SUPREME COURT OF NOVA SCOTIA

Citation: *Irving Shipbuilding Inc. v. Beazley Syndicates AFB 2623*, 2025 NSSC 52

Date: 20250214
Docket: Hfx No. 509361
Registry: Halifax

Between:

Irving Shipbuilding Inc.

Plaintiff

v.

Beazley Syndicates AFB 2623 and AFB 623 at Lloyd's

Defendants

Restriction on Publication: See details on next page

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	November 12, 2024, in Halifax, Nova Scotia
Decision released to parties:	February 7, 2025
Counsel:	Daniela Bassan, K.C., Paul Steep, and Manon Landry, for the Plaintiff Robert Bell, Michelle Awad, K.C., and Shannon Gaudet, for the Defendants

IT IS HEREBY ORDERED THAT:

1. All documents which relate to the security of Canada and which are or contain confidential and proprietary information belonging to non-parties to the within Application (the "Protected Information") are hereby sealed and will not form part of the public record. This Order extends to the pleadings in an arbitration between the Applicant and Odense Maritime Technologies and document filed and transcripts of evidence given during arbitration, to be identified and designated as Protected Information at a later date.

2. No Protected Information may be published in any document or broadcast or transmitted in any way.

(Order granted in Chambers, April 7, 2022)

By the Court:

[1] The parties have described this as a complex piece of litigation. It involves, among other things, the interpretation of a Marine Professional Liability Insurance Policy B0391TV1301140 ("the Policy") issued by the Defendants, Beazley Syndicates AFP 2623 and AFP 623 at Lloyd's (to whom I will refer in the singular "Beazley") in favour of Irving Shipbuilding Inc. ("ISI"). I was appointed Case Management Judge on June 20, 2023. The parties have, for the most part, exchanged Affidavits Disclosing Documents ("ADD"). ISI has also provided two supplements to its initial ADD.

[2] In this motion, the Defendant Beazley is the moving party. It seeks disclosure of approximately 200 documents in respect of which ISI has claimed privilege. The antecedents to this litigation are important to an understanding of the positions that have been taken by each party, and consequently will be explored in somewhat more depth (albeit not exhaustively) than is usual in disclosure applications of this sort.

Background

[3] The need for the Policy arose because of the Government of Canada's ("Canada") Arctic and Offshore Patrol Ships Project ("the AOPS Project" or "the Project"). Canada selected ISI to be the prime contractor for the Project. Its task was to design and build the ships which were to result pursuant to it.

[4] The AOPS project proceeded in phases. The period from 2013 to 2015 has been called the "Definition Phase". During this time, the designs for the vessels were finalized. The next phase, from 2015 to 2018, involved the actual construction of the vessels, and was dubbed the "Implementation Phase".

[5] Canada was very specific as to the type of insurance which it required ISI to have in place. Overall, the requirements were so specific that ISI turned to Integro (Canada) Limited ("Integro") to determine, first, whether this type of insurance was even available in the marketplace, and second, if so, to broker the deal.

[6] Adib Samaan, who was the Director of Risk Management of a company closely affiliated with ISI (J.D. Irving Limited, or "JDI") was the "lead". He was tasked with managing and implementing the insurance program for the AOPS on behalf of ISI. In its brief, ISI describes his need to share information with Integro:

> 22. To advance their common goal and mutual interest in obtaining, managing, and maintaining the policy, ISI brought Integro into confidential and privileged

> consultations with ISI's external and in-house legal counsel. ISI also shared with Integro confidential and privileged communications containing legal advice about insurance matters (including counsel's legal notes and work product) to ensure that the policy was obtained, managed, and maintained in accordance with ISI's needs.

[7] Mr. Samaan described the timing of these joint consultations as such:

> (a) The negotiations and drafting for the Policy between ISI and Beazley which started around the fall of 2012 and continued into the first quarter of 2013;
>
> (b) The negotiations and drafting for the insurance requirements related to the Definition Phase prime contract which also started around the fall of 2012 and continued in the first quarter of 2013;
>
> (c) The negotiations and drafting for the insurance requirements related to the Definition Phase subcontract with Odense Maritime Technology which took place in the first half of 2013;
>
> (d) The negotiations and drafting for the insurance requirements related to the Implementation Phase prime contract which started around mid-2014 and continued to the end of 2014;
>
> (e) The negotiations and drafting for the insurance requirements related to the Implementation Phase subcontract with Odense Maritime Technology which started around early 2015 and continued until spring 2015.
>
> (*Samaan Affidavit*, July 30, 2024, para. 9)

[8] In November 2012, a Non-Disclosure Agreement between ISI and Integro was signed. That document referred to ISI as the "Disclosing Party" and to Integro as the "Receiving Party" (*Samaan Affidavit*, para. 12, and Ex. D).

[9] Paragraph 3 governed the use which Integro could make of the "Confidential Information" disclosed to it by ISI as part of this process:

> A. Use the information only for the Purpose set forth herein, and not for any other purpose;
>
> B. Use the same degree of care and discretion to limit disclosure of Confidential Information as it use[s] to protect its own proprietary and confidential information but in no event less than a reasonable degree of care;
>
> C. Restrict disclosure of the Confidential Information to employees … of the Receiving Party and its Affiliates with a need to know and not disclose it to any other person or entity without the written consent of the Disclosing Party.
>
> D. Advise those employees and Representatives who receive the Confidential Information of their obligations with respect thereto; and

> E. Copy the Confidential Information only as necessary for those employees and Representatives who are entitled to receiv[e] it, and ensure that all confidentiality notice[s] are reproduced in full on such copies.
>
> F. Maintain the confidentiality of all information received. ...

[10] Subsequently, the two also executed a "Client Service Contract" which required the parties, *inter alia*, to share information and cooperate in the following terms:

> a) The Client will cooperate with Integro in the performance of the Services, and shall disclose and provide to Integro such material information and documentation which are necessary for the placement of the insurance required under the Services ("Client Information").
>
> b) The Client shall be solely responsible for the accuracy and completeness of any Client Information furnished to Integro and any applicable insurers, except to the extent of modifications by Integro of such Client Information prior to furnishing to such insurers. The Client shall have a continuing obligation to disclose to Integro any and all material information that might affect Integro's ability to place Clients' insurance program required as part of the Services, and Integro shall not be responsible for the consequences of any failure by the Client to disclose such information.
>
> (*Samaan Affidavit*, Ex. D)

[11] Integro successfully brokered the deal. The Policy which resulted was not "boilerplate" in any sense of the word. It was described by counsel for Beazley (during oral submissions) as one that was "made to order". It was intended to conform to the very precise needs of the participants in the Project. As a consequence, "manuscript" language was used when its terms were spelled out. Integro's remuneration (paid by Beazley) consisted of 10% of the premium that ISI had paid.

[12] Odense Maritime Technology ("OMT") was ISI's design subcontractor. During the Implementation Phase of the Project, ISI observed that there were some design problems associated with the vessels. It became concerned that these errors were widespread and were materially and adversely impacting the entire AOPS project. Both OMT and Beazley were put on notice (*Statement of Claim*, paras. 31 – 32).

[13] In June 2017, ISI commenced arbitration proceedings against OMT. These proceedings were initiated under the dispute resolution provisions of the

subcontracts. Canada was not a party to the arbitration. OMT's Defence and Counterclaim was funded by Beazley which, however, refused to indemnify ISI with respect to its legal fees and disbursements which were incurred in the course of defending OMT's counterclaim.

[14] It is uncontroverted that ISI was completely successful in the arbitration. OMT's counterclaim was dismissed. The arbitral award ("the Award") required OMT to pay damages to ISI in the amount of $170,573,824.03, plus pre and post judgement interest, and full indemnity for ISI's legal fees and disbursements.

[15] On December 2, 2022, OMT and ISI executed a Limitation Agreement. Among other things, that agreement protected OMT from any direct liability with respect to the Award.

[16] For its part, OMT agreed to, first, pay ISI the sum of $14,502,623 in respect of performance guarantees contemplated by the subcontracts. Second, it agreed to pay to ISI any monies that it received from Beazley under the Policy (with the exception of those indemnifying it for fees and disbursements incurred in the arbitration). The parties also agreed to cooperate in pursuing any insurance funds available under the Policy. Finally, OMT agreed to pay to ISI any monies that the company recovered pursuant to a different (specialist) indemnity insurance policy issued by another company (*Statement of Claim*, para. 58). ISI has taken the position that these subsequent agreements with OMT have not affected or impaired ISI's entitlement to the full value of the Award or interest accruing (*ISI Brief*, para. 33).

[17] On January 18, 2023, the Award was made a judgement of this Court by way of an enforcement proceeding.

[18] In these proceedings, ISI seeks direct recovery from Beazley of the full unpaid amount of the Award. The latter's position is that the coverage available under the Policy is limited to $25,000,000.

[19] The parties have been unable to resolve their differences, hence the Notice of Action and Statement of Claim filed by ISI against Beazley on June 19, 2023.

[20] The parties have entered into a Document Exchange Protocol ("the Protocol") pursuant to *Civil Procedures Rules* ("CPR") 16.04 and 16.05. Therein, the specifications for the parties' Privilege Logs are described as such:

> Each party shall provide a particularized Schedule B to its Affidavit of Documents listing all records over which privilege is being claimed in accordance with the Rules.
>
> The parties do not need to particularize the Records which are subject to claims of solicitor-client privilege arising from the Parties' retainers of counsel in the Action.
>
> The particularized Schedule B shall be generally formatted the same as Schedule A. However, it is agreed that the Parties' Schedule B listings (privilege logs) do not need to include any fields which would risk disclosing the privilege (e.g. descriptive document title or file name).
>
> [emphasis in original]
>
> (*Affidavit of Susan MacDonald,* July 31, 2024, Ex. A)

[21] ISI's disclosure was provided by way of its primary ADD, as well as two supplemental ADDs, all sworn by David Henley, KC. I will refer to them, collectively, as the "Henley Affidavits". Beazley has also provided an ADD, as well as two supplemental ADDs, all with Schedules A and B listed. As of the date that this motion was filed, these had only been provided by Beazley in unsworn, draft form (*ISI Brief,* para. 43). However, counsel has advised that copies of the documents listed in the Schedule A's were provided to ISI shortly before this motion was heard.

[22] Schedule B to each of the Henley Affidavits, and in particular the Privilege Logs noted therein, assert claims of solicitor-client privilege and common interest privilege. For example, Schedule B to the first Henley Affidavit states:

> **Solicitor-Client Privilege is also claimed over electronic information:**
>
> Documents containing confidential professional communications passing between the corporation (or the corporation's agents) and the corporation's legal advisers directly related to the seeking/obtaining or receiving of legal advice or legal assistance as well as confidential communications reflecting such legal advice. These confidential communications include:
>
> - Correspondence between the corporation and Stewart McKelvey/McCarthy Tétrault with respect to the matters which are now in question or may be in question in this litigation.
> - Documents prepared by and for Stewart McKelvey/McCarthy Tétrault contained in the files of Stewart McKelvey/McCarthy Tétrault for the purpose of advising the corporation.
> - Documents prepared by or for in-house counsel of the corporation with respect to the matters which are now in question or may be in question in this litigation.

[23] Schedule B to the second Henley Affidavit asserts:

> **Common Interest Privilege is claimed over electronic information:**
>
> Documents containing confidential and privileged communications shared for the purpose of pursuing and maintaining a common legal interest with the corporation in relation to the matters in question in this litigation and for which there is a shared claim of common interest privilege with the following parties: Integro (Canada) Ltd. and its successors HUB International and/or Tysers as represented by in-house counsel […]

[24] From the Privilege Logs, the following "categories" of ISI's privilege claims have been broadly summarized:

ISI Privilege Main Category	**ISI Privilege Sub-Category**
Solicitor-Client	Communications ("comms") reflecting Legal Advice Comms to seek/obtain Legal Advice Notes of Legal Counsel Work Product of Legal Counsel Other Docs reflecting Legal Advice Outside Law Firm Comms or Docs for Purpose of Litigation
Litigation	
Common Interest	
Combinations of the above	

(*ISI Brief*, para. 49)

[25] Common interest privilege has also been asserted by ISI in respect of correspondence with two of Integro's successors (*MacDonald Affidavit*, Ex. F and H).

[26] On the whole, the Privilege Logs' subindexes disclose 91 emails in relation to which privilege is claimed, some with attachments, and they are said to involve "communications between and among ISI, Integro, and ISI's external legal counsel". ISI's claim of privilege also extends to an additional 35 emails, some with attachments, "involving communications between and among ISI, Integro, and ISI's in-house legal counsel (to the extent that any attachments are not themselves privileged, they have been separately disclosed as part of ISI's Schedule A productions)." (*ISI Brief*, para. 50)

[27] Those documents over which privilege has been claimed are described by ISI, in its second supplemental affidavit, as follows:

- communications for the purpose of seeking or obtaining legal advice;
- communications that provide, reflect, or could reveal the substance of legal advice from in-house counsel;
- communications that provide, reflect, or could reveal the substance of legal advice from external counsel;
- notes of legal counsel that reflect legal advice; and
- work product of legal counsel that reflects legal advice, including draft versions of documents and annotated/redlined copies of documents, created, revised, or commented on by ISI's counsel.

[28] To be specific, ISI has provided a summary of the records from its Privilege Logs which are at issue in this motion (*ISI Brief*, *Appendices* 4 & 5). The documents have also been summarized (albeit, differently) in the materials filed by Beazley. I will subsequently refer to these documents in the manner in which ISI has categorized them. They will be considered in more detail later in these reasons.

[29] There are also some issues between the parties with respect to the disclosure of certain communications with Canada. They have agreed that, although these issues have not yet been resolved, they will be reserved until further discovery examinations have been completed (*Beazley Brief*, para. 27).

[30] Succinctly put, ISI argues that it brought its broker, Integro (and Integro's successors, HUB and Tysers, all three of which will be simply referenced as "Integro") into the tent (so to speak) and shared with it solicitor-client privileged information. This was because Integro needed to understand the advice that ISI was receiving from its counsel, and to communicate, at times, with these counsel directly, in order to ascertain that the coverage being negotiated with Beazley was in conformity with Canada's strict requirements (see, in particular, *ISI Brief*, paras. 3, 4, and 10). This disclosure does not amount to a waiver of the solicitor-client privilege (the argument continues). Rather, an extension of ISI's solicitor-client privilege is said to attach to disclosures made to a third-party (Integro) which shares an interest in common (the placement of this specialized Policy) with ISI. ISI further argues that Courts have recognized "common interest privilege" (sometimes referred to as "CIP") in circumstances such as these.

[31] Beazley counters with the argument that ISI lawyers never provided legal advice to the insurance brokers, nor did the brokers provide any legal advice to ISI (*Beazley Brief, para 30*). As a consequence, it contends that solicitor-client privilege cannot shield the documents at issue, because that privilege was waived when ISI

made the disclosures to Integro. Beazley argues that common interest privilege simply cannot arise in these circumstances.

Issue

[32] Essentially, there is one issue involved in this proceeding: Is Beazley entitled to production of the documents in issue, over which ISI has claimed privilege? Before directly considering this issue, however, some foundational principles will be explored.

Analysis

(i) The obligation to disclose in general

[33] To begin, it is indisputable that a party to a defended action must disclose and produce all relevant documents and electronic information that the party has or can obtain through reasonable efforts. The only permissible exceptions relate to those documents over which a valid claim of privilege may be asserted (*CPR*'s 15.02, 16.03, 14.01 (1) (a) and (b)). Information is relevant if it directly or indirectly enables a party to advance its own case, diminish or undermine the case of its adversary, or if it may disclose a path of inquiry that has either consequence.

[34] Whether or not a document is relevant is to be assessed by the motions Judge (myself) from the vantage of "trial relevance" (*CPR* 14.01). This is to say, based either upon what I know now of the case as a result of the evidence adduced, and the pleadings, and upon what I may reasonably extrapolate (on the basis of what I know) would the Judge presiding at the trial find the document, electronic information, or other thing which is at issue, relevant to the determination of the trial issues?

[35] As Justice Moir put it, in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4:

> [45] As I read Rule 14.01(1), counsel who are deciding whether to make an issue about the relevancy of something for disclosure, or at discovery, must do their best to put themselves at the vantage they will have at the beginning of the trial. And, when the issue goes to chambers, counsel will have to do their best to give the chambers judge the vantage the trial judge would have at the beginning of the trial. And, the chambers judge must make a ruling from that vantage, imperfectly constructed though it may be.

> [46] This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
>
> - The semblance of relevancy test for disclosure and discovery has been abolished.
> - The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
> - The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
> - Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.
>
> In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.
>
> [47] In my opinion, these conclusions do not suggest a retreat from the broad or liberal approach to disclosure and discovery of relevant information that has prevailed in this province since 1972.

[36] In this case, however, there can be no question as to whether the documents at issue are relevant. They have been noted in ISI's ADDs. Their relevance has been conceded.

[37] ISI's ability to withhold these documents, therefore, stands or falls, first, upon the validity of its assertion of solicitor client privilege in relation to them, and second (if a valid assertion of such privilege has been made) upon whether ISI subsequently waived that privilege when it shared the documents at issue with Integro.

[38] The latter consideration directly engages the question of whether common interest privilege may attach to the communications and/or documents at issue, notwithstanding their disclosure to Integro, in these circumstances. If it does attach, the assertion of privilege remains valid, and the documents need not be disclosed. If it does not, solicitor-client privilege has been waived, and they must be disclosed.

(ii) What is solicitor-client privilege?

[39] In *Smith v. Jones*, (1999), 132 CCC (3d) 225 (SCC), Cory, J. observed:

> 46 Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has a deep significance in almost every situation where legal advice is sought whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. It is an element that is both integral and extremely important to the functioning of the legal system. It is because of the fundamental importance of the privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step.

[40] In *R. v. Shirose*, [1999] 1 SCR 565, that Court, at paragraph 49, and quoting with approval the author of Wigmore, *Evidence in Trials at Common Law* 3d ed, defined the breadth of the privilege as such:

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal advisor, except the protection be waived.

[41] The principles noted above have been developed and applied in many cases, in many different contexts, over the course of centuries. What emerges is that privilege will attach to communications between a solicitor and their client when the latter approaches the former to obtain legal advice. Sometimes a retainer agreement will be formalized, however, this is not necessary in order that the privilege may arise. Where the communications are made to the lawyer in their professional capacity, and the object is to obtain legal advice, they will be protected. Litigation need not be contemplated. While there are some limited exceptions to this general rule, the privilege is "as close to absolute as possible" (see, for example, *Blood Tribe Department of Health v. Canda (Privacy Commissioner)*, [2008] 2 S.C.R. 574, at para. 9, and also *R. v. McClure*, [2001] 1 S.C.R. 445, at para. 35).

[42] Where in-house counsel, government counsel, or salaried lawyers of a corporate entity are involved, some may have different functions, not all of which extend to furnishing legal advice. Privilege will not extend when a lawyer is discharging, for example, a purely business function on behalf of their employer or principal, or some other function that is not law related. Moreover, the mere fact that a document was copied to either in-house or external counsel will not suffice, on its own, to shield that document from disclosure. (See, for example, *Canadian Natural Resources Limited v. ShawCor Ltd*., 2014 ABCA 289).

[43] It is also appropriate to emphasize that it is "communications" which are protected, rather than facts. Only if the facts are integral to the solicitor-client privilege will they be presumed to be privileged. The distinction is not always an easy one to make. As the court noted in *Canada (Attorney General) v. Chambre des notaires du Québec*, [2016] 1 SCR 336:

> [40] … it is not appropriate to establish a strict demarcation between communications that are protected by professional secrecy and facts that are not so protected …

[44] In *Sack v. Canada (Attorney General)*, 2023 NSSC 35, Keith J. had occasion to discuss the interplay between assertions of privilege and the disclosure obligations to which all parties are subject:

> [38] A party is not obliged to disclose information which is privileged, even if it is relevant (Rule 14.05). The following procedures are in place to address claims of privilege:
>
> 1. Parties are required to:
>
> a. Separate documents and electronic information which is relevant and non-privileged from documents or electronic information which is relevant and privileged (see the definition of "sort" in Rule 14.02(1)); and
>
> b. Either disclose relevant documents or electronic information or claim that it is privileged (see Rules 15.02(1)(b) and 16.03(1)(b)).
>
> 2. The obligation to expressly advance a claim for privilege is further reinforced under the following Rules 15.02(2)(b) and 16.03(2)(c) which state that any party claiming privilege over a document or electronic information must also disclose information "to the extent it is possible to inform another party without infringing the privilege" (Rules 15.02(2)(b) and 16.03(2)(c)). Furthermore, parties to an action must swear:

a. an affidavit disclosing documents which, among other things, attaches a Schedule B providing "information on all claims that a document ... is privileged in favour of the party or another person." (Rule 15.03(3)(f));

b. an affidavit disclosing electronic information which, among other things, attaches a Schedule B providing "information on all claims that a document ... is privileged in favour of the party or another person." (Rule 16.09(3)(f))

3. Where one party claims privilege and another party disputes that claim, a judge determines that dispute in accordance with the Rules (see Rule 14.05)(4)). In determining a claim of privilege, a judge may take various steps to ensure the integrity of any such privilege claim is preserved until the claim of privilege is determined (Rule 85.06(4)). (See also *Halifax (Regional Municipality) Pension Committee v State Street Bank & Trust Co.*, 2011 NSSC 355 at paragraph 343 – 344.)

4. Where privileged information is disclosed by mistake, Rule 14.06 provides additional procedures to mitigate the problem and protect the privilege.

[emphasis added]

(iii) What is common interest ("CIP") or third-party privilege?

[45] Generally speaking, solicitor-client privilege will be deemed to have been waived when disclosed to a third party. As the authors of *The Law of Evidence in Canada*, 3rd edition, LexisNexis Canada Inc. 2009 state:

> 14. 122 An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication … Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered.
>
> …
>
> 14. 129 Whether intended or not, waiver may [also] occur when fairness requires it, for example, if a party has taken positions which would make it inconsistent to maintain the privilege.

[46] This receives further elaboration in *The Law of Privilege in Canada*, R.W. Hubbard, S. Magotiauz, S.M. Duncan, looseleaf, Canada Law Book, where the authors observed that:

> Generally, waiver of part of a communication will be deemed to be a waiver of the entire communication if it is related to the same subject.

[47] And:

> As a better approach, Canadian Courts have embraced an examination of all of the circumstances of the case. If the disclosure of part of the communication only is likely to mislead the other party or the Court, privilege may then be lifted over the whole communication.

[48] Within the context of waiver, then, CIP amounts simply to a broader extension of the solicitor-client privilege. In some circumstances the privilege will be treated as having not been waived even if the (initially privileged) communications are disclosed to a third party. Most often, this will arise where the third-party may be described as an agent of the client, whose function or role is to facilitate the legal advice that is being given. This has at times, led the Court to scrutinize either the purpose, or the function to be discharged, by the third party in question, in order to determine whether the claim of privilege with respect to the documents disclosed still abides.

[49] In *Sable Offshore Energy Project v. Ameron International Corporation*, 2015 NSCA 8, the Court had recourse to a "purposive approach" when conducting the analysis (albeit, within a context where a claim of litigation privilege was also made).

[50] In *Sable*, the Appellants owned the Sable Gas Project. This included three offshore structures, as well as onshore gas processing facilities, at two locations in Nova Scotia. The Appellants had put together an Alliance based upon an agreement between themselves and several different contractors, each of whom bore responsibility for various aspects of the construction and coating of the facilities. This coating, or painting, was intended to provide a safeguard against corrosion. The Appellants eventually alleged that widespread paint failures had arisen, in relation to both the inshore and offshore facilities.

[51] Litigation commenced. Sable claimed against various defendants, including those contractors involved in the application of the paint coatings. It was able to achieve a settlement with everyone but the Respondents, Ameron International Corporation and Ameron BV ("Ameron").

[52] Prior to settling its claims against the others, Sable had participated in discussions with the Alliance contractors. These discussions had included an exchange of documents as well as some negotiations. They also included "a finalization or 'close-out' of their contractual relationship as dictated by the Alliance contract" (*Sable*, para. 9).

[53] Sable had made insurance claims against the insurers of both the offshore and inshore facilities . It settled these claims, in 2006 and 2009, respectively. One of the bases upon which its refusal to disclose certain documents to Ameron was premised, was that of common interest privilege.

[54] Justice Bourgeois, speaking for our Court of Appeal in *Sable*, said this:

> [62] The chambers judge undertook a thorough review of the case authorities outlining the creation and nature of common interest privilege. The foundation of her analysis arises from a definition provided by Lord Denning. At paragraph 116 of her decision the chambers judge writes:
>
> > [116] As Denning, L.J. said in *Buttes Gas and Oil Co. v. Hammer* (No. 3), [1981] Q.B. 223 (C.A.) at p. 243:
> >
> > > . . . There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him – who have the self-same interest as he – and who have consulted lawyers on the self-same points as he – but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation – because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff.
> >
> > An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
> >
> > In all such cases I think the courts should – for the purposes of discovery – treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged.

> [63] The above passage has been previously endorsed by this Court (see **Mitsui** at para. 51). I find no fault with the chambers judge's articulation of the law.
>
> [emphasis added]

[55] The Court continued:

> [66] While I do not take issue with the chambers judge's recognition of the potential for common interest privilege to arise where Sable and the Alliance Contractors have exchanged documents in the shared pursuit of a third party, with respect, her requirement that the document itself reference the joint endeavour in order to be protected by common interest privilege, is unduly restrictive and constitutes an error of law. If applied, the chambers judge's requirement could result in documents entitled to being considered privileged, being disclosed.
>
> [67] I will provide an example which may illustrate the type of problem which could arise with the application of the chambers judge's document based approach. In 2008, two adverse parties settle a litigious dispute. They together now decide to seek recovery from a third party to re-coup their respective losses. To facilitate that effort, one party shares with the other a previously undisclosed opinion it had received in 2005 from an expert for the purposes of the now settled litigation. Clearly, one would not necessarily expect to see in that 2005 report statements which "specifically refer to the joint position [chambers judge's underlining]" of the then feuding parties, against their now common foe.
>
> [68] The chambers judge's requirement that the privilege be founded in the content of the document itself, would in some instances, create an injustice. Although shared documents may very well reference a joint position against a common adversary, such is not a determining factor to finding a common interest privilege. Rather, the law, properly applied, would require the party claiming common interest privilege to establish that the document was shared for the clear intent of pursuing a common adversary. It is the *reason* the document is exchanged which should be determinative as to whether a common interest privilege arises, not its particular contents.
>
> [69] In my view, the chambers judge's direction must be modified to reflect the above purposive approach to determining whether a common interest privilege arises over documents Sable and the Alliance Contractors exchanged in their joint pursuit of third parties. The correct approach is to direct that only where it is clearly established that the documents were exchanged in furtherance of a joint interest against a third party, and the documents were also otherwise privileged, does a common interest privilege arise.
>
> [emphasis added]

[56] Next, the Court added:

[72] The chambers judge observed, correctly, that the "onus is on the party asserting privilege to establish it". She reviewed the statements contained within the affidavits of Mr. Strand and Ms. Andrewartha, and concluded as follows:

> [275] There is nothing in the evidence which satisfied me that litigation was ever reasonably contemplated against the Offshore Insurers. Coverage was not denied. There were negotiations with respect to coverage issues and with respect to the amount claimed.
>
> [276] Elizabeth Jane Andrewartha says litigation must be in reasonable contemplation for there to be litigation privilege but does not say that was the case. She simply says it "seemed likely" after mid 2003. In my view, that is insufficient. I do not accept the two phrases to be synonymous.
>
> [277] Nor has counsel for Sable at the relevant times, David Strand, been more helpful. He refers to contemplated litigation in para. 13 of his Affidavit, quoted above, but does not mention contemplated litigation against the insurers.
>
> [278] I conclude the onus has not been met to satisfy me that litigation privilege applies.

[73] The appellants submit that the chambers judge erred in not accepting the unrefuted evidence of counsel that litigation was reasonably contemplated, arguing their affidavits are abundantly clear that such was the case. With respect, the fact that an affiant is not challenged, does not require a trier of fact to accept their evidence or the submitted interpretation of their evidence. The trier of fact is entitled to accept some, all, or none of the evidence offered by a particular witness.

[74] Here, the chambers judge was entitled to consider the evidence presented as to whether litigation was reasonably contemplated, and determine whether she was satisfied such was the case. She determined the onus was not met by the appellants based on her consideration and weighing of the evidence. It is not the function of this Court to re-consider and re-weigh the evidence considered by the chambers judge. I am not satisfied the chambers judge committed a palpable and overriding error justifying appellate intervention.

[57] These observations culminated in the following statement:

> [88] The chambers judge instructed herself as to the correct principles of law. She also correctly, in my view, found that as Sable and the Onshore Insurers were adverse in interest as it related to the insurance claim, documents exchanged in relation thereto could not be protected by common interest privilege.
>
> [89] As with the previous two parties, the chambers judge recognized Sable may have a shared interest with the Onshore Insurers in pursuing third parties which could give rise to common interest privilege over documents exchanged for that purpose. She writes:

> [266] Documents exchanged, the dominant purpose of which was pursuit of claims against third parties, including these defendants, are protected by common interest privilege. As with the Alliance Contractors document exchange, a vague reference to third parties is not sufficient. There must be evidence of a joint position against third parties.
>
> [90] By focusing on the content of the exchanged documents as the determining factor to establish common interest privilege, as opposed to the purpose of the exchange, the chambers judge erred (see discussion earlier at paras. 66 through 69). Again, the correct approach would be to direct that only where it is clearly established that the documents were exchanged in furtherance of a joint interest against a third party, and the documents were otherwise privileged, does a common interest privilege arise.
>
> [emphasis added]

[58] In different circumstances, Courts have extended the "cloak" of common interest privilege to circumstances which (at the time the disclosure occurred) involved non-litigious contexts. Such an approach may pertain to circumstances in which the third party receiving the information is involved, for example, in pursuit of a commercial interest in common with the disclosing party.

[59] *Iggillis Holdings Inc. v. Canada (National Revenue)*, 2018 FCA 51, was such a case. In *Iggillis*, the Court overturned a trial decision which attempted to limit the ambit of common interest privilege by holding that it did not apply to commercial transactions.

[60] The Federal Court of Appeal rejected such a categorical restriction, and determined that CIP may, in appropriate circumstances, be invoked in different types of commercial contexts. In the case before it, the Court took the view that:

> 41 … solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions. This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.

[61] The Court further observed that, "… when dealing with complex statutes such as the *Income Tax Act*, sharing of opinions may well lead to efficiencies in completing the transactions and the clients may well be better served …" (para. 42).

[62] Given the denial of leave to appeal the ruling in *Iggillis* to the Supreme Court of Canada, it is clear that CIP may have application in contexts where disclosure is made at a time when litigation is not contemplated, in appropriate circumstances. Therefore, in a commercial context, the sharing of privileged documents or information by parties and their transactional counterparts need not necessarily result in a loss of solicitor-client privilege. But there must be a "common interest" in which the parties are united.

[63] Such extensions of solicitor-client privilege have been applied to so-called agency situations. However, it has, at times, been necessary for the Court to look beyond the specific label adopted or commonly applied to the third party or "agent" (to whom the disclosure(s) in question was/were made) and examine the specific roles that they performed. This has sometimes been called a "functional approach".

[64] An example of the application of such an approach is found in *General Accident Assurance Company v. Chrusz*, [1999] O.J. No 3291 (ONCA), during the course of which that Court explained:

> 120 I agree with the Divisional Court that the applicability of client-solicitor privilege to communications involving a third party should not be determined by deciding whether Mr. Bourret is properly described as an agent under the general law of agency. I think that the applicability of client-solicitor privilege to third party communications in circumstances where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of that function and which meet the criteria for client-solicitor privilege.
>
> 121 Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> 122 If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected.

[emphasis added]

[65] The Court goes on to observe:

> 127 The position of the Divisional Court provides incentive to a client who has the necessary means to direct all parties retained by the client to deposit any information they gather with the client's lawyer so as to shield the results of their investigations with client-solicitor privilege. The privilege would thus extend beyond communications made for the purpose of giving and receiving legal advice to all information relevant to a legal problem which is conveyed at a client's request by a third party to the lawyer. This view of client-solicitor privilege confuses the unquestioned obligation of a lawyer to maintain confidentiality of information acquired in the course of a retainer with the client's much more limited right to foreclose access by opposing parties to information which is material to the litigation. Client-solicitor privilege is intended to allow the client and lawyer to communicate in confidence. It is not intended, as one author has suggested, to protect "... all communications or other material deemed useful by the lawyer to properly advise his client...": Wilson, Privilege In Experts' Working Papers, supra , at 371. While this generous view of client-solicitor privilege would create what clients might regard as an ideal environment of confidentiality, it would deny opposing parties and the courts access to much information which could be very important in determining where the truth lies in any given case.
>
> [emphasis added]

[66] The Court (in *Chrusz)* then proceeded to scrutinize the specific role of the third party in that case:

> 129 The true function assigned to Mr. Bourret by General Accident must be determined from the entirety of the circumstances. Mr. Bourret's or General Accident's characterization of his function is not determinative of one of the very issues that the motion judge was called upon to decide: *Hamalainen (Committee of) v. Sippola* (1991), 62 B.C.L.R. (2d) 254 (B.C. C.A.) at 259. Mr. Bourret was initially retained to investigate the fire and report to General Accident. On November 16, 1994, after arson was suspected, his retainer changed in one respect only. He was to conduct the same investigation, but he was to deliver his reports to Mr. Eryou instead of General Accident. The affidavits of Mr. Bourret and Mr. Cook indicate that Mr. Bourret was to report the results of his investigations to Mr. Eryou and take instructions from him. The affidavits do not suggest that Mr. Bourret was given any authority to seek legal advice from Mr. Eryou on behalf of General Accident, or any authority to give instructions on legal matters on behalf of General Accident to Mr. Eryou. His authority did not reach inside the client-solicitor relationship between Mr. Eryou and General Accident. Instead, Mr. Bourret's function was to educate Mr. Eryou as to the circumstances surrounding the fire so

> that General Accident could receive the benefit of Mr. Eryou's informed advice and could instruct Mr. Eryou as to the legal steps to be taken on its behalf.
>
> 130 As I read the slim evidence provided by General Accident, it does not establish that Mr. Bourret's retainer extended to any function which could be said to be integral to the client-solicitor relationship. I would hold that the communications between Mr. Bourret and Mr. Eryou are not protected by client-solicitor privilege.
>
> [emphasis added]

[67] The parties have referenced *Maximum Ventures Inc. v. de Graaf*, 2007 BCCA 510, which involved an allegation by the Plaintiff that one of the Defendants had sold some mining properties to another of the Defendants in breach of a trust or fiduciary duty. A draft legal opinion was obtained by Brant and some of the other Defendants ("the McEwan draft") and was shared with another Defendant (Western) on a confidential basis. The Plaintiff sought production of this, as well as some notes related to it made by Western and "its potential financial underwriters" (*Maximum*, paras. 1-2).

[68] As the Court explained:

> 14 Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications, including those shared in furtherance of a common commercial interest. In the instant case the McEwan draft was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them. In my view, the ambit of the common interest privilege is aptly summarized in the Sopinka on evidence 2d ed., Supp. of 2004 @ p. 133 which cites the case of *Pitney Bowes of Canada Ltd. v. R.*, 225 D.L.R. (4th) 747, 2003 FCT 214 (Fed. T.D.) quoted by the chambers judge at para. 31 of his reasons. Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.
>
> [emphasis added]

[69] Critically, the Court went on to point out that:

> 16 The disclosures to Mr. Hotel were in the course of discussions between the solicitor for the De Graaf defendants (Mr. McEwan), the solicitor for Western (Mr.

> MacLean) and the solicitor for National Bank Financial (Mr. Hotel). The interests of the clients of the three solicitors were not identical but they were common to the extent that financing of the Western exploration of the Mongolian properties was beneficial to all of them. They also shared an interest in assessing the invalidity of Maximum's claims. Sharing the opinions in the McEwan draft was reasonably in aid of a due diligence investigation of the Maximum litigation. The chambers judge put it in terms of an ongoing interest in completing the transaction which the disclosure was designed to facilitate. In my view, that is a sufficient common interest to support the extension of the privilege. In this regard, I agree with Mr. Justice Lowry (as he then was) in *Fraser Milner Casgrain LLP v. Minister of National Revenue*, 6 B.C.L.R. (4th) 135, 2002 BCSC 1344 (B.C. S.C.), relied on by the chambers judge in the quotation I have earlier included, that commercial transactions can benefit from an uninhibited exchange of legal opinions among parties allied in interest.
>
> [emphasis added]

[70] ISI likens the placement and management of the Policy to such types of commercial transactions, citing the specialized and complex issues involved in assessing the adequacy of the Policy to Canada's requirements, the need for cooperation, and to share and discuss the legal advice it had received with the third party (Integro, its broker). It says that this sharing was integral to ISI's solicitor-client relationship (*Brief*, para. 118).

[71] As I consider these arguments, I remain aware of the cautions administered in *Chrusz* with respect to the application of "common interest privilege". Since it is often viewed as a branch or extension of solicitor-client privilege (some authorities have described it as an exception to a waiver of privilege) an overly broad application would, in many cases, deny "opposing parties and the courts access to much information which could be very important in determining where the truth lies in any given case" (*Chrusz*, para. 127).

[72] Moreover, I remain aware of another point, also made in *Chrusz*:

> 128 I make one further observation. If the Divisional Court's view of client-solicitor privilege is correct, litigation privilege would become virtually redundant because most third party communications would be protected by client-solicitor privilege. To so enlarge client-solicitor privilege is inconsistent with the broad discovery rights established under contemporary pre-trial regimes, which have clearly limited the scope of litigation privilege. The effect of that limitation would be all but lost if client-solicitor privilege were to be extended to communications with any third party who the client chose to anoint as his agent for the purpose of communicating with the client's lawyer.

[emphasis added]

[73] In oral argument, counsel for Beazley pointed out that not a single instance of CIP involving an insured (as principal) and its broker had been referenced in any of the authorities cited by either side. That observation is correct, as far as it goes. However, I can see no principled or categorical reason why such a relationship could not arise in such a context, in appropriate circumstances.

[74] In fact, the British case of *Svenska Handelsbanken v. Sun Alliance and London Insurance PLC*, [1995] 2 Lloyd's Rep 84 (QB, Comm) (Eng) comes close. It involved information shared by an insurer with a reinsurer. After observing that "there is a very close community of interest between an insurer and a reinsurer in general," which necessitated the sharing of legal advice (para. 87), the Court went on to observe:

> … where there is, either under legal compulsion or in practical terms, a need for legal advice to be shared confidentially within parties with a community of interest, then the law should not be astute to find differences between, for instance, in the case of a reinsurer and his reinsured on the one hand, and an assured and his legal liability insurer on the other …

[75] I conclude that there is nothing in the case law or in the practical realities associated with an insured as principal and its broker which would necessarily preclude the possibility of CIP extending to their relationship. The real issue is whether, on the facts of this case, and the relationship between ISI and Integro, I have been satisfied that it did arise.

(iv) What onus is borne by each party?

[76] This is not controversial. The onus is upon the party asserting solicitor-client privilege (or any type of privilege, for that matter) to establish it (*Sable*, para 72). We know that, within the context of document disclosure, there is an informational obligation borne by a party, even when that party withholds relevant information on the basis of privilege. Sufficient information must be provided about the document(s) withheld "to the extent it is possible to inform another party without infringing the privilege …" (*CPR*, 15.02(2)(b)).

[77] It has been earlier discussed that an ADD must possess a Schedule B, which provides information about "claims [of] privilege over communications … that a document … is privileged in favour of the party or another person" (*CPR*, 15.03(f)).

[78] The predecessor to CPR 15.03 (CPR 20.01) was interpreted such that the onus (borne by the person claiming privilege) was one such that they:

> … should have provided a short description of each document by identifying the status of the receiver and sender, their relationship to the respondents as parties to the action and the basis upon which the claim for privilege is grounded.
>
> (*Creaser v. Warren* (1987), 77 N.S.R. (2d) 429, para. 15)

[79] In *Roué v. Nova Scotia*, 2013 NSSC 254, within the context of the modern iteration of CPR 15, Rosinski, J. reasoned:

> [64] I have kept in mind that in interpreting the Rules, CPR 94.01 requires that I interpret them as if they were legislation, and in Nova Scotia that involves the *Interpretation Act* RSNS 1989 c. 235, particularly Sections 9 and 11, as well as the principles of statutory construction recently referred to in *Slauenwhite v. Keizer* 2012 NSCA 20 per Hamilton J. at paras. 7 and 18; per Oland J. at paras. 38 and 39.
>
> [65] Notably, CPR 15.06(1) reads:
>
> > A party....must deliver to each other party copies of all documents required to be disclosed under this Rule 15 and a list by which the documents can be identified and put in order. [emphasis added]
>
> [66] Privileged claimed documents obviously need not be copied and given to the other parties before a claim for privilege can be assessed by the Court; yet, how do parties in Applications in Court communicate to the other parties which documents they have control of and for which they claim privilege?
>
> [67] Consistent with the flexible nature of Applications in Court and the mechanisms of Motions for Direction [CPR 5.09] the manner of communicating to other parties which documents they have control of and for which they claim privilege must presumptively comply with CPR 15.01 and 15.02 and, particularly, 15.02(2)(b).
>
> [68] Therefore, the onus to disclose is on the party with the obligation to disclose under CPR 15.02(2)(b). That onus is presumptively to provide "a list by which the documents can be identified" and put in order - CPR 15.06(1). If that party wishes to restrict the information provided to the other party(ies) below a level that would, on a document by document basis, be required by CPR 15.02(2)(b) [i.e. each document's listing must provide a meaningful description of the document, and the claim of privilege in relation thereto without destroying the privilege asserted, yet still be sufficient to allow a Court to make a prima facie decision whether it is likely that a claim for privilege exists], then it should make a motion for directions under CPR 15.06(3) or 15.07.

> [69] Disclosure cannot be limited even by the judge unless the CPR 14.08 presumption for full disclosure has been rebutted by the party opposing disclosure.
>
> [70] In the case at bar, I conclude that:
>
> 1. The Respondents have a presumptive mandatory obligation to disclose "a list by which [all] the [relevant] documents [required to be disclosed under CPR 15] can be identified and put in order";
>
> 2. Such listing, includes a listing of any "document in the control of the party [which] is [claimed to be] subject to a privilege .... to the extent it is possible to inform another party without infringing the privilege" per CPR 15.02(2)(b); and
>
> 3. In relation to the Respondent Attorney General of Nova Scotia, that obligation presumptively affects only documents created before the Applicants/Roués served their Notice of Intended Action upon the Attorney General; and before the date of retention of counsel in relation to this litigation by each of the other Respondents.
>
> [71] Basic procedural fairness dictates this conclusion in my opinion.
>
> [72] I am satisfied that an Order should issue requiring the Respondents to disclose forthwith a listing by which documents can be identified and put in order for each document over which any party Respondent asserts privilege with "information" that includes:
>
> - the date of the document;
>
> - the sender and recipient (and status of each);
>
> - the general subject matter of the communication (without breaching privilege;
>
> - the type of privilege claimed; and
>
> - the basis upon which the specific claim for privilege is grounded
>
> for the periods before the Notice of Intended Action was served on the Attorney General of Nova Scotia and the retention of counsel in contemplation of litigation for each of the other Respondents.
>
> [emphasis added]

[80] These principles are consistent with the earlier mentioned agreements between the parties in the Protocol, i.e., "… it is agreed that the Parties' Schedule B listings (privilege logs) do not need to include any fields which would risk disclosing the privilege (e.g. descriptive document title or file name)" (*MacDonald Affidavit*, Ex. A).

[81] The basics of solicitor-client privilege have previously been discussed. It is one which has sometimes been called a "class privilege". Communications to which

such a privilege attaches enjoy a *prima facie* immunity from the ordinary protocols which would otherwise require the disclosure of relevant information. When communications are shown by the party resisting disclosure to, *prima facie,* fall into such a category, the party seeking disclosure must show why they should not be treated as privileged, in the circumstances.

[82] During oral argument, counsel for Beazley made the point that it cannot be expected to dispute what ISI says about the contents of the documents that have been withheld. This is for the obvious reason that its counsel has not seen them.

[83] This point is certainly valid. However, a party in Beazley's situation nonetheless retains the ability to explore the circumstances in which some or all of the documents at issue were created, albeit without delving into their contents. I note (in passing for now) that Beazley did not cross-examine Mr. Samaan as to his assertions respecting the purpose, the environment and/or the timeline in which the documents were generated. Nor did Beazley file an affidavit which challenged or offered a competing version of what was transpiring when the documents at issue came into being. Mr. Samaan's evidence is virtually unchallenged.

[84] Absent such cross examination or challenge, ISI asserts that Beazley's position amounts to simply an assertion that (in paraphrase) it disbelieves what ISI is saying about the nature of the documents in question and that, as a consequence, it should be able to access their disclosure, or, at the very least, be able to ask the Court to examine the documents to see if ISI's claims of privilege pass muster. (*ISI Brief*, para. 87).

[85] With respect, this is an oversimplification. As has been seen, Beazley's argument is that ISI waived any privilege which might have applied to the legal advice it received when it (admittedly) released and/or discussed that advice with a third party (Integro), its broker. Even if one was to accept, for now (Beazley's argument continues) what Mr. Samaan has said, it is <u>not possible</u> for common interest privilege to have arisen in the circumstances in which he says the disclosure was made, and in light of the role that Integro filled. It argues that there was no common interest between them, and more particularly:

> The relationship between ISI and Integro is distinct from the relationships that generally attract common interest privilege. ISI and Integro were not involved in a direct deal together. Rather, ISI and Beazley were parties to the "deal". Integro provided services to earn a commission when the Policy was placed
>
> (*Beazley Brief*, para. 59).

(v) Analytical framework

[86] Having considered the foregoing foundational principles, the analysis resolves itself into the following basic questions:

A. Has ISI established that the substance of the documents in question originated in solicitor-client communications and are presumptively privileged?

B. If yes, was the privilege waived when that substance was shared or discussed by ISI with Integro in the documents at issue, or has ISI established, at least on a *prima facie* basis, that the privilege was not waived (due to common interest privilege)?

A. Has ISI established that the substance of the documents in question originated as solicitor-client communications and are presumptively privileged?

[87] This is straightforward. As described in the Samaan Affidavit, all of the substantive information contained in the communications at issue herein began as information provided to ISI by either its internal or external counsel in a solicitor-client context. As discussed earlier, Canada originally advised ISI as to the precise type of insurance necessary for the Project. ISI, in turn, sought advice from its lawyers as to how to go about giving effect to these very specific requirements. I am satisfied that solicitor-client privilege attached to these communications.

[88] It is what happened with respect to these solicitor-client communications after this that has led to the competing arguments in this motion. Both ISI personnel, and their counsel, subsequently communicated with the broker (Integro). During the course of these interactions, the substance of the solicitor-client communications respecting the necessary insurance between ISI and its lawyers, was revealed and discussed. Integro and its personnel also communicated, at times, directly with ISI's counsel. Some of the personnel of ISI and Integro discussed between themselves what the lawyers were telling ISI, and/or what these lawyers had told Integro of ISI's insurance needs. Many of the specifics of this legal advice were exchanged in writing. It is these communications which are at issue.

B. If yes, was the privilege waived when that substance was shared or discussed by ISI with Integro in the documents at issue, or has ISI

established, at least on a prima facie basis, that the privilege was not waived (due to common interest privilege)?

[89] It is now necessary to take a closer look at the communications between ISI and Integro, and the circumstances in which they occurred. When referencing "ISI", I am aware, of course, that the "team" encompassed under that rubric includes people from its closely affiliated company, JDI, such as Mr. Samaan himself. Neither side has made a distinction between ISI and JDI personnel for the purposes of this motion, nor will I in these reasons.

[90] Earlier, the relevant time parameters associated with the drafting of the Policy were discussed. An expanse of time which began in or about the fall of 2012 and ended during the first quarter of 2013 was involved. Simultaneously, negotiations and drafting related to the insurance necessary for the Definition Phase of the contract were also taking place. Those in relation to the insurance requirements to cover the Definition Phase subcontract with OMT occurred during the first half of 2013, while those negotiations in relation to the Implementation Phase of the contract began approximately mid-2014 and continued to the end of that year. Finally, negotiations and drafting to cover the necessary insurance required for the Implementation Phase subcontract with OMT began in early 2015 and concluded in the spring of that year (*Samaan Affidavit*, para. 9).

[91] Mr. Samaan provides additional detail. Integro was retained by ISI in 2012 to broker the deal. The scope of the undertaking necessitated consultations with the broker's personnel in Toronto and London. John Haas (Toronto office) served as lead broker, but there were others involved with the placement of the Policy:

Mark Rankin	Integro (Canada)	President & Managing Principal
Jaap Nuis	Integro (Canada)	Senior Vice President
John Haas	Integro (Canada)	Former Managing Principal
Judy Anderson	Integro (Canada)	Former Senior Vice President
Tom Wilson	Integro (London)	Managing Principal
Paul Daniel	Integro (London)	Claims Manager
Brad Hendrick	Integro (London)	Former Senior Vice President

(*Samaan Affidavit*, para. 10)

[92] These individuals necessarily interacted with Beazley in order to bring the Policy to fruition. Mr. Samaan has identified the people working for the Respondent, who, to his knowledge, were in regular contact with Integro personnel for that purpose: Zareena Egon-Hussain, Peter Philpott, and Philip Sandle. He understood them to be fulfilling managerial roles, rather than acting as legal counsel on behalf of Beazley's marine group (*Samaan Affidavit*, para. 11).

[93] Reference has earlier been made to a Non-Disclosure Agreement between ISI and Integro. It was executed in November 2012. The parties also implemented a Client Service Contract which was intended to go into effect in January 2015. Once again, we observe that the latter document, at page 3, specified:

> **II. Client Obligations**
>
> a) The Client [ISI] will cooperate with Integro in the performance of the Services, and shall disclose and provide to Integro such material information and documentation which are necessary for the placement of the insurance required under the Services ("Client Information").
>
> (*Samaan Affidavit*, paras. 12-13; Ex. D)

[94] Mr. Samaan has fulsomely described the circumstances giving rise to the claim, first, of solicitor-client privilege, and second, the approach which ISI and Integro took with respect to the acquisition of the insurance coverage, and the drafting of the Policy.

[95] Appendices 4 and 5 to ISI's brief summarize ISI's Privilege Logs' subindexes. They list the documents in dispute herein (with a few exceptions, with which I will deal later in these reasons). Appendix 4 outlines communication with "outside law firm/external legal counsel". Appendix 5 lists those with "Internal legal counsel".

[96] Beginning with Appendix 4, the documents appear to range in time from November 20, 2012, to the end of 2015. They include emails sent by John Schmidt (1), John Haas (37), John MacIsaac (5), John Cook (9), Joel Heard (5), Beverley Vaillancourt (1), David Lever (1) and Richard Southcott (29).

[97] The purpose and/or description associated with the emails is described in one of three ways: either as "Communication to seek/obtain legal advice with outside law firm"; or as "Communication reflecting legal advice, outside law firm"; or as "notes of legal counsel, outside law firm". There are also a number of documents referenced as "agreements" (39). They are all described as "work product of legal counsel, outside law firm", except in one instance where the reference asserted

reflects “notes of legal counsel, work product of legal counsel, outside law firm” and another which is referenced “communications to seek/obtain legal advice, outside law firm”.

[98] Virtually all of the emails were sent to and/or copied to a circle of individuals. The names of the recipients to whom they were either directed or copied are as follows: John Haas (Integro), David Level (McCarthy Tétrault), William Dever (JDI), John Schmidt (JDI), Brad Hendrick (Integro), John MacIsaac (JDI), Gary Moore (Integro), John Cook (JDI), Judy Anderson (Integro), Bruce Drost (JDI), Adib Samaan (JDI), Joel Heard (McCarthy Tétrault), Mathieu Rheault (McCarthy Tétrault), Antonio Hechanova (Integro), Beverley Vaillancourt (Integro), Mark Valencia (Integro), Jaap Nuis (Integro), Lilian Bannon (Integro), Ed Devlin (Integro), James Lea (Stewart McKelvey), and David Henley (Stewart McKelvey).

[99] As for Appendix 5, we begin again with the emails. They range in time from March 5, 2013 to October 13, 2015, and emanate from Richard Southcott (8), John Haas (16), Adib Samaan (3) and David Henley (7). They are sent and/or copied to John MacIsaac, John Cook, Adib Samaan, Jaap Nuis, Judy Anderson, Ed Devlin, John Haas, Richard Southcott, Rick Kerr of Miller Insurance (in error, email retracted and resent the same day to Rick Southcott – *Samaan Affidavit*, para. 17), Mark Valencia, and David Henley.

[100] Once again, documents labelled “Agreement” are encountered. They are 17 in number. The descriptions applied to each document consist of, “solicitor client common interest: notes of legal counsel; work product of legal counsel,” or “solicitor client: common interest work product of legal counsel,” with the exception of one, where the document is noted to be “solicitor client; common interest, communications to seek/obtain legal advice, work product of legal counsel”.

[101] Finally, Appendix 5 contains documents simply labelled “Policy”. There are five examples of this. Each time, the privilege pertaining to the document is described as “solicitor client, common interest, work product of legal counsel”.

[102] Returning to Mr. Samaan’s Affidavit of July 30, 2024, we learn about the context in which these documents were generated. In paraphrase, we are advised that:

- Mr. Samaan was Director of Risk Management for a company closely affiliated with ISI (JDI) from 2013 – 2018. He was tasked to be the lead

"on the management of the insurance program" for AOPS on ISI's behalf (*Samaan Affidavit,* para. 1);

- Mr. Samaan required, received, and relied upon the support of some "in-house" and external individuals to assist him with the discharge of his duties. These individuals consisted of in-house and external counsel, as well as a professional insurance broker, which included the Policy at issue in this litigation (*Samaan Affidavit,* paras. 6-7)
- Some of the professionals who were involved in the AOPS insurance program, besides Mr. Samaan were:

  John MacIsaac ("JM") – ISI

  John Cook ("JC") – JDI

  Bruce Drost ("BD") – JDI

  John Haas ("JH") – Integro

  Brad Hendrick ("BH") – Integro

  Judy Anderson ("JA") – Integro

  (*Samaan Affidavit,* para. 8 and Ex. C)
- In house legal counsel for ISI consisted of the following:

  John Cook (JDI)

  John MacIsaac (ISI)

  Richard Southcott (ISI)

  David Henley (ISI)

  Bruce Drost (JDI)

  Ross Langley (JDI)

  James Lea (ISI)

  Scott Pickup (ISI)

  William Dever (JDI)

  (*Samaan Affidavit,* para. 20)
- ISI/JDI received legal advice from in house counsel when Mr. Samaan "communicated directly with in-house counsel in order to seek, obtain, or discuss their legal advice about insurance matters." Alternatively, such

> advice was obtained when "… in-house counsel discussed legal issues related to insurance matters amongst themselves, and prepared legal notes and work product, in order to develop their legal advice", which was then communicated to Mr. Samaan or other members of his team.
>
> (*Samaan Affidavit*, para. 21)
>
> External legal counsel providing legal advice about insurance requirements and process for AOPS Project:

External Legal Counsel for ISI and JDI	
McCarthy Tétrault LLP	David Lever; Joel Heard, Matthew Rheault; Hovsep Afarian; Ljiljana Stanic
Stewart McKelvey	Richard Southcott; David Henley; Art Barry

[103] Mr. Samaan further particularizes the process thus:

> 24. The relationship between JDI and ISI and our external legal counsel was coordinated by our in-house legal team. The choice of external counsel was also made by members of the in-house legal team. In-house counsel were responsible for communicating directly with outside legal counsel in order to seek or obtain legal advice about insurance matters and receive work product containing external legal advice (such as draft versions of documents annotated by external counsel). In-house counsel would then use or pass along to me the external legal advice that was received, so that I, or other members of my team, could move forward with next steps in the insurance program.
>
> 25. More specifically, my team and I received external counsel support, through our in-house counsel, in the form of:
>
> (a) legal advice about the negotiation and drafting of contractual insurance requirements at the Definition Phase;
>
> (b) legal advice about the negotiation and placement of the Policy during the Definition Phase; and
>
> (c) legal advice about the negotiation and drafting of contractual insurance requirements and the Implementation Phase.
>
> 26. In two cases, legal professionals who advised ISI and the AOPS Project transitioned from being *external* legal advisors to ISI to assuming roles as *in-house* legal counsel for ISI:
>
> (a) Richard Southcott was a lawyer at the firm of Stewart McKelvey before accepting the position of ISI General Counsel in 2013. The

> Honourable Richard Southcott was appointed as a Justice of the Federal Court of Canada in 2015.
>
> (b) David Henley, K.C. was a lawyer at the law firm Stewart McKelvey before accepting the position of ISI General Counsel in 2015. Mr. Henley became Counsel to ISI in 2020 and is still in that position.
>
> 27. In order for me and my team to discharge our duties and to ensure that we were getting meaningful and helpful legal advice, we often involved Integro, our professional insurance broker, in our discussions and communications with external and in-house legal counsel on the AOPS Project. Integro's involvement in this process was essential to obtaining this legal advice and at all times it was clear to me and my team that Integro's involvement was part of a confidential and privileged process.
>
> [emphasis added]
> (*Samaan Affidavit*)

[104] The specialized nature of the Policy, dictated by the terms imposed when ISI was selected by Canada to be the prime contractor for the AOPS Project, necessitated that ISI avail itself of the brokerage expertise of Integro. In the course of enlisting this expertise, it was necessary for ISI and its lawyers to communicate directly with the broker, so that it would understand the legal constraints under which ISI must operate when placing the Policy. As we have seen, Beazley argues variously that CIP could not arise under the circumstances, or that sufficient detail has not been provided to make out the claim, and that I should at least examine the documents themselves under CPR 86.

[105] First, and with respect, I observe that it is difficult to determine what additional information could have been supplied by ISI without revealing, in effect, the substance of the documents or communications themselves.

[106] Second, the Samaan Affidavit described Integro's role in the placement of the Policy, the means through which ISI consulted with Integro and its counsel, the purpose for, and the nature of, the required teamwork, and the time frame in which the documents at issue were created.

[107] The process which he described included the need for Integro, at times, to communicate with ISI personnel and their counsel. The Confidentiality Agreement itself underscored the restrictions upon the use of the confidential information being exchanged to "employers … the Receiving Party [Integro] and its affiliates with a need to know …". There was no cross examination of Mr. Samaan, nor has his discovery evidence been taken as of yet. His evidence, as earlier noted, is virtually

unchallenged. This does not mean that I am bound to accept it, but to repeat, in this case I did.

[108] Third, Beazley itself has acknowledged that:

> In September 2011, ISI's broker, Integro Group … approached Beazley on behalf of ISI to discuss the possibility of insuring … (the "AOPS Project")
>
> [emphasis added]
> (*Defence*, para. 11)

[109] Beazley has also acknowledged, in its defence, that the underwriting process included negotiations both with ISI and Integro regarding the scope of the necessary coverage (*Defence*, paras. 24-25).

[110] Mr. Samaan's Affidavit continues:

> 29. ISI and Integro shared a mutual interest to determine the contractual insurance requirements for the AOPS Project and to procure the Policy in accordance with those requirements.
>
> 30. Integro was contractually committed to deliver insurance brokerage services to ISI, to maintain confidentiality, and to cooperate with ISI in the sharing of information.
>
> 31. As noted, to advance their common goal and mutual interest, ISI and Integro regularly and jointly consulted JDI's and ISI's in-house counsel and external counsel on insurance matters. Integro needed to be jointly advised of legal issues and developments in order to deliver their services as a professional insurance broker on the AOPS Project. The transacting of insurance matters could not be completed without the joint sharing of information including privileged communications. As a result, ISI shared with Integro confidential and privileged communications containing legal advice about insurance matters. These communications including privileged legal notes and legal work product of legal counsel. These communications also coincided with the time periods and phases in the AOPS Project noted above.
>
> 32. From a functional perspective, Integro's services were provided in conjunction with and closely related to legal advice received from ISI's legal counsel. The services provided by Integro were necessary to assess, review, and contextualize the legal advice received from ISI's legal counsel. As broker for ISI, one of the functions of Integro was to assist ISI's legal counsel in advising ISI on insurance matters.
>
> 33. From an operational perspective, the sharing of privileged and confidential communications in this manner meant that legal advice could be obtained and decisions were made as quickly and efficiently as possible. Without the ability to

> safely and securely share privileged and confidential information with Integro, ISI could not have managed the insurance program on the AOPS Project in a practical or feasible way.
>
> 34. Integro and ISI agreed to keep all their communications and documents confidential under both their Non-Disclosure Agreement and Client Service Contract which are attached at Exhibit "D".
>
> 35. I am not aware of any exception to confidentiality, or any waiver of privilege, being asserted by Integro or ISI.
>
> [emphasis added]

[111] I have considered all of the circumstances surrounding ISI's sharing of the information in question, as have been made known to the Court at this juncture of the proceedings.

[112] Based upon what Mr. Samaan has explained, Integro was given a mandate. It was to broker a very specific type of insurance coverage for the Project, one which met Canada's specifications in every aspect. In some instances, it had to negotiate directly with Beazley on ISI's behalf, as Beazley acknowledges. In order to do so, it would have needed complete familiarity with the legal advice that ISI had received, so that it could understand whether what was under discussion met Canada's exacting specifications.

[113] On other occasions, Integro personnel had to be actually part of the discussion between ISI and its counsel in order to ensure that ISI was aware of the effect, in practical terms, of the legal advice ISI was receiving. In such circumstances, its role way "to assess, review and contextualize the legal advice received from ISI legal counsel" … and "… to assist ISI's legal counsel in advising ISI on insurance matters" (*Samaan Affidavit*, para. 32).

[114] I will now briefly segue and discuss the remaining three documents in issue, including two that are not found in Appendices 4 and 5. The first is an email and attachment which was referred to (in passing) earlier. It was intended for ISI's in-house counsel, Rick Southcott. It was sent, through inadvertence, to Rick Kerr at Miller Insurance (*Samaan Affidavit*, para. 17). Integro retracted the email and sent it to its proper destination (ISI privilege log ID PL 00219). In these circumstances, this does not amount to a waiver by ISI or its broker Integro. The unchallenged evidence before the court is that it was an error, one which was immediately rectified. In effect, it had been sent to the wrong "Rick". There was no intent, on the part of ISI or Integro personnel, to perform the specific act which is said to amount to a waiver with respect to this document.

[115] The final two documents are described as common interest agreements between ISI and the successors of Integro (HUB International and Tysers). They arose at a time when litigation was indeed contemplated with Beazley (*Samaan Affidavit*, para. 16). I agree with ISI that, in these circumstances, they would attract both common interest privilege and litigation privilege (*ISI brief*, para. 65).

[116] I have been satisfied, on a *prima facie* basis, that ISI and Integro shared a common interest: the need to implement a very specialized and particular form of insurance coverage for the AOPS Project, which was triggered when ISI was selected by Canada as the Prime Contractor of the Project. Beazley, itself, has conceded that what was required was not a boilerplate "run of the mill" policy. Rather, as we have seen, "manuscript" language was needed when the negotiated policy terms were put to paper.

[117] Legal opinions from ISI's internal and external legal counsel were exchanged and discussed with Integro personnel. It need not matter that the exchanges consisted of approximately 200 documents which included emails discussing the specifics of the legal advice with which ISI had been provided, as opposed to merely an exchange of one or two legal opinions being shared. It is the purpose for which the exchanges occurred which is of importance, and I have been satisfied, at present, that they were directed to the discussion and implementation of the legal advice which ISI critically needed, and as to how to best give effect to that advice, as the negotiation and placement of the Policy progressed.

[118] The success or failure of a claim of CIP in relation to disclosures made to a third party must always depend upon the particular circumstances involved, including the role played by the Third Party receiving disclosure. If what was involved in this case had been an ordinary, more standard type of policy, the role of Integro, and its need to have direct access to the legal advice which ISI was receiving, would likely not have been as acute.

[119] As touched upon earlier, Beazley has reminded the Court that a judge tasked with the determination of a claim that a document is privileged "may personally take control of the document and read or view the document for the purposes of making the determination" (*Beazley Brief*, para. 39).

[120] This possibility arises pursuant to CPR 85.06 which provides:

> **85.06 Privileged documents**

(1) Nothing in these Rules diminishes the power of a judge who must determine a claim that a document is privileged, or otherwise subject to a confidentiality protected by law, to keep the document confidential until the determination is made.

(2) A judge who must determine a claim that a document is privileged, or otherwise subject to a confidentiality protected by law, may do any of the following without the document being marked as an exhibit, made part of the public court record, disclosed to the party who contests the claim, or made available to the public:

(a) personally take control of the document;

(b) give directions to the prothonotary or any other member of court staff for storing the document, keeping it separate from court records, and doing with it only as the judge further directs;

(c) read, view, or listen to the document for the purpose of making the determination.

(3) A document taken control of and kept confidential by a judge is not part of the public court record and need not be made the subject of a confidentiality order.

(4) A judge who takes control of a document and determines that it or part of it is not privileged, and that it is not otherwise subject to a confidentiality protected by law, must do both of the following:

(a) maintain control of the document long enough for the party who claims privilege to make a motion for a confidentiality order pending appeal;

(b) place the document or the part on the court record, unless a confidentiality order is in effect pending appeal.

(5) A judge who takes control of a document and determines that it or part of it is privileged must make a sealed record for review by the Court of Appeal.

(6) The sealed record must include everything determined to be privileged, and everything else delivered to the judge for the determination must be placed on the record.

(7) The party who claims privilege may make a motion for the sealed record to be delivered to the party in the time referred to in Rule 84.04, of Rule 84 – Court Records.

[121] Use of CPR 85.06, in my view, is not to be made as a matter of course, or routine. Merely because a party has chosen to challenge an assertion that certain documents are privileged, it does not follow that CPR 85.06 will always be employed by the Court to "put these claims to the test", as it were.

[122] However, in some cases, where there are circumstances to which the moving party may point which raises a legitimate question as to whether the privilege claim has been established, or whether upholding the claim of privilege may be inconsistent with what the party asserting it has included in its pleadings, the Court has the prerogative to examine the documents pursuant to CPR 85.06.

[123] An example of the latter instance occurred in *Halifax (Regional Municipality Pension Committee) v. State Street Global Advisors Ltd.*, 2011 NSSC 3559, where Duncan, J. (as he was then) explained:

> [342] Privilege should not be treated as waived by implication except in those circumstances where it has been shown that it is likely that the defendants or the court will be misled if there is a failure to disclose the related material. Notions of fairness cannot be a guise for a fishing expedition into the plaintiff's lawyers files.
>
> [343] I conclude that the evidence is not sufficient to imply such a waiver of privilege and justify an order for disclosure. However, the evidence is sufficient to raise a legitimate question as to whether there is an inconsistency between the disclosed opinion and portions of the plaintiff's claim. To assess whether there is such an inconsistency and resulting unfairness by non disclosure, I have concluded that it is necessary for the court to view the material sought by the defendants. This is the only way that a determination of the claim for privilege can be arrived at. In doing so, I rely on the authority provided in **Rule 14.05(5)** and **Rule 85** . . .
>
> [emphasis added]

[124] If the information supplied by the party claiming privilege is sufficient to establish it on a *prima facie* basis, then the documents remain shielded, even from a CPR 85.06 review, unless the opposite party can provide a basis upon which the privilege should not be upheld, or, at the very least, uncertainty in the way the documents have been described, or some other valid issue which requires the Court to conduct such a review.

[125] In these circumstances, the need for me to take possession of the documents and examine them does not arise. There are no issues or circumstances to which reference has been made with respect to any of the documents that require such an examination in order to determine the issue. ISI has provided sufficient information to establish, on a *prima facie* basis, that the documents contain legal advice, or refer to legal advice, and that the common interest in which it was involved with Integro continues to protect these communications even after this advice was shared, and discussed with, Integro.

Summary & Conclusion

[126] ISI and Integro set about negotiating and securing the very specialized type of insurance coverage which Canada required of ISI. This has been considered in concert with the other information provided in Mr. Samaan's Affidavit, which included his description of Integro's role in facilitating the legal advice provided to ISI by its counsel, why the documents in question were generated, the timing of their creation, Integro's further role, at times, in negotiating directly with Beazley, and the agreements between ISI and its broker which circumscribed the use which Integro could make of the communication. I have concluded that it was necessary for Integro to have access to the legal advice which ISI had received in order that it may discharge the function which it was retained to fulfill. This included a need to secure the Policy, and ensure that it implemented very precise requirements to which Canada required ISI to adhere. It also included the need to assist counsel in advising ISI throughout the period of time that the Policy was being negotiated and drafted.

[127] The purpose, or role being fulfilled by Integro throughout the time interval relevant to the generation of the documents and communications at issue was essential to the operation of the solicitor-client relationship of ISI and its internal and external counsel. It required that this advice be made available to Integro. Further, the specialized nature of the Policy necessitated the very integrated and cohesive roles shared by ISI, Integro, and all of the legal counsel involved, as the Policy was negotiated and implemented with Beazley. Such cooperation was needed not only to obtain the Policy, but to manage and maintain it in accordance with ISI's needs.

[128] I have therefore concluded that ISI has established, on a *prima facie* basis, first, that the communications between itself and its counsel with respect to its insurance requirements are privileged, and second, that this privilege was not waived when the information respecting that advice was provided either by ISI personnel to those of Integro, or when particulars of that advice were discussed by ISI's counsel directly with Integro personnel, or when personnel of Integro, or those of ISI, discussed that advice *inter se*.

[129] Beazley has **not** shown a basis upon which this privilege should be disregarded. Should such a basis emerge, or at least one which would create enough uncertainty so as to require a review under CPR 85.06, in relation to some or all of the documents in issue, as the discovery process unfolds, this determination could be re-visited.

[130] At the moment, however, Beazley's motion is premature (at least). It is dismissed with costs.

[131] If the parties are unable to agree as to quantum, I will accept submissions within 30 days.

Gabriel, J.