Neutral Citation Number: [2020] EWHC 1492 (Ch)

Case No: FS-2019-000016

IN THE HIGH COURT OF JUSTICE
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Financial Services and Regulatory

Royal Courts of Justice
7 Rolls Building, Fetter Lane
London, EC4A 1NL

Date: 10/06/2020

Before :

MR JUSTICE TROWER

- -

Between :

A **Claimant**

- and -

(1) B
(2) The Financial Reporting Council Ltd **Defendants**

- -
- -

Richard Lissack QC and Adam Sher (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimant / Defendant to Counterclaim**
Alexander Polley (instructed by **Taylor Wessing LLP**) for the **First Defendant / Claimant by Counterclaim**

Hearing date: 28 April 2020

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Approved Judgment - Redacted

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of A and B by email. The date and time for hand-down is deemed to be Wednesday 10th June 2020 at 10:30.

Mr Justice Trower:

1. This judgment is concerned only with the counterclaim. I have directed that it be confidential to A and B and not be released for publication in its unredacted form when it is handed down. Having heard further submissions I am satisfied that it remains appropriate for the confidentiality directed by Master Shuman to continue to apply to those parts of the judgment which appear after paragraph 29 below.

2. The background to the counterclaim is described in my judgment on the claim. I do not propose to deal with the history of the dispute or whether or not either party has been obstructive in its attitude as to what should or should not have been disclosed. In my view, what matters for the purposes of determining the counterclaim is whether or not any of the six documents falls into a category which B would be entitled to refuse to produce in High Court proceedings on the grounds of legal professional privilege (paragraph 1(8) of Schedule 2 to SATCAR).

3. In respect of five of the documents, A raises questions of legal advice privilege. The sixth document is said to be protected from disclosure by litigation privilege.

4. The starting point on the principles applicable to legal advice privilege is the authoritative statement by Lord Rodger in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48 at [50]:

> "*Legal advice privilege attaches to all communications made in confidence between solicitors and their clients for the purposes of giving or obtaining legal advice, even at a stage when litigation is not in contemplation*."

5. I agree with A's submission that this extends to documents (such as internal communications within a company) which reproduce legal advice for dissemination to those who need it, anyway to the extent that the dissemination does not destroy the confidentiality. This point was explained by the Court of Appeal in its judgment reviewing the whole area of legal advice privilege in *CAA v R (Jet2.com)* [2020] EWCA Civ 35 at [45].

6. It is also clearly established that, for legal advice privilege to apply, it is not necessary for the communication to be telling the client the law or advising on some legal principle. It is sufficient for it to be advice on what can or should prudently and sensibly be done, so long as that advice is given in a legal context: per Taylor LJ in *Balabel v Air India* [1988] 1 Ch 317, 330. Where that is the case, the entirety of the communication is privileged, so long as it can all be said to have those characteristics.

7. The final principle I should mention is that it has been confirmed by the Court of Appeal in its comprehensive judgment in *CAA v R (Jet2.com)* at [96] that, for legal advice privilege to apply to a particular communication or document, the person asserting the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice. A submitted that this dominant purpose requirement was controversial and reserved the right to challenge the Court of Appeal's conclusion in a higher court. Be that as it may, the decision in *CAA v R*

(Jet2.com) on this point is part of the ratio of its decision and is binding on me, so I shall follow it.

8. I should also record that I looked at each of the six documents which are still in issue. There was a debate before the start of the trial as to whether or not they should be included in the trial bundle for the counterclaim, but all parties accepted that it was open to me to look at them if I considered it appropriate. I concluded that it was for three reasons:

    i) The context in which the court is often reluctant to look at the relevant documents is where it is being asked to decide a point of privilege when the party seeking disclosure has not seen them. Those considerations do not apply in this case, because B who seeks to disclose to the FRC has seen the documents and can make submissions on them.

    ii) I formed the view that the nature of the argument meant that I would be assisted by seeking the way in which the information said to be privileged was conveyed in or communicated by the relevant documents.

    iii) I considered that it would provide greater assurance to the FRC as to the robustness of a decision on privilege to which they were not a party, if the court had had the opportunity to look at the documents.

DD1 and DD2: Executive Committee Minutes

9. These two documents, which are minutes of meetings of A's executive corporate governance group held on 18 October 2017 and 15 November 2017 can be taken together. They appear to be a straightforward record of what was discussed at the two meetings and do not appear to record any legal advice.

10. A's evidence, given by Mr Jonathan Cary, a partner in Reynolds Porter Chamberlain LLP, is that both these documents are versions of the minutes which were created by the General Counsel of A in a legal context for the dominant purpose of providing legal advice. The reason A says this is the case is that they are labelled confidential and privileged and that the metadata discloses that A's general counsel was the last individual to modify each of the documents. It accepts that not all versions of this document are privileged, but simply that these particular versions are.

11. In my judgment, the claim to privilege is not established. The mere fact that a lawyer is involved in the preparation of minutes of a meeting does not mean that in carrying out that task, the function he is performing is connected with the giving of legal advice. Lawyers often fulfil secretarial functions in the context of recording discussions at important meetings, and there is nothing to indicate that the General Counsel in this case was doing any more than that. In the present case, all that the metadata shows is that the lawyer spent 2 minutes editing the first minute (which he did 9 days after the meeting) and no time at all editing the second one.

12. Even if that were not to be the case, I accept the submission made by B that it is still necessary to be able to identify from the document, either directly or by inference, a

statement of the advice or communication said to be privileged. In *FSCS v Abbey National Treasury Services* [2007] EWHC 2868 (Ch) at [17-18], David Richards J discusses the difficulties which arise if privilege is said to arise where there is nothing more than inference which supports a case that the document is in substance a statement of the advice or communication.

13. I accept that there will be cases where the inference is obvious and in which the privilege is therefore established, but in the present case, it is clear to me that there is no basis in the evidence (let alone one that is obvious) for drawing the inference that either of the documents record legal advice. The mere fact that the documents were headed "privileged and confidential" has little evidential weight one way or the other, because the question is whether they were in fact privileged, not whether the person who put the phrase on the documents thought that they were. It is not uncommon to find an organisation using the term "privileged and confidential" without much regard to the question of whether that is in law an accurate statement of its status, or indeed whether there is any difference between confidentiality which is not normally a ground for non-disclosure and privilege which is.

14. In any event, as B submitted, the metadata does not disclose what the changes that may have been made to the relevant versions of the minutes by A's general counsel in fact were. He may well have been correcting nothing more than an erroneous or infelicitous draft of the record.

15. A also submits that there is a section under the heading "Regulatory and legal matters" which should in any event be redacted. In making that submission A points to evidence that it is clear that the relationship partner at A's firm of solicitors is mentioned on the face of this part of the minutes. I accept that this establishes that a solicitor was present, but I do not agree that this is sufficient to demonstrate that any advice, whether or not of the type contemplated by *Balabel* was given. Even if the solicitor did give anything that amounted to such advice at the meeting, there is nothing from which it is possible to identify any part of the nature or substance of that advice from the face of the minute or the way that it was drafted.

DD 3: Minutes of board meeting dated 23 October 2017

16. A contends that the metadata for these minutes discloses that they were originally prepared by Mr Hingley, a solicitor from Freshfields Bruckhaus Deringer. A's evidence is that they were prepared before the meeting because Mr Hingley did not attend it: Mr Cary says that he understands that Mr Hingley drafted the document in advance in order to advise the board as to the topics to be discussed. He says that this amounts to the preparation of a confidential document in a legal context for the dominant purpose of providing legal advice.

17. In my judgment there is insufficient evidence to demonstrate that Mr Cary's understanding of the factual position is established. He does not give any source for his understanding apart from the contents of the document itself and the metadata actually discloses that the document was created in December (i.e. after the meeting). Mr Cary says that that information is unreliable because the metadata also appears to indicate that it was last printed before it was created, but I do not see that unreliability

of the metadata helps A's case because other parts of the metadata are all that it has to go on in support of its claim to privilege.

18. In any event, and largely for the reasons advanced in the evidence of B's solicitor, Mr Howell of Taylor Wessing LLP, I think that the probabilities are that the minutes were prepared by Mr Hingley after the meeting. One of the more striking aspects of this particular claim is that there is no evidence from Mr Hingley, nor is there an explanation (e.g. that he was asked but could not remember) as to why that is the case. Mr Howell points out that A's evidence does not even confirm that Freshfields were acting for A at the time, or the ambit of their instructions.

19. Of equal significance is the actual contents of the document itself. Most of the items recorded as having been discussed comprise resolutions in a form which are often drafted by solicitors. To that extent, a draft version of the document could have been pre-prepared as a means of advising a Board on the matters to be covered at the meeting, and might then have been privileged. However, it seems to me that the last item, under the heading Close of Business, illustrates that this version of the minutes is most unlikely to have been pre-drafted. The words used are much more consistent with this version of the document being a post-meeting record of what was actually said and discussed, not a pre-meeting advice to the Board as to what they should be discussing

20. For these reasons, I do not accept that this version of the minutes discloses privileged information of any kind. The evidence simply points to it being a record of the meeting which neither expressly records the communication of advice nor in its form reflects legal advice which has been given. I agree with B's submissions that no privilege can attach to this document.

DD4: the Risk Register

21. A contends that this document was prepared by A's General Counsel (with the assistance of others) for the dominant purpose of providing legal advice. It is said by Mr Cary that the risks which are addressed in the register are both legal and commercial. He contends that "*I understand it was created within a legal context and is, therefore, a confidential document prepared by an in-house lawyer for A for the dominant purpose of providing legal advice*".

22. B says that it is an entirely conventional risk register which on its face is described as having been prepared "*to mitigate any business interruption event which may seriously affect the company's business plans",* which is clearly not a privileged purpose. In principle I agree, although I do not think that this necessarily means that the description of how to mitigate particular risks will not amount to the communication of legal advice and the evidence supports A's case that a lawyer was involved in its preparation. To that extent, it is capable of recording a communication made by him.

23. However, having considered the document, it is clear that it does not state the substance of any advice. It is another instance in which A's claim to privilege can only be based on the proposition that the content of the advice can be inferred from

the record of how the risks which are dealt with item by item are to be resolved by the business. This is not sufficient.

24. In relation to this document, A submits that B has taken an unduly restrictive approach to what is capable of attracting privilege, because it has failed to take account of the fact that "*if a lawyer is being asked to apply his legal skills and to look at questions 'through legal spectacles', that may be protected by legal advice privilege*." I certainly agree that the communication of advice as to what should prudently and sensibly be done in a legal context is capable of attracting legal advice privilege – so much is clear from the passage in *Balabel* that I have already cited, which was cited with approval in *CAA v R (Jet2.com)* [2020] EWCA Civ 35 at [61-64].

25. However it is still necessary to identify how it is that the document in issue communicates or discloses the communication of that advice. I do not see how it is that the risk register satisfies that requirement. The most that could be said is that it might be possible to infer the substance of the legal advice from the way in which the document records the commercial decision. However, in my judgment that is not enough, and the courts have cautioned against drawing such inferences save in an obvious and inevitable context. As Ramsey J made clear in *Atos v Avis* [2007] EWHC 323 (TCC), a document is not privileged merely because it takes into account legal advice and, as David Richards J made clear in *FSCS,* it is only privileged if the way in which it does so makes clear or communicates in an obvious manner, the substance of that advice.

DD5: the draft Chairman's script

26. A stresses that the important question is the status of the particular version of the document in issue. It contends that this version of the document was prepared by a lawyer from Freshfields, and Mr Cary explains that he draws this conclusion from the fact that it contains his comments within the draft. He then says "*Therefore, this particular version of the chairman's script is a confidential draft document prepared by a lawyer for A in a legal context for the dominant purpose of providing legal advice*."

27. Mr Howell accepts that there is a single track changed comment contained in the version of the script for which privilege is claimed, which is deleted but the contents of which are visible. He says that it may be appropriate to redact the document to block out that comment so that it is no longer visible, because it communicates on its face legal advice. However, Mr Howell does not agree that the version of the script is otherwise privileged because it was a record which did not contain privileged material but was simply the final form of a script to be used at A's general meeting.

28. It is particularly important to concentrate on the precise version of the document to which this claim relates. As I mentioned, it contains a Freshfields comment which has been struck out in track changes, but which is still visible. In my view this indicates that it is more likely than not to be a version of the script which was not produced by a lawyer. The one which is likely to have been produced by the Freshfields lawyer is the immediately prior one in which the track changes were first

inserted, but not yet struck out. This particular version is just as likely to have been produced by somebody else who has track change deleted the Freshfields note having taken it into account in the draft of the script which is now in issue.

29. With the exception of the Freshfields note, there is nothing to indicate on the face of the document that it communicates legal advice in any form. For this short reason I am not satisfied that the script as whole is protected by legal advice privilege. However, because the deletion has remained in the document, but the contents can be seen, I think that this is a classic situation in which redaction of the deleted Freshfields comment is the right course.

30. REDACTED