

The Perils of Tactical Waivers of Privilege— *Gorbachev v Guriev* [2024] EWHC 622 (Comm)

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Introduction. A tactical waiver of privilege is always a fraught issue in litigation. Although there are circumstances in which disclosure of privileged material may help a party's case, the decision to go ahead with a waiver must be carefully balanced against the risk of unintended collateral waiver of privilege over other documents.

This is underscored by the judgment in *Gorbachev v Guriev* [2024] EWHC 622 (Comm), which concerned the disclosure of a chronology prepared by solicitors and the collateral waiver of privilege over other iterations of the chronology and documents referred to in those chronologies. As is discussed in more detail below, the judgment demonstrates the extreme caution parties should exercise in waiving privilege over documents for tactical advantage, particularly documents such as chronologies which make free reference to a wider range of materials. As Mr Gorbachev and his legal team discovered, there is always a real risk of a finding of collateral waiver over a much larger tranche of documents than what was intended.

Factual Background. In *Gorbachev*, the consistency of the Claimant's account of events over time was in issue. In seeking to show that his evidence had remained consistent, the Claimant disclosed, and waived privilege over, a chronology of events prepared by his barrister, Mr Fitzgerald.

The chronology in question had been prepared by Mr Fitzgerald in 2012 on the basis of instructions given by the Claimant at meetings and during telephone calls. Shortly thereafter, the Claimant instructed solicitors, and Mr Fitzgerald provided them with a copy of the chronology. A meeting then took place between Mr Fitzgerald, the solicitors and the Claimant, following which Mr Fitzgerald updated the chronology and circulated a copy to the Claimant and the solicitors. It was not suggested that the chronology was updated any further following that second iteration.

Many years later in connection with ongoing proceedings (other aspects of which we have written about [here](#)), the Claimant chose to waive privilege over the original iteration of the chronology. The basis of the Claimant's decision to do so was explained in a witness statement by one of his solicitors as being to demonstrate "that the

instructions he provided to Mr Fitzgerald ‘...in late 2012 and also early 2013 and which culminated in the production of the chronology were consistent with his case today’.

After the disclosure of the original chronology, the Claimant’s solicitors disclosed in correspondence to the Defendant the existence of the second version of the chronology. The disclosure of the existence of the second version of the chronology led to the Defendant applying to the court for a declaration that the Claimant had waived privilege in relation to all “*factual instructions provided by the claimant to Mr Fitzgerald in relation to his case against the defendant...*”.

What Must Be Disclosed When Privilege Is Waived? In considering the Defendant’s application, Pelling J noted the well-established principle that any party is entitled to waive privilege but that the whole of the material relevant to the issue in respect of which privilege has been waived must be disclosed, lest the waived material give an incomplete or unfair picture.

In determining what the whole of the material relevant to the issue is, the first step is to identify the issue to which the originally disclosed material was relevant. Citing R (*on the application of Jet2.com Ltd*) v Civil Aviation Authority [2020] EWCA Civ 35, Pelling J referred to the need to discern the “*actual transaction in respect of which disclosure is made*”, with the “actual transaction” being the issue to which the originally disclosed material is said to be relevant.

Once this is determined, the whole of the material relevant to the “actual transaction” must be disclosed. Further, if it is apparent that what has been disclosed is only part of a bigger picture, then further disclosure may be ordered in the interests of fairness. Determining the extent of the whole of the relevant material will be fact sensitive, and will “*vary very much from case to case*” (see *Fulham Leisure Holdings Limited v Nicholson Graham & Jones* [2006] 2 All ER 599 at [19]).

Disclosure of Documents Ordered. Applying the approach set out above, Pelling J determined that:

- The issue or “actual transaction” to which the chronology was relevant was whether the version of events pleaded in the claim was consistent with instructions provided by the Claimant at the outset of his case, specifically in relation to the preparation of the chronology.
- Once it was accepted that the purpose of the original disclosure of the chronology was to demonstrate consistency with the pleaded case, it was “*close to obvious...that if instructions were given shortly after the chronology was created for the purpose of its*

material alteration, then the chronology cannot be considered as anything more than a developing draft”.

- *“To disclose an earlier draft without disclosing the later version is...redolent with the risk that a misleading impression will be created as a result.”*
- Accordingly, in addition to the later draft of the chronology, the requirement for the disclosure of the whole of the material relevant to the issue in respect of which the original disclosure was made would require the disclosure of documents which contain, record, or otherwise evidence instructions given by the Claimant to his legal team regarding the contents of the original chronology and its updated iteration.

In order to limit the scope of further disclosure to be given the Claimant sought to have an end date imposed, being the date on which the second iteration of the chronology was finalised (particularly as there is no suggestion that any later iteration was prepared). Pelling J refused this request, noting that *“it would be unprincipled to impose what would inevitably be an arbitrary time limit”* since *“the law in this area requires the whole of the material relevant to the issue in question to be disclosed”*.

In light of those findings, Pelling J required the Claimant to disclose the second iteration of the chronology and the underlying instructions to his legal team.

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