

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA**

SUPREME COURT CIVIL APPEAL NO COA2023CV00044

APPLICATION NO COA2023APP00271

BETWEEN JAMAICA PUBLIC SERVICE COMPANY LIMITED APPELLANT

AND GREENWICH COFFEE COMPANY LIMITED RESPONDENT

Written submissions filed by Livingston, Alexander & Levy for the appellant

Written submissions filed by DunnCox for the respondent

8 May 2026

Civil procedure — Specific disclosure and inspection of documents — Legal professional privilege — Litigation privilege — Dominant-purpose test — Dual-purpose documents — Burden of proof — Bare assertion of privilege — Anxious scrutiny of affidavit evidence — The Court of Appeal Rules, rule 2.14(b) — The Civil Procedure Rules, Parts 28, 29, and 34

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

FOSTER-PUSEY, D FRASER, AND BROWN JJA

Introduction

[1] In this appeal, the appellant, Jamaica Public Service Company Limited ('JPS'), seeks to set aside the orders made by Master R Harris ('the learned master') on 20 June 2023. By those orders, the learned master granted the respondent, Greenwich Coffee Company Limited ('GCC'), specific disclosure and, where applicable, permission to inspect materials generated during an investigation commissioned by JPS. The

orders required the disclosure of the investigator's name and related details, the investigative report, all correspondence between the JPS and investigator arising out of the investigation, and all supporting documents, including photographs and drawings.

Background

[2] GCC owns and operates the Greenwich Estate ('the estate'), located at Lot 11, Greenwich Hill in the parish of Saint Andrew, where coffee is grown for local and international sale and distribution.

[3] JPS is authorised to generate, transmit, distribute, and supply electricity for public and private purposes throughout Jamaica. At the time of filing its defence, it was governed by the All-Island Electricity Licence, 2001, and the Electric Lighting Act of Jamaica. As a public utility, it is regulated by the Office of Utilities Regulation ('OUR'), which, among other responsibilities, sets rates, establishes guaranteed standards, and handles complaints relating to utility companies, including JPS.

[4] On 29 June 2015, at approximately 7:30 pm, a fire broke out, causing extensive damage to the estate. GCC stated that the electricity supply to the estate was interrupted with an audible sound. Soon after, a fire was seen at the eastern boundary of the property, near a JPS utility pole and beneath the supply lines running from Newcastle to Greenwich Ridge. The fire quickly grew into a forest fire, spreading across the estate and resulting in significant damage and financial loss.

[5] GCC's representative contacted emergency personnel and informed them about the fire spreading across the estate. On the same day, GCC also contacted JPS to report that a fire had erupted on the estate due to a fault in the supply or power line. The fire became uncontrollable. JPS representatives visited the incident site on 29 and 30 June 2015, but could not repair the electricity lines because of ongoing burning and thick smoke.

[6] On 6 July 2015, GCC wrote to JPS:

"This letter serves to inform the JPS that due to a fire caused by a JPS transmission line passing over our property and

falling down onto our coffee farm at Greenwich, St. Andrew (near Newcastle) on the night of June the 29th 2015, we have suffered extensive damage to our estate and the coffee thereon.

As a result of this fire 780 of our mature bearing coffee trees were burnt out, this being more than 30% of the total number of trees that we currently have, so we shall be making a claim to the JPS for compensation.

Details of the origin of the fire, along with witness statements, photographs, assessments and estimates of losses incurred directly due to this fire will be submitted to the JPS in due course.

In the meantime if you wish to have a representative visit Greenwich in order to verify the extent of the fire and the damage done throughout our properties, please give me a call....so that we can arrange to meet at Greenwich."

The letter was copied to legal counsel at DunnCox, attorneys-at-law for GCC.

[7] DunnCox then, on 15 September 2015, wrote to internal legal counsel for JPS stating:

"We act for Greenwich Coffee Co....and refer to earlier telephone conversation...Our client has made a claim in respect of damage to trees resulting from a fire at the coffee [sic] on June 29th 2015. Please see copies of the Statements which have been submitted to JPS together with correspondence dated July 20th, 2015 from the Manager of your Claims and Insurance departments.

Please advise of the status of this claim."

Proceedings in the court below

[8] On 6 April 2018, GCC filed a claim form and particulars of claim alleging negligence and breach of statutory duty against JPS. GCC claimed that the fire resulted from JPS's breach of its statutory duty to properly monitor, maintain, and keep all power lines servicing Greenwich Ridge free from interference. It also alleged that JPS failed, among other things, to adequately patrol and monitor the wayleave, clear and maintain vegetation along the line paths, properly insulate and maintain the power lines, and ensure the stability and reliability of the distribution system, which led to a

downed line that ignited the fire. Damages were claimed in the amount of US\$125,283.08 (equivalent to J\$16,063,796.52 at the relevant exchange rate), along with interest.

[9] GCC referred to and relied on various provisions of the Electricity Act (though it turned out that it was the Electric Lighting Act that applied at the time). It also relied on guaranteed standards that the OUR mandated JPS comply with between 2014 and 2019. These standards included timelines for JPS to respond to emergency calls and acknowledge written queries, complete investigations (Guaranteed Standard No 5(b)), and make compensatory payments. At para. 14 of the particulars of claim GCC pleaded:

“...Following the incident, [GCC] also wrote to [JPS] to request that it investigate the incident and address the loss incurred. Although [JPS] indicated that it would conduct investigations, to date it has not responded sufficiently to [GCC’s] request.”

[10] JPS filed its defence on 4 June 2018, denying liability and disputing that any interruption in its electricity supply caused or contributed to the fire. It further denied that the fire originated from its lines or equipment. JPS pleaded, among other things, that it investigated the incident, the investigation revealed no negligence on the part of JPS, its agents, or its employees, and that the fire resulted from conditions beyond its control. Significantly, JPS pleaded as follows at para. 11(c) of its defence:

“[JPS] admits that following the said incident [GCC] wrote to [JPS] to request an investigation into the incident, however, [JPS] denies that it did not responded [sic] sufficiently to [GCC’s] request. [JPS] will say that it investigated the incident and upon completion of the said investigation, [GCC’s] Attorneys-at-Law were informed that the investigations did not reveal any negligence on the part of [JPS], its agents or its employees and that conditions outside the control of [JPS] accounted for the said fire.”

[11] JPS pleaded that the guaranteed standards for 2014-2019 were performance measures that guide the provision of utility services that it delivers. It asserted that if JPS were to fail to honour the standards, then the customer is entitled to either make a claim for compensation or to automatic compensation depending on the standard that has been breached.

[12] GCC, thereafter, sought production of the investigative material to which JPS referred in its defence on several occasions. On 15 August 2018, it filed a request for information seeking a copy of:

“[t]he Investigator’s report mentioned at paragraph 11(c) of the Defence filed on June 04, 2018.”

[13] On 12 September 2018, JPS replied to the request for information, stating that no investigator’s report was mentioned in para. 11(c) of the defence, and that the report on the investigation into the incident was privileged.

[14] In light of this response, GCC filed a notice of application for court orders on 28 April 2022, seeking specific disclosure and, where applicable, inspection of the investigation report and related materials. JPS opposed the application, relying on an affidavit sworn by its internal legal counsel, Mr David Fleming, on 18 October 2022, in which it claimed litigation privilege over the documents. In the affidavit, Mr Fleming referenced GCC’s letter dated 6 July 2015. At para. 5 of the affidavit, he stated that upon receiving that letter, JPS assigned an investigator to conduct internal investigations, “the purpose of which was to deal with the claim being made and in anticipation of [GCC] instituting legal proceedings”.

[15] Mr Fleming referred to the 15 September 2015 email from DunnCox on behalf of GCC, and stated that, on receipt of that email, JPS informed its insurers of the claim. After referring to the request for information and the notice of application, he deposed at paras. 10 and 11 of his affidavit:

“10. I am advised by my Attorneys-at-Law and do verily believe that the report of the investigation is privileged and as such JPS is entitled to refuse disclosure and inspection of same.

11. While the contents of the report may be directly relevant to the claim, the report was prepared for the purpose of enabling JPS and its Attorneys to give and receive advice about how the claim should be handled in connection with the claim and which was certain to lead to litigation, which was clear from the outset and even clearer when [GCC’s] Attorneys-at-law wrote to the Company in September 2015. There was no other purpose for

conducting investigations and it was initiated only upon receiving [GCC's] claim letter and gathered evidence for the Company defence of the claim."

[16] After hearing submissions, the learned master granted GCC's application and made the following orders:

- "1. [JPS] be directed to specifically disclose and, where applicable permit inspection of:
 - a. The name, address, and contact information for the investigator engaged by [JPS] to conduct an investigation into the incident that is the subject matter of the Claim;
 - b. Any report or other documents containing the findings of the investigator engaged by [JPS] in relation to the incident that is the subject matter of the Claim;
 - c. All correspondence sent to and received from the investigator engaged by [JPS], insofar as that correspondence relates to, speaks about, or addresses the incident that is the subject matter of the Claim;
 - d. All photographs, drawings, diagrams, Titles, images, extracts, or other supporting documents provided to, utilised by, or produced by the investigator engaged by [JPS] in relation to the incident that is the subject matter of the Claim.
2. The information, documents, and material listed at Order No. 1 herein, be provided within fourteen (14) days of the date of this Order.
3. Costs of the Application to [GCC].
4. Leave to appeal is granted..."

[17] These orders now form the basis of the present appeal.

[18] On 10 July 2023, JPS filed an application for a stay of execution of the learned master's decision. A single judge of this court, on 19 September 2023, granted the application pending the determination of the appeal.

Preliminary consideration: application for extension of time

[19] JPS filed its notice of appeal on 4 July 2023 and, on 18 July 2023, filed an application seeking an extension of time until 1 September 2023 to file and serve written submissions. This application was supported by an affidavit of Mr David Fleming, internal legal counsel, who explained that JPS had not yet received the reasons for the learned master's decision, which delayed the preparation of submissions, and that counsel with conduct of the matter had been engaged in trials from 19 June to 28 July 2023. JPS' submissions were ultimately filed on 5 September 2023, before the application was considered. By order dated 19 September 2023, the court granted the application, permitting the submissions filed on 5 September 2023 to stand. However, the order made no reference to an extension of time for GCC to file its submissions. The appeal was, thereafter, listed to be considered on paper in the week beginning on 4 December 2023.

[20] On 24 November 2023, GCC therefore filed a notice of application seeking the following orders:

- "1. That [GCC] be granted an extension of time until October 18, 2023, to file and serve Submissions and Authorities in opposition to the Notice of Appeal, filed on July 04, 2023.
2. Alternatively, that [GCC's] submissions and authorities filed on October 17, 2023 and served on October 18, 2023, shall stand as properly filed and served.
3. Costs to be Costs in the Appeal.
4. Such further and other relief as this Honourable Court deems fit."

[21] The notice of application, together with the affidavit of Ms Samantha A Grant, was received by the attorneys-at-law for JPS on 27 November 2023, as evidenced by the date stamp affixed to the copies served.

[22] The grounds on which GCC sought these orders were as follows:

- "1. Pursuant to Rule 2.14 of the Court of Appeal Rules ('CAR') and Rule 26. 1(2) of the Civil Procedure Rules

('CPR'), the Court is empowered to extend time for compliance with any Rules of the court.

2. Pursuant to Rule 1.7 of the CAR, the Court may extend time for compliance with any rule, even if the Application for an Extension of Time is made after the time for compliance has passed.
3. The Court of Appeal Rules require [GCC] to file and serve written submissions within fourteen (14) days of receipt of the submissions filed by [JPS].
4. [JPS] filed and served written submissions out of time on September 05, 2023, and the Court of Appeal permitted those submissions to stand on September 19, 2023, without making a commensurate extension order for [GCC's] filing and service of submissions in response.
5. [GCC] also misunderstood the language of the Court's Notice of Hearing issued on September 26, 2023, and erroneously formed the incorrect impression regarding the deadline for filing [sic] submissions in response.
6. [GCC] therefore inadvertently filed submissions and authorities on October 17, 2023, outside the time prescribed for doing so.
7. The late filing and service of [GCC's] submission and authorities was not intended.
8. [GCC] has a strong prospect of success on the appeal, as evidenced by the content of the submissions filed on October 17, 2023 and it will be severely prejudiced if the Orders sought herein are not granted.
9. On the other hand, [JPS] will not be prejudiced by the granting of the orders sought herein, having received a similar extension itself on September 19, 2023 and having received [GCC's] Submissions and Authorities since October 18, 2023.
10. [GCC] pray that the orders sought will be granted, in the interest of justice."

Discussion

[23] JPS did not oppose the application.

[24] Upon considering the application, the court did not see any reason to refuse the unopposed application. The length of the delay was not inordinate. Further, given the date when JPS filed and received permission for its submissions to stand as properly filed, and the explanations of counsel, the reasons given by GCC for its delay are understandable. There is no evidence of prejudice to JPS. Further, the hearing of the appeal was not jeopardised. For the above reasons, we would grant the application.

The appeal

[25] Being dissatisfied with the learned master's orders, as referenced above at para. [16], JPS filed its notice and grounds of appeal on 4 July 2023, challenging the following findings of fact and law:

- “(a) That [GCC] is entitled to specific disclosure of [JPS'] report.
- (b) That [JPS'] clear statement of purpose for commissioning an investigative report in the affidavit of David Fleming filed 18 October 2022 was not enough to preclude the court from making an order for specific disclosure.
- (c) That [JPS'] investigative report was not subject to litigation privilege as it was made in contemplation of litigation.
- (d) That [JPS] was not entitled to withhold disclosure of its investigative report on the basis that it was privileged.”

[26] JPS advanced the following grounds of appeal:

- “(1) The learned [master] erred as a matter of law and/or fact in finding that [GCC] is entitled to specific disclosure of an investigative report commissioned by [JPS] in circumstances where the clear and unchallenged evidence is that the investigative report was made in contemplation of litigation.
- (2) The learned [master] misapplied the case of **Virginia McGowan v Jamaica Co-operative Credit Union**

League Limited [2015] JMSC Civ 179 in finding that a clear statement of purpose is not sufficient to bar the court from conducting an enquiry into whether legal professional privilege applies in that the learned judge failed to appreciate the series of event that precipitated the commissioning of the investigation report into the fire that occurred on 29th June 2015.

- (3) The learned [master] erred in failing to exercise her discretion properly in that she took into account or must have taken into account matters that were not relevant and/or she failed to take into account or have any regard at all to the following relevant facts or matters that ought properly to be taken into account:
 - a. [GCC], by letter dated 6 July 2015 to [JPS] and copied to Christopher Bovell, an Attorney-at-Law at DunnCox, made a claim for compensation for significant loss and damage to their coffee farm allegedly as a result of a fire on 29 June 2015.
 - b. The letter dated 6 July 2015 stated that 'details of the origin of the fire, along with witness statements, photographs, assessments and estimates of losses incurred directly due to this fire will be submitted to the JPS in due course'.
 - c. By email dated 15 September 2015 from Margaret Jervis at DunnCox, copies of statements from [GCC's] caretakers and Mrs Bloomfield together with letter dated 20 July 2015 were sent to Kim Robinson, a legal officer at [JPS] company.
 - d. The clear and sole purpose of preparing the report was to enable [JPS] and its Attorneys to give and receive advice as a result of the above series of events which were certain to and ultimately did lead to litigation.
- (4) In finding that a clear statement of the purpose of the report in question was not enough to bar the court from making an order for specific disclosure the learned [master] misdirected herself in law in failing to examine the evidence, whereby [GCC], in making a claim for compensation, included its Attorneys-at-Law in all correspondences and provided statements from potential witnesses prior to a suit being filed.

- (5) The learned [master] erred in determining that [JPS] investigative report was not subject to litigation privilege and/or that [JPS] was not entitled to withhold disclosure of the report on the basis of litigation privilege in circumstances where the evidence before her clearly showed that the report was made in contemplation of litigation.”

[27] JPS asks that the court allow the appeal, set aside the learned master’s orders and order that it be granted costs in this court and below.

Submissions on behalf of JPS

[28] Counsel for JPS relied on rule 2.14(b) of the Court of Appeal Rules (‘CAR’) and the authorities of **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 2 WLR 322 and **The Attorney General of Jamaica v John McKay** [2012] JMCA App 1 to outline the scope of this court’s powers. Counsel submitted that this court may affirm, set aside, or vary any judgment made below, and may intervene in the exercise of a judge’s discretion where the decision is based on a misunderstanding of the law or the evidence, or on an inference of fact that is demonstrably wrong.

[29] Counsel argued that, in determining that the report was not privileged and ordering disclosure, the learned master failed to give proper regard to the factual circumstances that precipitated its preparation. Counsel submitted that following the incident on 29 June 2015, GCC wrote to JPS, copying its attorneys-at-law, outlining the extent of the damage to its estate and the loss of coffee. GCC, through its attorneys-at-law, subsequently provided JPS with witness statements, photographs, and assessments and estimates of the losses suffered. Upon receiving this material, JPS notified its insurers of the claim, after which the investigative report was prepared. (By way of comment, there is nothing in the record of appeal indicating the timing of the preparation of the report.) Counsel submitted that although the contents of the report may be relevant to the substantive claim, the dominant purpose for its creation was to enable JPS and its attorneys-at-law to obtain and provide legal advice on how the claim should be handled, thereby engaging litigation privilege.

[30] Counsel also relied on rules 28.1(3), 28.4(1), and 28.15 of the Civil Procedure Rules (‘CPR’) regarding the principles governing disclosure. Counsel noted that

disclosure requires a party to reveal the existence of a document and that standard disclosure obliges disclosure of all documents directly relevant to the issues in dispute. However, the duty of disclosure is not absolute, as there are recognised bases upon which a party may decline to disclose or permit inspection. Counsel further pointed out that, at Schedule 1 Part 2 of its list of documents, JPS asserted litigation privilege over certain documents and maintained this position in its response to GCC's request for further information.

[31] Counsel submitted that legal professional privilege, once established, operates as a complete bar to disclosure even where the documents are relevant. In support of this submission, counsel referred to **Winston Finzi v Mahoe Bay Company Limited and JMMB Merchant Bank Limited** [2016] JMCA Civ 34 ('**Winston Finzi**'); **Three Rivers DC v Bank of England (No 6)** [2004] UKHL 48; **Waugh v British Railways Board** [1980] AC 521 ('**Waugh**'); **Re Highgrade Traders** [1984] BCLC 151, and **Director of Serious Fraud Office v Eurasian Natural Resources Corporation** [2019] 1 WLR 791. Counsel emphasised that litigation privilege allows a litigant or potential litigant to obtain evidence and prepare its case without being compelled to reveal the results of its preparatory work to its opponent. Accordingly, the question for the learned master was whether the report was created for the sole or dominant purpose of litigation that was pending, reasonably contemplated, or existing. Counsel submitted that it plainly was.

[32] Counsel submitted that although the learned master has not provided written reasons, her oral ruling revealed that she relied on **Virginia McGowan v Jamaica Co-operative Credit Union League** [2015] JMSC Civ 179 ('**Virginia McGowan**') to conclude that JPS had not shown that the report was created for the purpose of contemplated litigation. The learned master found that JPS merely asserted, without evidential support, that the report was prepared in contemplation of litigation, and that a bare assertion of purpose was insufficient to prevent the court from inquiring into whether litigation privilege applied. Counsel argued that this conclusion was plainly wrong, inconsistent with the evidence before the learned master, and one that no reasonable judge, acting on the same material, could have reached.

[33] Counsel further submitted that the learned master failed to appreciate that **Virginia McGowan** was wholly distinguishable. In **Virginia McGowan**, the defendant offered no factual background regarding when or why its report was prepared and relied solely on a bald assertion of privilege, creating ambiguity that Sykes J (as he then was) resolved in favour of disclosure. Counsel argued that, unlike **Virginia McGowan**, there was no ambiguity here: the factual background and chronology clearly show that JPS commissioned the report for the dominant purpose of contemplated litigation. By treating JPS' explanation as unsubstantiated and failing to consider the relevant factual circumstances, the learned master misapplied **Virginia McGowan** and thereby erred.

[34] It was, therefore, submitted that the learned master misapplied the law, failed to properly evaluate the evidence, and consequently erred in granting GCC's application for specific disclosure.

Submissions on behalf of GCC

[35] Counsel for GCC relied on **The Attorney General of Jamaica v John McKay** and accepted that this court will interfere with a judge's exercise of discretion only in limited circumstances. Two issues were identified: whether the learned master erred in law by misconstruing the legal principles governing specific disclosure and litigation privilege, particularly the principles outlined in **Virginia McGowan**; and whether the learned master erred in fact by finding that JPS failed to adduce sufficient evidence to establish litigation privilege.

[36] On the first issue, counsel submitted that JPS was required to demonstrate a misunderstanding of the applicable legal principles, but failed to do so. Reference was made to Parts 28, 29, and 34 of the CPR, and it was emphasised that there was no dispute that the information sought was directly relevant. Counsel argued that once relevance is established, the court must consider whether specific disclosure is necessary, having regard to proportionality, costs, and the parties' resources. Counsel further noted that parties are entitled to inspect documents mentioned in statements of case, and that this court may compel compliance where necessary for the fair disposal of the claim.

[37] Counsel argued that the learned master correctly applied these principles in her oral ruling. Further, that the central factual issue is whether the fire was caused by a broken JPS power line, and JPS itself relied on its investigation to deny negligence. As the investigation was contemporaneous, the report was likely to contain cogent evidence relevant to resolving the dispute. Disclosure would also assist this court in assessing JPS' compliance with the Guaranteed Standards (2014–2019) and its statutory obligations.

[38] Counsel further submitted that the learned master correctly considered the law on litigation privilege. Relying on **Waugh**, JPS' reliance on **Starbev GP Ltd v Interbrew European Holding BV** [2013] EWHC 4038 (Comm) ('**Starbev GP Ltd**') was criticised, as the authorities make clear that a mere assertion of privilege or a stated purpose is not determinative. In the absence of supporting evidence, it was open to the learned master to conclude that privilege had not been established.

[39] This approach, counsel argued, is consistent with **Virginia McGowan**, where the court held that a bare statement of purpose is insufficient unless supported by evidence explaining the circumstances of preparation. The learned master expressly cited and applied **Virginia McGowan** and **Waugh**, and no misunderstanding of the law was shown that would justify appellate interference.

[40] Counsel relied on **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 to submit that appellate courts will not lightly disturb findings of fact made at first instance.

[41] Counsel argued that this court was required to determine whether the learned master was plainly wrong on the evidence as a whole. Counsel submitted that authorities such as **Waugh**, **Miguel Gonzales v Leroy** (unreported), Supreme Court, Jamaica, Claim No 2011HCV04442, judgment delivered on 5 October 2015, **Neilson v Laugharne** [1981] 1 All ER 829, and **Rawlinson and Hunter Trustees SA v Akers** [2014] 2 All ER (Comm), demonstrate that even detailed statements identifying a document's purpose, author, and connection to litigation may be insufficient where the dominant purpose is not litigation, particularly in cases involving regulatory or dual-purpose investigations.

[42] Counsel submitted that to discharge its burden of establishing litigation privilege, JPS was required to satisfy two distinct requirements: first, that litigation was reasonably contemplated or anticipated at the time the documents were created; and secondly, that the documents were created for the dominant purpose of enabling legal advice to be sought or given, or of obtaining evidence or information for use in such litigation. Addressing the first requirement, counsel noted that JPS asserted that the internal investigation was commissioned to deal with the claim made by GCC and in anticipation of legal proceedings.

[43] Counsel submitted that JPS failed to satisfy both limbs of the litigation-privilege test. At most, it demonstrated the possibility of litigation, not inevitability. Counsel noted that customers may pursue compensation outside adversarial proceedings under JPS' regulatory framework, a position admitted in JPS' defence. Moreover, the investigation was commissioned before the later correspondence relied on by JPS, and in any event, JPS was still required to establish the dominant purpose.

[44] On that issue, counsel argued that JPS relied only on a bare assertion in its affidavit. No evidence was provided by the investigator, no report or commissioning correspondence was produced, and the description of withheld documents was inadequate. These deficiencies, counsel urged, fell well short of what is required to establish litigation privilege.

[45] Counsel further submitted that JPS' pleadings reinforced the learned master's conclusion. JPS admitted that it was obliged under Guaranteed Standard No 5 to investigate customer complaints within fixed timelines, supporting the inference that the investigation was undertaken as part of routine regulatory compliance rather than for the dominant purpose of litigation.

[46] Counsel submitted that in light of the potential dual purpose of the investigation and the admissions in JPS' defence, JPS failed to meet the heightened evidential threshold required to establish litigation privilege. Further, that the learned master's findings were permissible on the evidence as a whole, and it cannot be said that she was plainly wrong or misapprehended the affidavit evidence.

The issue for determination

[47] Having regard to the grounds of appeal set out above, the appeal raises one main issue, whether the learned master erred in law and/or fact in determining that the report arising out of the investigation commissioned by JPS was not protected by litigation privilege and was therefore subject to specific disclosure (grounds 1 and 5);

[48] In determining that main issue, the court also considers the following questions:

- i. whether the learned master misapplied the principles in **Virginia McGowan** in assessing the claim to litigation privilege, when she (as it is asserted) found that a clear statement of purpose is not sufficient to bar the court from conducting an enquiry into whether legal professional privilege applies. (grounds 2 and 4); and
- ii. whether the learned master failed to properly exercise her discretion when ordering specific disclosure by taking into account irrelevant matters and/or failing to consider relevant ones (ground 3).

[49] These questions are addressed and resolved in the course of the court's analysis of the principal issue and do not require separate determination.

Analysis

Whether the learned master erred in law and/or fact in determining that the report arising out of the investigation commissioned by JPS was not protected by litigation privilege and was therefore subject to specific disclosure.

[50] The learned master exercised her discretion in making the order now under review. In this matter, we do not have the full reasons of the learned master and appear to be in as good a position to determine the matter as she would have been. However, we are guided by the principles outlined in the authorities of **Hadmor Productions Ltd and Others v Hamilton and Others** and **The Attorney General of Jamaica v John McKay**, which require us to defer to the learned master's exercise of discretion. This court may intervene only where it is shown that the decision is based on a misunderstanding of the law or the evidence, or on an inference shown to

be demonstrably wrong, or the decision is so aberrant that no learned master, regardless of her duty to act judicially, could have made that decision.

[51] The learned master was empowered to make an order for specific disclosure pursuant to rules 28.6 and 28.7 of the CPR. The criteria governing the making of such an order are set out in rules 28.7(1) and (2) of the CPR, which provide that:

“Criteria for ordering specific disclosure

28.7 (1) When deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.

(2) It must have regard to-

(a) the likely benefits of specific disclosure;

(b) the likely cost of specific disclosure; and

(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.” (Emphasis as in original)

[52] Notwithstanding these provisions, a party is entitled to assert a right to withhold disclosure. This is expressly provided for under rule 28.15(1) of the CPR, which states:

“28.15 (1) A person who claims a right to withhold disclosure or inspection of a document, class of document or part of a document must-

(a) make such claim for the document; and

(b) state the grounds on which such a right is claimed,

in the list or otherwise in writing to inspect the document.”

[53] Further, rules 28.15 (5) and (7) of the CPR provide that:

“28.15 (5) A person who does not agree with a claim of right to withhold inspection or disclosure of a document may apply to the court for an order that such

document be disclosed or made available for inspection.

28.15 (7) Where a person-

- (a) claims a right to withhold inspection; or
- (b) applies for an order permitting that person not to disclose the existence of, a document or part of a document, the court may require the person to produce that document to the court to enable it to decide whether the claim is justified."

[54] JPS contends that the learned master erred in law and fact in concluding that the investigative report was not protected by litigation privilege and was therefore subject to specific disclosure. In support of this contention, JPS argues that the evidence before the learned master established that the report was commissioned in contemplation of litigation and for the purpose of obtaining legal advice.

[55] It is well established that a claim to withhold disclosure or inspection of a document may properly be made on the ground of legal professional privilege. McDonald-Bishop JA (as she then was), in **Winston Finzi**, at paras. [68]–[69], explained that:

"[68] The common law doctrine of legal professional privilege that is applicable to our jurisdiction operates in three sets of circumstances. In the first place, it enables a client to maintain the confidentiality of communications between him and his lawyer made for the purpose of obtaining and giving legal advice. This is known as 'legal advice privilege'. **In the second way, it enables a client to have communications between him or his lawyer and third parties (such as potential witnesses and experts), the dominant purpose of which was preparation for contemplated or pending litigation. This is known as 'litigation privilege'.** Thirdly, the privilege extends to items enclosed with or referred to in such communications and brought into existence for obtaining legal advice, among other things. See Adrian Keane, *The Modern Law of Evidence*, Seventh edition, page 609.

[69] The rationale for the rules of legal professional privilege is that they encourage those who know the facts to state them fully and candidly without fear of compulsory disclosure. See

Waugh v British Railways Board [1980] AC 521 at 531-2
and **R v Derby Magistrates' Court**, ex p B [1996] AC 487."
(Emphasis supplied)

[56] In the well-known decision of **Waugh**, cited by the parties, Lord Edmund-Davies observed at pages 541, para. G – 542, para. C:

"It is for the party refusing disclosure to establish his right to refuse. It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it)

'... for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation.'
(Sixteenth Report, para. 17 (c).)

In cases falling within (a) privilege from disclosure attaches to communications for the purpose of obtaining legal advice and it is immaterial whether or not the possibility of litigation were even contemplated....

But in cases falling within (b) the position is quite otherwise. Litigation, apprehended or actual is its hallmark." (Emphasis supplied).

[57] In **Waugh**, Lord Wilberforce stated at pages 531, para. H – 532, para. B:

"It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation?
On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation. At the lowest such

desirability of protection as might exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available.” (Emphasis supplied)

[58] Lord Wilberforce went on to clarify the position at page 533, paras. B-C:

“...It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly...”

[59] The principles articulated in **Waugh** have since been repeatedly affirmed in later authorities. In **Starbev GP Ltd**, Hamblen J reviewed the law relating to litigation privilege and summarised the applicable requirements at paras. 11-13. He emphasised, first, that the burden of establishing litigation privilege rests firmly on the party asserting it. Secondly, an assertion of privilege or a statement of purpose in a witness statement is not determinative; such assertions constitute evidence of fact which may require independent proof and must be subjected to careful scrutiny. Thirdly, it is not sufficient to show a mere possibility or general apprehension of litigation; litigation must be reasonably in prospect at the time the document was created. Finally, even where litigation is reasonably contemplated, the party claiming privilege must also demonstrate that the dominant purpose of the communication or document was to obtain legal advice or evidence for use in that litigation. Where documents are created for multiple purposes, the privilege will not attach unless litigation is shown to be the dominant one.

[60] Hamblen J further observed that courts must subject the evidence supporting claims of litigation privilege to “anxious scrutiny”, and assess purpose objectively in light of all relevant evidence, including contemporaneous material where available. Importantly, he also identified the options available to a court where it is not satisfied, on the affidavit evidence and material before it, that a right to withhold inspection has been established. In such circumstances, this court may:

- (a) conclude that privilege has not been established and order disclosure;
- (b) direct the filing of a further or more detailed affidavit to address deficiencies in the evidence;
- (c) require production of the documents to the court for inspection, although this is a course of last resort and should not be undertaken unless there is credible reason to doubt the reliability or accuracy of the privilege claim; or
- (d) in limited circumstances, order cross-examination on the affidavit, although the authorities caution that this will rarely be appropriate in relation to affidavits or documents at an interlocutory stage.

These principles underscore both the stringent evidential burden borne by a party asserting litigation privilege and the evaluative discretion vested in the court when assessing such a claim.

[61] Drawing these authorities together, a determination of whether the report is protected by legal professional privilege on the basis that it was made in contemplation of litigation therefore requires the court to address two questions: first, whether litigation had commenced or was reasonably in prospect at the time the report was created; and secondly, whether the sole purpose, or dominant purpose, of preparing the report was to enable legal advice to be sought or given and/or to obtain evidence or information for use in, or in connection with, such anticipated or contemplated proceedings.

[62] Consistent with the approach outlined in **Starbev GP Ltd**, the court is required to consider contemporaneous material alongside the affidavit evidence. One such piece of contemporaneous material was the letter dated 6 July 2015 from GCC to JPS, notifying JPS of the fire and stating, in part:

“As a result of this fire 780 of our mature bearing coffee trees were burnt out, this being more than 30% of the total number of trees that we currently have, **so we shall be making a**

claim to the JPS for compensation. Detail of the origin of the fire, along with **witness statements,** photographs, assessments and estimates of losses incurred directly due to this fire will be submitted to the JPS in due course. In the meantime if you wish to have a representative visit Greenwich in order to verify the extent of the fire and the damage done throughout our properties, please give me a call... so that we can arrange to meet at Greenwich.” (Emphasis supplied)

[63] That correspondence was copied to DunnCox. The early involvement of attorneys-at-law reinforces that litigation was more than a mere possibility. In those circumstances, when JPS proceeded to commission an investigation, it did so against a background of a reasonable prospect of litigation. Litigation was, therefore, reasonably contemplated or anticipated at the time the investigation was undertaken.

[64] Before considering other aspects of the appeal, the **Waugh** case warrants closer scrutiny. It concerned an interlocutory appeal to the House of Lords arising from an order for disclosure of an internal investigation report prepared by a public authority.

[65] The proceedings arose out of a fatal railway accident involving a collision between two locomotives operated by the British Railways Board (‘the board’). The deceased, John Wallace Waugh, was an employee of the board and died because of the collision. Following the accident, the board prepared a joint internal report investigating its cause. The report was created for two purposes: first, to comply with the board’s internal and statutory obligations relating to railway safety; and secondly, in contemplation of possible civil litigation arising from the accident.

[66] By an action against the board, the appellant, Alice Simpson Waugh, widow of the deceased, claimed damages under the Fatal Accidents Acts 1846–1959. She alleged that the collision was caused by the negligence of the board, its servants, or agents.

[67] In its defence, the board denied negligence and alleged that the collision was caused or contributed to by the deceased’s own negligence. The appellant sought discovery of the joint internal report prepared by two officers of the board two days after the accident. The board refused disclosure, asserting legal professional privilege.

[68] On an interlocutory application, Master Bickford Smith ordered disclosure of the report on 26 January 1978. That order was set aside by Donaldson J on appeal on 8 May 1978. A further appeal by the appellant was dismissed by the Court of Appeal on 28 July 1978 by a majority (Eveleigh LJ and Sir David Cairns; Lord Denning MR dissenting). The appellant, thereafter, appealed to the House of Lords with leave of the Court of Appeal.

[69] The House of Lords considered whether a document prepared for dual purposes, one of which is anticipated litigation, is protected by litigation privilege where litigation was not the dominant purpose for its creation.

[70] The appeal was allowed on the basis that the due administration of justice strongly required that a document such as the internal inquiry report, which was contemporary, contained statements by witnesses on the spot and would almost certainly be the best evidence as to the cause of the accident, should be disclosed. Further, for that important public interest to be overridden by a claim of privilege the purpose of submission to the party's legal advisers in anticipation of litigation must be at least the dominant purpose for which it had been prepared; and that, in the case, the purpose, of obtaining legal advice in anticipation of litigation having been no more than of equal rank and weight with the purpose of railway operation and safety, the board's claim for privilege failed and the report should be disclosed.

[71] Their Lordships accepted that litigation was reasonably contemplated when the report was prepared, and one of its purposes was to inform the board's solicitors. The court noted that the report stated on its face that it had finally to be sent to the board's solicitor for the purpose of enabling him to advise, but stated that such a statement cannot be conclusive as to the dominant purpose for which it was prepared.

[72] This brings into focus the case at bar. There is no dispute that the investigative report in question is highly relevant.

[73] The determination of the dominant purpose for which a document was created is a question of fact. It requires the learned judge or master to examine the evidence as a whole and to assess objectively why the document came into existence. In the

present case, JPS relied on the affidavit of Mr David Fleming, legal counsel for JPS, filed on 18 October 2022 in opposition to the application for specific disclosure.

[74] The only contemporaneous correspondence evidencing the basis for initiating the investigation was the letter of 6 July 2015 from GCC. In para. 5 of his affidavit, Mr Fleming stated:

“Upon receiving [GCC’s] letter on or about 15 July 2015, the Company assigned an investigator to carry out internal investigations, the purpose of which was **to deal with the claim being made and in anticipation of the Claimant instituting legal proceedings.**” (Emphasis supplied)

[75] Although in its written submissions (at para. 19) JPS submitted that the investigative report was prepared after it notified its insurers of GCC’s claim, there is no evidence on the record supporting this, and this is not mentioned in Mr Fleming’s affidavit or in the statements of case. Further, there is no contemporaneous material, including correspondence or memos from or within JPS, supporting the assertion made by Mr Fleming in the affidavit that the internal investigation was commissioned on receipt of GCC’s letter dated 6 July 2015. As GCC has correctly submitted, there is no contemporaneous documentation reflecting the circumstances surrounding the preparation of the investigative report. It is very striking that the only exhibits to Mr Fleming’s affidavit were correspondence from GCC. To that extent, Mr Fleming’s assertion in paragraph 5 of his affidavit can properly be seen as a bare assertion. Mr Fleming’s affidavit is not contemporaneous. It is a retrospective view.

[76] At para. 11 of the affidavit, Mr Fleming also stated:

“While the contents of the report may be directly relevant to the claim, the report was prepared for the purpose of enabling JPS and its attorneys to give and receive advice about how the claim should be handled in connection with the claim and which was certain to lead to litigation, which was clear from the outset and even clearer when [GCC’s] attorneys-at-law wrote to the company in September 2015. There was no other purpose for conducting investigations and it was initiated only upon receiving [GCC’s] claim letter and gathered evidence for the Company defence of the claim.”

[77] Mr Fleming asserted that the report was prepared in contemplation of litigation and for the purpose of assisting JPS in obtaining legal advice. However, as the authorities make clear, such assertions are not determinative and must be assessed against the totality of the evidence. Paras. 10 and 11 of Mr Fleming's affidavit are really legal submissions indicating the conclusion to which JPS hopes that the court will arrive on an examination of the law and facts. They do not add to the factual base that the court is to examine.

[78] GCC has argued that the investigative report may have been commissioned for a dual purpose. In particular, JPS was subject to obligations imposed by the OUR under Guaranteed Standard No 5(b), which required it to investigate complaints and respond to customers within 30 working days.

[79] JPS did not deny the existence of this obligation. Rather, in its defence, it asserted that the Guaranteed Standards were performance measures intended to guide the provision of utility services delivered by JPS (para. 10). The learned master, therefore, had to determine whether, on the evidence, the investigation was undertaken solely or dominantly in contemplation of litigation, or whether it was also undertaken pursuant to GCC's request and in fulfillment of JPS' regulatory and operational obligations.

[80] In that regard, the pleadings were material. At para. 14 of GCC's particulars of claim filed on 6 April 2018, it was stated that

"...[f]ollowing the incident, [GCC] also wrote to [JPS] to request that it investigate the incident and address the loss incurred. Although [JPS] indicated that it would conduct investigations, to date it has not responded sufficiently to the [GCC's] request."

That request plainly referred to JPS' statutory obligations. While the 30-working-day period under the Guaranteed Standards may have passed without adequate response, the request itself was not denied by JPS.

[81] Furthermore, JPS stated in its defence:

“[JPS] admits that following the incident the [GCC] wrote to [JPS] to request an investigation into the incident, however, [JPS] denies that it did not responded [sic] sufficiently to [GCC’s] request. [JPS] will say it investigated the incident and upon completion of the said investigation, [GCC’s] Attorneys-at-law were informed that the investigations did not reveal any negligence on the part of [JPS], its agents or its employees and that conditions outside the control of [JPS] accounted for the said fire.”

[82] As seen above, JPS pleaded that it, in fact, investigated the incident. JPS also asserted that it responded sufficiently to GCC’s request in that regard. This response supports GCC’s assertions that JPS had a responsibility to investigate as requested, and that this investigation, requested by GCC, would be independently required as a part of routine regulatory compliance. If such an investigation is to be undertaken in response to GCC’s request, it would be incongruous for GCC not to have any details of the investigation separate and apart from the conclusion to which the investigator arrived.

[83] It is noteworthy that in his affidavit, Mr Fleming did not refer to GCC’s request or provide any context surrounding the basis on which JPS would agree, and in fact agreed to undertake the investigation. Is it plausible that this response to GCC’s request for an investigation into the incident consisted of gathering material solely to present to its attorneys-at-law for legal advice and in contemplation of legal proceedings? We do not believe so.

[84] Did the investigative report that was prepared result from the investigation initiated after GCC requested one? It seems so, considering para. 11(c) of the defence.

[85] In light of GCC’s claim letter, the commissioning of the investigation, at best, reflected a dual purpose.

[86] The case of **Re Highgrade Traders Ltd**, a decision of the Court of Appeal of England and Wales, on which JPS relies, is distinguishable on its facts.

[87] This was an appeal from the dismissal by Mervyn Davies J, on 3 December 1982, of a motion brought by the insurance company, Phoenix, seeking to discharge an order of Registrar Bradburn dated 30 April 1982. The order, made on the

application of the liquidator of Highgrade Traders Ltd pursuant to section 268 of the Companies Act 1948, required Mr Alexander, a responsible officer of Phoenix, to attend for examination on oath and to produce documents.

[88] Highgrade Traders Ltd made an insurance claim following the destruction of its warehouse premises and entire stock by fire. Although the son of the company's controller was prosecuted for arson, he was acquitted on a directed verdict. The insurer, Phoenix, became suspicious of the circumstances surrounding the fire and, suspecting arson, appointed loss adjusters, specialist fire investigators, and chartered accountants to examine the cause of the fire and the validity of the claim. From the outset, it was apparent that any claim might be disputed as to both liability and quantum, and Phoenix also instructed solicitors.

[89] Having considered the investigative reports, Phoenix concluded that the fire had been deliberately started and declined liability under the policies, notifying the company in April 1981.

[90] In July 1981, it was resolved to wind up the company as, due to its liabilities, it was unable to continue in business. Little or nothing would be available for creditors if the insurance claim were not met. During negotiations with Phoenix, the liquidator sought disclosure of the investigative reports and obtained an ex parte order under section 268 of the Companies Act 1948 for the examination on oath of Phoenix's officer and the production of the reports. Phoenix applied to have that order set aside, asserting that the reports were protected by litigation privilege, but the application was dismissed, and Phoenix appealed.

[91] The summary of the editors is very useful. It reads:

Held – Allowing the appeal: –

(1) Documents brought into being with the dominant purpose of obtaining legal advice as to whether a legal claim should be made or resisted and which would lead to a decision whether or not to litigate were protected by legal professional privilege and it was not necessary that the documents be brought into existence for the dominant purpose of actually being used as evidence in anticipated litigation or only after a decision to make or resist a claim had been made. On the

facts, the reports sought by the liquidator were prepared in circumstances which indicated that the dominant purpose for their preparation was to assist Phoenix in obtaining legal advice with respect to possible litigation on the company's claims under its insurance policies and they were accordingly protected by legal professional privilege and the liquidator was not entitled to their production under s 268 of the Companies Act 1948 (see pp 172g–173d, 174b–d, 174f, post).” (Emphasis as in original)

[92] Oliver LJ, with whom Goff LJ agreed, opined that the court is not bound to accept a ‘bare assertion’ as to the dominant purpose of an affiant, where there is no explanation of the circumstances, in a case where more than one purpose is possible. (see page 166 paras. d-f). In the circumstances, Oliver LJ concluded that the insurers’ purposes of commissioning the reports were inseparable. They wanted to ascertain the cause of the fire and obtain their solicitors' advice. They suspected that the fire had been fraudulently started by the insured. Whether they paid the claim made depended on the legal advice they received, and the reports were prepared to enable that legal advice to be provided. The only reason Phoenix commissioned the reports was to determine whether potential proceedings under the fire insurance policy could be successfully defended.

[93] We found Oliver LJ’s distinguishing of the **Waugh** case to be particularly helpful. At page 174 paras. e-f, he wrote:

“The instant case is not, in my judgment, on all fours either with *Crompton’s* case or *Waugh’s* case. In the former there was a quite independent primary statutory duty which motivated (and indeed practically compelled) the bringing into being of the documents. In the latter the documents in question would, in any event, have had to be produced for the Board's internal purposes in connection with railway safety. Those seem to me to be quite different circumstances from those of the instant case where there was no purpose for bringing the documents into being other than that of obtaining the professional legal advice which would lead to a decision whether or not to litigate. That, in my judgment, was a sufficient purpose on its own to entitle them to privilege quite apart from any subsidiary purpose which they might

serve in any litigation which might ensue as a result of the decision.” (Emphasis supplied)

[94] Later, at page 175 paras. b-d, Oliver LJ also stated:

“For my part, therefore, I would hold that the specific documents sought by the liquidator are, in the circumstances of this case, the subject matter of privilege. **I emphasise the words 'in the circumstances of this case' for it is, I think, clear from *Waugh's* case that, whenever the question arises, the court is concerned to determine the actual intention of the party claiming privilege and, where it discerns a duality of purpose, to determine what is the dominant purpose.** It is apparent from Mr Buttle's evidence that the letter of 20 August 1980 was written by Messrs Lawrance Messer & Co with a view to recording the position so as to preclude further challenge to the privileged status of the documents which subsequently came into being. In fact, the evidence establishes in this case – I think overwhelmingly – that the letter in fact confirmed the actuality, namely that the insurers were actuated by the motive of obtaining legal advice in relation to litigation which was genuinely regarded as being probable; **but I would not want it to be thought that the mere writing of such a letter by solicitors**, whether for insurers or anyone else, sometimes perhaps as a matter almost of routine drill, **is in all cases necessarily going to be determinative of the question. At highest, it is no more evidence of a fact which may require to be independently proved.**” (Emphasis supplied).

[95] In our view, the case at bar is similar to that of **Waugh**. JPS, by Guaranteed Standard No 5(b), had an obligation to “[c]omplete [i]nvestigations and respond to customer within thirty (30) working days. Where investigations involve a 3rd party, same is to be completed within sixty (60) working days”. GCC requested an investigation so as to ascertain the cause of the fire. JPS responded to indicate that it conducted an investigation. Even if the requirement for JPS to conduct an investigation is a performance measure guiding the provision of utility services delivered by JPS, as it has pleaded in its defence, the fact is that this is a requirement imposed on it by the OUR. It must investigate incidents (including fires) in which damage or loss has occurred potentially due to the operation of its equipment including transmission lines, delivery of electricity services or from its potential failure to fulfil its statutory

responsibilities. As in **Waugh**, JPS would have had to carry out investigations into the cause of the fire, whether litigation was threatened or not. It did not appear to us, therefore, that the dominant purpose for the investigation was to enable legal advice to be given or to obtain evidence to be used in connection with such contemplated proceedings.

[96] It is also noteworthy that in its defence, JPS referred to having done an investigation. While it is true that it did not specifically mention a report, in the usual course of things, a report is provided on the conclusion of an investigation. Having specifically referred to an investigation in its defence, it would be expected that what it has referred to in its defence would be available as a part of the evidence for court proceedings. It would not be expected that an investigation initiated for a dominant purpose of seeking legal advice from its attorneys-at-law would be expressly referenced in the defence.

[97] We also examined **Director of the Serious Fraud Office v Eurasian Natural Resources Corpn Ltd** [2019] 1 WLR 791, another authority on which JPS relied. In this case, the Eurasian Natural Resources Corpn Ltd ('ENRC') claimed that some documents ('the documents') created during investigations into its activities by its solicitors and forensic accountants were covered by legal advice and/or litigation privilege. The documents concerned fraudulent practices allegedly committed in Kazakhstan and Africa, brought to its attention by a whistle-blower. They included notes made by ENRC's outside counsel of 184 interviews including current and former employees. The Director of the Serious Fraud Office ('SFO') claimed declarations that the documents were not covered by legal professional privilege. This was granted at first instance. ENRC appealed.

[98] The court concluded that a criminal investigation and a potential prosecution was reasonably in contemplation of ENRC when it commissioned an investigation. The court then had to determine whether ENRC's dominant purpose was to investigate the facts to see what had happened and address compliance and governance or to defend possible proceedings. Their Lordships determined that the judge ought to have concluded that the documents were brought into existence for the dominant purpose

of resisting or avoiding contemplated criminal proceedings against ENRC or its subsidiaries or their employees. Their Lordships explored what seems to have led to the error in the judge's consideration of the case. At para. 118, they stated:

"Finally in this connection, it is worth summarising what seems to have gone wrong with the judge's consideration of the question of dominant purpose. First, she started with Goldberg J's dictum that documents prepared for the purpose of settling or avoiding a claim are not created for the dominant purpose of defending litigation. That was, in our view, an error of law. **Secondly, she did not properly understand the way in which *Waugh* [1980] AC 521 and *Highgrade* [1984] BCLC 151 are to be understood. The policy of the board in *Waugh* requiring it to investigate all accidents was a distinct purpose that prevented the possible litigation being the dominant purpose. The need to identify the cause of the fire in *Highgrade* or to investigate the existence of corruption in this case was just a subset of the defence of contemplated legal proceedings.** Thirdly, the judge misinterpreted the contemporaneous material, thinking wrongly that it showed that ENRC always intended or agreed to share the core material they obtained from their interviews and investigations with the SFO (as opposed to any report they ultimately prepared). Instead, the material clearly demonstrates that no such formal agreement was ever made. ENRC certainly led the SFO to believe it might in the future waive privilege in such material, but it never actually did so. It was noteworthy that the SFO never even contended for a waiver of privilege." (Emphasis supplied)

[99] We have concluded that this case was also distinguishable from the case at bar due to JPS' duty to investigate complaints in accordance with the guaranteed standards. This is coupled with the bare assertion made by JPS' legal counsel that the report was covered by litigation privilege.

[100] GCC's attorneys-at-law relied on **Neilson v Laugharne**. In that case, on the authority of a search warrant, the police searched the plaintiff's house for drugs while he was away. On his return home, the plaintiff contacted the police, alleging that his house had been burgled. He was asked to go to the police station, where he was held for five hours for questioning, and no charges were brought against him. He consulted with his solicitors, who, on 7 August 1978, wrote a letter before action to the chief

constable stating that they were instructed to bring proceedings for damages for trespass, damage to property, false arrest, wrongful imprisonment, and assault.

[101] The chief constable, pursuant to the procedure laid down in section 49 of the Police Act 1964 for the investigation of a complaint by a member of the public against the police, held an investigation into the plaintiff's complaints. During the investigation, the police took statements from many persons, including the plaintiff. The report was considered, as required, by the Director of Public Prosecutions and the Police Complaints Board, who decided that there were no grounds for criminal or disciplinary proceedings against any police officer.

[102] The plaintiff began civil proceedings and, for the purpose of the action, sought discovery of the statements taken in the investigation. The chief constable claimed that the statements were protected by legal professional privilege and, in addition, should not be produced as their disclosure would be injurious to the public interest. Affidavits in support of the chief constable's objection asserted, among other things, that the dominant purpose of the investigation was to obtain evidence for use in the plaintiff's threatened action.

[103] A county court judge, reversing the registrar's order for production of the statements, held that the statements were protected from disclosure by legal professional privilege but expressed doubt whether they were protected by public interest privilege. The plaintiff appealed. At the hearing of the appeal, the chief constable asserted that the statements were privileged because the complaint that led to the investigation was in the form of a letter before action, and, therefore the investigation served the dual purpose of fulfilling the statutory procedure under section 49 and providing evidence for use in the threatened litigation. The chief constable also asserted that the documents were privileged on the grounds of public interest.

[104] The Court of Appeal held that the documents were not protected from disclosure by legal professional privilege as the dominant purpose of the police when they took the statements was to carry out the statutory duty, under section 49 of the 1964 Act, to investigate the plaintiff's complaints; it was not to obtain legal advice in

regard to his threatened action or for use in that action. The court, however, ruled that the documents were not to be disclosed in the public interest.

[105] Lord Denning MR, one of the three judges who wrote in the matter, referred to the plaintiff's letter before action and stated at page 832, para. h:

"Stopping there for a moment, if the chief constable had taken the ordinary course in litigation, if he had interviewed the witnesses and taken statements from them, all the statements would have been covered by legal professional privilege. They would be prepared for the dominant purpose of litigation (See *Waugh v British Railways Board...*)"

[106] Further on in the judgment, in considering the issue of legal professional privilege, Lord Denning MR wrote at pages 833, para. j – 834, para. a:

"Since the decision of *Waugh v British Railways Board...* we have to look for the dominant purpose of the police in taking the statements. On this point I am not prepared to accept the affidavit of the common law clerk. To my mind it is clear that there were two purposes. One was to carry out the statutory duty to investigate required by s 49 of the Police Act 1964. The other was to be able, in due course, to deal with the letter before action. Of these two, the dominant purpose was to carry out the duty under s 49. After that was done, then, and then only, was the question of compensation to be considered. Seeing that litigation was not the dominant purpose, there is no legal professional privilege available here."

[107] On that same issue, Oliver LJ wrote at pages 836, para. j - 837, paras. a-f:

"The county court judge, reversing the order of the district registrar, held them to be protected on the ground of legal professional privilege, but speaking for myself I am quite clear that his judgment cannot be supported on this ground. The section lays down a mandatory procedure which is to be followed when a complaint is received regarding the conduct of a police officer. It requires the complaint to be investigated and a report made, but there is nothing whatever in the section to suggest that the statements are to be taken or the report prepared for the purpose of obtaining legal advice. The absence of this essential element is sought to be supplied in the instant case by reliance on the fact that the complaint which triggered off the inquiry took the form of what was

clearly intended to be a letter before action. And thus, it is said, the inquiries which followed served a dual purpose. They carried out the statutory purpose of complying with the provisions of the section to which I have referred; but they also served the purpose of providing witnesses' statements for the proposed defendant's solicitors. **The test is not in dispute. It is to be found in the decision of the House of Lords in *Waugh v British Railways Board* [1979] 2 All ER 1169, [1980] AC 521, and it is whether the dominant purpose for which the document in question came into existence was for obtaining advice or for use in the threatened litigation.** Despite the persuasive submissions of counsel for the chief constable, **I am quite clearly of the view that that test cannot be satisfied on the facts of the instant case and this is, in my judgment, demonstrated by the letter of 5th September 1978 which was addressed to the plaintiff personally and is contained in the papers before the court. This informs the plaintiff that it has been decided to call for an investigation under the section and that Det Supt Rimmer will shortly be calling on him for the purposes of that investigation.** Now if, as counsel for the chief constable submits, the dominant purpose of Det Supt Rimmer's inquiries really was to provide material for the threatened civil proceedings, this was a very tricky letter indeed, for it involved, in effect, inviting the prospective plaintiff in those proceedings to make a statement to a representative of the proposed defendant for the purpose of the preparation of the defendant's case under the guise of carrying out a statutory inquiry. Let me say straight away that I am perfectly certain that so shabby a design never for one moment crossed the mind of the writer of this letter. I am quite sure that he never intended anything of the sort and that the letter meant and was intended to mean exactly what it said. And this, as I would have expected, is exactly what Mr Moody, the deputy chief constable, says in his affidavit. **There is, however, in the defendant's evidence an affidavit by a clerk in the employment of the defendant's solicitors which formally suggests that the dominant purpose of the production of the statements was for use in the threatened litigation. This really cannot stand against the contemporary correspondence and the direct evidence of the person responsible for instituting the inquiry.**

For my part, therefore, I am quite satisfied that the claim for legal professional privilege cannot be sustained and if the matter depended on this alone, I

would allow the appeal and reverse the decision of the judge.” (Emphasis supplied)

[108] Oliver LJ agreed with his brothers that legal professional privilege was not established. He stated that he could not accept the assertion of the law clerk as to what was the dominant purpose of the taking of the statements. He opined that it was clear that the dominant purpose in taking the statements was the section 49 inquiry, and this was made certain by the fact that a statement was taken from the plaintiff himself.

[109] Similarly, in the case at bar, JPS was mandated by the OUR guaranteed standards to carry out an investigation as requested by GCC. The investigation therefore served a regulatory purpose irrespective of whether litigation was anticipated.

[110] JPS has also argued that the learned master misapplied the principles in **Virginia McGowan** when (it is asserted) she found that a clear statement of purpose is not sufficient to bar the court from inquiring into whether legal professional privilege applies. If the learned master expressed those principles, she was correct, as the authorities cited in this judgment have already indicated.

[111] In its grounds of appeal, JPS challenged the learned master’s exercise of discretion in ordering specific disclosure, contending that she took into account irrelevant matters and/or failed to take into account relevant matters, including the pre-action correspondence, the involvement of attorneys-at-law, the provision of witness statements, and the asserted purpose for which the investigative report was prepared.

[112] In the absence of reasons from the learned master, the court undertook a review of the material available before the learned master, along with the applicable legal principles, with a view to determining whether her decision reflected an error of law or fact. Having undertaken such a review, our conclusion is that it was entirely open to the learned master to have ordered specific disclosure.

Conclusion

[113] For the foregoing reasons, this court concludes that JPS failed to establish that the investigative report was protected by legal professional privilege. While litigation was reasonably contemplated at the time the report was commissioned, JPS did not discharge its burden of demonstrating that contemplation of litigation was the dominant purpose for which the report was prepared. In those circumstances, the learned master was entitled to order specific disclosure of the report pursuant to the CPR, as such disclosure was necessary to ensure the fair disposal of the claim. No misunderstanding of the law or the evidence, or erroneous inference has been demonstrated that would justify appellate intervention. The stay of execution granted on 19 September 2023, pending the determination of this appeal, will no longer be in place.

[114] As a result, none of the grounds of appeal succeeded. Accordingly, the appeal must be dismissed.

Costs

[115] We have not seen any basis for holding that costs should not follow the event in this appeal.

Apology

[116] This court acknowledges the considerable delay before issuing this decision. We sincerely apologise to the parties and counsel.

Order

1. The respondent's application for extension of time, filed on 24 November 2023, is granted.
2. The respondent's submissions and authorities filed on 17 October 2023 and served on 18 October 2023, shall stand as properly filed and served.
3. The appeal is dismissed.
4. The order of the learned master made on 20 June 2023 is affirmed.
5. The stay of execution granted on 19 September 2023, pending the determination of this appeal, is hereby lifted.

6. Pursuant to the order of the learned master affirmed at order no 4 herein, the appellant shall comply with the disclosure directions contained therein.
7. The disclosure required by the learned master's order shall be effected within 14 days of the date of this judgment.
8. Costs of the appeal are awarded to the respondent, to be taxed if not agreed.