Neutral citation [2022] CAT 29

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1342/5/7/20;
1409-10/5/7/21 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

1 July 2022

Before:

BEN TIDSWELL
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED

Claimants

- v -

(1) FOOTBALL DATACO LIMITED
(2) BETGENIUS LIMITED
(3) GENIUS SPORTS GROUP LIMITED

Defendants

AND BETWEEN:

FOOTBALL DATACO LIMITED

Claimants

- v -

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED
(3) PETER KENYON
(4) ISAIAH GARDNER
(5) FLOYD MARCH
(6) NICK MILLS
(7) PRZEMYSLAW DUBININ

Defendants

AND BETWEEN:

BETGENIUS LIMITED

Claimants

- v -

(1) SPORTRADAR AG
(2) SPORTRADAR UK LIMITED
(3) PETER KENYON
(4) ISAIAH GARDNER
(5) FLOYD MARCH
(6) NICK MILLS
(7) PRZEMYSLAW DUBININ

Defendants

Heard remotely in private on 9 June 2022

RULING (PRIVILEGE)

APPEARANCES

Alan Bates (instructed by Sheridans) appeared on behalf of Sportradar AG and Sportradar UK Limited, Peter Kenyon, Isaiah Gardner, Floyd March, Nick Mills and Przemyslaw Dubinin

Thomas Sebastian (instructed by DLA Piper UK LLP) appeared on behalf of Football DataCo Limited

Tristan Jones (instructed by Macfarlanes LLP) appeared on behalf of BetGenius Limited and Genius Sports Group Limited

A. INTRODUCTION

1. This is a ruling determining two competing applications, both dated 17 May 2022, brought by: (i) Football DataCo Limited ("FDC"), which is supported by BetGenius Limited and Genius Sports Group Limited (together, "Genius"), and (ii) Sportradar AG and Sportradar UK Limited (together, "Sportradar").

2. Both applications relate to a document which was disclosed to Sportradar and Genius by FDC, known as "FDC-775". In summary, FDC say that FDC-775 was disclosed inadvertently and is protected by privilege, whereas Sportradar do not consider FDC-775 is privileged and seek to rely on its contents in proceedings.

B. BACKGROUND

3. Sportradar, FDC and Genius are engaged in litigation both in this Tribunal and in the High Court. In February 2020, Sportradar brought a claim in the Competition Appeal Tribunal ("CAT") alleging breaches of competition law by FDC and Genius (the "Sportradar Claim"). Following the Tribunal's judgment dated 2 December 2020 ([2020] CAT 25), FDC and Genius brought actions against Sportradar and a number of individuals in the High Court alleging breach of confidence and breach of statutory duty relating to trade secrets (the "HC Proceedings"). In its defence, Sportradar raised competition law issues which were transferred to the CAT pursuant to the Order dated 22 June 2021 of the President of the CAT, Mr Justice Marcus Smith, sitting as a High Court judge (together with the Sportradar Claim, the "CAT Proceedings"). By a further Order of the President dated 29 July 2021, it was directed that disclosure in the CAT Proceedings would be provided concurrently with disclosure in the HC Proceedings as a single overall disclosure process, and that further disclosure was to be provided in accordance with Practice Direction 51U of the Civil Procedure Rules ("CPR PD51U"), subject to some adaptations.

4. On 28 January 2022, FDC-775 was disclosed by FDC to Genius and Sportradar as part of the parties' disclosure exercise. FDC-775 is a Board Paper referring

to and including, as Appendix 1, a copy of the body of an email from an employee of FDC to an employee of Genius dated 26 February 2021 (the "Email"). FDC-775 contained a number of redactions, but the extract from the Email which was replicated in Appendix 1 was entirely unredacted. Appendix 1 did not include the headings that appeared in the Email, in particular the subject field which read "Private & Confidential / Without Prejudice".

5. On 11 March 2022, solicitors for Sportradar wrote to FDC and Genius requesting further disclosure on a number of issues. One of them related to the matters discussed in FDC-775, specifically Appendix 1. Solicitors for Genius responded on 18 March 2022 stating that Appendix 1 should have been redacted by FDC's lawyers on the basis of (i) without prejudice privilege held jointly by Genius and FDC, or (ii) common interest privilege. FDC's solicitors confirmed on 24 March 2022 that disclosed parts of FDC-775 were privileged and that the document was produced inadvertently, and sought its return and replacement with a redacted copy of FDC-775.

6. In subsequent *inter partes* correspondence, Sportradar explained that the Email could not be protected by privilege and indicated its intention to apply for an order that, pursuant to paragraph 19 of CPR PD51U, Sportradar be permitted to rely on FDC-775 as disclosed. The dispute was not resolved by further correspondence, leading to the applications before me. It should be noted that FDC-775 has only been disclosed to Sportradar's advisers within the confidentiality ring set up in the proceedings.

7. In the course of correspondence about their respective applications, the parties identified another document, FDC-786, which had been disclosed by FDC but in respect of which FDC and Genius maintained a similar claim to privilege. FDC-786 is a board minute, which records the proceedings at the board meeting during which FDC-775 was discussed. There was no application before me in relation to FDC-786.

C. JURISDICTION

8. As noted already, disclosure was made in both the CAT Proceedings and the HC Proceedings. Given that the President is to hear a trial of the CAT Proceedings and the HC Proceedings in October 2022, I was appointed to hear the applications. At the commencement of the hearing held remotely and in private, I asked the parties to confirm that my decision in the CAT Proceedings about the status of FDC-775 would determine the status of the document in the HC Proceedings. The parties duly agreed to this position. To the extent necessary, the conclusion I reach in this judgment can be replicated by appropriate orders in the HC Proceedings made by the President, sitting as a High Court judge.

D. THE DOCUMENTS

9. As well as FDC-775, the Email itself was also in evidence before me, having been exhibited to the statement of Lois Horne, a partner at Macfarlanes LLP with conduct of the matter for Genius. In addition to the claim of privilege, both FDC-775 and the Email are said to contain commercially sensitive material, for which confidential treatment is claimed. I will therefore describe the contents of the documents in more general terms than I might otherwise.

10. The Email begins by referring to a previous discussion between its sender and recipient and notes that the contractual arrangements between FDC and Genius - by which FDC granted Genius the exclusive right to collect, collate and distribute live match data directly from certain football events for betting purposes - are subject to a three-year break point, which will arise in the next few months and which is noted to be important to Genius. The Email goes on to propose a deal by which FDC would not exercise its upcoming three-year termination right in return for Genius's agreement to six items, listed further down the Email. It is made clear that Genius is being asked to agree to all of the items as a condition of the deal.

11. The first item listed concerns the scope of contractual indemnity provisions ("the Indemnity") between FDC and Genius. This is the item which underpins

the continuing claim by FDC and Genius to without prejudice privilege. The second to sixth items can be regarded as a mixture of commercial points or issues relating to the litigation with Sportradar.

12. Ms Horne, in her witness statement, says that the Indemnity had been the subject of disagreement between FDC and Genius, expressed in correspondence between FDC's solicitors and Genius's solicitors in November 2020. This included arguments about two separate clauses, on which the parties had diametrically opposed views (that is, FDC said that Genius had indemnified FDC, while Genius said the reverse). Ms Horne also said that the dispute had not been resolved by the time the Email was sent, and that the Email amounted to FDC setting out terms either to resolve the Indemnity issue or to terminate a commercial relationship that had been in place between the parties for nearly three years. The solicitors' earlier correspondence regarding the Indemnity was not in evidence before me.

13. In the Email, FDC asserts that there is "no question" that the Indemnity operates in its favour in the way that FDC contends, such that FDC "do not see [Genius] 'giving' this to [FDC] as it is clearly in the agreement". Nonetheless, it is one of the items to which Genius is expressly invited to agree in return for FDC not exercising its contractual termination right. The Email concludes by saying that if the proposed terms are not acceptable to Genius then "we all need time to pursue a different path".

14. In August 2021, FDC and Genius entered into a deed to vary their prior contractual arrangements (the "Variation Deed"). The Variation Deed recorded (i) FDC's revocation of its termination notice (which had by this time been served), (ii) agreement between FDC and Genius on terms to resolve the issues between them in relation to the Indemnity, and (iii) agreement between the parties on other matters, including other items from the six listed in the Email.

E. ISSUES

15. At the hearing of the applications, it became apparent that the issues between the parties had narrowed following the exchange of skeleton arguments. FDC

confirmed in its skeleton that it did not, for the purposes of the hearing, rely on common interest privilege. FDC also narrowed the basis of its claim to without prejudice privilege. In oral argument, Mr Bates, for Sportradar, helpfully confirmed that only two issues remained extant:

(1) Is the Email (and therefore Appendix 1) covered by without prejudice privilege, in circumstances where the communication contained a number of commercial issues as well as the Indemnity issue?

(2) If the aim of the Email was to reach an agreed position on the Indemnity issue, had that issue matured into a dispute sufficient to establish the without prejudice privilege?

16. Mr Bates developed his arguments as follows:

(a) The nature of the Email

(1) The relevant test is what the essential aim of the communication (the Email) is.

(2) If the essential aim is a commercial negotiation of matters not in dispute, but the communication also includes discussion of a subsidiary disputed matter, that will not be sufficient to give rise to without prejudice privilege in relation to the wider communication.

(3) To hold otherwise would be to invite abuse of the privilege, so parties could create a privilege even where the overriding intent of the communication was to deal with commercial matters.

(4) It is also consistent with the public policy rationale of without prejudice privilege to ensure disputed matters (but not commercial matters) can be encouraged to be settled. A person can make use of the privilege in a proper way, by separating the discussion of commercial and disputed items.

(5) In the present circumstances, the essential aim of the Email was to deal with the extension (or avoid the termination) of the contract, which needed to be addressed regardless of what happened with the Indemnity. The Indemnity issue was very much subsidiary to this point, and indeed the other commercial issues listed in the Email.

(b) Litigation in contemplation

(6) Without prejudice privilege requires more than simply a difference of views between parties.

(7) The burden is on FDC and Genius to produce sufficient material to establish that litigation could, on an objective basis, be said to be contemplated or reasonably likely at the time of the communication.

(8) Here, there was a paucity of evidence, with no other parts of the negotiations produced in evidence. Ms Horne's statement was not sufficient to fill that gap.

F. LEGAL AUTHORITIES

17. The legal authorities are for the most part uncontroversial and can be summarised as follows:

(1) Without prejudice privilege is founded on the public policy of encouraging litigants to settle their differences. It is a rule about admissibility, excluding all negotiations genuinely aimed at settlement from being given in evidence. The privilege applies to oral or written communications in such negotiations. See *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280 ("*Rush & Tompkins*") at [1299].

(2) The fact that a document is headed without prejudice indicates that the author intended the document to be treated as part of a negotiating process in which admissions might be made, but is not conclusive as to

the document's status. See *Schering Corp v Cipla Ltd & Another* [2004] EWHC 2587 (Ch) at [14] – [15].

(3) The rule does not just apply to protect negotiations aimed at resolving legal issues. Provided the criterion of "genuinely aimed at settlement" is met, the nature of the proposals put forward or the character of the arguments to support them is irrelevant. See *Forster v Friedland* (Unreported, CA, 10 November 1992).

(4) In relation to the likelihood of litigation, the test is "*whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree."* See *Barnetson v Framlington Group Ltd* [2007] EWCA Civ 502, [2007] 1 WLR 2443 at [34].

(5) As to the question of what is covered, the courts have taken a generous view. In *Unilever Plc v The Procter & Gamble Co* [1999] EWCA Civ 3027, [2000] 1 WLR 2436 ("*Unilever*") Robert Walker LJ said at [2443] – [2444]:

> "Without in any way underestimating the need for proper analysis of the rule, I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not "sacred" *(Hoghton v Hoghton* (1852) 15 Beav. 278, 321), has a wide and compelling effect. That is particularly true where the 'without prejudice' communications in question consist not of letters or other written documents but of wide-ranging unscripted discussions during a meeting which may have lasted several hours.
>
> At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers, and statements (which might be characterised as threats, or as thinking aloud) about future plans and possibilities. As Simon Brown LJ put it in the course of argument, a threat of infringement proceedings may be deeply embedded in negotiations for a compromise solution. Partial disclosure of the minutes of such a meeting may be, as Leggatt LJ put it in *Muller v. Linsley & Mortimer* [1996] P.N.L.R. 74, 81, a concept as implausible as the curate's egg (which was good in parts). …"

And at [2448] – [2449]:

> "In those circumstances I consider that this court should, in determining this appeal, give effect to the principles stated in the modern cases, especially

> *Cutts v Head*, *Rush & Tompkins Ltd. v. Greater London Council* and *Muller v. Linsley & Mortimer*. Whatever difficulties there are in a complete reconciliation of those cases, they make clear that the without prejudice rule is founded partly in public policy and partly in the agreement of the parties. They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lord Griffiths in the Rush & Tompkins case [1989] A.C. 1280, 1300:
>
> > "to speak freely about all issues in the litigation both factual and legal when seeking compromise and, for the purpose of establishing a basis of compromise, admitting certain facts."
>
> Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers or patent agents sitting at their shoulders as minders."

G. ANALYSIS

(a) Nature of the Email

18. There was a dispute between FDC and Genius about the Indemnity. This dispute was brought into discussions, as set out in the Email, alongside a number of other matters, including the potential threat from FDC of exercising its termination rights. The Indemnity issue was settled alongside FDC giving up its right to terminate, as set out in the Variation Deed.

19. The Email was therefore part of a negotiation which was genuinely aimed at settlement of, among other things, the Indemnity issue. The fact that the Indemnity issue was actually resolved in the Variation Deed makes that abundantly clear.

20. This conclusion is also consistent with the labelling of the Email by its author, who added the words "Private & Confidential / Without Prejudice" to the subject title. While not determinative, this is a strong indication that the Email was created in an attempt to settle matters in dispute between FDC and Genius.

21. I do not accept Mr Bates's argument that the Indemnity issue was so subsidiary to other commercial matters in the negotiation that without prejudice privilege should not arise in relation to the Email:

(1) Mr Bates was not able to point to an authority for a test which seeks to identify an "essential aim" of a negotiation, so as to separate primary aims from subsidiary ones.

(2) There will be many situations in which a negotiation between parties to a dispute will bring into account commercial matters which are not part of the historical dispute. To separate those items from the item in dispute would be artificial and contrary to the encouragement of parties to seek to resolve matters without litigating.

(3) It would also be entirely impracticable, leading to uncertainty about what was or was not part of the dispute, as opposed to a distinct commercial matter. As Mr Jones, for Genius, pointed out, the parties themselves might have quite different views on such things. That uncertainty is directly in opposition to the public policy rationale for without prejudice privilege, and the broad approach to what is included, as expressed by Robert Walker LJ in *Unilever*.

(4) The test set out in *Rush & Tompkins* makes it plain that the negotiation has to be a genuine attempt to settle a dispute. Parties to a negotiation who seek to abuse the privilege (seeking to cloak a commercial negotiation as privileged by bringing in an incidental dispute with no real connection) will fall foul of that requirement.

(5) In any event, that is clearly not the case here. The Indemnity issue was clearly a matter of significance for both parties. FDC was willing to use the commercial leverage of its contractual position to engineer a settlement of the Indemnity issue in return for giving up its termination right. As Mr Sebastian, for FDC, noted, the outcome of the Indemnity issue as recorded in the Variation Deed indicated a degree of concession on both sides. It is also apparent from the Variation Deed that the potential liability under the Indemnity is a substantial sum.

(6) The fact that FDC deployed the threat of termination, which may or may not have been a point it would otherwise have taken, does not change

the analysis. Parties to negotiations can be expected to use what leverage they possess. FDC used the leverage of the potential termination of its contractual arrangements with Genius to effect a settlement of the Indemnity issue. It is entirely consistent with the public policy behind without prejudice privilege to treat that exercise as being protected by privilege.

22. In its written submissions, Sportradar advanced an argument to the effect that the Email could be part privileged if the Indemnity gave rise to without prejudice privilege, on the basis that the other discussions were severable. Mr Bates did not argue this point in any detail but he did maintain it as a secondary point to his main argument. For the same reasons set out above in relation to his primary case, this argument also fails. The Email was, in its totality, part of a negotiation genuinely aimed at resolving a dispute between the parties.

23. Accordingly, I reject Mr Bates's arguments on this issue.

(b) Litigation in contemplation

24. As Mr Bates acknowledged, the test here is not to be confused with the test that applies to the application of litigation privilege. It is an objective assessment of whether the parties have contemplated or might reasonably have contemplated litigation if they did not agree.

25. The Indemnity issue apparently concerned a significant amount of money. It warranted inclusion in the Variation Deed, where some degree of compromise by the parties seems to have occurred. It had been the subject of correspondence between solicitors, although I have not seen those documents. While the Email expressed FDC's position in confident terms, that is not surprising and does not establish the strength or weakness of either party's position. The Email concluded with a firm expression of intent to "pursue a different path" if agreement could not be reached on all of the items covered, which is suggestive of further action such as litigation. It is not difficult to imagine that the Indemnity issue might reasonably have been the subject of litigation, if not settled in the Variation Deed.

26. In my judgment, there is sufficient evidence before me to conclude that the Indemnity issue was one which the parties might reasonably have contemplated litigating if they had not agreed to resolve it.

27. As a result, I also reject the arguments of Mr Bates on this issue.

H. CONCLUSION

28. I find, in favour of FDC and Genius, that the Email is subject to without prejudice privilege in its entirety. As a consequence, it is protected from admission in these proceedings. I therefore order, pursuant to Rule 65 of the Competition Appeal Tribunal Rules 2015, that Sportradar is refused permission to use any of the contents of the Email or those parts of FDC-775 (including Appendix 1) which refer to or replicate the contents of the Email. It follows that the same outcome should apply in the HC Proceedings.

29. As it is now clear that FDC-775, in the form disclosed on 28 January 2022, is a privileged document, all hard and soft copies of that document in the possession of Sportradar (including in particular its advisers in the confidentiality ring), must be returned to FDC or made subject to an appropriate undertaking to be destroyed or, where in electronic form, destroyed insofar as technologically feasible or made inaccessible. The same applies to copies of the Email as exhibited to Ms Horne's statement, and any notes of the content of the privileged document – including skeleton arguments – prepared for the purposes of the applications or otherwise.

30. In relation to FDC-786, I make no order at present. I anticipate that the views expressed in this ruling will enable the parties to reach agreement on the future treatment of that document, but the parties are at liberty to apply further if that is not the case.

Ben Tidswell
Chair

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 1 July 2022