witness statement (see at para 7 above).

26. Mr Boeddinghaus submitted that it made a difference that the writing in question might have been an e-mail rather than a letter. This appears to have influenced both courts below. In fact, it was common ground that there was a covering letter (as Patten J

remarked). In any event, in my judgment it makes no difference: both are documents, and as long as there could be no confusion as to the document there would be nothing in that point to prevent a direct allusion. It might have been different if there had been both a covering letter and an e-mail, and only one or the other had been mentioned: that would not be a mention of the other. In this case, however, there could be no uncertainty as to the writing of which the witness statement made mention.

27. Subject, therefore, to a possibility that this reasoning would have to be revisited on the basis that the test in CPR 31.14 should be a strict one, in order to guard against the casual mention of documents whose privilege would thereby be automatically and absolutely waived, I would therefore conclude that the covering letter was mentioned in Mr Rubin's witness statement.

Issue 2: Was mention of the letter an automatic and absolute waiver of privilege?

28. Mr Lightman developed a powerful submission based on the terms of CPR Part 31 to the effect that the rule-makers had deliberately decided to depart from the former law under RSC Order 24 in order to make a right of inspection under CPR 31.14 supersede any ability otherwise to claim privilege. On this basis, mention of a document in one of the relevant categories of documents operated as an automatic and absolute waiver of privilege. In this connection he was able to point to the absolute terms of rules 14 and 15 (subject to the specific and narrow rule 14(2) exception in relation only to documents mentioned in an expert's report), and to counter-point the presence in rules 3(1)(b) and 10(4)(a), but not in rule 14, of an express reference to a right or duty to withhold inspection, as well as to cross-references to rule 19. (A similar point could be made about rules 16.4(b)(ii) and 17.4(b)(ii).) He was also able to show that for the purposes of RSC order 24, rule 10 express allowance had been made in rule 11(1)(b) for the case where a party "objects to produce any document for inspection". That had disappeared from CPR 31.14/15. The waiver, although automatic, was understandable because the party mentioning the document and thus waiving privilege had an unfettered choice to decide for itself what it wished to do. It could mention and waive privilege, or not. What it could not do was both to rely on a document and claim privilege in respect of it. He was prepared to allow, nevertheless, that during the seven days in which a rule 15 notice required inspection the party mentioning the document had an opportunity to withdraw, by deleting its mention and thereby dispensing with its waiver of privilege.

29. Mr Boeddinghaus, on the other hand, submitted that rule 19 was of general application, and that in particular rules 19(3) and 19(4)(b) permitted a party against whom inspection was sought to object to inspection even "if there is no list", as for instance where inspection is sought on the basis of a rule 14 mention. That was a matter of interpretation of the rules. More fundamentally, however, the substantive change from

the previous regime in respect of so important a right as privilege could not be left to a mere inference, either from the rules of CPR Part 31 themselves or from any change of language as between Part 31 and the previous regime under RSC Order 24. If mention of a document was to be an absolute waiver, then that had to be done by express language, if that was even possible as being within the powers of the rule-makers, which he submitted it was not.

30. While it must be remembered that the rules are now in different terms to what they were, it is necessary and helpful to start with the relevant jurisprudence under the RSC regime. In *Buttes Gas and Oil Co v. Hammer (No 3)* [1981] 1 QB 223 certain documents had been referred to in the plaintiff's pleadings of which inspection was sought. The plaintiffs relied on public interest privilege and legal professional privilege to resist inspection. The right to privilege was contested. The defendant submitted that in any event privilege had been waived by reference to the documents in the pleadings. The members of this court each spoke in somewhat different terms on that latter question: but the upshot was that mere reference to documents in the pleadings was not a waiver. Thus Lord Denning MR said (at 246F):

> "In general, it is clear that if a party refers in his pleading to a document, the other side are entitled to require it to be produced, see R.S.C., Ord. 24, r. 10(1) and (2); but it is open to the pleader to object to its production, see R.S.C., Ord. 24, r. 11(1)(a).
>
> Buttes in their amended reply and defence to counterclaim referred to a number of documents. By pleading them, Buttes show that they intend to rely on them. They should make them available for production. If and in so far as they contend that those documents are the subject of a privilege, they should amend their pleading by striking out all reference to them."

31. Donaldson LJ said (at 252E/F):

> "It must be right that a bare reference to a document in a pleading does not waive any privilege attaching to it as otherwise there would be no scope for taking objection under R.S.C., Ord. 24, r. 11(i), when a notice was served under rule 10(1). If, on the other hand, a document is reproduced in full in the pleading, its confidentiality is gone and no question of privilege could arise. Where the line is to be drawn between these two extremes may be a matter of some nicety, but I do not think that it is necessary to reach a conclusion in the present case which does not, in my judgment, turn on so narrow an issue as waiver in relation to the few documents which are referred to in the pleadings."

32. Brightman LJ said (at 268C/D):

> "So far as waiver by pleading is concerned, I agree with the judge that reference to a document or to its contents in a pleading does not waive any legal professional privilege attached to it. It is to my mind equally clear that a party cannot rely on a privileged document so pleaded without thereby waiving privilege. Therefore sooner or later Buttes will have to decide whether to forego privilege in respect of a privileged document which is pleaded, or to abandon reliance on it. If they sit on the fence until the trial (if any) begins or is in actual progress, they will do so at their own risk. Circumstances might arise in which the other side could properly claim to be entitled to an adjournment at Buttes' expense. Whether Buttes could force Occidental to step down from the fence prior to trial by an application to strike out a pleaded document in respect of which privilege is maintained does not arise for decision on this appeal, but I would think that Occidental might be able to do this."

33. That was the position under the RSC regime, where, as Lord Denning and Donaldson LJ each remarked, the rules themselves demonstrated that the party asked for inspection of a document referred to in a pleading could object to its production. A more modern authority, under the CPR regime, is *Lucas v. Barking, Havering and Redbridge Hospitals NHS Trust* [2003] EWCA Civ 1102, [2004] 1 WLR 220. That concerned expert reports which referred to other documents of which inspection was sought under CPR 31.14(2). Inspection was resisted on the ground that the documents in question fell within CPR 35.10(3) and (4) as part of the instructions given to the experts and thus subject to the limitations on waiver of privilege contained in rule 35.10(4). This court sustained the claim to privilege. In the course of the hearing, however, there was some albeit incomplete discussion of the general effect of CPR 31.14 on the maintenance or waiver of privilege. Thus Waller LJ said this:

> "[24] Where there is a right to inspect without application, and without the right being subject to r 35.10(4), it is not absolutely clear whether a party is still entitled to refuse inspection on the grounds of privilege. There is a suggestion in *Hollander and Adam's Documentary Evidence* 7th ed (2000), para 13-14 that CPR r 31.14(1) provides an absolute right to inspection. The suggestion is that CPR r 31.21 then acts as a sanction disallowing the party who has refused inspection from using the document referred to. I have my doubts as to whether that is right. It seems to me unlikely that the CPR would have intended to abolish privilege at a stroke under CPR r 31.14(1) without expressly saying so. In relation to 'instructions' in experts' reports CPR r 35.10(4) expressly refers to there being no privilege and if privilege was to be lost I would expect express reference to that result. There is no indication that there was an intention to revoke privilege in all other cases. In addition if privilege has been waived by deployment of the contents of a privileged

> statement, it is not a satisfactory sanction that a party should simply be precluded from relying on the document of which it is not allowed inspection. If a party has in fact waived privilege, the other party should be entitled to use the documents then disclosable for its own purposes.
>
> [25] …However, the question whether there was an absolute right to inspection under CPR r 31.14(1)(a)-(d) was not fully argued out before us. It is possible that on a proper construction of r 31.14 there is a right to refuse inspection on the grounds of privilege even if documents are referred to in a statement of case, a witness statement, a witness summary or an affidavit. CPR r 31.15 appears in broad terms to refer to a party's right to inspect without any right to refuse to do so but in parenthesis at the end of the rule it says: "Rules 31.3 and 31.14 deal with the right of a party to inspect a document". By bringing in CPR r 31.3 at that stage it is possible that the draughtsmen contemplated that a party may be able to refuse disclosure on the grounds that it has "a right" to do so under CPR r 31.3(1)(b) allowing for the matter to be argued out as to whether reference to the document or deployment of its contents has waived the privilege."

34. Laws LJ expressed himself provisionally but in strong terms as follows:

> "[44] Although, as Waller LJ has pointed out in para 25, the matter has not been fully argued before us, and thus no doubt it would be wrong to express a concluded view, for my part I would have very great difficulty in accepting that CPR rr 31.14(1)(a)-(d) confer an absolute right to inspect, thus abrogating privilege otherwise inherent in any document there referred to. Such a construction would require very clear words. The sub-paragraphs are not generally concerned with documents which would attract privilege, and so have ample scope to operate without the assumption of any incursion into the law of privilege. It is inconceivable that they abrogate the impact of public interest immunity, which presumably they would if they created absolute rights. And it would be quixotic if documents whose privilege is expressly withdrawn (rule 35.10(4)) were subject only to limited rights of disclosure but those (rule 35.14(1)) whose privilege is only impliedly withdrawn were liable to be inspected without restriction."

35. In *Zuckerman on Civil Procedure*, 2006, at para 14.30, the opinion is expressed in relation to *Lucas* that –

> "The better view is that a precise and specific mention of a document in a statement of case and the like amounts to a waiver of the privilege."

However, no reason is given for that opinion. *Disclosure*, by Matthews and Malek,

2007, however, appears to be of a different view, for at para 9.04 at pp 217/218, the following appears:

> "Once it is shown or admitted that a document is mentioned in a statement of case, a witness statement, a witness summary, an affidavit or an expert's report, the onus is on the party against whom the application is made to produce it unless he can show good cause why he should not"

citing *Quilter v. Heatly* (1883) 23 Ch D 42 at 51. (That, however, concerned a rule which spoke in terms of "other sufficient cause for not complying with such notice" at 46.) The special position of expert's reports under CPR 35.10 is then addressed. The authors of *Disclosure* deal specifically with the question of privilege in relation to documents within CPR 31.14 again at paras 12.19/24. The general position taken there, again by reference to authorities preceding the CPR regime, is that a mere reference to a privileged document does not of itself amount to a waiver of privilege, although the deployment of its contents may be. In essence, the authors do not regard the position as having changed with the new regime.

36. If the arguments were confined to a careful analysis of the language of the new CPR regime as compared with that of the old rules in RSC Order 24, I can see that there is much to be said for Mr Lightman's submissions. Waller LJ in *Lucas* canvassed the possibility that the solution was to be found in the cross-reference in CPR 31.15 to rules 31.3 and 31.14. But Mr Lightman pointed out that whereas rule 31.3 allowed expressly of the taking of objection on the ground of a right or duty to withhold inspection, rule 31.14 said nothing about this – save to a limited degree via cross-reference to rule 35.10 in the sole case of documents mentioned in an expert's report. And although rule 31.19(4)(b) might have been designed to maintain a right of objection "if there is no list" in the case of a rule 31.14 right of inspection, Mr Lightman was able to show that there could be other circumstances where there was a right of inspection in the absence of a list, so that there was no necessity to ascribe rule 19(4)(b) to our case.

37. Nevertheless, in my judgment these factors, influential as they are, are not as powerful as the contrary arguments. I would describe these as follows. First, Mr Lightman was unable to provide a solid, if any, reason why the drafters of the CPR, in contra-distinction to the previous law, should have decided to require the automatic and absolute waiver of privilege as the price for the mere mention of documents in statements of case and the like. Secondly, there is nothing in Part 31 itself to explain this change of philosophy. Mr Lightman attempted to meet these points, on which Patten J had remarked in his judgment, by submitting that the party subject to a rule 31.14 right of inspection has a seven day *locus poenitentiae* during the rule 31.15 notice period, in which he may decide to withdraw and delete his reference to the documents whose inspection is in the progress of being sought. The difficulties with this suggestion, however, are that rule 31.15 says nothing to this effect; and it is not obvious how privilege once waived can be reacquired. Moreover, the effect of this submission is that mention of documents within rule 31.14 is no longer to be regarded as an automatic and absolute waiver of privilege.

38. Thirdly, the change mooted in the philosophy of CPR Part 31 is to the effect that, apparently for the first time in the history of English litigation, the fundamental protection of privilege is automatically abandoned by the mere mentioning of documents. I would respectfully agree with the albeit provisional views of Waller and Laws LJJ in *Lucas* that such a fundamental change should not be regarded as having been effected by mere inference. The role of privilege as "a fundamental condition on which the administration of justice as a whole rests" (*per* Lord Taylor of Gosforth, *R v. Derby Magistrates' Court, ex p B* [1996] 1 AC 487 at 507) needs no emphasis. Its importance is such that a provision in CPR 48.7(3) requiring the disclosure of privileged documents in the context of applications for wasted costs orders has been held to be *ultra vires* of the statute under which the CPR were made, being the Civil Procedure Act 1997: see *General Mediterranean Holdings SA v. Patel* [2000] 1 WLR 272. Toulson J there quoted and applied in this context Lord Hoffmann's words in *R v. Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115 at 131 that

> "Fundamental rights cannot be overridden by general or ambiguous words… In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

Toulson J also quoted Steyn LJ, delivering the judgment of this court in *R v. Secretary of State for the Home Department, ex p Leech* [1994] QB 198, where he said at 211:

> "Legal professional privilege is therefore based on an important auxiliary principle which serves to buttress the cardinal principles of unimpeded access to the court and to legal advice. It is not without significance that counsel could not refer us to a single instance where subordinate legislation was employed, let alone successfully employed, to abolish a common law privilege where the enabling legislation failed to authorise the abolition expressly."

39. Fourthly, ultimately there is no sufficient reason, especially in this context, why CPR 31.19 should not be read as having general application, whether or not a previous rule within Part 31 should have referred expressly to a right to object to inspection or should have expressly cross-referred to it. One strong indication of this is that rules 19(1) and 19(8) concerning public interest immunity seem to be of quite general application. In my judgment CPR 31.19(4)(b) appears to be well designed for the situation where disclosure is made by mentioning a document within CPR 31.14. For all that CPR 31.15 appears to be absolute in terms ("must permit inspection"), it is not, as the cross-reference to rule 31.3 (with its allowance for claims of privilege) alone demonstrates.

40. Fifthly, one possible reason why CPR 31.14 itself does not expressly cross-reference to rule 19 is that rule 14 is viewed as merely an adjunct to CPR 31.3, so that a further

cross-reference is unnecessary. In this connection it will be observed that rule 3 is of general application whenever "a document has been disclosed". Although disclosure generally takes place by list under rule 10, it also takes place by virtue of the mention of documents within rule 14. Thus rule 14 disclosure (with its ancillary right to inspect) is merely a species of disclosure and comes within the general provisions of rule 3. That appears to have been the view of this court in *SmithKline Beecham plc v. Generics (UK) Ltd* [2003] EWCA Civ 1109, [2004] 1 WLR 1479, albeit there the point arose not in the context of an argument about privilege, but in the context of an analogous issue as to whether documents mentioned within rule 14 and thereupon provided to the other party were "disclosed" for the purposes of CPR 31.22 and therefore confidential to the proceedings save (inter alia) with the leave of the court. It was argued that such documents were not "disclosed" within rule 22, because they had been produced voluntarily (at para 28). However, this court concluded that such documents were still "disclosed". Aldous LJ said (at para 29):

> "29. I agree with Mr Turner that CPR Pt 31 is a complete code, but I reject his submission that that code perpetuated in all respects the distinction between documents disclosed in a list of documents and those that might be disclosed in another way. The obligation to disclose and the ability to inspect are dealt with separately as is the ability to use a document after disclosure. CPR r 31.3 is concerned with disclosed documents but reserves an ability to refuse inspection. CPR r 31.14 adds to CPR r 31.3. In any case the wide definition in CPR r 31.2 must be determinative. That states that "A party discloses a document by stating that the document exists or has existed". No distinction is sought to be drawn between documents obtained from third parties and no limitation is placed on the way that the statement is made. In my view a reference by a party to a document in a witness statement is a statement that the document exists. I therefore reject Mr Turner's application. It follows that the judge was right to consider the application by Generics as an application under CPR r 31.22(2)."

Chadwick and Latham LJJ agreed.

41. That is tantamount to a decision that the letter in our case was disclosed for the purposes of rule 3. Rule 3, which is expressed in general terms and is not confined to disclosure by list, states that the right to inspect (which is further developed in rule 15) is subject to a claim to a right or duty to withhold inspection. Rule 15 cross-refers to both rule 3 and rule 14. Thus what might appear to be an "absolute" right to inspect for the purposes of rules 14 and 15 is in fact a qualified right, by reference to rule 3. This would of course be wholly consistent with the view that rule 19 is of general application. It is also consistent with my untutored view (see para 14 above) that mention of a document is a species of disclosure.

42. Sixthly, for these reasons the contemplation of the qualified rights of privilege dealt with in CPR 35.10(4) and to which rule 14(2) makes reference throws no light on the role of the principles of privilege in relation to documents mentioned otherwise than in

an expert's report. No inference can be drawn therefore from the provisions of rule 14(2). Moreover, the detailed provisions in relation to privilege in relation to an expert's report in any event needed to be separately addressed, requiring cross-reference to CPR 35.10, since that is where this issue in the case of experts' reports is dealt with. Even so, CPR 35.10 deals only with the role of privilege in relation to "instructions". It does not deal with the role of privilege in relation to documents mentioned in an expert's report wholly generally. Therefore, outside the scope of CPR 35.10, the position of documents mentioned in an expert's report is the same as in the case of documents mentioned in a statement of case, a witness statement, a witness summary or an affidavit. Laws LJ's observations in *Lucas* ("it would be quixotic if…") are therefore particularly pertinent.

43. In the circumstances, it is unnecessary to consider whether a provision impliedly leading to the automatic and absolute loss of privilege merely by virtue of the mention of documents in other specified categories of documents, however slight the reference and whether or not the mentioned documents are deployed in the litigation, would have been *ultra vires*. It is also unnecessary to revisit issue 1.

Conclusion

44. For these reasons, I conclude that the covering letter was mentioned in Mr Rubin's second witness statement, but that privilege for it was not thereby automatically and absolutely lost. I would therefore dismiss the appeal.

LORD JUSTICE JACOB:

45. I agree.

MR JUSTICE FORBES:

46. I also agree.