Neutral Citation Number: [2018] EWHC 2784 (Ch)

Case No: HC-2017-000498

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 23/10/2018

Before :

MR JUSTICE NORRIS

- -

Between :

(1) WH HOLDING LIMITED	**Claimants**
(2) WEST HAM UNITED FOOTBALL CLUB LIMITED	
- and -	
E20 STADIUM LLP	**Defendant**

- -
- -

Paul Downes QC and Luka Krsljanin (instructed by **Gateley PLC**) for the **Claimants**
Thomas Plewman QC and Tom Wood (instructed by **Gowling WLG**) for the **Defendant**

Hearing date: 5 October 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A 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.

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MR JUSTICE NORRIS

MR JUSTICE NORRIS :

1. E20 Stadium LLP ("E20") now owns the head lease of the former Olympic Stadium at Queen Elizabeth Olympic Park at Newham ("the Stadium"). Amongst the objects of the Olympic project was the conferment of legacy benefits. One of the benefits so conferred was the grant of a 99-year concession to West Ham United Football Club Ltd and its holding company (together "West Ham") to use the Stadium for matches during the football season when the Stadium is configured in football mode. The arrangement is embodied in a Concession Agreement dated 22 March 2013 ("the Agreement").

2. There are many disputes between E20 and West Ham concerning the Agreement. In evidence prepared for an earlier hearing concerning disputes over disclosure in this action the solicitor for E20 referred to

> "…the litigious nature of the relationship between the parties, and the fact that almost every issue under the [Agreement] has been in dispute, is in dispute or has the potential to be in dispute in the future"

including what she referred to as "apparently anodyne issues".

3. One of the current issues is a dispute between E20 and West Ham about the number of seats in the Stadium that West Ham can use. There is a definition in the Agreement of "Agreed Capacity". So far as material the expression is defined as "a minimum of 53,500 seats when the Stadium is provided in Football Mode". The expression is used in various places in the Agreement to define the content of E20's obligations (for example, in the definition of "Key Operational Obligations") and its rights in relation to hosting non-football events. West Ham says that this is merely a minimum and that E20 is in fact contractually obliged to provide more than the Agreed Capacity.

4. The Agreement identifies what are called "the Concession Areas". Physically the concession areas contain more than 53,500 seats: on one estimate there are 66,500 actual seats. Clause 7.3 of the Agreement provides that E20

> "… shall provide access to the Concession Areas for [West Ham] to stage Competitive Matches throughout the Term, including any applicable Set-up and Break-down Time".

Clause 10.7 of the Agreement says that

> "Subject to the terms and conditions of this Agreement [E20] hereby grants to [West Ham] during the term… a non-assignable licence on Stadium Dates to access and to occupy the Concession Areas…. all in accordance with this Agreement in relation to the staging of each Event during the Term."

Clause 10.2 of the Agreement says that

> "subject to the terms of any Grantor Consent (including, without limitation, the terms of the General Safety Certificate)

> and any requirements of a Regulatory Body at [E20's] sole cost and expense [E20] shall provide to [West Ham] …. access to the Concession Areas to permit a [West Ham] to stage its Events…."

(This is not a complete list of all the provisions of the Agreement to which West Ham refers in prosecuting its dispute: but it is sufficient to outline the dispute). The General Safety Certificate to the Stadium when used for football was originally for a capacity of 54,000 for ordinary matches (though that has since August 2016 increased to 57,000). It is short of the 66,500 maximum seating capacity that can be used for other events, and short of the 60,000 seating capacity which West Ham wants.

5. A summary (necessarily incomplete, but sufficient for the purposes of this application) of West Ham's position is as follows. West Ham says that on the proper construction of the Agreement the obligation "to afford access" is an obligation "to provide seating" so that it has a right to use all seats in the Concession Areas if the requisite Grantor Consents (a defined term in the Agreement) are in place: this is a pure construction argument based on the interpretation of the words used in the Agreement. As an extension of this argument West Ham advances an argument that E20 is (and has since February 2017 been) obliged to take all reasonable steps to obtain the requisite Grantor Consents to enable 60,000 seats to be used. There is no such obligation expressed in the Agreement, but West Ham says that it is implicit in clauses like clause 7.3 and clause 10.2 having regard (a) the contract read as a whole, (b) the commercial objective of the parties and (c) pre-contractual representations.

6. The dispute about the meaning of the Agreement as regards how many seats West Ham has the right to use has been rumbling on since at least June 2016. Clause 50 of the Agreement provides for expert determination of some disputes: they are those arising under specified clauses of the Agreement ("the Specified Provisions"). The clauses upon which West Ham relies for its construction argument are not included in the Specified Provisions. But E20 and West Ham have discussed referring the seating capacity question for expert determination. The discussions did not result in an agreement and on 23 February 2017 West Ham commenced Part 8 proceedings for declaratory relief as to the meaning of the Agreement (the disput summarised in paragraph 3 above). The proceedings are due for trial over a 20-day period commencing on 19 November 2018. A pre-trial review on the 10 to 12 October 2018 before Snowden J.

7. On 7 September 2018 West Ham amended its claim to advance a new argument. This was that the Agreement was a "relational contract" dependent on mutual trust and confidence so that there should be implied into the Agreement the duty of good faith: and it was alleged that E20 had acted in bad faith in failing to conduct adequately detailed cost/benefit and safety analyses of the consequences of applying for Grantor Consent to permit an increased seating capacity of 60,000 and had been guilty of deceit in explaining why it had not done so.

8. As an illustration of the way the case is pleaded by West Ham I may take two subparagraphs from paragraph 56A of its Re-Amended Particulars of Claim:-

> "56A(b) E20's justification for its refusal at a meeting with [West Ham] on 31 January 2017 was that it harboured concerns

> about safety issues. In making this assertion without conducting the analysis referred to above, E20 wrongly advanced a justification for its breach of [the Agreement] without any genuine belief in its truth, or alternatively being reckless as to its truth. This was (and is) contrary to good faith and fell below the Standards of a Reasonable and Prudent Operator.
>
> (e) E20's statements to the effect that cost and/or safety are the reasons for its refusal to seek an increase in capacity are not truthful and/or are not made in good faith and/or are not reasonable statements in the light of E20's failure to conduct any analysis of these issues. E20's true reason for refusing to seek an increase in the capacity of the Stadium lay in a desire to extract an increased Usage Fee from [West Ham] … "

9. Illustration of the way the defence is advanced (a denial of any duty of good faith, and in the alternative a denial that E20 has acted in breach of the Agreement or has been deceitful) is afforded by three subparagraphs in paragraph 76A of the Amended Defence:-

> "76A(3) E20 believed
>
> (i) that it was not required by [the Agreement] to agree to an increase in the capacity of the Stadium or to seek the Grantor Consents necessary for that purpose;
>
> (ii) that it was entitled to negotiate a commercial agreement at arm's length should West Ham wish for the available seating in the Stadium to be increased; and
>
> (iii) at the time of West Ham's requests… that (a) there were safety issues affecting any increase in capacity and (b) the costs to E20 should the capacity be increased without any further Usage Fee would be greater than the benefits.
>
> (4) E20 analysed at a high level the estimated operational costs and revenues of the increased capacity prior to and at the time of negotiations in relation to the Interim Seating Agreement in the summer and autumn of 2016… These analyses informed its belief that the costs of increasing capacity would be greater than the benefits…
>
> (9) objectively, the costs to E20 of applying for Grantor Consents for 60,000 seats and making those available to West Ham outweighed the attendant benefits."

10. Disclosure has taken place in relation to the pleaded issues (on 29 January 2018). As Snowden J found on 5 October 2018 in [2018] EWHC 2578 (Ch) the entire population of documents harvested in September 2017 amounted to some 1.5 million

documents. Date ranges and over 70 keywords were then applied in order to generate a population of documents for manual review: this review population totalled 114,006 documents. The first stage review of these documents was conducted by a team of associates, trainee solicitors and paralegals at E20's solicitors. Second and third stage reviews were then conducted by a core team of trainee solicitors, associates and directors, all of whom had day-to-day handling of the matter, to identify matters which were privileged and matters which were commercially sensitive and/or irrelevant.

11. By an application issued five months later on 3 July 2018 West Ham challenged this process. This led to a further review of the challenged documents by a senior lawyer at E20's solicitors, Ms Emma Carr, who has had day-to-day conduct of the matter. That led to the first of the hearings before Snowden J at which guidance was given, followed by a yet further review of selected documents containing redactions on the grounds of privilege and irrelevance undertaken by Ms Carr. (The extraction and review of documents for which privilege was claimed was not something where Snowden J had given guidance or made an order: it was voluntarily undertaken). There was then a still further review of documents redacted on the grounds of irrelevance, undertaken by another senior lawyer. When the matter came back before Snowden J there were still documents that were the subject of challenge. He considered the challenge grounded upon relevance. He decided to inspect the documents and found that for the most part the redactions in the sample documents had been properly made: but he did require a limited number of modifications principally on the bases (a) that redactions should be consistently applied and (b) that redactions must leave the remaining material intelligible.

12. Snowden J did not address redactions grounded upon a claim to privilege. The unfortunate and inconvenient result of a judge seeing documents for which privilege is properly claimed is that the judge is debarred from hearing any further applications in or trying the case. Because of that the parties agreed that that limb of the challenge should be maintained before another judge.

13. To that end West Ham prepared a sample of 20 documents in respect of which a challenge to privilege was maintained by E20: and on 10 September 2018 West Ham issued an application notice seeking an order that the 20 sample documents identified be inspected by a judge and (depending on the outcome of such review) that E20 be required (a) to provide disclosure of the same to West Ham, and (b) to again review all documents over which privilege was asserted.

14. The arguments specifically concerning privilege in support of that application is contained in a single paragraph in the application notice. Mr Warner, the partner with day-to-day conduct of this matter on behalf of West Ham, says:-

> "…I am concerned about the basis specifically for E20 making claims of privilege given the following
>
> (a) Litigation privilege has been claimed on a number of occasions when no adversarial court proceedings were contemplated. For a long period of time, whilst the parties had considered that an expert determination

might take place on the issue of capacity at the Stadium, adversarial court proceedings were not envisaged …

(b) Legal advice privilege appears to have been claimed where communications were between non-lawyers and where it is implausible that the totality of the document contained dealt with legal advice: see for example Martin Gaunt's email dated 30 January 2017 timed 15:17:12 with the subject line "Commercial in confidence: WH capacity commercial proposal" which was disclosed in entirely redacted form save for its subject line and the details of the sender and recipient. This document was not from a lawyer and was not sent to a lawyer, and on its face given the subject line, would appear to deal with commercial considerations. It is unlikely that the entirety of this document could be covered by legal advice privilege…

(c) E20's previous approach to privilege proceeded on the wrong assumption that the totality of lawyer/client communications were privileged… "

15. The evidence in answer to the application was given in the witness statement of Ms Carr dated 26 September 2018. She gave evidence that (even though not ordered to do so) she had in August 2018 undertaken a re-review of 63 documents where redactions were made on the ground of privilege alone and had modified some of the redactions so as to demonstrate the subject of the redaction without any waiver of privilege: and when the September application was issued she undertook a further re-review. In relation to the sample she prepared a schedule detailing the claim for privilege in relation to each redaction in each sample document.

16. West Ham's evidence in reply (which is in truth its main evidence in support of its application) is contained in a witness statement of Mr Warner served on the evening of 1 October 2018, two working days before the opening of the window for the hearing of this application. E20 (whilst complaining of this and indicating that if the evidence had been served in support of the application then it would have been answered) have not sought an adjournment.

17. The relief sought by West Ham may be granted under CPR 31.19(6)(a), provided that to do so is consistent with dealing with the case justly and at proportionate cost (as elaborated in CPR 1.1(2)).

18. In approaching the exercise of that power, I shall apply the following principles:-

a) Legal professional privilege is a fundamental condition upon which the administration of justice rests: Re Derby Magistrates [1996] 1 AC 487.

b) The burden clearly lies on the party claiming legal professional privilege to make out the claim: West London Pipeline and Storage Ltd v Total UK [2008] 2 CLC 258 at [50]. The claiming party is not

required to provide such detail as will disclose the very material in respect of which privilege is claimed: *ibid* at [86].

c) Given that constraint, the burden is ordinarily discharged by a witness statement from the solicitor to the party claiming privilege which sets out (as specifically as possible in the circumstances) the basis of the claim to withhold inspection.

d) Such a witness statement can be challenged (CPR 31.19(5)) and if challenged is not determinative; Starbev GP v Interbrew Central European Holding [2013] EWHC 4038 at [11]. The question then is whether (after considering the original claim to privilege, the challenge and any response to the challenge) it is reasonably certain that the person claiming privilege has mistakenly represented or has misconceived the character of the documents or it is apparent from other material that the evidence supporting the claim to privilege is incorrect on material points: West London Pipeline (*supra*) at [86]. If it is reasonably certain that the party claiming privilege has misunderstood the process or has proceeded upon an incorrect basis then the evidence supporting the claim for privilege cannot be treated as determinative of the question.

e) If that threshold is crossed, then the Court must determine how to reassess the claim to privilege. It may (1) decide that the evidence does not establish the right to withhold inspection, and order inspection: or (2) require the question to be reviewed again and direct the filing of further evidence (either in the form of a new disclosure statement or in the form of evidence supplementing that already supporting the existing disclosure statement); or (3) as a matter of last resort, itself inspect the documents if either (i) there is credible evidence that the party claiming privilege has misunderstood the duty or is not to be trusted with the decision making; or (ii) there is no reasonably practicable alternative: West London Pipeline (*supra*) at [86].

19. Ms Carr identified in the Schedule to her witness statement of 26 September 2018 each redaction in each sample document and shortly stated the nature of the document and the basis for the redaction. In the closing minutes of the hearing Mr Downes QC identified 44 alterations in response of which no challenge was maintained at the hearing.. Of the remainder Mr Downes QC challenged those

a) Where the redaction was said "implicitly" to reflect legal advice (the earliest of these dating from 15 September 2016);

b) Where the redaction related to the communication to third parties ("key stakeholders" in E20) of a proposed response to West Ham and the nature of the legal advice that had been sought upon that proposed response (the earliest dating from 6 October 2016);

c) Where the redactions were in communications with non-legal advisers or employees or board members but related to "litigation strategy", "settlement strategy" or "a commercial settlement of the dispute when

litigation was in contemplation" (the earliest dating from 12 December 2016);

d) Where the redactions related to legal fees or costs budgets (the earliest dating from 6 October 2016).

20. Legal advice privilege protects communications between lawyer and client which form part of the continuum of seeking and obtaining legal advice: and such communications ordinarily remain privileged from production. I did not understand it to be in dispute on this application that documents by which such advice from a lawyer was disseminated within a body corporate or communicated to third parties under an obligation of confidence were likewise privileged from production. (If it was in dispute, I hold that to be the applicable principle in any event). The argument rather was as to the nature of what was disseminated or communicated. If what was said to the executives/employees or third parties was a quotation of or a summary of the advice tendered, then it was accepted by West Ham that such a communication (described as "express communication") was properly the subject of legal advice privilege. But in an argument (not developed at any length) Mr Downes QC submitted that nothing less would really do: and that any claim for privilege in relation to a document that was "implicit of legal advice" was suspect and that I should proceed immediately to inspect it.

21. Mr Plewman QC submitted that such a formulation of the test was too narrow: and that documents about legal costs were routinely treated as privileged from disclosure not because they quoted or summarised advice from a lawyer but because from them it was possible to work out what advice had been sought or given. Although he did not put it this way, I understood the effect of his submission to be that if in relation to any given document (treated as part of a continuum of communication) it was possible by "reading between the lines" to see what advice had been sought from or given by a lawyer (either as to the law itself or what should prudently or sensibly be done in the relevant legal context) then that document, if sent to an executive/employee or to a third party in confidence, was privileged from production as being "implicit of legal advice" (being evidence of the contents of the communications between client and lawyer). That, I think, is a correct proposition.

22. So, if a solicitor sends to the client and to the client's accountant an e-mail which says "Yesterday Counsel said that you should make the film investment and take out the funding loan in different fiscal years" that is express communication of the lawyer's advice (by means of a summary). It is accepted that both copies of the e-mail are privileged. If the client sends the solicitor and the accountant an e-mail which says "Following yesterday's meeting with Counsel I suppose I must ensure that the film investment and the funding loan are taken out in different fiscal years" then (a) the e-mail to the solicitor is plainly privileged: (b) looked at as a separate communication the e-mail to the accountant is (on the formulation in the preceding paragraph) also privileged as being implicit of legal advice.

23. The question for me is whether it is reasonably certain on the totality of the evidence that E20's solicitors have misapplied this principle.

24. The first challenge is made to an e-mail from a director at E20 (Mr Skewis) to (a) other executives/employees of E20, (b) the lawyers acting for key stakeholders in the Stadium, (c) the lawyers acting for E20 (including Ms Carr), and (d) certain executives/employees of key stakeholders in the Stadium. It is part of a continuum of e-mails that begins with an e-mail from the solicitor for West Ham to the solicitor for E20 (copied to key executives at West Ham). The recipients of Mr Skewis' e-mail were all persons who (on unchallenged evidence) received it on a confidential basis. Its content is said by Ms Carr implicitly to reflect the contents of legal advice on trouble at a game with Watford. (Trouble-free games are relied on by West Ham as indicating that seating capacity can safely be increased). My attention was not drawn to any specific comment by Mr Warner (who gave evidence for West Ham) upon this document. I am not satisfied on the totality of the evidence that Ms Carr has misunderstood legal advice privilege in redacting this document.

25. The next challenge is made to board minutes dated 6 October 2016 where there are redactions from a "Director Update". Paragraphs 7.3 and 8.2 are said to relate to legal costs. Paragraphs 8.3 to 8.7 are said to relate to discussion of the parameters of a "without prejudice" settlement which implicitly reflect the contents of legal advice.

26. The redactions relating to legal fees are short. They are said to be "information about legal costs". Information about legal costs is not itself privileged: and the redaction is not said to be implicit of legal advice. I am reasonably certain from the totality of the evidence that the wrong test had been applied: it is insufficiently nuanced. Although the "last resort" test is probably not satisfied I decided to inspect the unredacted document because (i) the parties should not be distracted from trial preparation (by being required to participate in yet another round of interlocutory evidence) to any greater extent than is strictly necessary (ii) the proximity of the trial means a determination of the issue is highly desirable. This is an unprincipled and strictly pragmatic case management in this case and should not be treated as a precedent. It is of importance to the integrity of the established systems for disclosure and the correct allocation of judicial resources that the "last resort" requirement is maintained and that parties are not encouraged to pursue interlocutory challenges to disclosure decisions in the hope that a judge will routinely read material for which privilege is claimed. The Court relies on its officers for that purpose.

27. Having read the redacted material I am of the view that whilst the claim for privilege redaction is marginal, it is clear that (a) the interests of the just resolution of the issues for decision in the action do not require disclosure, and (b) it is not proportionate (in terms of costs and resources) either to explore the marginality of the decision or to introduce yet more material for examination and debate in the trial. The burdens arising from the costs of the disclosure process itself and from the management of the material produced already threaten the fair resolution of many disputes. The introduction of peripheral material is to be discouraged.

28. As to the remainder of the redaction I am not reasonably certain on the totality of the evidence that the claim that the material is privileged (as being "discussion of "without prejudice" parameters implicitly reflecting the contents of legal advice") is misconceived or incorrectly maintained. My attention was not drawn to any specific challenge by Mr Warner to this document. That there should be discussions within E20 and with the key stakeholders in the Stadium about a proposal to settle the dispute with West Ham that it is common ground had existed since June 2016 is

entirely credible: and that the discussion should reflect the legal advice given in terms which implicitly disclose its content is entirely plausible.

29. I take the same view (and for the same reason) of the redaction from sample document 3, and of those from sample document 20 relating to legal fees and costs budgets.

30. Sample document 14 is an e-mail chain between board members of E20, E20's solicitors, the legal advisers to key stakeholders and the representatives of key stakeholders (all subject to obligations of confidence) which either contains legal advice or implicitly reflects legal advice. There are 6 challenges to redactions said to "implicitly reflect" legal advice. Sample document 15 is an "issues log" created in June 2017 (and so after the commencement of proceedings) which is said implicitly to reflect legal advice. Sample document 16 contains one redaction which is claimed implicitly to reflect legal advice. Sample document 18 are is composed of board minutes dated 31 January 2017 from which redactions are made as either repeating legal advice or implicit of legal advice (including recommendations on legal strategy implicit of legal advice). There are four redactions said to be implicit of legal advice. Sample document 19 contains two redactions said to be implicit of legal advice. Mr Downes QC did not argue each of these challenges to the redactions. He maintained the broad position that it is not possible to redact simply because the redacted words are implicit of legal advice.

31. I have looked at each of these redactions within the framework I have set out above. Following the approach of Mr Downes QC, I shall simply say that I am not reasonably certain on the totality of the evidence that Ms Carr's statements are misconceived or incorrect in relation to the several claims to privilege advanced. I shall therefore not seek to go behind her statement.

32. The redaction from sample document 4 raises a different issue. This is an e-mail dated 4 January 2017 from Chris Allison (E20's egress consultant) to executive members of E20 and Executive members of the Stadium operator. The redactions are said to have been made "for the dominant purpose of contributing to E20's settlement strategy in relation to [West Ham]". It is an invocation of litigation privilege. There is no communication with any lawyer. The litigation did not actually start until 23 February 2017.

33. Litigation privilege was the subject of much debate. It was Mr Warner's submission in his evidence that it was clear beyond doubt that the only means of dispute resolution in contemplation at the time the documents in the sample were generated was expert determination, and that litigation privilege does not attach to expert determination processes.

34. The first strand of the argument is to identify what is meant by "litigation". It was common ground before me (a) that "litigation" is not confined to proceedings before the Court but extends to arbitrations and other tribunals exercising judicial functions and (b) that the essential characteristic of "litigation" is that it is adversarial, not investigative or inquisitorial. Adversarial procedures involve the parties to a dispute submitting that dispute to a decision maker, each presenting their own case to him or her, and having the opportunity to test and challenge the other's case before him or her in a contest. The issue that was argued was whether a process of expert

determination (such as that contemplated in clause 50 of the Agreement) could and in this case did constitute "litigation". Ms Carr advanced in paragraph 28(g) of her witness statement a secondary argument (a fall-back position) that in any event expert determination of the seating capacity dispute "would itself have inevitably been an adversarial process".

35. As to the general question whether a process of expert determination *could* constitute "litigation" Mr Downes QC conceded that it might. For the purposes of argument he accepted as accurate the statement in *Kendall on Expert Determination* paragraph 12.7-5 that

> "[i]n considering the question whether litigation privilege arises in an expert determination it is necessary to consider whether the proceeding is adversarial and whether the parties' preparations need to be protected to facilitate a fair outcome."

He referred also to *Hollander on Documentary Evidence* 13th edition paragraph 18-11f, *Passmore on Privilege* at paragraph 3-086f and *Thanki on the Law of Privilege* 3rd edition at paragraph 3.61f. He submitted that what occurred in the instant case did not satisfy the relevant criteria.

36. Clause 50 of the Agreement provides that under the Specified Provisions (which do not include the provisions on which West Ham relies in its seating capacity arguments as imposing obligations on E20 in that regard) disputes must be determined by an expert. Clause 50 declares that the person so appointed shall act as an expert and not as an arbitrator, shall decide the procedure to be followed in the determination and that the expert determination shall (in the absence of manifest error) be final and binding. West Ham and E20 appear to have assumed that clause 50 would apply to the seating capacity dispute and would determine what E20s obligations were to apply for an increased seating capacity. The parties did not in fact refer the seating capacity dispute to an expert. Instead, against the background of a proposed reference, they set about negotiating an interim seating agreement (which itself contained an expert determination clause). But in the end that came to nothing.

37. Mr Plewman QC submitted that (a) although under clause 50 the expert controls the process, that did not make the process of necessity inquisitorial; (b) the process was still supervised by the Court since a determination by an expert could be set aside for manifest error under the terms of the Agreement (and under the general law might be set aside for fraud or collusion, bias or a material departure from instructions); (c) the proposed interim seating agreement would have modified clause 50 so as to entitle the parties to the dispute to make written submissions to the expert and written replies to the other side's submissions; (d) when a reference was in fact made under clause 50 in May 2018 in respect of a different dispute that was in fact the procedure that was adopted.

38. I hold that the expert determination process in the instant case did not amount to "litigation". The only agreed process was that set out in clause 50 of the Agreement: and that is entirely open about what form the process might take, the matter being left to the expert. All the rest was negotiation which did not eventuate in any concluded bargain. There never was an adversarial expert determination process in place. It is not permissible for the court to use either unagreed proposals or hindsight derived

from a later agreement in a different context to modify the actual terms of clause 50. I agree with the observation in *Thanki* (*supra*) at paragraph 3.72 that

> "if the expert determination has not yet commenced but is only reasonably contemplated it may be difficult to show that it will necessarily be sufficiently "adversarial" to found a claim of litigation privilege"

If litigation privilege is to apply to this dispute then it must apply in relation to Court-based proceedings.

39. The second strand of the argument is to identify at what point litigation privilege arises. It was common ground before me that litigation privilege arises only when litigation is reasonably contemplated or anticipated. This does not mean that litigation must be regarded as probable: but it does mean that litigation must be regarded as something more than a mere possibility, so that a general apprehension of future litigation will not suffice. The parties drew on the summary of the law given by Hamblen J in Starbev *(supra*). The area of dispute was whether E20 had produced sufficient evidence to establish when that condition was satisfied.

40. Mr Downes QC argued that it was only shortly before the actual commencement of the action that the condition was met. Before then, all that was in reasonable contemplation was the resolution of the dispute by expert determination, and expert determination was not "litigation" in this case. Mr Warner refers in his evidence to 22 documents created by E20 executives or employees between 21 June 2016 and 2 February 2017 which refer to the resolution of the dispute by expert determination, including two from 5 August 2016 and 8 August 2016 which refer to that course as being "very likely". He argues in his evidence that there is an irresistible conclusion that as at January 2017 E20 envisaged expert determination (not litigation) as the manner of resolving the dispute.

41. That, however, is not the test: and I do not accept either Mr Downes QC's or his witness's argument. The question is whether litigation is "reasonably in contemplation": and it can be "reasonably in contemplation" even if some other means of dispute resolution is regarded as more probable. The chance of litigation eventuating must be placed somewhere on the spectrum between "general apprehension" or "mere possibility" at one end and "probable" at the other.

42. In the instant case it is the evidence of Ms Carr that adversarial proceedings had been in contemplation for a long time prior to January 2017. She refers to the instruction of her firm in April 2016: though I cannot infer from that that the instructions related to litigation then reasonably in contemplation. She draws attention to a statement on behalf of West Ham seeking a resolution of the dispute by agreement "to avoid protracted and costly legal debate at a later stage" but saying that if they did have legally to defend it then they would do so. Notwithstanding the litigious nature of the relationship I do not think that by any objective measure E20 could properly say that litigation was at that point reasonably in contemplation (though no doubt generally apprehended).

43. The parties then set about exploring the possibility of settlement of the dispute by expert determination and the negotiation of an interim seating agreement. It is

permissible to look at the drafts in circulation to see what the parties thought they were doing by engaging in this process. It is plain that they did not think that litigation was precluded, or the threat of litigation removed. The proposed interim agreement expressly stated that no party was restricted from commencing proceedings. On 31 August 2016 solicitors for West Ham wrote to say that if the interim agreement was not settled and if E20 failed to provide additional seats in accordance with West Ham's reading of the Agreement then "E20 is facing a significant claim". West Ham may now seek to say that this was just empty bluster: but they cannot complain if E20 took them seriously. By 13 October 2016 it was plain that West Ham took the view that both reference to an expert and any interim arrangement were dead. By 9 December 2016 Baroness Brady was requiring complete submission to West Ham's demands, adding:-

> "Please be assured that if we need to escalate these discussions so that the club is adequately compensated for its losses, we shall do so. If this requires taking this matter to court, then so be it."

Once again, West Ham may wish to say that she should not be taken seriously: but they can hardly complain if E 20 regarded it as a reiteration of the stand taken on 31 August 2016.

44. In my judgment E20 can fairly and properly say that litigation was in reasonable contemplation from 31 August 2016.

45. The third strand of the argument is to identify in respect of what documents generated in that period litigation privilege may be claimed. I understood it to be common ground before me that litigation privilege relates to documents brought into existence for the purpose of the conduct of litigation, and passing between client, lawyer, agent or third party. There are two points.

46. First, Mr Downes QC submitted that the only documents to which litigation privilege can attach are documents concerned with obtaining advice or evidence for use in litigation because only such communications could fairly be said to relate to "conducting" the litigation. He said the documents which concern strategy or potential settlement offers fall outside the ambit of litigation privilege. I do not accept that this narrow formulation is now correct. In SFO v Eurasian Natural Resources Corporation Ltd [2018] EWCA CIV 2006 ("the ENRC case") the Court of Appeal made clear (a) at para [102] that legal advice given to head off, avoid or settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of defending those proceedings (a proposition that Mr Downes QC was inclined to accept); and (b) at para. [118] that documents prepared for the purpose (I will come back to that) of settling or avoiding a claim are created for the purpose of defending litigation. At a time when there is so much emphasis (by means of pre-action protocols and otherwise) on discouraging the commencement of proceedings and encouraging compromise this is entirely understandable. The pre-action gathering of evidence for potential deployment in reasonably contemplated proceedings is plainly within the scope of litigation privilege: and so, in my judgment, is the pre-action gathering of information and material created for the purpose of settling or avoiding a claim (whether or not it might be deployed in evidence if litigation started), and the analysis of that material for the purpose of considering a settlement

offer. The documents at issue in the ENRC case itself consisted not only of notes of evidence that could be given by individuals relevant to the events under investigation but also summaries of reviews of documents and information about the work being undertaken, presentations made to the Board or internal committees, and reports prepared by forensic accountants. These were held to be the proper subject of a claim to litigation privilege once litigation was reasonably in contemplation (and a consideration of self-reporting to avoid or mitigate criminal proceedings was under way).

47. Second, Mr Downes QC submitted (in my judgement correctly) that it was not sufficient that a document was of the correct character; but it must also have been produced for the sole or dominant purpose of conducting the relevant litigation. He referred to Rawlinson & Hunter v Akers [2014] 2 BCLC 1 at [53]. So, the task of the person or tribunal considering a potential claim that litigation privilege applies is to determine the actual intention of the party claiming privilege, and, if there is more than one purpose, what is the dominant purpose of the author or of the person or entity commissioning the creation of the document. Faced with a challenge the Court must subject the evidence in support of such a claim to "anxious scrutiny". Given the evidential constraints upon challenging a witness statement on an interlocutory application this means that the Court must make an objective assessment of the document itself and of what is disclosed by the evidence as to the circumstances of its creation.

48. Having dealt with the issues argued in relation to sample document 4 this document (the e-mail from Mr Allison the egress consultant to E20) I must apply my holdings of law to the evidence adduced. On the totality of the evidence (and without having looked at the document) I think it is reasonably certain that Ms Carr has misconceived the character of the document because her evidence does not engage at all with the instructions that were given to Mr Allison in the preparation of the report (beyond the mere assertion of its dominant purpose). The document is headed "Capacity Extension Application". That issue was relevant to the future management of the Stadium generally and to its financing as well as to the conduct of litigation about (a) whether West Ham was entitled under the Agreement to use additional capacity and (b) whether E20 was obliged to seek consents for extra capacity. There is little point in requiring a fifth re-examination of the claim to privilege, and I have therefore as a last resort inspected the redacted part. Having done so I invite submissions (when I hand down judgment) as to what should be done. I make clear that those submissions encompass the question whether (now that the document has been inspected) it remains reasonably certain that the character of the document has been misconceived.

49. The fifth sample document consists of Board Minutes and an Annexe. The Annexe is a Report to the Board headed "Private and Confidential - Legally Privileged: Overview of Legal dispute on all issues". It is claimed that this implicitly reflects legal advice. Even if it does not expressly record the actual legal advice or summarise it (being an "overview") I see no reason to doubt a claim that it evidences the legal advice given to E20 because "reading between the lines" the advice given as to legal merit and what should be done in the circumstances can be spelt out. The claim to privilege is sustained.

50. The principal document is described in Ms Carr's detailed schedule as "Board Minutes". For two redactions litigation privilege is claimed (since it is said that they

relate to the strategy to be employed in the contemplated litigation). For two, legal advice privilege is claimed (in that the comments implicitly disclose advice given). As to the latter, I am not reasonably certain that the claim is misconceived.

51. As to the former, I cannot say that I am reasonably certain on the totality of the evidence that the redactions for litigation privilege mischaracterise the documents. But I do have some disquiet. Litigation privilege can only be claimed where the dominant purpose of creating the report of the item must have been to conduct reasonably contemplated litigation (including preparing to avoid or settle it). Ms Carr may have included in the concept of "litigation" the idea of expert determination. If the item under report related to expert determination but not to litigation, then litigation privilege could not be claimed. I would therefore direct Ms Carr in this instance to review the claim now that the position has been clarified and either remove the redaction or specifically confirm that information or report in the redaction did not relate to a process of expert determination.

52. The sixth sample document includes an e-mail from E20 to its solicitors and other stakeholders circulating legal advice received: and an e-mail attaching a diagram summarising the legal advice. They form part of a chain of e-mails commencing with one from E20 to its solicitors which it is accepted seeks legal advice relevant to the dispute, which advice is tendered and on which further advice is then sought. It is unsurprising that that advice should then be circulated on a confidential basis (as is said in evidence to be the case) to key stakeholders. Approaching the matter in accordance with the preceding paragraphs I am not reasonably certain on the totality of the evidence that these claims are claim misconceived. The claim to privilege is sustained.

53. The seventh sample document is of the same character and I treat it in the same way for the same reasons.

54. The eighth sample document is an e-mail dated 30 January 2017 from an E20 executive to the E20 board and to key stakeholders (on a confidential basis) said to be sent with the dominant purpose of discussing a commercial settlement of the litigation then reasonably contemplated (and that would in fact be commenced shortly thereafter).

55. Mr Downes QC submitted that the discussion of settlement proposals does not fall within the scope of litigation privilege, which is confined to documents generated to obtain advice or to gather evidence. The consequence of this submission appears to be that if E20 in fact made a "without prejudice" offer to West Ham to dispose of the impending litigation then that document *would not* be before the Court in any subsequent case: but any document (not passing between solicitor and client) recording the terms of the proposed offer, or recording discussion of the offer, or authorising the terms and putting of the offer *would* be open to inspection and to inclusion in the trial bundle. That is odd. It is even odder if the discussion within the board of a corporate party arises during the trial itself: can it really be the case that that party (under its ongoing disclosure obligation) is bound to disclose to its opponent documents recording its settlement strategy because they are not covered by litigation privilege? I do not think that can be right.

56. In my judgment documents prepared for the dominant purpose of formulating and proposing the settlement of litigation that is in reasonable contemplation (or in existence) are protected by litigation privilege. The principle must be carefully applied. Documents may, of course, be generated about the settlement of a claim for other purposes, such as the general management of the business ("We must dispose of this claim because its continuation is harming our fund-raising"). Litigation privilege would not apply. Documents may be generated which are relevant to a settlement e.g. a projected cashflow which has a bearing on the terms of an offer. But litigation privilege does not apply because if you ask the question "Why was this document created?" the answer is not "Because of the litigation" but "Because prudent management of the business requires cash flow projections". The document is created in connection with the litigation; but not for the sole or dominant purpose of the litigation.

57. In the present case there is no doubt about the centrality of the dispute to the relationship between E20 and West Ham. I have no reason to doubt that the nature of the document is correctly described. It is headed "WH capacity commercial proposal" and the clear evidence of Ms Carr is that it related to the development of a potential settlement offer. If it was an e-mail regarding settlement proposals the remaining question is whether it was sent with the dominant purpose of discussing with the recipients a commercial settlement of the dispute to be put to West Ham. There is no direct evidence from the creator of the document: there is the evidence of Ms Carr that it was so related. That evidence must be looked at objectively. If the nature of the document is correctly described, then why else would the document be created other than to dispose of the litigation that had been threatened in December 2016? No-one has suggested (and the evidence to which I have been directed does not establish) that there was some other emerging opportunity open to West Ham and E20 to which a commercial proposal might be directed. Rather the evidence shows that what dominated the fractious relationship was West Ham's demand for greater seating capacity at no extra cost and its assertion that E20 was bound to facilitate it, backed by the threat of legal proceedings. I am not reasonably certain that Ms Carr's disclosure statement is incorrect.

58. I would give the same answer in relation to sample documents 9,10, 11,12,13 and 17 (each of which I have separately considered). The point of objection taken was the point of principle that it is not possible to claim litigation privilege in respect of a settlement proposal. For the reasons I have given I do not accept that argument. No detailed argument was advanced in relation to any individual redaction. My determination of the point of principle therefore dictates the outcome of each of these challenges.

59. The challenges are in essence dismissed. But that result is worthy of comment (though cautious comment, because of the impending trial). Mr Downes QC sought to demonstrate from the documents that until the latter part of January 2017 E20 appeared to be seeking the requisite safety certificate to underpin an increase in seating capacity to 60,000 (though it cannot be said that by so doing they were recognising an obligation so to do, or that they intended to offer any extra capacity to West Ham for the same fee as had been agreed in relation to 53,500 seats). But on 31 January 2017 there was a board meeting (the minutes of which were redacted) following which E20 indicated that it would decline to pursue any application to

increase seating capacity until a commercial deal on the increase over 53,500 seats had been done. There is no open record of the reason or reasons for that decision. Mr Downes QC submitted that the grounds for the decision are likely to be found in the redacted material and the claims for privilege were suspicious.

60. I have taken the view that privilege is absolute. The only question is whether it is claimed on proper grounds and maintained after proper scrutiny. The grounds do not vary by reference to the potential significance of the material for which privilege is claimed. But of course, privilege can be waived: and a party who seeks to persuade a Court that he took a decision on ground X and not ground Y may (in the absence of any other documentary evidence) think it prudent to waive privilege.

61. I should deal, lastly, with one challenge not made in West Ham's application, hinted at (but identified) in Mr Warner's evidence, but only advanced at the hearing itself. Mr Downes QC selected sample document 5 (a report to the E20 board dated 17 January 2017 and providing an overview of the relationship with West Ham) ("Overview 1"). He identified another document outside the sample ("Overview 2") and submitted that Overview 2 was an early draft of Overview 1. He then compared the redactions and noted that at one point in the document a passage in Overview 1 had been left unredacted but in Overview 2 some text in the same place had been redacted. This, he said, showed a worryingly aggressive approach to redaction, and the claiming of privilege. I do not so find. It is pure speculation that the text redacted from Overview 2 is the text that appears in Overview 1. A comparison of the unredacted "recommendations" shows this to be so.

62. I did not find the second example of "aggressive redaction" any more compelling. In one e-mail chain privilege had been claimed for an e-mail emanating from West Ham's solicitor. Undoubtedly an error: but an insufficient foundation for an argument that the whole disclosure process is flawed through unjustified claims for privilege.

63. I so dispose of the application.