



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
CHARITY**

Appeal No.CA/2021/0007

BETWEEN:

**THE KNIGHTLAND FOUNDATION
(an incorporated body, charity no. 1143110)**

Appellant

-and-

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Respondent

Upon hearing Mr Faisal Sadiq, Counsel for the Charity Commissioner and Ms Natalie Pratt, Counsel for the Knightland Foundation at a hearing conducted via Cloud Video Platform on 21 July 2021

DECISION

Pursuant to rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 the Tribunal requires that by 1pm on 26 July 2021 the Appellant will provide copies of

- a) The legal advice referred to in their Reply dated 22 May 2021 at paragraphs 7,16, 24, 29, 43, and Schedule 1 rows 2 to 6, columns 2 and 3.
- b) The instructions provided to their legal advisors in relation to the giving of that advice.

REASONS

1. There are two applications for resolution as preliminary issues. In summary
 - a. The Respondent applies for disclosure of the legal advice referred to within the Appellant's reply to the response to the appeal.
 - b. The Appellant applies for a direction preventing reliance by the Respondent on documents in their possession over which the Appellant asserts privilege.

Both parties agree that the second issue falls away should I determine the first in favour of the Charity Commission.

Background to the Appeal

2. On 24 February 2021 the Respondent opened a statutory inquiry into the affairs of the Appellant Charity under section 46 Charities Act 2011 [the Act]. Under s76(3)(g) of the Act the Respondent appointed an Interim Manager [IM] on 8 April 2021. The Appellant filed a notice of appeal against the decision to appoint an IM on 12 April 2021 submitting that the Respondent had acted unreasonably in appointing the IM and that the order under s76(3)(g) should be quashed.
3. The Commission responded to the appeal on 7 May 2021, and the Appellant then served a Reply dated 22 May 2021. It is the contents of that Reply that the Respondent submits waives privilege.
4. The Tribunal has allocated this appeal to its Fast Track and it is listed for hearing in the first week of August.

The law

5. The Respondent's application is made under rule 5(3)(d) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 [the Rules] which gives the Tribunal a discretion to require a party or another person to provide documents, information or submissions to the Tribunal. Rule 5 must be exercised in the light of the over-riding objective in rule 2 to deal with cases fairly and justly.
6. I have been referred to two authorities
 - a. PCP Capital Partners LLP (2) PCP International Finance Ltd v Barclays Bank Plc [2020] EWHC 1393, a decision of Waksman J.

- b. In re D (a Child) [2011] EWCA Civ 684, a decision of the Court of Appeal.
7. I am grateful to both counsel for their clear and focussed submissions.
8. It is not necessary to rehearse the contents of those authorities at length but they are referred to below as necessary. The principles to be applied are agreed; the parties differ as to the application of those principles to this case.
9. Arising from the caselaw and the Rules, there the following questions need to be addressed before moving on to consider whether to exercise the discretion given under rule 5(3)(d).
 - a. Has there been a waiver of privilege?
 - b. If so, should the Tribunal exercise its discretion to direct the production of not only the privileged documents specifically referred to but also other privileged documents other than those specifically referred to?

Has there been a waiver of privilege?

10. A waiver of privilege will only arise if a party refers to the content of legal advice and not simply to the effect of the legal advice received. This distinction must be viewed through the “prism” of the context of the case, whether the privileged material is relied upon and the purpose of that reliance.
11. The Respondent’s decision to appoint an IM was based on the conclusion that misconduct and/or mismanagement had taken place in the administration of the charity such that it was both necessary and proportionate to do so. In summary, the statement of reasons for that decision relies upon alleged failures not only to comply with the statement of recommended practice [SORP] but also the Action Plan issued by the Respondent in March 2017, as well as alleged conflicts of interest and financial irregularities. It is said that these factors taken together placed the charity’s assets at risk.
12. The grounds of appeal included in the notice dated 12 April 2021 assert that the Respondent acted unreasonably in appointing an IM because they did not take account of the explanations provided and “misconstrued the facts”. The Appellant submits there was no risk to the charity’s assets, and no benefit to the trustees.

13. On 20 April 2021 the Appellant served detailed grounds of appeal, see consolidated bundle page 8 expanding on the grounds set out in their notice of appeal. Those details grounds state, page references in the right-hand column to the consolidated bundle,

11	<p><i>xx. The Commission refer several times to the Action Plan of 2017. The trustees took advice from their auditor regarding the action plan and did improve on their governance, even if they did not document their management of conflicts as well as they should have. The trustees always acted in the best interests of the charity and have generated substantial profit for the charity via their efforts and expertise. The trustees can confirm that the action plan has now been complied with in full.</i></p> <p><i>xxi. The charity has also recently engaged lawyers who are specialists in charity administration and have been taking advice regularly.</i></p>
23	<p><i>They have also considered their investment policy and advice provided by their legal advisors</i></p>
80	<p><i>The Charity will always prepare property appraisals based on the trustees' market experience, and on advice from the Charity's professional advisors</i></p>
81	<p><i>The trustees are aware of this risk and will regularly review the position based on up to date market knowledge and advice from professional advisors, as well as obtaining formal valuations when necessary.</i></p>

14. The response to the appeal dated 7 May 2021 set out the concerns of the Respondent in detail. The Respondent stated at paragraph 79 that the failure to comply with the action plan/SORP were indicative of a "*chronic problem which appears to beset this charitable structure, viz, that there is no apparent consistent effort nor an appetite on the part of the trustees to ensure compliance with recommended governance and compliance.*"

15. The reply to the response was served on 22 May 2021 [page 516 consolidated bundle], the Respondent relies on 11 sections of that reply in their application, see page 5 para 18 of the Respondent's reply dated 20 July 2021. The Respondent's aver that either these statements amount to a direct reference to the content of legal advice received or the content can be inferred from the Appellant's actions in response to the advice.

16. The Appellant contends that the references amount only to the fact that advice has been sought; they submit that they rely on the effect of the advice and not the content or substance of that advice. The references to taking advice are relied upon to support the Appellant's contention that the trustees fulfilled their duties.
17. As set out by Waksman J. in PCP a narrative reference to the giving of legal advice will not waive privilege. Reference to the effect of legal advice will not waive privilege. The word 'effect' is used to mean outcome or conclusion of the advice. In order to distinguish whether a reference is to the effect or the content of advice it may be necessary to consider the context and purpose of the reference. Simply because only the conclusion of legal advice is stated, as opposed to the detail, may not prevent there being a waiver. The question should not be approached mechanistically.
18. I have considered each statement relied upon by the Respondent. The strength of the application lies with the passages relied upon at paragraphs 24 and 43 and in schedule 1 Row 2 Column 2 and 3.
19. At paragraph 24 of the reply the Appellant states
- "The Trustees obtained professional advice on the acquisition of them shareholding in Belloview Land Ltd and the payment of the developer fee. Including ... From the Charity's solicitor, in order to satisfy the Trustees that the transaction was compliant with charity law, and to advise on best practise. The Trustees followed this advice."*
20. At paragraph 43 the Appellant states
- "Fifth, the Charity has taken independent and specialist legal advice, and endeavoured to comply with the same (examples of which can be found in both Schedule 1 and Schedule 2). The Trustees are fully aware of their duties as Trustees and the need to seek specialist advice to ensure compliance with the same. The Trustees, if and when advised of a need to modify their practice, ensure that the necessary changes are made. As such, the Trustees are not reckless and without regard for both the law and guidance as to best practise, as the Commission suggests. Rather, the Trustees act in good faith and in what they believe to be the best interests of the Charity, and seek advice on the same"*
21. At schedule 1 Row 2 Column 2 and 3 the Appellant states
- "Following discussions with legal advisors on 29/09/20, who recommended that the trustees take steps to alleviate any concerns the commission may raise going forward"*

... Considered whether it would be suitable to appoint Baruch Shloma Ehrenfeld (BSE) as additional trustee. BSE works for Bellview and has requisite experience and proximity to charity's affairs. Discussed concerns re conflict of loyalty with MTG. Discussed at trustee meeting on 11/11/20 and resolved after due consideration that BSE be appointed"."

22. The last reference is to the explicit content of the advice. The Appellants assert that their lawyers recommended (advised) them to act in a specific way but they do not go so far as to set out what steps were recommended. However, in all three passages the references to acting on the advice or to compliance with it is to the effect that the lawyers recommended/approved of the actions of the trustees. That is a reference to the conclusion of the advice but that alone may be sufficient to waive privilege.
23. The references are not made casually or by accident. The Appellant clearly relies on the assertions to support the contention that the actions of the trustees were not misconduct and/or mismanagement as characterised by the Respondent but were steps taken in accordance with the advice of their solicitors. This goes to the trustee's state of mind, their motivation for acting as they did (or for not acting), the characterisation of their actions/omissions and whether it was necessary or proportionate to appoint an IM. The references are intended, in part, to rebut the Respondent's suggestion that *"there is no apparent consistent effort nor an appetite on the part of the trustees to ensure compliance with recommended governance and compliance."*
24. Turning to the other passages relied upon at paragraphs 7, 16, and 29. There is no reference to the content of the advice given, nor to whether the advice was tendered by lawyers or other professionals. The Respondent submits that it can be inferred that it was legal advice however, read in the context of the grounds of appeal it could equally be simply a reference to advice provided by their auditor. However in so far as these passages refer to legal advice the Appellant is saying that they acted in a certain way as a result of the advice given and the purpose of the reliance on acting in accordance with that advice is the same as that in the three passages quoted above.
25. As to the passages relied upon in schedule 1 Rows 4-6 Column 3. These references all post-date the making of this appeal. On one view the statements only amount to an assertion that in making this appeal the Appellant has reviewed the case in the light of communications from their solicitors (and with their solicitors) and that the trustees believe they did not act improperly as alleged by the Respondent. On this reading the Appellant is stating that they received advice, and the effect of that advice was to cause them to

believe the basis of the Respondent's concerns should be reviewed and the appointment of an IM overturned. That is the point of this appeal. On this view, these statements in schedule 1 Rows 4-6 Column 3 reveal by inference that the Appellant's solicitor disagrees with the approach of the Respondent. With respect to the Appellant's solicitor what they think about the strength of the Respondent's case is irrelevant to the outcome of the appeal. The appeal will succeed or fail according to the opinion of the tribunal.

26. If that were the only interpretation then the waiver of privilege would not extend to those pieces of advice as the Appellant could not rely upon the solicitor's irrelevant opinion, but that is not the only reading of these passages. It seems to me that what is being described is the review of previous advice given by solicitors and whether the trustees acted in accordance with that advice. This reading is consistent with the Appellant's assertions that the acts or omissions of the trustees were not misconduct and/or mismanagement as characterised by the Respondent but were steps taken in accordance with the advice of their solicitors.
27. Therefore these passages are saying 'we revisited the legal advice we had been given by solicitors previously, we did so with our current solicitors (at least in part) we considered the steps we took and whether our actions complied with the advice we had been given, we take the view based on that review that the Respondent's concerns are unfounded because we acted in accordance with the advice we were given.' This is, once again, reliance on following the advice they were previously given the conclusion of which the Appellant invites the tribunal to conclude was if you do/do not do x or y then you will be acting properly as trustees.
28. Ms Pratt submitted that there would be no waiver for any of the references because the reliance on the passages in the reply does not go to the heart of the issue. She referred me to paragraph 24 of re D and suggested that this case fell within the scope of an assertion that amounts to no more than "I am acting on the advice of my solicitors". In answer to my question about the use of the word "ordinarily" in paragraph 24 she submitted that an extra-ordinary situation would be where the advice given goes to the heart of the issues in the case.
29. Despite Ms Pratt's eloquent submissions to the contrary it seems to me that the reliance on legal advice does go to the heart of this case. The Appellant's appeal rests on taking issue with the Respondent's assertions that the charity

was mismanaged, and the trustee's acts/omissions amounted to misconduct. It is at the core of the Appellant's submissions that there was no misconduct or mismanagement such as to justify the appointment of an IM, and in that context that they say they obtained and acted upon legal advice.

30. In re D was a case where there could be no argument that the mother had simply done no more than said "I am acting on the advice of my solicitors", she had revealed not only the giving of the advice but also the detailed nature of it. The passage referred to in paragraph 24 of re D is a statement of an uncontentious principle. The case did not consider whether the words used by the Mother may constitute a waiver, the fact of a waiver was conceded and once it was conceded by the Mother that there had been a waiver, it did not matter whether it was a waiver by her legal representatives on her behalf or in addition a waiver by the Mother herself.
31. Moreover in PCP, Waksman J analysed those situations where an assertion such as that referred to in paragraph 24 might not only amount to not a reference to the effect of the advice given but also to its content; in other words would go beyond the ordinary.
32. For the reasons set out above I have concluded that the passages referred to in the reply seek to say more than simply 'I am acting on the advice of solicitors and counsel', the Appellant is saying 'I sought and acted on advice, steps were taken on the recommendation or approval of legal advisors and so therefore the Charity Commission was wrong to appoint an IM as this was not necessary because there was no misconduct or mismanagement.'
33. I have therefore concluded that privilege has been waived by the Appellant because the references to the legal advice in the Appellant's reply are sufficient for the reasons explained above and the Appellant relies on these passages to support their case.

The scope of the material to be disclosed

34. I now turn to consider the extent of the waiver and whether fairness requires that disclosure is made of further privileged documents beyond those to which reference has been made.
35. The consistent theme throughout the passages relied upon is that the Appellant through its trustees, acted in accordance with the legal (and other) advice it received. The Appellant relies on the references to legal advice to

make its overarching point that the acts/omissions of the trustees did not amount to misconduct or mismanagement.

36. The Respondent submits that to allow such a general assertion to be made without being able to scrutinise that advice would be unfair to the respondent and amount to “cherry-picking”.
37. In my view it goes further than this, as the Tribunal is required to assess the evidence and can only do so if that evidence is placed in a proper context.
38. As pointed out by Waksman J, a lawyer’s advice cannot be seen in a vacuum. Much depends on the instructions given against which the quality of the advice may be judged. A lawyer’s advice may be valueless if given on inaccurate or incomplete instructions. Thus the instructions that lead to the advice relied upon in the reply form part of the material caught by the scope of the waiver.

The exercise of the discretion under rule 5(3)(d)

39. I then turn to consider whether I should exercise my discretion under rule 5 (3)(d) to require the production of the documents within the scope of the material where privilege has been waived.
40. The Appellant asks me to take account of the timing of the application, and the delay in it being made. I am asked to infer that the Respondent has not been hindered in its conduct of the case and the application (or its timing) is vexatious.
41. The Respondent submits that the application was made at the moment the Respondent knew they needed to make it and could not have been made before as they were within their rights to await the content of disclosure made in accordance with the Tribunal’s previous directions.
42. The over-riding objective requires the Tribunal to deal with the case fairly and justly.
43. It may be that the Respondent has not been hindered in the preparation of its case, but the material falls to be disclosed in order that the Tribunal can properly assess the Appellant’s case, not to assist the Respondent. The material is relevant to the core of the case for the reasons set out above and its consideration is important for the proper consideration of the issues.

44. This case is on the Fast Track protocol. This is because the nature of the appeal requires swift resolution in the interests of justice. I was informed by counsel that there would be no delay to the hearing in the event of the Tribunal directing the disclosure of the privileged material. I am told the volume of material to be disclosed is not significant. The parties may wish to make further submissions but there will not be a requirement for extensive time and cost to be expended.
45. I appreciate that the parties are not agreed about when the application could or should have been made. However, it seems to me that I need not resolve that issue as even taking the appellant's submissions at their highest, it would be neither fair nor just to refuse to exercise my discretion to require disclosure as a mechanism to punish the Respondents when the effect would be to deprive the Tribunal of relevant and important evidence.
46. I have not been provided with the dates or any other way to identify the advice relied upon in the Reply in my direction other than by reference to the paragraph numbers of the reply. Ms Pratt informs me that the material has been identified. Should there be any issue as to whether the entirety of the advice referred to and the instructions, then the parties should endeavour to resolve such an issue swiftly and any application to the tribunal must be made by 5pm on Wednesday 28 July 2021.

Conclusion

47. For these reasons I exercise the discretion under rule 5(3)(d) to require the production to the Tribunal and to the Respondent of the legal advice referred to in the Appellant's reply.

The application by the Appellant

48. Given my decision the Appellant's application does not fall to be considered.

Tribunal Judge Lynn Griffin

22 July 2021