Neutral Citation Number: [2022] EWHC 1136 (Comm)

Case No: FL-2018-000019

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (QBD)
FINANCIAL LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 May 2022

Before :

THE HON MR JUSTICE ROBIN KNOWLES CBE

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Between :

LORELEY FINANCING (JERSEY) No 30 LIMITED	**Claimant/ Respondent**
- and -	
(1) CREDIT SUISSE SECURITIES (EUROPE) LIMITED **(2) CREDIT SUISSE INTERNATIONAL** **(3) CREDIT SUISSE SECURITIES (USA) LLC** **(4) CREDIT SUISSE AG**	**Defendants/ Applicants**

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Tamara Oppenheimer QC, Adam Sher and Marcus Field (instructed by **Cahill Gordon & Reindel (UK) LLP**) for the **Defendants**
Tim Lord QC and Fred Hobson (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**

Hearing dates: 24 November 2021

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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles CBE:

Introduction

1. The Defendants ("Credit Suisse") challenge claims by the Claimant ("Loreley") to legal professional privilege. For Loreley, Mr Tim Lord QC formulates the "central question" arising in these terms: "Is the identity of the persons who are authorised to give instructions to solicitors on behalf of a corporate client in ongoing litigation a matter which is covered by litigation privilege?".

2. Loreley's counsel and solicitors state that although previous authorities address matters which "bear at least some resemblance to the question in hand", they are aware of no authority or commentary which addresses this specific question, and that none is referred to by Credit Suisse. They describe Credit Suisse's position as "in effect, inviting the Court to create an exception to the application of [litigation privilege], such that it would cover all aspects of a party's preparation for litigation *except* the identity of the persons authorised to give instructions".

The litigation

3. The litigation concerns Loreley's purchase of notes ("the Notes") from the Third Defendant in 2007 for US$100 million. The Notes formed part of a CDO (collateralised debt obligation) transaction. They were linked to the credit of residential mortgage-backed securities (RMBS). Credit Suisse had been involved in the securitisation of a number of the RMBS.

4. Loreley alleges fraud in relation to the securitisation by Credit Suisse of the RMBS and in representations made to Loreley in the sale of the Notes. The causes of action advanced include fraudulent misrepresentation and unlawful means conspiracy. There are limitation issues, including what facts and matters relevant to its claim Loreley knew or could with reasonable diligence have discovered before November 2012 or 2015.

Loreley's knowledge: IKB and KfW

5. Although a company, Loreley is a special purpose vehicle. It has no employees. Its directors are "supplied" by a professional services company.

6. IKB Deutsche Industriebank AG ("IKB") was the sole "Liquidity Facility Provider" to Loreley, and Credit Suisse contends that Loreley is reliant on IKB for its record keeping. A subsidiary of IKB, IKB Credit Asset Management acted as Loreley's investment adviser in connection with the purchase of the Notes.

7. Another German bank, Kreditanstalt fur Wiederaufbau or KfW Bankengruppe ("KfW") rescued IKB in 2007 in the global financial crisis. Credit Suisse says that KfW took over as the "Liquidity Facility Provider" to Loreley. KfW became a creditor of Loreley with security over Loreley's assets which include this claim or its proceeds.

8. On Credit Suisse's case, on the question of knowledge, "the knowledge of IKB and KfW is … relevant, not least given that, in reality, all decisions by [Loreley] were made by IKB (albeit then formally approved by the professional directors)". In its Defence, Credit Suisse alleges that "KfW initiated and/or was otherwise involved in the decision to launch the present litigation and (it appears) may be providing instructions to RPC [Reynolds Porter Chamberlain LLP, Loreley's solicitors] on behalf of [Loreley]".

9. The parties are agreed that the question whether knowledge is capable of being attributed to Loreley in the context and for the purpose of this case is an issue to be resolved at trial and is not for determination now. The parties are aware that there are decisions in other cases that may or may not bear on that question in this case.

10. Through Mr Lord QC, Loreley queries whether the information sought by Credit Suisse is of any probative value in relation to the limitation issue. Nevertheless, Loreley accepts that the question who gives instructions on behalf of Loreley to RPC is "relevant as a building block (albeit a small one) for Credit Suisse's contention that the claims against it are time barred". Loreley recognises that if KfW/IKB provide instructions to RPC, Credit Suisse will seek to rely on this "as a badge of 'control' so as to argue that the knowledge of KfW/IKB is attributable to [Loreley]."

The information sought

11. A CPR Part 18 Request from Credit Suisse asked Loreley to confirm whether IKB decided to pursue this litigation and whether individuals at KfW were providing instructions to RPC in relation to this litigation.

12. Loreley's position in response is that the information sought is irrelevant and "by its nature, subject to legal professional privilege". Later exchanges, including by direction of the Court, did not resolve the matter but made clear that litigation privilege rather than legal advice privilege was the form of legal professional privilege on which Loreley placed primary reliance.

13. On this application, Credit Suisse seek Orders that "the names of the individuals who are, or have been, authorised to give instructions to RPC in relation to the litigation are not subject to [legal professional privilege]", that Loreley provide a full response to the relevant CPR Part 18 Request, and that certain documents provided by Loreley with redactions be provided without those redactions.

14. On 30 June 2021 following certain directions given by Picken J, Loreley gave early disclosure of documents described as follows by Loreley: (i) minutes of a

Loreley board meeting on 7 November 2018 to consider the issuance of the claim (ii) board approval instructing RPC to issue proceedings (iii) RPC's engagement letter with Loreley dated 12 November 2018 and (iv) minutes of a Loreley board meeting on 13 February 2020 to consider the filing/service of the present proceedings.

15. The disclosure was subject to redactions, including one made to the engagement letter on the basis that litigation privilege applied to text in that letter that referred to the identity of individuals who are entitled to provide instructions to RPC in relation to the litigation.

Legal professional privilege

16. Legal professional privilege "is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege" (Three Rivers DC (No. 6) v Bank of England [2004] UKHL 48; [2005] 1 AC 610 per Lord Carswell at paragraph [105]). The two sub-heads "have different characteristics" (SFO v Eurasian Natural Resources Corp Ltd [2018] EWCA Civ 2006; [2019] 1 WLR 791 per Sir Brian Leveson PQBD, Sir Geoffrey Vos CHC and McCombe LJ at [64]-[66]).

17. The requirements for litigation privilege may be taken to be as follows (Three Rivers DC (No. 6) (above) at [102] per Lord Carswell; see SFO v ENRC (above) at [64]-[66]):

> "… communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:
>
> (a) litigation must be in progress or in contemplation;
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> (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;
>
> (c) the litigation must be adversarial, not investigative or inquisitorial."

18. The elements of legal advice privilege may be taken to be as follows (Three Rivers DC (No. 6) (above) at [102] per Lord Carswell; see SFO v ENRC (above) at [64]-[66]):

> "… After examining the authorities in detail, Taylor LJ said, at p 330 [in *Balabel v Air India* [1988] Ch 317 (" *Balabel* ")]:
>
> > "Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal

> advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as 'please advise me what I should do'. But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context ."

In a later passage, at pp 331-332, relied upon by the Court of Appeal [2004] QB 916 as support for its conclusions Taylor LJ stated:

> "It follows from this analysis that those dicta in the decided cases which appear to extend privilege without limit to all solicitor and client communications upon matters within the ordinary business of a solicitor and referable to that relationship are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs. To speak therefore of matters 'within the ordinary business of a solicitor' would in practice usually have meant the giving of advice and assistance of a specifically legal nature. But the range of assistance given by solicitors to their clients and of activities carried out on their behalf has greatly broadened in recent times and is still developing. Hence the need to re-examine the scope of legal professional privilege and keep it within justifiable bounds."

I agree with the view expressed by Colman J in *Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow Holding* [1995] 1 All ER 976, 982 that the statement of the law in [*Balabel*] does not disturb or modify the principle affirmed in *Minter v Priest* [1929] 1 KB 655, that all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client."

19. As Hildyard J summarised in Re RBS Rights Issue Litigation [2016] EWHC 3161 (Ch); [2017] 1 WLR 1991 at [108]:

> "It is axiomatic that the burden of proving privilege falls on the party claiming it. The relevant principles are found in *West London Pipeline v Total* [2008] EWHC 1729 (Comm) *per* Beatson J (as he then was) at §86. In particular:
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> (1) A claim for privilege is an unusual claim in that the party claiming privilege and their legal advisers are judges in their own case, subject of course to the power of the Court to inspect the documents.
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> (2) For that reason, the Court must be particularly careful to consider the basis on which the claim for privilege is made.
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> (3) Evidence filed in support of a claim to privilege should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect."

Argument

20. For Credit Suisse, Ms Tamara Oppenheimer QC, with Mr Adam Sher and Mr Marcus Field, argues that because legal professional privilege protects communications not facts, the identity of the person giving instructions to a lawyer is not privileged. Credit Suisse, she argues, simply wants to know who was party to communications "privileged or otherwise" between RPC and Loreley. It does not seek any information as to the content of communications between solicitor and client.

21. Ms Oppenheimer QC acknowledges however, and in this connection, that "there may be exceptional cases in which the identity of a client can properly be said to form an integral part of a confidential communication".

22. Consistently, Ms Oppenheimer QC goes on to contend that no such exceptional circumstances apply in the present case. I should note that later, when dealing in her written argument with the subject of redactions, Ms Oppenheimer QC was to write in unqualified terms that litigation privilege "does not apply to lawyer-client communications" and that "no [legal professional privilege] of any kind attaches to the identity of those providing instructions to a lawyer" but I consider these passages best understood as impliedly subject to her acknowledgment mentioned at paragraph 21 above. That acknowledgement was, in my view, appropriate and required, as some of the authorities below show.

23. For Loreley, Mr Lord QC and Mr Fred Hobson argue that the identity of those who are authorised to provide instructions is itself an aspect of those instructions. It is, they argue, within a "zone of privacy" around a party's preparation for litigation that it is the purpose of litigation privilege to establish.

Decision

24. In the present case, it may be more helpful if I state my overall decision first, before going on to explain that decision by reference to the principal cases and texts I was taken to and arguments that were developed in writing or at the hearing.

25. In my judgment, the answer to the question whether the identity of a person communicating with a lawyer is privileged lies in whether two requirements are met. First, whether the communication is privileged. Second, whether that privilege will be undermined by the disclosure of identity sought. This answer applies as much where the person communicating does so as a person authorised to give instructions to the lawyer on behalf of the lawyer's client as where that person has a different role.

Examples from the cases

26. Examples of cases where the two requirements I have identified were not met are Bursill v Tanner (1885) 16 QBD 1 (where disclosure of the names of trustees seeking advice was required), Pascall v Galinski [1970] 1 QB 38 (where disclosure of the name of the lessee for which solicitors were acting was required) and R (Howe) v South Durham Magistrates Court [2004] EWHC 362 (Admin); [2005] RTR 4 (where disclosure was required on the point whether the solicitor's client in a later prosecution was the same client as in a previous prosecution).

27. In R (Miller Gardner Solicitors) v Minshull Street Crown Court [2002] EWHC 3077. Fulford J (as he then was, and sitting in a Divisional Court with Rose LJ, who agreed) said:

> "The enduring principle set out in R v Cox and Railton (1884) 14 QBD 153, and repeated down the years, is that a client must be free to consult his legal advisers without fear of his communications being revealed. It is therefore critical for the court to look at the purpose behind the communication, because the limitations on the situations properly covered by this legal concept mean that not every communication will attract privilege solely on the ground that it is made to a solicitor. …
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> …
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> [The decision of Lord Bingham in Rogers (below)] provides strong support, for the proposition that the provision of an individual's name, address and contact number cannot, without more, be regarded as being made in connection with legal advice. It records nothing which passes between the solicitor and client in relation to the obtaining of or giving of legal advice. Taking down the name and telephone number is a formality that occurs before the legal advice is sought or given. As my Lord (Rose LJ) observed

during argument, providing these details does no more than create the channel through which advice may later flow ….

It follows, in my judgment, that the identity of the person contacting the solicitor is not information subject to legal professional privilege and the telephone numbers of the brothers, equally, are not covered by this protection; neither are the dates when one or either of those men phoned the office. Moreover, the record of appointments in the office diary and attendance notes, insofar as they merely record who was speaking to the solicitor and the number they were calling from, fall within the same category. Other details contained within the attendance notes may well be covered by legal professional privilege depending on what, if anything was discussed."

(In R (Rogers) v Manchester Crown Court [1999] 1 WLR 832 at 839D-F, referred to by Fulford J in the passage quoted above, Lord Bingham considered some time records not to be communications and others not, without more, to be regarded as made in connection with legal advice.)

28. SRJ v Persons Unknown (being the author and commenters of Internet blogs) and D&Co [2014] EWHC 2293 (QB) is an example of a case in which disclosure of the identity of the client (an anonymous 'blogger') was not required. Sir David Eady's judgment shows the circumstances:

"18. In his witness statement of 9 June 2014, the partner made clear at the outset of his account that his firm was no longer instructed by or on behalf of the Defendant; that his firm had no financial or commercial interest in the outcome of the dispute; and that their only interest was to adhere to their professional obligations. It seems to me that he has been scrupulously careful in treading a delicate path.

19. The witness statement contained the following evidence:

"4. In case it should assist, I will summarise the position at the outset. At all times during our retainer by the Client, circumstances of confidentiality surrounded his name. He communicated his identity confidentially for the purpose of being advised by my firm and gave express instructions that he retained my firm on condition that his identity should be kept confidential and should not be disclosed. I have taken the view at all times that disclosure of the client's name would have the practical effect of disclosing confidential communications between lawyer and client. In other words, unlike the vast majority of cases, the identity of the client was not a routine communication but it was the very information which linked him to the case and potential liability to the Claimant. In effect, the advice he sought was inextricably bound up with his anonymity.

5. The outline circumstances of the instruction were as follows. I had an exploratory meeting with a person using a pseudonym on 2 April 2014. In the particular circumstances of the proposed instructions, it was thought better that I used this pseudonym at all times. I gained a

broad understanding of the issues in these proceedings. I understood that there had been ongoing communications on a without prejudice basis between him and Osborne Clarke during which he had remained anonymous. Significant progress had been made towards agreement and he thought that agreement could be achieved. His concern was that getting close to an agreement he needed the assistance of a lawyer to ensure that he did not get caught out with the legal meaning of any document that was concluded. This was especially as he recognised that he was up against experienced lawyers. There had been very recent exchanges of email between him and Osborne Clarke. The reason for the urgency was that, as he understood the position, proceedings had to be served by 3 April 2014 i.e. the following day and therefore pressure was being put upon him to conclude the matter very quickly. His express instruction to me was that, should I agree to act, his identity should remain strictly confidential.

6. I looked at the paperwork showing the state of the without prejudice discussions and noted his desire to resolve the matter. The Client was keen to know whether I thought I could assist in the delicate circumstances facing him. I am an experienced negotiator and also an experienced mediator. Given the Client's determination to resolve the matter and the confidential details that he disclosed to me, the progress which had already been made in the discussions and assuming good faith all round, I thought that I could usefully assist and that it was likely that I could help him achieve an agreement on the basis required by him which, in particular, would involve the non-disclosure of his identity to the Claimant.

7. During the meeting the Client disclosed what I believe to be his true identity to me. He could not have made it clearer that he was doing so in the strictest confidence and for the purpose only of obtaining my advice and assistance. I took appropriate measures within the firm to maintain his anonymity."

20. Despite his best efforts, the solicitor told me that he was unable to achieve a meaningful solution which he could recommend to the Defendant. He discussed matters with him and noted that he had concerns about continuing to fund the matter. The instructions were terminated on 8 May of this year. …

21. If Mr Davies is correct in his submission that … the communication of the information in question (i.e. the Defendant's identity) was the subject of legal professional privilege, then that would be an end of the matter. It would be an "absolute" protection ….

…

27. I have come to the conclusion, in the light of the circumstances of this unusual case, and in particular the evidence given by his solicitor, that the information as to the Defendant's identity was indeed the subject of legal

professional privilege and thus protected (whether "absolutely" or according to settled practice). Even if it were not, there are powerful reasons not to override the duty of confidence. It was not simply a piece of neutral background information, as would generally be the case with a client's name, since both he and his solicitor were well aware that the Claimant was keen to establish his identity (for perfectly legitimate reasons): it was accordingly central to their discussions about the retainer that confidentiality should be maintained."

29. BTA Bank v Ablyazov [2012] EWHC 1252 (Comm) is an example of a case in which disclosure of a channel of communication by phone and email was not required. Teare J observed, at [24], that "the connection between the telephone number and the email address and the seeking and receiving of legal advice in the present case is clear and manifest".

Argument over the cases

30. But Mr Lord QC says of the cases that they are specific to legal advice privilege, rather than litigation privilege, and where they deal with the question "who is your client?" that is not the question at hand in this case. It would, he argues, be a wrong turn in the analysis to apply the cases to litigation privilege where different policy considerations apply; the protection conferred by litigation privilege responds to the particular sensitivities and demands of the adversarial process.

31. In the present case Mr Lord QC's argument required him to advance as a first stage the proposition that litigation privilege is capable of applying to communications between lawyer and client, even if legal advice privilege also applies.

32. That first stage proposition was challenged by Ms Oppenheimer QC. I can see that a focus on the way in which authorities (including Lord Carswell in Three Rivers (No 6) in the passages above) have emphasised the parties to the communication assists her challenge: see Mr Bankim Thanki QC and Contributors, The Law of Privilege (3rd edition) at para 1.11 and 3.08. Ms Oppenheimer QC also fairly points out Professor Lord Burrows' emphasis of the parties to the communication in English Private Law (3rd edition at para 22.67).

33. However I consider the first stage proposition advanced by Mr Lord QC sufficiently established by Three Rivers (No 6) (above) at [27] per Lord Scott, Winterthur Swiss Insurance v AG (Manchester) Ltd [2006] EWHC 839 at [71] per Aikens J and Jet 2.com v CAA [2020] QB 1027 at [71] per Hickinbottom LJ (with whom Peter Jackson and Patten LJJ agreed). In the texts it is also valuable to see Mr Colin Passmore, Privilege, (4th edn) at para 3-002 to 3-006 and Mr Charles Hollander QC, Documentary Evidence, (14th edn) at 18-01.

34. In forceful advocacy Ms Oppenheimer QC challenged both Lord Scott and Hickinbottom LJ as wrong on the point. I respectfully disagree; I see no

principle that should deny litigation privilege simply because legal advice privilege was available in the particular case. But, that said, I believe it is important to recognise the limits to the proposition advanced by Mr Lord QC. The proposition does not disturb the compass of litigation privilege (which requires actual or contemplated litigation) or of legal advice privilege (which does not). And it does not disturb the explanation and emphasis in the authorities of the broad point that communications with third parties will only be subject to legal professional privilege if the test for litigation privilege is met.

35. Authorities cited by Ms Oppenheimer QC should in my view be understood as providing that explanation and emphasis, rather than as showing Lord Scott and Hickinbottom LJ were wrong. Those authorities were Lord Edmund-Davies in Waugh v British Railways Board [1980] AC 521 at 541G-542C; Re L [1997] AC 16 at 24H-25A; and Andrews J (as she then was) in SFO v Eurasian Natural Resources Corp Ltd [2017] EWHC 1017 (QB); [2017] 1 WLR 4205 at [65]).

36. Further, I anticipate the first stage proposition will often be academic. This is because legal advice privilege will apply to legal advice so that it is not necessary to claim litigation privilege too. I can travel that far with Mr Thanki QC, but not to the point of excluding a claim to litigation privilege in all cases where legal advice privilege applies (para 3.08). The separate origins and development of the two forms of privilege would make a result that was that categoric surprising. I respectfully consider Mr Passmore puts it well in saying that there is nothing inherently wrong with an approach that recognises that the same communications can be protected by both sub-heads of privilege (para 3.005).

37. However, for Mr Lord QC's purposes, establishing the first stage proposition allows him in the present case to move on to the second stage in his argument: that where litigation privilege applies, its rationale is engaged. In an adversarial system "each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations" (Three Rivers (No 6) at [52] per Lord Rodger).

38. Here, Mr Lord QC invokes the description of a "zone of privacy", used by Mr Thanki QC (above, at para 3.10) who draws on Canadian and US material. The zone is established around a party's preparation of the case. Examples include the identity of proposed witnesses: see China National Petroleum v Fenwick Elliott [2002] EWHC 60 at [46] (proposed witness of fact) and S County Council v B [2000] 3 WLR 53 at 76 (proposed expert witness).

39. Mr Lord QC argues that the identity of the persons authorised to instruct RPC is contained in communications (e.g. the relevant paragraph of an engagement letter) that are privileged since they were provided for the purpose of obtaining information or advice in connection with existing or contemplated litigation and for the sole or dominant purpose of conducting that litigation. He adds that the question who instructs RPC is not routine or background information; rather, Credit Suisse is seeking to obtain an advantage in the litigation by means of an investigation into the way in which instructions are given to RPC in respect of the litigation. He points out that if the information were not privileged "one can foresee situations in which a client may have reservations before authorising a

particular individual to provide instructions on its behalf, since the identity of which persons gave instructions on particular matters might give "clues" as to the content of particular instructions or the client's litigation strategy".

40. I am respectfully cautious about the use of the description "zone of privacy" in the way Mr Lord QC's argument seeks to use it. It has some appreciable value as an informed description of the general position, but it is not an expression of the principle or the test.

41. The fact that Credit Suisse's investigation is directed to an issue in the case is not in my judgment an objection to its request. It means simply that the answer to the question whether privilege applies is not simply that the information sought is routine or background (see SRJ (above), on legal advice privilege).

42. To my mind, the situations posed by Mr Lord QC as foreseeable illustrate that each case will require a decision on its facts. There is no reason in principle why the fact that the position might be different in another case should have the consequence of attracting in every case litigation privilege to the identity of those who give instructions.

43. In the present case, as Ms Oppenheimer QC emphasises, Loreley has adduced no evidence that "the revelation of the identity of the person giving instructions would … "give clues" as to the content of particular instructions". Mr Lord QC describes this as a false point because it would be "impossib[le] to descend into the particular facts without waiving privilege". I do not, with respect, accept that response. There may be no difficulty in some cases, as where (rather than the hypothetical example) the position is simply that all instructions were and are given by a particular board member, reporting to the board. But in another case, a party may (if it is true, and guided by its lawyers with the responsibilities they too have) be entitled to claim privilege on the basis that, on the specific facts and in the particular circumstances of the case, it cannot disclose the information of who gives instructions without waiving privilege over the content of the instructions. Loreley does not take that position in this case.

44. Mr Lord QC cautions that there is not a "bright line divide" between the fact of who gives instructions and the content of those instructions. Again, reference was made to the "zone of privacy". A hypothetical example, involving limitations or restrictions on the matters that an individual was authorised to give instructions, was given by Mr Lord QC though with emphasis that it was just that – a hypothetical example and one that was not intended to say anything in relation to whether KfW or IKB in fact provide instructions to RPC.

45. In the example, the provision of an answer to the question of who gives instructions to the lawyer would, it was suggested, trespass into an answer to the question of the content of those instructions. In my view, this makes the point. In such a case (other matters aside) litigation privilege may be available for that reason. But that is not this case.

46. Mr Lord QC pressed that in adversarial proceedings the identity of the person giving the instructions "would invariably betray something about the way in which the litigation is being handled within the party concerned", and the

opposing party "is not entitled to dig around in such matters in the hope of turning up something of forensic or other value". But that is not this case; and here it is common ground on this application that the information is sought in connection with an issue in the case.

47. Ms Oppenheimer QC draws attention to what expert commentators have said on the question of client identity, referring to, among others, Mr Passmore (above) at [2-57]; Mr Thanki QC (above) at [2.86] and Mr Hollander QC at [17-25]. For present purposes it is in my judgment sufficient to note that each recognises the potential for client identity to be required to be disclosed and none suggests that there are no circumstances in which client identity can be required to be disclosed.

48. There is also no suggestion in the present case that the identity of the persons authorised is only available from privileged communications.

Conclusion on litigation privilege

49. Each case requires a decision on its facts, including by the solicitor claiming legal professional privilege on behalf of her or his client, a task involving particular responsibility to the client, to other parties and to the Court.

50. This is true for litigation privilege (which is claimed by Loreley) as for legal advice privilege. The established tests for each type of privilege are not disturbed.

51. For litigation privilege the answer to the question whether the identity of a person communicating with the lawyer is privileged lies in whether the communication itself is privileged and whether the privilege will be undermined by the disclosure of identity sought. I find nothing in the present case to show that the privilege will be undermined by the disclosure of identity sought.

52. It does not follow from this conclusion that the disclosure of the identity of the person will be relevant to the issues in a particular case.

Redactions

53. The redactions have been numbered. Loreley accepts that the conclusion on litigation privilege deals with redaction 6. The remaining disputed redactions are made in three documents: (i) the minutes of a board meeting of Loreley dated 7 November 2018 at which the board resolved to issue the claim, (ii) an engagement letter between RPC and Loreley dated 12 November 2018 and (iii) the minutes of a board meeting of Loreley dated 13 February 2020 at which the board resolved to serve the claim.

54. Mr Fred Hobson, who addressed the Court for Loreley on this part of the application, summarised the redactions as limited and made on grounds of litigation privilege and/or legal advice privilege "principally on the basis that

the redacted text refers to the substance of instructions given by, or advice given to, [Loreley]."

55. In claiming legal advice privilege Loreley did not identify the particular individuals who were tasked with obtaining or receiving legal advice on behalf of Loreley. Its reason for taking this course was because that might reveal the identity of those authorised to instruct RPC, when it claimed litigation privilege in that respect. Now that it has been held that Loreley does not have litigation privilege I shall proceed on the basis that Loreley will now identify the particular individuals.

56. Mr Hobson also argued that where the redacted text in board minutes refers to advice given by RPC the advice is "self-evidently" subject to legal advice privilege because it cannot realistically be suggested that the board of Loreley was not authorised to receive legal advice from RPC. I am at present not able, with respect, to accept that argument. The board minute might refer to legal advice where the legal advice was provided by RPC not to the board but to a person not tasked with seeking and receiving legal advice on behalf of Loreley and who was simply sharing it with the board of Loreley. This may be unlikely, but it is important as it goes to the specific approach required to ascertain whether there is legal advice privilege.

57. A schedule was produced on behalf of Loreley with both a description of the document containing redaction and Loreley's position as to why the redaction is justified. The schedule includes references to "LP [litigation privilege]/LAP [legal advice privilege]" being claimed without giving the claimed compass of each, and to advice "given by RPC" (e.g. redactions 1 and 10) and to "RPC's work" (redaction 11), without saying to or for whom. A witness statement of Mr Tom Hibbert made on 12 October 2021, a partner at RPC, does not fill these gaps. Limitations of this nature, added to the points made in the immediately preceding paragraphs of this judgment, leave uncertainty that is not desirable.

58. In the particular circumstances of the case, I think the fairest and most reliable course is to require Loreley and RPC to review again closely and carefully, and in light of this decision, the claim to redact. The review should take separately legal advice privilege and litigation privilege.

59. Where with the benefit of the review RPC conclude that Loreley is entitled to make a redaction on grounds of privilege (specifying which) the claim to redact must be supported by evidence that is as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect. In the event that a claim to redact is maintained and is challenged by Credit Suisse I will decide the point, if appropriate on short written submissions and without a further hearing.