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Case No: CL-2021-000035

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 09/10/2023

Before :

DAME CLARE MOULDER DBE
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

EURASIAN NATURAL RESOURCES CORPORATION LIMITED	**Claimant**
- and -	
(1) THE DIRECTOR OF THE SERIOUS FRAUD OFFICE	
(2) JOHN GIBSON	
(3) ANTONY PUDDICK	**Defendants**

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Anna Boase KC, David Glen and Helen Morton (instructed by **Hogan Lovells**) for the **Claimant**
Tom Richards K.C. and Celia Rooney (instructed by **Eversheds Sutherland (International) LLP**) for the **First and Second Defendants**

Hearing dates: 19 September 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 09 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dame Clare Moulder DBE :

Introduction

1. There were three applications before the Court: the application by Eurasian Natural Resources Corporation Limited ("ENRC" or the "Claimant") to challenge the redactions made by the First Defendant to the Byrne Report dated 11 October 2021 (the "Byrne Report"), a confidential application and a security for costs related application. The security for costs application however was resolved and does not require a determination by the Court.

2. The confidential application was heard in private. CPR 39.2(3)(c) permits the Court to sit in private if the hearing involves confidential information and publicity would damage that confidentiality. That application and evidence in support of it contained information which, if made public, would contravene the reporting restrictions orders made by the High Court and the Court of Appeal [redacted text]. Accordingly, the Claimant filed a redacted skeleton and the written submissions for the First and Second Defendants were contained in a confidential appendix to its skeleton argument.

3. **In addition to this public judgment, there is a confidential judgment which refers to matters related to the reporting restrictions arising from the confidential application. Where necessary to amend parts of this judgment the redacted sections have been indicated as such**.

Background

4. In April 2013 the SFO announced that it had launched a criminal investigation into ENRC (the "ENRC Investigation"). ENRC alleges that since then sensitive information about the ENRC Investigation has been leaked by SFO officers and staff to journalists and other third parties.

5. The First Defendant is the Director of the Serious Fraud Office (the "SFO"). The Second Defendant, Mr Gibson, is a former employee of the SFO and for a period from 2014 to 2018 was the Case Controller in respect of the ENRC Investigation.

6. The Third Defendant, Mr Puddick, is a Senior Investigator within the SFO. He was the subject of an internal misconduct investigation as to whether he had leaked confidential case information to investigative journalists. The Byrne Report is the report by Mr Byrne setting out the conclusions of his investigation, which found that there was a "case to answer" on the part of Mr Puddick in respect of suspected leaking of confidential case information in respect of the Rolls-Royce investigation carried out by the SFO.

7. On 24 August 2023 the SFO announced that it would not prosecute ENRC and that the ENRC Investigation had been closed.

8. Proceedings in this case were issued in January 2021. Cockerill J heard two case management conferences in November 2022 and February 2023.

9. The SFO and Mr Gibson are jointly represented and submissions on the applications now before the Court were made by Mr Richards KC on behalf of both the First and Second defendant. Reference to "the SFO's submissions" is used only for convenience in this judgment. Mr Puddick is separately represented.

Byrne Report application

10. On the Byrne Report application, the application by the Claimant to challenge the redactions are advanced in relation to 3 categories:

    a. Public Interest Immunity ("PII");
    b. Privilege;
    c. Irrelevant and confidential.

11. Cockerill J by her order of 11 January 2023 following the CMC directed that to the extent that the First Defendant sought to redact any part(s) of the Byrne Report by reason of public interest immunity (the "PII Redactions"), the Director of the SFO shall certify that she believes that those parts of the Byrne Report should be protected by PII. A certificate dated 19 December 2022 (the "PII Certificate") was issued by the then Director of the SFO, Ms Osofsky.

12. Cockerill J further directed that to the extent the Court is required to determine whether any PII Redactions should be upheld, an order recording the Court's decision shall be served on all parties (but any confidential reasons given by the Court for its decision shall be contained in a confidential schedule that shall only be served on the First Defendant and shall not be placed on the Court file). Having considered the PII Redactions, it has not been necessary for this Court to provide confidential reasons for the decision to the SFO in addition to the reasons set out below.

13. The SFO has provided the Court separately with two documents which have not been provided to the Claimant: the confidential schedule to the SFO's PII certificate showing how the competing public interests have been assessed and compared (the "Confidential Schedule") and also a version of the Byrne Report which reveals the material redacted by reason of PII but not the material redacted on other grounds.

PII Redactions

14. The preliminary point to note is that since the PII Certificate was filed the SFO has announced its decision not to pursue the ENRC Investigation. In its written submissions the SFO stated that the analysis will be revisited and that this exercise has begun, but the ultimate decision as to whether or not to maintain the claim for PII is properly one for the SFO's new director who is due to take up the role on 25 September 2023.

15. It was submitted for the SFO orally that it may be that the Claimant's challenge is rendered academic by a future decision, but that does not mean that there is not a matter which can usefully be decided at this hearing; namely, is the claim to PII, as set out in the PII Certificate, a good one.

16. The impact of the announcement on the PII Redactions and whether the SFO will take a different view going forward is therefore unknown. As the Court indicated at the hearing it is an unsatisfactory state of affairs for the Court to rule on an analysis which may well change. However no application was made by either party for an adjournment and the Court was of the view that it would not have been in furtherance of the Overriding Objective to adjourn the hearing, given the time that had already elapsed on this application.

Legal principles

17. These were said to be common ground: the test for whether PII can legitimately be asserted in respect of a document remains the 3-stage test explained by the House of Lords in *R v Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274:

    a. Firstly, is the information in question relevant and material to an issue in the proceedings?
    b. Secondly, if it is relevant and material, is there a real risk that disclosure of the information in question will cause 'substantial harm' to a public interest?
    c. Thirdly, even where a real risk of substantial harm can legitimately be said to arise, is the public interest in withholding inspection nonetheless outweighed by the public interest in the fair administration of justice?

18. The correct approach when the Court is asked to rule upon an asserted claim of PII was summarised by Lord Clarke in *Al Rawi v Security Service* [2012] 1 AC 531, at [145]:

> "*…(i) A claim for PII must be supported by a certificate signed by the appropriate minister relating to the individual documents in question… (ii) Disclosure of documents which ought otherwise to be disclosed under CPR Pt 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice. (iii) In making that decision, the court may inspect the documents…This must necessarily be done in an ex parte process from which the party seeking disclosure may properly be excluded…*
> *(iv) In making its decision, the court should consider what safeguards may be imposed to permit the disclosure of the material…*".

19. I also accept the submissions for the SFO that claiming PII is a duty and not a matter of discretion and that whilst the balancing of competing interests is for the Court to assess, the views set out in the PII Certificate will be given substantial weight (*R (Charles & Dunn) v Secretary of State for Foreign and Commonwealth Affairs* [2020] EWHC 3010).

Submissions

20. It was submitted for the Claimant that:

a. Ms Osofsky's views about the probative value of the information are doubtful: it is not clear whether Ms Osofsky has understood the fundamental importance of this document to these proceedings.
b. Ms Osofsky's assessment of the risk of substantial harm (paragraph 11 of the PII Certificate) is dubious. There are two separate points: one is the public interest in not deterring potential human sources in future by naming sources now and, secondly, the SFO's duty to protect actual human sources from potential harm. The language of the certificate and the SFO's submissions give the impression that the SFO has made a blanket decision to redact all human source names on these grounds. What the *Wiley* test requires is a proportionate evaluation of each time a source is named or otherwise identified and to ask which of those two points applies? Is the risk a real one? Is the potential harm substantial? The Claimant queries whether the risks on either of those two points are truly so real and substantial where there would be no prosecution of ENRC.
c. To decide the weight to be attributed to the administration of justice, the Court has to consider the degree of relevance and materiality of the information to the case. The mere fact that there may be some risk of harm to the other public interest does not mean the information should not be disclosed. If that harm, for example, is modest or even if it is substantial, if the information is extremely relevant to a highly material issue, the balance may well favour disclosure.
d. The SFO does not seem to have considered alternative ways to mitigate the disadvantage created by the major redactions it has made to this crucial document or whether the closure of the investigation puts a different complexion on the adequacy of alternative safeguards. The Court should consider what safeguards should be imposed to permit disclosure - holding part of the hearing in camera, requiring undertakings from recipients of the documents, restricting the number of copies or the circumstances of inspection or unique numbering of a sensitive document. Another method for protecting names could be the use of a cipher, so at least one could see where the same name appears in different places.

21. For the SFO it was submitted that:

a. There are quite severe limits in relation to what the SFO can say in explaining the basis of the PII claim on an *inter partes* basis.
b. The primary rationale for the public interest in the protection of sources is the risk that disclosing the identity of one source may deter other sources from offering information in future (*D v NSPCC* [1978] AC 171, 218D E per Lord Diplock). That harm to the public interest is distinct from the possibility of actual harm to the source and it is not necessary to show specific evidence of actual harm to a specific source.
c. This public interest is not limited to situations where the contact between the source and the SFO concerns the SFO's core functions − the unmasking of an anonymous source is liable to deter other potential sources from assisting the SFO in the discharge of its functions of investigating serious and organised crime, whether the information supplied by the anonymous source strictly relates to core functions or not.
d. The SFO is aware of its duty to mitigate any prejudice from withholding information and the SFO considers that it has complied with that duty by producing a document which contains the minimum necessary PII redactions. The Court will need to have in mind, in considering whether some other method than

redaction would have been practicable in this case, contrary to the Director's view, the unusual sensitivities of this case.

Discussion

22. The Certificate states (so far as material):

> "*10. I am satisfied that, in principle, the Information attracts the protection of PII.*
>
> *11. The public interest in the prevention and detection of crime is advanced by not deterring potential human sources from providing to the SFO information in confidence that is relevant to the SFO's core functions of investigating and prosecuting serious or complex fraud. Linked to this is the SFO's duty to protect its human sources from potential harm.*
>
> *12. Confidential sources are a valuable tool for the SFO in the discharge of its statutory functions and I am of the view that the SFO should encourage, and not discourage, the flow of information from such sources. The public interest in the prevention and detection of crime is advanced by the SFO's ability to obtain relevant information from confidential sources, either before an SFO criminal investigation has started or during the course of any such investigation. The possibility that the identity of such sources could be revealed would in all likelihood deter individuals from offering information to the SFO, because of the fear of adverse consequences to the informant (and/or to his or her immediate family members). Those feared consequences could in appropriate cases include reputational harm or serious physical harm or even death. If potential sources are deterred from providing information to the SFO in confidence, the SFO would be less likely to receive such information. This would have a negative impact on the SFO's ability to investigate, detect and prosecute serious or complex fraud offences. There is therefore, a public interest in protecting the identity of the SFO's confidential sources.*"
>
> *14. I have assessed the SFO legal team's explanation of the probative value of the Information and the extent to which it is possible to say that Information may assist any of the parties, but in particular the Claimant and the Third Defendant and their legal representatives, in the proceedings. I have also taken into account the public interest in the application of the disclosure rules in the context of the proceedings. This embraces the public interest in open justice, safeguarding the rule of law and accountability which are key features of our democratic system.*
>
> *15. These public interest factors must be balanced, however, against the risk of serious harm to the public interest that would arise if the Information were to be produced for inspection in the proceedings, as noted in paragraph 3.3 above.*" [emphasis added]

23. It would not be appropriate for the Court to address in this judgment the Claimant's submissions as to what may be within the redacted text. However I have considered the

Confidential Schedule both in the light of the overarching submissions made for the Claimant and the submissions for the Claimant on the individual PII Redactions.

24. Giving due weight to the PII Certificate I am satisfied having considered the explanation provided for the SFO and the context as shown by the Confidential Schedule that there is a real risk that disclosure of the information in question will cause 'substantial harm' to a public interest. I accept that there is a public interest in protecting the identity of the confidential sources whether or not the particular investigation is ongoing.

25. To decide whether the public interest in withholding inspection is outweighed by the public interest in the fair administration of justice, in relation to each redaction I have weighed the public interest in withholding inspection against the relevance and materiality of the particular redactions. I note that the question of relevance and materiality is one which I have considered in relation to each specific redaction and the issues in the proceedings in respect of which the information could be said to have relevance having regard to the confidential explanation provided to the Court. I have also weighed the extent to which the redacted material is of probative value. If and to the extent that the Claimant sought to suggest that the Court should weigh the harm against the importance of the Byrne Report as a whole to the proceedings I do not accept that approach which seems to me to approach the matter without regard to the assessment of the relevance of the particular redaction.

Conclusion on PII Redactions

26. For the reasons set out above and applying the 3 stage test in *Wiley*, I have concluded that for each PII Redaction the balance lies in favour of non-disclosure and the redactions on the basis of PII are upheld.

27. Having considered whether safeguards could be imposed to permit disclosure, I am of the view they would not be appropriate given the nature of the information redacted and in the circumstances of this case.

Redactions on the basis of Privilege

Application for the Court to inspect the documents

28. The Claimant made an oral application at the start of the hearing for an order that the Court should pursuant to Practice Direction 57AD, paragraph 14.3 inspect the Byrne Report to determine if all the redactions on the basis of privilege are rightly made.

29. Practice Direction 57AD, paragraph 14 provides:

> "*14.1 A person who wishes to claim a right or duty (other than on the basis of public interest immunity) to withhold disclosure or production of a document, or part of a document, or a class of documents which would otherwise fall within its obligations of Initial Disclosure or Extended Disclosure may exercise that right or duty without making an application to the court subject to—*
> *(1) describing the document, part of a document or class of document; and*

> *(2) explaining, in the Disclosure Certificate, the grounds upon which the right or duty is being exercised.*
>
> *A claim to privilege may (unless the court otherwise orders) be made in a form that treats privileged documents as a class, provided always that paragraph 3.2(5) is complied with.*
>
> *14.2 A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement.*
> *14.3 The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty.*"

30. Paragraph 16 deals with redactions to documents including on the basis of privilege:

> "*16.1 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is—*
> *(1) irrelevant to any issue in the proceedings, and confidential; or*
> *(2) privileged.*
>
> *16.2 Any redaction must be accompanied by an explanation of the basis on which it has been undertaken and confirmation, where a legal representative has conduct of litigation for the redacting party, that the redaction has been reviewed by a legal representative with control of the disclosure process. A party wishing to challenge the redaction of data must apply to the court by application notice supported where necessary by a witness statement.*"

31. The SFO accepted that where a claim to privilege is challenged, the burden of proof lies on the party claiming privilege to establish it: *West London Pipeline and Storage v Total UK* [2008] 2 CLC 258, at [50].

32. The SFO also accepted that the Court has a general discretion to inspect documents in relation to which privilege has been asserted and challenged: *WH Holding Ltd and another v E20 Stadium LLP* [2018] EWCA Civ 2652 ("*WH Holding*"), cited in *UTB LLC v Sheffield United Ltd and others* [2019] EWHC 914 (Ch) at [70].

33. However the SFO submitted that, in the ordinary course, the Court will not inspect documents itself in the face of a claim to privilege unless there is credible evidence that the lawyers responsible for the redactions have misunderstood their duty, that their assessment is not to be trusted, or where there is no reasonably practical alternative: *National Westminster Bank Plc v Rabobank Nederland* [2006] EWHC 2332 (Comm) at [60]; *Atos v Avis* [2007] EWHC 323 (TCC) at [37].

34. The Claimant accepted that *NatWest* and *Atos* may provide "*useful guidance*" about how the discretion might be exercised in different circumstances but submitted relying on *WH Holding* at [40] they are not prescriptive; that case makes clear that the discretion is a broader one than that.

35. The Claimant submitted that applying *WH Holding*, having regard to the overriding objective and the factors identified, it is a clear case for the exercise of the Court's discretion. There is only a single document and the main body is only 26 pages long. On privilege, there are only seven redactions which are challenged. It is not a wholesale challenge and it is a document of enormous potential relevance. When she ordered that it be disclosed, Cockerill J said in her ruling that it is a document which would, on any analysis, be regarded as key.

36. The SFO submitted that it has identified both the basis of the privilege claimed - litigation privilege - and the relevant proceedings in respect of which litigation privilege arises.

37. The Claimant submitted that the SFO was obliged to provide an explanation of the basis for the redaction (Practice Direction 57AD, paragraph 16.2) but in certain cases it may be appropriate for a party to go further than a basic explanation particularly "*where the basis for redaction is unlikely to be apparent*". The Claimant thus relied on Butcher J in *ENRC v Dechert LLP, Gerrard & the Director of the SFO* [2020] EWHC 1002 (Comm) at [92]:

> "*Depending on the case, it may also be desirable for an additional 'clear explanation' (to use the words of Sir Geoffrey Vos C in UTB v Sheffield United) of the claim of entitlement to redact also to be provided. This may well be appropriate in cases where the basis for redaction is unlikely to be apparent. In such cases, the explanation required would, in any event, not be such as would undermine any privilege involved. The exercise should be undertaken, as Sir Geoffrey Vos C pointed out, in the collaborative spirit which underlies PD 51U."* [emphasis added]

The email at Annex A/71 (redactions made to paras 38, 43 and 71 of the Byrne report)

38. The Claimant challenged in particular the redactions made to paragraphs 38, 43 and 71 of the Byrne Report which relate to the email at Annex A/71.

39. The SFO has stated that it concerns an unsolicited approach by a third party to make disclosures to the SFO for the purposes of the SFO's investigation into ENRC. It was supplied to and received by the SFO *qua* investigator: *Jeffries v Privacy Commissioner* [2010] NZSC 99 at [17]-[22].

40. The Claimant submitted that it could work out that the email at A/71 is an official email by which Mr Puddick reports to another SFO officer an otherwise unrecorded communication between himself and probably Mr Hollingsworth. It was submitted that Mr Puddick is allegedly, on the face of the email, passing on the fact that Mr Hollingsworth is offering to provide information useful to the SFO. A/71 looks like it is part of that same transaction which led to the 8 June meeting. But it was submitted that Mr Puddick's case is that he treated Mr Hollingsworth as a potential human source on the Rolls−Royce investigation, not the ENRC investigation, which casts doubt on the claim to litigation privilege.

41. The Claimant accepted in principle that there can be occasions when a third party provides unsolicited information to a solicitor acting for a party to litigation which can attract litigation privilege, however it queried whether there was privilege in the underlying conversation between Mr Puddick and Mr Hollingsworth. If not, it submitted that Mr Puddick's own internal report of that conversation cannot be privileged.

42. Further the Claimant challenged whether, on the face of the email at A/71, Mr Hollingsworth actually conveyed to Mr Puddick any substantive information and whether it was about the ENRC investigation at all, which then Mr Puddick passed to his superiors. The Claimant submitted that it was much more likely that Mr Hollingsworth was simply dangling the possibility of having some information in front of Mr Puddick in order to get access to other officers with operational information.

Paragraph 48 (and 63) of the Byrne report

43. The Claimant also challenged the redaction in paragraph 48 of the Byrne Report. The SFO states that the redaction is made on the grounds of litigation privilege not legal advice privilege.

44. As to paragraph 48 (and 63) the Claimant submitted that in the Byrne Report, Mr Byrne exonerated Mr Puddick of leaking ENRC information on the basis that he did not have access to any ENRC case information. Whether or not that is true is a "*hot topic*" and the SFO maintains that Mr Puddick had no access to any substantive information about ENRC in its defence. However the Claimant submitted that one of the avenues through which he had potential access was through his relationship with Allister Dawes, an SFO officer who did work on the ENRC Investigation. Mr Byrne concluded that Mr Puddick did not get information from Mr Dawes but the Claimant submitted that it is completely unclear, due to redactions, why he reaches that conclusion. The Claimant submitted that it is told that Mr Puddick had no substantive access to ENRC information yet it has to accept the explanation for why that is true, subject to litigation privilege.

45. The SFO says that the second, longer redaction in paragraph 48 of the Report is made on the grounds of litigation privilege. The relevant passage is a quotation and summary of the email at A/64. As above, the privilege arises from the criminal investigation into ENRC, which long pre-dates the email in question. (First Defendant's Submissions on Redactions to the Byrne Report).

Other redactions challenged

46. As set out in the table provided to the Court [F1/16/8], there are four other paragraphs within the Byrne Report itself which the Claimant challenges as well as challenges to the redaction of certain emails in the Annex:

    a. Paragraph 33- Blanket redaction of an entire paragraph and its accompanying footnotes. The SFO has stated that it asserts litigation privilege and the privilege in question arises from the criminal investigation into ENRC.
    b. Paragraph 49- Redaction of the second half of the penultimate sentence. The Claimant states that it appears to expand on Mr Byrne's reasoning as to why Mr

Puddick was unlikely to have access to information about the ENRC Investigation. The Claimant submitted that it is not immediately apparent how reasoning on Mr Byrne's part about the extent of Mr Puddick's access to information about the ENRC Investigation (or lack thereof) could be privileged. The SFO stated that it asserted litigation privilege and the privilege in question arises from the criminal investigation into ENRC.

c. Paragraph 54- The Claimant states that several redactions are made throughout paragraph 54 on the ground of privilege, including a blanket redaction of an entire paragraph at the end of paragraph 54. The Claimant submitted that paragraph 54 is "*plainly important*" given its focus on the likely provenance of the information which Mr Hollingsworth was able to relay to his associates about the ENRC investigation in the course of 2017.

d. Paragraph 71- Redaction to the end of a sentence which refers to Messrs Payne and Cherrington's accounts being credible and corroborative. The Claimant submitted that the structure of the sentence suggests that the redacted text constitutes another reason why Mr Byrne considers that Messrs Payne and Cherrington's account of their contact with Mr Hollingsworth should be accepted. If so, it was submitted that it is not clear why Mr Byrne's reasoning can attract privilege in this context. The SFO stated that it asserts litigation privilege and the privilege in question arises from the criminal investigation into ENRC.

e. Annex A/69, 72- The Claimant objects to the blanket redaction of the entirety of the emails in question. The basis for the claim for privilege (which includes the date and sender / recipient) is said to be unclear and the sweeping nature of the redactions prevents any sensible assessment of the document's status. The SFO asserts litigation privilege and states that the privilege in question arises from the criminal investigation into ENRC.

Discussion

47. There is a duty on the solicitors under PD57AD paragraph 3.2 to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained:

> "*Legal representatives who have the conduct of litigation on behalf of a party to proceedings that have been commenced, or who are instructed with a view to the conduct of litigation where their client knows it may become a party to proceedings that have been or may be commenced, are under the following duties to the court—*
> *(1) to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings;*
> *(2) to take reasonable steps to advise and assist the party to comply with its Disclosure Duties;*
> *(3) to liaise and cooperate with the legal representatives of the other parties to the proceedings (or the other parties where they do not have legal representatives) so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;*
> *(4) to act honestly in relation to the process of giving disclosure and reviewing documents disclosed by the other party; and*

> *(5) to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and the reason for the claim to privilege is sufficiently explained.*
> *3.3 The duties under paragraphs 3.1 and 3.2 above are continuing duties that last until the conclusion of the proceedings (including any appeal) or until it is clear there will be no proceedings.*" [emphasis added]

48. Sir Geoffrey Vos C in *UTB* at [70] said:

> "*The Court of Appeal held in WH Holding [2018] EWCA Civ 2652 that inspection of documents by a court is a matter of broad discretion. The court held: "39. It seems to us that, contrary to Beatson J's narrow formulation contained in [86(3) and (4)(c)] of the West London Pipeline case [2008] 2 CLC 258, as the Court of Appeal identified in both the Birmingham and Midland Motor Omnibus Co Ltd v London and North Western Railway Co [1913] 3 KB 850 and the Westminster Airways Ltd v Kuwait Oil Co Ltd [1951] 1 KB 134 cases the power to inspect a document is a matter of general discretion. That was also the approach of Lord Denning MR in Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1971] 2 QB 102, 130. It is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied. The need for "reasonable certainty" appears to have sprung from the earlier case of Attorney-General v Emerson (1882) 10 QB D 191, which was concerned with the position prior to the introduction of the express power of inspection in November 1893 and which was followed in Frankenstein v Gavin's House-to-House Cycle Cleaning and Insurance Co [1897] 2 QB 62.*
> *"40. The court may inspect the documents in relation to which privilege is claimed in order to see whether the test has been correctly applied, although it should be cautious about doing so and should be alive to the dangers of looking at documents out of context. The discretion must be exercised in accordance with the overriding objective, which requires balancing dealing with cases justly, proportionately and at proportionate cost and allocating an appropriate share of the court's resources. Among the factors which will be relevant to the exercise of the discretion are (a) the nature of the privilege claimed (b) the number of documents involved and (c) their potential relevance to the issues.*" [Emphasis added]

49. Sir Geoffrey Vos stressed that the test under paragraph 14.3 of PD57AD is one of necessity:

> "*The court may inspect the document or samples of the class of documents if that is necessary to determine whether the claimed right or duty exists or the scope of that right or duty.*"

The email at Annex A/71 (redactions made to paras 38, 43 and 71 of the Byrne report)

50. In relation to the redactions made to paras 38, 43 and 71 of the Byrne Report which relate to the email at Annex A/71 where the claim to privilege was not apparent, the

SFO has provided more than the "basic explanation" in that it has explained that it was an unsolicited approach by a third party.

51. The Claimant accepts that in principle such circumstances can attract privilege but challenges whether in the circumstances of this case there is privilege.

52. The Claimant's submissions on the email A/71 seem to me to illustrate the danger to which the authorities refer of the Court looking at documents out of context at an interlocutory stage: the Court is asked to form a view on privilege not only by reference to the email but also the events giving rise to the email (the underlying conversation). I accept the submissions for the SFO that there would be a real difficulty for the Court, just looking at the Byrne Report in unredacted form, to form such a view without the benefit of any other evidence. It also seems to me inherently unsatisfactory that the Court should seek to assess whether the content of the email attracted privilege again without the benefit of other evidence and context.

Paragraph 48 (and 63) of the Byrne report

53. As to paragraph 48 and the email at A/64 the focus of the Claimant's submissions was the potential evidence which that email could provide on the issue of whether Mr Puddick had access to any substantive information about ENRC and whether in particular he had access through his relationship with Allister Dawes, an SFO officer who did work on the ENRC Investigation. However the potential significance of any evidence is not enough to override privilege.

Conclusion on inspection

54. The claim made is to litigation privilege and the time period for litigation privilege is not disputed. Whilst the Byrne Report is a single document and the number of challenged redactions on the grounds of privilege are limited this is not of itself sufficient to warrant an inspection of a document absent other factors which tend to support inspection. Whilst the power of the Court to inspect documents is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied, the Court has to be cautious and mindful of the danger of looking at documents out of context at the interlocutory stage. For the reasons referred to above, the nature of the challenges raised in this case would in my view require the Court to have knowledge of the context which as referred to above, would probably not be apparent merely by reading the relevant sections in the Byrne Report in order to assess the claim to privilege. In the circumstances I am not persuaded that it is necessary for the Court to inspect the redactions on the grounds of privilege to determine whether the claimed right exists nor in my view is it desirable for the Court to undertake this.

55. In relation to the other redactions which were not the subject of oral submissions it seems to me that the Court should not exercise its discretion to inspect merely on the basis that the redacted communications may contain relevant material in circumstances where the Court would be reaching conclusions without the context and where there is no real basis for finding that the solicitors have misunderstood their duty or that their assessment of the nature of privilege is unreliable.

56. For all these reasons I refuse the application to order that an unredacted version of the sections of the Byrne Report which have been redacted on the grounds of privilege be provided to the Court for inspection.

Application for additional explanation

57. In the alternative the Claimant seeks a direction that the SFO give an additional explanation so that the Claimant "*can understand their position and potentially come back to court to challenge again*". The Claimant now seeks (paragraph 31 of its skeleton for this hearing) an order that the SFO provide in each case where privilege is claimed "*a description of the general nature or purpose of the information (and its corresponding relevance to the reasoning of the Byrne Report)*".

58. Butcher J in *ENRC v Dechert LLP, Gerrard & the Director of the SFO* [2020] EWHC 1002 (Comm) held at [91] that:

> "*... what is ordinarily required under paragraph 16.2 is a list of documents which have been redacted which identifies for each the reason for the redaction, namely whether it is irrelevance and confidentiality, or privilege. The list can be drawn up in such a way that documents can be listed by number and given a code to say which basis for redaction applies to each, provided that a legal representative with control of the disclosure process is able to confirm that each redaction falls within the relevant category. If different passages in a document are redacted for different reasons, then more than one code will apply to that document*." [emphasis added]

59. In the first instance the SFO supplied a redacted copy of the Byrne Report with codes for I&C and privilege {F1/8}. That complied with the requirements of paragraph 16.2 as found by Butcher J in *Dechert*.

60. ENRC then requested more information (paragraph 31 of their submissions, challenging the redactions) {F1/9/15}. They asked whether litigation privilege or legal advice privilege was claimed and an explanation "*sufficient to allow the basis on which privilege is claimed in each instance to be coherently understood*" as well as if litigation privilege was claimed the particular proceedings to which the privilege is said to relate should also be identified.

61. At [92] of *Dechert* Butcher J held that:

> "*92. Depending on the case, it may also be desirable for an additional 'clear explanation' (to use the words of Sir Geoffrey Vos C in UTB v Sheffield United) of the claim of entitlement to redact also to be provided. This may well be appropriate in cases where the basis for redaction is unlikely to be apparent. In such cases, the explanation required would, in any event, not be such as would undermine any privilege involved. The exercise should be undertaken, as Sir Geoffrey Vos C pointed out, in the collaborative spirit which underlies PD 51U.*"

62. The SFO provided further information in its responsive written submissions at paragraphs 22 to 25 and in an accompanying table. {F1/15/7}

63. In relation to the email exchange at A/17, the SFO's submissions (at paragraph 24.1) {F1/15/7} stated that the relevant privilege was litigation privilege in the criminal investigation into ENRC and, as referred to above have now explained that it was an unsolicited approach by a third party to make disclosures to the SFO.

64. As to paragraph 48 the SFO stated that the second, longer redaction in paragraph 48 of the Byrne Report is made on the grounds of litigation privilege. The relevant passage is a quotation and summary of the email at A/64. The privilege is said to arise from the criminal investigation into ENRC, which long pre-dates the email in question. (First Defendant's Submissions on Redactions to the Byrne Report, 20/01/2023 {F1/15/8})

65. The Claimant now seeks an explanation in relation to each redaction of "*its corresponding relevance to the reasoning of the Byrne Report*". It is difficult to see how this could be provided without defeating the very claim to privilege as it would in all likelihood require the SFO in effect to disclose the substance of the communication: for example, on the paragraphs relating to the email at A/71, where the Claimant seeks to discover whether Mr Hollingsworth "*actually conveyed to Mr Puddick any substantive information and whether it was about the ENRC investigation*"; on paragraph 49 where the Claimant seeks in effect to know the reasoning on Mr Byrne's part about the extent of Mr Puddick's access to information about the ENRC Investigation; on paragraph 71 where the Claimant seeks to challenge how Mr Byrne's reasoning can attract privilege. In all these instances it is difficult to see how further information of the kind sought by the Claimant as to the relevance to the issues and the conclusions of the Byrne Report in particular can be given without destroying the privilege which is claimed.

66. Even if further information could be provided without destroying privilege (for example the date of the relevant communication, parties to the communication and purpose of the communication), the information sought goes beyond what is required by the Practice Direction and the authorities referred to above. In my view given the information that has now been provided as to the basis for the redactions, there is no entitlement for the Claimant to receive more information as to the circumstances of the litigation privilege asserted and I am not persuaded that a further order should be made.

Redactions on the basis that the data is irrelevant and confidential

67. The Claimant seeks to challenge a number of redactions which the SFO has made to the Byrne Report on the basis that the information is irrelevant and confidential.

68. It was common ground that in order to redact on these grounds, information must be both irrelevant and confidential. The Claimant's challenge is to the SFO's decisions on relevance of the redacted information.

Submissions

69. It was submitted for the Claimant that nothing in the Byrne Report should be irrelevant. This is a document whose main body is only 26 pages in length. Its stated purpose is to present analysis and conclusions of an investigation into whether Mr Puddick leaked confidential information, a question which goes to the heart of this case. This is not a report looking at a range of things, only one of which is relevant to this case.

70. It was further submitted for the Claimant that Practice Direction 57AD, paragraph 16.1. says that:

> "*A party may redact a part of a document on the ground that the redacted data is irrelevant to any issue in the proceedings and confidential…".* [emphasis added]

It is not confined to relevance to one of the Issues for Disclosure. A party may be directed only to search for issues relevant to Issues for Disclosure, but once that party has found a document containing some relevant information, material can only be redacted if it is not relevant to any point in issue between the parties, whether on the list of issues or not: *JSC Commercial Bank Privatbank v Kolomoisky, Bogolyubov & oths* [2022] EWHC 868 (Ch).

71. It was submitted for the Claimant that in the context of irrelevant and confidential redactions, relevance is a black and white question. If information has any relevance at all, it cannot be redacted and that once a party has found a relevant document, proportionality has no role to play in whether it should be redacted or not.

72. In relation to the issues in the proceedings and the determination of relevance the Claimant drew attention to Issues 6 and 8 of the Approved List of Areas of Common Ground and Issues in Dispute ("Agreed List of Issues") as demonstrating that the issues in the proceedings extended beyond the ENRC Investigation to leaks on other investigations.

73. The Claimant referred to paragraph 29.4 of the SFO's original submissions on the Byrne Report in this context:

> *"29.4 In reality, ENRC's submission on this point amounts to nothing more nor less than a submission that evidence of leaking in the context of one investigation bears on the likelihood of leaking in another (¶36.3) or Mr Puddick's general propensity to leak information (¶36.4(a)). But the Byrne Report is clear in its conclusion that there was a case to answer "in respect of suspected leaking of confidential case information in respect of the Rolls-Royce (RRO01) investigation…." (¶3). ENRC is therefore already aware of Mr Byrne's conclusions. The detailed evidence upon which Mr Byrne reached that conclusion is irrelevant, still less necessary and proportionate for the resolution of one of the approved Issues for Disclosure."* (First Defendant's Submissions on Redactions to the Byrne Report, {F1/15/9}) [emphasis added]

It was submitted for the Claimant that the SFO here falls squarely into the holes identified in the *Privatbank* case. There is an incorrect focus on the Issues for

Disclosure as opposed to relevance to any issue in the proceedings. Similarly there is reliance on an irrelevant test of necessity and proportionality that is not in the Practice Direction and an incorrect judgment call about relevance. Evidence on which a conclusion is based is as relevant as the evidence of the conclusion itself.

74. The Claimant also submitted that the SFO has wrongly redacted the names of a case controller and a case lawyer who witnessed Mr Puddick using his personal mobile phone to discuss information about SFO investigations.

75. The SFO submitted (paragraph 22 of its skeleton) that:

> "*... the SFO does not deny the fact that evidence that showed that Mr Puddick used his phone to contact persons that would provide him with information regarding SFO business may be relevant to the proceedings. The Byrne Report discloses that information. But the names of specific individuals , identified in the course of an investigation into a specific alleged leak, are not relevant and are properly redacted for I&C.*" [emphasis added]

Further in its original submissions the SFO stated ({F1/15/11}, paragraph 30.1):

> "*... ENRC ... knows the only information that is likely to be relevant or pertinent to the present case... That information is clearly disclosed at [paragraph] 60 of the Byrne Report. The suggestion that it would be necessary or proportionate for ENRC to call the relevant SFO officers as witnesses for that purpose ... is, with respect, unreal*."

76. The Claimant submitted that the identities of the individuals who witnessed Mr Puddick using his mobile phone are not irrelevant. It deprives ENRC of the ability to understand and test the value of the accusations against Mr Puddick. It was submitted that again in this example the SFO has fallen into the errors identified in the *Privatbank* case.

77. For the SFO it was submitted that:

a. This is not a case where redactions have been applied heavily or on a blanket basis.
b. The Byrne Report is relied upon in the pleadings in support of a denial that the investigation into Mr Puddick was inadequate or gives rise to any inference of conspiracy and it is also relied upon in support of the SFO and Mr Gibson's plea that they have no reason to believe that Mr Puddick disclosed ENRC information.
c. In light of what was said at the CMC by Cockerill J the SFO identified any information suggesting a systems problem with leaks as relevant and any material suggesting a propensity to leak or a pattern of leaking by Mr Puddick. However information that relates to particular leaks in other investigations is irrelevant. The parties' pleadings and the Agreed List of Issues for trial do not generally put in issue allegations as to what leaks, if any, occurred within the SFO and who was responsible for them.
d. Whilst there was in paragraph 29.5 of its earlier written submissions a reference to matters being irrelevant, still less necessary and proportionate for disclosure the SFO has confirmed that it has not adopted any approach of proportionality in determining relevance.

78. It was further submitted for the SFO that the approach that the SFO has taken can be illustrated by reference to the Byrne Report's discussion of the fourth investigation in which possible leaks by Mr Puddick were considered. It was submitted in this regard:

    a. Below paragraph 55 the code name of the investigation has been blacked out. The code name is confidential and irrelevant.
    b. In paragraph 59, there has been no redaction of the fact that Mr Puddick was suspended from duty on 31 October 2019 and that thereafter concerns were raised by his case controller, and it is clear from what is left unredacted that these included concerns relating to the potential leaking of case information. So there is information which may tend to implicate Mr Puddick in leaks in another investigation, not the ENRC investigation, and upon which ENRC might want to rely in support of a propensity argument. That information has been left unredacted. But what has then been redacted in the final lines of paragraph 59 are details of the possible leak which do not suggest that Mr Puddick was involved. If they suggested any involvement by Mr Puddick, then they would have been left unredacted.
    c. In paragraph 60, the names of the case controller and the case lawyer in this particular investigation have been redacted. It is quite usual for internal staff names to be redacted on irrelevance and confidentiality grounds if they have nothing to do with the pleaded allegations and that is why they have been redacted here.
    d. In paragraph 61, there are redactions covering the subject matter of the alleged leak and those to whom it might have been known, and those redactions are appropriate when it is no part of the court's role at the eventual trial of these proceedings to determine whether there was in fact a leak in relation to the fourth investigation, save to the extent that it involves a pattern of possible leaking by Mr Puddick.

Discussion

79. It was submitted for the SFO that what the SFO has done is to draw a principled dividing line which preserves the confidentiality of the SFO's sensitive internal operations save to the extent that material is relevant to the pleaded issues.

80. However in determining relevance, in my view, the SFO have in fact applied the test too narrowly. Its own submissions would suggest that the SFO have treated the test as whether the material was relevant to the Issues for Disclosure. In the First Defendant's Submissions on Redactions to the Byrne Report, the SFO stated:

> "*However, ENRC's submission proceeds on a number of erroneous assumptions. Most notably, for example, ENRC appears to assume that it is entitled to disclosure in respect of matters <u>which are not only not required to fairly resolve any of the approved Issues for Disclosure,</u> but which are not even pleaded…*" {F1/15/8}

81. In its skeleton for this hearing the approach which the SFO has adopted continued to be linked to the Issues for Disclosure:

> *20.4 However, I&C redactions have been made to the subject matter of specific alleged leaks in investigations other than the ENRC Investigation and the names of investigations that are not disclosed in the Truth Provider email. That approach is consistent with the approach that the Judge adopted in respect of the parties' wider disclosure exercise and it is for that reason that the SFO's responsive submissions suggested that "[s]tanding back, the relevance… of the further disclosure must be assessed against the backdrop of the approved Issues for Disclosure in this case*". [emphasis added]

At 21:

> "*…As above, in recognition of the Issues for Disclosure (including Disclosure Issue 12), the SFO has not redacted information in the Byrne Report that might be said to disclose a 'systems problem' with leaks in the SFO, nor has it redacted information that might be said to show a propensity to leak on Mr Puddick's part…*". [emphasis added]

82. Assessing relevance by reference to the Issues for Disclosure was the error found by the judge to have been made in the *Privatbank* case:

> "*18. Fieldfisher's statements (a) that they were only arguably relevant to the issues for disclosure and (b) that they were unlikely to be of any particular significance to the issues in dispute in the proceedings appears to me to illustrate that they had adopted an approach to relevance which was too narrow*."

83. I accept the submission for the Claimant that this approach which has been adopted by the SFO cannot be said to follow from what Cockerill J said at the CMC. Cockerill J held that it would be disproportionate for searches to be conducted in respect of other investigations on the basis it might unearth problems in which the SFO admitted it might have a systems problem. Cockerill J did not purport to change the test in relation to what material could be redacted as irrelevant and confidential.

84. It is clear from the Agreed List of Issues that the issues in the proceedings are both the disclosure of information in respect of the ENRC investigation as referred to in the various emails and publications which are set out in the pleadings but also extend more broadly to any communications or meetings between the Second and Third Defendants and journalists or intermediaries. Thus Issue 3 of the Agreed List of Issues refers to the identified communications and publications but Issue 6 is broader and extends to any other communications and the circumstances of those communications:

> "*3: Did SFO Officers (including Mr Gibson, Mr Puddick and/or Mr Mack) disclose or cause to be disclosed the information in respect of the ENRC Investigation and/or ENRC's affairs which was contained or alluded to in each or any of the emails, news articles or publications, to any "intermediary", media outlet and/or journalist, in each case, as pleaded in §§13 to 24 of the APoC and in §§1-2 of the Confidential Annex A?*

> *6. Did Mr Gibson and/or Mr Puddick communicate with any intermediary, journalist, or media outlet on other occasions? If so, when and in what circumstances did such communication(s) and/or meeting(s) take place?*"

85. The issues as formulated in Issue 6 are further expanded in scope by Issue 8 which extends to what was discussed at those other meetings/communications. By its terms it is clear that it is not limited to discussion of meetings or communications about ENRC and thus disclosure of ENRC information:

> "*8. In relation to each of the meeting(s) and communication(s) referred to at Issues 5 and 6 above:*
>
> *8.1. What was the nature and purpose of the communication(s)/meeting(s)? Was the purpose to disclose information relating to ENRC's affairs and/or the ENRC Investigation?*
>
> *8.2. What was discussed? Was any information relating to ENRC's affairs and/or the ENRC Investigation disclosed?*

86. The Byrne Report has to be read in light of these Issues and therefore meetings and communications with journalists and/or intermediaries will be relevant whatever the purpose of the meeting and will extend to information about what was discussed even if there was no disclosure of ENRC affairs.

87. Even where the SFO has apparently taken a broader approach, it has confined its assessment of relevance to the main strands of the pleaded case in the sense of the causes of action rather than assess relevance by reference to the Agreed List of Issues. At paragraph 29.2 of its original submissions the SFO stated:

> "*The extent to which a senior officer knew about leaks on one investigation is, moreover, irrelevant to the question of whether the SFO should be vicariously liable for alleged leaks in respect of the ENRC Investigation. The Court's conclusions on any vicarious liability alleged to arise in these proceedings will depend on the facts and circumstances of any alleged leaking in respect of the ENRC Investigation*." (First Defendant's Submissions on Redactions to the Byrne Report {F1/15/9})

88. Further in some instances in its skeleton for this hearing the SFO appears to have redacted material which it regards as having no additional probative value rather than properly applying a true test of whether the information can be said to be irrelevant:

> *"22 As regards the redactions of other SFO officers on the basis of I&C 17, the SFO does not deny the fact that evidence that showed that Mr Puddick used his phone to contact persons that would provide him with information regarding SFO business may be relevant to the proceedings. The Byrne Report discloses that information. But the names of specific individuals, identified in the course of an investigation into a specific alleged leak, are not relevant and are properly redacted for I&C.*

> *23. Finally, ENRC makes the general assertion that redactions made on the basis of I&C have been applied to "important contextual detail", including the final sentence of ¶28 of the Byrne Report, which ENRC speculates is "relevant to the inference that Mr Byrne draws in the preceding sentence about [Mr Puddick's] position as Mr Hollingsworth's inside source". As the SFO confirmed in its written submissions on the redactions, however, the final paragraph of ¶28 of the Byrne Report does not add to Mr Byrne's analysis as to whether Mr Puddick was Mr Hollingsworth's inside source."* [emphasis added]

89. As can be seen from the Agreed List of Issues the circumstances of communications are relevant and this would extend to the individuals who witnessed the phone calls being made. Further in relation to the redacted information in paragraph 28 information relevant to the issues in the proceedings would include information which related to the conclusions of Mr Byrne, information which forms part of the circumstances surrounding the communication or which relates to the information that was discussed or to the identity of those who knew about the meeting or contact (all of these being matters which arise within the Agreed List of Issues).

Conclusion

90. As in the case of the redactions for privilege the Claimant seeks an order that the Court inspect an unredacted version of the Byrne Report to determine whether the redactions for irrelevant and confidential information are properly made.

91. The Claimant relied on the judgment in the *WH Holding* case at first instance (*WH Holding v E20 Stadium* [2018] EWHC 2578 (Ch)) where the judge decided to inspect the unredacted documents with a view to determining whether or not the redacted information was relevant (but not to determine whether such information was commercially sensitive). It was submitted for the Claimant that applying those principles the reasons for exercising the discretion to inspect the irrelevant and confidential redactions are even stronger than the reasons for doing so in relation to the privileged redactions, but with the greater force in a case like this, where there are huge swathes of a document redacted on grounds of relevance.

92. In *WH Holding* case at first instance the reasons given by the judge for deciding to inspect the documents were in summary as follows:
    a. the heavy redaction of a very large number of documents justifies the court in adopting greater vigilance to ensure that the right to redact is not being abused or too liberally interpreted.
    b. the evidence that the lawyers were originally asked to take a broad approach to what constituted commercial sensitivity, resulting in a very large number of redactions and an obvious risk that a reviewer who was motivated to exclude commercially sensitive information might, entirely honestly, take an excessively narrow view of the potential relevance of such information.
    c. the possibility that errors of approach or judgment might have crept into the process was borne out by the fact that on each subsequent review further modifications were made to the redactions.

d. the redactions were on the grounds of irrelevance and not privilege. The general reluctance of the court to inspect documents must be strongest where the claim relates to privilege.
e. there really was no viable alternative mechanism for the unredacted documents to be seen on a confidential basis by the lawyers.
f. counsel accepted that he would not be able to see the documents but made submissions on a general basis as to the factors that the judge should take into account on his review.

93. In this case, as discussed above, it is clear that too narrow an approach has been adopted by the SFO to the redaction of the Byrne Report on the basis of irrelevant and confidential material. However rather than take the approach of what is in effect an *ex parte* process of review by the Court at an interlocutory stage of the proceedings (with the inherent disadvantages of such a process), it seems to me that in this case it is better to direct that there be a further review of the redactions on the basis of irrelevance and confidentiality by the SFO's lawyers in light of the Court's judgment.

Confidential application (as referred to in paragraphs 2 and 3 above, parts of this section of the judgment including part of the reasoning have been redacted)

94. This is an application by the Claimant pursuant to an Amended Application Notice dated 19 July 2023 for an order that the First Defendant shall produce to the Claimant an unredacted copy of the document (mentioned at paragraphs 4 and 5.2.1 of the Confidential Annex to the First and Second Defendants' Amended Defence) ("Document A") and a declaration that: (a) the First Defendant has no right to restrain disclosure to the Claimant of any other versions or copies of Document A which are in the possession of third parties; alternatively (b) that any determination which the Court makes in relation to the privilege and confidentiality attaching to Document A in the possession of the First Defendant shall also apply to any versions or copies of the same Document A which are in the possession of third parties.

Background

95. [Redacted text].

96. [Redacted text].

97. [Redacted text].

98. The First Defendant provided a redacted copy in April 2023 in response to this Application asserting a right to redact parts of Document A on the grounds of privilege.

99. On 11 August 2023 the First Defendant conceded that information in Document A referred to in open court was no longer confidential and privileged and it disclosed a less redacted version.

Grounds

100. The Claimant maintains that the First Defendant can no longer assert privilege over any parts of Document A vis-à-vis the Claimant and accordingly seeks an order for production of the unredacted copy pursuant to PD57AD paragraph 16.2. The Claimant also asserts that the First Defendant has already taken steps intended to prevent third parties from disclosing to the Claimant the version of Document A in their possession, such that it is appropriate for the Court to make the order sought in relation to copies and versions of Document A in the hands of third parties.

101. The Claimant advances four alternative grounds in support of its case that the SFO can no longer assert privilege over any parts of Document A which in summary are:

    a. "implied waiver";
    b. confidentiality lost when contents referred to in open court;
    c. flawed approach to redaction;
    d. the SFO have relied on the substance of Document A in its pleadings.

Implied waiver

102. The Claimant submitted that the SFO's conduct amounted to an implied agreement to waive the SFO's privilege in Document A. The Claimant submitted that a party can expressly agree to waive privilege in a document and it follows that a party can impliedly agree to waive privilege: *Matthews & Malek Disclosure 5th ed*. Chapter 16 at [16.04] and [16.05]. It was submitted that it is a question of fact as to whether what the party has done amounts to implied agreement. [Redacted text].

103. [Redacted text].

104. [Redacted text].

105. [Redacted text].

106. [Redacted text].

107. [Redacted text].

108. [Redacted text].

109. [Redacted text].

110. [Redacted text].

111. [Redacted text].

Conclusion

112. For the reasons addressed in the confidential judgment I find that there was no implied waiver of privilege in Document A including no implied agreement to waive privilege

between ENRC and the SFO.

Confidentiality in the whole of Document A has been lost by reference to it in open court.

113. The second ground relied on by the Claimant is that it submitted that confidentiality in the whole of Document A has been lost by reference to it in open court.

114. The legal principles were common ground and are set out in *Serdar Mohammed v MoD* [2013] EWHC 4478 (QB) at [18]-[20].

> "18. *I accept that information does not necessarily enter the public domain just because a document containing it is mentioned in open court, or even because the information itself is disclosed in open court. However, there are, as I see it, two routes by which in such circumstances the confidentiality of information may be lost.*
> *19. First, sufficient publicity may be given to information disclosed in open court that it can no longer be regarded as confidential. This is a question of fact and degree. Frequently and no doubt typically, however, passing references to documents in open court do not attract sufficient publicity to cause them to lose their confidentiality in this way.*
> *20. Second, there is a general public right of access, based on the principle of open justice, to documents read or referred to in court: see R (Guardian News & Media Ltd) v Westminster Magistrates Court [2013] QB 618. For this reason, I take the default position to be that reference to a document containing confidential information in open court will put the information into the public domain and deprive it of its confidential character. This is, however, subject to the power of the court to prevent or restrict the further publication or use of the information, and thereby preserve its confidentiality, if there is good reason to do so*."

115. In relation to the reference in open court to Document A both sides rely on *SL Claimants v Tesco Plc* [2019] EWHC 3315 (Ch) at [42]:

> "*There is a distinction between the information in a document and the document itself. Whether references (whether by the court or counsel) are such as in fact to constitute such an exposure of the document to the public that confidentiality in it is lost is a matter of degree…*".

116. [Redacted text].

117. [Redacted text].

118. [Redacted text].

119. [Redacted text].

120. [Redacted text].

121. I do not accept that merely because the Judge had read Document A in full it would have been necessary for the public to be allowed access to the full unredacted version in order to follow what was going on. Further the Judge in *Serdar* expressly acknowledged that the default position of open justice is subject to the power of the court to prevent or restrict the further publication or use of the information, and thereby preserve its confidentiality, if there is good reason to do so. I do not accept that the Judge would have acceded to a request for an unredacted copy to be produced. He acknowledged and took into account in reaching his decision that Document A was "*highly confidential*" and that some of the information was "*particularly sensitive*". Given the nature of Document A it is clearly appropriate for the balance to be struck in this case by preserving the confidentiality of Document A such that the default position should not apply.

122. This basis for the alleged loss of confidentiality must fail for the reasons addressed in the confidential judgment.

Flawed approach to redaction

123. The Claimant has produced a table setting out ENRC's specific challenges to the redactions. It is submitted for the Claimant that the number and character of ENRC's challenges cast doubt over the First Defendant's approach to redactions as a whole. The Claimant submitted that certain information which has been redacted is not confidential as against ENRC:

    a. five redactions contain information which is also contained in another document of a similar nature;
    b. three redactions relate to information which emanates from ENRC;
    c. one redaction relates to information which is publicly available.

124. For the SFO it was submitted that there is no basis to assume that the content of the other document of the similar nature to Document A is the same as that of Document A in issue on this application; ENRC does not know what is behind the redactions. It can only guess. It was further submitted that a communication, not a fact, which is privileged and the distinction is important because otherwise privilege can be lost in any communication between lawyer and client in relation to litigation to the extent that the communication mentions facts which are known to the opposing party.

125. In my view the position in relation to redactions is set out in paragraph 16.1 and 16.2 of PD 57AD as discussed above:

> "*16.1 A party may redact a part or parts of a document on the ground that the redacted data comprises data that is—*
> *(1) irrelevant to any issue in the proceedings, and confidential; or*
> *(2) privileged.*"

126. The SFO have accepted that to the extent that the contents of Document A have become known to ENRC [redacted text] the SFO cannot maintain privilege over those parts of Document A. However as a matter of principle the SFO must be correct that privilege is not lost over a document or parts of a document merely because it contains facts which

are already known to the other party. Accordingly if and to the extent that the Claimant has identified in the redacted sections of Document A facts which are already known to it, this does not cast doubt on the approach of the SFO to the process of redaction. As discussed above, paragraph 16.2 requires that *"any redaction must be accompanied by an explanation of the basis on which it has been undertaken*." Having regard to the authorities discussed above the basis for these redactions is clear: it is litigation privilege in the communication. No further explanation in the circumstances is required.

Waiver by reliance in the pleadings

127. The final ground relied on by the Claimant is that it invites the Court to decide now whether the SFO's pleading, if unamended, will trigger a waiver of privilege come trial.

128. [Redacted text].

129. [Redacted text].

130. It was submitted for the SFO that mere reference to a document does not constitute deployment. Reliance must be placed on its content. Further even if reliance is placed on the content of a document, such reliance in a pleading does not constitute deployment and that a party has a grace period in which to decide whether or not to amend its case appropriately in advance of the trial: *Passmore on Privilege* at 7-212 to 7-214; *Buttes Gas & Oil Co v Hammer (No 3)* [1981] QB. In relation to the first sentence it was submitted for the SFO that there is no reliance upon the contents of Document A. In relation to the second sentence it was submitted for the SFO that it advances a plea as to the approach the SFO took to the drafting, which is divorced from any particular reliance upon the contents of Document A, but, if it did cross the line, the SFO would be entitled for a grace period to consider amending the relevant part of the confidential annex and would ask for such a period.

131. In my view the first sentence of paragraph 5.2.1 does not put in issue the content of Document A for the reasons submitted by the SFO as set out above and in the confidential Judgment. However in my view the second sentence cannot be characterised as merely the "approach to drafting" but does put in issue the content of Document A. In line with the authorities the SFO can elect whether to amend its pleading and whilst it has not lost privilege by reason of the pleading it will need to elect whether to amend its pleading and this should be done within a period to be specified in the order consequential upon this judgment.