Case No: CO/5488/2016

Neutral Citation Number: [2018] EWHC 514 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2018

Before :

LORD JUSTICE IRWIN
MR JUSTICE GREEN

- -

Between :

(1) ABDEL HAKIM BELHAJ **(2) FATIMA BOUDCHAR**	**Claimants**
- and -	
DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**
- and -	
(1) SIR MARK ALLEN CMG **(2) COMMISSIONER OF POLICE OF THE METROPOLIS** **(3) THE SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS**	**Interested Parties**

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Ben Jaffey QC (instructed by the **Leigh Day**) for the **Claimants**
John McGuinness QC and Tom Little (instructed by **the Government Legal Department**) for the **Defendant**
David Perry QC and Victoria Ailes (instructed by **BCL Burton Copeland**) for the **1st Interested Party**
The 2nd Interested Party did not attend and was not represented
James Eadie QC and Ben Watson (instructed by **the Government Legal Department**) for the **3rd Interested Party**
Zubair Ahmad (instructed by **the Special Advocates' Support Office**) appeared as **Special Advocates**

Hearing dates: 14th and 15th February 2018

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JUDGMENT

OPEN JUDGMENT FOLLOWING CLOSED HEARING ON 15 FEBRUARY 2018

Introduction

1. This is a second judgment on the scope of privilege to which we have both contributed. Argument in relation to this issue was heard in closed proceedings. We are of the view, however, that much of what we wish to say can be included in an open judgment, and in the interests of ensuring that as much as possible of these proceedings is available in the public domain we are producing this open judgment on the point. In a different open judgment we address the broader arguments concerning waiver of privilege. The context and background to this case has been described already in a number of open judgments: see for example [2017] EWHC 3056 (Admin). In essence the claim is a challenge to the decision of the DPP not to mount a prosecution for alleged cooperation and participation in the rendition of the Claimants to Libya.

2. The point in issue arises from the submission by the Secretary of State that there have been a number of errors in disclosure of the three key documents (the advice provided to the DPP of Richard Whittam QC, the review note by Sue Hemming and the VRR decision by Gregor McGill). The documents have been identified in OPEN but disclosed in redacted form and only into CLOSED. The Secretary of State has indicated that a number (it is said 8) of examples of "overclaim" of legal professional privilege ["LPP"] have been corrected, and we have been shown examples of those. Those corrections are in themselves uncontroversial, since of course they lead to greater information being revealed.

3. The argument arises over a larger number (20) of passages where the Secretary of State argues that material was inadvertently left unredacted in the original disclosure which should have been redacted on the basis of LPP. These "underclaims" were notified by the Secretary of State and are now sought to be corrected. The fact of this application has been made open in an approved communication to the Claimants' lawyers of 25 January 2018, and a communication request of 7 February 2018 from the Special Advocate which has been made open. No communication has revealed any of the content of an "overclaim" or an "underclaim".

Inadvertent Waiver

4. CPR 31.20 provides:

> "Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court."

5. As a number of commentators have observed, the case law on inadvertent waiver is not entirely reflective of the terms of CPR 31.20. The manner in which the rules governing inadvertent disclosure operate was set out by the Court of Appeal in *Mohammed Al Fayed et ors v The Commissioner of Police for the Metropolis et ors* [2002] EWCA Civ 780 ["*Al Fayed*"]. This is presently viewed as the definitive summary of the relevant principles. A number of authorities were cited to the Court

in *Al Fayed*: *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027, *Derby & Co Ltd v Weldon (No 8)* [1991] 1 WLR 73, *Pizzey v Ford Motor Co*, The Times 8 March 1993; *International Business Machines Corporation v Phoenix International (Computers) Ltd* [1995] 1 All ER 413; and *Breeze v John Stacey and Sons Ltd*, unreported, 21 June 1999. All the cases were concerned with LPP. Lord Justice Clarke in *Al Fayed* summarised the principles which flowed from the decided case law in the following way:

> "16. In our judgment the following principles can be derived from those cases:
>
> i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.
>
> ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.
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> iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.
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> iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.
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> v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.
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> vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.
>
> vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:
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> a) the solicitor appreciates that a mistake has been made before making some use of the documents; or
>
> b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;
>
> and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.
>
> viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by

> mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made but is not conclusive; the decision remains a matter for the court.
>
> ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.
>
> x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

6. In principle, and without tying the illustrations below to the facts of the present case, inadvertent disclosure can take different forms. The disclosure could for instance summarise legal advice actually provided, or it could refer indirectly to the substance of legal advice provided by others, or it could refer to the mere fact of legal advice having been received, possibly with details of the identity of the author of the advice or the topic covered and/or the circumstances in which it was provided. It is not necessary in this open judgment to address the material disclosed or how one would categorise it. It suffices to record that it is agreed between counsel that the items in question are in principle all covered by LPP.

7. An important consideration in this case is the principle in paragraph 16(vii) of *Al Fayed* referred to above: "obviousness".

8. In addressing obviousness there are certain contextual facts which in our judgment are important to the ultimate assessment in this case. These facts are all open facts. They are as follows: (i) that in relation to the disclosed material the Defendant has asserted LPP; (ii) that nonetheless there were disclosures of material covered by LPP; (iii) that the disclosure which incorporated legal advice was sent in the closed procedure to the Special Advocates; (iv) that the Defendant did then seek to reassert LPP over the relevant parts of disclosed legal advice on grounds of inadvertence; and (v) that the Special Advocates indicated to the FCO that they would oppose any application to reassert LPP, upon the basis that LPP had been previously waived and that the disclosure to the Special Advocates was not an obvious mistake, citing *Al Fayed* (ibid). The timetable and sequence of events are addressed in more detail in our closed judgment.

9. For the avoidance of any doubt the above facts are confirmed in an email memorandum dated 26th January 2018 sent by the Special Advocates to the Claimants in a form approved by the FCO.

10. On the basis of these facts it is our view that there are certain inferences that necessarily follow. In particular, a reasonable lawyer receiving the material otherwise subject to LPP would appreciate (i) the highly specialised and sensitive nature of the material which would be the subject of *any* disclosure (including therefore material otherwise covered by LPP) into a closed process; and (ii), the existence of the law relating to inadvertent disclosure. Mr Ahmad, the Special Advocate who appeared before us, accepted both of these points as arising from the very nature of the process

that is engaged in cases such as these. It is our view that these inferences flow from the five contextual facts referred to above.

11. In our judgment all of these matters are important to the test of obviousness. Any reasonable advocate receiving this information, in these circumstances, setting aside any attempt by the disclosing party to secure tactical gain, would know or believe that the provision of material otherwise covered by LPP was inadvertently provided. This flows in large measure from the context. The suggestion that the State would deliberately disclose part but not all of its legal advice in such sensitive proceedings is intrinsically counterintuitive and improbable.

Cherry Picking

12. We deal now with the argument about "cherry picking". Mr Ahmad did not suggest that in making the disclosures there was any mischievous or manipulative intent on the part of the Defendant. He did argue however that the processes by which disclosure was made and the sensitivity of the material was determined, were thorough and undertaken conscientiously, and that it was unfair now to seek to reassert LPP over material that had already fallen into the hands of the Special Advocates.

13. He drew our attention to the judgment of the Court of Appeal in *Great Atlantic Insurance Co. v Home Insurance Co.* [1981] 1 WLR 529 ["*Great Atlantic*"] where at page 536F Lord Justice Templeman stated that the simplest, safest and most straightforward test for waiver would be that privilege must be asserted as to the whole document

> "… unless the document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete".

Mr Ahmad argued that the present documents could not be so divided such that the waiver over one part was severable in the manner described from the rest, and that therefore waiver was applicable to at least the disclosed documents, but in principle to the entirety of legal advice material.

14. Mr Eadie QC argued that the test for cherry picking was straightforward and applied only where there had been deliberate or manipulative partial disclosure. He disputed the interpretation placed on *Great Atlantic* by Mr Ahmad. The gravamen of the judgment of Lord Justice Templeman on cherry picking lay in his starting point, which was that once it was decided that a document covered one topic, then:

> "… it might be or appear dangerous or misleading to allow the plaintiffs to disclose part of the memorandum and to assert privilege over the remainder".

The term "*allow*" is, in context, referring to whether the Court would countenance or tolerate a dangerous and misleading use of partial disclosure. The answer is obviously that the court does not permit or "*allow*" such a state of affairs. Understood thus, it is clear that cherry picking concerns a policy or strategy by the client to use

legal advice in a selective manner to obtain a forensic advantage, or an approach which might risk such arising.

15. This was how the test was understood by Leggatt J (as he then was) in *Serdar Mohammed v MOD* [2013] EWHC 447 (QB) where he summarised the principles in the following way (see paragraph 14):

> "i) What might be called a 'true' waiver occurs if one party either expressly consents to the use of privileged material by another party or chooses to disclose the information to the other party in circumstances which imply consent to its use. Such a waiver may be either general or limited in scope.
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> ii) Where a party waives privilege in the above sense by deliberately deploying material in court proceedings, the party also loses the right to assert privilege in relation to other material relating to the same subject matter: see e.g. *Great Atlantic Insurance Co. v Home Insurance Co.* [1981] 1 WLR 529. The underlying principle is one of fairness to prevent 'cherry picking': see e.g. *Brennan v Sunderland City Council* [2009] ICR 479, 483-4 at [16].
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> iii) Similarly, a party who by suing its legal advisor puts their confidential relationship in issue cannot claim privilege in relation to information relevant to the determination of that issue. Again, the governing principle is one of fairness: see e.g. *Paragon Finance v Freshfields* [1999] 1 WLR 1183.
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> iv) Because privilege only protects information which is confidential, if the information concerned ceases to be confidential, privilege cannot be claimed. Where a party does an act which has the effect of making information public, this has sometimes been described as a waiver of privilege (see e.g. *Goldstone v Williams* (1899) 1 Ch 47), but it is more accurate to say that privilege cannot be claimed because confidentially has been lost.
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> v) Where a party comes into possession of privileged material by any means, and even if without the knowledge or consent of the other party, the receiving party is free to use such material subject to the equitable jurisdiction of the court to restrain a breach of confidence."

16. Applying these principles to the present case it is not contended that the Defendant has engaged in any tactical deployment of the legal advice. In our view Leggatt J was correct in his construction of *Great Atlantic*. "Cherry picking" is concerned with knowing, deliberate, deployment resulting in partial disclosure. Absent such an intention, the issue of cherry picking does not arise.

17. So far as the fairness argument is concerned (that it is now unfair to permit reassertion of privilege) we have dealt with the analogous argument in the related judgment to this, which addresses other issues of privilege. The open version of that judgment is at [2018] EWHC [ ] (Admin). It suffices to say that the risk of unfairness is catered for and mitigated by recognition of the importance of the Defendant's duty of candour to the court.

Conclusion

18. We conclude that the inadvertent disclosure here was precisely that. No basis for a finding of bad faith is asserted, and correctly so. Nor is there a basis for a conclusion that the partial disclosure was "cherry-picking", in other words a tactical disclosure of part of the privileged material for presumed advantage. We consider that, once focussed on the point, and in the specific context, the reasonable solicitor would have concluded that the partial disclosures or "underclaims" were made in error. We expand on this reasoning in the CLOSED judgment: standing back, we also conclude that this outcome favours fairness. For these reasons the Defendant is entitled to assert LPP over all the disputed items. No use may be made of these matters in these proceedings or otherwise.