Neutral citation [2025] CAT 32

Case No: 1570/5/7/22 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

14 May 2025

Before:

JUSTIN TURNER KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

JJH ENTERPRISES LIMITED
(TRADING AS VALUELICENSING)

Claimant

- v -

(1) MICROSOFT CORPORATION
(2) MICROSOFT LIMITED
(3) MICROSOFT IRELAND OPERATIONS LIMITED

Defendants

Heard at Salisbury Square House on 13 and 14 May 2025

RULING (COLLATERAL WAIVER)

APPEARANCES

Matthew Lavy KC and Jon Lawrence (instructed by Ghaffari Fussell LLP) appeared on behalf of the Claimant.

Geoffrey Hobbs KC, Robert O'Donoghue KC, Nikolaus Grubeck, Jaani Riordan & Kristina Lukacova (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Defendants.

A. THE COLLATERAL WAIVER APPLICATION

1. The Claimant makes an application for broad classes of disclosure relating to legal advice given by the Corporate, External and Legal Affairs ("CELA") team of Microsoft, to Microsoft's business, in relation, inter alia, to the lawfulness of the contractual terms in issue in these proceedings.

2. The basis of the application is that there has been a collateral waiver of privilege by Microsoft following its voluntary disclosure of what is referred to as the Corporate, External and Legal Affairs presentation (the "CELA Presentation"), which was given by Julia Keim on or about 18 February 2016. For present purposes it is accepted that the CELA Presentation comprised legal advice, and privilege was waived in that document when it was voluntarily disclosed to the Claimant.

3. The CELA Presentation describes the application of the Court of Justice of the European Union's ("CJEU") decision in C-128/*11 UsedSoft GmbH v Oracle International Corp*, EU:C:2012:407; [2012] 3 CMLR 44 ("*UsedSoft*") to Microsoft's business at a high level. It states in one of its opening slides under the heading "Basic rules":[1]

> "SHS is legal, CJEU clarified legality requirements";
>
> "Be careful with any statements about SHS and specific SHS vendors (even internal communication might be discoverable)";
>
> "Don't criticize or retaliate against partners selling SHS or customers buying or using SHS"; and
>
> "Play fair and communicate objectively".

(It is understood that "SHS" is used in the CELA Presentation to refer to second-hand software.)

4. The CELA Presentation then sets out some principles or conclusions from the *UsedSoft* case and includes a slide stating that "*software licences can be legally*

[1] Note that the quotations here and in the following paragraphs are limited quotations, used for illustrative purposes rather than a comprehensive account of all relevant quotations from throughout the CELA Presentation.

resold on the secondary market if the distribution right is 'exhausted'", and that "*[a]ny subsequent acquirer of an exhausted copy is deemed a 'lawful user' of that copy*". The slide goes on to state that "*[a]s a lawful user, this subsequent user does not infringe the copyright by using the software*". Then on a later slide, the CELA Presentation states that members of the business departments should "*[s]eek legal support to go after illegal SHS offers*".

5. The CELA Presentation contains a slide entitled: "*Where to find which documents, content and use*", which states as follows:

> "Please use the Reactive Letter on SHS for EU/EFTA in case you get questions regarding Microsoft's general position on secondhand software or specific inquiries with respect to the acquisition and use of secondhand software (e.g. when a customer asks if he is allowed to compensate an identified shortage with SHS)."

6. The CELA Presentation includes an example of a "reactive letter". This particular example of the reactive letter which, was produced as a slide, appears to be a draft. Indeed, my understanding is that there are various versions of this reactive letter, and that a number have already been provided in disclosure.

7. The CELA Presentation was sent to the Claimant on 12 November 2024. The covering letter stated that Microsoft was "*taking the unusual step of waiving privilege*" in the CELA Presentation because it "*shows … that the notion of any campaign as alleged by your client is bogus*". There was a further letter sent to the Claimant on 29 November 2024 which asserted that the CELA Presentation disproved the Claimant's conduct allegations, as articulated in the Claimant's Re-Amended Particulars of Claim at paragraph 48, and "*[i]f the alleged conduct did take place (quod non), it would have run directly contrary to the guidance provided by Microsoft's legal team to the business units at the time the alleged Campaign was taking place*".

B. LEGAL PRINCIPLES

8. The principles to apply when considering whether there has been collateral waiver of privilege were set out by Mr Justice Hobhouse (as he was then) in *The Zephyr* [1984] 1 WLR 100 ("*The Zephyr*") at 114D-115F:

"The principles upon which I am relying in arriving at this conclusion have been covered by the full arguments of counsel. It is right that I should summarise them. The first is that under the English adversarial procedure a party can choose what evidence he does or does not adduce at the trial.

Second, under the rules of legal professional privilege certain categories of communication are protected from pre-trial discovery and from being the subject matter of the investigation at the trial. This is essential to the adversarial procedure followed in this country. The reasons underlying it and its importance have been stated in many cases, including by Lord Simon in *Waugh v. British Railways Board* [1980] A.C. 521, 536–537.

Third, a party is at liberty to decide whether or not to waive privilege and, if so, the extent to which he does so. This is expressly stated in *Lyell v. Kennedy* 27 Ch.D. 1 [("*Lyell*")], in the passage to which I referred. This applies to interrogatories and it applies to the discovery of documents. The issue in the present matter is the degree to which it applies in the proceedings in court.

Fourth, the waiver of a part of the document or conversation is a waiver of the whole of that document or conversation as was stated in *Lyell's* case, and as was the subject of decision in *Burnell v. British Transport Commission* [1956] 1 Q.B. 187 [("*Burnell*")] and *Great Atlantic Insurance Co. v. Home Insurance Co.* [1981] 1 W.L.R. 529 [("*Great Atlantic*")].

Fifth, with regard to waiver before a trial, there can be no question that these principles are correct and that the waiver in the present case of the confidentiality and privilege in the document dated 6 October 1981 did not of itself waive privilege in anything else.

Sixth, by adducing evidence at a trial one does get involved in potential further waiver. The underlying principle is one of fairness in the conduct of the trial and does not go further than that. The fact that this principle does not arise unless you adduce the evidence at the trial is clearly stated in the judgment of Mustill J. and it was clearly raised by the facts in the *Doland* [*George Doland Ltd v Blackburn, Robson Coates & Co.* [1972] 1 WLR. 1338] case and it was likewise raised by the facts in the *Great Atlantic* and *Burnell* cases. Further, if the evidence is adduced then the extent of the waiver relates to the transaction to which that evidence goes. The extent of the transaction has to be examined and where it is what somebody said on a particular occasion, then that is the transaction. It is not the subject matter of those conversations. It does not extend to all matters relating to the subject matter of those conversations.

In support of that latter point I would observe that if Mr. Saville's submissions were to be accepted in full at face value they would be tantamount to a disruption of legal professional privilege. Any waiver of privilege at all would be liable to have the most wide ranging consequences and indeed give rise to a reduction ad absurdam. If one follows the approach of looking at the transaction concerned rather than at the subject matter of the communications, that problem does not arise.

Seventh, the necessity that the evidence shall have been adduced also involves that it must be adduced by the party who is waiving the privilege or who is alleged to be waiving the privilege. Once a document has had its privilege waived then of course it is open to be used by any party. Mr. Saville, or Mr. Hamilton, for the plaintiffs, could have used the document in the present case at any time after 6 May 1983. They likewise can use it, if it is used by Mr.

> Baxter to refresh his memory when Mr. Baxter comes to give evidence. But it cannot be suggested that any use by an opposite party amounts to a waiver by the original party of anything. Likewise the mere production of the document on discovery, or in some pre-trial procedure, cannot in the ordinary course be treated as a waiver of anything beyond the document itself.
>
> Eighth, with regard to the consequences, once evidence is adduced it gives rise to a right to cross-examine freely and fairly with regard to the transaction in respect of which the document is adduced or the evidence is called. The principle applies to the introduction of both documentary and oral evidence. Fairness requires that the opposite party shall be entitled to investigate by cross-examination the transaction and therefore be entitled to ask for and see documents that are relevant to that transaction. But the requirements of fairness do not go beyond that; no conclusion is to be drawn from the use by Mustill J., or indeed by the Court of Appeal, of language such as "the whole of the material" or "the whole of the material and not merely a fragment" to extend the principle beyond the actual transaction so as to include the matters which are merely referred to in the relevant communication. That is the essence of the decision of Mustill J. and any other conclusion would be a departure from his decision."

9. It is of note that the question of collateral waiver arises when the document is deployed in evidence. At that point it is necessary to have regard to the transaction to which that evidence is deployed.

10. In *Documentary Evidence,* (15th Edition, 2024) ("Hollander") at 23-21, Charles Hollander KC commented on Mann J's judgment in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 158 (Ch); [2006] 2 All ER 599 ("*Fulham Leisure*"), stating:

> "[Mann J's] approach [in *Fulham Leisure*] draws a distinction between the act or transaction over which privilege is waived, which depends on precise identification of what privileged material has been disclosed voluntarily and may be very narrow, and the material which fairness requires to be disclosed in consequence of that voluntary disclosure. The judge rightly rejected an argument that the purpose of the disclosure was irrelevant: it is crucial to understand for what purpose the privileged material is relied upon in order to decide what fairness requires to be disclosed."

11. This passage in *The Zephyr* was cited with approval by the Court of Appeal in *Tanap Investments v Tozer* (Unreported, 11 October 1991).

12. Furthermore, in *The Zephyr*, it is stated in the context of Hobhouse J's seventh principle that "the mere production of [a] document on discovery, or in some pre-trial procedure, cannot in the ordinary course be treated as a waiver of anything beyond the document itself".

13. The Defendants also referred *to R (Jet2.com Ltd) v Civil Aviation Authority* [2020] EWCA Civ 35, in which after reviewing the relevant authorities, it was emphasised by the Court at paragraph 114 that:

> "The purpose of the voluntary disclosure ... is therefore an important consideration in the assessment of what constitutes the relevant 'transaction'".

C. ANALYSIS

14. The purpose of disclosing the CELA Presentation was to provide comfort to the Claimant that there had not been a "Campaign". It is necessary to consider how the Claimant described the Campaign in their Re-Amended Particulars of Claim, in which the Campaign is described from paragraph 46. First, reference is made to "Custom Anti-Resale Terms" which are self-evident from the relevant agreements.

15. Paragraph 48 of the Re-Amended Particulars of Claim then states:

> "48. VL believes that the Campaign has also included:
>
> a. as well as, or instead of, using Custom Anti-Resale Terms, Microsoft simply advising such customers that such licences could not be resold, either at all or during the subscription term;
>
> b. Microsoft seeking to dissuade customers from reselling perpetual licences, including by express or implied legal threats;
>
> c. Microsoft purporting to link existing or future discounts on subscription licences (including From SA subscription licences) to customers' retaining, or otherwise not selling, perpetual licences, in ways that fell short of contractual agreements; and/or
>
> d. Microsoft exploiting large customers' concerns about their ongoing relationship with Microsoft so as to dissuade them from reselling their perpetual licences, including by refusing to consent to such resale in cases where no such consent was required."

16. Paragraphs 49-52 of the Re-Amended Particulars of Claim then refer to stage two of the Campaign: the May 2020 'From SA' condition which were introduced in or around May 2020.

17. It is not altogether surprising that the CELA Presentation did not provide sufficient comfort to the Claimant, as it is little more than a high level and uncontroversial description of the *UsedSoft* decision, accompanied by a

recommendation that the business should behave in accordance with the principles set out by the CJEU.

18. Mr Lawrence, for the Claimant, was pressed on the relevance of the CELA Presentation and the additional privileged documents he sought, by reference to the Claimant's pleaded case. He pointed to various emails already provided by Microsoft in disclosure, which were sent within the company between 2018 and 2020. These emails are said to be confidential, therefore I will not set them out in this ruling. However, in broad terms, the emails discuss and/or relate to, the reasons for introducing the new 'From SA Condition' of which complaint is made.

19. Mr Lawrence posited that taking these emails together, they show that:

    (1) CELA was involved in the drafting of the relevant terms in the New From SA, or the relevant New From SA Conditions;

    (2) the purpose of these conditions was to prevent the sale of second-hand software;

    (3) the purpose of the conditions was not to address the risk of copyright infringement, which has now been said my Microsoft to be the case; and

    (4) it is reasonable to hypothesise that CELA thought they could sidestep the *UsedSoft* requirements by introducing these anti-competitive terms.

20. For these reasons, Mr Lawrence avers that there are good reasons to order disclosure of further privileged CELA documents relating to these issues, as they will be highly relevant to the case.

21. The fact that there may be *relevant* privileged documents in the possession of Microsoft is not, however, sufficient on this application. The starting point is that the mere disclosure by Microsoft of the CELA Presentation for the purpose of providing comfort does not, of itself, give rise to a waiver of privilege beyond

that document. It is necessary to consider what use is to be made of the CELA Presentation at trial.

22. In oral submissions Mr Grubeck for Microsoft explained that there is no current intention to rely on the CELA Presentation at trial. That is a credible position, given the CELA Presentation does not directly address the Claimant's pleaded case. Mr Grubeck also stated that if this position changes, the Claimant will be informed of this, and they will be informed by the time of exchange of evidence in chief.

23. In the event that the CELA Presentation is to be deployed at trial, and such notice is given, it will then be necessary for the parties and (if necessary) this Tribunal to understand the use to which it will be put at trial; and in the light of that use, to consider the scope of the transaction and whether waiver should extend beyond the CELA Presentation. Until this Tribunal understands the use to which the document is to be put, it cannot assess the nature of the transaction and the scope of any collateral waiver in the light of that transaction.

24. For this reason, I decline to order any further disclosure of privileged documents. In the event that Microsoft does intend to rely on the CELA Presentation at trial, the question of collateral waiver may be revisited.

25. I should also add that Microsoft has offered some limited disclosure beyond the CELA Presentation in the run up to this hearing. My understanding is that offer remains and those documents will be provided.

Justin Turner KC
Chair

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 14 May 2025