Appeal No. UKEAT/0282/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 4 December 2013
Judgment handed down on 17 January 2014

Before

THE HONOURABLE MR JUSTICE SINGH

(SITTING ALONE)

MR A FADAIRO APPELLANT

SUIT SUPPLY UK LIME STREET LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR NICHOLAS YEO (of Counsel) Direct Public Access Scheme
For the Respondent	MR JOSEPH BARRETT (of Counsel) Instructed by: Clyde & Co LLP The St Botolph Building 136 Houndsditch London EC3A 7AR

SUMMARY

PRACTICE AND PROCEDURE – Admissibility of evidence

The Employment Tribunal made a case management decision preventing the Claimant from relying on an email which was found by the Tribunal to be confidential and the subject of legal advice privilege. The Claimant appealed against that decision on various grounds. His main submissions were that (1) the email had been disclosed to him before litigation began deliberately and not inadvertently; (2) the email was no longer confidential as between the Respondent and him even if it remained confidential as against others; and (3) the Employment Tribunal had been wrong to direct itself that it did not have a discretion to permit the use of the email in the proceedings, since it should have conducted a balancing exercise weighing competing interests.

Held¸ dismissing the appeal:

(1) It had been common ground before the Employment Tribunal that the disclosure of the email had been inadvertent. The Claimant had not challenged evidence to that effect which was before the Tribunal nor had he sought to adduce any other evidence. The Tribunal was entitled to make that finding on the basis of the material before it and there was no perversity challenge in any event. It was not open to the Claimant now to submit that the disclosure had in fact been deliberate and not inadvertent.

(2) The email was clearly still confidential as against the Claimant.

(3) Although there was a discretion in certain circumstances to refuse a case management order of this type (by way of analogy with the equitable jurisdiction of the High Court to restrain a breach of confidence where a document was the subject of legal advice privilege), it was not broad enough to encompass a general weighing up of competing interests, including balancing the interest in confidentiality and the interest in establishing the truth in litigation. The Employment Tribunal was right in reaching its decision to that effect.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is an appeal by the Claimant from the decision of the Employment Tribunal at London Central (Employment Judge Snelson sitting alone), sent to the parties on 30 October 2012. By that decision the Tribunal held that an email of 5 December 2011, referred to in the claim form, and all associated correspondence, were at all relevant times and remain protected by legal advice privilege and that the Claimant is precluded from relying on their content or any part thereof in the proceedings. That order was made under Rule 10 of the **Employment Tribunals Rules of Procedure 2004**. It is common ground in these proceedings that the Employment Tribunal has jurisdiction to make such an order as part of its case management powers under that rule; and that it should do so in circumstances where the High Court would exercise its equitable jurisdiction to grant an injunction to restrain a breach of confidence. For convenience I will refer to the parties as they were in the Employment Tribunal, as the Claimant and the Respondent.

2. At the request of both parties I conducted this hearing in private. This is because it concerns an email which is said to be both confidential and privileged: it would have been impossible to conduct a public hearing about it without destroying that asserted confidentiality and privilege. Nevertheless, it is possible and appropriate to give an open judgment in this case, subject to setting out any matters that need to be kept private in a confidential Annex. Accordingly, and with the consent of the parties, I have set out the terms of the email of 5 December 2011 in that confidential Annex.

Factual background

3. The Claimant was employed in the Respondent's menswear business from 12 October 2009 to 13 May 2012. From 1 February 2010 he was employed as the shop manager of premises in Lime Street in the City of London. He reported to the Respondent's UK manager, Mr Ruben Fust.

4. On 1 November 2011 the Claimant informed Mr Fust and Ms Sascha Beins of the Human Resources department that he would be requesting additional paternity leave ("APL") from 2 January to 12 May 2012, pursuant to regulation 6 of the **Additional Paternity Leave Regulations 2010** (SI 2010 No. 1055). He followed this with an email attaching the necessary documentation and, in accordance with regulation 7(1), expected written confirmation within 28 days. Since no response was received within that time, on 1 December 2011 the Claimant chased this up.

5. On 2 December 2011 Mr Fust called Mr Charles Urquhart of Clyde & Co, solicitors acting for the Respondent, and asked for legal advice. On 5 December 2011 Mr Urquhart sent an email to Ms Beins, summarising the advice he had given Mr Fust. I have set out that email in a confidential Annex to this judgment.

6. On 29 March 2012 at 14:50 Mr Chris Mooij, the Respondent's financial administrator, emailed an organisation called ADP, to which payroll matters had been outsourced by the Respondent, to ask why there was no payslip in respect of the Claimant for the month of March. It would appear that this query was triggered by a question raised by the Claimant, who was at the time chasing bonus payments due to him notwithstanding his APL.

7. On the same date ADP replied at 16:06:

> **"The employee is on Additional Paternity Leave until 12th May and will therefore not receive a payslip.**
>
> **As you can see from the attached he is not due to be paid until he returns to work in May.**
>
> **His first 6 weeks of ASPP were paid and he will then be unpaid for the remainder.**
>
> **Hope this explains for you."**

Attached were documents which included the email of 5 December 2011.

8. On 11 April 2012 at 14:34 Mr Mooij forwarded the email from ADP to the Claimant. He did not answer the Claimant's queries in terms but drew his attention to the email from ADP with the words:

> **"Here is the answer from ADP, about your pay slip, Hope this is the right answer…"**

9. Later on 11 April, at 19:49, a further email was sent to the Claimant from Mr Fust, stating that the earlier email had been sent to him in error and that the correspondence was protected by legal privilege.

10. On 13 May 2012 the Claimant resigned.

The proceedings in the Employment Tribunal

11. By a claim form presented to the Employment Tribunal on 5 June 2012 the Claimant complained, among other things, of unfair dismissal, alleging that he had been constructively dismissed. In his grounds of claim he wished to support that claim for unfair dismissal by relying upon the email of 5 December 2011.

12. In their grounds of resistance the Respondent contended that the email of 5 December 2011 was privileged and requested that the Tribunal should make a case management order preventing the Claimant from making use of it in the proceedings.

13. On 14 August 2012 a case management discussion took place before Employment Judge Wade, as a result of which various orders were made. There were two issues identified for a pre-hearing review, as set out in Schedule A to that order. The first of those issues was:

> **"whether an email dated 5 December 2011 from Clyde and Co to the Respondent which the Claimant saw on 11 April 2012 when it was inadvertently disclosed to him is legally privileged." [My underlining]**

14. In Schedule B a number of orders and directions were made, setting out a timetable up to the pre-hearing review. At para 1.2 of Schedule B it was ordered that by 28 August 2012 the parties:

> **"will exchange copies of all documents relevant to this issue, the Respondent will serve on the Claimant any relevant witness evidence so that at the Pre-Hearing Review the Tribunal will be able to see how the document passed from Ms Beins and into the hands of the Claimant."**

15. The pre-hearing review took place before Employment Judge Snelson on 8 October 2012. At para 1 of his judgment, he observed that, although the formulation of the first issue was confined to the email of 5 December 2011, it was not in dispute that all associated communications containing or evidencing the Respondent's request for advice and the advice given were to be treated as falling within the scope of that issue.

16. At the hearing there was brief evidence from Mr Urquhart. As is normal, his witness statement, dated 22 August 2012, had been served in advance. At para 7 it contained the following evidence, which appeared in a passage headed "Description of how an e-mail that I sent to Ms Beins on 5 December 2011 was transmitted to the Claimant":

> **"I understand from Ms Beins that, as a matter of course, Mr Mooij scans the documents that Ms Beins provides to him so that they are held in electronic form. I also understand that he did the same with the information that Ms Beins provided to him that contained the E-mail. Later, when the Claimant queried a payment that was made to him, I understand that on 11**

April 2012 Mr Mooij sent certain information to the Claimant by e-mail. I understand from Ms Beins that the E-mail was inadvertently included in the bundle of information sent to the Claimant." [My underlining]

17. I was informed at the hearing of this appeal that Mr Urquhart was not cross-examined by the Claimant, who appeared in person at the hearing below, although it should be noted that he has legal training. Furthermore it was pointed out to me that the Claimant had not sought any other witness orders in respect of other potential witnesses. Accordingly, the position before the Employment Tribunal was that the Claimant did not challenge the factual statement made on behalf of the Respondent that the email of 5 December 2011 was disclosed to him inadvertently.

18. At paras 9-13 of his judgment Employment Judge Snelson set out the applicable principles of law as he understood them to be, referring to a number of authorities which had been cited to him. At paras 14-23 he set out the parties' arguments and his conclusions on the relevant issue.

19. At para 15 he set out the Claimant's contentions before him, by reference to his skeleton argument:

"(a) Once a privileged document or copy of a privileged document is in the hands of the other party, the benefit of the privilege is lost.

(b) The receiving party may use a copy in evidence despite the fact that the original is privileged.

(c) Where the receiving party has come into information as a result of a step by the disclosing party in proceedings, a court will not grant an injunction to restrain the use of that information.

(d) Where contents of a privileged communication have been deployed during proceedings, privilege will be considered to have been waived.

(e) Where the information is a material fact in proceedings, it will not be privileged.

(f) The granting of permission to use an inadvertently disclosed privileged document is at the discretion of the court."

20. The judge then proceeded to consider each of those propositions and rejected them. In relation to the first issue before him, he concluded, at para 23 of his judgment, that legal advice privilege attached to the communications under consideration. Accordingly the Tribunal directed that the Claimant was prohibited from referring to, or otherwise making use of, that material in the proceedings.

21. By an order of 4 Nov 2013, made by the President of this Appeal Tribunal (Langstaff J), Employment Judge Snelson was directed to say whether (and if so, to what extent) he recollected that the circumstances surrounding (a) the purpose of sending and (b) the actual receipt of the allegedly privileged material were put in issue before him, copying any relevant evidence of which he had a note or confirming that there was none.

22. In accordance with that direction, Employment Judge Snelson offered the following observations, in the form of a letter sent on his behalf by the tribunal office dated 13 November 2013, which were based on is manuscript note of the hearing before him:

> **"(3) …**
>
> **(a) R counsel in his skeleton and in initial argument stated that the disputed email was inadvertently sent to C by an employee of R's with other documents in response to his request for papers to do with his grievance about being denied paternity pay. A document consistent with this account was contained in the bundle.**
>
> **(b) C said that R's version of events was 'not quite right', and that the disclosure had come from 'someone in payroll'. Later in argument C referred to bundle pp 61 and 62 and said…: 'my case is the email was not attached… I believe the doc was sent to [by?] external payroll provider. Confidentiality destroyed at that point.' The judge queried if C was saying that it was too late for R to shut the stable door and C replied: 'R let the horse out!'**
>
> **(c) There appears to have been no evidence of any kind to substantiate C's assertions about the supposed release of the disputed email to (or by) an external payroll provider. The only witness (Mr Urquhart, called by R) was not questioned on that aspect (his witness statement was contained in the bundle…). C could have given evidence but did not do so and did not express the wish to. Nor did he produce any document to make good the suggestion that the disputed email had not been attached to doc 61 (or 62) (one might have expected, for example, an email in response pointing out the alleged failure to attach the email – C did not suggest that he had sent any such message). Nor did he present documentary evidence of an external payroll advisor handling or passing on the disputed email or explain why such documentary evidence could not be produced. Nor was the judge shown any documentary evidence concerning the legal relationship between R and the allegedly independent payroll provider.**

(4) When, following the hearing, C delivered written submissions at the judge's invitation to address the argument that the confidentiality of the disputed email had been destroyed, he made no mention of the suggested involvement of an external payroll provider or of the legal significance of any such involvement.

(5) Doing the best he can, the judge believes that he proceeded on the basis that either the assertions about the external payroll provider were implicitly withdrawn or that those assertions were unsupported by any evidence whatsoever and that the hitherto uncontroversial narrative (of an <u>inadvertent</u> disclosure to C only by an <u>employee</u> of R in the course of his employment) must be adopted for want of any sustainable alternative." [My underlining]

<u>The grounds of appeal</u>

23. The Claimant's notice of appeal, which was drafted by him rather than by counsel, contained 8 grounds at para 13, lettered (a) to (h), with ground (g) having a number of sub-paragraphs. At the hearing before me Mr Yeo, counsel for the Claimant, made it clear that he did not pursue grounds (b), (f) or (g). The remaining five grounds, as set out in the notice of appeal, were as follows:

(a) The Tribunal failed to apply the orders and directions of Employment Judge Wade of 14 August 2012.

…

(c) The position on the authorities is that it is clear that the jurisdiction to restrain the use of privileged communication is based on the equitable jurisdiction to restrain breach of confidence. What the Court of Appeal was doing in **<u>Lord Ashburton v Pape</u>** (followed by **<u>Goddard v Nationwide Business Society</u>** [1987] QB 670) was applying the law of confidentiality in order to prevent disclosure of documents which would otherwise have been privileged, and were and remained confidential (see Lawrence Collins J in **<u>ISTIL Group Inc v Zahoor</u>** [2003] 2 All ER at 74).

(d) The Tribunal's application of **<u>London Borough of Redbridge v Johnson</u>** [2011] EWHC 2861 (QB) to the case instant was inappropriate. **<u>Redbridge v Johnson</u>** is not on all fours with this case and was decided on whether the disclosed documents were in

the public domain (and hence privilege lost) and whether disclosure should take place in the public interest. These arguments, with regard to privilege, were not advanced by the Claimant. The use of secondary evidence and the exceptions to privilege were not argued in **Redbridge v Johnson**.

(e) Further, the court of appeal in **Al Fayed v Commissioner of Police of the Metropolis** [2002] EWCA Civ 780 at 25 (Clarke LJ) considered that it may be unjust or inequitable to grant relief to restrain the use of privileged documents where the lay client learns of a fact which it would be unjust to prevent him using in litigation.

…

(h) The tribunal's finding that confidentiality was not lost cannot be correct; in that the dismissal advice was shared with a third party (ADP) who had no interest in the information and the dismissal advice was discussed between Mr Fust and Mr Graham Giovannini, a sales assistant at Suit Supply, who subsequently discussed this with Mr Fadairo. In addition, the Claimant has submitted that the content of the dismissal advice was disclosed to a number of junior Suit Supply staff by Mr Fust prior to his resignation.

24. However, both in his skeleton argument and in his oral submissions at the hearing before me, Mr Yeo presented his arguments in a different order. I hope it will be convenient if I address his three main submissions in the order that they were made in his skeleton argument and before me; and if I indicate the grounds of appeal to which each main submission corresponds.

The Claimant's first main submission

25. First, Mr Yeo submitted that the Employment Tribunal failed to apply para 1.2 of Schedule B to the order of Employment Judge Wade. This corresponds to Ground (a) in the

grounds of appeal. However, it became apparent at the hearing before me that the bulk of the Claimant's submissions in this regard were in fact directed to a somewhat different point: it was submitted that the disclosure of the email of 5 December 2011 had been deliberate and not inadvertent after all. That argument is not, on the face of it, within the scope of Ground (a) but I will deal with it.

26. Mr Yeo made a number of criticisms about alleged failures by the Employment Tribunal in this regard. He submitted that there was no clear finding of fact as to the circumstances in which the email came to be disclosed, in particular the chain of events from December 2011 to April 2012. He also complained that the only evidence filed by the Respondent, the witness statement of Mr Urquhart, was insufficient for the Tribunal to have concluded that the email of 5 December 2011 was privileged. He further submitted that the events were not wholly within the knowledge of Mr Urquhart and his statement included hearsay. He complained that Mr Urquhart had not even apparently spoken to Mr Mooij and there was no evidence of Mr Mooij's state of mind.

27. In my judgment, there is no substance to these complaints and it is certainly too late to make them in this Appeal Tribunal. First, there was no failure to comply with the order of Employment Judge Wade. The Respondent did comply with it by filing such evidence as it considered appropriate, in particular the witness statement of Mr Urquhart. Furthermore, if the Claimant disagreed that the Respondent had complied with the order of Employment Judge Wade, it was within his power to pursue matters either before the hearing at the Employment Tribunal or certainly at that hearing. For example he could have asked for orders requiring other witnesses to attend to give evidence at the hearing. He could also have cross-examined Mr Urquhart, in particular on his evidence in paragraph 7 of his statement to the effect that the disclosure was inadvertent. The fact that he did not query or challenge that at any stage,

including in his written submissions at the time, is consistent with the Respondent's submission, that this factual matter was common ground before the Employment Tribunal.

28. In this context it should be noted that, in the Claimant's skeleton argument, filed for the purpose of the pre-hearing review, the Claimant stated, at para 30, that:

> **"the Claimant came into possession of the Urquhart E-mail through a step by the Respondent in proceedings and of the Mooij Copy due to <u>inadvertent</u> disclosure." [My underlining]**

29. In further representations in writing filed for the pre-hearing review, the Claimant stated, at para 7:

> **"an accidental recipient of confidential information is not fixed with a duty of confidence to the <u>inadvertent</u> confidant because there is no pre-existing obligation that is being protected…" [My underlining]**

30. As recently as in a letter dated 21 December 2012 addressed to the registrar at this Appeal Tribunal, at para 1, the Claimant was still referring to "the <u>inadvertent</u> disclosure" (my underlining).

31. However, in a skeleton argument filed with this Appeal Tribunal and written by the Claimant himself, dated 17 April 2013, at para 19, he suggested for the first time that he had come into possession of the email "by a deliberate disclosure of the document by the Respondent." It may be that it was for that reason that the President of this tribunal granted permission to appeal. In any event, the Respondent submits that that was the first occasion on which the Claimant had suggested that the disclosure of the email to him was not inadvertent but rather deliberate. Furthermore, the Respondent submits, it is not open to the Claimant to criticise Employment Judge Snelson for not having proceeded on the basis that the disclosure

was deliberate or made factual findings about that, since it was common ground before him that the disclosure was indeed inadvertent. In this context, Mr Barrett, counsel for the Respondent, has also pointed out that even now the grounds of appeal do not allege any perversity in the findings of fact made by the Employment Tribunal.

32. I accept those submissions for the Respondent. In my judgment, it is not open to the Claimant now to seek to reopen this question of fact. There is certainly no perversity challenge before me. In the light of the evidence that was before the Employment Judge, he was perfectly entitled to reach the conclusion of fact which he did, namely that the disclosure was inadvertent.

33. Mr Yeo also submitted that there had been a failure by the Employment Tribunal to deal with the involvement of ADP. This limb of his first main submission would appear to correspond with Ground (h) in the Claimant's grounds of appeal.

34. Mr Yeo submitted that this was important because it raised the question of whether confidentiality was preserved at the point in time when the 5 December email was sent to ADP. Again I see no merit in this complaint. It seems to me, first, that if this factual question was thought to be material, it should have been explored by way of evidence before the Employment Tribunal. Employment Judge Snelson's note, as set out in the letter of 13 November 2013, makes it clear that it was not.

35. Further and in any event, it is a reasonable inference that ADP was working for the Respondent even if it was not directly part of it. It would have been expected to retain matters confidential, in particular data which concerned the personal and financial details of individual employees of the Respondent.

36. Mr Yeo also drew attention to the fact that the copy of the 5 December email which was transmitted to the Claimant had the final passage (in the main) struck through although not rendered illegible. I am not sure that this limb of the first submission corresponds to any of the Claimant's grounds of appeal but I will deal with it on its merits.

37. Mr Yeo submitted that the striking through of the passage was relevant to the state of mind of the person who struck it through: it demonstrated an awareness of that part of the document and suggested that there was a deliberate decision to communicate the document with that part of the advice struck through. If anything, in my view, the fact that a person had thought it appropriate to strike that passage through makes it clear that it was not intended to be communicated to the Claimant. The rest of the email may have been considered to address the query which he had raised relating to APL. The last part had nothing to do with that query and any reasonable person would have understood it to relate to a confidential matter between the Respondent and its legal adviser.

38. For all those reasons I reject the first main submission made on behalf of the Claimant.

The Claimant's second main submission

39. The second main submission which Mr Yeo made on behalf of the Claimant was that the 5 December email was no longer confidential with respect to this Claimant in any event. I am not sure that this submission corresponds to any of the Claimant's grounds of appeal but I will deal with it on its merits.

40. Mr Yeo placed reliance upon a passage in a textbook by *Style & Hollander on Documentary Evidence* (6th ed., 1997) at p. 227:

> **"If the document is read out on the television news or in open court then confidentiality is lost once and for all. No further question of privilege arises. But it is important to bear in mind that it is possible for a document to cease to be confidential as between some parties and not others. If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of those friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world."**

41. Mr Yeo pointed out that that passage was cited with approval in **Gotha City v Sotheby's** [1998] 1 WLR 114, at 118.

42. Mr Yeo further submitted in this context that it is well established that privilege cannot be waived in relation to part of a document: see the decision of the Court of Appeal in **Great Atlantic Insurance Co. v Home Insurance Co. and Others** [1981] 1 WLR 529. However, I do not think that decision assists the Claimant. First, this part of the case is not concerned with any issue of waiver of privilege; it is concerned with whether the relevant part of the 5 December email which summarised legal advice was still confidential as between the Respondent and the Claimant. Secondly, the Court of Appeal made it clear in **Great Atlantic Insurance Co** that the memorandum in that case dealt with a single subject and so could not be divided into what would in effect be two or more memoranda. By way of contrast, Templeman LJ considered that "severance would be possible if the memorandum dealt with entirely different subject matters or different incidents and could in effect be divided into two separate memoranda each dealing with a separate subject matter." (p.536) In the present case, there were two different subjects dealt with in the email of 5 December 2011.

43. I do not accept the analogy suggested by Mr Yeo with the deliberate disclosure of a document to a small group of friends. It seems to me that the relevant part of the 5 December email was clearly intended to remain confidential as against this Claimant. That no doubt is one reason why the author who transmitted it sought to strike out the relevant passage, however

poorly he or she may have achieved that result. There can be no doubt, in my view, that a reasonable person would have understood it to remain confidential.

44. Accordingly I reject the second main submission advanced on behalf of the Claimant.

The Claimant's third main submission

45. Mr Yeo next submitted that the protection under **Goddard v Nationwide Building Society** is not automatic. He submits that the Employment Judge erred in considering that he did not have discretion to balance different competing interests. This formed a large part of his submissions at the hearing before me and corresponds to Grounds (c), (d) and (e) in the Claimant's grounds of appeal.

46. In considering this submission I have found helpful the summary of the relevant principles to be found in *Phipson on Evidence* (17th ed.) at paras 26-61ff.

47. At para 26-61 it is stated that:

> **"where one party comes into possession of privileged material of the other, it is necessary to consider whether the privileged material can be retained and used. There are two situations to consider. One is when the lawyers of one party inadvertently disclose privileged documents. The other is where a party comes into possession, through accident or malice, of a privileged document of the other party. Historically, there was a conflict between two lines of authority. On the one hand, the court has no discretion to refuse to admit evidence at trial; if the evidence is relevant and admissible, the court is not concerned with how it was obtained. On the other hand, where privileged documents are improperly obtained, the court has jurisdiction to grant an injunction against client and solicitors to prevent the information in the documents being used. Modern authorities have not had difficulty in reconciling these apparently conflicting principles."**

48. At para 26-62 it is further stated that:

> **"the leading modern authority is Goddard v Nationwide Building Society."**

As is noted at para 26-63, **Goddard** was not a case in which the documents were disclosed in error as part of the procedures during the proceedings. There was thus no question of waiver of privilege.

49. At para 26-64 it is stated that:

> **"when one party's lawyer inadvertently discloses privileged documents to the other party or their lawyer in the course of proceedings, issues of waiver of privilege arise. The principles are thus different."**

50. The passage continues to suggest that a difference of approach is taken as between the situation where inspection has not yet taken place and the situation once inspection has taken place. The passage continues:

> **"after inspection, the court will only grant relief if the other party or his solicitor has either procured inspection of the relevant document by fraud or, on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake."**

51. As has already been noted, the leading modern authority is **Goddard v Nationwide Building Society**. That was a decision by a two member Court of Appeal, comprising May and Nourse LJJ. In that case the Court sought to reconcile two lines of authority. On behalf of the defendant it was contended that, even though communications between solicitor and client are confidential, nevertheless if a document comes into the hands of a third party, even by dishonesty, then that third party is entitled to use that document as evidence in litigation between himself and the former client: reliance was placed upon **Calcraft v Guest** [1898] 1 QB 759. However, in **Lord Ashburton v Pape**, [1913] 2 Ch 469 it was accepted by the Court of Appeal that the court could exercise its equitable jurisdiction to restrain a breach of confidence. In **Goddard** at p. 683 May LJ said:

> **"I confess that I do not find the decision in Lord Ashburton v Pape logically satisfactory, depending as it does upon the order in which applications are made in litigation. Nevertheless**

> **I think that it and <u>Calcraft v Guest</u> … are good authority for the following proposition. If a litigant has in his possession copies of documents to which legal professional privilege attaches, he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them."**

52. At pp. 684-685 Nourse LJ sought to resolve the

> **"apparent conflict between the rule of evidence established by <u>Calcraft v Guest</u> … and the equitable jurisdiction reaffirmed in <u>Lord Ashburton v Pape</u>".**

He was in no doubt that the court's decision must be governed by **<u>Lord Ashburton v Pape</u>**. He then laid down a series of observations which were intended to be

> **"in general confined to a case, such as the present, where the communication is both confidential and privileged and the privilege has not been waived."**

53. First, he emphasised that the proceedings in which the rule of evidence denies protection to the confidential communication are not proceedings whose purpose is to seek that protection. The question is an incidental one which arises when the party who desires the protection asserts a right to it as if he were the plaintiff in an action seeking to invoke the equitable jurisdiction. The crucial point is that the party who desires the protection must seek it before the other party has adduced the confidential communication in evidence or otherwise relied on it at trial.

54. Secondly, although the equitable jurisdiction is of much wider application, Nourse LJ had little doubt that it can prevail over the rule of evidence only in cases where privilege can be claimed.

55. Thirdly, the right of the party who desires the protection to invoke the equitable jurisdiction does not in any way depend on the conduct of the third party into whose possession the record of the confidential communication has come.

56. Fourthly, once it is established that a case is governed by **Lord Ashburton v Pape** there is no discretion in the court to refuse to exercise the equitable jurisdiction according to its view of the materiality of the communication, the justice of admitting or excluding it or the like:

> **"the injunction is granted in aid of the privilege, which unless and until it is waived, is absolute. In saying this, I do not intend to suggest that there may not be cases where an injunction can properly be refused on general principles affecting the grant of a discretionary remedy, for example on the ground of inordinate delay."**

57. In **B v Auckland District Law Society** [2003] 2 AC 736 the Privy Council had to consider the relationship between privilege and confidentiality. The judgment of the Privy Council was given by Lord Millett. It is clear that the Privy Council had before it and considered the Court of Appeal decision in **Goddard**. At para 46 Lord Millett said that the majority of the Court of Appeal of New Zealand had described the case before it as one which required the court to strike a balance between competing private and public interests. He said that, while that was undoubtedly the position where the Claimant invokes the equitable doctrine of confidence, it is not at all the same where he claims to withhold information on the ground of privilege.

> **"As Lord Taylor CJ observed…[in] R v Derby Magistrates' Court, ex p. B [1996] AC 487, 507, 508, the privilege does not exist for his sake alone. It is 'a fundamental condition on which the administration of justice as a whole rests' and exists 'in the wider interest of all those who hereafter might otherwise be deterred from telling the whole truth to their solicitors.'"**

58. As Lord Millett observed at para 48, the public interest in overriding the privilege could scarcely have been higher than it was in the **Derby Magistrates' Court** case. In that case the applicant was charged with the murder of a young girl. Nevertheless, Lord Millett noted, at para 50, the House of Lords upheld his claim to privilege and expressly rejected the argument that legal professional privilege falls to be balanced against competing public interests. As Lord Taylor had put it at page 508:

> **"if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits."**

59. At para 71 Lord Millett stated:

> **"the fact that the claim to recover the documents is made on equitable grounds does not mean that it must yield to an overriding countervailing public interest. The documents are both confidential and privileged. Whether a claim to the return of such documents is based on a common law right or an equitable one, the policy considerations which give rise to the privilege preclude the court from conducting a balancing exercise. A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he consent in future to disclosure for a limited purpose those limits will be respected: see Goddard…, 685, per Nourse LJ."**

60. It should be observed that one of the members of the Privy Council was Lord Scott of Foscote who had been the judge in the **Webster** case, to which I now turn.

61. Mr Yeo placed some reliance on **Webster v James Chapman & Co** [1989] 3 All ER 939, at 943, Scott J said:

> **"Calcraft v Guest and Lord Ashburton v Pape are examples of two independent and free standing principles of jurisprudence. The former case related to privileged documents and to the scope of the protection provided by legal privilege. The latter case related to confidential documents and to the protection that equity will provide to that category of documents. I think it is important to notice the different principles on which protection of confidential documents on the one hand and privileged documents on the other hand are based.**
>
> **Once a privileged document or a copy of a privileged document passes into the hands of some other party to the action, prima facie the benefit of the privilege is lost: the party who has obtained the document has in his hands evidence which, pursuant to the principle in Calcraft v Guest, can be used at the trial. But it will almost invariably be the case that the privileged document will also be a confidential document and, as such, eligible for protection against unauthorised disclosure or use."**

62. Further in his judgment at 946-947, Scott J said:

> **"Nothing in these judgments [referring to a number of authorities cited, including Goddard], in my view, detracts from the analysis of the principles underlying Calcraft v Guest and Lord Ashburton v Pape to which I have already referred. If a document has been disclosed, be it by trickery, accident or otherwise, the benefit and protection of legal privilege will have been lost. Secondary evidence of the document will have come into the possession of the other side to the litigation. The question then will be what protection the court should provide given that the document which will have come into the possession of the other side will be confidential and that use of it will be unauthorised. If the document was obviously confidential and had been obtained by a trick or by fraud, it is not difficult to see that the balance would be struck in**

> **favour of the party entitled to the confidential document. If the document had come into the possession of the other side not through trick or fraud but due to mistake or carelessness on the part of the party entitled to the document or by his advisers, the balance will be very different from the balance in a fraud case.**
>
> **Suppose a case where the privileged document has come into possession of the other side because of carelessness on the part of the party entitled to keep the document confidential and has been read by the other party, or by one of his legal advisers, without realising that a mistake has been made. In such a case the future conduct of the litigation by the other party would often be inhibited or made difficult were he to be required to undertake to shut out from his mind the contents of the document. It seems to me that it would be thoroughly unfair that the carelessness of one party should be allowed to put the other party at a disadvantage."**

63. It should be noted that **Webster** was a litigation case, not a legal advice privilege case.

64. The Claimant placed particular reliance on the decision of Lawrence Collins J in **ISTIL Group Inc v Zahoor** [2003] 2 All ER 252. He pointed out that that case had been approved by the Court of Appeal in **Imerman v Tchenguiz** [2011] 1 All ER 555. It is helpful first to go to the summary of **ISTIL** given by Lord Neuberger MR at para 75 of **Imerman**:

> **"in ISTIL…, after a full and illuminating survey of the authorities, Lawrence Collins J held (at [74]) that, where a privileged document has been seen by an opposing party through fraud or mistake, the court has power to exercise its equitable confidentiality jurisdiction, and 'should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy', a view which he discussed in the ensuing paragraphs. On the facts of that case, he concluded (at [115]) that an injunction should be refused 'on the grounds [of] the public interest in the disclosure of wrongdoing and the proper administration of justice'."**

65. Turning to **ISTIL** itself, at para 74, Lawrence Collins J said:

> **"the position on the authorities is this. First, it is clear that the jurisdiction to restrain the use of privileged documents is based on the equitable jurisdiction to restrain breach of confidence. The citation of the cases on the duty of confidentiality of employees makes it plain that what the Court of Appeal was doing in Lord Ashburton v Pape was applying the law of confidentiality in order to prevent disclosure of documents which would otherwise have been privileged, and were and remained confidential. Second, after a privileged document has been seen by the opposing party, the court may intervene by way of injunction in exercise of the equitable jurisdiction if the circumstances warrant such intervention on equitable grounds. Third, if the party in whose hands the document has come (or his solicitor) either (a) has procured inspection of the document by fraud or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene by the grant of an injunction in exercise of the equitable jurisdiction. Fourth, in such cases the court should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, e.g. on the ground of delay."**

66. Again, it will be observed from that passage that what Lawrence Collins J was addressing was litigation privilege, not legal advice privilege.

67. At para 75 Lawrence Collins J observed that the controversial question in that case related to the extent of the discretion to make the order and, in particular, the extent to which the court may conduct a balancing exercise in the interests of justice and the truth. He then referred to the decision of the Court of Appeal in **Goddard**. He noted at para 79 that that was the decision of a two member Court of Appeal and that May LJ had expressed no view on the extent of the court's discretion.

68. Having considered a number of other authorities, including the decision of the House of Lords in the **Derby Magistrates' Court** case (at para 87) Lawrence Collins J then sought to set out the extent of the discretion which he understood to exist in accordance with the authorities.

69. At paras 89-94 Lawrence Collins J set out the position as he understood it to be in the light of the apparent difference of view between Nourse LJ in **Goddard** and Scott J in **Webster**, along with subsequent authorities.

70. First, the starting point is that the essence of legal professional privilege is that it entitles the client to refuse to produce documents or to answer questions about privileged matters. Once a privileged document is disclosed the privilege itself is lost. The question then becomes one of admissibility and not privilege.

71. Secondly, since the line of authority beginning with **Lord Ashburton v Pape** involves the equitable jurisdiction to grant injunctions to protect confidence, it follows that the normal rules relating to the grant of equitable remedies apply. For example, in **Goddard**, Nourse LJ

had expressly mentioned delay as a factor. It would also follow that other equitable principles, such as the consideration of the conduct of the party, including the clean hands principle, would apply. As the Court of Appeal observed in **Al Fayed v Commissioner of Police for the Metropolis** [2002] EWCA Civ 780 at para 16, since the court is exercising an equitable jurisdiction, there are no rigid rules.

72. Thirdly, in such cases, the court should "ordinarily" intervene.

73. Fourthly, in **Goddard** Nourse LJ was not saying that the court should never apply the general principles relating to confidential information. What he was saying was that in this context the court is not concerned with weighing the materiality of the document and the justice of admitting it.

74. Fifthly, there is nothing in the authorities which would prevent the application of the rule that confidentiality is subject to the public interest. However, it is to be noted that in this context:

> **"the emergence of the truth is not of itself a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former by the establishment of the rules concerning legal professional privilege…" (para 83).**

75. Sixthly, other public interest factors may still apply. So there is no reason in principle why the court should not apply the rule that the court will not restrain publication of material in relation to misconduct of such a nature that it ought in the public interest to be disclosed to others.

76. In **London Borough of Redbridge v Johnson** [2011] EWHC 2861 (QB) Supperstone J considered the case of **ISTIL** at paras 36-39. However, as was pointed out to me, he was apparently not shown the Court of Appeal decision in **Imerman**, where Lord Neuberger MR had cited **ISTIL** with approval. In any event Supperstone J commented that subsequent authority and textbook writers have observed that Lawrence Collins J could in fact have refused the injunction in **ISTIL** on general principles, on the basis of the clean hands doctrine: para 38. He also observed, at para 39, that the balancing exercise in **ISTIL** was conducted in circumstances which concerned the administration of justice and a combination of alleged forgery and misleading evidence to the court, a factual context far removed from that existing in **Johnson**.

77. At para 43 Supperstone J said:

> **"in my judgment, the privilege is absolute and for the reasons I give in the confidential annex to this judgment, I am satisfied that there are no grounds on which the Claimants could be deprived of privilege on the basis of the fraud exception. If, contrary to my view, the court is to conduct a balancing exercise, again for the reasons I give in the confidential annex, I am satisfied that the privilege should not give way to any other public interest requiring disclosure of the confidential information."**

78. I do not accept the Employment Judge erred in law as alleged under this head of the argument for the Claimant.

79. First, there is a distinction, as the authorities and the helpful analysis in *Phipson on Evidence* make clear, between a situation where one party to litigation mistakenly discloses a privileged document in the context of that litigation and the situation where it inadvertently discloses such a document to another person who has not yet embarked on litigation but now wishes to use that document in litigation. The present case falls into the latter category and is governed by the principles set out in the leading authority of **Goddard**. The Employment Judge was right to take that view: see para 12 of his judgment.

80. Many of the submissions made by the Claimant to the Employment Judge proceeded on the basis that this case fell within the former category. For example, it was submitted that the disclosure of the 5 December email had been a "step … in proceedings": see para 15(c) of the judgment, which has been quoted above. It clearly was not a step in proceedings and the Claimant was simply wrong to submit that it was. He was also wrong to submit that the document had been "deployed during proceedings" and that privilege had been waived: see para 15(d) of the judgment.

81. The Claimant's submissions both below and to some extent in this appeal have been based on authorities that were concerned with cases in which disclosure of a privileged document had been a step in proceedings: as the summary in *Phipson on Evidence* quoted above makes clear, different principles apply to such cases and, in particular, the issue of waiver of privilege arises.

82. Secondly, whatever the exact scope of the discretion that exists when a court is exercising its equitable jurisdiction, it is not broad enough to involve a general balancing of different interests in which the privileged and confidential nature of the document is merely one consideration. That discretion certainly exists in cases of inordinate delay, as Nourse LJ recognised in **Goddard** itself. It may also exist in cases where the "clean hands" doctrine can be invoked or on other similar grounds which are well known to equity. However, what is not permissible is a general balancing of competing interests, weighing up the privileged and confidential nature of a document with the interest in establishing the truth in litigation. That is made clear not only by the authorities generally but by the comments of Lawrence Collins J in **ISTIL**. That case represents the high water mark of the authorities cited by Mr Yeo. Yet in that case Lawrence Collins J himself emphasised that the discretion in this context is not so

broad as to encompass a general power to balance competing interests, including the balancing of privilege against the interest in establishing the truth in litigation.

83. That in essence is what the Claimant needs to be able to do in the present case if he is to be permitted to place reliance in the Employment Tribunal proceedings on the 5 December email. The way in which he presented his case before the Employment Judge, as set out in his various grounds, which have already been set out earlier, was in essence to argue that the Tribunal should indeed give priority to the interest in establishing the truth in litigation. For example, the way in which the argument was recorded at para 15(e) of the judgment was that the Claimant was contending that: "Where the information is a material fact in proceedings, it will not be privileged." That is plainly wrong as a matter of law. It would completely undermine the concept of legal advice privilege, as the authorities cited earlier have emphasised on many occasions and at the highest level.

84. The Employment Judge was right to reject the various ways in which that argument was put to him. They all fell foul of the correct principles, as set out in **Goddard** in particular, and the Employment Judge was right so to conclude.

85. Accordingly I reject the third main submission advanced on the Claimant's behalf.

Conclusion

86. For the reasons I have given this appeal is dismissed.