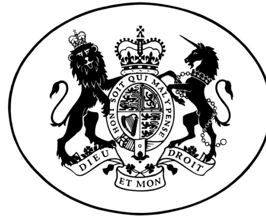
[2017] UKFTT 769 (TC)



TC06178

Appeal number: TC/2013/09674

PROCEDURE – Application to exclude certain documents on grounds of without prejudice privilege – Whether documents subject to without prejudice privilege – If so whether privilege been waived – Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NICHOLAS TAYLOR **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1 on 16 October 2017

Nicola Shaw QC, instructed by PricewaterhouseCoopers LLP, for the Appellant

Sebastian Purnell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. By an application, dated 14 August 2017, HM Revenue and Customs ("HMRC") seek to exclude certain documents (the "Documents"), and the reference to one of these in the appellant's skeleton argument, on the basis that these are subject to without prejudice privilege and should not be admitted in evidence. Alternatively, it is contended that the evidence should be excluded on grounds of irrelevance. The application is opposed by the appellant, Mr Nicholas Taylor, primarily on the grounds that, even if the material is subject to without prejudice privilege (which is not accepted), such privilege has been waived by HMRC.

2. Mr Sebastien Purnell appeared for HMRC and Ms Nicola Shaw QC for the appellant. I am grateful to both for their clear and succinct submissions.

Background

3. The issue in this appeal, for which a substantive hearing with a time estimate of eight days is listed to commence on 8 December 2017, is whether Mr Taylor was resident and/or ordinarily resident in the United Kingdom in the years 2005-06, 2006-07 and 2007-08.

4. In accordance with directions, the parties served on each other a list of documents on which each intended to rely. The Documents were included in the list provided by the appellant on 3 June 2014 and also that provided by HMRC on 27 June 2014. On 19 March 2015, as required by the directions, the appellant served a paginated bundle of documents "incorporating all the documents from each party's list" which included the Documents.

5. On 28 April 2017, having received the bundle and appellant's skeleton argument, dated 24 April 2017 (the hearing was originally listed to commence on 8 May 2017 but was postponed on the application of both parties due to a family bereavement) HMRC wrote to the appellant's representatives, PricewaterhouseCoopers LLP, stating that they had, "a number of issues regarding the bundles" including the Documents which they said "contain without prejudice material which should be redacted." The letter also referred to the reference to one of the Documents in the appellant's skeleton argument which "should be removed." In the absence of any agreement by the appellant to exclude the Documents, HMRC made this application to the Tribunal.

6. It is therefore necessary to consider:

(1) whether the Documents are subject to without prejudice privilege;

(2) if so, whether that privilege has been waived; and

(3) if the Documents are not subject to without prejudice privilege and/or privilege has been waived whether the material should nevertheless be excluded on grounds of irrelevance.

Without Prejudice Privilege

7. As Lord Griffiths explained in *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280, at 1299:

> "The "without prejudice" rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in *Cutts v. Head* [1984] Ch. 290, 306:
>
> > "That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J. in *Scott Paper Co. v Drayton Paper Works Ltd.* (1927) 44 R.P.C. 151, 156, be encouraged fully and frankly to put their cards on the table …. The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."
>
> The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. … if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission."

8. As to whether communications are properly to be regarded as being subject to without prejudice privilege, Vos LJ, as he then was, in *Suh and another v Mace* (UK) Ltd [2016] EWCA Civ 4 having referred to the above passage from *Rush & Tomkins v GLC*, said, at [22],:

> "In my judgment, the true question is whether the discussions were or ought to have been seen by both parties as "negotiations genuinely aimed at settlement" within the principles stated above. The judge plainly took a narrow view of the kind of discussions that might be properly so regarded. In my judgment, a broader view is now authoritatively required. As Lord Neuberger (with whom Lords Hope, Rodger and Walker agreed) said at paragraph 89 in *Ofulue v. Bossert* [2009] 1 AC 990:-
>
> > "… it is worth quoting a passage from Robert Walker LJ's invaluable judgment in *Unilever plc v The Procter & Gamble Co* … [2000] 1 WLR 2436, which, in my

opinion, makes a point which should always be borne in mind by any judge considering a contention that a statement made in without prejudice negotiations should be exempted from the rule. After considering a number of authorities, Robert Walker LJ said (… [2000] 1 WLR 2436 at 2448-2449) that the cases which he had been considering-

'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 ... "to speak freely about all issues in the litigation ..." Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence, with lawyers ... sitting at their shoulders as minders.'

This approach is entirely consistent with the approach of your Lordships' House in *Rush & Tomkins Ltd v Greater London Council* … [1989] AC 1280, and with that of the courts in the nineteenth century, mentioned by [Lord Walker in paragraph 57 of his opinion]"."

9. Although, to avoid any danger of the hearing judge becoming aware of the details of the Documents, I have not set out or referred to their contents, having been taken through them in some detail during the course of the hearing and having subsequently re-read them, I am satisfied that the contents of the Documents do refer to negotiations genuinely aimed at settlement and are therefore privileged and ought not be admitted in evidence unless that privilege has been waived.

Whether privilege waived

10. It is common ground that the starting point is, as Sharp LJ observed at [28] in *Gresham Pension Trustees v Cammack* [2016] 4 Costs LO 691, [2016] EWCA Civ 655:

> "… that without prejudice privilege can only be waived with the consent of both parties: see for example Avonwick Holdings Ltd v Webinvest Ltd [2014] EWCA Civ 1436 at para 21."

11. Mr Purnell contends that HMRC has not waived privilege in the present case and, as such, the Documents are inadmissible. He relies on the unreported decision of the Court of Appeal in *Forster v Friedland* (1992) in which Hoffman LJ, as he then was, said:

> "Finally, [counsel for the respondents] submitted that the defendants had waived the privilege because they had included in their list of

> documents for the purpose of discovery, without any claim to privilege against production, two drafts which had been produced by Mr Friedland in the course of negotiations and which had been discussed between the parties.
>
> The fact that a party cannot or does not claim privilege from production does not necessarily mean that the document will be admissible. In the nature of things without prejudice communications will usually be within the knowledge of, and if in writing in the possession of, both parties. they are nevertheless inadmissible unless their exclusion is waived by both parties."

12. However, Ms Shaw argues that by including the Documents in their lists of documents on which they seek to rely, the parties have bilaterally waived privilege and that this was confirmed by the inclusion of the unredacted Documents in the bundle. She distinguishes *Forster v Friedland* by contrasting rule 27(1) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "Tribunal Procedure Rules") under which a party must send or deliver to the Tribunal and to each other party a list of documents which it "intends to rely upon in the proceedings" with the standard disclosure under the discovery provisions of the Civil Procedure Rules (Part 31.6 CPR) which applied in that case and under which, in addition to documents on which a party relies, he must also disclose documents that adversely affect his own case, adversely affect another party's case, or support another party's case in addition to the documents which he is required to disclose by a relevant practice direction.

13. Ms Shaw relies on *Brunel University, Professor Schwartz v Ms G Webster, Professor Vaseghi* [2007] EWCA Civ 482 in which the Court of Appeal held that, in an employment dispute, the employees had waived privilege by referring to without prejudice discussions in their ET1s and witness statements and the employer had also waived privilege by pleading its responses as it did and attaching a grievance panel's report to the ET3. However, as Smith LJ, giving the judgement of the Court of Appeal in *Brunel University*, observed, at [25]:

> "The facts of this case are most unusual. In our judgment, on the particular facts of this case, the EAT's observations and its conclusion were justified. … the EAT was entitled to conclude that privilege had been bilaterally waived."

She continued, at [40], to explain that in the view of the Court of Appeal:

> "… it is clear that, by referring to the 'without prejudice' discussions in their ET1s and witness statements, the employees made it plain that they intended, unless prevented, to waive their privilege. By pleading their responses as they did and by attaching the grievance panel's reports to the ET3s, the University made it plain that it too intended to waive privilege. In our view, bilateral waiver had taken place at the time the ET3s were lodged with the Tribunal office. Considering the nature of the issues, this was an entirely sensible and understandable position for both sides to take. However, we would accept that the die was not yet irrevocably cast in that either side could have applied to amend its pleading so as to remove all reference to the 'without

> prejudice' material. If the University had sought that permission and if permission had been granted, it would have been possible for the waiver to be withdrawn. …”

14. Similarly, in the present case it seems to me that the die is not yet irrevocably cast so as to prevent the withdrawal of any waiver of privilege by HMRC, if indeed privilege had been waived. Although I was initially attracted by Ms Shaw’s argument based on the reliance on documents contained in the list provided under the Tribunal Procedure Rules, it is not necessary for me to decide whether the without prejudice privilege was waived by HMRC. It would appear from *Brunel University* that even if Ms Shaw is correct and privilege had been waived, given the stance now adopted by HMRC in asserting that without prejudice privilege applies to the Documents, it is clear any such waiver (if ever given) has been withdrawn.

15. Ms Shaw was critical of HMRC for raising the issue of without prejudice privilege some three years after service of lists of documents and two years after provision of the bundle. In response Mr Purnell frankly accepted that this was an error on HMRC’s part and that the issue had simply been overlooked until receipt of the appellant’s skeleton argument. He contends, and I accept, that the position in this regard is similar to that in *Gresham Pension Trustees v Cammack* where the appellants “simply did not spot the difficulty” when an attendance note, recording a “without prejudice” exchange, which had not been provided to the appellants beforehand was shown to the judge and had played an important part in his conclusion on costs.

16. I have therefore directed, in directions issued contemporaneously with, but separately from, this decision that the relevant parts of the Documents which are subject to without prejudice privilege be excluded and that no reference be made to without prejudice material in the appellant’s skeleton argument.

17. In the circumstances, it is not necessary to consider HMRC’s alternative argument that the Documents should be excluded on the grounds that they are not relevant.

Costs

18. Both parties sought their costs under rule 10(1)(b) of the Tribunal Procedure Rules, on the basis that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings, in the event they were successful in making or opposing the application.

19. The Upper Tribunal (Judge Berner and Judge Powell) in *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC) observed, at [15], that:

> “The condition in rule 10(1)(b) is a threshold condition. It is only if the tribunal considers that a party has acted unreasonably in a relevant respect that the question of the exercise of a discretion can arise.

20. In *Wallis v HMRC* [2013] UKFTT 81 (TC) the Tribunal (Judge Hellier and Mr Hossain) said, at [27]:

> "It seems to us that it cannot be that any wrong assertion by a party to an appeal is automatically unreasonable. After all the result of any appeal is that one party is found to be wrong. … In our judgement before making a wrong assertion constitutes unreasonable conduct in an appeal that party must generally persist in it in the face of an unbeatable argument that he is wrong. Thus for example a party who persists in a legal argument which is precisely the same as one recently dismissed by the Supreme Court and which has been drawn to his attention, or who proceeds on the basis of facts which that party accepts, or can only reasonably accept, are wrong, could be acting unreasonably in defending or conducting the appeal. …"

21. Mr Purnell contends that, given the Documents were clearly privileged, by refusing to deal with an informal request for their exclusion and by resisting the application in the face of an unbeatable argument the appellant, who is not a litigant in person but has had the benefit of professional representation throughout, has acted unreasonably.

22. However, I do not consider the conduct of the appellant to be anywhere near that described in *Wallis*. Neither would I describe the argument advanced by HMRC as "unbeatable". Although I have concluded that the Documents were subject to without prejudice privilege and that this has either not been waived by HMRC or if it has that any waiver has been withdrawn, I was only able to do so having reserved my decision rather than give the extempore judgment immediately following the submissions on behalf of the parties as I had hoped.

23. Therefore, having regard to all the circumstances, I do not consider either party has acted unreasonably and, accordingly, have not made any order for costs.

Appeal Rights

24. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 23 OCTOBER 2017