Neutral Citation Number: [2015] EWHC 1003 (Ch)

Case No: HC-2012-000005

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 15/04/2015

Before :

MR JUSTICE NEWEY

- -

Between :

(1) JOANNA ELIZABETH BIRDSEYE **(2) LUCY-JANE COOKE** **(Personal representatives of the estate of Rosemary Cooke)**	**Claimants**
- and -	
(1) ROYTHORNE & CO **(2) ROYTHORNES LLP** **(3) ROBERTO MARCO FRANCESCO POLA** **(4) JOHN WILLIAM DOUBLEDAY** **(5) NORMA ELIZABETH DRING** **(6) DRING BROS LIMITED**	**Defendants**

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Miss Penelope Reed QC (instructed by **Mossop & Bowser**) for the **Claimants**
Mr Richard Wilson (instructed by **Plexus Law**) for the **First and Second Defendants**
Mr David Halpern QC (instructed by **Kenneth Bush Solicitors**) for the **Third Defendant**

Hearing date: 18 March 2015

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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.

....

Mr Justice Newey :

1. The question raised by the present application is whether certain passages in the Re-Amended Particulars of Claim should be struck out on the basis that they refer to matters protected by legal professional privilege.

Basic facts

2. The proceedings arise out of the death of Mr Dick Dring, who was married to the fifth defendant ("Mrs Dring").

3. Mrs Dring's brother and sister-in-law, Mr Michael Cooke and his wife Rosemary ("Mrs Cooke"), were tenant farmers at a property known as Manor Farm. In 1987, the farm was bought in the name of the sixth defendant ("Dring Bros"), a company of which Mr and Mrs Dring were the only shareholders, so that the Cookes could continue to live there.

4. In 1980, Mr Dring had made a will under which he had appointed his wife and the third and fourth defendants ("Mr Pola" and "Mr Doubleday") as his executors and left his residuary estate to his wife. Mr Pola and Mr Doubleday were respectively Mr Dring's accountant and a friend.

5. In 1999, Mr Dring executed a codicil which provided for Manor Farm to be given to Mrs Cooke. Like the will, the codicil was drawn up by the first defendants, Roythorne & Co. For convenience, I shall refer in this judgment to both the first defendants and Roythornes LLP, the second defendants, as "Roythornes".

6. Mr Dring died on 28 September 2008. Following his death, probate was granted to Mr Pola and Mr Doubleday, with power reserved to Mrs Dring. Roythornes were appointed to act for Mr Pola and Mr Doubleday as executors.

7. Mrs Cooke herself died in November 2008. In December, Roythornes told solicitors acting for the claimants, who are Mrs Cooke's daughters and the administrators of her estate, that she "does not benefit under the estate of the late Dick Dring" and that they were therefore "instructed by the executors not to disclose the Will and Codicil as requested". In a subsequent letter, Roythornes explained that Manor Farm "is owned by Dring Bros Limited" and that "the purported gift under the Codicil dated 28th October 1999 is of no effect as the deceased could not give away that which he didn't own".

8. Mrs Cooke's daughters responded by asserting claims against Mr Dring's estate, in particular on the basis of proprietary estoppel. In time, a compromise was achieved under which Mrs Dring varied her husband's will so that it provided for a legacy to Mrs Cooke of £300,000. In return, Mrs Cooke's daughters agreed not to make any claims against Mrs Dring, her husband's estate or Dring Bros. The agreement expressly stated, however, that the daughters were not prevented from bringing a claim against Roythornes.

9. All or most of Mr Dring's residuary estate, including his shares in Dring Bros, had already been distributed to his widow, on the strength of an indemnity from her. To

facilitate the settlement with Mrs Cooke's daughters, Dring Bros transferred £305,000 to Roythornes, and they in turn paid £300,000 to the daughters' solicitors.

10. Mrs Cooke's daughters issued the present proceedings, as the administrators of their mother's estate, in 2012. Initially, Roythornes were the only defendants, it being alleged that they had acted negligently in relation to the preparation of Mr Dring's codicil. When, however, it came to be appreciated that Dring Bros' accounts had not always shown Manor Farm as an asset of the company, the proceedings were enlarged to include claims on the footing that, although the company was its legal owner, the farm was held on trust for Mr Dring absolutely. In the context of the application with which I am concerned, paragraph 17 of the Re-Amended Particulars of Claim is of particular importance. This alleges that Roythornes negligently failed to investigate the beneficial ownership of the farm. The particulars given in support of that allegation are also relied on in support of claims that Mr Pola and Mr Doubleday "failed to administer [Mr Dring's] estate in accordance with the Codicil and the law" (paragraph 23 of the Re-Amended Particulars of Claim) and that Mrs Cooke's daughters were induced to enter into the compromise agreement by representations negligently made by or on behalf of Mrs Dring (paragraph 32).

11. The present version of paragraph 17 of the Particulars of Claim was introduced into the pleading by amendments made in April 2014. The particulars contained in the paragraph largely concern communications between Roythornes and one or both of Mr Pola and Mr Doubleday. More specifically, they refer to what was said at a meeting between Roythornes, Mr Pola and Mr Doubleday on 23 October 2008 and during a telephone conversation between Roythornes and Mr Pola on 18 November 2008.

12. What is said in paragraph 17 of the Re-Amended Particulars of Claim about the 23 October meeting and the 18 November conversation is based on attendance notes made by Roythornes. Mossop & Bowser, Mrs Cooke's daughters' solicitors, were provided with a copy of the Roythornes file relating to the administration of Mr Dring's estate by Calthrops Solicitors LLP, who act for Mr Doubleday, under cover of letter dated 13 May 2013. A week or so earlier, Mossop & Bowser had written to Mr Pola inviting him to provide a full account of the facts regarding the administration of the estate. Mossop & Bowser suggested to Mr Pola in their letter that he should obtain legal advice, but he does not appear to have done so at this stage. At all events, he replied by a letter dated 15 May. In the course of that letter, Mr Pola explained that Roythornes' file gave "much clarification on the issues" and referred to, among other things, meetings that he, Roythornes and Mr Doubleday had attended in late October and early December of 2008, communications from Roythornes to the executors, advice that Roythornes gave and opinions of the executors. In the final paragraph of his letter, Mr Pola said:

> "I personally have copies of all documents, emails, referenced to support all of the above. I would be more than happy to complete a Witness Statement with all of the documents attached as appendices to my Witness Statement."

13. Defences have been served on behalf of Roythornes; Mr Pola and Dring Bros, of which Mr Pola has now become the sole director; Mr Doubleday; and Mrs Dring (who, however, was in poor health when the Defence was prepared and who died in

December 2014). Further, Mr Doubleday has made Part 20 claims against Roythornes and Dring Bros and given notice that he claims an indemnity or contribution from Mr Pola and Mrs Dring.

14. The Defence served on behalf of Mr Pola and Dring Bros states that the particulars under paragraph 17 of the Particulars of Claim (as re-amended) "relate to matters which are privileged in the hands of Mr Pola and Mr Doubleday as executors" and that Mr Pola and Dring Bros "will accordingly seek to have these Particulars struck out". Mr David Halpern QC, who had been instructed by Kenneth Bush Solicitors on behalf of Mr Pola, Dring Bros and Mrs Dring, had already flagged the point in a letter of 23 June 2014 to Mrs Cooke's daughters' counsel, Miss Penelope Reed QC. Mr Halpern referred in that letter to having instructions "to apply for an injunction requiring [Miss Reed's clients] and solicitors to hand over all copies of the documents and restraining [them] from relying on them in any way".

15. On 21 November 2014, Mr Pola issued the application that is now before me. This asks for an order "that paragraph 17 of the re-amended Particulars of Claim and the reference to paragraph 17 in paragraphs 23(8) and 32 thereof be struck out on the grounds that the same are privileged and that privilege has not been waived by [Mr Pola] and that all reference to the privilege matters in paragraph 17 be deleted from the Court file".

16. As matters stand, Kenneth Bush Solicitors continue to represent both Mr Pola and Dring Bros, and they have also agreed to act for Mrs Dring's executors. However, they have advised Mr Pola that he will need to find alternative representation once the present application has been determined.

17. Manor Farm has been sold.

The issues

18. The issues that arise can, I think, be conveniently addressed under the following headings:

    i) Were communications between Mr Dring's executors and Roythornes privileged as against Mrs Cooke and her estate?

    ii) Was privilege waived by Mr Doubleday?

    iii) Was privilege waived by Mr Pola?

    iv) Loss of confidentiality.

Were communications between the executors and Roythornes privileged as against Mrs Cooke and her estate?

19. It is well established that a trustee cannot always assert privilege against a beneficiary of the trust. Thus, in *Talbot v Marshfield* (1865) 2 Dr & Sm 549, while beneficiaries were denied access to advice that the trustees had received on how to defend a claim, they were held to be entitled to see advice that the trustees had taken on the exercise of a power. Kindersley V-C said (at 551):

> "It was contended that [the advice on the exercise of the power] was not taken for the benefit of all the *cestuis que* trust; but all the *cestuis que* trust have an interest in the due administration of the trust, and in that sense it was for the benefit of all, as it was for the guidance of the trustees in their execution of their trust. Besides, if a trustee properly takes the opinion of counsel to guide him in the execution of the trust, he has a right to be paid the expense of so doing out of the trust estate; and that alone would give any *cestui que* trust a right to see the case and opinion."

20. Miss Reed contended that the present case is similar. The advice that Roythornes gave to Mr Pola and Mr Doubleday, as the executors of Mr Dring's will, on whether his estate encompassed Manor Farm is, she argued, comparable to that which the trustees were required to disclose in *Talbot v Marshfield*. That being so, Miss Reed submitted, the materials cannot be privileged as against Mrs Cooke or her estate. According to Miss Reed, Mrs Cooke is to be considered to have been a beneficiary because she was named as such in Mr Dring's will: it does not matter in this context whether the property she was to receive was in fact comprised in the estate. In any case, there was a joint interest between Mrs Cooke and the estate of which Mr Pola and Mr Doubleday were the executors: the interests of the executors and Mrs Cooke were, so Miss Reed said, entirely aligned.

21. The authorities indicate, however, that privilege can be maintained against a person who has no more than an arguable claim to be a beneficiary. Thus, in *Wynne v Humberston* (1861) 27 Beav 421 Romilly MR declined to order a trustee to produce documents to someone asserting a claim to part of a testatrix's estate. Romilly MR noted (at 423):

> "There can be no question that the rule is, that where the relation of trustee and *cestui que trust* is established, all cases submitted and opinions taken by the trustee to guide himself in the administration of his trust, and not for the purpose of his own defence in any litigation against himself, must be produced to the *cestui que trust.*"

However, he went on (at 424):

> "[C]onsidering the application as one made by a Plaintiff claiming the estate against *Humberston* as a trustee, still I am of opinion that he is not entitled to see the cases and opinions until a *prima facie* case of the relation of trustee and *cestui que trust* is established. This is simply the case of a claimant who has not made out his title. If *Williams* is entitled to a production, then any stranger might come and claim the estate and see all the opinions and cases, and a very serious injury might be caused to the persons really entitled to the property."

22. Remarks to comparable effect are to be found in *O'Rourke v Darbishire* [1920] AC 581, a decision of the House of Lords. In *O'Rourke,* Lord Parmoor said (at 619-620):

> "A cestui que trust, in an action against his trustees, is generally entitled to the production for inspection of all documents relating to the affairs of the trust. It is not material for the present purpose whether this right is to be regarded as a paramount proprietary right in the cestui que trust, or as a right to be enforced under the law of discovery, since in both cases an essential preliminary is either the admission, or the establishment, of the status on which the right is based. I agree in the view expressed by Peterson J., that the rule as to the right of a cestui que trust to the production of trust documents for inspection does not apply when the question to be tried in the action is whether the plaintiff is a cestui que trust or not."

For his part, Lord Wrenbury focused on the "proprietary right" of a beneficiary to production of trust documents. He observed (at 626):

> "If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgments in this case a proprietary right. The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own….
>
> But this plaintiff cannot as matters stand say that he is a beneficiary. That is the very question to be determined in the litigation."

In a similar vein, Viscount Finlay said that the plaintiff had not even made out a prima facie case that he was a cestui que trust.

23. Some of what was said in *O'Rourke v Darbishire* falls to be reconsidered in the light of the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709. In *Schmidt*, Lord Walker, giving the judgment of the Board, concluded (in paragraph 66) that:

> "a beneficiary's right to seek disclosure of trust documents, although sometimes not inappropriately described as a proprietary right, is best approached as one aspect of the court's inherent jurisdiction to supervise, and where appropriate intervene in, the administration of trusts."

24. To my mind, however, it must remain the case that a person must, at least normally, establish as a minimum a prima facie case that he is a beneficiary before there can be any question of the Court requiring a trustee or executor to disclose documents which would be protected by privilege if the applicant were not a beneficiary. That view appears to me to derive support from the cases I have mentioned in the preceding paragraphs: Romilly MR spoke of the need for "a *prima facie* case of the relation of trustee and *cestui que trust*" in *Wynne v Humberston*, and in *O'Rourke v Darbishire* there were references to, for example, the establishment (or admission) of the status on which the right to production was based as an "essential preliminary" and the

plaintiff's inability to make out even a prima facie case that he was a cestui que trust. Further, to require an applicant to show a prima facie case that he is a beneficiary accords with the approach that the Courts adopt where it is suggested that no privilege exists because the relevant document came into existence as part of a fraud (as to which, see e.g. *Royscott Spa Leasing Ltd v Lovett* [1995] BCC 502, especially at 506, and paragraph 31.3.22 of the White Book).

25. In the circumstances, it seems to me that, if they are to succeed on this particular issue, Mrs Cooke's daughters need to make out a prima facie case that Manor Farm was held on trust for Mr Dring. As I have mentioned, Miss Reed argued to the contrary, maintaining that Mrs Cooke was to be regarded as a beneficiary for this purpose simply on the strength of the reference to her in Mr Dring's will. I do not, however, accept that submission. It would mean that executors could not rely on privilege against someone named as a donee in a will even if it were entirely plain that the property in question had never formed part of the testator's estate.

26. In the course of her oral submissions, Miss Reed submitted that there is a prima facie case that Manor Farm was held on trust for Mr Dring. She did not, however, develop the argument at any length, and I have not been persuaded that a sufficiently strong case has been made out. I can certainly understand the argument to that effect, but I do not consider a prima facie case to have been established.

Was privilege waived by Mr Doubleday?

27. The next question is whether privilege was waived by Mr Doubleday when he disclosed the Roythornes file to Mossop & Bowser.

28. The general rule is of course that, where solicitors have been retained by clients jointly, a single client cannot waive privilege unilaterally. The law was conveniently summarised by Rix J in *Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison (The "Sagheera")* [1997] 1 Lloyd's Rep 160 in these terms (at 165-166):

> "Parties who grant a joint retainer to solicitors of course retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim to privilege for documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be waived jointly, and not by one party alone."

29. In reliance on this principle, Mr Halpern argued that Mr Doubleday could not waive privilege without the consent of his co-executor, Mr Pola. Miss Reed, however, contended that Mr Doubleday was able to waive privilege on his own because the act of one executor binds all of them.

30. In support of her submission, Miss Reed took me to Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (20th ed.). This explains (in paragraph 54-69):

> "[C]o-executors, however numerous, are regarded in law as an individual person. The same principle applies under a joint

> grant of administration. Thus, as a general rule, the act of one of joint representatives is regarded as the act of all and is binding unless the case falls within one of the exceptions considered later in this section."

31. The principle that "the act of one of joint representatives is regarded as the act of all and is binding" was recognised in, for example, *Fountain Forestry Ltd v Edwards* [1975] Ch 1, in which there was extensive discussion of the case law. Implicit acknowledgment of it is also to be found in the Administration of Estates Act 1925, section 2(2) of which provides that, "[w]here as respects real estate there are two or more personal representatives, a conveyance of real estate devolving under this Part of this Act or a contract for such a conveyance shall not be made without the concurrence therein of all such representatives or an order of the court". It would not have been necessary to say this but for the general rule that a single executor can act alone.

32. The law relating to executors thus differs in this respect from that relating to trustees, who have to act together. It is not even possible for a majority of (non-charitable) trustees to bind a minority: see e.g. *Luke v South Kensington Hotel Company* (1879) 11 Ch 121, at 125-126. The basis for the rather curious distinction between executors and trustees is presumably to be found in the fact that the "origins of the two roles are quite different–one being derived from the jurisdiction exercised by the ecclesiastical courts, the other from the courts of Chancery" (Williams, Mortimer and Sunnucks, at paragraph 57-06).

33. Mr Halpern described the principle that "the act of one of joint representatives is regarded as the act of all and is binding" as anomalous. That may be so, but it is deeply entrenched, and it plainly is not open to me to gainsay it.

34. Mr Halpern argued that the principle is inapplicable on the facts of the present case for two reasons. In the first place, he suggested that it cannot apply because Roythornes were not retained by Mr Doubleday alone but by the two executors together. The result, Mr Halpern suggested, was that the privilege belonged to Mr Doubleday and Mr Pola jointly and could not be waived by either on his own. Secondly, Mr Halpern submitted that the executors became trustees and that, when they did so, the trust rule supplanted that relating to executors.

35. So far as the latter point is concerned, Mr Halpern did not suggest that Mr Pola and Mr Doubleday had expressly assented to property comprised in residue being vested in themselves as trustees, but he pointed out that assent can be implied (see Williams, Mortimer and Sunnucks, at paragraph 81-07, and the explanation of the law given by Rowlatt J in *IRC v Smith* [1930] 1 KB 713, at 720-721, endorsed by Lord Hanworth MR at 731). In the present case, however, Mr Pola and Mr Doubleday merely distributed property to Mrs Dring as residuary beneficiary against an indemnity from her. I doubt whether, in the circumstances, an assent such as Mr Halpern alleges is to be inferred. In any case, I do not see why any such assent should have resulted in Mr Doubleday losing the ability to waive privilege unilaterally in the relevant materials. While the law relating to trustees would doubtless apply in relation to any advice that Mr Pola and Mr Doubleday had taken in that capacity, it seems to me that the law relating to executors would continue to be applicable as regards matters pre-dating the

transition from executors to trustees. Trust principles will not, in my view, have supplanted those relating to executors.

36. Turning to Mr Halpern's reliance on the fact that Roythornes were retained by the two executors together, Mr Halpern referred me to an authority I have already mentioned, *Fountain Forestry Ltd v Edwards*. In that case, a deceased's personal representatives were his son and widow. A contract for the sale of land forming part of the deceased's estate was signed by the son "for himself and [the widow]", but the son did not in fact have authority from the widow to enter into the transaction. It was held that the purchaser was not entitled to specific performance of the contract. Brightman J explained (at 15):

> "The son did not purport to bind the estate of the deceased without the concurrence of the widow. He purported to bind the estate for himself, as one administrator, and as the authorised agent of the widow as his co-administrator. He bound himself as one of two administrators and he warranted that he had authority to bind the other administrator, the widow. He did not bind himself to sell without the concurrence of the widow. It was really the reverse. He bound the estate of the deceased only on the assumption, which he warranted to be correct, that he had authority to sign as agent for the widow. That assumption having been falsified, there is no contract to be enforced in relation to the … property. All that may be sued upon is the warranty of authority given by the son."

37. The present case is, however, quite different. *Fountain Forestry Ltd v Edwards* might have been in point if Mr Doubleday had purported to disclose the Roythornes file on behalf of himself and Mr Pola, in the mistaken belief that Mr Pola had agreed to disclosure. Nothing like that is, though, suggested. When Calthrops sent Mossop & Bowser the file, they were clearly acting for Mr Doubleday, and they did not claim that Mr Pola had assented to disclosure. That being so, there is, I think, no reason why the general rule that "the act of one of joint representatives is regarded as the act of all and is binding" should not operate.

38. It follows, in my view, that it was open to Mr Doubleday to waive privilege in the Roythornes file on his own and that he in fact did so when his solicitors sent the file to Mossop & Bowser in May 2013.

Was privilege waived by Mr Pola?

39. Supposing, contrary to the conclusion I have just arrived at, that privilege was not waived by Mr Doubleday alone, was it waived when Mr Pola wrote to Mossop & Bowser on 15 May 2013?

40. Miss Reed argued that it was. Mr Pola, she said, did not just indicate that he had received advice from Roythornes, but set out the substance of the advice, relied on it by way of defence to the allegations made against him and offered to provide the documents in question. He thus, she submitted, evinced a clear and express intention to waive privilege.

41. For his part, Mr Halpern argued that Mr Pola was not aware of his rights in May 2013 and, hence, that he could not have waived privilege. In support of this submission, Mr Halpern cited *Peyman v Lanjani* [1985] Ch 457. One of the issues in that case was whether the plaintiff had affirmed a contract and so lost the right to rescind it. The Court of Appeal decided that he had retained the right to rescind, taking the view that, to have lost the right, he would have had to have been aware of his right of election as well as the facts giving rise to it. Thus, May LJ said (at 494):

> "I do not think that a party to a contract can realistically or sensibly be held to have made this irrevocable choice between rescission and affirmation unless he has actual knowledge not only of the facts of the serious breach of the contract by the other party which is the pre-condition of his right to choose, but also of the fact that in the circumstances which exist he does have that right to make that choice which the law gives him."

Similarly, Slade LJ said (at 500):

> "Lord Blackburn in *Kendall v. Hamilton*, 4 App.Cas. 504, 542, said, 'there cannot be election until there is knowledge of the right to elect.' For the reasons given by Stephenson and May L.JJ., I am of the opinion that this statement, which was cited by Lord Porter in *Young v. Bristol Aeroplane Co. Ltd.* [1946] A.C. 163, 186, as being the foundation of the principle of election, still correctly represents the law. With Stephenson and May L.JJ., I do not think that a person (such as the plaintiff in the present case) can be held to have made the irrevocable choice between rescission and affirmation which election involves unless he had knowledge of his legal right to choose and actually chose with that knowledge."

42. As Mr Halpern pointed out, the judgments in *Peyman v Lanjani* contain various references to "waiver". Even so, I do not accept that privilege can be waived only where the person entitled to it is aware of his rights. Thanki, "The Law of Privilege", 2nd ed., is correct, I think, that the "basic position in England is that once the substance of privileged material is divulged to one's opponent, even by accident and even where there is no implication of an intention to waive, privilege is *prima facie* lost" (paragraph 5.02). Thanki goes on to observe that, if the terminology of "waiver" is to continue to be used, "it must be with the caveat that in this area the term can bear a rather different connotation than elsewhere in the law" (paragraph 5.03). Thus, in *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027, Slade LJ noted (at 1043) that "[p]rivilege may be lost by inadvertence", referring by way of authority to *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529. In the *Great Atlantic* case, privilege in the whole of a memorandum was held to have been waived as a result of the plaintiffs' counsel reading out part of it during his opening, notwithstanding that, as Templeman LJ said at 537, "[t]he plaintiffs and all their legal advisers never intended to waive any privilege."

43. Mr Halpern stressed that *Great Atlantic Insurance Co v Home Insurance Co* concerned events at trial. While, he submitted, privilege cannot in general be waived unintentionally, a different rule applies to (a) disclosure at trial and (b) disclosure by

list and inspection (as to which, see e.g. *Al Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, at paragraph 16(iv)). To my mind, however, privilege can be waived by inadvertence at any point. In the *Great Atlantic* case, Templeman LJ observed (at 537) that "[i]n interlocutory proceedings and before trial it is possible to allow a party who discloses a document or part of a document by mistake to correct the error in certain circumstances". Although, however, it may be easier to *remedy* a mistake made in advance of trial (notably, by an application for an injunction or pursuant to CPR 31.20), neither this, nor any other authority to which I was referred, appears to me to lend support to the proposition that privilege can be waived by accident only at trial or as a result of disclosure by list and inspection. There would, moreover, appear to be no principled reason for allowing privilege to be waived by mistake in those particular circumstances, but not in others.

44. In short, it seems to me that privilege would have been waived by Mr Pola if it had not already been waived by Mr Doubleday.

Loss of confidentiality

45. The last issue relates to loss of confidentiality.

46. As I have mentioned, Mrs Cooke's daughters have had the attendance notes on which paragraph 17 of the Re-Amended Particulars of Claim is based since May 2013. On top of that, Mr Doubleday has recently included the relevant documents in his list of documents. In the absence, therefore, of a successful application for injunctive relief, I should have thought that the bundles for the forthcoming trial should include the documentation. If for some reason it was not included, it would seem that Mrs Cooke's daughters could adduce secondary evidence as to its contents (compare e.g. *Calcraft v Guest* [1898] 1 QB 759, *In re Briamore Manufacturing Ltd* [1986] 1 WLR 1429 and *Goddard v Nationwide Building Society* [1987] QB 670). In such circumstances, it is hard to understand how any claim to privilege could be sustained: "confidentiality is a precondition for privilege" (Thanki, at paragraph 5.01). In any case, I would not think it right to strike out passages in the Particulars of the Claim derived from the documents. If the documents, or evidence as to their contents, can be expected to be before the trial judge, I cannot see why Mrs Cooke's daughters should not be allowed to rely on them in support of the allegations they make.

47. In *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership*, Slade LJ (with whom Woolf LJ and Sir George Waller expressed agreement) said (at 1045) that, where documents that have been disclosed in error have been inspected, "the general rule is that it is too late for the party who seeks to claim privilege to attempt to correct the mistake by applying for injunctive relief". Slade LJ envisaged exceptions to that rule: he said (at 1044) that he did "not think that after inspection has taken place in the course of discovery, the court is inevitably and invariably powerless to intervene by way of injunction in exercise of the equitable jurisdiction … if the particular circumstances warrant such intervention on equitable grounds". It is implicit, however, in the Court's approach that the party wishing to maintain privilege could not do so without obtaining injunctive relief.

48. Mr Halpern referred in his letter to Miss Reed of 23 June 2014 to a potential application for an injunction to require Mrs Cooke's daughters to hand over copies of the Roythornes documents and to prevent them from relying on them. In the event, no

such application has (yet, at any rate) been made. In the course of his submissions, Mr Halpern raised the possibility of treating the present application as extending to injunctive relief, but I do not think it would be fair to do so: Miss Reed told me that she and those instructing her had not understood themselves to be facing an application for an injunction and so had not prepared for one.

49. In the circumstances, I would not have been prepared to accede to the application before me even if I had not concluded that privilege in the relevant documents had been waived by Mr Doubleday or, failing that, Mr Pola.

Conclusion

50. I shall dismiss Mr Pola's application.