Neutral Citation Number: [2021] EWCA Civ 978

Case No: A2/2020/1494

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
(BUSINESS AND PROPERTY COURT)
Mr Andrew Hochhauser QC (sitting as a Deputy High Court Judge)
[2020] EWHC 2064 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2021

Before :

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE COULSON

- -

Between :

Travelers Insurance Company Ltd.	**Appellant**
- and -	
Armstrong & Anr	**First Respondent**
-and-	
Berrymans Lace Mawer LLP	**Second Respondent**

- -

Mr Ben Lynch QC & Ms Nathalie Koh (instructed by **DWF LLP**) for the **Appellant**
Mr Christopher Boardman QC (instructed by Katten Muchin Rosenman LLP) for the **First Respondent**
Mr Ben Hubble QC (instructed by **Mills & Reeve LLP**) for the **Second Respondent**

Hearing date : 26 May 2021

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Approved Judgment

LORD JUSTICE COULSON :

1 Introduction

1. The principal issue which arises on this appeal can be presented in simple terms. Where insurers and insured jointly retain solicitors and a barrister, and can therefore each claim joint retainer privilege ("JRP") in the documents created, if the insured assigns its professional negligence claims against the solicitors and barrister to X, is X (as the insured's successor in title) entitled to disclosure of the files covered by JRP, or does the insurer have the right to claim privilege against the successor in title, thereby preventing X from accessing the documents? The answer would, on the face of it, appear to be plainly in favour of disclosure to X. However, in this case, the issue has become mired in a certain amount of factual complexity and a good deal of suspicion and bitterness between the parties, the consequence of group litigation gone wrong and large amounts of costs which have not been recovered.

2. By his order of 12 August 2020, Mr Andrew Hochhauser QC, sitting as a deputy High Court Judge ("the judge"), decided that the administrators of Transform Medical Group (CS) Ltd (the insured, a cosmetic surgery company, whose administrators are the First Respondents to this appeal) were entitled to disclose to HJI, their successors in title, the documents in the file created by Transform's joint retainer of Berrymans Lace Mawer LLP ("BLM") as their solicitors in connection with litigation brought against Transform by a large number of claimants in respect of faulty breast implants. BLM were jointly retained as solicitors in that litigation by Travelers (Transform's insurers and the Appellant in this appeal).

3. The judge's order meant that, despite Travelers' vehement objections, disclosure would be to an entity called Hugh James Involegal ("HJI") and their solicitors (Hugh James), because HJI had taken an assignment from the administrators of Transform's causes of action against BLM and counsel arising out of advice given during the underlying litigation. For these purposes, therefore, HJI were Transform's successors in title in respect of the assigned claims. The twist is that Hugh James had been the solicitors acting for the claimants in the group litigation against Transform in respect of the faulty implants, prior to its unsatisfactory conclusion. In this way, Hugh James, the solicitors acting for the claimants against Transform (and therefore against Travelers), have become the solicitors acting for and the owners of HJI who, as the assignees of Transform's own claims against their former legal advisors are, on the judge's order, entitled to disclosure of the documents covered by Travelers' JRP.

4. On the face of it, that might appear to be an odd result. Perhaps understandably, that was Travelers' initial response, doubtless exacerbated by the fact that the assignment and its consequences were presented to them as a *fait accompli*. But the more this court was taken to the authorities, and the few documents relevant to this appeal, the more it became apparent to me that Travelers could do little more than point to the unusual result on the facts as a reason why, in principle, their JRP should override Transform's right to disclosure, and thus that of HJI, Transform's successors in title. Despite Mr Lynch's sterling efforts in this respect, no principle, no authority, and no part of the background material was identified which even began to persuade me that the ordinary principles relating to successors in title, and joint retainer privilege, did not apply to this case.

5. I set out the background facts in Section 2. I set out the relevant parts of the Deed of Assignment in Section 3. In Section 4, I identify the relevant passages in the judge's judgment. In Section 5, I identify what I consider to be the relevant assumptions which this Court has to make, at this stage of these satellite proceedings, for the purposes of this appeal. In Section 6, I deal with the law. In Section 7, I explore whether HJI are entitled to disclosure in principle. Assuming that the answer to that question is Yes, in Section 8 I consider whether there are particular facts, or particular parts of the Deed, which should lead to a different result in all the circumstances of this case. In Section 9, assuming that the answer to the second question is No, I address Mr Lynch's second alternative argument, as to the disclosure of particular categories of documents. There is a short summary of my conclusions in Section 10. I am grateful to all counsel for the clarity of their written and oral submissions.

2 The Background Facts

6. Transform were one of the UK's leading cosmetic surgeries. They used silicone breast implants manufactured by a French company, Poly Implant Prothese ("PIP"). These implants were made using inferior quality silicon. By 2012, hundreds of claimants had indicated claims against Transform in consequence of their use of PIP implants and, on 17 April 2012, a group litigation order was made, with Hugh James acting as lead solicitors for the claimants. As noted, Transform and their insurers Travelers jointly engaged BLM to act on their behalf in relation to those claims which were covered by Travelers' insurance. In addition, Transform retained BLM in relation to those claims which were not covered by Travelers' insurance.

7. It appears that, in relation to the 623 claimants in the group litigation against Transform, 197 of those claimants were making claims that were covered by Travelers' insurance of Transform. That meant that 426 of the claimants were not so covered. This was primarily because these claimants, although very anxious about what had happened, had not exhibited any signs of personal injury and were – wholly unbeknownst to them – outside the terms of Travelers' insurance of Transform. They are referred to in the papers as "the worried well", which I am confident, is a description that the women in question would rightly disown. This unhappy insurance position was not disclosed to the claimants in the group litigation until June 2014.

8. In 2015, the claimants who were covered by the terms of Travelers' insurance of Transform settled their claims with Transform. It then became apparent that, without insurance, Transform would not have the resources to pay compensation or costs to any successful but uninsured claimants. Transform entered administration. The administrators were appointed on 30 June 2015. The uninsured claimants subsequently obtained summary judgment against Transform on 20 October 2016, but there was of course no money to pay any damages.

9. As a result, there was a significant black hole in Hugh James' accounts. In the group litigation, there was a large amount of what were called 'common costs' (which one estimate puts at £11 million) for which Travelers were not liable and which Transform could not pay. Since Hugh James were representing the claimants in the group litigation on a CFA arrangement, this meant that it was Hugh James themselves who were significantly out of pocket in respect of costs. It is plain to me that it is that shortfall which has primarily driven the subsequent events.

10. Armed with the judgment of 20 October 2016 against Transform, Hugh James' first attempt to make good the shortfall was an application for a third party costs order against Travelers under s.51 of the Senior Courts Act 1981. That application was granted by Thirlwall J (as she then was) and upheld by the Court of Appeal, but the Supreme Court allowed Travelers' appeal against that order ([2019] UKSC 48; [2019] 1 WLR 6075). One of the reasons that the Supreme Court gave for allowing the appeal was that the non-disclosure of limits of cover by a defendant at the request of the insurer was unlikely to amount to unjustified meddling by that insurer since, as a matter of law, such non-disclosure was legitimate[1].

11. By the time of the Supreme Court judgment, Hugh James had already set in motion an alternative means of seeking to make good the costs shortfall, and also – at least potentially – to make some recovery for those claimants whose claims against Transform were not covered by Travelers' insurance. On 30 August 2018, the administrators of Transform assigned to HJI the claims which Transform "had or may have" against BLM and counsel "arising out of or concerning the conduct of the defence" in the group litigation. I identify the relevant parts of the Deed of Assignment in Section 3 below.

12. In consequence of that Deed of Assignment, the administrators sought disclosure of the joint retainer files to HJI, and their solicitors, Hugh James. Travelers objected. On 8 July 2019, ICCJ Jones directed that the dispute as to whether or not the joint retainer files should be disclosed to HJI and/or Hugh James was to be determined as a preliminary issue. The judge heard that dispute in early February 2020 but did not hand down judgment until 31 July 2020 ([2020] EWHC 2064(Ch)). As noted above, he found against Travelers and ordered disclosure. It is Travelers' appeal against the judge's order with which these judgments are concerned.

3 The Deed of Assignment

13. The recitals to the Deed identified BLM and counsel and others who advised Transform as "the potential defendants", and went on:

> "(I) Transform has or may have claims against the Potential Defendants for breach of contract, negligence or other breach of duty or tort arising out of or concerning the conduct of the defence by BLM of Transform's defence in the Litigation…"

14. The principal part of the Deed read as follows:

> "1. The Administrators hereby:
>
> > i) assign to Involegal absolutely all claims, choses in action and rights whatsoever which Transform has or may have against the Potential Defendants arising out of or concerning the conduct of the defence by the Potential Defendants of Transform's defence in the Litigation ("the Assigned Claims");

[1] That echoed the traditional view that, in cases where the taking out of insurance was not a requirement of a defendant's contractual or other legal obligations to the claimant, the terms of the defendant's insurance policy were *res inter alios acta* or, as we now say, irrelevant.

> ii) agree to provide Involegal with reasonable access to any and all documentation which is in the Administrators possession and control which relates to Transform's defence in the Litigation, to include any privileged documentation. The Administrators also agree to use their reasonable endeavours to co-operate in a timely manner with any requests made by or on behalf of Involegal…"

15. There was a Declaration of Trust which dealt with how the balance of any net recoveries would be shared between Transform, Hugh James, and those amongst the uninsured claimants who were part of the new arrangement. There was a Client Agreement which each such claimant had to sign. These ancillary documents made plain that, whilst the recovery of costs was the primary purpose of the claim against BLM and counsel, there would also be claims for other alleged losses (although in my view the basis for such claims is rather less clear-cut).

4 The Judgment

16. The Judgment sets out the evidence and the parties' submissions at some length. The section entitled 'Discussion and Conclusion' is, by contrast, very short. In passages which demonstrate that, like this court, the judge had difficulty in pinpointing the legal basis for Travelers' opposition, he said:

> "115. It is important to remember that the Joint Retainer files sought by the Administrators, are the property of Transform. Where an application is made pursuant to section 234 of the 1986 Act, adopting the approach taken in the *Re Corporate Jet* case, "*there is little or no argument that the Court may order a person to deliver up books and records that belong to the company in question*". Travelers do not seem to me materially to challenge that entitlement.
>
> 116. The dispute revolves around what the Administrators are entitled to do with the documents and materials contained in the Joint Retainer files once they have them. As stated at paragraph 33 above, it is common ground that both Transform and Travelers can see the Joint Retainer files, but neither can disclose it to a third party without the other's consent. Thus if the Administrators had not assigned the Assigned Claims, would they be entitled to use the documents within the Joint Retainer files for the purposes of proceedings in relation to such claims and to instruct solicitors to advise in that regard? In my view Travelers could not prevent this and as I understand it, it accepts this. That exercise would not require a waiver by Travelers, because a party's solicitors are not to be regarded as independent third parties, but as the agents of those instructing them. Such an approach is consistent with the *Winterthur* case where at [116], Aikens J held that whilst documents that are obtained in the exercise of common interest privilege obviously cannot be used for any purpose the applicant wishes, it is clear that they can be used in litigation between the two parties who at an earlier stage had a "common interest". Another

permitted purpose, therefore, would be for the Administrators to use the documents in seeking advice from solicitors in relation to possible litigation relating to the claims that were subsequently assigned by Transform, and in any litigation which followed.

117. In my judgment, the key issue here relates to the effect of the Assignment and the entitlement of HJI, following the execution of the Assignment. In *Winterthur*, Aikens J held at [130] that the right to access privileged information can be transferred by the Assignment of rights of suit. This is because the assignee of such rights stands in the position of the assignor. If HJI are to be regarded as assignees, then the successor principle applies. However, as Mr Lynch points out, correctly in my view that paragraph was dealing with a situation where there was sole, as opposed to common interest, privilege. Aikens J treated "common interest" privilege and "joint" privilege as being governed by the same principles, see [133]. I agree and therefore I will adopt the same approach as he did. With joint privilege, the position is as set out at [134] of *Winterthur*, namely that the Assignment of the causes of action comes with "all its benefits and burdens", one of which is that the Joint Retainer files are subject to a privilege that is jointly shared with Travelers. I accept Mr Lynch's submission that the Assignment cannot put HJI in a better position to that in which Transform had been prior to the Assignment. It is in the same position as the Administrators, but no better.

118. It therefore follows that if the Administrators would have been entitled to use the documents and materials in litigation relating to the Assigned Claims, without seeking a waiver from Travelers, why should HJI, as an assignee not be in the same position? In the present situation, in my judgment, there has been an effective Assignment of rights of suit against BLM and counsel by the Administrators to HJI. Clause 1(i) of the Assignment between the Administrators and HJI is drafted in wide terms, assigning "*absolutely all claims, choses in action and rights whatsoever*" that Transform might have against BLM and counsel. It follows from that where the assignor would have been entitled to disclose privileged information to his solicitors, an assignee would equally be entitled to do so. It follows that HJI has equal entitlement to access the Joint Retainer files as have the Administrators to the extent that Travelers cannot invoke the joint privilege against them for the purpose seeking advice and litigating the Assigned Claims .

119. I would make clear that in reaching this conclusion, and in finding that HJI are entitled to access the Joint Retainer files as assignees, I do not do so on the basis of overriding any joint privilege in favour of a third party or interpreting the provisions of section 234 and 236 of the 1986 Act so as to abrogate privilege. In my judgment, all that is being done here is to enable Transform's documents, namely the Joint Retainer files, some of which are privileged, to be delivered up to the Administrators, who are entitled to provide access to HJI to them as

> assignee of Transform's cause of action of the Assigned Claims for the purpose of seeking advice and pursuing litigation in relation to those claims. It seems to me that there is no need to rely upon the provisions of section 236 of the 1986 Act here. In my view, the remedy sought by the Administrators is to be found within section 234. I would make it plain, however, that had I regarded HJI as a third party, as opposed to the assignee of Transform's cause of action of the Assigned Claims, I would not have overridden privilege in order to provide it access, either under the provisions of section 234 or 236 of the 1986 Act."

17. Thereafter, the judge made an alternative finding of waiver of privilege on the part of Travelers at [120]. Although that was originally the subject of ground 2 of this appeal, the administrators concede that the judge was wrong to make that finding. At [121]-[122], the judge dealt with a point about conflict of interest which is not the subject of this appeal, although Mr Lynch made some submissions which suggested that he thought perhaps it was. At [123]-[125] the judge rejected Travelers' detailed submissions on the undertakings which had been offered by Hugh James in respect of confidentiality and the like. I note that in his second judgment of 12 August 2020 ([2020] EWHC 2220(Ch), the judge was obliged to deal with further objections from Travelers as to the detailed mechanics of the order, particularly in respect of confidentiality.

5 The Relevant Assumptions

18. Before leaving the factual background and turning to the law, it is necessary to identify the relevant assumptions which this court must make for the purposes of this appeal.

19. First, this court must assume that the Deed of Assignment (Section 3 above) was validly constituted and completed. Accordingly, on that basis, the court must also assume that HJI are the *bona fide* successors in title to any claims which the administrators of Transform had or may have against BLM and counsel. That cause of action has been properly assigned to HJI.

20. Secondly, this court must assume that the claims against BLM and counsel are at least arguable. That assumption arises from the fact that BLM and counsel sought unsuccessfully to strike out the claims by HJI on the basis that they had no reasonable prospect of success. The grounds for the application were that the assignment savoured of champerty and/or maintenance and was therefore invalid. It was also said that there was no real prospect of establishing loss, both because Transform as a company was doomed to fail in any event, but also because the uninsured claimants would have continued with their claims anyway, in order to obtain judgment and then seek the s.51 order for costs on the back of it. His Honour Judge Jarman QC's rejection of the application to strike out can be found in his judgment dated 15 December 2020 ([2020] EWHC 3402 (QB)). Whilst it is clear from that judgment that the various points taken by BLM and counsel will undoubtedly loom large at the trial, Judge Jarman concluded that the claims surmounted the relatively low threshold of

demonstrating a real prospect of success. For that reason, this court must assume that those claims are at least arguable[2].

21. Thirdly, this court should assume that there has been no waiver of their JRP by Travelers. Although the judge found, by reference to certain correspondence, that there had been such a waiver, Mr Boardman's skeleton argument fairly conceded that this argument had not been run before the judge and was not sustainable by reference to the particular correspondence on which he had sought to rely. Although Mr Boardman's skeleton argument hinted that there may have been waiver on other occasions, that was not an argument which he advanced orally and, in the absence of a cross-appeal, it is not one that this court can properly consider.

22. Accordingly, this court must assume that Travelers have never waived their JRP. The critical issue, however, is whether any such waiver is required before the joint retainer files are disclosed to HJI. What assistance do the authorities provide in answer to that question?

6. The Relevant Law

6.1 The Authorities

23. A large number of authorities were cited to us on the successor in title ("SIT") principle, and some more recent cases on the interplay between SIT and privilege, including JRP. It is unnecessary to set them all out, but I note the most significant authorities below.

24. In *Minet v Morgan* [1873] LR 8 Ch App 361, a plaintiff who was the successor in title to his mother was not compelled to produce confidential correspondence between himself or his mother and their respective solicitors "with respect to questions concerned with matters in dispute in the suit". In *In Re Pickering* [1883] 25 Ch D 247, the executors of the deceased partner had an equal interest in the partnership books and were entitled to see the relevant documents, save for those which related only to the defendant's private matters. The effect of these earlier cases was summarised by Hodson LJ in *Schneider v Leigh* [1955] 2 QB 195 at 203:

> "I have emphasised that the privilege is the privilege of the company. This statement is subject to the qualification that the privilege enures for the benefit of successors in title to the party to an action, at any rate, where the relevant interests subsist."

25. This principle was restated by Goff J in *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd and Anr.* [1972] (Ch) 553. In that case, which was concerned with the sale of a property, the second defendant was the successor in title to the first defendant, who had taken advice from counsel in relation to the title of the land in question. That advice was protected by legal professional privilege. The second defendant's right to

[2] An issue which did not feature in the application to strike out, but which I consider is likely to arise at trial, is the apparent tension between the Supreme Court's decision that a s.51 costs order against Travelers was not appropriate because the disclosure of the insurance position was not a legal requirement, and the allegations against BLM and counsel to the effect that they were negligent from the outset in failing to advise that the insurance position should be disclosed.

claim that privilege as successor in title to the first defendant was upheld by the judge, who said in unqualified terms at 562F that "it is clearly established that legal professional privilege of a predecessor in title does enure for the benefit of his successor". The same principle was affirmed in *The Aegis Blaze* [1986] 1 Lloyds' Rep 203, although that was by reference to *Schneider v Leigh*, *Crescent Farm* apparently not being cited to the court.

26. The first authority of direct relevance to this appeal is *In Re Konigsberg* [1989] 1 WLR 1257. In that case, a husband and wife took advice from a solicitor in connection with the transfer of the matrimonial home into the wife's sole name. When the husband went bankrupt, the trustee in bankruptcy sought a declaration that the transfer was void as against him. In the ensuing dispute, the trustee sought to rely on an affidavit from the solicitor, and the wife sought to exclude that affidavit on the basis that its admission was a breach of her right to legal professional privilege. Her application was refused. Peter Gibson J noted at 1265H-1266B that, where two parties employed the same solicitor, privilege could not be asserted by one against the other in proceedings against each other. So the issue was whether the trustee could be said to stand in the shoes of the bankrupt, or whether the trustee was to be treated as a third party (1266C). Counsel for the wife conceded that, for the purposes of insolvency law, the relevant privilege of the bankrupt had devolved on to the trustee (1267A). In those circumstances, Peter Gibson J held that the trustee was not a third party and went on to say at 1267E:

> "The rule recognises that joint clients cannot maintain privilege against each other and as the privilege of the bankrupt had devolved on to the trustee who is entitled to obtain the privileged information from the bankrupt, in my judgment it is appropriate to treat the trustee as being in the shoes of the bankrupt for the purpose of privilege in proceedings against the joint client."

27. The next case of direct application to the present appeal is *Surface Technology PLC v Young* [2002] F.S.R. 25, which was another joint retainer case, this time concerned with an entire file of documents. Pumphrey J held that, in respect of the relevant intellectual property, the claimants were the successors in title to Ultraseal International Ltd, and that they could therefore claim the same legal professional privilege which Ultraseal could have claimed against the defendants (who were third parties), in respect of all matters on which the original solicitors had been jointly instructed by Ultraseal and its parent company. At paragraph 25, Pumphrey J said this:

> "25 Obviously the first question is what was transferred to the claimants in this case. Undoubtedly it seems to me the intellectual property in so far as title subsisted to it including the patents if the Vendor owned them. So it seems to me that the claimants can claim privilege to this extent. I would hold also that it is implicit in this proposition that the claimant is entitled to copies of the privileged material from the solicitors at its own expense. This follows, it seems to me, because otherwise the privilege is valueless, since the claimants have no means of knowing what material they are asserting privilege in. It seems to me that this follows from the

> existence of the privilege itself and not from any entitlement to the documents in question under the Agreement…"

28. *Shlosberg v Avonwick Holdings Ltd* [2016] EWCA Civ 1138; [2017] (Ch) 210, was an insolvency case and was not concerned with JRP. Sir Terence Etherton MR said at [63] that, on a proper interpretation of the relevant provisions of the Insolvency Act 1986, privilege was not property of a bankrupt which automatically vested in the trustee in bankruptcy. He noted at [64] that in *In Re Konigsberg* the contrary had been conceded by counsel, so as a matter of narrow insolvency law, *Konigsberg* was wrong. But he did not suggest that the wider analysis of JRP in *Konigsberg* was erroneous, and he expressly referred to and did not doubt the results in both *Surface Technology* and *Crescent Farm* (neither of which were insolvency cases).

29. The most recent case of direct relevance is *Twin Benefits Ltd v Barker* [2017] EWHC 177 (Ch); [2017] 4 WLR 42. In that case, Arnold J (as he then was)[3] was dealing with the rights of successors in title (Twin Benefits, who were the assignees of Tom and Freya) and their impact on another beneficiary, Euan. Arnold J noted at [30] the concession that, for the purposes of the application, there was a common interest between Euan on the one hand, and the other members of the class, in particular Tom and Freya, on the other hand, such as they were jointly entitled to claim legal professional privilege ("LPP"). Arnold J then went on:

> "**31** Given that concession, it is common ground that (a) Euan cannot rely upon LPP to deny Tom and Freya (or Twin Benefits as their successor in title) inspection of the documents, but (b) Tom and Freya (and Twin Benefits) cannot waive LPP so as to permit inspection of the documents by the defendants without Euan's consent. Ms Meek has consulted Euan's mother, who does not consider that it would be in Euan's best interests to waive LPP. Although it would be open to Ms Meek, as Euan's litigation friend, to take a different view as to Euan's best interests, she does not. At this stage, Twin Benefits does not challenge Ms Meek's view.
> **32** It follows that LPP would not prevent Twin Benefits from inspecting these documents, but prima facie it would prevent Twin Benefits from deploying the documents as part of its case in these proceedings. In those circumstances, counsel for Ms Meek submitted that rule 31.17(3) (a) was not satisfied. Counsel for Twin Benefits submitted that it was not necessary in order for rule 31.17(3)(a) to be satisfied for the applicant to show that the documents themselves could be deployed as part of its case. Once Twin Benefits had seen the documents, it could attempt to prove their contents in other ways. In the alternative, counsel for Twin Benefits submitted that it would be open to Twin Benefits to seek to challenge the claim to LPP on the basis of the improper purpose rule."

[3] Arnold LJ, as he now is, had previously been leading counsel in *Surface Technology*, and the judge at first instance, upheld by this court, in *Shlosberg*.

6.2 Textbooks

30. In *Documentary Evidence* (13th Edition, Charles Hollander QC) in chapter 19, the learned author says this about the scope and limits of joint retainer privilege:

> "19-01 Persons who grant a joint retainer to solicitors retain no confidence against one another; if they subsequently fall out and sue one another, neither can claim privilege against the other for documents generated in respect of the joint retainer. The trustee or successor stands in the shoes of the original party. Against the rest of the world, however, either can maintain a claim for privilege in respect of such documents. Because the privilege is joint it can be waived only jointly and not by one party alone…
>
> 19-05 Privilege may be claimed by a party or his successor in title. The death of a client does not destroy his privilege since it may be asserted by his heirs. A trustee in bankruptcy is not a successor in title for this purpose. The principle has been extended beyond the personal right: where it can be regarded as an incident of a property right, it may be asserted by a successor in title to that property."

In this connection, the learned author cites both *Crescent Farm* and *Surface Technology*. The specific point about a trustee in bankruptcy not being a successor in title is, of course, a reference to *Shlosberg*. The learned author notes that, in the light of this, *Konigsberg* is no longer to be regarded as good law "on this point". I consider that these paragraphs are an entirely accurate and useful summary of the law of JRP.

31. Other textbooks say very much the same: see, for example, *Phipson on Evidence* (19th Edition, Hodge Malek QC) at 24-01 and 24-04, and *The Law of Privilege* (3rd Edition, Bankim Thanki QC) at 1.37 and 6.04.

6.3 *Winterthur*

32. In relation to either JRP or the SIT principle, none of the textbooks cite *Winterthur Swiss Insurance Company v AG (Manchester) Ltd (In Liquidation)* [2006] EWHC 839 (Comm). That is unsurprising, as it was not a case directly concerned with either. It is cited in *Documentary Evidence* at 19-06 as authority for the proposition that an assignee was in the same position as a successor in title so far as the incidence of legal privilege, and that where access rights had been given contractually to insurers they were not in the nature of rights that were capable of assignment. Despite this unpromising background, Mr Lynch continued to rely heavily on *Winterthur*: indeed, his sole written ground of appeal was that the judge was wrong not to follow the decision of Aikens J in that case.

33. *Winterthur* was a complicated case on the facts, concerned with common interest privilege and waiver. Legal expenses insurance had been underwritten by NIG, who had delegated to TAG the underwriting of individual after the event ("ATE") policies, and the use of panel solicitors to act for the claimants. This was known as the TAG scheme. The TAG scheme was unsuccessful and NIG brought proceedings against the

panel solicitors. They then assigned their causes of action to Winterthur, and separately assigned to them a right of access to documents. In the proceedings, there were privilege and waiver arguments concerning two categories of documents: the documents created before the ATE policy for that particular claim came on risk, and those created after the ATE policy came on risk.

34. In respect of the pre-ATE documents, at [127]-[131] Aikens J found that, if there had been an assignment by NIG of its causes of action in favour of Winterthur, Winterthur stood in the place of NIG and was in a similar position to a successor in title with regard to the incidence of legal professional privilege. So as between them and the panel solicitors, the solicitors could not refuse to give Winterthur disclosure of the pre-ATE documents (which were NIG's sole retainer files). That seems to me to be a straightforward application of the SIT principle to a single retainer.

35. As to the post-ATE documents, the position was more difficult. The judge noted that, if the only basis on which NIG could assert a right of access to the post-ATE documents was common interest privilege, then Winterthur, who could not claim any common interest, faced two difficulties. First, it had not obtained any assignment of NIG's right to claim common interest privilege in those documents and secondly, without waiver, those documents remained confidential as against all other third parties. However, under the principal insurance arrangement, NIG had a wide contractual right of access to documents (condition 6), which gave them the right to demand the waiver of privilege. Aikens J found that condition 6 amounted to an automatic waiver of privilege and meant that, as the separate assignee of that right of access, Winterthur could obtain access to the ATE claimants' sole retainer files.

36. Aikens J said at [125] that "it does not make sense" to talk of an assignment of privilege. He went on:

> "Legal professional privilege is not a right to conduct and prosecute causes of action… nor, in my view, is it a right of access to documents or information that 'arises under or in connection with' the ATE policy."

He reiterated that at [134]. In addition, the only reference to JRP was at [133], where Aikens J said:

> "Moreover, if legal professional privilege is held jointly, then it cannot be waived by one person alone. In my view that rule must apply equally to common interest privilege as much as to joint privilege where e.g. two parties jointly obtain advice from a lawyer."

6.4 Summary

37. In my view, the authorities outlined above can be summarised in this way:

(a) In respect of privileged documents, a successor in title stands in the shoes of his or her predecessor: see *Schneider v Leigh* and *Crescent Farm*. Thus, if the predecessor in title is entitled to the disclosure of privileged documents, so too is the successor in title.

(b) The right of a successor in title to disclosure of such documents, and to assert privilege in such documents as against third parties, is not a matter of the terms of a particular assignment or deed. It is a right that passes as a matter of law: see *Surface Technology* and *Winterthur*.

(c) Of course, the scope of the rights of a successor in title will always depend on precisely what it is that has been passed on or assigned to him: see as far back as *Minet*, and the analysis in *Surface Technology*. Thus if a solicitor was jointly retained to deal with an IP claim and a fatal accidents claim, and the successor in title is an assignee of claims consequential upon the IP claim only, the successor in title is not entitled to see the privileged documents relating to the fatal accidents claim.

(d) Legal professional privilege is a fundamental right, as restated in clear terms by Sir Terence Etherton MR in *Shlosberg*. In a case of JRP, it is therefore a fundamental right of each party who has jointly retained the solicitors in question. There is no authority to suggest that one party's right to claim JRP might override the rights of the other party who jointly retained the solicitors, whilst *Konigsberg* states in unequivocal terms that one such party cannot assert privilege against the other.

(e) This can make for complexity, particularly in respect of what can be disclosed to third parties: see the discussion in *Twin Benefits*. But the general position is as set out there by Arnold J. Whilst neither party can claim privilege as against the other in respect of any documents created pursuant to the joint retainer, as against any third party (other than a successor in title, who stands in the shoes of the original party), both parties can maintain a claim for privilege in respect of any such documents.

(f) As the privilege is joint it can only be waived jointly and not unilaterally: see *Winterthur* and 19.01 of *Documentary Evidence*.

7. Are HJI Entitled To Disclosure In Principle?

38. For the reasons set out below, applying those principles to the present case, I am in no doubt that HJI are entitled to disclosure of the joint retainer files as a matter of principle.

39. HJI are the successors in title to Transform in respect of the claims against BLM and counsel arising out of the PIP group litigation. They are therefore entitled in law to the same rights as Transform in connection with those claims. Transform had an unequivocal right to see the documents covered by JRP since they were one of the joint clients. As a result of the Deed of Assignment, HJI, as their successors in title, have precisely the same right.

40. In my view, that result is entirely consistent with the authorities cited in Section 6.1 above and the passages in the textbooks noted in Section 6.2 above. Furthermore, I consider that this analysis is entirely consistent with the first part of the judgment of Aitkens J in *Winterthur*. As explained below, the second part of that judgment is concerned with different issues.

41. Underpinning Mr Lynch's submissions were two assertions of principle which were, in my judgment, demonstrably wrong. The first was the suggestion that HJI were, in reality, third parties and not successors in title. There can be no legal foundation for

that submission. The authorities make plain that there is a clear distinction between a successor in title (who is entitled to disclosure of documents covered by JRP) and a third party (who is not). There is absolutely nothing in the papers which could allow this court to conclude that, in some way, although they are successors in title, HJI should be treated as third parties for the purposes of JRP. In my view, that submission is untenable.

42. The second erroneous assumption made throughout Mr Lynch's submissions was that, because legal professional privilege was a fundamental right (which it is), if Travelers asserted their right to privilege in the joint retainer file, that in some way overrode or prevailed over HJI's right, as successors in title, to disclosure of the same documents. Again, there was no principle or authority which was identified by Mr Lynch which justified this assumption. Again, I consider it to be contrary to the authorities noted above. Joint retainer privilege means what it says. Each of the parties is entitled to claim privilege as against the world, but each is not entitled to claim privilege as against the other. It has never been suggested, let alone held, that, as a matter of principle, one of the parties' right to JRP trumps the right of the other to disclosure of the documents.

43. On the law, Mr Lynch's main point focussed on the second part of the judgment in *Winterthur*, dealing with the post-ATE policy documentation. He said that it was telling that this issue was *not* decided by reference to the SIT principle and was instead only decided in Winterthur's favour by reference to condition 6 of NIG's insurance and the separate assignment to Winterthur of the right to access documents. He suggested that this showed that the law did not generally allow disclosure of documents covered by JRP to a successor in title unless there was a specific term permitting it (such as condition 6 in that case).

44. In my view, that argument too is untenable. First, it is contrary to the authorities and textbooks which indicate the contrary, noted in Sections 6.1 and 6.2 above. Secondly, it is contrary to the first part of the judgment in *Winterthur* (see paragraph 34 above) which expressly applies the SIT principle by analogy. Thirdly, it ignores the very real differences between the factual situation governing the post-ATE documents in *Winterthur* and the present case (paragraph 35 above). The second part of the judgment in *Winterthur* was not concerned with JRP or SIT: Winterthur could not claim common interest privilege anyway. Furthermore, there is no authority which applies SIT to common interest privilege, which may also go some way to explaining why the point did not arise in argument. Instead, the second part of *Winterthur* is all about waiver, an issue which does not arise in the present case. Finally, the passage at [133] of the judgment in *Winterthur* which makes the comparison between joint retainer and common interest privilege[4] was, as Mr Boardman rightly pointed out, extremely limited. It was simply saying that, for both types of privilege, it requires both parties to achieve a waiver. That is not in doubt. But again it has no relevance to the outcome of this appeal.

45. Mr Lynch's other submission on the authorities relied on *Shlosberg*. He maintained that that decision overruled *Konigsberg* and that, because *Surface Technology* relied on *Konigsberg*, that authority too should no longer be regarded as good law.

[4] As set out at paragraph 36 above.

46. I simply cannot accept that. The only part of *Konigsberg* that was overruled by *Shlosberg* was the erroneous proposition that, as a matter of insolvency law, a trustee in bankruptcy is a successor in title to the bankrupt. It is on that narrow point that it is cited in *Documentary Evidence*. I am confident that the remainder of the analysis in *Konigsberg* remains good law. Furthermore, the attempt to taint *Surface Technology* is even more hopeless, since that case was referred to, and not the subject of any criticism, in *Shlosberg*.

47. Mr Lynch also had the problem of *Twin Benefits*, which was again contrary to his submissions. His argument suggested that there had been an incorrect concession in that case, which meant that the point had not been properly argued and the decision should be ignored. Leaving aside the unlikely proposition that Arnold J failed to spot an incorrect concession, I consider that the suggestion is in any event confused. The only concession that was made in *Twin Benefits* was that set out in paragraph 29 above. That was a concession on the facts of that particular case. It was not a concession of any point of law. It cannot therefore affect the principle that a successor in title can claim the privilege that his or her predecessor could have claimed.

48. For all these reasons, I conclude that the judge's decision, that as a matter of principle HJI were entitled to disclosure of the joint retainer file, was correct.

49. On the face of it, that conclusion deals with the only live ground in this appeal. However, during the course of his submissions, Mr Lynch identified two subsidiary arguments. The first was that, even if in principle HJI were entitled to disclosure, that right was limited by - or even lost as a result of - the Deed of Assignment and/or the factual background. The second was that, even if that too was wrong, the court should be very careful to restrict the documents that were actually disclosed to HJI from the joint retainer files. Although these alternative arguments were not properly within the scope of ground 1, Mr Boardman was content to deal with them and therefore, in deference to Mr Lynch, I address them briefly below.

8. Do The Particular Facts Make Any Difference?

8.1 The Terms of the Deed

50. Mr Lynch made a number of submissions about the terms of the Deed. Drawing them together, his arguments were that:

(a) There was no assignment of the documents or the JRP by way of clause 1(i);

(b) The documents were instead the subject of a simple contractual agreement at clause 1(ii);

(c) On a proper construction of that agreement, it was subject to Travelers' right to assert privilege, and therefore to object to the disclosure of the joint retainer file.

51. For the reasons set out below, I consider that this argument fails at every stage.

52. First, as explained in *Surface Technology* and *Winterthur*, the terms of the assignment are irrelevant to the right to the documents (with its benefits and burdens). The entitlement to the documents passes as a matter of law.

53. Secondly, to the extent that the terms of the Deed are relevant, I consider (as the judge did) that clause 1(i) was more than sufficient to assign to HJI all Transform's rights in relation to the documents in the joint retainer file. What is assigned is "absolutely all claims, choses in action and rights whatsoever which Transform has or may have against the Potential Defendants…". That is broad enough to encompass the joint retainer files in their entirety. Clause 1(ii) is therefore irrelevant.

54. Thirdly, I do not accept the proposition that clause 1(ii) in some way limited clause 1(i). Clause 1(ii) was simply dealing with a right of access. That cannot affect the assignment in the previous clause. I note that a similar provision did not qualify the SIT principle in *Surface Technology* or the first part of the *Winterthur* judgment.

55. Fourthly, I consider that Mr Lynch's interpretation of clause 1(ii), to the effect that on its true construction this provision allowed Travelers to object to disclosure to Transform's successors in title, is misconceived. It is common ground that Travelers would have had no right to object to disclosure of the joint retainer files to Transform. Travelers were not a party to the Deed of Assignment. It is simply not possible to see how, as a matter of law, the wording of an agreement to which they were not a party gave Travelers a right to object which they would not otherwise have had.

56. Finally, there is simply nothing in the words of clause 1(ii) which indicates that Travelers' right to assert privilege in the documents now outweighed or overbore HJI's equivalent right pursuant to the SIT principle. There are no words of Clauses 1(i) or 1(ii) – and Mr Lynch was unable to identify any – which provide any such entitlement.

57. For those reasons, I consider that the terms of the Deed do not qualify or impinge upon the entitlement in principle explained in Section 7 above.

8.2 Other Background Facts

58. Essentially, an analysis of the background brought Mr Lynch back to the consequences of the Deed of Assignment, namely that, as a result of its terms, HJI (and therefore their solicitors, Hugh James), who were on the other side of long-running litigation, will now see the privileged documents. In many ways, that was a resurrection of the conflict of interest argument rejected by the judge at [121]-[122] and which was not the subject of this appeal. But there is in any event a short answer to it.

59. No question of conflict of interest can prevent the disclosure to HJI. No authority was cited which supported any contrary proposition. Of course, there will need to be strict confidentiality safeguards, but the judge dealt with those at length and those too are not the subject of the appeal. Merely because a principle of law gives rise to practical or logistical difficulties which need to be catered for is not a reason for ignoring or disapplying that principle altogether.

60. More widely, I also understand that, once disclosure has taken place, there may be arguments about what material can be deployed at the trial of the claims against BLM and counsel. Those difficulties were advised in *Twin Benefits*. This is, though, a different set of circumstances, and those disputes may not arise in this case. But in

any event, just as in *Twin Benefits*, any such difficulties could not prevent the disclosure of the documents in the first place.

8.3 Summary

61. Accordingly, in my view, there is nothing in the terms of the Deed or other background facts which affects or impinges upon HJI's entitlement in principle to disclosure of the joint retainer files.

9. Particular Categories Of Documents Or Other Restrictions

62. At one point during Mr Lynch's submissions, the court wondered if it might be able to provide assistance to the parties by indicating the particular categories of documents, likely to be on the joint retainer file, which ought to be the subject of disclosure. However, as the hearing wore on, it became apparent that that would be an unwise course.

63. The principal reason for that is because the court does not have the requisite knowledge about either the scope of the likely claims, or the categories of documents that are likely to exist within the joint retainer files, in order to provide that assistance. One example will suffice. Mr Lynch was anxious to persuade the Court that the narrow basis for the claims against BLM and counsel was their failure to advise Transform to disclose their insurance position at an early stage of the group litigation. He said that it therefore followed that documents relating to anything else did not require to be disclosed. But whilst that issue is clearly at the heart of the claim as currently pleaded, there may be all sorts of documents connected to, but not directly concerned with, that issue which might, on a proper analysis, be relevant to the claims, and which would therefore be disclosable. This court is simply not in a position to make such a judgment call.

64. Furthermore, as Mr Boardman convincingly demonstrated, what has been assigned to HJI are the claims which Transform have "or may have". So there may be other claims which are unconnected to the insurance position which might conceivably be made and in respect of which disclosure would then be appropriate.

65. For those reasons, it would not be sensible for this court to give guidance as to the particular categories of documents to be disclosed. On the face of it, the entirety of the joint retainer files is disclosable to HJI and, particularly given the time that has elapsed since they first sought those documents, it is now incumbent upon Travelers and BLM (or the Administrators, in so far as they are in possession of them) to disclose the entirety of those documents as soon as possible.

66. As far as other restrictions are concerned, I am not persuaded that, beyond those put in place by the judge, any other restrictions are necessary or required. Travelers put up considerable resistance to the wide set of undertakings and other restrictions offered by HLJ, Hugh James and Transform, and the judge reached detailed conclusions, over the course of two judgments, on those issues. Those are not the subject of an appeal to this court and again it is not appropriate for this court to consider in detail any further restrictions.

10. Conclusions

67. For the reasons that I have given, if my ladies agree, I would dismiss this appeal. Although Travelers may be unhappy as to the identity of Transform's assignees, that cannot, either in law or on the facts, prevent disclosure to those assignees of the joint retainer files.

LADY JUSTICE ASPLIN

68. I agree that the appeal should be dismissed for the reasons given by my lord, Lord Justice Coulson.

LADY JUSTICE KING

69. I also agree.