Neutral Citation Number: [2019] EWCA Civ 1710

Case No: A2/2018/2509

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Slade J
[2018] UKEAT 0261/17/0908

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/10/2019

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE LEWISON
and
LORD JUSTICE BEAN

- -

Between :

Michael CURLESS	**Claimant/ Respondent to Appeal**
- and –	
SHELL INTERNATIONAL LIMITED	**Respondentt o Claim/ Appellant**

- -
- -

Bankim Thanki QC and **Nico Leslie** (instructed by **Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Patrick Halliday (instructed by **Fox Williams LLP**) for the **Respondent**

Hearing dates : 2 & 3 October 2019

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Approved Judgment

Sir Terence Etherton MR, Lord Justice Lewison and Lord Justice Bean:

1. The central issue on this appeal is whether the Employment Tribunal (Judge Tsamados) ("the ET") was correct to order on a preliminary hearing that two paragraphs of the disability discrimination and victimisation claim of the respondent, Michael Curless, should be struck out on the ground that they referred to respectively an email and a conversation in respect of which Shell is entitled to claim legal advice privilege (LAP).

2. This appeal by Shell is from the order of the Employment Appeal Tribunal (Mrs Justice Slade) ("the EAT") dated 9 August 2018 allowing Mr Curless' appeal from the decision of the ET and setting aside that decision.

Background

3. The following account is largely based on the findings of the ET.

4. Mr Curless was employed as a Senior Legal Counsel by Shell from 29 or 30 January 1990 until his dismissal allegedly for redundancy with effect from 31 January 2017.

5. He suffers from Type 2 Diabetes and Obstructive Sleep Apnoea ("OSA"). He uses Constant Positive Airway Pressure ("CPAP") equipment to help alleviate the effects of his OSA. This is breathing equipment consisting of a mask worn at night, through which humidified air is pumped, so as to prevent the user's throat tissues closing during sleep. Mr Curless has always struggled to use the equipment and, in particular, the face masks.

6. There were ongoing concerns by Shell as to Mr Curless' performance at work from 2011 with regard to his ability to meet deadlines and general standard of work. He was given low Individual Performance Ratings, his applications for vacant litigation roles were rejected and he was required to provide written reports as to work carried out. Mr Curless says that these matters gave rise to unlawful disability discrimination and/or failure to make reasonable adjustments.

7. Mr Curless submitted a claim to the ET on 14 August 2015 ("the First Claim"). He also raised an internal grievance on 2 January 2016. Both raised complaints of disability discrimination. The grievance was subsequently dismissed in June 2016.

8. Shell acquired BG Group plc ("BG Group") on 15 February 2016. There followed a group-wide redundancy programme.

9. From April 2016 onwards Shell offered Selective Voluntary Severance ("SVS") to certain targeted groups of employees, which allowed those employees to apply for voluntary severance from 7 June 2016. Mr Curless applied for certain roles but was unsuccessful and was then placed in a redundancy consultation process. His employment was terminated with three months' notice allegedly by reason of redundancy on 1 November 2016, his employment ending on 31 January 2017.

The Second ET Claim

10. Mr Curless commenced a second ET claim on 3 March 2017 ("the Second Claim") alleging further disability discrimination, victimisation and unfair dismissal. In broad terms, Mr Curless alleges that Shell relied on a planned re-organisation of its in-house legal department as a pretext by which to terminate his employment by way of redundancy. He alleges that this was also unlawful discrimination and victimisation as a result of the First Claim and his grievance of 2 January 2016.

11. In the "Details of Claim", which accompanied the claim form in the Second Claim, Mr Curless said in paragraph 8 that Shell purported to dismiss him on the ground that he was redundant but he denied that redundancy was the genuine reason or principal reason for his dismissal. He alleged in paragraph 9 that he was dismissed because of (1) his disability, (2) matters arising in consequence of his disability, and/or (3) his protected acts. Paragraphs 10 and 11 of the Details of Claim were as follows:

> "10. In support of the matters averred in the previous paragraph, the Claimant relies in particular on the following:
>
> (i) In or around late May of 2016, the Claimant was in The Old Bank of England, a bar on Chancery Lane in London. He overheard a conversation between two people, who he believes to have been lawyers from Lewis Silkin. They mentioned a senior lawyer at the Respondent who had commenced a disability discrimination claim in the Employment Tribunal. The Claimant believes that they were referring to him. They said that this individual's *"days are numbered"*, because his managers had said that his Employment Tribunal claim was to be handled firmly, and because the Respondent planned to use the context of a redundancy exercise to terminate his employment purportedly by reason of redundancy.
>
> (ii) In October 2016, the Claimant learnt that, in April 2016, Ms Alex Ward (the Respondent's *"Managing Counsel, UK Employment and Employee Benefits"*) had told David Brinley (who was the line manager of the Claimant's line manager) that the Respondent could use a planned re-organisation of the Respondent's in-house legal department in order to terminate the Claimant's employment. Ms Ward told Mr Brinley that it was worth considering this in order to avoid the risk of *"impasse and proceedings with ongoing employment with no obvious resolution"*. She did so while the Claimant's disability discrimination grievance process (see below) and existing claims for disability discrimination were in train, and three months before the Claimant was put on notice of risk of redundancy. This indicates that the Claimant's 'redundancy' process was a sham designed to end his employment, and that the Respondent wanted to end his employment because he had done protected acts, namely raising his disability discrimination grievance and bringing his Employment Tribunal claims of disability discrimination.

> 11. For the avoidance of doubt, the Claimant contends that none of the matters described in the previous paragraph attracts legal professional privilege. Even if (which is not admitted) any of those matters involved the giving or receiving of legal advice, privilege does not attach to iniquity, i.e. to communications which are for any *"dishonest"* purpose, including *"sham contrivances"*; and/or to conduct which the law treats as contrary to public policy. It was dishonest and/or a sham contrivance and/or contrary to public policy for the Respondent to use 'redundancy' as a pretext for terminating the Claimant's employment, especially where it wished to terminate his employment because of his protected acts."

12. Mr Curless became aware of the matters in paragraph 10(ii) of the Details of Claim as a result of seeing an email dated 29 April 2016 between other Shell lawyers. That email was sent to him by an anonymous sender in October 2016. The email was from a lawyer, Ms Alex Ward (Managing Counsel, UK Employment and Benefits). At the time, she retained high-level responsibility for giving legal advice in relation to Mr Curless. The recipient was Angela Gill of Lewis Silkin LLP, who effectively had been seconded to Shell. Ms Gill had conduct of Shell's defence in the First Claim. The email recorded Ms Ward's conversation of 29 April 2016 with David Brinley (General Counsel for the Projects and Technology Business). Mr Brinley was Mr Curless' indirect line manager because he line-managed Pamela Nelson, Mr Curless' immediate line manager.

13. The email was headed "Legally Privileged and Confidential" and said as follows:

> "Spoke to David Brinley [In-house General Counsel with Shell].
>
> It looks as though there are both opportunities for SVS conversations (as parts of the wider UK announcements and done consistently with others) and opportunities for potential compulsory redundancies. On a strictly confidential basis they are looking at reducing the overall number of senior C &P lawyer roles they have, both as part of the integration and generally.
>
> I told him this is their best opportunity to consider carefully how such processes could be applies [sic] across the board to the UK legal population including the individual. If done with appropriate safeguards and in the right circumstances, while there is always the risk he would argue unfairness/ discrimination, there is at least a wider reorganisation and process at play that we could put this into the context of. I felt in the circumstances this is definitely worth considering even if there is the inevitable degree of legal risk which we would try to mitigate. Otherwise we risk impasse and proceedings with ongoing employment with no obvious resolution. Happy to discuss next week."

14. It is not in dispute that the "individual" mentioned in the second paragraph of the email was Mr Curless.

15. Shell applied by letter dated 23 March 2017 to strike out paragraphs 10(ii) and 11 of the Details of Claim on the ground that they referred to correspondence that was protected by LAP. The application was subsequently extended to cover paragraph 10(i).

16. In its Grounds of Defence in the Second Claim dated 7 April 2017 Shell denied all the allegations in the Second Claim as to detrimental and less favourable treatment, discrimination arising from Mr Curless' disability, unfair dismissal, discrimination and victimisation, and asserted that Mr Curless was dismissed because his role was redundant. As regards paragraphs 10 and 11 of the Details of Claim, Shell denied that the conversation alleged in paragraph 10(i) took place as alleged and/or that Mr Curless overheard the conversation. Shell asserted that, to the extent that Mr Curless did overhear a conversation in the terms alleged, such conversation was protected by legal privilege. Shell also asserted that paragraph 10(ii) referred to the contents of confidential and legally privileged correspondence.

17. A preliminary hearing to determine whether paragraphs 10 and 11 should be struck out on the ground that they referred to matters in respect of which Shell was entitled to assert LAP was fixed for 7 July 2017.

The ET's Decision

18. At the preliminary hearing Shell submitted that the email of 29 April 2016 and the conversation (if it took place) gave rise to LAP. The issue was whether they were nevertheless admissible because of the so-called "iniquity principle", that is to say that there is no confidence in an iniquity. On that issue the ET referred to: Phipson on Evidence (18th Ed.); *Barclays Bank pic v Eustice* [1995] 1 WLR 1238; *McE v Prison Service of Northern Ireland* [2009] UKHL 15, [2009] 1 WLR 782; *Three Rivers v Bank of England (No 6)* [2004] UKHL 28, [2005] AC 610; *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2010] EWHC 2176 (Ch), [2011] Ch 296; *JSC BTA Bank v Ablvazove* [2014] EWHC 3612 (Comm), (2014) 2 CLC 263; *Menon v Hereford Council* [2015] EWHC 2165 (QB); *Crescent Farm (Sidcup) v Sterling Offices* [1972] Ch 553; *Walsh Automation (Europe) Ltd v Bridgeman* [2002] EWHC 1344 (QB); *Goodard v Nationwide Building Society* [1987] QB 670; *BNP Paribas v Mezzotero* [2004] IRLR 508; *Dadourian Group v Simms* [2008] EWHC 186 (Ch); *Bullivant v A-G for Victoria* [1901] AC 16; *Forster v Friedland* (unreported) and *Fazil-Alizadeh v Nikbin* (unreported) 25 February 1993 CA.

19. The ET accepted Shell's interpretation of the email, which, so far as relevant, was that it was a standard piece of advice from lawyers when dealing with redundancy. The ET said the following (at [84]) on this point:

> "It is clearly a legally privileged document containing legal advice to Mr Brindley. It is headed "Legally Privileged and Confidential" and the Claimant acknowledges that it is legally privileged and that he should not have been given a copy. It

> is evident that the Respondent has not waived privilege on its contents. At its highest, the e-mail discloses advice on how to handle a possible redundancy of the Claimant as part of a UK wide process by which it would be reducing the number of lawyers it employed and acknowledges the risk that the Claimant might take legal action but points to the wider context as in effect justification. It is advising on a possible course of action and is not disclosing any element of discrimination or victimisation. It is legal advice aimed at avoiding rather than evading possible legal action (*Bullivant*) in place of simply doing nothing in fear that the Claimant might take further legal action. This is what lawyers do day in day out and the giving of legal advice does not as a matter of course raise iniquity."

20. On the question of iniquity the ET said (at [49]) that the types of iniquity which may be covered by the iniquity principle include crime and fraud and that, in this context, fraud has a broad meaning. The ET accepted Shell's submission that, for the iniquity exception to apply, there must be a strong prima facie case of iniquity and that such a case was not made out in respect of the email. The ET said (at [84]) as follows:

> "I do not find that it discloses a strong prima facie case or even a prima facie case of iniquity. I have considered the authorities cited and the submissions made and I accept the Respondent's submissions as to what is required for the iniquity exception to apply. Whilst of course protection against discrimination and victimisation is important, it is a tort, and to elevate it to the status required to disapply legal advice privilege, goes too far. The case law supports as much and I am specifically bolstered in this finding by Norris J at *BBGP* at pages 318 & 319, Schiemann L J in *Eustice* at paragraph 1250H, *Walsh* and *Dadourian*"

21. So far as concerns the conversation alleged in paragraph 10(i) of the Details of Claim in the Second Claim, the ET accepted on a balance of probabilities Mr Curless' evidence of overhearing a conversation in the Old Bank of England pub on Fleet Street on about 19 May 2016. So far as relevant, the ET summarised that evidence as follows:

> 26. Around 6 pm a group of professionally dressed people came into the pub and walked past [Mr Curless] and sat at the table behind him. There were three or four males and two females in their 30s or 40s with brownish hair. One of the men was carrying a Lewis Silkin notepad inside a plastic sleeve. The group sat at a table the other side of the pillar about a metre or so away from where he was sitting. Whilst he could hear their conversation, he did not pay any attention to what they were saying until one of the women mentioned dealing with a complaint by a senior lawyer at Shell. It was at this point that he started to listen to what she was saying.

> 27. The woman referred to a "he" who had brought a complaint of disability discrimination that had taken up a lot of Shell's time, had been ongoing for a long time and that Shell wanted his tribunal complaint to be handled firmly or sternly. She said that however his days were numbered as there was now a good opportunity to manage him out by severance or redundancy in a big reorganisation exercise that was underway, as a result of Shell's acquisition of British Gas. The second woman did not speak much but listened to what the first woman was saying. At this point the conversation was interrupted by the other people in the group. The Claimant said in oral evidence that this was the gist of the conversation.
>
> 28. The Claimant felt uncomfortable and conspicuous because he believed what he had overheard was clearly about him. He decided to leave. The traffic outside was still busy and so he decided to walk to Marylebone Station and left."

22. The ET held that the conversation was also protected by LAP. The ET said (at [86]:

> "As the Respondent submits it is a repetition possibly third or fourth hand of something privileged, a discussion between solicitors. Privilege was not waived because the privilege belonged to the Respondent and not to whoever allegedly had this conversation in public. At its highest it is an extremely indiscrete conversation by an unknown lawyer relaying a strategy clearly not with the Respondent's permission to do so and no doubt without Lewis Silkin's permission to do so. The extent to which this is the speaker's slant on the matter or legal advice given is not known. But again it simply refers to what at most is action relating to tortious claims and not excepted by the iniquity principle."

The EAT's Decision

23. On the proper interpretation of the email of 29 April 2016 Slade J, in the EAT, did not agree with the view of the ET. She said (at [29]) that the interpretation of the email was a matter of law but that where, as was the case with the ET, external facts were relied upon to interpret the document, the ET's finding deserved particular respect. She nevertheless held (at [33]) that the second paragraph of the email recorded "advice that the redundancy situation can be used as a cloak for dismissing the claimant for other reasons", and (at [34]) that the "other reasons" were or included the First Claim made by Mr Curless for disability discrimination. She said that, against the background of a claim of disability discrimination having been made, a grievance raising disability issues and issues over performance said by Mr Curless to be attributed to his disability and his allegation of Shell's failure to make reasonable adjustments, the risk referred to in the email was of future complaints of disability discrimination. She summarised (at [35]) her conclusion that the ET had erred in its interpretation as follows:

> "In my judgment the email of 29 April 2016 is to be interpreted as recording legal advice that the genuine redundancy exercise could be used as a cloak to dismiss the Claimant to avoid his continuing complaints and difficulties with his employment which were said by him to be related to his disability."

24. On the scope of the iniquity exception to LAP, in addition to some of the cases examined by the ET, Slade J referred to *Ventouris v Mountain* [1991] 1 WLR 607 and *Gamlen Chemical Ltd v Rochem Ltd (No 2)* [1979] 124 SJ 276.

25. Slade J did not agree with the view of the ET that it goes too far to elevate the tort of discrimination "to the status required to disapply legal advice privilege". She said (at [58]) that such a view may be appropriate in many cases but the facts of some discrimination may take advice on how to commit it into the category of advice which is contrary to public policy.

26. Slade J held (at [59] and [60]) that it is for a party seeking to rely on material in respect of which LAP is claimed to establish a strong prima facie case of iniquity. She concluded that the advice recorded in the email satisfies that test for the following reasons:

> "59. If the advice in the email of 29 April 2016 had gone no further than "you may select the Claimant, an employee with a disability, for redundancy but you run the risk of a claim by him" in my judgment it would not have reached the high threshold required to disapply legal advice privilege. The EJ reached his decision based on such an interpretation. However I have held that the EJ erred in doing so. In my judgment, properly interpreted, the email of 29 April 2016 records advice on how to cloak as dismissal for redundancy dismissal of the Claimant for making complaints of disability discrimination and for asking for reasonable adjustments which will continue if there is "ongoing employment". In my judgment a strong *prima facie* case has been established that what is advised is not only an attempted deception of the Claimant but also, if persisted in, deception of an Employment Tribunal in likely and anticipated legal proceedings. The email does not record any advice on neutral selection criteria for redundancy. It concentrates exclusively on how the redundancy can be used to rid the Respondent of ongoing allegations of discrimination by the Claimant and of underperformance which he stated are related to his disability and failure to make reasonable adjustments. Whether the legal advice given was in fact to perpetrate or in furtherance of iniquity will be for the Employment Tribunal hearing the claim to which it relates to decide."

27. So far as concerns the status of the overheard conversation in the pub, Slade J simply said:

> "61. Although of significantly lesser importance, lest there be any doubt about whether legal advice privilege can be claimed in respect of the overheard conversation in the pub in May 2016, it cannot."

28. For those reasons the EAT allowed Mr Curless' appeal from the ET.

The appeal to the Court of Appeal

29. Shell appeals from the decision of the EAT on the grounds that Slade J was wrong (1) in her interpretation of the email of 29 April 2016, (2) in concluding that the overheard conversation in the pub was not covered by legal professional privilege, and (3) in holding that the crime/fraud exception to legal professional privilege is applicable to the circumstances of the present case, whether or not her interpretation of the email was correct; and, in particular, she failed (i) to apply the correct test of dishonesty and/or (ii) to require the correct standard of a "very strong" prima facie case.

30. Mr Curless served a respondent's notice advancing the following additional grounds for upholding the decision of the EAT: properly interpreted in the context of the pub conversation and as a question of law, the email disclosed not only advice on how to "cloak" as redundancy the real reasons for dismissing Mr Curless but also advice on how to victimise and discriminate against him (by dismissing him for protected acts and because of matters from his disability); the reference in the email to "proceedings" included the First Claim; the pub conversation was not privileged because it recorded or evidenced advice from a lawyer given for the purpose of effecting iniquity; the threshold for application of the iniquity principle was passed because the conduct met the threshold identified by Norris J in the *BBGP* case, the deception described in the EAT's decision at [59] was dishonest, and, insofar as a "very" strong prima facie case of iniquity is required, this is such a case.

Shell's application for anonymity

31. The hearing before the ET was a closed hearing. The ET's judgment was not, however, the subject of any anonymity or reporting restriction order.

32. By an order dated 1 August 2018, in which Mr Curless was shown in the title as "X" and Shell was shown as "Y Limited", Slade J made the following order on the application of Shell for an anonymity order and a restricting reporting order:

> "IT IS ORDERED that;
>
> Pursuant to Rule 2A(1) of the Employment Appeal Tribunals Rules 1993 as amended and Section 30(3) of the Employment Tribunals Act 1996 that there shall be no publication in Great Britain in respect of the above proceedings of any identifying matter in a written publication available to the public, nor shall any identifying matter be included in a relevant programme for reception in Great Britain. Identifying matter means any matter likely to lead members of the public to identify a person as a

> person making, receiving or affected by the material in respect of which legal advice privilege is claimed.
>
> The following are the persons who may not be identified
>
> (1) Michael Curless; (2) Shell International Ltd; (3) Alexandra Ward; (4) Angela Gill; (5) David Brinkley
>
> The Registrar shall omit from any register kept by the Appeal Tribunal available to the public, and shall delete from any order judgment or other document which is available to the public, any identifying matter which is likely to lead members of the public to identify a person making, receiving or affected by the material in respect of which legal advice privilege is claimed. The parties shall be identified as above.
>
> There shall be no publication of any such identifying matter in any publication available to the public or any programme.
>
> Subject to further order the Anonymity Order and Restricted Reporting Order be extended to the conclusion of the final appeal on the issue of legal advice privilege."

33. No application was made direct to the Court of Appeal for any similar order. Shortly before the hearing of the appeal, Shell's solicitors wrote to the Court of Appeal proposing that, "pursuant to the spirit and intention of the order of [Slade J]", in oral submission the parties be referred to as "X" and "Y limited" or "Y" and that the individuals identified in her order be referred to as "Lawyer 1", "Lawyer 2" and the "Line Manager" respectively. Shell's solicitors said that Mr Curless' "representative" had confirmed that there was no objection to that approach.

34. On the morning of the hearing of the appeal, we pointed out to Mr Bankim Thanki, QC, for Shell, that Slade J's order was not binding on this court and so, if Shell wanted an anonymity order in respect of the appeal, it would have to make the application to us. Mr Thanki duly made an oral application, the basis of which was that, if the appeal succeeded, it would be important that confidentiality in respect of the relevant emails should be maintained and the judge conducting the future substantive hearing in the ET should not have any knowledge of those emails.

35. We dismissed the application and said that we would give our reasons when delivering judgment.

36. The principles applicable generally to applications for a hearing to be in private or for an order for anonymity or for reporting restrictions are now well settled, as is the position specifically in the Court of Appeal. They are to be found in, among other places: *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429, [2011] 1 WLR 770 (addressing the procedure in the Court of Appeal); Practice Guidance: Interim Non-Disclosure Order [2012] 1 WLR 1003 (issued by Lord Neuberger MR in August 2011); and *Norman v Norman* [2017] EWCA Civ 49, [2017] 1 WLR 2523. A recent consideration and application of the principles by the Supreme Court can be found in *Khuja v Times Newspapers Limited* [2017] UKSC 49, [2017] 3 WLR 351.

37. It is not necessary for us to set out in detail once again the same matters in this judgment. It is sufficient to repeat the following. An order for a hearing in private, for anonymity or for reporting restrictions for an appeal in the Court of Appeal must be made by the Court of Appeal. A judge of a lower court cannot bind the Court of Appeal in that respect.

38. The starting point for any consideration of an application for any such order is CPR 39.2(1), which provides that the general rule is a hearing is to be in public. A number of discretionary exceptions to the general rule are set out in CPR 39.2(3). In addition to those expressly mentioned there, and any statutory restrictions, it may be necessary in some cases to carry out a balancing exercise where there are competing rights under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") such as between, on the one hand, an individual's right to private and family life under Article 8, and, on the other hand, the right to a fair and public hearing under Article 6 and the right to freedom of expression under Article 10. Such a situation is contemplated by CPR 39.2(4).

39. Although none of those Convention rights has automatic priority over the other or others, and always depending on the precise facts and circumstances, due to the importance of the principle of open justice it will usually only be in an exceptional case, established on clear and cogent grounds, that derogation from the principle of open justice (including the freedom to publish court proceedings) will be justified; and, in such a case, the derogation must be no more than strictly necessary to achieve its purpose. There is no general exception to open justice where privacy or confidentiality are in issue.

40. No question arises in the present case of any Convention right competing with the principle of open justice. The concern of Shell was that, even if it won the appeal, and so the relevant emails were excluded as evidence on which Mr Curless could rely at the future hearing on the substantive merits of his claim, the mind of the judge hearing the substantive dispute in the ET might be tainted by knowledge of the emails through learning about the hearing and the determination of this appeal. We consider that this is a plainly inadequate ground for qualifying the operation of the principle of open justice. Judges are well used to having to exclude from their consideration of the merits and their reasoning evidence which is strictly inadmissible. This is standard practice as judges often have to decide on the admissibility of evidence before or during a trial. Indeed, this is graphically illustrated by the fact that, although we were referred to several cases on the scope and application of legal professional privilege, we were not shown a single transcript or report in which the parties were anonymised.

41. We were not told anything to suggest that the relevant principles and appropriate considerations for derogations from the open justice principle are any different in the ET or the EAT. The position in the ET is governed by various provisions of the Employment Tribunals Act 1996, including in particular sections 10-12, and the ET Rules in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2103, including in particular Rule 50 headed "Privacy and restrictions on disclosure". Those provisions were recently considered by the Court of Appeal in *L v Q Ltd* [2019] EWCA Civ 1417. Bean LJ, with whose judgment the only other member of the court, Rose LJ, agreed, said (at [11]) that he had very serious doubts about the decision of the ET to conduct the hearing in private but neither that

decision nor the ET's orders anonymising the parties and the witnesses was in issue on the appeal. The Court set aside an order of the ET that its judgment was not to be placed on the register of ET decisions, emphasising the importance of open justice and the limited scope for derogations from it.

Mr Curless' application to admit fresh evidence

42. On the day before the hearing of the appeal Mr Curless, invoking the Court of Appeal's discretion under CPR 52.21(2)(b), applied to have various emails admitted in evidence that were not before the ET or the EAT.

43. In his witness statement in support of the application Mr Curless stated that the emails were sent to him anonymously in an envelope bearing a post stamp dated 19 September 2019 and, due to his absence, he only opened the envelope on 29 September 2019. It appears from the handwriting on the envelope and the covering letter that they were sent to Mr Curless by the same person who anonymously sent the email of 29 April 2016.

44. There are four emails. Three were sent in late December 2014 and one was sent in early January 2015. Two were sent by Eleanor Silvero, who was an HR manager, to Pamela Nelson, Mr Curless' line manager and a lawyer, and to Alex Ward, who we described earlier as one of Shell's in-house counsel. They are headed "Legally privileged & Confidential". Two were sent by Pamela Nelson to Eleanor Silvero and Alex Ward. One of those is headed "Privileged and Confidential" and "Attorney-Client Communication" and the other is headed "Privileged and Confidential".

45. The emails relate to Mr Curless' work performance. Mr Halliday relies on the emails as showing that, even in 2014, there was concern about Mr Curless' perceived under-performance at work and a focus on the possibility of persuading him or negotiating with him to leave and of the possibility of utilising a group re-organisation to procure him to leave his employment. On the face of it, the emails were not only confidential and sent to Mr Curless in breach of confidence but they formed part of a chain of emails subject to legal professional privilege, bearing in mind the manifest expectation that Alex Ward would review them and give advice on their content if she thought that necessary or appropriate.

46. We refuse the application to admit this fresh evidence. Admitting the new evidence would not further the Overriding Objective but would undermine it. The emails do not simply fall short of the requirement in *Ladd v Marshall* [1954] 1 WLR 1489 that they would probably have an important influence on the result of the appeal. The reality is that they are manifestly incapable of having any bearing on the meaning of the email of 29 April 2016, which is at the heart of the appeal. They were written some 16 months before that email and over a year before Shell's acquisition of BG Group on 15.2.2016, which gave rise to the group-wide redundancy programme leading to Mr Curless being made redundant. Moreover, apart from Alex Ward, the parties to the emails were entirely different.

The interpretation of the e-mail of 29 April 2016

47. We agree with Slade J that the proper meaning of the email of 29 April 2016 is a matter of law. Although it follows that no special deference is due to the ET's

interpretation, we agree with the ET's interpretation and, with respect, disagree with that of Slade J.

48. There seems to be no dispute that, following the acquisition of BG Group by Shell on 15 February 2016, there was to be a significant reorganisation of the group's legal department involving the loss of some jobs. Shell was seeking legal advice on whether, and if so how, Mr Curless might be either offered voluntary severance or dismissed on the grounds of redundancy in the course of that reorganisation, these being the two "processes" mentioned.

49. Legal advice was being given on how such processes could be applied to Mr Curless "with appropriate safeguards and in the right circumstances": the email leaves open what such safeguards or circumstances might be, but there is nothing in the email to suggest that if further elucidation was sought and given, it would have consisted of anything other than entirely conventional advice. The writer was considering two alternative risks. If the processes led to Mr Curless being selected for redundancy, there was a risk that he would argue that the dismissal was unfair and discriminatory. On the other hand, if Mr Curless was not considered for redundancy and remained in employment, the First Claim would continue anyway and there was a risk of an impasse.

50. We agree with the ET that this was the sort of advice which employment lawyers give "day in, day out" in cases where an employer wishes to consider for redundancy an employee who (rightly or wrongly) is regarded by the employer as underperforming. We do not agree that this was advice to act in an underhand or iniquitous way.

51. Mr Patrick Halliday, for Mr Curless, also relied on some earlier internal emails of Shell as showing a long-standing desire to find a pretext for dismissing Mr Curless, and submitted that the disputed email should be interpreted in the light of those earlier communications. They were all sent in February 2014, two years before the acquisition of BG Group and the consequential group restructuring. They do no more than focus on Mr Curless' medical condition, including the possibility of his agreeing to medical release and the possibility of his role being removed in a restructure. They are far too remote in time and context to colour the otherwise innocuous wording of the email of 29 April 2016 with an iniquitous meaning or objective.

52. Accordingly, the email of 29 April 2016 remains privileged and cannot be relied on by Mr Curless in support of his case.

The overheard pub conversation

53. Mr Halliday sought to rely on the overheard conversation in the Old Bank of England pub only as an aid to interpreting the disputed email. We cannot accept that the conversation can be used in this way. The email preceded the conversation by about two weeks. There is no evidence that the woman whose conversation Mr Curless overheard had seen the email (Ms Ward, who sent the email, provided a witness statement denying that she had been involved in the conversation if it ever took place) or what the source of her information was. The advice in the email cannot be tainted by a conversation involving gossip from someone else after the event.

The crime/fraud exception to privilege

54. In view of our conclusion on the meaning of the disputed email of 29 April 2016 the scope of the crime/fraud exception to LAP does not arise for decision. It was common ground between counsel that, if the email has the meaning ascribed to it by the ET, the iniquity exception has no application, and, if it has the meaning and purpose ascribed to it by Slade J, it was part of a dishonest plan. We, therefore, simply record as follows the bare bones of the argument that Mr Thanki wished to advance.

55. In its origins the exception applied where a client consulted a lawyer in furtherance of crime or fraud: *R v Cox and Railton* (1884) 14 QBD 153. The exception does not retrospectively remove legal professional privilege. Rather, it prevents the privilege from arising in the first place. The public policy underlying legal professional privilege is that when a client consults a lawyer the client must be confident that what passes between them will never be revealed without the client's consent. The need for certainty at the time of consultation was underlined by the House of Lords in *R v Derby Magistrates' Court ex parte B* [1996] 1 AC 487, and in subsequent cases. In so far as there are competing public policies the balance was struck in favour of legal professional privilege in the 16th century and has been maintained ever since.

56. Argument in *Derby Magistrates* concluded on 22 June 1995, and the speeches of the appellate committee were delivered on 19 October 1995. Between the conclusion of the argument and the delivery of the speeches, this court decided *Eustice*. Judgment in *Eustice* was delivered on 6 July 1995. Lord Lloyd mentioned *Eustice* in *Derby Magistrates* but only to say that it came too late for consideration. None of the other Law Lords referred to it.

57. *Eustice* concerned an application under section 423 of the Insolvency Act 1986 to set aside transactions said to have been at an undervalue for the purpose of putting assets beyond the reach of creditors. The claimant bank sought disclosure of the legal advice leading up to those transactions. Schiemann LJ rejected the submission that the exception to legal professional privilege was confined to cases of dishonesty. He said at 1250H that the most important consideration was to decide "whether public policy requires that the documents in question are left uninspected." Having referred to authority he continued at 1252C:

> "For reasons given earlier in this judgment we start here from a position in which, on a prima facie view, the client was seeking to enter into transactions at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions be discoverable."

58. He went on to say that these cases "throw up difficult problems of public policy" and concluded that "the balance of advantage" was in permitting inspection.

59. Mr Thanki's argument is that this approach cannot stand with the decision of the House of Lords in *Derby Magistrates*. Whether or not legal professional privilege attaches to a communication must be clear at the time when the communication is made. It cannot depend on a retrospective evaluative judgment by the court whether the purpose of seeking advice is "sufficiently iniquitous" to prevent privilege from

attaching to the communication. The iniquity exception is confined to dishonesty. In so far as there are competing public policies, the balance has been struck in favour of legal professional privilege. For those reasons *Eustice* cannot be considered to be good law. Although as a general proposition this court would be bound by an earlier decision of the same court, there is an exception where this court considers that an earlier decision cannot stand with a subsequent decision of the House of Lords, even though it has not been expressly overruled: *Young v Bristol Aeroplane Co* [1944] KB 718, 725-6. Accordingly, Norris J went too far in *BBGP*, which was relied upon by Slade J, in saying (at [62]) that the iniquity exception is engaged in any "circumstances … which the law treats as entirely contrary to public policy".

60. It is an important argument, which will no doubt have to be decided one day; but not in this case.

Conclusion

61. For all those reasons we allow this appeal.