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Privilege - A principle under threat?

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Privilege: A principle under threat?

- Legal Privilege: a brief refresher.
- Recent developments
 1. Privilege and internal investigations

SFO v Eurasian Natural Resources Corporation.
 2. Privilege and the iniquity exception

X v Y
 3. Search warrants: privilege and proportionality
- Conclusions



What is Legal Privilege?

- Confidentiality which attaches to communications between lawyer and client.
- Various referred to as *“legal professional privilege”* *“lawyer-client privilege”*
- In Scotland: *“lawyer-client confidentiality”*
- An aspect of the law of evidence, but importance goes far beyond rules of evidence
- In the context of regulatory law, important limitation on investigatory powers

Historical origins and development

Can be traced back to the insitutional writers.

Sir George MacKenzie of
Rosehaugh 1636 – 1691

Lord Advocate 1677 - 1688





“The client has deposited in [the lawyer’ s] breast the greatest secrets imaginable, and it is in the interest of the Commonwealth to have that freedom allowed and secured without which, people cannot manage their affairs and private business; and who would use that freedom if they might be ensnared by it? This would prompt a diffidence between such persons who should, of all others, have the greatest mutual confidence in one another.”

MacKenzie, *Observations*, (n11) pp190 – 91)



By middle of the 19th Century the principle was enshrined in the common law of Scotland:

“The rule by which communications between clients and their legal advisers are protected from discovery is one of great value and importance.”

McCowan v Wright (1852) 15 D 229 at 237 per Lord Wood.



Modern position

- “The principle which runs through all these cases...is that a person must be able to consult a lawyer in confidence, since otherwise half the truth might be withheld. Clients must be sure that what they tell their lawyers will never be revealed without their consent.....”



“Legal professional privilege is thus much more than an ordinary rule of evidence limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

R v Derby Magistrates ex p B [1996] AC 487 at per Lord Taylor of Gosforth at 507D



“The doctrine of legal professional privilege is rooted in the public interest, which requires that hopeless and exaggerated claims and unsound and spurious defences be so far as possible discouraged, and civil disputes so far as possible settled without resort to judicial decision. To that end it is necessary that actual and potential litigants should be free to unburden themselves, without reserve, to their legal advisers.”

Ventouris v Mountain [1991] 1 WLR 607 per LJBingham



Relevance of English law

- Scots law developed from historically different roots
Does not recognise separate notions of:
 1. Litigation privilege; and
 2. Legal advice privilege.
- These are both treated as instances of privileged, or confidential, communications.

BUT



Lord Reed:

“The general principle, its fundamental importance and the considerations of public policy which underlie it, are common to both systems”

R (on the application of Prudential plc & anor) v Special Commissioner for Income Tax [2013] UKSC 1, at para 103

Scotland: Less is more?

Legal Professional Privilege

The Key Features

1. Privilege belongs to the client not the lawyer
2. May be waived by the client
(but to be effective, waiver of fundamental right must be an informed choice – *McGowan v B* [2011] UKSC 54)
3. Once waived, lost forever



4. Legal Advice Privilege extends to communications between a lawyer and a client for the purpose of legal advice (whether or not litigation is in contemplation).

5. Legal Professional Privilege is limited to advice provided by members of the legal profession. (Does not apply to Chartered Accountants; decided by Supreme Court in *Prudential* by a majority of 5-2)



6. BUT communications produced for the purposes of ongoing or contemplated adversarial litigation are protected even if not legal advice *per se* – known as Litigation Privilege.
7. Does NOT extend to legal advice provided in furtherance of a criminal purpose or for the purpose of effecting an iniquity. The Fraud Exception

Recent Developments

The ENRC case

Privilege Renewed?

-v-

Eurasian Natural Resources Corporation Ltd
[2018] EWCA Civ 2006





- Multinational mining group conducted internal investigation in relation to bribery allegations against companies it was considering acquiring in Africa.
- Forensic accountants and external lawyers instructed to investigate allegations and provide advice to company.
- SFO subsequently issued s2(3) production notices (1987 CJ Act), requiring documents generated in the course of investigation including lawyers' notes of witness interviews and document produced by forensic accountants.



- ENRC refused to provide documents, citing legal privilege. Inquiry stalled
- SFO applied to High Court for determination on whether legal privilege applied.
- At first instance Justice Andrews held that:
“The documents could not enjoy litigation privilege because they were created at a point before criminal proceedings were contemplated.”



- Company could not establish that documents created for “dominant purpose” of use for conduct of litigation
- Focus of investigation was “to find out if there was any truth in the whistleblower’s allegations” and “on trying to prepare for an investigation by the regulator.”

Court of Appeal allowed the appeal (in part)

- The judge was wrong to conclude that a criminal prosecution was not reasonably in prospect.
- The dominant purpose of the investigation WAS indeed preparation for litigation.
- “...in both the civil and criminal context, legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending contemplated proceedings.”



BUT

In relation to Legal Advice Privilege (strictly obiter):

- The Court was bound by decision in *Three Rivers DC v Bank of England* which limited the scope of the protection to advice received by authorised persons.
- There was force in the submission that *Three Rivers* was wrong in this respect.
- It resulted in different rules applying to small companies -v- large companies
- Can only be determined by the Supreme Court



Court of Appeal also reaffirmed clear public interest in allowing corporations to conduct investigations prior to involvement of prosecutor without forfeiting LPP, otherwise:

“The temptation might well be not to investigate at all, for fear of being forced to reveal what had been uncovered.”



Lessons from case

- The decision reconfirms the application of legal privilege in the context of internal investigations.
- Context: Regulators are increasingly placing pressure on companies to provide materials considered to be protected by legal privilege.
- Importance of limitation on powers of inspectors.
- Reminder of importance of carefully considering basis upon which assertion of legal privilege proceeds
- Internal investigations should be conducted on the basis of legal advice that the investigation is required for the purpose of advising on reasonably contemplated litigation, whether civil or criminal.



What next?

- Lisa Osofsky
- 2 October 2018 – First public announcement : declines to appeal
- Waiting for the right case?
- Use Parliament instead?



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X v Y

and the Iniquity Exception



The Iniquity Exception

- *"...first, that a fraudulent party who communicates with his solicitor for the purposes of the furtherance of fraud or crime is both communicating with his solicitor otherwise than in the ordinary course of professional communications, and secondly that in any event it would be monstrous for the Court to afford protection from production in respect of communications which are made for the purpose of fraud or crime"*

Per Parker LJ in *Banque Kayser v Skandia* [1986] 1 Ll. Rep 336 at 338



X v Y

- Lawyer's email advising employer (law firm) how to handle possible redundancy.
- Employee sought to rely on email to bring a claim of disability discrimination and victimisation.
- Legal advice privilege claimed.
- Email was marked “legally privileged and confidential”
- Employee claimed that email advised employer how to unlawfully victimise him by using redundancy programme as a ‘cloak’ to dismiss him.



Key Question

- Did advice simply point out risks of claims if employee was selected for redundancy
- OR
- Did it go further and advise that redundancy could be used as cloak to dismiss troublesome employee?



- Email included lines such as:
- “there is at least a wider reorganisation and process that we could put this into the context of”
and
“otherwise we risk impasse and proceedings with ongoing employment with no obvious resolution”



- Employment tribunal held that email was protected by legal advice privilege (merely disclosed advice on how to handle possible redundancy)
- Claim for discrimination struck out.
- Appeal to Employment Appeals Tribunal



- Mrs Justice Slade held that there was a strong prima facie case that the email:
 1. contained advice to commit the tort of discrimination.
 2. amounted to an attempted deception of the employee.
 3. And, if persisted in, the tribunal in anticipated legal proceedings.
 4. that it been written for the purpose of “effecting an iniquity.”



- “Advice sought or given for the purpose of effecting iniquity is not privileged.”
- “Iniquity” includes “crime and fraud”
- Fraud in a wider sense: “all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances.”

BUT



- To negate legal privilege, must go beyond conduct which merely amounts to a civil wrong: has to amount to a fraud or something which the law treats as entirely contrary to public policy,
- Only applies to conduct “that really is dishonest, and not merely disreputable or a failure to maintain good ethical standards.”



- “Advice to commit the tort of discrimination...may be different in degree from advice on how to commit fraud or breach of fiduciary duty. However, depending on the facts, the discrimination advised may be so unconscionable as to bring it into the category of conduct which is entirely contrary to public policy.”



- On that basis, Mrs Justice Slade held that:

“In my judgement the advice recorded in the email crosses the high bar of a strong *prima facie* case of inquiry”



Significance of decision

- Raises spectre of advice provided to employers being the subject of disclosure orders or otherwise recoverable.
- Lack of clarity as to extent of iniquity exception.
- Possible application beyond employment law?
- Decision being appealed to Court of Appeal. Watch this space.....



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Search warrants:
privilege
&
proportionality.

Why is this important in practice?

- Applications for a search warrant are often made on an *ex parte* basis to a sheriff without intimation to the haver.
- The haver may not be named as a suspect (yet.....)
- Client may learn of warrant when police arrive at their door.
- May be necessary to react quickly by challenging search warrant.
- Involves raising a Bill of Suspension in the High Court of Justiciary.



Three significant recent(ish)cases:

1. Holman Fenwick Willan LLP & Anr v Orr 2017 JC 239
2. Clyde & Co (Scotland) LLP v Richardson 2016 SLT 1200
3. S, Complainers, High Court of Justiciary, 9th October 2018

Holman Fenwick Willan LLP

- Police investigation in relation to acquisition of Rangers FC.
- Police seized documents belonging to administrators Duff and Phelps Ltd from their lawyers' offices
- Lawyers raised claim of privilege.
- After service of indictment PF presented petition for search warrant for lawyers' offices.
- Application did not indicate that legal privilege might apply to documents sought

Duties of party seeking warrant

- A police officer seeking for a warrant from a sheriff should provide “all relevant information.”
- In this case, the relevant information included the fact that the havers were a firm of solicitors maintaining a plea of legal privilege.
- Application for a warrant without intimation was oppressive (in the absence of any suggestion of illegality or risk of destruction or concealment.)

Procedure where privilege capable of being asserted

- Where it was clear that legal privilege was capable of being asserted, warrant ought to have provided for:
 - independent supervision of search by a commissioner; OR
 - documents to be sealed and delivered to sheriff unread to enable court to adjudicate on the issue.



Reminder that....

- “Legal privilege is a matter to be asserted by a client. It cannot be asserted by a firm of solicitors in the absence of instructions to do so, assuming there has been time to take such instructions.”

Clyde & Co (Scotland) LLP

- Motion for Interim Suspension of a search warrant.
- PF had applied to fiscal for warrant to search solicitors' offices for files relating to a client.
- Application was not intimated on the complainers.
- “The averments were not accurate. They were not comprehensive. They were misleading.”
- Interim suspension granted by Lord Brodie on the basis of oppression on the part of the Crown.



Duties of Court

Citing Lord Rodger in *Birse v MacNeill* 2000 JC 507

“The hearing before the magistrate is by no means a formality, and he must be satisfied that the circumstances justify the taking of this unusual course, and that the warrant asked for is not too wide or oppressive”

Actions of Crown held to be oppressive

- “High standards of accuracy are always required of a party seeking a remedy *ex parte*... Here the requisite standards were not met.”
- Failure to give intimation of intention to apply for search warrant was oppressive, where privilege was capable of being asserted.

Proportionality: *S, Complainers*

- Bills of Suspension in relation to search warrants sought by HMRC in relation to premises of professional services companies in England.
- Companies were third party havers. Not named as suspects in the petition.
- Relevant statutory provisions enabled HMRC to apply for Search Warrants OR Production Orders.
- Search warrants granted on the basis of ex parte applications to sheriff by HMRC officer.



- Sheriff considered granting production order instead of search warrant but concluded that there was a risk that documents would not be forthcoming or would be destroyed.
- The Sheriff was not informed of prior history of co-operation between complainers and HMRC investigations



Decision

- Court held that had the sheriff been aware of this history, he would have been bound to consider whether a Search Warrant was PROPORTIONATE where less intrusive alternative of a Production Order was available.
- *Holman Fenwick Willan* required applicant to supply all relevant information.
- Had this been done, warrants would have been refused on grounds of proportionality.

How to challenge search warrants

- Lodge Bill of Suspension in High Court of Justiciary.
- Include crave for interim suspension.
- Set out basis for challenge as clearly as possible.
Sheriff will be invited to provide a report dealing with the matters raised in the Bill.
- Time is of the essence.

Possible grounds of challenge

- Under umbrella heading of “oppression”:
 - privileged materials seized.
 - proportionality/ Article 8 – less intrusive alternative available.
 - inaccurate or misleading information.
 - failure to include all relevant information.
- Formal legal requirements
 - Width of warrant
 - Technical requirements complied with.

Advising clients: practical issues to consider

- Identify early in investigation if legal privilege likely arise.
- If so, put investigating authority on notice at an early stage.
- Be careful how material is handled
- If application for warrant anticipated, request intimation.
- Maintain record of co-operation with investigating authority.
- If appealing, once Bill of Suspension lodged, seek undertaking in relation to material seized.



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