Neutral Citation Number: [2023] UKIPTrib 4

Case No: **IPT/21/05/CH and ors**

IN THE INVESTIGATORY POWERS TRIBUNAL

Date: 11 May 2023

Before :

LORD JUSTICE EDIS
LADY CARMICHAEL
and
MR STEPHEN SHAW KC

- -

Between :

(1) SF
(2) DM
(3) PB
(4) CS
(5) KT
(6) KSS
(7) CP
(8) CC
(9) ME
(10) UB
(11) NA

Claimants

- and –

NATIONAL CRIME AGENCY **Respondent**

- -
- -

Abbas Lakha KC and Aneurin Brewer (instructed by Avisons Law) for the **1st, 2nd, 3rd, 4th and 5th Claimants**
Stephen Kamlish KC and Thomas Schofield (instructed by No5 Barristers Chambers) for the **6th Claimant**
Matthew Ryder KC and Daniel Cashman (instructed by Carson Kaye Solicitors and Kenyon McAteer Solicitors) for the **7th, 8th and 9th Claimants**
Simon Csoka KC and Oliver Cook (instructed by Eldwick Law) for the **10th and 11th Claimants**

Sir James Eadie KC, David Perry KC, Victoria Ailes, Andrew Deakin, Richard O'Brien, and Natasha Barnes (instructed by National Crime Agency) for the **Respondent**
Jason Beer KC appeared as Counsel to the Tribunal

Hearing dates: **14th December 2022**

- -

JUDGMENT

Lord Justice Edis:

1. This is the judgment of the Tribunal on the application particularly by Mr. Csoka KC and Mr. Schofield for an order that privilege in the legal advice received by the NCA from its legal department prior to the application for the warrants in this case has been waived, and that there should be disclosure of it. We heard oral argument on part of this application on 14 December 2022 and announced our decision refusing the application, and said that we would give further reasons when handing down the judgment on the substantive issues in the case. These are the reasons.

2. These claims were listed for hearing in September 2022, but adjourned part heard to three days in December 2022. There had been a number of directions hearings before September 2022. On 21 September 2022, during the hearing, the claimants served a disclosure request which sought:-

> "Disclosure of the details of the call on 20 February 2020 at 17:30, referred to in the exhibit to Mr Willmott's witness statement **[Second Supplementary Bundle/11]**. The call is relevant to the extent it demonstrates the NCA's understanding of the nature of the technique and the appropriate warrant (TI or TEI), including whether the NCA was candid as to any concerns there expresses in accordance with its duty of full and frank disclosure in seeking to obtain the warrant."

3. The NCA responded on 9 November 2022 as follows:-

> "As to the request at §1(a) and as contained in Mr Cashman's email of 5 October 2022 12:46[1]:
>
> a written note of the relevant telephone call does exist; the note is protected by legal professional privilege; the NCA does not waive privilege over the note. Accordingly, nothing further falls for disclosure."
>
> Footnote 1 reads: "In that email Mr Cashman expanded on the Claimants' request 1(a) as follows: *'1. Does there exist a written record of the legal advice given on 20 February 2022? 2. If so, has that written record of advice been disclosed to (a) IPCO / the judicial commissioner, and/or (b) anybody outside the NCA? 3. Does the NCA maintain an assertion of legal advice privilege over that written record of advice? 4. If so, in the context of these inquisitorial proceedings (concerning inter alia whether the NCA complied with its duty of full and frank disclosure in identifying anything that militated against the issuance of the TEI Warrant), is the NCA willing to waive any such privilege that may remain to (a) the Tribunal and/or (b) the Claimants?'"*

4. On 25 November 2022 Mr. Ryder KC and Mr. Cashman filed a request for a further directions hearing as soon as possible and in any event before the adjourned hearing which was due to start on 14 December 2022. Perhaps surprisingly, it proved possible to hold such a hearing, which took place on 8 December 2022. The request was addressed to a number of matters including this:-

> *"Request 1(a): Disclosure of advice given to NCA officers and claim to privilege over that advice*
>
> 12. The Claimants asked for confirmation of whether a written record of the advice given on 20 February 2022 has ever been disclosed to IPCO/the judicial commissioner, and/or anybody outside the NCA.
> 13. The NCA in its Response set out this request at footnote 1, but then omitted to answer it.
> 14. This request for information is repeated and, if necessary, the Claimants seek a ruling on it.
> 15. It is relevant to the Claimants' submissions on full and frank disclosure, and as to arguments about whether privilege in that document has been maintained.
> 16. The Claimants will also wish to examine any claim to privilege and the nature of any advice in light of what has been disclosed in Ms. Sweeting's more recent disclosure.
>
> The G1 Claimants understand that this issue is addressed in a separate document by the G2-G4 Claimants, filed on 25 November 2022."

5. It transpired that the G1 Claimants' understanding was correct. A 17 page document dated 24 November 2022 was supplied to the Tribunal. This dealt at length with the law relating to legal professional privilege. It was prefaced by this introduction:-

> "1. We submit that the information provided to NCA Legal by Emma Sweeting, Luke Shrimpton, and, or James Willmott on 20th and 21st February 2020 before a TEI warrant was applied for; and the consequential advice (written or oral) provided by NCA Legal, should be disclosed to the Claimants and the Tribunal.
> 2. It is submitted that legal professional privilege does not apply. Alternatively, if the Tribunal finds that it does apply, the material should be disclosed under the iniquity exception or pursuant to a statutory abrogation of LPP. We further submit that, in any event, privilege has already been waived."

6. This document concludes with these submissions:-

> **"Legal Advice Privilege or Litigation Privilege**
> 51. It is uncontroversial that the communications between Officers Sweeting, Shrimpton and Willmott on the one hand, and NCA Legal on the other, were for the dominant purpose of seeking and providing legal advice.
>
> 52. It is submitted that LP cannot apply to the instant case because what was contemplated was not adversarial litigation, but instead an *ex parte* application for a TEI warrant for investigative purposes – see, *In re L (a minor) (police investigation: privilege), [1997] A.C. 16, 16-17 (H.L.)*. There is no evidence that supports the proposition that the Respondent contemplated that there would be future, adversarial litigation before the IPT, such as a risk assessment or advice from leading counsel.

53. Therefore, it is submitted that any privilege that might, theoretically, exist could only be LAP.

54. It is arguable that in a case such as the instant one, where the Claimants are defendants in criminal proceedings facing substantial custodial sentences if the product of the disputed warrant is admissible; and the Respondent has nothing whatsoever to lose by revealing what NCA Legal was told and its advice, there are powerful reasons for interfering with the Respondent's right to LAP, which are proportionate and in furtherance of other legitimate aims – see, *Foxley v. United Kingdom*, (2001) 31 E.H.R.R. 25, and *Medcalf v. Mardell*, [2002] UKHL 27, [60], [2003] 1 A.C. 120, 145.

Waiver

55. First, it is submitted that the Respondent has already revealed part of the substance of the advice given by NCA Legal by disclosing and relying on the following emails:

a. Wayne Johns' email to Ian Lee, 5/3/20:
'The actual advice document is privileged but we can say that this is equipment interference because it is the copying of stored communication on UK devices. We are doing this in accordance with s.6(1)(c)(i) of the Investigatory Powers Act 2016';
b. Elizabeth Holly's email to Ian Lee, 5/3/20:
'I thought that it may help if I address the position with the legal advice. Due to the fast moving nature of this project and the way in which we obtained the information about the technical specifics although there were meetings and discussions about equipment interference there isn't a specific piece of legal advice that addresses the equipment interference issue. The technical specifics as far as we know them and the legal position under the IPA (in this is equipment interference rather than intercept) is set out in the application itself so I hope that would be of assistance for you in that regard.'

56. The Respondent is respectfully invited to explain the meaning of the following entry (in blue text) in the recently disclosed document (ES/01/26/10/2022 – Europol summary 19-21 Feb Rolling Notes) specifically, is it part of NCA Legal's advice provided to Emma Sweeting:

> ***A** (TI)-*
> *Communications (the chat messages) between all EncroChat devices will then be collected as they are transmitted to the chat the server in France i.e. in transmission. When a message is sent by a device, it will be mirrored and sent to another (clone) server in France, as well as the EncroChat chat server in the normal course of transmission.*

> *The messages collected by the French Authorities will then be decrypted using keys (from where?)*
> ***OR***
> *We need to decide if the data is collected though TI or EI. The two techniques are described below:*
> *A) TI: The encrypted messages are collected while they pass through the chat server and are decrypted by French Law Enforcement.*
> *B) EI: Decrypted messages are sent from the device to a server owned by French Law Enforcement.* [The underlining is the "blue text" referred to above].

57. Therefore, it is submitted that the 'transaction test' is met and fairness dictates that the scope of collateral waiver be extended to include the full advice and any information provided by Emma Sweeting, Luke Shrimpton and James Wilmott before the conference call on 20th February 2020, to avoid cherry picking. Without the information sought, the Tribunal will be left with a distorted and inaccurate (and therefore, misleading) picture.

58. Secondly, it is submitted that the NCA has put these matters in issue by relying on the description of the activity (Ms Sweeting email dated 21/2/20) and claiming that the TEI warrant was applied for following advice from NCA Legal based on that description alone. If so, it is submitted that this amounts to an effective waiver of the contents of the advice as opposed to the existence of such advice – see, *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd & Anor* [2020] EWCA Civ 11.

59. Thirdly, it is notable that the CPS has waived any privilege it might have by disclosing the opinions of Lord Anderson. That, in and of itself, gives rise to legitimate concern about NCA Legal's assertion of privilege. However, regardless, the Respondent's voluntary disclosure and reliance on the material it provided to Lord Anderson to persuade him to change his opinion on the 'bulk point' provides an effective waiver.
Applying the principles established in *The Civil Aviation Authority v Jet2.Com Ltd [2020] EWCA Civ 35*, the scope of the collateral waiver should be extended to include the 'TEI/ TI issue' because it is necessary in order to fulfil the overriding requirement of fairness and to avoid the creation of a misleading picture.

Exceptions
Iniquity exception
60. It is submitted that there is a 'strong prima facie case of fraud' that should override the Respondent's assertion of LAP.

61. First, that prima facie case is revealed by the inexplicable volte face in the NCA's recorded understanding of how the French implant worked:

a. Luke Shrimpton's note on 19th February 2020 that: *'Looks like it's interception'*;
b. James Willmott's note on 20th February 2020 that: *'From the information provided, forward looking data will only be collected domestically in France via the server as opposed to targeting every individual device … Legal advice now needs to be sought to consider the new definition of the activity, prior to the UK agreeing to participate … Conference Call with NCA Legal to discuss EI/TI issue';*
c. Emma Sweeting's email on 21st February 2020 that:
'*The French Authorities will be exploiting EncroChat devices globally to collect data from them. The French have domestic legal authorities in place which permits this activity. However, this activity would likely be deemed a Computer Misuse Act offence (more detail needed) in the UK. This application for Targeted Equipment Interference under the IPA 2016 will make that activity lawful.*

62. Secondly, it is a reasonable inference that at the NCA Legal conference call on 20th February 2020 at 5:30pm, the problems with applying for a TEI warrant (given the description of the activity recorded by Messrs Shrimpton and Willmott on 19th February 2020) were discussed and Emma Sweeting was advised to extract from Jeremy Decou a description of the activity that could be shoehorned into a TEI warrant, and that she drafted the email on 21st February 2020 referred to above, even though it was never accurate nor confirmed by Jeremy Decou.

63. Thirdly, the following email on 14th May 2020, from Simon Armstrong (NCA Legal) to Matt Horne (NCA Gold Commander) reveals a cynical manipulation of the NCA's duty of record keeping to avoid the necessity to make disclosure:

'I understand Nikki has asked for a FoW re the meeting with IPCO as Nick Price was still very interested in the nature of that meeting. As discussed, and I know you agree, we need to be very careful that we don't put in writing anything to the CPS that they could use to allege we did not fulfil our duty of candour. Having said that, I do not consider the nature of our interaction with IPCO is an issue.'

An implied statutory abrogation of LPP

64. It is submitted that there is a respectable argument that the unique status of the Investigatory Powers Tribunal (created by RIPA 2000 and the IPA 2016) and in particular, its ability to hold Closed hearings, amounts to an implied abrogation of LPP in Tribunal proceedings.

65. This is because the Tribunal is uniquely equipped (even in adversarial litigation) to manage and mitigate the disclosure of sensitive information whilst rigorously enforcing the NCA's duty of candour. Therefore, material that might be LPP in another forensic

> setting, can be disclosed without breaching the fundamental reason for the existence of privilege – a party being able to freely seek legal advice without fear of the opposing party becoming aware of it, and exploiting it in litigation."

7. There are four contentions here, in summary:-

   a. A submission based on the dissenting judgment of Lord Hobhouse in *Medcalfe v. Mardell* and on the judgment of the EHCR in *Foxley v. United Kingdom* that the legal advice privilege of the NCA should be "interfered with".

   b. A submission that the legal advice privilege has been waived by the matters identified in paragraphs 55-59 of the extract above. Mr. Schofield in his oral submissions placed emphasis in particular on the Consolidated Response of the NCA in these proceedings served on 22 November 2021 at paragraph 38 which reads:-

      > "On the basis of briefing from NCA colleagues as well as knowledge of how EncroChat and other encrypted platforms operate, Mr Horne formed the belief that that the NCA delegation's view that the French technical operation was TEI activity was correct. In sum, Mr Horne considered that communications taking place between EncroChat devices was encrypted end-to-end. As such interception of data in transmission would be unintelligible and unencrypted 'clear text' messages could only be obtained from stored information on EncroChat devices themselves. He was not aware of any other method by which this data could be obtained. Mr Horne accordingly directed that, after taking legal advice, the operational team should apply for a TEI warrant."

   c. A submission that the iniquity exception applies because it is a "reasonable inference" that Emma Shrimpton was advised at the telephone conference with the lawyer that she must "extract from Jeremy Decou a description of the activity that could be shoehorned into a TEI warrant", or because of the later email about what should be said in emails to the CPS about the application for the warrant.

   d. A submission that the Investigatory Powers Act 2016 and the Regulation of Investigatory Powers Act 2000 should be construed so that legal professional privilege is abrogated in proceedings before this Tribunal. These are lengthy and complex statutory provisions and nothing in them was drawn to our attention which could be construed so that it has this effect.

8. Submissions (a), (c) and (d) above are wholly without merit and not arguable. Submission (b) is fact specific and based partly on the "rolling note", part of which is set out above at paragraph 56 of the document. This had been disclosed by Emma Sweeting after the September 2022 hearing. In these circumstances, the Tribunal disposed of the hopeless grounds without a hearing, under Rule 10 of the Investigatory Powers Tribunal Rules 2018. A ruling was issued on 30 November

2022 which gave notice that a hearing could happen on 8 December 2022 and provided, among other things, as follows:-

> "4. The only issues which may be the subject of that further hearing are:-
>
> a) Whether there is any basis for ordering disclosure of the approach taken by the NCA to other applications for warrants which might show that the approach to the law contended for in this case has not always been applied by the NCA (request 1(b) paragraphs 17-20 of the application for a directions hearing).
>
> b) Whether the legal professional privilege in the advice received from NCA Legal on that legal issue in and after February 2020 has been waived. The Tribunal considers that none of the other submissions on LPP are arguable and does not require or permit further written or oral submissions on the issue, Reasons will be given in the main judgment."

9. We therefore turn to the three grounds which we held were not arguable.

   a. Ground (a) relied on *Foxley v. UK*, a decision of the European Court of Human Rights concerning the interception of correspondence of a serving prisoner. It was held that this was a violation of his Article 8 rights because "there was no pressing social need for the opening, reading and copying to file of the applicant's correspondence with his legal advisers and that, accordingly, the interference was not "necessary in a democratic society" within the meaning of Article 8(2)." Our attention was not drawn to any passage in the judgment which supports the current submission and, on a careful reading of it, we can find none. *Medcalfe v. Mardell* is no more promising for the claimants. This Tribunal is bound by the majority in that case, which held itself bound in that situation by authority which is equally binding on us. Speaking for the majority, Lord Bingham said this:-

      > 24. It was not submitted to the House that a relaxation of the existing rules on legal professional privilege could or should be permitted in a case such as the present: the decision of the House in *R v Derby Magistrates' Court, Ex p B* [1996] AC 487 gave no encouragement to such a submission, and subordinate legislation introduced to modify that decision for purposes of the wasted costs jurisdiction was held to be ultra vires in *General Mediterranean Holdings SA v Patel* [2000] 1 WLR 272 and was revoked. No attempt has been made to modify the rule by primary legislation.

   b. Ground (c) relies on a "reasonable inference" that the telephone conversation on 20 February 2020 involved a conspiracy to pervert the course of justice by an agreement that Emma Sweeting should "extract" something from Jeremy Decou which could be used in a warrant. The idea,

presumably, is that what would be "extracted" would be untrue, in that either M. Decou would say something which was not true or Ms. Sweeting would falsify whatever he did say. Quite how Ms. Sweeting would set about "extracting" an untruth from M. Decou is not specified. If she was simply planning to falsify the conversation which had not yet happened, she hardly needed to "extract" anything. In short, what is said to be a "reasonable inference" is an incoherent speculation. The later email from Simon Armstrong, set out at paragraph 63 of the submissions quoted at [6] above, does not appear to be about legal advice at all. It is a warning to ensure that emails to the CPS (which will or may be disclosable) should not contain any material to fuel a suggestion that the NCA did not comply with its duty of candour in dealing with the application to IPCO for the warrants. The concluding phrase suggests that any such suggestion would be false, because the interaction with IPCO was not an issue. The matters relied on do not arguably reveal the kind of iniquity which requires the veil of privilege to be lifted. The main judgment will deal with the issue of whether there was any material failure in the duty of candour at that stage. This email needs to be understood in the light of those findings.

c. Ground (d) is, if anything, even more far-fetched. This result contended for would require clear primary legislation, see the passage from Lord Bingham in *Medcalfe v. Mardell* cited above. There isn't any.

10. This leaves the question of waiver. We left this open for decision at the hearing so that we could receive oral submissions after the further evidence about the rolling note from Emma Sweeting and from Wayne Johns.

11. Our short form ruling on 14 December 2022 on the waiver issue said this:-

> "For reasons which we will give later, in the interests of proceeding efficiently with this hearing, principally, we have decided that there has been no reliance on the content of any legal advice, there has been no waiver and no collateral waiver and, accordingly, the claim to privilege is upheld."

12. It is not submitted that the legal advice given prior to the making of the warrant application (including during the telephone conversation of 20 February 2020) has actually been disclosed. If it had been, there would be nothing to argue about. The two emails relied upon at paragraph 55 of the submissions set out at [6] above clearly show an intention to preserve legal professional privilege and actually include an assertion that "there isn't a specific piece of legal advice that addresses the issue", see Elizabeth Holly's [NCA legal] email to Ian Lee [CPS], 5 March 2020 set out in the submissions at [6] above. Whatever that may mean, it is not possible to read these emails as waiving privilege in legal advice. One of them specifically preserves privilege and the other denies that there was any "specific piece of legal advice".

13. The form of waiver contended for is that which arises when the content of legal advice is deployed, or relied upon, beyond the legal adviser/client relationship. It is suggested that this occurred in the emails to the CPS just cited, and in the Consolidated Response of the NCA to the Tribunal quoted at 7(b) above. The waiver is said to arise from the making of the application following the giving of the legal advice, which is said to involve deployment of the legal advice in support

of the application to IPCO. It is then said that a further waiver arose in November 2021 when the Tribunal was invited to find that the NCA had relied on legal advice before it when submitting that Mr. Horne's belief that a TEI warrant was appropriate because it was based on the legal advice he had received.

14. The submission that the emails to the CPS waived privilege is implied based on the assertion that they implied that application for the warrants was supported by all legal advice given by the NCA legal department at all stages of the process. In very simple terms, the submission is that where a body making an application lets it be known beyond its members that it has received legal advice about the application, it invariably waives privilege in that advice. This is contrary to authority, where the distinction between the fact of legal advice and its content is always maintained. It is here necessary to recall the context. The CPS is an independent agency which has access to its own legal advice. IPCO is also able to secure legal advice if it is necessary, but the Commissioner himself and the other judicial commissioners are expert and distinguished lawyers themselves exercising a judicial function. Neither the CPS nor IPCO would be at all surprised to learn that NCA lawyers had been involved in the preparation of the warrant application. IPCO would be very unlikely to think for an instant about what the NCA lawyers thought of the position. The Commissioner would review the application and take a decision on the basis that it complied with the duty of candour in its presentation of relevant facts and law. There is an arms' length relationship between an applicant and the judicial decision which means that the mere fact that NCA lawyers had been involved in the preparation of an application means nothing. Were it otherwise, every time counsel signs a pleading in a civil case, privilege in advice they had given on the merits of the claim would be waived. In this case, there was no reliance on or deployment of any advice given by the NCA lawyers. The wording of the emails is important here, and we have analysed that at [12] above.

15. Contrary to Mr. Schofield's oral submission, we do not consider that the written submissions of the NCA constitute a waiver of privilege in the legal advice referred to. We note that in a Skeleton Argument in these proceedings signed by Mr. Schofield among others on the 31 January 2022, the following appears:-

> "7. The Respondents have, unlike the CPS, declined to waive privilege in respect of the advice they received on the status of the material and have not even permitted the CPS to see it. The latter would engage CPIA duties and so it can reasonably be inferred that the Respondent wishes to avoid this consequence."

16. This contradicts the current submission that the NCA had in fact waived privilege two months earlier. It supports our conclusion that the effect of the relevant passage of the November submissions is not to waive privilege in the content of the advice but merely to record the fact that the evidence shows that advice had been taken. This is common ground. That was a carefully drawn up document by counsel for the NCA. We did not read it as relying on the content of advice because it did not do so. In order to rely on the content of legal advice it is necessary to waive privilege in it and to disclose the advice without "cherry

picking". The authors of the Consolidated Response and the persons to whom it was addressed, the claimants and the Tribunal, all understand that. Given that this was not done, it is not sensible to read this document as an invitation to the Tribunal to conclude that the course taken by the NCA in applying for the warrant was supported by legal advice. Any such conclusion would be irrational. The relevant passage of the Consolidated Response does not identify the evidence about the legal advice which it mentions, but it is necessary to recall that this evidence included the email from Mr. Johns of 5 March 2020 set out at 55(a) of the submissions set out at [6] above which expressly claimed privilege.

17. We should record the fact that the evidence and submissions on the issue of waiver at the hearing in December 2022 did not, in the result, change the analysis which was apparent from the paper.