Neutral Citation Number: **[2023] EWHC 2863 (Ch)**

Case No: **FL-2019-000007; FL-2020-000035; FL-2021-000022**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
FINANCIAL LIST

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

Date: **8 November 2023**

Before :

Mr Justice Michael Green

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Between :

Various Claimants	**Claimant**
- and -	
G4S PLC	**Defendant**

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- -

Shail Patel, Calum Mulderrig and Ed Grigg (instructed by **Morgan, Lewis & Bockius UK LLP**) for the **Claimants**
Laurence Rabinowitz KC, Simon Colton KC and Emma Jones (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendants**

Hearing dates: **8th November 2023**

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JUDGMENT

Mr Justice Michael Green **Wednesday, 8 November 2023**
(**16:08**pm)

Judgment by **MR JUSTICE MICHAEL GREEN**

Introduction

1. This is the third CMC in respect of three sets of proceedings which are being tried together and which are due to be heard at a six-week trial listed to start in court on 29 January 2024, after four days of judicial pre-reading. I am now the assigned judge for these proceedings, Lady Justice Falk having been the original assigned judge.
2. This judgment is concerned with a specific application brought by the Claimants in relation to the Defendant's claim to withhold certain documents on the grounds of privilege. The Claimants say that the documents are covered by what they call the "shareholder principle", by which they mean that a company cannot claim privilege as against its own shareholders save where the documents came into existence in contemplation or for the dominant purpose of proceedings between the company and its shareholders.
3. I have heard the application this morning and early this afternoon and, because of other commitments over the next few days, I have decided to give judgment immediately today so the parties know where they stand. It will therefore be a little unpolished but I hope I will be forgiven for that.
4. It is unfortunate that I am in this position and that this application has been brought so late in the day. Given the extensive argument and pre-reading list required, and the difficult issues involved, including being asked by the Defendant in its skeleton argument not to follow first instance decisions, and even one Court of Appeal decision, on the grounds that they are not binding on me and/or were decided *per incuriam* (although these points were not in the event pursued), it was not really appropriate to try to fit this into a tight schedule, requiring an immediate judgment from me, with the imminence of the trial and the possibility that the losing party might seek to appeal. Furthermore, if the Claimants are right and these documents need to be disclosed, there are serious

practical and trial management issues that cannot just be brushed aside. Such issues maybe also be relevant ultimately to the exercise of my discretion.

5. It seems to me that the point should have been obvious to the Claimants some time ago. Mr Patel, on behalf of the Claimants, fairly accepted that they should have appreciated the point much earlier, but I do not agree that the burden was on the Defendant to have raised it, as Mr Patel suggested. The Defendant had asserted privilege over the documents in question some 20 months ago. The Claimants recognised that it was doing so and I can therefore see little justification for leaving it so long and so close to trial to bring this substantive application. The application and supporting evidence were only filed last week, on 30 October 2023.
6. There is not much point going back through the correspondence to see where the fault lies as I have now heard the application and need to decide it, but I will be bearing it in mind when I come to consider the practical difficulties that this gives rise to and whether they can be fairly overcome.
7. Having said that, I have in the time available had the benefit of excellent submissions from counsel on this point. I have referred to Mr Patel and he appears together with Calum Mulderrig and Ed Grigg on behalf of the Claimants and Mr Laurence Rabinowitz KC leading Simon Colton KC and Emma Jones on behalf of the Defendant.

Background

8. I will endeavour to explain my reasons for my decision in relatively short order.
9. The background is very familiar to the parties and I will not set it out in detail. The claims are brought under s.90A and Schedule 10A of the Financial Services and Markets Act 2000 ("FSMA"). The Claimants were, or claim to have been, institutional shareholders in the Defendant, G4S Limited. At the material time, the Defendant was a listed company on the London Stock Exchange and Nasdaq Copenhagen. It is now delisted and privately owned.
10. The UK Government, in the form of the Ministry of Justice, was a customer of the Defendant in respect of a contract concerning the electronic tagging of prisoners ("EM contracts") and to HMCTS

for facilities managements in the courts ("FM contracts"). Both contracts were via an operating subsidiary. In the case of the EM contracts, G4S Care and Justice Services (UK) Limited ("G4SCJS") and for the FM contracts, G4S Integrated Services (UK) Limited. In 2013 and 2014, it was announced that the Defendant had been overcharging the Government on both contracts and the Defendants settled with the Government by paying £108.9 million in March 2014. The Claimants call this part of their allegations the "Wrongful Billing".

11. The Claimants contend that the Wrongful Billing rendered false various statements made in the Defendant's published information, or that it wrongly failed to disclose it or its publication was dishonestly delayed. As I know from a judgment that I have handed down today in similar claims under Section 90A, against Standard Chartered Plc, it is necessary for the Claimants to show that at least one "PDMR" - a "person discharging managerial responsibilities" - knew of or was reckless as to the false statements. It is essentially a case of dishonesty. The claims in relation to the EM and FM contracts, the Wrongful Billing claims, are the subject matter of the first claim that was issued in 2019 and it is limited in time to six months between October 2012 and April 2013.

12. There are two other claims begun in 2020 and 2021 that cover much the same ground, but more, in that they involve many more Claimants and additionally they also allege what has been called the "Financial Model Fraud", whereby from 2005 onwards, G4SCJS perpetrated a fraud on the Government by providing false financial models for the purpose of hiding the true profits realised under the EM contracts. Unanticipated cost efficiencies were meant to be shared with the Government. Mr Patel showed me the actual allegations in this respect on the pleadings and the fact that privilege had been claimed over advice from Linklaters taken at the time in relation to their investigation of this issue on behalf of the Defendant. The pleading references to privilege perhaps further demonstrate that this application should have been made long ago.

13. On 14 July 2020, a deferred prosecution agreement was entered into between G4SCJS and the Serious Fraud Office, which was approved by Mr Justice William Davis on 17 July 2020. This

revealed the Financial Model Fraud. G4SCJS agreed to pay a fine of £38.5 million. Three individuals were subsequently charged with fraud but the trial collapsed earlier this year. The Claimants contend that the published information was false or had material omissions by reference to the Financial Model Fraud.

14. There was a first CMC before Mrs Justice Falk, as she then was, on 29th and 30 June 2022. She ordered that there be a split trial, with the first trial concerned with the Defendant's liability, the so-called "common issues", and the Claimants' standing to sue. Mr Patel said that the parties were hopeful of agreeing the standing issues before the trial. Trial 2 is to be concerned with the Claimants' reliance claims and issues of causation and limitation. The Claimants will be represented at trial 2 by sample. There was also provision in that CMC order for disclosure, witness statements and expert evidence. Some time extensions have been made, but largely the parties are on track for trial 1 at the end of January 2024.
15. There was also a second CMC before Mr Justice Trower on 14 December 2022 that was largely dealing with the sampling process for the purposes of trial 2, but also further directions were made in relation to trial 1.
16. There have been various amendments to the pleadings and further particulars of standing have been served since the last CMC and disclosure is largely complete.

The Privilege Application

17. As I said, the privilege point only arose in the last month and I turn therefore to this specific application concerning privileged documents. We are only concerned with documents that came into existence at the material time before these proceedings were contemplated. It is accepted that privileged material prepared for the purposes of these proceedings are covered by privilege and do not and should not be disclosed.
18. The Claimants rely heavily on *Sharp v Blank* [2015] EWHC 2681 (Ch), ("*Sharp v Blank*") an *ex tempore* judgment of Mr Justice Nugee, as he then was, on a similar application to the one before

me and heard at a CMC. With all due respect to Mr Justice Nugee, it is a little surprising to me that such an apparently accepted doctrine has not received more consideration in the authorities.

19. The Claimants also rely on a two-man Court of Appeal judgment in *Woodhouse and Co (Limited) v Woodhouse* [1914] 30 TLR 559 ("*Woodhouse*"). Mr Patel said that this is a Court of Appeal decision, as it is, and it is therefore binding on me. Indeed, Mr Justice Nugee said that it was binding on him in *Sharp v Blank.* But that rather depends on what its ratio was. Again, it is a curiously insubstantial case upon which to found this apparent doctrine of no privilege between shareholder and company.

20. Mr Rabinowitz submitted that the application actually goes far wider than the scope of the decided cases because it seeks to apply the principle to:

    (i) litigants who are at best former shareholders;

    (ii) litigants who never had legal title to the shares in the relevant company; and

    (iii) all forms of privilege, including legal advice privilege, litigation privilege and without prejudice privilege.

21. Mr Rabinowitz had three main arguments against the application. First, he said that the exception in *Sharp v Blank*, meaning that shareholders can see their company's privileged documents, is anomalous and should no longer be followed. He raised this in his skeleton argument, but he sensibly accepted at the hearing that I could not, in this judgment, find that the rule should not exist and not apply it. But, secondly, he said that, in any event, *Sharp v Blank* can only apply to: (a) members of the company, but the Claimants are not now and never were members of the Defendant company; and(b) in respect of legal advice privilege only, that is legal advice paid for out of company funds and not extending to litigation privilege or without prejudice privilege. Thirdly, he referred to the case management consequences of permitting the Claimants' application and that those uncertain consequences at this very late stage militate against any order being made.

22. Mr Patel maintained that the shareholder principle is well established on the authorities and that it is binding on me because of the *Woodhouse* decision. He said that it had effectively been recognised in many authorities, including in the Court of Appeal and the Supreme Court. He said that the Defendant's objections are unjustified. In particular, he said that most listed shares are held in uncertificated form these days through CREST and it would be odd if this meant that the principle could not apply. He also submitted that the Defendant's practical objections could easily be overcome, probably by the imposition of a confidentiality club.

23. Turning back to Mr Rabinowitz's submissions, he started by emphasising the importance of privilege. It is, he said, such a fundamental right that the court should be wary of making any inroads into it. He quoted from Lord Taylor in *R v Derby Magistrates' Court* [1996] AC 487 at page 507 where Lord Taylor said that legal professional privilege is:

> "Much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

24. Mr Rabinowitz continued to say that legal professional privilege was previously considered as a procedural right, but it is now recognised to be an important substantive right. He referred to what Lord Phillips said in *McE v Prison Service of Northern Ireland* [2009] 1 AC 908 where he cited what Lord Scott had said in *Three Rivers District Council and others vThe Governor and Company of the Bank of England (No 6)* [2005], 1 AC 610, that the privilege is absolute and cannot be overridden by "*some supposedly greater public interest*". It could only be overridden, he said by legislation.

25. It is difficult to discern how the principle arose, but it has clearly been recognised in a number of cases, the latest of which is *Sharp v Blank*. It would be bold and perhaps churlish of me to suggest that these are all misplaced. I do have a great deal of sympathy with the points made by Mr Rabinowitz as to the logic and basis of the principle. Mr Rabinowitz referred to a critique of it in

Hollander's *Documentary Evidence* (14th ed) where it is explained that the principle emerged before the seminal case of *Salomon v A Salomon & Co Ltd* [1897] AC 22 and other cases, which assert the separation of the company and its shareholders. The modern way of looking at that relationship is perhaps expressed in the Supreme Court decision in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25. Shareholders have no actual interest in the assets of a company. Nor can they gain access to documents, including privileged documents, save in the course of litigation between them and the company. That is what produces the anomalies and why it is suggested that the foundations of the principle, which was originally brought about in the context of partnership law, but also by analogy with the relationship between trustee and beneficiary, seem so shaky now as between shareholder and company. That is clearly not a relationship of trustee and beneficiary. Even directors have been held not to be trustees of company property.

26. In *Sharp v Blank* Mr Justice Nugee said at [9]

> "the foundation, as I understand it, of the general rule is the same as the foundation of the similar general rule that applies in the case of trustees and beneficiaries. Just as a trustee who takes advice as to his duties in relation to the running of a trust and pays for it out of the trust assets cannot assert privilege against the beneficiaries who have indirectly paid for that advice,.so too a company taking advice on the running of the company's affairs and paying for it out of the company's assets cannot assert a privilege against the shareholders who, similarly, have indirectly paid for it."

27. *Woodhouse* was actually concerned with the exception to the principle, as was *Sharp v Blank*, the Court of Appeal finding that the legal opinions were obtained in the context of proceedings that had already been contemplated and begun against the shareholder. Mr Rabinowitz therefore submitted that the principle was not the *ratio* as the exception was applied. But while that is so there is no escaping the fact that the Court of Appeal was considering an exception and had therefore accepted that there was such a principle from which there was an exception.

28. The Court of Appeal found it to be based on the common fund rationale. Lord Justice Phillimore held that:

"the principle was that the people had a common interest in property, an opinion having regard to that property, paid for out of the common fund, ie company's money or trust fund, was the common property of the shareholders or cestui quo trust"

Mr Justice Lush held –(he was the other member of the Court of Appeal on that occasion)

> "Where a company obtained advice in the common interest and paid for it out of the common fund, undoubtedly the shareholder would have a right to see it."

29. This basis might also be open to attack now as there is no "*common fund*", as such, to which shareholders are entitled and, as I have said, the analogy with trustees and beneficiaries is not a particularly strong one. But, as I also said, it has been recognised - for example in a case such as *Re Hydrosan Limited* [1991] BCC 19 by Mr Justice Harman and in *Sharp v Blank* itself, and many other authorities - and even in Hollander on *Documentary Evidence*, where it is said that the rule is so well established that it is now probably for the Supreme Court to overturn it.

30. I, therefore, as a lowly first instance judge, and even though I have my doubts as to the justification now for such a principle, cannot say, particularly after the short argument I have had at this CMC, that the principle does not exist or should be got rid of. I think that would require a higher court to say that.

31. Mr Rabinowitz, I think, sensibly realised that and did not pursue the point vigorously, but he did say that the shaky foundation for the principle, together with the fundamental nature of privilege to the administration of justice should influence how broadly the principle should extend. He said that, given that background, I should not extend it beyond its very narrow boundaries.

32. The trouble is that I have not been shown any authority where the principle has been challenged or as to whether it applies, for example, to ultimate beneficial owners of the shares or as to the requisite

timing of ownership. It was assumed in, for instance, *Sharp v Blank* that the rule or principle exists but that was because it was not challenged at all, nor were its boundaries tested.

33. Therefore, Mr Rabinowitz submitted that the principle should be confined by reference to current shareholders only and only those who are and were entered on the register of members. He said that the vast majority of the Claimants never were shareholders and none are now. He said that the principle, if it exists, must be limited to those that were shareholders at the time of the creation of the privileged document and who are still shareholders.

34. The Claimants are not pursuing this application on behalf of one group of Claimants who had derivative interests in shares on Nasdaq Copenhagen. But they are pursuing this application on behalf of three Claimants who were actual registered shareholders at the time, albeit for different periods, and also the other Claimants who were, as they describe it, the ultimate beneficial owners of shares through the CREST system, via custodians and sub-custodians. They form the vast majority of the 90 claimants; I think over 80 of them are in that category of non-registered shareholders but who are the ultimate beneficial owners.

35. Mr Patel relied on the Claimants' standing for the purposes of these proceedings, which has been held to be wider than registered shareholders and includes ultimate beneficial owners through the CREST system - see *Various Claimants v Tesco plc* [2020] BusLR 25, a decision of Mr Justice Hildyard, which is largely about the definition of "*interests in securities*" that appears in the legislation and gives standing to the Claimants to be able to claim under section 90A FSMA. Mr Patel said that this is a wide definition, reflecting the fact that this is the way the majority of shares are held these days and that it would therefore be odd to include such ultimate beneficial owners for the purposes of standing to bring these claims but exclude them from the right to claim privileged documents from the company.

36. However, because of the inadequate analysis in the authorities as to the requisite qualification for being able to rely on the principle, it is not easy to determine the specific requirements. If Mr Patel

is right, then in these cases brought pursuant to a statutory right in section 90A and schedule 10A FSMA , it will nearly always mean that the company defendant can never assert privilege and one would have thought that this will have wide-reaching effects for all similar cases.

37. In the only similar case, *Sharp v Blank*, which was concerned principally with the liability of directors to shareholders, it does not appear from Mr Justice Nugee's judgment that the point about the Claimants' standing was argued. The outcome was that the issue was actually left to another time, while the Claimants' standing to bring the proceedings was still not resolved, but for the consideration to be on that other occasion about which documents should be disclosed and which not by reference to when the litigation was contemplated. One can seefrom the trial judgment in that case that some privileged documents were ultimately disclosed. What we do not know is whether the shareholders satisfied Mr Rabinowitz's criteria or not. I do not think therefore in the circumstances I can read much into the *Sharp v Blank* judgment in relation to which shareholders can claim and which cannot.

38. In relation to privilege, I start from the position that it is better to err on the side of caution and preserve privilege unless there is good reason not to. In other words, unless I am bound by precedent to order disclosure, it is safer in my view not to override the important right to privilege.

39. Mr Rabinowitz submitted as follows:

    (1) the origin of the principle or exception is the analogy with the trustee-beneficiary situation and in that context it is so as to hold the trustee or company to account for its administration of the trust or the management of the company. The basis also seems to have been because the shareholders should be taken to have paid in part for the legal advice, even though that is really somewhat of a fiction because the company actually paid for the advice.

    (2) the articles of association show that, as is perfectly normal, the Defendant company does not recognise beneficial owners of its shares: see Article 9. And furthermore Article 147, as is also normal in articles of association, restricts the rights of shareholders to obtain accounting

records and documents from the company. That is an express restriction on registered shareholders who are the only parties to the articles and so the even more remote ultimate beneficial owners of the shares would be less entitled to obtain such documents from the company As we discussed at the hearing, the principle only comes into effect once litigation has commenced and so such documents will only then be provided, if at all, pursuant to a court order and that would be within the provisions of that article.

(3) It is only directly registered shareholders that have rights against the company. These are rights that are seemingly attached to the shares of the Defendant company and there are only three Claimants who were actually registered shareholders, the rest held their rights through CREST or the Nasdaq Copenhagen depository system. Mr Rabinowitz pointed to certain cases that show that only the registered shareholder has rights against the company - *BBGP Managing General Partners Ltd v Babcock & Brown Global Partners* [2011] Ch 296, a decision of Mr Justice Norris, and also Mr Justice Hildyard in *Tesco* at [59(a)] where he referred to the chain of interests in shares held through CREST, but emphasised that it is only the direct shareholder that has those rights as against the company.

(4) the right to bring a claim under section 90A FSMA is granted by statute to certain classes of persons that could be wider than the class of persons entitled to privileged documents against the company.

Mr Patel sought to meet these points by reference to the following:

(1) the common fund point relied on in *Woodhouse*. He submitted that the investors had similarly contributed towards the advice and held an interest in the common fund.

(2) he said that the common fund rationale is based on beneficial interests, not legal interests. I think that actually confuses the trustee analogy with the way shares are held through CREST. It assumes that beneficial interests in shares equate with a beneficiary of a trust fund,

overlooking the fact that it is a direct relationship in a trust situation, whereas it is only an indirect relationship in the company shares situation.

(3) Mr Patel complained that if the principle was so limited, it would denude the principle of having any practical effect in these cases because nearly all Claimants will have held their shares in uncertificated form.

(4) He referred also to cases where the number of Claimants was no bar to reliance on the principle. In *CAS (Nominees) Ltd v Nottingham Forest plc* [2002] BCC 145, for example, the defendant company and its directors ran an argument that the shareholder principle: "… *should not be applied to companies such as the first defendants, a public limited company with substantial numbers of shares in issue quoted on a stock market*." The court rejected that submission out of hand. Mr Justice Evans-Lombe stated: *"Nothing in the Woodhouse case or the subsequent authorities, down to and including the Hydrosan case, supports the proposition that the rule is to be differently applied depending on the size and importance of the company concerned*." In a similar vein, in *Harley Street Capital Ltd v Tchigirinsky (No.2)* [2006] BCC 209, the court had no difficulty accepting that the shareholder principle could apply to a public company with shares listed on a major stock exchange. And *Sharp v Blank*, of course, is another example too.

40. Mr Rabinowitz criticised these points as being based principally on policy reasons, whereas the strongest policy argument, he said, is that privilege should be respected as it is a fundamental right.

41. It seems to me that the difficulty with the Claimants' position is that there is no authority where non-registered shareholders have been held entitled to the company's privileged documents. It may have happened in *Sharp v Blank*, but the point has basically not to date arisen so I have had to work out whether the principle should be extended to non-registered shareholders.

42. I have difficulty with it for the following reasons:

(1) as I have already said, the principle itself, while well-recognised in the authorities, has a somewhat shaky foundation in the light of the current ways of viewing the position of shareholders and their company, and whether they are akin to beneficiaries under a trust. It is clear that a company is totally separate from its shareholders and holds its property for itself. Shareholders have no direct interest in the company's property. Therefore, the common fund basis is now dubious.

(2) the principle, if anything, seems to me to be based on the relationship between shareholders and their company and it is a right attaching to that relationship that in proceedings between the shareholders and the company, the company should not be entitled to claim privilege over legal advice in relation to transactions that are the subject matter of the litigation.

(3) it is therefore a right that is an incidence to the legal ownership of shares. Other such rights are the right to receive dividends or a distribution on a solvent liquidation. The rights under the articles which govern the relationship between shareholders and the company are limited to registered shareholders and can only be enforced by them.

(4) claims under section 90A and schedule 10A FSMA are the creature of statute, granted to a certain class of claimants, not limited to shareholders at law.

(5) it would be quite an extension to say that all such claimants are automatically entitled to privileged documents from the company.

(6) do not think it would be right to so rule. I am not bound to do so by authority. I think the right to privilege should only be removed where it is necessary to do so and in strictly defined circumstances. The old authorities all concerned legal owners of shares and I do not think it is for me to broaden that category and thereby expand the relationships concerned.

43. That still leaves the three registered shareholders and before dealing with the practical problems that that gives rise to, I should deal with Mr Rabinowitz's two other points.

44. The first is the timing issue and whether the shareholders have to be shareholders now to invoke the rule. Mr Rabinowitz said that the joint interest privilege doctrine, of which this is said to be a species, is not well founded, despite what is said in Thanki on *Privilege* (3rd ed) at [6-12]. He said that the authorities relied on by the Claimants to the effect that the privilege remains even when the relationship breaks down are not applicable to the company shareholder situation.

45. Mr Patel had indeed relied on such authorities, in particular, *BBGP Managing General Partners Ltd v Babcock & Brown Global Partners* [2010] EWHC 26 (Ch) where Mr Justice Norris approved the statement in Thanki on *Privilege* at [6-12] and *CIA Barca De Panama SA v George Wimpey & Co Ltd* [1980] Lloyd's Law Reports 598, a decision of Lord Justice Stephenson.

46. Mr Patel also relied on a Bermudan first instance authority which was, as Mr Rabinowitz accepted, directly on the point. That is a case called *Oasis Investment II Master Fund Limited and ors v Jardine Strategic Holdings Limited and ors* [2023] SC (Bda) 8 (Civ), as I said a decision of the Supreme Court of Bermuda. And Mr Patel also relied on a Supreme Court authority, *James-Bowen v Commissioner of Police of the Metropolis* [2018] 1 WLR 4021, where it was accepted that this is an example of joint interest privilege.

47. Mr Rabinowitz argued that the test should be whether the Claimant was a shareholder at the time the obligation of disclosure arose, alternatively at the outset of the proceedings. But as Mr Patel pointed out this would produce anomalous results as, even in this case, the Claimants were largely shareholders at the start of the proceedings, but then sold their shares on the privatisation of the Defendant in 2021 during the course of these proceedings. Did they really lose their right in the existing proceedings? I do not think so and I think it makes much more sense, if the rule exists, for it to apply to the time the documents came into existence and that that rule applies to the Claimant as having to be a direct registered shareholder at that time.

48. Mr Rabinowitz also suggested that rule should only apply to legal advice privilege and not litigation privilege or without prejudice privilege. In the interests of time, I will state my conclusions shortly because there is no authority either way, it seems.

49. In my view, without prejudice privilege is not covered by the rule. It has the complication of a third party being involved and I do not see on any view of the authorities that it has been extended to such a privilege.

50. As to litigation privilege, I do not see on the authorities that any such limitation has been imposed and I would have ordered that all documents, whether subject to legal advice privilege or litigation privilege, would have to be disclosed under this principle.

51. But I turn finally to the practical issues. In my view, these are very real, heightened by the time at which this has arisen. On the basis that I have ruled that only three Claimants are entitled to privileged documents, and even among those three it is for different periods of time, so some documents can be disclosed to one or other of the Claimants, but not the other. How will it be possible for the documents to be prevented from being used by the Claimants who are not entitled at trial to use them by the counsel and solicitors who act for all the Claimants?

52. Mr Patel suggested that any practical difficulties can be overcome by case management directions when we know whether the documents amount to much (meaning whether the Claimants wish to rely on them and deploy them at trial) and by the imposition of a confidentiality club. However, even he was forced into the backstop suggestion at the end of his submissions that the Claimants may be willing to proceed only with those three Claimants who were registered shareholders, if I were to so order, and to hive off the other Claimants to another trial or to some other occasion. It is probably too late for such a radical change and the Defendant would probably object as it would want all the Claimants bound by the result in trial 1.

53. The problem arises in the Claimants' lawyers being able to compartmentalise the documents for the three Claimants from the other Claimants (in fact such compartmentalisation would have to be done

as between the three Claimants themselves, because they held shares for different periods and so would be entitled to see different privileged documents). I do not see how a trial could work if the three Claimants wish to deploy that material at the trial. It would require considerable contortions on their lawyers' (and the judge's) part not to take into account some of the material for certain Claimants, whether in the course of cross-examination, reliance on the documents themselves, and in the course of making submissions (and for the judge, preparing a judgment). A confidentiality club does not solve this intractable problem.

54. Mr Rabinowitz rightly said that those to whom privileged material is disclosed have a positive duty not to breach that privilege further and not to allow those documents to go to any sort of wider audience. That would apply to the Claimants' lawyers if documents were disclosed to them by any order that I make and would prevent them being used on behalf of those Claimants who were not entitled to see them.

55. I am afraid that the Claimants have got themselves into this awkward position by leaving it so late to make the application, two and a half months before trial. If it had arisen at the first CMC, directions could have been made, perhaps, to separate off the Claimants to protect privilege, but unfortunately it is too late for that now. Unless the parties were prepared now to hive off the 87 odd Claimants to another trial, I do not see that it is reasonable and proportionate, in accordance with PD57AB, paragraph 17.3, to order disclosure of the privileged material to the three Claimants at this time. It will be impossible to manage a trial where such documents are to be deployed, and there is the Defendant's possible threat of applying for an injunction to prevent the Claimants' lawyers from acting for all the Claimants.

56. To order disclosure of this material to a very small number of the Claimants will be impossible to manage and potentially highly disruptive to the imminent trial and I do not see that it is possible for there to be a fair trial in those circumstances. Accordingly I will dismiss the application.