Appeal No. UKEAT/0261/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 February 2018
Judgment handed down on 9 August 2018

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

(SITTING ALONE)

X — APPELLANT

Y LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PATRICK HALLIDAY (of Counsel) Instructed by: Fox Williams LLP 10 Finsbury Square London EC2A 1AF
For the Respondent	MISS DAPHNE ROMNEY (One of Her Majesty's Counsel) Instructed by: CMS Cameron McKenna Nabarro Olswang LLP The Blade Abbey Square Reading Berkshire RG1 3BE

SUMMARY

PRACTICE AND PROCEDURE - Disclosure

PRACTICE AND PROCEDURE - Striking-out/dismissal

An Employment Judge struck out paragraphs of the Claimant's claim as they depended on an email in respect of which legal advice privilege was claimed. In considering whether privilege could not be claimed as the advice in the email was given for the purpose of facilitating an iniquity, the Employment Judge erred in his interpretation of the email. *Prima facie*, the email gave advice on how to cloak what would otherwise be a disability discrimination dismissal as a dismissal for redundancy. Properly interpreted the email surmounted the high bar of iniquity. There was a strong *prima facie* case that the email recorded not just that the Claimant could be dismissed in a redundancy exercise but may claim disability discrimination. **Barclays Bank plc v Eustice** [1995] 1 WLR 1238 and **BBGP Managing General Partner Ltd v Babcock & Brown Global Partners** [2011] Ch 296 considered. Decision of the Employment Judge to strike out the relevant paragraphs in the ET1 set aside.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. X ("the Claimant") appeals from the decision of the Employment Tribunal, Employment Judge Tsamados ("the EJ") sent to the parties on 20 September 2017 ("the decision of the ET"). In a closed Preliminary Hearing on 7 July 2017 the EJ held that the legal advice privilege in material upon which paragraphs 10 and 11 of section 8.2 of the Second Claim Form lodged by the Claimant on 3 March 2017 ("the Second ET1") were based was not lost by reason of the application of the "iniquity" principle. Accordingly the EJ granted the application of Y Ltd ("the Respondent") to strike out those paragraphs of the Second ET1 under Schedule 1 Rule 37(1)(a) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** on the grounds that they refer to an email of 29 April 2016 from a member of the Respondent's legal department to a solicitor seconded to the Respondent, and a conversation overheard by the Claimant in a pub on or about 19 May 2016, both of which were held to be protected by legal advice privilege.

2. The issue of whether legal advice privilege had been lost arose in the context of the Second Claim in which the Claimant alleged disability discrimination and victimisation. In deciding that issue the EJ determined two questions: first the meaning of the email of 29 April 2016 and second whether the advice in the email constituted a strong *prima facie* case of iniquity. The EJ rejected the contentions of the Claimant on both questions. The Claimant appeals from the decision of the EJ on both questions.

Outline Relevant Facts

3. The Claimant was employed by the Respondent as a lawyer from 30 January 1990 until his dismissal on 31 January 2017. The Claimant suffers from Type 2 Diabetes and Obstructive Sleep Apnoea.

4. The EJ made the following findings of fact relevant to this appeal. In paragraph 15 the EJ recorded that from 2011 there were ongoing concerns about the Claimant's performance at work. The Claimant claimed that measures taken by the Respondent amounted to disability discrimination and/or failure to make reasonable adjustments. The Claimant submitted his First Claim to the ET on 14 August 2015 ("the First Claim"). On 2 January 2016 he raised a grievance. In both he asserted that he had been subjected to disability discrimination. A grievance hearing took place on 8 March 2016 and an outcome letter was received on 15 June 2016.

5. From April 2016 onwards the Respondent announced a program of voluntary redundancy. Having been unsuccessful in applying for certain roles, the Claimant was placed in a "redundancy consultation process".

6. The EJ accepted evidence given by the Claimant that on or about 19 May 2016 he overheard a conversation in the Old Bank of England public house on Fleet Street. The conversation was the subject of a claim of legal professional privilege. The Claimant gave evidence that a group of professionally dressed people including two women in their 30s or 40s came into the pub. One of the women mentioned dealing with a complaint by a senior lawyer at Y Ltd. The EJ held at paragraph 27 that the woman had mentioned that a lawyer at Y Ltd had brought a disability discrimination complaint. The woman said that there was a good opportunity to manage X out by severance or redundancy as there was a big reorganisation underway as a

result of Y's acquisition of another company. The second woman did not speak much but listened to what the first woman was saying. At this point the conversation was interrupted by the other people in the group. The Claimant said in oral evidence that this was the gist of the conversation.

7. The overheard conversation in the Old Bank of England pub is relied upon by the Claimant to interpret an email which he was sent anonymously in the last week to ten days of October 2016. The Claimant was sent a print out of the email in the post. The email was marked "Legally Privileged and Confidential". The anonymous sender had added a handwritten note to the Claimant at the bottom of the email. The email was sent on 29 April 2016 by A, a senior lawyer, to B, a lawyer assigned to the Respondent. As the email has been held to be subject to legal advice privilege the full text will not be set out in this open judgment but appended to it sealed and confidential to the parties, their legal advisers and any court concerned with this appeal until the final determination of this appeal. The EJ summarised in paragraph 40 the interpretation placed by the Claimant on the email:

> **"However, the Claimant asserts that the e-mail contains advice on how to commit unlawful victimisation by seeking to use (and ultimately using) the redundancy/restructuring programme as a cloak to dismiss the Claimant. As such, the Claimant submits it is not protected because it falls foul of what is called the iniquity principle. The Respondent's position is that even if this interpretation of the e-mail is true, which it denies, it does not fall within the ambit of iniquity and is therefore is [sic] privileged."**

8. The Respondent terminated the employment of the Claimant allegedly by reason of redundancy by three months' notice ending on 31 January 2017.

9. The Claimant submitted his Second Claim to the ET on 3 March 2017 alleging further disability discrimination, victimisation and unfair dismissal.

The Decision of the EJ on the two questions subject to appeal

Question 1: The meaning of the email of 29 April 2016

10. At paragraph 84 the EJ accepted the Respondent's interpretation of the email of 29 April 2016. As privilege was claimed in respect of the email rightly the full text was not set out in the judgment. The EJ held:

> **"… At its highest, the e-mail discloses advice on how to handle a possible redundancy of the Claimant as part of a UK wide process by which it would be reducing the number of lawyers it employed and acknowledges the risk that the Claimant might take legal action but points to the wider context as in effect justification. … It is legal advice aimed and [sic] avoiding rather than evading possible legal action (*Bullivant*) in place of simply doing nothing in fear that the Claimant might take further legal action. This is what lawyers do day in day out and the giving of legal advice does not as a matter of course raise iniquity."**

As the EJ accepted the Respondent's interpretation of the email it is to be taken as incorporated into his decision. The Respondent's interpretation was set out in paragraph 58:

> **"The Respondent's position as to the interpretation of the e-mail, is as follows. Looking at the e-mail at page 181 it is quite clear that the "opportunities" referred to in the first paragraph is about reorganising the whole structure. So, it is not clear at all who first came up with the idea of the effect that this might have on the Claimant amongst the other lawyers involved. In the second paragraph it refers to the process applying "across the board to the UK legal population including the individual", ie the Claimant and so is not an e-mail just about him. If "done with appropriate safeguards and in the right circumstances", is clearly about the Claimant but is a standard piece of advice from lawyers when dealing with redundancy. The last sentence refers to "proceedings", but it is not clear it is a reference to the extant proceedings. What is clear is that there were concerns about the Claimant from 2011 onwards there were significant concerns about the Claimant's performance. This is something that lawyers do when dealing with reduction of the workforce. Paras 23 to 26 Claimant's submissions allegations are not born out as a difference between options in carrying out redundancy and carrying out a scheme of victimisation."**

11. Further, in paragraph 71 the Respondent is recorded as submitting:

> **"… the assumption made by the Claimant is that advice given about possible grounds for dismissal equates to advice about how to dismiss [dis]honestly or because of discrimination/ victimisation. The language of the e-mail cannot be read in that way. …"**

Question 2: Does the email of 29 April 2016 disclose a strong prima facie case or a prima facie case of iniquity?

12. The EJ held at paragraph 85 of the email of 29 April 2016:

> **"I do not find that it discloses a strong prima facie case of iniquity. I have considered the authorities cited and the submissions made and I accept the Respondent's submissions as to what is required for the iniquity exception to apply. Whilst of course protection against**

discrimination and victimisation is important, it is a tort, and to elevate it to the status required to disapply legal advice privilege, goes too far. The case law supports as much and I am specifically bolstered in this finding by Norris J at *BBGP* at pages 318 & 319, Schiemann LJ in *Eustice* at paragraph 1250H, *Walsh* and *Dadourian*."

13. As for the conversation in the pub the EJ held at paragraph 86:

> **"… The extent to which this is the speaker's slant on the matter or legal advice given is not known. But again it simply refers to what at most is action relating to tortuous [sic] claims and not excepted by the iniquity principle."**

14. In earlier passages in the judgment the EJ recorded the Respondent as submitting that the email did not carry implications of iniquity. The Respondent contended that whilst having regard to the judgment of Cox J in **BNP Paribas v Mezzotero** [2004] IRLR 508 discrimination is a tort to be viewed seriously, it is a tort. It was submitted that to qualify as an iniquity there has to be conduct akin to fraud. Reference was made to the judgment of Norris J in **BBGP Managing General Partner Ltd v Babcock & Brown Global Partners** [2011] Ch 296.

15. The submissions of the Respondent on **Walsh Automation (Europe) Ltd v Bridgeman** [2002] EWHC 1344 (QB), a case referred to by the EJ in the decision section of the judgment was that it:

> **"… is a case of clear evidence of a dishonest not to say fraudulent purpose and in breach of fiduciary duty and not analogous to the case before this Tribunal." [74]**

The submission of the Respondent on **Dadourian Group & Another v Simms & Another** [2008] EWHC 186 (Ch), also referred to in paragraph 85 of the judgment, was relied upon as stating that for iniquity to be established "there has to be strong evidence of fraud".

The Grounds of Appeal

Ground 1

The Tribunal erred by failing to rule that the strong prima facie interpretation of the email is that it recorded advice for the purpose of victimising or discriminating against the Claimant

16. The overarching submission of Patrick Halliday, counsel for the Claimant, on the construction of the email of 29 April 2016 is that its meaning is clear. In the email A was relaying to B legal advice which she had given to C, a senior manager. The advice was how to seize the opportunity of a redundancy exercise to dismiss the Claimant. The redundancy exercise, if done carefully, could be used as a cloak to achieve this. Mr Halliday submitted that the Respondent had already formed a wish to terminate the employment of the Claimant.

17. Mr Halliday pointed out that the Claimant had lodged the First ET1 claiming disability discrimination. The Respondent had concerns about his performance. The advice recounted in the email gave advice that it was worth considering making the Claimant redundant in the wider exercise or face an impasse and proceedings with no obvious resolution. Mr Halliday submitted that the latter was a reference to proceedings already lodged in the First Claim and future trouble bearing in mind that the Claimant had previously raised a grievance.

18. Mr Halliday submitted that the email did not record genuine advice on redundancy. There were two other lawyers at the level of the Claimant. There was no mention of them but only on "the individual", obviously referring to the Claimant. If advice had been given on a genuine redundancy selection exercise it is curious that no mention was made of others who may be selected.

19. Counsel submitted that the context of the email was relevant to its construction. From April 2016 when the Respondent announced a process of voluntary redundancy the Claimant applied for certain roles but was unsuccessful. The other two lawyers at his level were treated differently.

20. Further, Mr Halliday submitted that the meaning of the email as explained by the Claimant is supported by the conversation overheard by him in May in the pub. He overheard a discussion about a person assumed to be him who had made a complaint of disability discrimination which had taken up a lot of time and that his days were numbered in the light of a reorganisation which gave the employer its best opportunity to manage him out. Counsel pointed out that the Respondent at the hearing before the ET characterised the overheard conversation as a "killer" piece of evidence.

21. The EJ recorded at paragraph 86 the submission of the Respondent as to the effect of the overheard conversation:

> **"… At its highest it is an [extremely] indiscreet conversation by an unknown lawyer relaying a strategy clearly not with the Respondent's permission to do so and no doubt without [her employer's] permission to do so. The extent to which this is the speaker's slant on the matter or legal advice given is not known. But again it simply refers to what at most is action relating to tortious claims and not excepted by the iniquity principle."**

22. Daphne Romney QC, counsel for the Respondent submitted that the meaning of the email of 29 April 2016 was clear. It contained advice such as that given by solicitors to clients day in day out. Solicitors advise clients on the consequences of pursuing certain courses of action. If they take certain steps they may be faced with litigation. Counsel contended that the interpretation of the email by the EJ at paragraph 84 was not perverse.

23. Mr Halliday sought to rely on the overheard conversation in the pub to interpret the email and contended that the EJ erred in failing to do so. Miss Romney QC submitted that he was right not to rely on an unauthorised conversation of which no record was taken to interpret the earlier email.

Discussion and Conclusion

24. The EJ did not take into account the overheard conversation at the pub in May in deciding on the proper interpretation of the email of 29 April 2016. In my judgment he was right not to do so principally for the reasons advanced by Miss Romney QC in her skeleton argument. Counsel submitted that the conversation was rightly not relied upon as it was unauthorised by the Respondent and therefore could not assist in deciding their position and because there was no contemporaneous note taken of what was said.

25. The overheard conversation took place about three weeks after the email of 29 April 2016 was written. The speaker was not identified and no contemporaneous note was made of what was said. In such circumstances it would have been unsafe for the EJ to rely on evidence of the overheard conversation to interpret a document written about three weeks earlier.

26. Mr Halliday relied upon paragraph 40 of the judgment of Lord Neuberger in **Airtours Holidays Transport Ltd v Revenue and Customs Commissioners** [2016] 4 WLR 87 to support the proposition that the interpretation of a document is a question of law. Miss Romney QC contended that the interpretation of the email of 29 April 2016 could only be challenged on perversity grounds.

27. Lord Neuberger in **Airtours** held at paragraph 40:

> **"… In the end, we are concerned with the interpretation of a document, and it is well established that that is a matter of law, not fact, in the courts of all parts of the United Kingdom. Of course, where there are relevant findings of primary fact (or even, at least in some cases, of secondary fact) relevant to interpretation, a Tribunal's finding will deserve particular respect, but that does not arise in this case. …"**

28. In this case the Claimant placed some reliance on external facts to assist in interpretation of the email of 29 April 2016. These included that the Claimant had lodged the ET1 alleging disability discrimination and had raised a grievance. This was relied upon to interpret "proceedings with ongoing employment with no obvious resolution". The Claimant's case was that the meaning of the email was that redundancy could be used as a guise under which to dismiss the Claimant for other reasons. Reference was made to the fact that the Respondent had ongoing concerns about the Claimant's performance at work and that he had been given low Individual Performance Ratings. The Claimant attributed his difficulties to his disabilities and the failure by the Respondent to make reasonable adjustments. This background was relied upon to assist in interpreting the email of 29 April 2016 as recording a device to fulfil a long held wish to dismiss the Claimant.

29. In my judgment both the EJ and the Claimant relied upon external facts to interpret the email of 29 April 2016. In those circumstances, applying the approach of Lord Neuberger in **Airtours** the interpretation of the email is a matter of law but where, as in this case, external facts are relied upon to interpret the document the Tribunal's finding deserves particular respect. Even if such an approach could be described as applying a perversity test as contended by Miss Romney QC such a challenge is made in the Notice of Appeal.

30. The competing contentions of the parties as to the interpretation of the email of 29 April 2016 are straightforward. For the Respondent it is said that, as the EJ found, the email disclosed

advice given in the context of reducing the overall numbers of lawyer roles. Insofar as it referred to an individual, assumed to be the Claimant, the email recorded the type of advice given by lawyers day in and day out. It did no more than record advice that consideration could be given to applying the redundancy process to the Claimant in respect of whose performance there had been concern. The reference to proceedings was to the risk of future complaints and proceedings. A lawyer could be expected to give advice that a particular course of action could give rise to proceedings. That did not amount to advice to act in an underhand way.

31. The first paragraph of the email appears innocuous. It sets out the background that as part of an integration programme and generally the Respondent was looking to reduce the overall number of senior lawyer roles. However the email does not record any general advice on selection for redundancy such as would be expected to be given for such an exercise. Instead the second paragraph of the email moves the focus to "the individual", assumed to be the Claimant. The advice recorded in the second paragraph is concerned with how to deal with him. The writer records that the redundancy exercise provided "their best opportunity" of applying processes to the legal population including the individual, the Claimant. There would have been no need to make reference to "the individual" or to the risk that "he" and not lawyers generally would argue unfairness/discrimination. In the absence of any other explanation the reference to risking impasse and proceedings with ongoing employment is a reference to the Claimant.

32. The key question in the interpretation of the email is whether the advice recorded simply points out the risk of claims if the Claimant were selected for redundancy or whether it goes further and advises that the redundancy can be used as a cloak for dismissing the Claimant who was troublesome to the Respondent because of his continuing allegations of disability discrimination.

33. If the Claimant were to be dismissed by proper application of a redundancy selection procedure there would have been no need to write that "there is at least a wider reorganisation and process at play that we could put this into the context of". Further in a genuine redundancy dismissal there would be no need to say "Otherwise we risk impasse and proceedings with ongoing employment with no obvious resolution". In my judgment these passages record advice that the redundancy situation can be used as a cloak for dismissing the Claimant for other reasons.

34. Mr Halliday contended that on a proper interpretation of the email the "other reasons" were or included the First Claim made by the Claimant for disability discrimination. In my judgment the reference to proceedings is to future proceedings if employment were to continue, not to past proceedings. Against the background of a claim of disability discrimination having been made, a grievance raising disability issues and issues over performance said by the Claimant to be attributed to his disability and his allegation of the Respondent's failure to make reasonable adjustments, the risk referred to in the email was of future complaints of disability discrimination.

35. In my judgment the email of 29 April 2016 is to be interpreted as recording legal advice that the genuine redundancy exercise could be used as a cloak to dismiss the Claimant to avoid his continuing complaints and difficulties with his employment which were said by him to be related to his disability.

36. The structure and language of the email of 29 April 2016 leads to the conclusion that the EJ erred in his interpretation. If it is appropriate to use the term in the interpretation of a document, the interpretation by the EJ of the email was perverse.

Ground 2

The Tribunal erred by holding that victimising or discriminating against the Claimant by dismissing him was insufficiently serious to count as relevant "iniquity"

37. It was agreed that the email of 29 April 2016 from A to B was subject to legal advice privilege. It recorded legal advice given by A, a solicitor, to the Respondent. In-house legal advice is protected from disclosure in the same way as legal advice from an external solicitor.

38. Both parties agreed, as is well established, that legal advice privilege is based on public policy. It is in the interests of the public and the administration of justice for a client to be open and frank with their legal advisors so that soundly based legal advice can be given without the concern that it could be made public. That principle has been explained in many authorities. Perhaps the most cited is that of Bingham LJ (as he then was) in **Ventouris v Mountain** [1991] 1 WLR 607 at page 611C-D in which he explained:

> **"The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision. To this end it is necessary that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision. It is the protection of confidential communications between client and legal adviser which lies at the heart of legal professional privilege …"**

39. It is also well established and agreed between the parties that "advice sought or given for the purpose of effecting iniquity is not privileged". **Barclays Bank plc v Eustice** [1995] 1 WLR 1238 at 1249C is frequently cited for this proposition ("the iniquity principle"). The burden of proof is on the party seeking to establish that the relevant facts fall within the iniquity principle. Both parties argued the appeal on the basis that the standard of proof is whether there is a "strong *prima facie* case" (albeit the Claimant reserved its position to argue, in any further appeal, that the test is simply a "*prima facie* case").

40. It must be borne in mind that even if privilege is lost because the iniquity principle applies to the legal advice in issue that is not determinative of whether the advice given was in fact to perpetrate or in furtherance of iniquity. The *prima facie* case which led to its disclosure whether strong or of a lesser standard is just that. The strong *prima facie* case is not determinative of the issue of whether the legal advice given was to perpetrate or in furtherance of iniquity. That decision would be for the court or tribunal determining the claim to which the disclosed material relates, in this case the Second Claim which is for disability discrimination and unfair dismissal.

41. The issue between the parties on appeal is whether the EJ erred in deciding the Claimant had not established a *prima facie* case or a strong *prima facie* case that the email of 29 April 2016 fell within the iniquity principle so that legal advice privilege was lost.

42. The parties also agreed that **Eustice** and **BBGP Ltd** applied to the issue of iniquity in the circumstances before the EJ. Where counsel diverged was on their analysis of the type of conduct properly categorised as iniquity. On this question counsel relied on different authorities.

43. The EJ referred to **Eustice** in paragraph 44 of his judgment. However the passage he set out was from page 1238 which quoted the public interest principle clearly articulated in the judgment of Bingham LJ in **Ventouris** set out above.

44. The EJ summarised the facts in **Eustice** in paragraph 45 of his judgment. The facts:

> **"… involved a case where a solicitor's advice regarding disposing of property at an undervalue was held to fall within the exemption of privilege (referred to a iniquity). … in *Eustice* there was an allegation that the legal advice was sought to frustrate the mortgagee's rights to the property because the mortgagors regarded the mortgagee bank as interfering with family assets, a situation which the Respondent states is miles away from the one in the present case."**

45. The relevant passage in **Eustice** dealing with iniquity is that in the judgment of Schiemann LJ at page 1249B-H in which he held:

> **"It will be noted that in the last sentence cited Bingham LJ referred to the "absence of iniquity." In so doing he was recognising the effect of a line of cases which have established that advice sought or given for the purpose of effecting iniquity is not privileged. The present appeal is concerned essentially with the question whether the effecting of transactions at an undervalue for the purpose of prejudicing the interests of a creditor can be regarded as "iniquity" in this context. "Iniquity" is I believe, without having done any research on the point, Bingham LJ's word. The case law refers to "crime or fraud" (*Reg v Cox and Railton* (1884) 14 QBD 153, 165), "criminal or unlawful" (*Bullivant v Attorney-General for Victoria* [1901] AC 196, 201), and "all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances" (*Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 553, 565). The case law indicates that "fraud" is in this context used in a relatively wide sense. Thus in *Gamlen Chemical Co (UK) Ltd v Rochem Ltd* (unreported), 7 December 1979; Court of Appeal (Civil Division) Transcript No. 777 of 1979 Goff LJ cited and approved a passage in the judgment of Goulding J in the court below [1983] RPC 1, 8, where he had said in the in the language of an age which has passed:**
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> > **"For servants during their employment and in breach of their contractual duty of fidelity to their master to engage in a scheme, secretly using their master's time and money, to take the master's customers and employees and make profit from them in a competing business built up to receive themselves on leaving the master's service, I would have thought that commercial men and lawyers alike would say that that is fraud."**
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> **On the other hand the courts have shown themselves reluctant to extend the concept indefinitely and have warned against the indiscriminate setting aside of legal privilege. Thus in the *Gamlen* case, 7 December 1979 Goff LJ stated:**
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> > **"the court must in every case, of course, be satisfied that what is prima facie proved really is dishonest, and not merely disreputable or a failure to maintain good ethical standards and must bear in mind that legal professional privilege is a very necessary thing and is not lightly to be overthrown, but on the other hand, the interests of victims of fraud must not be overlooked. Each case depends on its own facts."**
>
> **In *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* [1972] Ch 533 the court was not willing to extend the concept to the tort of inducing a breach of contract."**

46. The relevant passage in **BBGP Ltd** is in paragraph 62 of the judgment of Norris J and was set out by the EJ in paragraph 50 of his judgment. Norris J held:

> **"Although the case law refers to crime or fraud or dishonesty (such as fraudulent breach of trust, fraudulent conspiracy, trickery or sham contrivances) it is plain that the term "fraud" is used in a relatively wide sense: *Eustice*'s case [1995] 1 WLR 1238, 1249D. So a scheme to effect transactions at an undervalue was sufficient (*Eustice*'s case); as was deliberate misrepresentation for the purpose of securing a mortgage advance (*Nationwide Building Society v Various Solicitors* [1999] PNLR 52, 72); or making a disposition with the intention of defeating a spouse's claim for financial relief (*C v C (Privilege)* [2008] 1 FLR 115); or the establishment by employees, in breach of a duty of fidelity to their employer, of a rival business: *Gamlen Chemical Co (UK) Ltd v Rochem Ltd (No 2)* (1979) 124 SJ 276 and *Walsh Automation (Europe) Ltd v Bridgeman* [2002] EWHC 1344 (QB). The enumeration of examples is useful only in so far as it enables some underlying theme or connectedness to be identified. In each of these cases the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy. (I borrow language from *Gamlen* and from *Williams v Quebrada Railway Land and Copper Co* [1895] 2 Ch 751.)"**

A The iniquity in **BBGP Ltd** was that the material for which privilege was claimed included advice regarding a plan to remove for cause a party to a dispute who was a partner and thus deprive it of compensation together with either covert plans. Norris J held that conduct of that character was sufficient to engage the iniquity principle.

B

47. Mr Halliday submitted that the EJ erred when focussing his attention on whether the torts of disability discrimination and victimisation which were the subject of the email of 29 April 2016 constituted iniquity for the purpose of disapplying legal advice privilege. Counsel contended that the proper approach was to look at the seriousness of the conduct suggested in the email: dismissing the Claimant for matters related to his disability under the cloak of redundancy.

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48. Mr Halliday submitted that it is established that discrimination is a great evil and contended that deception in disguising it under a cloak of legitimate action is an iniquity for the purposes of excepting the privilege attached to legal advice. Counsel referred to **Mezzotero**. Under consideration in **Mezzotero** was protection from disclosure of "without prejudice" settlement discussions not legal advice privilege. However counsel contended that the observations of Cox J of the importance of having discrimination claims properly determined are equally applicable to legal advice privilege. In **Mezzotero** the Employment Appeal Tribunal held that the ET had not erred in holding that the Claimant could give evidence for the purposes of her complaints of sex discrimination and victimisation that at a meeting said by the employers to be "without prejudice" they had suggested that her employment be terminated by mutual agreement after she had raised a grievance about her treatment on returning from maternity leave. In the course of her judgment in the EAT Cox J held:

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> **"35. … The sex and race discrimination legislation seeks to eradicate what the Court of Appeal have referred to as the 'very great evil' of discrimination - see *Jones v Tower Boot* [1997] IRLR 168, and I consider that it is very much in the public interest that allegations of unlawful discrimination in the workplace are heard and properly determined by the employment tribunal to whom complaint is made, as the appropriate forum under the legislation. Further, it is widely recognised that cases involving allegations of sex and race discrimination are**

peculiarly fact-sensitive and can only properly be determined after full consideration of all the facts - see *Anyanwu v South Bank Students' Union and South Bank University* [2001] IRLR 305, and in particular the speeches of Lord Hope and Lord Steyn."

Counsel submitted that there is a public interest in having discrimination cases heard with all relevant evidence. The iniquity evidenced in the email of 29 April 2016 is seeking to disguise an act of victimisation or discrimination as a dismissal for redundancy. This is a deceit falling within the iniquity principle. To preserve privilege in the email would be to withhold important evidence of discrimination and victimisation.

49. It was submitted that the EJ erred in holding that the Claimant failed to establish a *prima facie* case of iniquity let alone a strong *prima facie* case. Counsel rightly concentrated his submissions on the existence of a strong *prima facie* case.

50. Miss Romney QC contended that the authorities established two categories of iniquity which lead to the loss of legal advice privilege. There are cases involving the preservation of property and those concerned with the duty of good faith and fiduciary duties.

51. Miss Romney QC referred to the contention on behalf of the Claimant before the EJ recorded at paragraph 76 of the judgment that there was an element of dishonesty in this case in concealing victimisation under the cloak of redundancy.

52. Miss Romney QC submitted that there has to be some understanding and clarity over where the boundary of iniquity lies. Counsel contended that disguising a breach of a fiduciary duty is different from disguising a breach of mutual trust and confidence in an employment relationship. **Gamlen Chemical Ltd v Rochem Ltd (No 2)** [1979] 124 SJ 276 and **Walsh Automation (Europe) Ltd v Bridgeman** [2002] EHWC 1344 were examples of misconduct of

a much more serious nature, diverting clients and trade secrets which was akin to fraud whereas breaching employment law provisions was of a significantly lesser category of wrong.

53. Miss Romney QC submitted that the Claimant was seeking to extend the scope of iniquity beyond that to which it should apply. Counsel referred to reference by Norris J to examples of wrongdoing which had been held to constitute iniquity so as to negate legal advice privilege. Norris J observed that in such cases the wrongdoer had gone beyond conduct which merely amounted to a civil wrong. The wrongdoing had to amount to a fraud or something which the law treats as entirely contrary to public policy.

54. Counsel referred to **Crescent Farm (Sidcup) Sports Ltd v Sterling Offices** [1972] Ch 553 at page 565 in which the Court of Appeal held that the tort of inducing breach of contract or conspiracy as pleaded in that case did not fall within the ambit of fraudulent conduct, trickery and sham contrivances constituting iniquity for the purpose of applying the iniquity principle.

55. Miss Romney QC cautioned against widening the scope of "iniquity" for the purpose of disapplying legal advice privilege. Simon Brown LJ (as he then was) emphasised in **Fazdil-Alisajeh v Nikbin** The Times 19 March 1993 that there are "powerful policy reasons for admitting in evidence as exception to the without prejudice rule only the very clearest of cases". Miss Romney QC contended that the torts of disability discrimination and victimisation were not such a case. They were not akin to fraud or conduct attracting the degree of opprobrium which has led to conduct being categorised as iniquitous.

56. It was submitted on behalf of the Respondent that the content of the email of 29 April 2016 recorded no more than the type of advice solicitors frequently give to clients. The email

A suggested there could be consideration given to avenues available to achieve a resolution of ongoing difficulties with an employee. Committing an act of discrimination or victimisation may be a deplorable tort but it does not amount to iniquity. It was submitted that the EJ did not err in paragraph 86 of his judgment in which he declined to categorise actions relating to tortious claims as falling within the iniquity principle.

B

Discussion and Conclusion

C

57. The question of whether the legal advice recorded in the email of 29 April 2016 was given for the purpose of facilitating an iniquity was rightly decided by the EJ on the basis of his interpretation of the email. He concluded in paragraph 84 that:

D

> **"… At its highest, the e-mail discloses advice on how to handle a possible redundancy of the Claimant as part of a UK wide process by which it would be reducing the number of lawyers it employed and acknowledges the risk that the Claimant might take legal action but points to the wider context as in effect justification. …"**

E

Advising that taking a certain course of action runs a risk of being held unlawful whether the illegality be breach of contract, discrimination or even breach of fiduciary duty is not in itself iniquitous. Giving advice that a certain course of action which may be unlawful could be taken shades into iniquity. Advising how a fraud could be perpetrated as in **Crescent Farms** would

F

clearly be an iniquity, as would advice on how to breach a fiduciary duty as in **Gamlen**. However advising termination which would be a breach of a notice provision in an employee's contract may well not be relevant conduct usefully characterised by Norris J in **BBGP Ltd** paragraph 62

G

as going:

> **"… beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy. …"**

H

58. Without seeking to diminish the opprobrium which Cox J attached to discrimination in **Mezzotero**, in my judgment advice which could be construed as advice to commit the tort of

discrimination, depending on the facts, may be different in degree from advice on how commit fraud or breach of fiduciary duty. However, depending on the facts the discrimination advised may be so unconscionable as to bring it into the category of conduct which is entirely contrary to public policy. In this respect I differ from the decision of the EJ in which he held at paragraph 85 that it goes too far to elevate the tort of discrimination "to the status required to disapply legal advice privilege". That may be an appropriate view in many cases but the facts of some discrimination may take advice on how to commit it into the category of advice which is contrary to public policy.

59. If the advice in the email of 29 April 2016 had gone no further than "you may select the Claimant, an employee with a disability, for redundancy but you run the risk of a claim by him" in my judgment it would not have reached the high threshold required to disapply legal advice privilege. The EJ reached his decision based on such an interpretation. However I have held that the EJ erred in doing so. In my judgment, properly interpreted, the email of 29 April 2016 records advice on how to cloak as dismissal for redundancy dismissal of the Claimant for making complaints of disability discrimination and for asking for reasonable adjustments which will continue if there is "ongoing employment". In my judgment a strong *prima facie* case has been established that what is advised is not only an attempted deception of the Claimant but also, if persisted in, deception of an Employment Tribunal in likely and anticipated legal proceedings. The email does not record any advice on neutral selection criteria for redundancy. It concentrates exclusively on how the redundancy can be used to rid the Respondent of ongoing allegations of discrimination by the Claimant and of underperformance which he stated are related to his disability and failure to make reasonable adjustments. Whether the legal advice given was in fact to perpetrate or in furtherance of iniquity will be for the Employment Tribunal hearing the claim to which it relates to decide.

60. It is for a party seeking to rely on material in respect of which legal advice privilege is claimed to establish a strong *prima facie* case of iniquity. Norris J observed in **BBGP Ltd** at paragraph 73 of the Claimants' need to establish a strong *prima facie* case of iniquity upon the facts of the case. The public interest and public policy considerations in maintaining privilege in advice given by a legal adviser to a client is long established. A strong *prima facie* case has to be established of an iniquity which reaches the high threshold of something of an underhand nature which is entirely contrary to public policy. Each case depends on its own facts. This case depends on a proper interpretation of the email of 29 April 2016. In my judgment the advice recorded in the email crosses the high bar of a strong *prima facie* case of iniquity.

61. Although of significantly lesser importance, lest there be any doubt about whether legal advice privilege can be claimed in respect of the overheard conversation in the pub in May 2016, it cannot.

Disposal

62. Both grounds in the Notice of Appeal succeed.

63. The decision of the Employment Judge that paragraphs 10 and 11 of section 8.2 of the Claimant's Second Claim Form presented on 3 March 2017 are struck out is set aside.