Neutral Citation Number: [2018] EWHC 3364 (Admin)

Case No: CO/1481/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2018

Before:

MR JUSTICE MORRIS

- -

Between :

THE QUEEN ON THE APPLICATION OF JET2.COM LIMITED	**Claimant**
- and -	
CIVIL AVIATION AUTHORITY	**Defendant**

- -
- -

Charles Béar QC and Nicolas Damnjanovic
(instructed by **Norton Rose Fulbright LLP**) for the **Claimant**

Sam Grodzinski QC and Iain MacDonald
(instructed by **Office of General Counsel, The Civil Aviation Authority**) for the **Defendant**

Hearing dates: 21 and 23 November 2018

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Approved Judgment

Mr Justice Morris:

A. Introduction

1. This is an application by Jet2.com ("the Claimant") for an order pursuant to CPR 31.12 for specific disclosure against the Civil Aviation Authority ("the Defendant") of seven categories of document.

2. The application is made in judicial review proceedings, in which the Claimant challenges, first, the Defendant's decision taken on or about 27 December 2017 to publish a press release concerning the Claimant's refusal to participate in a new ADR scheme proposed for the aviation industry and, secondly, the Defendant's decision to publish inter partes correspondence regarding that press release on or about 5 February 2018 and on or about 19 February 2018.

B. The Factual background

Background and summary

3. The Claimant operates flights to and from the UK and is the UK's fourth largest scheduled airline. Mr Philip Meeson is its Executive Chairman and Mr Steve Heapy is its Chief Executive Officer. The Defendant is the regulator for the aviation industry. At the relevant time Mr Andrew Haines was its Chief Executive Officer and Mr Richard Moriarty was Group Director of its Consumer and Markets Group ("CMG") and Deputy Chief Executive. Mr Moriarty has subsequently succeeded Mr Haines as CEO.

4. The claim concerns the Defendant's conduct in relation to the Claimant's decision not to participate in a new, voluntary, alternative dispute resolution ("ADR") scheme introduced for the aviation industry.

5. The Defendant has for many years funded a service known as the Air Transport Users Council which handled air passenger complaints. That service was incorporated into the Defendant, becoming the Passenger Advice and Complaints Team (PACT). PACT mediates complaints between passengers and commercial operators by communicating directly with an operator on a passenger's behalf.

6. EU Directive 2013/11/EU requires Member States to implement regulations which ensure that consumers can, on a voluntary basis, access ADR processes for disputes concerning contractual relations between consumers and traders. In accordance with the Directive, the UK passed the Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015. The Regulations provide for a voluntary scheme of ADR, with both traders and consumers able to elect whether they make use of it. The Defendant is designated as the competent authority in relation to ADR for the aviation industry. To date the Defendant has approved two organisations to provide ADR services to resolve complaints made by passengers against airlines ("the new scheme").

7. Under the Regulations airlines can choose whether or not to participate in the new scheme. The Claimant has to date elected not to participate in the new scheme and continues to rely on the PACT scheme.

8. It is the Claimant's case that, at all stages and as the Defendant is aware, there has been nothing unlawful, improper or contrary to any industry code of practice in the Claimant's decision not to participate in the new scheme.

9. It is the Defendant's published objective to obtain full participation in the new ADR scheme and ultimately to close down PACT. Since 2016, it has also expressed increasing support for primary legislation to make participation in the new scheme mandatory.

The Press Release

10. On 27 December 2017, the Defendant issued a press release ("the Press Release"), at the same time as publishing its policy document "ADR in the aviation sector – a first review" CAP 1602 ("the Review"). The Press Release subjected the Claimant to criticism for choosing not to participate in the new scheme.

11. In the Press Release, headed "*Thousands more airline passengers are now receiving compensation thanks to Alternative Dispute Resolution (ADR)*", the Defendant gave information as to the number of airlines who had signed up to ADR and identified others, and in particular, the Claimant, who had not, urging them to sign up. The Press Release criticised the Claimant for choosing not to participate in the new scheme. It stated that Claimant:

> *"has 'inexplicably and persistently' refused to sign up - "denying its customers access to a fair arbitration service, which can legally resolve disputed complaints fairly and efficiently".*

The Press Release went on to quote observations from Mr Haines, including the following:

> *"it is extremely disappointing that Jet2, one of the UK's largest airlines, has so far inexplicably and persistently refused to sign up, denying their passengers access to an independent arbitration service. .... Clearly this decision puts Jet2's customers, and those of other airlines that haven't yet signed up, at a distinct disadvantage, and, in many cases, could mean their passengers are denied the fundamental rights they are entitled to".* (emphasis added)

It is the Claimant's case that these accusations were false and/or misleading.

The ensuing correspondence: January and February 2018

12. In a 7-page letter from Mr. Meeson to Mr Haines, dated 16 January 2018 ("the 16 January Letter") the Claimant complained to the Defendant about the tone and content

of the Press Release (and, at that stage, of the Review) and explained its reasons for choosing not to move to the new ADR scheme.

13. The Defendant responded, by letter dated 1 February 2018 ("the 1 February Letter") by criticising the Defendant further, including (so the Claimant alleges) making further false and/or misleading statements. The 1 February Letter stated, inter alia:

> *"Your letter was surprising and extremely disappointing on two fronts; your apparent disregard for the rights of customers when your levels of service fall below that which you say you aspire to and secondly the poor and inconsistent case you make in seeking to defend, what I regard, as your indefensible position".*

It went on to assert that the Claimant's arguments against ADR are "*transparently narrow and self-interested*" and repeated the criticism of denying customers their fundamental rights. The 1 February Letter also contained complimentary observations about the Claimant's services and asserted that the Defendant was pursuing a proper purpose by drawing attention to the Claimant's ongoing failure to participate in ADR. The Letter concluded by the Defendant reserving the right to publish its letters and any previous or future correspondence on the issue.

14. On 6 and 19 February 2018 the Daily Mail published articles that referred in detail to the foregoing correspondence between the Claimant and the Defendant, as well as the underlying critique in the Press Release. The 6 February article repeated some of the criticisms of the Claimant made in the 1 February Letter. It included the direct quotes from the Letter, set out in paragraph 13 above. It is now clear that the Defendant provided some or all of the correspondence to the Daily Mail. The Claimant contends that the article adopted the Defendant's stance against it, portraying the Claimant as intent on depriving it customers of compensation to which they were legally entitled.

The Proceedings

15. After pre-action protocol correspondence in March 2018, proceedings were issued on 12 April 2018. The Defendant opposed permission in Summary Grounds of Defence dated 8 May 2018. On 8 June 2018 Mr Justice Turner granted permission on the papers, stating that "on a quick perusal of the material available there is an arguable case for judicial review". The substantive hearing of the claim is due to commence on 29 January 2019.

16. Subsequently on 3 August 2018 the Defendant served Detailed Grounds for Contesting the Claim ("Detailed Grounds") together with a witness statement of the same date from Mr Richard Moriarty.

17. In September 2018 and in the light of the Detailed Grounds and Mr Moriarty's statement, the Claimant wrote to the Defendant seeking disclosure of material in a number of categories. Correspondence ensued, with the Defendant broadly declining to give such disclosure. The present application was issued on 26 October 2018, supported by a witness statement from Mr Springthorpe of the Claimant's solicitors, Norton Rose Fulbright. Ms Serena Lim, the Defendant's Principal Legal Adviser, responded in a witness statement dated 13 November 2018. In the lead up to and

indeed during the course of the hearing, further correspondence has ensued. As a result, some issues were resolved and yet further, new, issues have been raised.

The Claimant's grounds for judicial review

18. The Claimant contends that the Defendant's publication of the Press Release and subsequent inter partes correspondence (in January and February 2018) was unlawful on four grounds: the publications were ultra vires; the Defendant acted for an unlawful purpose or took into account irrelevant considerations; breach of duty of procedural fairness; and irrationality. It is the first two grounds which are relevant to this application: the Claimant's case is as follows:

    (1) The Defendant had no statutory power publicly to criticise the Claimant for choosing not to participate in the new scheme. Section 83 Civil Aviation Act 1982 ("CAA 1982"), which gives the Defendant the power (and the duty) to publish information and advice for the purpose of assisting consumers to compare services and facilities used in connection with the use of air transport services or with a view to improving the standards of services, did not give power to issue the Press Release or to publicise the correspondence.

    (2) In publishing the Press Release and the correspondence the Defendant acted for unauthorised purposes, namely to damage the Claimant's trading interests and reputation by singling it out for severe criticism from a neutral body and thereby punish the Claimant for its decision not to join the new ADR scheme, and in turn to put pressure on the Claimant to take the voluntary step of joining the scheme. In acting for those purposes, the decisions were reached for an improper purpose and/or by taking into account improper and/or irrelevant considerations. Moreover such purposes were outwith the Defendant's powers in s.83 CAA 1982 and in any event a public authority which uses its powers to punish a person who has done nothing unlawful acts for an unlawful purpose.

The Defendant's case on the substantive judicial review

19. The Defendant denies each of the grounds. Its case specifically on these two grounds is as follows:

    (1) Publication of the Press Release and of the correspondence was clearly within the Defendant's powers under section 83 CAA 1982.

    (2) As to purpose, the Claimant's allegations that its purpose was to damage the Claimant's trading interests and to punish it are entirely unsupported by the facts. Rather the Defendant's lawful purpose was to promote the interests of consumers by making them aware of which airlines had refused to join the ADR scheme, since the Defendant properly considered that the availability of such a Scheme benefited consumers. The Defendant admits that the publicity would put pressure on the Claimant to join the scheme. That was not unlawful. It could lawfully take the view that it would be beneficial to consumers for airlines to sign up to the scheme, even though the scheme is voluntary.

The application for disclosure

20. By its application, the Claimant seeks the following seven categories of documents:

    (a) All documents recording the Defendant's communications with the Claimant, Norwegian, Aer Lingus or Emirates in advance of publication of the Press Release and which relate to that publication.

    (b) All documents recording the Defendant's discussions concerning their decision to take a different approach to the communications with the Claimant.

    (c) Any correspondence or communication between the Defendant and the Daily Mail in relation to ADR and/or the Claimant between 1 January 2018 and 28 February 2018.

    (d) Any correspondence or other communications between the Defendant and any other media organisation in relation to ADR and/or the Claimant between 1 January 2018 and 28 February 2018.

    (e) All drafts of the Defendant's letter to the Claimant dated 1 February 2018.

    (f) All records of any discussions concerning those drafts.

    (g) All drafts of the Press Release.

    Categories (a) and (b) both concern an allegation of differential treatment of the Claimant as compared with other airlines; category (c) relates to communications between the Defendant and the Daily Mail; categories (e) and (f) both concern drafts of the 1 February Letter; and category (g) relates to drafts of the Press Release itself. Ms Lim has stated that there are no documents falling within category (d) and the Claimant no longer pursues the application for that category.

Relevant events between November 2017 and February 2018 in more detail.

21. In the following paragraphs, I set out, in more detail and chronologically, specific facts relevant to the foregoing categories of document in the application for disclosure. Much of this was disclosed in Mr Moriarty's witness statement and accompanying documents.

22. In its draft policy, published for consultation in January 2015, the Defendant set out its policy on the new ADR scheme. The Defendant explained how it would encourage more reluctant airlines to join an ADR scheme, by use of information and other measures. It expressly referred to the option of "naming and shaming" airlines that do not participate "as a means of encouraging participation".

Advance notice of the Press Release: November 2017 (categories (a) and (b): differential treatment)

23. At the end of 2017, the Defendant was due to publish the Review. At the same time it intended to publish a statement, which Mr Moriarty says, was aimed at informing the public about which airlines and airports had signed up to an ADR scheme and

encouraging others who had not yet signed up to do so. The Defendant decided to contact, in advance of the Press Release, the main airlines who had not yet signed up. In addition to the Claimant, these were Norwegian Air Shuttle, Emirates and Aer Lingus ("the Other Airlines").

24. The means by which these airlines were contacted was different. On or around 27 November 2017, the Other Airlines were each contacted by Mr Tim Johnson, (Policy Director in the Defendant's Strategy and Policy Department) in an email in standard form wording. The wording of that email had been agreed internally on 24 November. It is clear that by that stage it was agreed that, in the case of the Claimant, Mr Moriarty was going to speak directly to Mr Heapy, and, to this end, on the same day Mr Moriarty sent Mr Heapy a personal email.

25. The email to the Other Airlines indicated an intention to publish the Review and pointed out that the airline in question had not yet signed up and that the Defendant would be calling publicly on the airline to participate. The email offered the airline the opportunity to discuss with Mr Johnson its plans for participating in ADR and gave the recipient time to discuss the points made "with your colleagues". Mr Johnson suggested a call some time between 27 November and 1 December.

26. In the case of the Claimant, Mr Moriarty's email to Mr Heapy, sent three days earlier, on 24 November 2017, was in different, and less formal terms. Mr Moriarty said that he wanted to give Mr Heapy a private heads up and to see whether he wanted a quick call next week. He went on to explain:

> *"Over Xmas and into Jan we are planning a major public and press campaign about ADR and airlines and I suspect this will put a spotlight on those that have not signed up. As you know Jet 2 is now the only airline of scale not signed up to ADR. What I wanted to test was whether this was a No Never or something you are prepared to do in principle but need to choose a partner, etc – clearly this could affect the tone.*
>
> *Anyway, because of our relationship I wanted to reach out confidentially and swap notes with you. I'd be grateful if you did not forward this."*

27. In his witness statement, Mr Moriarty explains the difference in approach. Given his pre-existing relationship with Mr Heapy, which had always been amicable, he decided to contact him directly and in his own words. Given the importance of the issue, he did not want to leave matters with someone more junior on the Claimant's side and felt it was important for the email to come from him, in order to lend it authority. He wanted to do this purely on a one-to-one basis as the CAA was not yet in a position to go public with the press release. As such, he asked Mr Heapy to keep the contents of his email to himself.

28. As regards the Other Airlines' responses to the email of 27 November, Mr Moriarty explains in his witness statement: "*I am told that Mr Johnson received responses from Emirates, Norwegian and Aer Lingus within five days of his emails being sent and calls were held to discuss the matter further before the Claimant had responded to my email*." As a result of those calls Norwegian agreed to join the ADR scheme, whilst

Emirates and Aer Lingus indicated to Mr Johnson that they had not ruled out the idea of joining the scheme.

29. By email on 13 December, Mr Heapy responded to Mr Moriarty's email of 24 November explaining that he had been travelling extensively. He had discussed the issue with Mr Meeson, who had indicated that he did not consider that ADR was the right mechanism for them. He offered a discussion over the next few days.

30. Mr Moriarty forwarded Mr Heapy's email to Mr Johnson. Mr Johnson responded, on 15 December 2017, with the comment that Mr Heapy's response was "*a pretty strong line*" and that it was not worth a follow-up and "*so proceed with Plan A*." Mr Moriarty responded on the same date "*Defo Plan A*". The Defendant has since confirmed in correspondence that this was colloquial and that there were in fact no formal plans A, B or otherwise.

Preparation of the Press Release (category (g))

31. The Defendant proceeded with preparation for the publication of the Review and the Press Release.

32. On 21 December 2017, Henry Killworth, a senior press officer at the Defendant distributed by email to Mr Haines, Mr Johnson and, Richard Stephenson, (the Defendant's Communication Director) a draft press release, which had been approved subject to any final amendments which Mr Haines might have. That draft ("draft 1") has been exhibited to Mr Moriarty's statement. Later that day, each of Mr Johnson and Mr Richardson made small amendments to draft 1 and at 6:37pm Mr Richardson circulated the draft as so amended. That draft ("draft 2") has also been exhibited by Mr Moriarty. The principal change is an express reference to the fact that Norwegian had recently signed up to the ADR scheme.

33. The next morning at 907 am, 22 December 2017, Mr Haines circulated a further draft under cover of an email in which he stated "*Have made a few tweaks to pimp it up a little*". In that draft ("draft 3") the words "inexplicably, persistently" were added to describe the Claimant's refusal to sign up.

34. The Press Release itself was in similar, but not precisely the same, terms as draft 3. The adverbs "inexplicably and persistently" were specifically attributed to Mr Haines in his personal quotation and there was a grammatical change by the addition of the word "and" between "inexplicably" and "persistently". There were a couple of other changes.

35. On the basis of this account, the Claimant suggests (and the Defendant accepts) that there must have existed further drafts of the Press Release both prior to draft 1, and after draft 3 and before the final document.

The Preparation of the 1 February Letter (categories (e) and (f))

36. In the 16 January Letter, the Claimant complained about the content and tone of the Review and the Press Release, explaining why it does not wish to join the new ADR scheme and setting out in detail why it considers ADR not to be appropriate for Regulation 261 claims and that it had not dismissed it out of hand. Mr Meeson

concluded by confirming that the Claimant presently had no intention of signing up to the current ADR schemes. On 18 January 2018 the Claimant issued a press release and at some point also published the 16 January Letter on its own website.

37. Following receipt of the 16 January Letter and internal distribution of the Claimant's press release, there was internal email correspondence within the Defendant involving Mr Moriarty, Mr Haines and Mr Stephenson and others. In particular in an email dated 18 January 2018, Mr Haines suggested:

> *"We should develop a narrative around Jet 2. They have been (one of) the most litigious airline disputing 261, threatening legal action against the CAA. References to their billionaire chairman might not go amiss in the process. We could share it with Jet 2 as our rebuttal of any continuation of such misleading information.*
>
> *Attack dogs please Lord S"*

38. In the result, that rebuttal took the form of the 1 February Letter. Before it was sent on 24 January 2018 Mr Buffey, Head of Consumer Enforcement within CMG circulated for comment, to Mr Moriarty and others, including Ms Lim, a draft of what became the 1 February letter ("draft 1 February Letter"). In his covering email Mr Buffey commented: "*I wouldn't quite call it "attack dog" style. More of a cranky alpaca. Anyway, see what you think...*"

39. In his witness statement, Mr Moriarty accepts (and states that "Mr Haines also acknowledges") that Mr Haines' reference to "billionaire chairman" was inappropriate. The phrase "attack dogs" was a reference to pressing on with the CAA's media publicity. He explained that "*Mr Haines' passion for consumer rights did on occasion lead him to express himself in colourful terms*", but his email was not reflective of any part of the approach taken by the Defendant.

40. There are a number of differences between the draft 1 February Letter and the 1 February Letter as sent. In particular three additional paragraphs were inserted at the beginning of the letter, the first of which is the paragraph set out at paragraph 13 above. It is common ground that further drafts, after the draft 1 February Letter, exist and were circulated for discussion within the Defendant, including to its in-house lawyers, Ms Lim and Dilsha Caldera.

The involvement of the Daily Mail 29 January to 19 February 2018 (category (c))

41. In his statement, Mr Moriarty explains that the Defendant has a team of press officers who brief journalists on a regular basis and has many contacts at national newspapers. On 29 January 2018, there was a breakfast briefing meeting between personnel at the Defendant and Victoria Bischoff, deputy editor of Money Mail at the Daily Mail. The main focus of the meeting was the different issue of allocated seating. The ADR issue was also discussed. Under cover of an email dated 1 February 2018 stating "*As promised here is a background briefing for you*" and suggesting a follow-up call, Mr McConnell (Senior Communications Adviser at the Defendant) sent Ms Bischoff a background briefing, which outlined the Defendant's work on a number of consumer issues, including ADR. In that briefing, the section on ADR retained the quote from

Mr Haines in the Press Release that the Claimant had "*inexplicably and persistently refused to sign up - denying its customers access to a fair arbitration service*". Mr Moriarty states in his statement that that was done in error and it was clear that at that stage it was no longer accurate to use the word "inexplicably"; the Claimant had by that point provided an explanation for its reluctance to sign up to the new ADR scheme.

42. In his statement (at paragraph 34), Mr Moriarty states that at the meeting on 29 January 2018 Mr Stephenson showed Ms Bischoff a copy of the 16 January letter and informed her of the Defendant's likely response, but did not discuss its approach with her. There is some ambiguity in the last two sentences of that paragraph in his statement as to whether a draft of the 1 February Letter was also shown to Ms Bischoff in the course of that meeting however, in the light of further explanation given by Ms Lim and in the course of the hearing, I read those sentences as referring, or including reference to, the 1 February Letter.

43. On 5 February 2018, the Defendant published on its website the 1 February Letter, together with the 16 January Letter. On the same day Mr McConnell emailed Ms Bischoff stating "*here is the link as promised*". The link was to a specific page on the Defendant's website, which page itself included links to a number of general letters on the subject of ADR and also specifically to both the 16 January Letter and the 1 February Letter.

44. By email at 315pm on 6 February 2018, the Claimant sent to Ms Bischoff a statement, together with a copy of its further letter dated 6 February 2018, in response to the 1 February Letter. Within a few minutes, Ms Bischoff forwarded that email to Mr Stephenson at the Defendant.

45. Later that day, shortly after 10pm, the Daily Mail published an article on ADR and the Claimant. That article was updated and produced on 7 February 2018.

46. Mr Moriarty goes on to explain that the Daily Mail contacted the Defendant again on 19 February 2018, following publication of the Claimant's financial results, asking for comments on the Claimant's refusal to sign up to the ADR scheme. Mr McConnell responded by email on that day, with a statement which reiterated its previous position.

C. Relevant principles relating to disclosure in judicial review claims

47. Relevant principles relating to disclosure in judicial review claims are established in a series of well known authorities. I have been referred in particular to *R v Secretary of State for Health ex parte London Borough of Hackney and others* (CA), unreported, 29 July 1994; *Belize Alliance of Conservation Non-Governmental Organisations ("BACONGO") v The Department of the Environment* [2004] UKPC 6; *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650; *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 4)* [2016] UKSC 35 at §§183-184; and *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin) at §§8-24; reiterated in *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812 [2018] 4 WLR 123 at §106.

48. The established principles can be summarised as follows:

(1) In judicial review proceedings, disclosure is not required unless the court orders otherwise: CPR 54, PD54A §12.

(2) In judicial review proceedings public authorities have a duty of candour, requiring them to provide a full and accurate explanation of all the facts relevant to the issue which the court must decide, including the full facts and reasoning underlying the decision challenged. It is a "self-policing" duty. The duty requires disclosure which is relevant or assists the claimant. See *Tweed*, §54, *Bancoult* §184, and *Hoareau* §§18, 23.

(3) Public authorities must be open and honest in giving disclosure and in their affidavits or witness statements. They must identify "the good, the bad and the ugly". Witness evidence must not obscure areas of central relevance, whether deliberately *or unintentionally,* nor contain any ambiguity nor be economical with the truth, nor contain spin: *Hoareau* §§20 and 22.

(4) The duty of candour is one of the reasons why the ordinary rules of disclosure do not apply to judicial review: *Hoareau* §13 and also *Bancoult* §183.

(5) Disclosure orders are likely to remain exceptional in judicial review proceedings. The court should guard against "fishing expeditions" seeking further grounds of challenge.

(6) Whilst in the *BACONGO* case, Lord Walker commented that "proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation", that observation was made in the context of describing *the public authority's* duty of candour and, as such, was directed towards the approach and conduct of the public authority resisting disclosure, rather than the applicant seeking disclosure. (See also the purpose of citation of *BACONGO* in *Hoareau* §§13-17).

(7) Where the court is required to resolve factual disputes, disclosure will be ordered where, in the given case, it appears to be "necessary in order to resolve the matter fairly and justly": *Tweed* §§3, 32, and 52. An example of such an issue of fact is whether a decision has been taken for an improper purpose: see *R (Core Issues Trust) v Transport for London* (CA) [2014] EWCA Civ 34 especially at §§34, 38 and 48.

(8) It will be regarded as so necessary, if a party raises a factual issue of sufficient substance to lead the court to conclude that it may, or will, be unable to resolve the issue fairly, fairly that is *to all parties*, without discovery of documents bearing on the issue one way or the other: per Bingham LJ in *ex parte London Borough of Hackney* at p19. However disclosure will not be ordered on the basis of unsupported assertions of wrongdoing on the part of public authorities: *supra,* per Saville LJ at p34.

The relationship between compliance with the duty of candour and the Court's power to order disclosure of documents

49. On the basis of the foregoing principles, Mr Grodzinski submitted that where a public authority serves a witness statement explaining that it has complied with its duty of candour, but the claimant disputes that, the court must assess all the material available to it in order to determine whether there is a substantial doubt that the public authority has failed to appreciate, or comply with, its duty of candour. Only if there is such a substantial doubt, should the court order disclosure of documents.

50. He makes this submission because, he contends, in the present case there is nothing either on the face of the contemporaneous documents or from any other material before the court that undermines the explanations given by Mr Moriarty in his witness statement. The Defendant, by that statement and by exhibiting certain emails, has disclosed "the good, the bad and the ugly". The court should have confidence that the Defendant has appreciated the scope of its duty of candour and has complied with it.

51. Leaving to one side, for the time being, the question of whether Mr Moriarty has given a sufficiently full and frank account, I do not accept Mr Grodzinki's statement of principle. Compliance with the duty of candour and an order for disclosure are not mutually exclusive. Whilst, as stated above, the duty of candour is one of the reasons why the *ordinary rules* of disclosure do not apply, the Court nevertheless retains the power to order disclosure. It is ultimately for the Court (and not the public authority) to decide whether, in any particular case, disclosure of documents is necessary for the fair and just disposal of the issues. The public authority may have genuinely done its very best to comply with its duty of candour, but that is not conclusive.

52. Mr Grodzinski fairly accepted that there is no authority for his further proposition. In fact, the authorities suggest the contrary. In *Tweed*, it was held that there is no longer any rule that there must be a demonstrable contradiction or inconsistency or *incompleteness* in the public authority's witness evidence before disclosure is ordered: see Lord Carswell §32 and Lord Brown §56. Moreover, Lord Carswell (§31) rejected the notion that the previously more restrictive rule on disclosure should not be relaxed because of the existence of the duty of candour. Moreover, in *Tweed*, even where the applicant did not suggest that there had been any deficiency in candour in the summary evidence placed before the court, Lord Carswell (at §39) saw force in the applicant's submission that original documents should be disclosed because "it is not always possible to obtain the full flavour of the content of documents from a summary, however carefully and faithfully compiled and that there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge from the summary". Although I note that in *Bancoult* Lord Kerr cited *Fordham's Judicial Review Handbook* stating that "a main reason why disclosure is not ordered in judicial review is because courts trust public authorities to discharge this self-policing duty", in my judgment that explains the reason for the starting point in PD54A and does not provide a blanket reason not to order disclosure in any particular case.

53. Two further aspects of legal principle are in issue: CPR 31.14 and legal advice privilege. I deal with these under the particular document category where they arise.

D. Discussion and Analysis

Generally: the issue relevant to the application and disclosure so far

54. Before turning to consider each of the categories, I make some general observations.

55. First, the central issue in the proceedings relevant to this application is the issue between the parties as to whether the Defendant decided to publish the Press Release, the 1 February Letter and the other correspondence for an improper purpose.

56. Secondly, the Claimant's case of improper purpose is arguable; permission has been granted and since then further material has been disclosed. Unlike the position in *ex p. Hackney*, this is not a case of a wholly unsupported allegation.

57. Thirdly, the actual purpose or purposes for which the Defendant decided to make the publications is a question of fact.

58. Fourthly, absent an express statement of intention, purpose and intention are matters of inference to be drawn from primary facts. The court will be required to reach a conclusion of inferential fact drawn from all the relevant circumstances. Moreover, questions of purpose, motive or foreseeability of consequences may involve drawing some fine lines of distinction. In such a case, nuances of meaning, nuggets of information or expressions of opinion may well be important.

59. The Claimant submits that it is appropriate for the Defendant to disclose all documents which illuminate its purpose or purposes in making the publications, the degree of influence those purposes had on the decision and the considerations the Defendant actually relied upon in making the Publications.

60. Finally, as regards the material disclosed (in the wide sense) to date, the Defendant, pursuant to its duty of candour, has disclosed a substantial amount of evidence concerning the Press Release and the correspondence, both in Mr Moriarty's witness statement and in documents exhibited. The Defendant has taken its duty seriously, given a detailed account, and has disclosed "colourful" material, which might be regarded as unhelpful to its case. On the other hand, there is some substance in the Claimant's criticisms, first, that the Defendant was slow in its response (for example, failing to address issues relating to the Daily Mail at any time before its Detailed Grounds) and secondly that aspects of Mr Moriarty's statement may be less than full. I make no findings on that at this stage, but Mr Béar has made some cogent points to suggest that the Defendant has not placed all its cards "face up". However, in the light of my conclusion at paragraphs 51 and 52 above, I do not need to make findings as to the Defendant's compliance with the duty of candour.

Categories (a) and (b): Other airlines and unequal treatment

61. Category (a) covers *all documents* which *record* the Defendant's communications with the Claimant and with the Other Airlines. It thus includes (but is not necessarily limited to), both the Other Airlines' responses to the 27 November email sent to them and any internal discussions following, and which refer to, those responses. Category (b) concerns only internal discussions concerning *the decision to take a different*

approach to communications with the Claimant. Ms Lim's evidence is that there are no documents falling within category (b).

The parties' submissions

62. The Claimant seeks specific disclosure under CPR 31.12. Further by application notice issued in the course of the hearing, it seeks disclosure specifically of the Other Airlines' responses pursuant to CPR 31.14, as being "documents mentioned in a witness statement".

63. As regards the main application for specific disclosure, the Claimant contends that it was "singled out" by the Defendant, both in the content and manner of pre-contact at the end of November, and then more particularly in the Press Release and the 1 February Letter. A comparison between the treatment of, and circumstances of, the Other Airlines and the Claimant will be likely to elucidate the purpose of the different treatment of the Claimant. As to category (a), the similarities and differences between the responses the Defendant received from the Other Airlines and the response from the Claimant and the Defendant's internal reactions will illuminate its purposes in treating the Claimant as it did. As to category (b), the Claimant contends that it is surprising that there are no such further documents and asks that the Defendant be required to conduct a further search.

64. As regards CPR 31.14, Mr Béar submitted that it applies to judicial review proceedings, that a distinction is to be drawn between inspection under CPR 31.14 and "disclosure" under CPR 31.2 and that, although there is a residual discretion in the court not to order inspection of a document mentioned or referred, in the present case the considerations which might trigger that residual discretion do not arise.

65. The Defendant submits, first, that the premise of "differential treatment" is not made out. There was in substance no difference in the November email sent to the Claimant and that sent to the Other Airlines. Mr Moriarty has given a clear and candid account both of those emails, how they came to be sent and of how the comparative responses of the Other Airlines and the Claimant led the Defendant to take the approach it did in the Press Release. The Other Airlines' responses and the Defendant's internal discussion of them are irrelevant to any grounds. As regards category (b) the Defendant has given a further, full and detailed explanation of the searches that have been carried out. There are no such documents and that is sufficient.

66. As regards CPR 31.14, Mr Grodzinski submits, first, that CPR 31.14 does not apply at all to judicial review proceedings, relying on the decision of Lewis J *in R (on the application of Sustainable Development Capital LLP) v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin) at §76-80; secondly that as a matter of discretion, the Court should not order inspection, in particular because of confidentiality issues; and thirdly, that in any event the CPR 31.14 application has been made very late in the day and should be adjourned to allow the Defendant proper opportunity to consider the position.

Discussion

67. First, as regards the November emails themselves, I consider that the difference between the standard form email sent on 27 November and the personal email sent by

Mr Moriarty to Mr Heapy (see paragraphs 25 and 26 above) does not establish a relevant "differential treatment" of the Claimant. There is little difference as regards the substantive topics covered by the emails. In this regard I do not accept the criticisms made at paragraph 20 of Mr Springthorpe's witness statement. Moreover, Mr Moriarty has given a cogent explanation of the reasons for the more personal approach made to Mr Heapy: see paragraph [30] above.

68. Secondly, however, I consider that, in principle, disclosure of the responses from the Other Airlines and subsequent internal discussion of those responses is necessary for the fair resolution of the issue of improper purpose; in particular to illuminate the lead up to the Press Release and the alleged "singling out" of the Claimant. Mr Moriarty himself in his witness statement, at paragraph 18 and 26, expressly refers to (and relies upon) those responses, and by way of contrast with the position of the Claimant, and indicates that that informed the Claimant's subsequent conduct generally and in relation to the content of the Press Release. (I rely upon this factor, regardless of the operation of CPR 31.14, see below). Since nuance may be important, the Court should have before it both the actual documents and the subsequent internal consideration to which Mr Moriarty refers (cf *Tweed* §39). Thus in principle category (a) is to be disclosed.

69. Thirdly, as regards the responses from the Other Airlines, the Defendant properly raises the possibility that they contain confidential information of the Other Airlines which should not be disclosed to a commercial competitor such as the Claimant. This would provide a basis either for limiting the persons to whom disclosure should be given, or possibly, making redactions to the disclosed documents. At this stage disclosure will be limited to the Claimant's legal representatives. Thereafter consideration can be given to whether the responses can properly be seen more widely by the Claimant.

70. Finally, as regards category (b) – which relates to matters in advance of the November emails - I accept Ms Lim's statement that there are no documents falling within this category, in the context of her detailed explanations of the searches which have been carried out. I see no basis for requiring the Defendant to carry out further searches.

CPR 31.14: documents referred to in a witness statement

71. CPR 31.14 is headed "Documents referred to in statements of case etc" and states, inter alia, "(1) "A party may *inspect* a document mentioned in … (c) a witness statement".

72. In the light of my conclusion in paragraph 68 above, this issue is not necessary for my decision. Nevertheless, in my judgment CPR 31.14 does not automatically apply to judicial review proceedings. I recognise the distinction between "disclosure" in the narrow sense of CPR 31.2 and "inspection" and accept that the decision in *Sustainable Development*, was addressed, in terms, to CPR 31.2 and 31.3 (and not 31.14). Nevertheless in my judgment the general limitation upon "disclosure" in PD54A §12 is not intended to make that distinction and is a reference to the otherwise applicable rules on disclosure and inspection found in CPR 31 as a whole. I refer to Lord Brown in *Tweed* at §44, a fair reading of which is that he considered the word "disclosure" in PD54A to include both aspects of CPR 31. He expressly referred both to disclosure and inspection without distinction, and included reference to the specific

power in CPR 31.14 of inspection. His reference to the latter is made expressly in the context of the "rule" in PD54A i.e. where the court does decide "to order otherwise", then one of its powers is CPR 31.14. Thus CPR 31.14 is not distinct from PD54A. See also the use of the word "disclosure' by Singh LJ in *Hoareau* at §15. Moreover, the alternative construction – that "disclosure" in PD54A excludes "inspection" – would be entirely contrary to the underlying rationale for Lewis J's decision in *Sustainable Development* and would lead to the conclusion that it was wrong on the facts, merely because no one had noticed CPR 31.14.

73. For these reasons, I do not address further arguments about the nature of the discretion under CPR 31.14 and in particular the case of *NCA v Abacha* [2016] EWCA Civ 760 at §§28-32.

Category (c): Daily Mail

The parties' submissions

74. The Claimant submits that the publicising of the correspondence by the Daily Mail at the behest of the Defendant has been at the centre of the Claimant's complaint from the outset and is a central aspect of the facts in issue. Whilst aspects of the communications between the Defendant and the Daily Mail have been disclosed in, and by, Mr Moriarty's statement (and are thus conceded to be relevant), the entire chain of communication between them is relevant and the whole chain cannot be properly understood unless all the individual communications within it are identified. Mr Springthorpe in his statement identifies three particular matters which suggest that there are further relevant documents.

75. The Defendant contends that Mr Moriarty has given a full account of the relevant communications between the Defendant and the Daily Mail in this period. Whilst there are further documents, none of the them fall to be disclosed, for the reasons given by Ms Lim in her statement. The Claimant is wrong to assume that all telephone, text or other communications between the Defendant and Ms Bischoff at that time must have been in relation to the Claimant's refusal to participate in the ADR scheme.

76. Following the hearing, I have received informal written submissions from Associated Newspapers Limited, the owner of the Daily Mail. These arose after an email by Associated Newspapers to the parties following the first day of the hearing in which it raised concerns. Associated Newspapers complains that further disclosure by the Defendant of any of the communications with the Daily Mail would be in breach of its duty of confidence owed to Associated Newspapers and that the court must take into account the protection afforded by Art 10 ECHR and s10 Contempt of Court Act 1981 to communications generally between journalists and their source. I thus invited, and received, written submissions from the parties on the points raised by Associated Newspapers. Associated Newspapers has not sought to intervene in the proceedings. Nevertheless, as Mr Béar fairly observed, the court is required to apply Article 10 ECHR in any event.

Discussion

77. In my judgment disclosure of this category of documents is not necessary for the fair disposal of the issues in the case. I take the three specific matters raised by Mr Springthorpe in turn.

78. First, as to the call referred to in Mr McConnell's email of 1 February 2018 and further contact between the Defendant and Ms Bischoff, Ms Lim has explained that there was no such call and that further text messages related to issues other than the ADR issue (those other issues being covered by the briefing document).

79. Secondly, as regards the "promise" to provide the link referred to in Mr McConnell's email of 5 February (see paragraph 43 above) and the communication in which the Defendant informed Ms Bischoff that the 1 February Letter had been sent, in the course of the hearing Mr Grodzinski confirmed that the promise was made at the meeting on 29 January and in his witness statement Mr Moriarty explains that it was by the email of 5 February that Ms Bischoff was informed that the 1 February Letter was in the public domain. Further, in the course of the hearing, Mr Grodzinski confirmed, on instructions, that the Defendant did not inform Ms Bischoff of the 1 February Letter otherwise than by sending the link.

80. Thirdly, as regards communication between Ms Bischoff and Mr Stephenson on or around 6 February about the article she was about to publish, Ms Lim explains that there was a short call and text messages, but states that they are not relevant to the Claimant's allegations. I have no reason to go behind that statement.

81. More generally, a substantial amount of material concerning the contact between the Daily Mail and the Defendant has been disclosed. It is clear that matters other than the ADR issue were the subject of those communications.

82. In the light of this conclusion, the issues raised informally by Associated Newspapers do not arise.

Category (e) and (f): drafts of 1 February 2018 letter

83. The Claimant has disclosed one draft of the 1 February Letter, and at the same time has disclosed email exchanges in the lead up to the 1 February Letter being sent, including emails from Mr Haines, see paragraphs 37 to 40 above. Those emails included the reference to "Attack dogs", "developing a narrative" and "billionaire chairman". Other drafts of the 1 February Letter exist, as do emails of discussions concerning those drafts.

84. Two distinct issues arise: first, is disclosure of documents falling within these two categories necessary for fairly disposing of the issues? Secondly, if, in respect of any such document, disclosure is so necessary, is that document protected by legal advice privilege?

(1) Necessary for fair disposal

The parties' submissions

85. The Claimant contends that all the drafts of the 1 February Letter and internal discussion of those drafts are plainly relevant to ascertaining the Defendant's purposes in publishing that letter and in providing it to the Daily Mail. This proposition is made even stronger by the involvement of Mr Haines who was responsible for promoting an aggressive stance in the course of its preparation.

86. The Defendant contends that some of the material sought is not required to be disclosed for the fair disposal. In principle there is no need to "excavate every single draft". Mr Moriarty has addressed the decision making leading up to 1 February in significant detail. To the extent that further drafts of the 1 February Letter do no more than show further changes in the precise wording, disclosure of them is not necessary. The 1 February Letter itself, including the additional three paragraphs, does not remotely suggest an improper purpose; and it follows that any intermediate drafts cannot illuminate the matter any further.

Discussion

87. As regards necessity, in my judgment, having conceded that at least one draft of the 1 February Letter should be disclosed together with certain discussion of the drafts, in principle all drafts of the 1 February Letter, together with internal discussion of those drafts should be disclosed in order fairly and justly to dispose of the issue of the Defendant's purpose in writing that letter, intending it to be published. It is clear from what has been disclosed to date that, at one stage in the preparation of the letter, Mr Haines at least, wished to take a "proactive" stance towards the Claimant and that the letter was to be the means of doing so. Whilst I accept that the changes as between draft 1 and the final Letter may not contain the strongest of criticism of the Claimant, nevertheless, in my judgment, the genesis and development of the Letter is relevant to its purpose in tone and content and in principle in order for the Court to dispose of the question fairly, all drafts are needed to show the genesis.

88. Moreover, as became clear in the course of oral argument, the Defendant accepts that there is further material in these two categories, whether by way of draft or internal discussion, which falls to be disclosed, subject to the issue of legal advice privilege. However no clear explanation of the distinction between the two sub-classes (non-relevant vs. relevant, but privileged) within these categories was provided.

(2) Legal Advice Privilege

89. In her witness statement, Ms Lim asserted legal advice privilege in respect of this category for the first time. She stated that she and Ms Caldera were involved in internal discussions and gave legal advice in relation to the various drafts of the 1 February Letter, the contents of which advice is privileged.

90. Between then and 22 November 2018 there was detailed inter partes correspondence, in which the Claimant sought clarification of the basis and supporting details of this claim for privilege. By letter of 16 November 2018 the Defendant responded by relying upon the general rule that a witness statement is generally conclusive. It

declined to give additional information about, nor to identify, specific documents and denied the existence of the dominant purpose test. In response to a further request for clarification, by letter dated 20 November, the Defendant confirmed that the documents in question are drafts of the 1 February Letter and internal emails about such drafts. Finally on 22 November 2018 the Defendant provided a further, more detailed, explanation of its position in relation to privilege. First, detailed searches of files of relevant personnel had been carried out. Secondly, if documents found were not disclosable under the duty of candour, they had not been disclosed and the issue of legal advice privilege is irrelevant. Thirdly, if the document would otherwise be disclosable under the duty of candour, the Defendant had applied the following approach to its consideration of legal advice privilege.

(1) Where a draft of the 1 February Letter was sent by email to one or both legal advisers for the purposes of obtaining legal advice on that draft, the email response from, and any revised draft prepared by, the adviser, and any comment by the recipient on that revised draft falls within the privilege.

(2) Where drafts of the letter had been sent by email to multiple addressees including one of the legal advisers and non-lawyers, such emails and drafts are protected by privilege. On the facts, each such communication was *sent to the lawyer* as part of the continuum of confidential communications for the purpose of legal advice.

(3) Even if the dominant purpose test applies, the reviewing lawyers were satisfied that the drafts and the emails discussing them were sent for the dominant purpose of obtaining legal advice as to their content.

(4) Disclosure of the drafts themselves would reveal the content of the legal advice.

The parties' submissions

91. The Defendant contends as follows:

(1) Drafts of the 1 February Letter are protected by privilege not only where they are prepared for the purpose of obtaining legal advice, but also where drafted in the knowledge that a lawyer was going to look at it. Each draft sent to, and from, the in-house lawyer is protected, once the in-house lawyer had become involved.

(2) Discussions of the drafts with others remain covered by privilege because they are covered by the continuum of communications with the in-house lawyer. Here the primary purpose of communicating with the in-house lawyers was to obtain their advice, and not merely to keep them "up to date". An email sent to both in-house lawyers and to non-lawyers, and an attached draft are all covered by privilege. If the draft were to lose privilege because it was sent at the same time to a non-lawyer, it would make a large inroad to the protection of legal advice privilege. Thus, all communications both with the in-house lawyers and with the non-lawyers, and all their comments and changes to any draft are covered by the privilege.

92. The Claimant contends:

(1) Legal advice privilege cannot apply to the drafts of the letter themselves; subject to redaction of any embedded legal advice, they are "raw material" and should be disclosed. This applies even if it is known at the time of the draft that it will be shown to in-house lawyers for legal advice. In any event, the dominant purpose of the preparation of the draft cannot have been obtaining legal advice in this case.

(2) Discussion of the drafts with non-lawyers are not privileged.

(3) Discussion of drafts with lawyers are privileged only if it can be established to have been on a topic of legal advice.

(4) A multi-addressee email or document cannot be privileged in so far as it was sent to non-lawyers – either because the dominant purpose was not legal advice, or because the communication with each addressee falls to be treated as a separate email.

(5) There is no undue inroad into privilege. A draft prepared for a commercial purpose relevant to an issue (e.g. rectification of a lease) should be disclosed and sending it to a lawyer does not make it non-disclosable.

Relevant principles concerning legal advice privilege

93. The central issues are, first, to what type of communication or documents (including "raw materials") does legal advice privilege attach? Secondly, is there a "dominant purpose" test in legal advice privilege? Thirdly, what is the correct approach to communications sent at the same time to lawyers (and in particular in-house lawyers) and non-lawyer executives?

94. I have been referred to a number of authorities, in particular *Balabel v Air India* [1988] 1 Ch 317 at 330D-331A; *Three Rivers Council and others v Governor and Company of the Bank of England*: Tomlinson J [2002] EWHC 2730 (Comm) at §§20, 26, 30; Court of Appeal [2003] EWCA Civ 474 [2003] QB 1556 ("*Three Rivers (No 5)*") at §§32, 35 and the House of Lords [2004] UKHL 48 [2005] 1 AC 610 ("*Three Rivers No 6*") at §§35, 36, 38 and 111; *USA v Philip Morris Inc* [2003] EWHC 3012 (Comm) at §38 and 39; *West London Pipeline and Storage Limited v Total UK Limited* [2008] EWHC 1729 (Comm) at §§52, 53 and 86; *Rawlinson and Hunter Trustees SA v Akers* [2014] EWCA Civ 136 §13; *Citic Pacific Ltd v Secretary of State for Justice* [2016] 1 HKC 157 (Hong Kong Court of Appeal) at §§42-43; *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006 at §§131, 132; and to *Hollander: Documentary Evidence* (13th edn) at §§17-15 to 17-17 and *Passmore on Privilege* (3rd Edn) at §§2-099 to 2-107.

95. The following principles can be derived from these authorities:

(1) The mere involvement of a lawyer is not enough to justify a claim for privilege.

(2) Legal advice privilege applies only to confidential communications between client and lawyer which *are made* for the purpose of giving or obtaining legal advice. All communications between the lawyer and his client relating to a transaction in which the lawyer has been instructed for the purpose of obtaining legal advice will be privileged, provided they are directly related to the performance by the lawyer of his professional duty as legal adviser to his client. That covers documents prepared for communication to the lawyer. Furthermore, where information is passed between client and lawyer as part of continuum of communications between them in relation to the transaction in question, privilege attaches to those communications and the information. See *Balabel*, supra and *Three Rivers* per Tomlinson J, supra and *Three Rivers (No 6)* per Lord Carswell at §111.

(3) However legal advice privilege does not apply to documents which are merely "raw materials" that were not created for the purpose of obtaining legal advice. Documents which come into existence during the course of a transaction or event (for example created before legal advice is sought) and not created for the purpose of legal advice are not protected by legal advice privilege, (nor generally are copies of such documents even where the copies are forwarded to or made by the solicitor (unless issues arise as to selection): *Three Rivers (No 5)* at §35 and see also *Citic Pacific* at §§42, 43. Nor, without more, are documents, generated in the course of a transaction or event, protected; but if a document comes into existence as part of a process in the communication with a lawyer with the purpose of obtaining legal advice, then it is protected.

(4) Whilst I am aware of academic commentaries suggesting that the point is not free from doubt, in my judgment, on the current state of the first instance authorities and obiter observations in the Court of Appeal, claims for legal advice privilege are, in principle, subject to a dominant purpose test, namely whether the communication or document was brought into existence with the dominant purpose of it or its contents being used to obtain legal advice: *Three Rivers*, per Tomlinson J (also citing *The Sagheera* [1997] 1 Lloyd's Rep 160 at 167-168), *Philip Morris* at §38, *Three Rivers (No 5)* at §32 (and see also *Three Rivers (No 6)* at §70) and *Hollander* §17-16. I do not consider that the short passage in the *Eurasian* case undermines the thrust of these authorities, given the particular facts of that case. As *Hollander* explains, in normal cases of an email sent to an external lawyer, the issue of dominant purpose is unlikely to arise: see also the submission in *Three Rivers (No 6)* at 635F-G. However, the issue may be more acute where material is sent to in-house lawyers, who may have a dual role in the company. Lawyers, particularly in-house solicitors, may often take part in general business discussions which do not involve legal advice. Where the in-house lawyer is clearly being asked for legal advice, privilege is likely to attach. However, where the in-house lawyer is being consulted also as an executive about a largely commercial issue, then the dominant purpose test will fall to be applied.

(5) As regards the position of a communication (such as an email) sent to multiple addressees, some of whom are lawyers and others are not, the position is not established by authority. *Hollander* addresses it at §17-17. In my judgment, if the dominant purpose of the email is to seek advice from the lawyer and others

are copied in for information only, then the email is privileged, regardless of who it is sent to. If on the other hand, the dominant purpose of the email is to seek commercial views, and the lawyer is copied in, whether for information or even for the purpose of legal advice, then the email, in so far as it is sent to the non-lawyer, is not privileged. Further, if sent to the non-lawyer for a commercial comment, but sent to the lawyer for legal advice, then, in my judgment, the email is not protected by privilege, unless it or the non-lawyer's response discloses or might disclose the nature of the legal advice sought and given.

(6) The burden of proving a claim to privilege is on the party asserting privilege. An assertion of privilege in an affidavit or witness statement is not determinative; however the court will not readily go behind such a statement. Nevertheless such a statement should be specific enough to show something of the analysis of the documents in question. The Court will go behind the statement where it appears that the statement is incorrect or incomplete, either as to the nature of the documents or indeed as to the basis upon which privilege is claimed. If the court is not satisfied, then it may order disclosure of the documents, or order a further statement or affidavit, or inspect the documents themselves or order cross-examination of the person who has made the statement or affidavit: see *West London Pipeline* at §86.

Discussion on legal advice privilege

96. First, standing back it seems obvious that the principal (or dominant) purpose of the creation of a draft of the 1 February Letter was to prepare a letter to respond to the 16 January Letter, in the course of a matter of regulatory and commercial contention as between the Defendant and the Claimant. This is the starting point for consideration of this issue.

97. Secondly, I observe that the Defendant has already disclosed without claiming privilege one draft of the 1 February Letter, and the covering email of 24 January under which that draft was distributed, which was sent both to non-lawyers and to Ms Lim: see paragraph 38 above.

98. Thirdly, I accept the Defendant's assertion that its in-house lawyers became involved for the purpose of giving legal advice; and were not involved merely as members of the in-house team of executives providing commercial advice.

99. Against this background and applying the above principles, any draft of the 1 February Letter created before the Defendant's in-house lawyers were consulted or created without any involvement of in-house lawyers is not privileged. That is the case, even if it were known that in due course legal advice would be taken on the draft, unless the dominant purpose of the person creating the draft was to seek legal advice on it.

100. Further drafts of the 1 February Letter are not covered by privilege unless specifically drafted by the lawyers or for the dominant purpose of obtaining legal advice. Such drafts do not subsequently attract privilege when they were shown to the in-house lawyers. However if a particular draft was created by the in-house lawyers, or by

another specifically for the purpose of seeking or giving legal advice then that draft will be privileged.

101. On the basis that the Defendant's in-house lawyers were instructed for the purposes of obtaining legal advice, then any communication with those lawyers (to and fro) and including comments and advice on the draft letter (whether on the document itself or in a covering communication) are covered by legal advice privilege. Moreover any further communication between non-lawyer executives which discloses or might disclose or concerns comments and advice from the in-house lawyers in relation to the draft of the 1 February Letter is also covered by legal advice privilege.

102. Where a draft of the 1 February Letter (or even discussion about such a draft) was sent in one email to both in-house lawyers and other non-lawyer personnel within the Defendant (such as the email of 24 January which has already been voluntarily disclosed), then, even assuming that in so far as the email was sent to the in-house lawyer it is privileged, in so far as it is also sent to a non-lawyer, neither the email nor the response of the non-lawyer is protected by legal advice privilege, *unless* the content of the email, or the response from the non-lawyer, discloses or is likely to disclose the nature and content of the legal advice sought and obtained. If the email to the non-lawyer clearly seeks, and the response provides, commercial views, with no connection to the legal advice, then it is not covered by legal advice privilege; here the dominant purpose of the email, as sent to the non-lawyer and any enclosed draft was to obtain commercial views. The email of 24 January falls into this category. (I add that if, contrary to the foregoing, a multi-addressee email of this type is in principle covered by privilege, there would be a strong argument that, assuming Ms Lim was copied in for the purpose of seeking legal advice, in any event by disclosing the email of 24 January the Defendant has, in this case, waived privilege in this class of document).

Conclusion

103. In these circumstances, I will direct the Defendant to reconsider the materials in these two categories in respect of which it has asserted legal advice in the light of my conclusions of principle. I would expect the further drafts of the 1 February Letter to be disclosed (possibly subject to any embedded legal advice) and possibly internal communications not involving in-house lawyers. This should be accompanied by a further witness statement explaining what has, and has not, been disclosed. If there is any remaining dispute, the matter can be referred back to me. If need be, but as a last resort, the parties may invite me to inspect the material in question under CPR 31.19.

Category (g): drafts of the Press Release

104. As explained in paragraphs 32 to 35 above three drafts of the Press Release have been provided by Mr Moriarty. There are other drafts: both before 21 December at 637pm and after 22 December at 907am.

The parties' submissions

105. The Claimant contends that it is self-evident that looking at all drafts will shed light on the purpose of the Press Release. There is no explanation for the contrast in wording and tone between the Press Release and the accompanying Review. The

Defendant submits that there is no reason to suppose that any or every of the other drafts illuminate the Defendant's purpose any further. The Defendant has already disclosed "the good, bad and ugly" surrounding the preparation of the Press Release; that demonstrates due compliance with the duty of candour; and there is no reason to suppose that the Defendant will have withheld anything nor that the court cannot trust the Defendant to have complied with its duty.

Discussion

106. First, the Press Release is a, if not the, central document in these proceedings. It is different in tone from the Review, publication of which it accompanied. The exhortation of the Defendant's CEO, Mr Haines, in the course of its preparation, to "pimp it up" demonstrates an intention, at least on his part, to take a stance towards the Claimant which might be described as at least "proactive".

107. Secondly, given the nature of the challenge made to the content of the Press Release, evidence as to the genesis of that document is, in principle, relevant to ascertain the Defendant's purpose in publishing it. This is confirmed by the fact that the Defendant has disclosed some of the drafts, and some surrounding discussion, pursuant to its duty of candour. Even if what has been disclosed to date might evidence the most significant changes made to the draft over time, and the comments most favourable to the Claimant's case, other, less drastic, changes may cast light by way of nuance. Thirdly, the additional number of drafts of the Press Release will not be so voluminous as to make an order for disclosure impracticable or oppressive.

108. Finally, the primary documents are before the Court, from which each side seeks to draw different inferences as to purpose. Given the fine lines of distinction in relation to purpose, I conclude that the Court should have before it the full genesis and development of the Press Release, through all its drafts.

109. I conclude that disclosure of the drafts of the Press Release is necessary for the fair and just disposal of the issues of ultra vires and improper purpose that arise in these proceedings.

Conclusions

110. In the light of my conclusions in paragraphs 68-70, 77, 87, 103 and 109 above, there will be an order for disclosure of documents falling within categories (a) (in the first place on a lawyers' only basis) and (g). The application in relation to categories (b) and (c) is dismissed. In relation to categories (e) and (f), there will be an order for disclosure of any draft of the 1 February Letter prepared prior to the Defendant's in-house lawyers being consulted on its terms. As regards further drafts and surrounding emails discussing those drafts, if in the light of the terms of this judgment, a claim to privilege is maintained, the Defendant is to provide a further witness statement as indicated in paragraph 103 above; otherwise such material should be disclosed.

111. I will hear counsel as to the precise terms of the order and consequential matters. Finally, I am grateful to all counsel for the assistance they have provided in the presentation of oral and written argument.