Neutral Citation Number: [2023] EAT 34

Case No: EA-2022-001138-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22nd March 2023

Before :

THE HONOURABLE MR JUSTICE BOURNE

- -

Between :

(1) MOVING BRANDS LIMITED
(2) YEAR 15 LIMITED
(3) MR BEN WOLSTENHOLME
(4) MR GUY WOLSTENHOLME
(5) MR JOHN TOPPIN
(6) MS CHRISTINA-ANNE KYOSTI

Respondents/Appellants

- and –

(1) MR MATHEUS HEINL
(2) MS HANNA LAIKKO

Claimants/Respondents

- -

Rajiv Bhatt (instructed by Lawrence Stephens Limited) for the **Respondents/Appellants**
Jamie Susskind (instructed by Mishcon De Reya LLP) for the **Claimants/Respondents**

Hearing dates: 16th February 2023

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE, UNFAIR DISMISSAL, WHISTLEBLOWING, PROTECTED DISCLOSURES

An appeal against an ET's order for specific disclosure was allowed in part. In respect of the 5 grounds:

(1) When making an order for specific disclosure, the ET did not rule that legal advice privilege will only apply to communications between a legal adviser and third parties claiming to be the agents of the client where the client is copied in. Instead it found as a fact that in the relevant communications the third parties had acted as more than a mere "means of communication" for the client and therefore the communications were not privileged: see *Jet2.com Ltd v Civil Aviation Authority* [2020] EWCA Civ 35 and the authorities cited there.

(2) Before rejecting the assertion of privilege over certain documents, the ET had a discretion to order further evidence to be filed. But where no party applied for such an order, there was no obligation to make it and the ET was entitled to decide the privilege issue on the material before it.

(3) The ET's disclosure order wrongly omitted to make an exception for documents which further evidence might show tended to reveal the contents of communications to which legal advice privilege applied.

(4) Having ordered that communications occurring after a certain date need not be disclosed if litigation privilege applied to them, the ET wrongly omitted to order also that those communications need not be disclosed if legal advice privilege applied to them, given the possibility that litigation privilege might be challenged.

(5) At the ET, disclosure was not opposed on grounds of relevance. Relevance having been assumed, the ET did not err by omitting from its order an exception for irrelevant documents. The ruling in *Howes v Hinckley and Bosworth BC* (EAT 4 July 2008) did not mean that the EAT always will (or must) allow a relevance issue to be taken on appeal if it was not taken below. Nevertheless, that case establishes that an ET should always consider the relevance of any documents with respect to which a party is seeking disclosure, whether the resisting party specifically raises the matter or not.

THE HONOURABLE MR JUSTICE BOURNE:

Introduction

1. The Respondents to ET proceedings ("the Respondents", or "R1" to "R6") bring this appeal against a case management order ("the CMO") made by the ET (EJ Joffe sitting with Members). On the application of the Claimants, the ET ordered specific disclosure of a number of documents and gave directions for resolution of the privilege issue in respect of other documents. The Respondents contended, and contend, that the order for disclosure covered documents which are subject to legal advice privilege and/or litigation privilege and/or which are irrelevant and therefore that the CMO was wrong in law.

2. The underlying dispute is between the Claimants ("C1" and "C2") who worked in senior roles for R1, which is wholly owned by R2. R3 and R4 were the founding shareholders of R1. C1 claims to have made protected disclosures about matters relating to R1. In a board meeting on 18 March 2021 C1 and his partner C2 were given 12 weeks' notice of dismissal and R5 and R6 were appointed as directors. The Claimants' directorships were terminated on 19 April 2021. Then, after what the Claimants say were a sham investigation and a sham disciplinary procedure, they were summarily dismissed on 8 June 2021, a day before their notice periods were to expire. As a result they claim to have suffered loss in respect of their shareholding in R2. C1 claims for whistleblowing detriments and automatically unfair dismissal and for victimisation under section 27 of the Equality Act 2010. C2 claims for unfair dismissal.

3. The application for specific disclosure was heard on 23 September 2022 which was the penultimate day of the 15-day hearing of the ET claim. Since the making of the CMO, the final day of the ET hearing has been adjourned to await the outcome of this appeal.

4. The disclosure application arose from evidence given by R6 on 20 September 2022 that she had received advice in correspondence from the Respondents' solicitors, Lawrence Stephens ("LS"), in February 2021. At that time, she said, R1 and R2 were clients of LS but she was not.

5. On that day the Claimants' solicitors Mishcon de Reya ("MDR") wrote to LS, requesting disclosure of the correspondence on the basis that it was not privileged. On 21 September Mr Conway of LS responded that R6 was mistaken in that until 22 March 2021, he was instructed by R3 but was not advising R1 or R2, and that during that period he corresponded with R6 (and R5) as agents for R3, and therefore the correspondence was covered by legal advice privilege.

6. MDR were not satisfied with that explanation and made the disclosure application on 22 September and, as I have said, it was heard the next day.

7. Preparation for that hearing accordingly was hurried. At the hearing, the ET considered an "understandably brief" witness statement by Mr Conway. The statement commented on communications falling into 3 categories:
   (1) communications between LS and R3, into some of which R5 and/or R6 were copied;

(2) communications between LS and R5 and/or R6, into which R3 was copied; and
(3) communications between LS and R5 and/or R6, into which R3 was not copied.

8. There is no longer any issue about documents in category 1.

9. The ET adopted the Respondents' submission that litigation privilege could arise from 17 February 2021, which is when they decided to dismiss the Claimants. Although the Claimants had suggested that an earlier date might apply, it was to their advantage to restrict litigation privilege to the later date.

10. For category 2 documents predating 17 February 2021, the ET accepted that any document whose dominant purpose was the provision of legal advice would be privileged, and that more evidence would be needed to decide which documents were of that description.

11. The ET's Reasons continued at [36]:

> "Documents post-dating 17 February 2021 in category 2 will also be covered by litigation privilege where the dominant purpose was obtaining advice or information in preparation for adversarial proceedings which have commenced or are reasonably contemplated. We have made similar orders in respect of this sub-category for the same reasons."

12. For category 3 documents, the ET decided that legal advice privilege would not apply. However, where such communications occurred on or after 17 February 2021, litigation privilege might apply but would have to be evidenced.

13. These findings were to be given effect by the CMO.

14. The CMO requires the disclosure of:

(1) category 2 documents sent before 17 February 2021 whose dominant purpose was not the giving or seeking of legal advice ([2.1]);

(2) category 2 documents sent on or after that date whose dominant purpose was not obtaining advice or information in preparation for reasonably contemplated adversarial proceedings [2.2];

(3) category 3 documents sent before that date [2.3]; and

(4) category 3 documents sent on or after that date whose dominant purpose was not obtaining advice or information in preparation for reasonably contemplated adversarial proceedings [2.4].

15. As there had been, until then, no analysis by Mr Conway of specific documents, the CMO required him to file a detailed statement which, in respect of categories 2 and 3, would identify each document to which a claim of privilege was maintained [3.2] and:

(1) for any document predating 17 February 2021,
    (a) state whether its dominant purpose was to seek or give legal advice, and
    (b) if not, state whether it might disclose the nature and content of legal advice sought or given [3.3]; and

(2) for any document sent on or after that date, attest to its dominant purpose [3.4].

16. The Respondents rely on the following grounds of appeal (which are set out verbatim save that names are replaced by "R3" etc):

(1) The ET has erred in law in that the reasoning at ¶¶ 37 and 38 has led it to the conclusion that for R5 and/or R6 to be acting as R3's agents for the purposes of legal advice privilege, R3 must be copied into email correspondence that R5 and/or R6 exchanged with Lawrence Stephens Solicitors (who were at the material time solicitors for R3) and thereby to construct the category at ¶2.3 of the Case Management Order signed on 23rd September 2022 ("the CMO") accordingly.

(2) The ET has erred in law in that without sight or proper analysis of the documents which fall within ¶2.3 of the CMO, it has ordered their disclosure having predetermined that none of those documents can attract legal advice privilege in circumstances where they do.

(3) Having failed to consider submissions made to it about documents that reproduce or otherwise reveal privileged material, the ET erred in its construction of the CMO in that it does not permit the Respondents to withhold documents that reproduce or otherwise reveal privileged communications as between R3 and a solicitor.

(4) The CMO does not permit the Respondents to withhold documents on grounds of legal advice privilege in respect of communications made on or after 17 February 2021 which amounts to an error of law.

(5) The CMO having not considered the issue of relevance, nonetheless mandates the disclosure of all documentation within the scope of that order regardless of relevance, which amounts to an error of law.

Ground 1

17. The Respondents' counsel, Rajiv Bhatt, complains that the ET wrongly added a new component to the legal test of whether a third party sends or receives a communication as a mere agent by ruling that in communications to which R3 was not copied, R5 and R6 were not mere agents by reason of that fact.

18. I agree with the Claimants' counsel Jamie Susskind that it is necessary to identify what the ET actually decided and what its reasons were, before considering the parties' submissions in detail.

19. At [16] the Reasons stated that the ET had had regard to the following "uncontroversial facts":

> "17. The fifth respondent became a director of the first and second respondents on 18 March 2021. He is an accountant and has done work for the first and second respondents as an ad hoc external consultant at various periods. His involvement in late 2020 and early 2021 included preparing an investigation report into the claimants which was used for the purpose of disciplinary proceedings conducted by the sixth respondent.
>
> 18. The sixth respondent became a director of the first and second respondents on 18 March 2021. She was involved in advising the third respondent in late 2020 and early 2021 and conducted the disciplinary proceedings which resulted in the claimants' summary dismissal in June 2021 (following their dismissal on notice in March 2021).
>
> 19. The third, fifth and sixth respondents were in communication with one another in late 2020 and early 2021 about the future of the corporate respondents and at some point also about the proposals to dismiss the claimants.
>
> 20. We saw communications from early January 2021 between these respondents which made reference to Mr Conway, for example:
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> a. In an email from the fifth respondent to the third and sixth respondents of 6 January 2021, the fifth respondent asked how things were progressing with Mr Conway;
> b. In an email of 4 February 2021, the fifth respondent suggested that it might be worth keeping something 'as leverage for discussion with Andrew [Conway]';
> c. In an email of 4 February 2021 again from the fifth to the third and sixth respondents, the fifth respondent says: 'NB: It's probably worth discussing with Andrew Conway the time at which it would make sense, tactically, for you to have me appointed to the board (pre or post leadership change);
> d. On 24 March 2021 the fifth respondent wrote to the sixth respondent inter alia: 'Let's add this to the list with Andrew Conway.'
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> 21. There were also communications between the three relevant respondents about employing private investigators to report on the claimants. GPW, the firm used, suggested that they could be instructed via a law firm in order to 'operate under privilege'. On 26 February 2021, the sixth respondent wrote to Mr Worman of GPW saying 'I need to check with Andrew our lawyer, re: putting you under them as you suggested and what their recommendations are on the timeline in the coming weeks."

20. The ET then set out relevant legal principles. In respect of the agency issue, the Reasons stated:

> "23. … A third party will be an agent for the client only where the agent is no more than a means of communication. There are various authorities on this point and in *Jet2.com* the passage from *Wheeler v Le Marchant* 17 Ch D 675 which sets out this principle is quoted in support of proposition 3 in the judgment."

21. The ET then summarised the parties' submissions, and on this subject said:

> "26. Mr Susskind drew our attention to the authorities on agency in the context of legal advice privilege and submitted that the communications showed that the fifth and sixth respondents were not acting as mere conduits for communication between the third respondent and the lawyers. The claim to legal advice privilege in respect of communication with the fifth and sixth respondents must fail.
> …
> 32. Mr Strelitz [counsel for the Respondents at that hearing] also said in reply that *Jet2.com* post-dated the extract from Passmore on Privilege relied on by Mr Susskind in support of his agency arguments and that therefore the broader analysis in *Jet2.com* of the circumstances in which legal advice privilege applied represented the authoritative position."

22. Then, in its conclusions, the ET said:

> "37. So far as the third category is concerned, we concluded that *Jet2.com* did not displace the long-established principles on agency in this context. In fact Hickinbottom LJ quoted from the relevant passage from *Wheeler* without suggesting any disagreement with the principles expressed. In any event the principles in *Jet2.com* all applied to multi party communications where the non-lawyer parties in copy were all emanations of the client. This was in significant contrast to the facts of this case where category 3 consisted of documents in relation to which no client or emanation of the client was copied.
>
> 38. We therefore concluded that there was no legal advice privilege attaching to these documents."

23. The ET reached a different conclusion about the documents in category 2, where R3 was copied in. At [35], it adopted a concession by Mr Susskind that such documents at least could be privileged and therefore that more evidence would be needed to ascertain whether the dominant purpose of each document was the obtaining or giving of legal advice. Where those documents post-dated 17 February 2021 they could also be subject to litigation privilege, and further evidence was needed on that topic as well.

24. It is not entirely easy to identify the reason(s) why the argument for privilege over category 3 documents was rejected. In fairness to the ET, I bear in mind that the application was heard and decided, and the Reasons were produced, in some haste in the hope of minimising disruption of the rest of the substantive hearing.

25. It is however clear that the Respondents had argued for a departure, based on the case of *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, from the relevant principles as they had been advanced by Mr Susskind, and that the ET rejected that argument, which has not been renewed on appeal.

26. It is also clear that the ET found the "long established principles" to be fatal to the Respondents' claim for privilege based on agency. As I shall explain, that means that the ET found that in the category 3 communications, R5 and R6 were more than just a "medium of communication" for R3, and therefore their involvement was not as mere agents for him.

27. The error of law identified in ground 1 is the alleged imposition of a requirement, as a condition for legal advice privilege on the basis of communication as mere agents, of the principal having been copied into the communication.

28. It seems to me that the only evidence, in the Reasons, that such a requirement was imposed is in the last sentence of [37] as quoted above. Does it mean that the omission to copy R3 into the communications was the reason why the ET rejected the notion that R5 and R6 communicated merely as his agents?

29. To answer that question it is necessary to say more about the parties' submissions on the law.

30. Mr Bhatt began by reminding me of the fundamental nature of legal professional privilege, which has been described as "much more than an ordinary rule of evidence" and "a fundamental condition on which the administration of justice as a whole rests": *R v Derby Magistrates Court ex p B* [1996] 1 AC 487 at 507D per Lord Taylor.

31. He then submits, and it is common ground, that privilege "goes not merely to a communication made to the professional agent himself by the client directly" but also "goes to all communications made by the client to the solicitor through intermediate agents": *Anderson v Bank of British Columbia* [1876] 2 Ch D 644 at 649 per Lord Jessel MR.

32. It is also common ground that for a communication made via an agent to be privileged, it is not necessary for the principal to be included in the communication e.g. by being copied in. If the ET did rule that there was such a requirement, that was an error of law.

33. Mr Bhatt submits that the key question in such a case is whether an instruction by the principal can be clearly traced into the communication between the agent and the legal adviser. Although privilege will certainly attach where the agent acts purely as a messenger or postbox, it is not confined to such cases.

34. At the ET hearing, Mr Susskind relied on a passage from *Privilege* by Colin Passmore (2019) which states:

> "… a communication with a third party need not be made directly by the client or lawyer in order to come within the scope of litigation privilege. In both cases, the client or the adviser is entitled to make the communication through an agent, so long as the agent is merely a medium of communication …
>
> Where an agent is employed in this way … the agent must be no more than the means of communication. So, the starting point is to determine for what purpose the client or solicitor is dealing with an agent. In Jones v Great Central Railway Co, Lord Loreburn L.C. said in relation to advice privilege that:
>
> > 'Both client and solicitor may act through an agent, and therefore communications to or through the agent are within the privilege. But if communications are made to him as a person who has himself to consider and act upon them, then the privilege is gone; and this is because the principle which protects communications only

between solicitor and client no longer applies.'

> Accordingly, to be constituted an agent of communication means that, under English law, the agent must have no personal input into the communication. Where the agent does have such an input, he is engaging in an independent communication that is likely to be outwith the scope of advice privilege; and only protected by litigation privilege if made for the dominant purpose of litigation."
>
> (emphasis added)

35. The Respondents' counsel Mr Strelitz sought to persuade the ET that Passmore's summary of the law has been modified in the recent case of *Jet2*. The ET rejected that submission, which has not been renewed before me.

36. Mr Bhatt nevertheless submitted that the test posited by Passmore of "no personal input" is too stringent and that, although a communication with a legal adviser will not be privileged if the alleged agent's input goes beyond their instructions, or if they bring material into existence as part of the communication, it is not correct to say that the agent can have no personal input at all. He submitted that there will be a spectrum of greater or lesser involvement by an alleged agent, and that the outcome in each case will depend on whether the agent's communication can clearly be traced back to the principal's instruction.

37. That submission is made by reference to leading cases such as *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583 and *Wheeler v le Marchant* (1881) 17 Ch D 675.

38. In *Wheeler*, a party's solicitor sought information from the party's surveyor to assist him in giving legal advice. The Court of Appeal rejected a claim that the relevant communications were privileged. At 684 Cotton LJ said:

> "If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice."

39. *Wheeler* was applied in *BCCI*. There, Price Waterhouse was engaged by a company to produce reports on certain transactions and forward them to the company's solicitors. Since it was "charged with the duty of bringing the material into existence", it was not merely passing on communications from the company. Therefore the communications were not privileged.

40. Mr Bhatt submits that these were clear cases where the third parties had distinct roles requiring them to do more than be a medium of communication. This case, he says, is closer to the "mere agent" end of the spectrum, because R5 and R6 were at all times acting on R3's instructions and were corresponding as his agents, even if they drafted the correspondence themselves.

41. The ET referred at [20-21] to other emails (not involving the solicitors) which show R5 and R6 having some input in respect of the dispute and which refer to Mr Conway. Mr Bhatt submits that those documents are not capable of shedding light on the nature of the role of R5 and R6 in the communications with Mr Conway. Moreover, he submits, although the Reasons mention those other emails, the ET's conclusions do not refer back to them.

42. So, Mr Bhatt contends, on a proper interpretation of the decision, the ET did not make a finding of fact that R5 and R6 were not agents. Instead it made a faulty legal ruling that they could not have been agents.

43. Mr Susskind responds that the authorities are clear and that to be an agent, a third party must be a mere "means of communication". He further submits that the evidence clearly showed, and the ET was more than entitled to conclude, that R5 and R6 were working collaboratively with the lawyers and were not mere messengers who had no personal input into the communication. He submits that the ET did not introduce a new element into the legal test, but simply made a finding of fact which ground 1 does not challenge and which, short of perversity, could not be challenged.

44. Reading the Reasons as a whole, in the context of the legal submissions, I am satisfied that the difference perceived by the ET between category 2 and category 3 documents was that the agency issue arose only in category 3. Whereas the category 2 communications were effectively between a solicitor and a client, the category 3 communications were between a solicitor and a non-client. Therefore, to make out a claim for privilege, the Respondents had to show that in category 3 R5 and R6 acted as mere agents for R3.

45. So, in category 3 only, the ET asked itself whether the test for agency was satisfied. In light of the submissions made, it first had to decide what that test was. It decided that the test was as per the "long established principles" as summarised above, and that R5 and R6 were agents only if they acted merely as a "means of communication" for R3. That in my judgment was the correct test.

46. The ET's conclusion, that the test was not satisfied, was reached by consideration of all the "uncontroversial facts" recited in the Reasons.

47. The Reasons did not say which facts carried particular weight, or why. That is unfortunate. But ground 1 is not based on an inadequacy of reasons.

48. As Mr Susskind submitted, there is no reason to assume that the omission to copy R3 into the emails was the decisive fact. Rather, it was the reason why the Respondents had to rely on the agency argument at all.

49. Looking at the "uncontroversial facts", it is (at the very least) unsurprising that the ET rejected the agency submission. R5 and R6 occupied senior roles. R5 was a professional adviser, and both had decision-making roles. The emails not involving Mr Conway show that R5 and R6 were bringing independent judgment to bear on issues relating to the Claimants and to Mr Conway's role as solicitor. There was also no apparent reason why R3 would choose to

communicate with Mr Conway via R5 or R6. Still less was there any apparent reason why he would not be copied in, if in truth he was the principal in those communications.

50. Ground 1 therefore fails. The ET applied the long established test based on the authorities, and did not modify it by introducing a requirement that the principal be copied in to the communications.

Ground 2

51. Where ground 1 is substantive, ground 2 is procedural. Mr Bhatt complains that the ET's conclusion, that legal advice privilege did not apply to category 3 documents, was reached without the necessary procedural steps being taken.

52. That submission is founded on *West London Pipeline and Storage Ltd and another v Total UK Ltd and others* [2008] EWHC 1729 (Comm) at [86], where Beatson J summarised the effect of the authorities on challenges to a claim to privilege. Having noted that the burden of proof is on the party claiming privilege, Beatson J said that that party's affidavit asserting privilege will be conclusive unless the evidence shows that it is incorrect or incomplete, and that where a court is not satisfied by the affidavit and any other evidence that privilege is made out, it has four options i.e. to (i) reject the claim for privilege and order inspection, (ii) order a further affidavit to deal with the remaining issues, (iii) as a solution of last resort, inspect the documents or (iv) order cross-examination of the author of the affidavit. See also *Trentside Manor Care Ltd v Raphael* [2022] EAT 37 at [46], where this Tribunal applied those principles.

53. Here, Mr Bhatt points out that the ET acknowledged that Mr Conway had not been able to review all of the relevant documents and that his statement was "understandably brief". He submits that in those circumstances it was incorrect or unfair for the ET to choose option (i) above, and that further investigation was needed.

54. Essentially, Mr Bhatt suggests, the error underpinning ground 1 also affected this aspect of the CMO in that the ET decided on a legally incorrect basis that the agency argument could not succeed.

55. Mr Susskind responds that, faced with the disclosure application, it was for the Respondents to show that the communications were privileged and that they simply failed to do so. The ET followed a legally orthodox approach by considering the witness statement of Mr Conway, and it drew conclusions based on it. Neither party applied to adjourn the application to adduce more evidence or for inspection of the documents. Nor, Mr Susskind points out, has there been any application to adduce new evidence on appeal which could change the picture as it was before the ET.

56. In my judgment, ground 2 fails because the ET made no error of law. Whilst it had a discretion to request more evidence, it was not bound to do so. The burden was on the Respondents to prove, in this case, that R5 and R6 communicated with Mr Conway as mere agents for R3. For the reasons explained under ground 1 above, they failed to do so. If the Respondents had

applied to adduce more evidence or for the ET to inspect the documents, such application would have had to be decided on its merits. But in the absence of any such application, the ET was not bound to instigate further investigation.

Ground 3

57. This ground is based on a separate reason for which the communications were said to be privileged. Mr Bhatt cites *Three Rivers DC v Bank of England (No 5)* [2003] EWCA Civ 474 for the proposition that documents which reproduce or otherwise reveal the content of privileged legal advice are themselves protected by legal advice privilege. At the ET hearing the same point was made, in particular by reference to *Jet2.com*.

58. The ET's Reasons acknowledge this principle at [23], in the section dealing with the law as it applies to legal advice privilege:

> "Where a communication has been sent simultaneously to multiple addressees, including a lawyer, the communication will be subject to legal advice privilege if its dominant purpose has been to settle the instructions to the lawyer even if that communication has been sent to the lawyer himself by way of information or is part of a rolling series of communications. If the dominant purpose has been to obtain the commercial views of the non-lawyer addressees, it will not be so privileged, even if a subsidiary purpose has been to obtain legal advice from the lawyer addressee. The response from the lawyer, if it contains legal advice, will almost certainly be privileged, even if copied to more than one addressee. Where a communication discloses or is likely to disclose the nature and content of legal advice then it will in any event be privileged (*Jet2.com*). In *Jet2.com*, all of the addressees were emanations of the client and we considered that these principles were enunciated in that context.
> Where there is a "continuum of communications and meetings" between lawyer and client which has the dominant purpose of giving/seeking legal advice, anything within that 'continuum' is covered (*Jet2.com*)."
>
> (emphasis added)

59. However, Mr Bhatt points out that the CMO requires the documents to be disclosed unless they were sent with the dominant purpose of (1) obtaining or giving legal advice or (2) obtaining advice or information in connection with litigation. There is no "carve out" for documents which fit neither of those descriptions but which would tend to disclose the nature and content of other communications covered by legal advice privilege.

60. Mr Susskind accepts the principle that a document which tends to reveal the content of a prior privileged communication may be privileged, and that the CMO makes no "carve out" for such documents, and therefore that the real issue on ground 3 is whether, on the facts before the ET, the CMO needed to reflect the principle. He submits that there was no need for a "carve out" if in fact the ET was not convinced that there were any privileged communications whose content might be revealed by any category 3 document.

61. Mr Conway has since provided the further witness statement required by the CMO, with an annexe identifying the relevant documents and the legal issues raised by each of them. The

statement was not before the ET and does not assist me in deciding whether it made any error of law. However, the parties agree that I can have regard to it in order to decide how to dispose of this appeal if any of the grounds are upheld. It could show that ground 3 either is, or is not, academic.

62. The further statement shows that there are a maximum of 7 documents to which ground 3 is said to be relevant. The first 6 of these are the first, in time, of all the documents covered by the CMO.

63. That matters because Mr Susskind submits that the relevant principle is predicated on the existence of a prior privileged communication whose contents are at risk of being revealed. So, he says, the first 6 documents cannot be covered by the principle because there is no privileged communication which predates them.

64. Mr Susskind did not concede ground 3 to any extent, but he did not strongly argue against a course of allowing it to the extent of permitting Mr Conway to attest to the applicability or otherwise of the principle to the seventh document.

65. To Mr Susskind's argument about the scope of the principle, Mr Bhatt responds by submitting that the focus should be on whether the document in question tends to reveal the content of any privileged legal advice whereas Mr Susskind's approach focuses on whether it tends to reveal the content of any specific communication. So, Mr Bhatt submits, the principle would apply to a document which tended to reveal the content of privileged advice given later.

66. In my judgment the CMO erroneously failed to invite Mr Conway to attest to the applicability of this category of privilege to any communication.

67. I therefore consider that the order must be amended to cure this omission.

68. Had the appropriate "carve out" been included, it would not have been restricted to specific documents because the ET did not have the relevant information which would later be provided in Mr Conway's second statement. The corrected order therefore will not be so restricted.

69. I am also not convinced that the authorities support the temporal limitation for which Mr Susskind contends. Relevant authorities are reviewed by Morgan J in *Re Edwardian Group Ltd* [2017] EWHC 2805 (Ch)at [32-34], and some of those refer to revealing the advice which was being sought or given, rather than the advice which had been sought or given. It may be that cases in which a document tends to reveal the content of a privileged communication which has not yet occurred will be rare, but I do not conclude that this situation could not arise.

70. None of this means that a further statement by Mr Conway will necessarily be determinative of whether privilege attaches to any of the 7 documents. The Respondents will continue to have the burden of satisfying the ET of that. Something more than mere assertion will no doubt be needed.

71. Ground 3 therefore succeeds.

Ground 4

72. Mr Bhatt submits that the ET erred in law by restricting any claim for privilege over communications on or after 17 February 2021 to litigation privilege. The CMO did not invite Mr Conway to attest to legal advice privilege applying to such communications.

73. Mr Susskind agrees that either type of privilege could apply in principle, though he submits that this has no practical impact in this case. However, he invites me to interpret the CMO as, in fact, allowing either type of privilege to be claimed. The Reasons state at [35] that legal advice privilege may apply to the earlier documents. Then at [36], the ET says that the later documents may "also be covered by litigation privilege", the word "also" showing that it accepted that either type of privilege could apply. Consistently with that understanding, paragraph 3.4 of the CMO extended an open invitation to Mr Conway to "attest to the dominant purpose" of each such document.

74. Paragraphs 2.2 and 2.4, however, required disclosure of such communications "which did not have the sole or dominant purpose of obtaining advice or information in preparation for adversarial proceedings which were reasonably contemplated". It seems to me that paragraph 3.4 must be read as subject to that requirement. The conclusion which is visible at [36] is not reflected in the CMO.

75. Such a restriction could have been justified on purely practical grounds by a finding that all of the relevant communications would definitely attract litigation privilege. In the absence of such a finding, it seems to me that the CMO contains an erroneous omission. As Mr Bhatt says, it is not impossible that the Claimants may dispute the application of litigation privilege to one or more documents.

76. Ground 4 therefore succeeds and the omission must be cured, though it remains to be seen whether it will have any practical impact.

Ground 5

77. Mr Bhatt argues that the ET erred in law by ordering the disclosure of categories of document without any reservation for the relevance of individual documents within the category.

78. That submission is based on *Howes v Hinckley and Bosworth BC* (EAT 4 July 2008), where a respondent had sought disclosure of advice given by a solicitor. The ET refused on the basis of legal advice privilege and litigation privilege. The claimant appealed on the ground that neither type of privilege applied. The EAT raised the question of whether the document was relevant. Having originally conceded relevance, the respondent resiled from the concession. Having heard submissions, the EAT decided that the document was not relevant. Elias P said:

> "20. It follows that I agree with His Honour Judge McMullen QC, who first sifted this matter, that the content of this legal advice has no bearing on any of the issues in dispute.

> The advice does not assist the employer if right, nor damn him if wrong. I would dismiss the appeal on this basis alone, notwithstanding that this point was originally conceded.
>
> 21. The court should, in my judgment, always consider the relevance of any documents with respect to which a party is seeking disclosure, whether the resisting party specifically raises the matter or not. That is the first question that should be addressed in any privilege case. A court should not order disclosure if the documents have no proper bearing on any of the issues in the case. In my judgment, these documents do not.
>
> 22. To order disclosure might lead the Employment Tribunal to believe that the documents must be taken to have some significance when they do not. As I have said, the employment judge in fact appeared to consider that the documents were not relevant, even though he did not determine the case on that basis."

79. The EAT noted that it was not necessary to deal with the grounds of appeal regarding privilege but nevertheless did so, ruling that the ET had been entitled to find that legal advice privilege was applicable.

80. Mr Bhatt submits that although his clients did not take any point on relevance before the ET, *Howes* imposes a hard-edged rule. The ET failed to observe the requirement to consider relevance and, Mr Bhatt submits, the EAT is obliged to entertain the ground of appeal and allow it if it has merit.

81. Mr Susskind unsurprisingly relies on the fact that relevance was not disputed before the ET, and submits that it was implicitly accepted by the Respondents and by the ET. The context, he says, is a factual matrix in which communications between the Respondents and Mr Conway were highly likely to be relevant to this case.

82. In the alternative, he submits that blanket disclosure of documents by category is not unusual in litigation, and there is nothing untoward in some irrelevant documents being caught in the trawl.

83. As to the approach to be taken by this Tribunal, Mr Susskind relies on the general principle that points of law not taken before the ET cannot usually be taken before the EAT. He cites *Secretary of State for Health v Rance* (EAT, 4 May 2007), where HH Judge McMullen listed the relevant principles at [50]. In particular there is a discretion to allow a new point to be argued, but it will be exercised only in exceptional circumstances, and generally not where the issues arises as a result of "lack of skill by a represented party" or a tactical decision.

84. Accordingly Mr Susskind submitted that *Howes* does not mean that a relevance point can always be taken on appeal, and it is at most a factor to be considered when the EAT decides how to exercise its discretion having regard to the principles stated in *Rance*.

85. In my judgment, the point made by Elias P in *Howes* was important and should be borne in mind by ETs whenever they order disclosure. I repeat and reinforce that guidance.

86. In the present case, it seems to me that the problem arises because the ET's Reasons do not mention relevance. Had they expressed a view on it or recorded that it was conceded, or had they added the word "relevant" to the CMO where appropriate, the question would not have arisen. Again, the hurried nature of the application may well explain the omission to make the position clear.

87. On the facts of this case, it seems to me that relevance was assumed rather than overlooked. That is, after all, the obvious explanation for the Respondents not taking a point on relevance.

88. The case can therefore be distinguished from *Howes*, where it was clear to the EAT that the single document to be disclosed was not relevant. The ET was not in a position to decide relevance, and neither am I.

89. When the EAT is asked to consider a point not taken below, it will exercise a multi-factorial discretion as cases like *Rance* make clear. A point based on *Howes* therefore may or may not be entertained according to the circumstances.

90. In the present case, ground 5 has been fully argued. Mr Bhatt has not persuaded me that the ET made an error of law and so the ground cannot succeed.

91. It is not necessary to decide whether the Respondents would have been permitted to raise it if, on examination, it had appeared to have merit. One factor against it, however, would have been the existence of an alternative remedy. In the circumstances of this case, where the order was made before the documents were reviewed, I see no reason why the ET would not entertain an application to vary its order if it emerged that it covered irrelevant material.

92. That option remains open to the Respondents. If a lack of relevance can be properly explained without disclosing the documents, the ET should give it serious consideration. It might even be agreed, though this is hard-fought litigation between parties who clearly do not trust each other.

Disposal

93. The appeal is allowed on grounds 3 and 4 only.

94. In my judgment the outstanding matters need not be remitted to the ET. The only possible outcome is a variation of the CMO to cure the omissions identified in those grounds.

