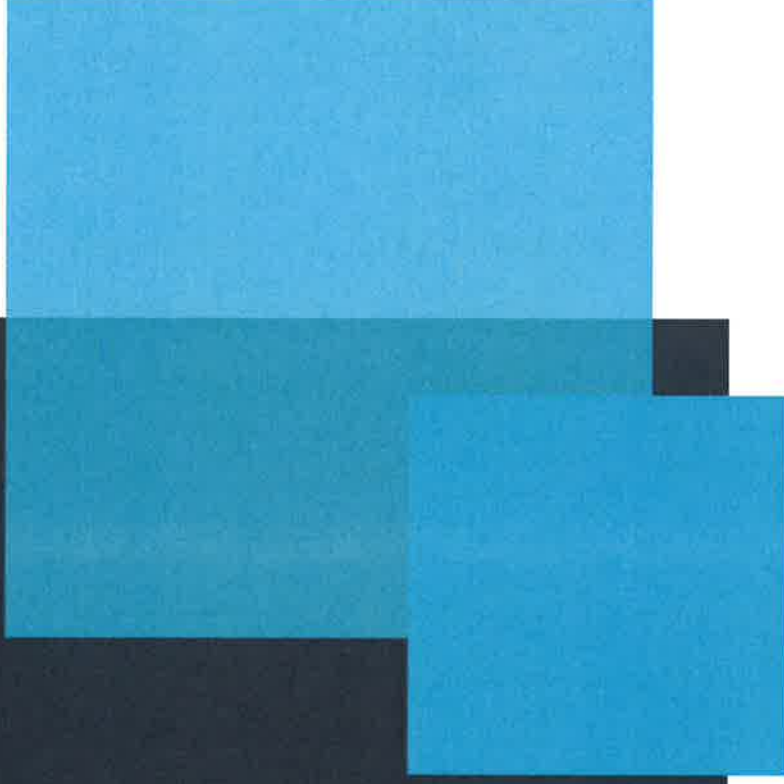


Privilege Update 2014

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Topics to cover

- A great variety, because:-
 - A huge number of cases in 2014 in England and elsewhere;
- Mostly civil cases, but a few criminal decisions as well

Jurisdictional issues: the *lex fori*

- Before the English Courts it is only English law that is relevant to privilege:
 - *Rochester Resources -v- Lebedev* (2014, Comm. Court);
- Facts:
 - Preliminary draft complaint;
 - Prepared by New York lawyers for use in New York proceedings;
 - Stamped: “For settlement purposes only”;
 - Sent by Defendant’s New York lawyers to Claimant’s London lawyers, offering an opportunity to engage in settlement discussions.
- Blair J refused to admit New York procedural law evidence that the draft was not WP:-
 - “... when the question arises in English proceedings, the rule is that the question of whether or not a document is privileged is to be determined by English law; the fact that under a foreign law the document is not privileged or that the privilege that existed is deemed to have been waived is irrelevant.”
- But what if there is a loss of confidentiality?

Parliament and Privilege (1)

- Parliament can override privilege but rarely does so: privilege preservation provisions;
- S.42 Freedom of Information Act 2000: privilege is (unusually) only a qualified exemption to a RFI;
- In most cases, the weight attached to privilege ensures that disclosure requests are rejected:
 - So, *The Cabinet Office –v- The I.C.* (2013) UT (AAC):
“... difficult to imagine anything other than the rarest case where LLP should be waived in favour of public disclosure without the consent of the two parties to it.”
- But: *The Bingham Centre for the Rule of Law –v- Information Commissioner* (2014 FTT), is a rare exception:
 - BCRL sought a copy of independent legal advice referred to in a Government Report “Intercept as Evidence”; the IC refused as advice related to a live issue on which Government still consulting;
 - FTT (by a majority) felt that the public interest in having a full and open debate on the importance of intercept evidence was such that there was a specific justification in this case to order disclosure;
 - Decision based in part on a partial waiver by Government of its legal advice
- Home Office not a party to the appeal ...

Parliament and Privilege (2)

- Note also the position of the security services and privilege:-
 - The Investigatory Powers Tribunal revelations two weeks ago re targeting of privileged communications;
 - Disclosure of extracts of SS policies indicating this is done routinely;
- *McE -v- Prison Service of Northern Ireland* (2009): House of Lords indicated in light of s27(1) RIPA 2000 that privilege does not confer a right of privacy:
 - *Lawful surveillance etc.*
 - *(1) Conduct to which this Part applies shall be lawful for all purposes if–*
 - *(a) an authorisation under this Part confers an entitlement to engage in that conduct on the person whose conduct it is; and (b) his conduct is in accordance with the authorisation.*
- But HL warned about the chilling consequences of too much intrusive surveillance.
- Where will the Government go from here?

Litigation Privilege

- 2014: A great year for litigation privilege issues
- “Once privileged always privileged”:
 - Really?
 - *University College Cork -v- ESB* (2014) Irish High Court
 - Cork followed the Supreme Court of Canada and held that the “zone of privacy” created by litigation privilege comes to an end with the litigation in which arising;
 - Save where there is a related dispute;
 - Thus expert reports prepared re a 1990 flood claim by X were disclosable in this latest flood claim by UCC 19 years later;
- This does not represent the law of England and Wales – yet.
- But remember the concept of “spent privilege” – *Derby Magistrates* (1996, HL).

Litigation privilege: making the claim (1)

- The *Tchenguiz* litigation against the SFO and others:-
 - First Court of Appeal decision – February 2014
 - A real focus on the need for the party claiming privilege to do so in a way that clearly demonstrates dominant purpose and identified litigation;
 - This case concerned reports by liquidators into company affairs following a corporate collapse;
 - Unusually detailed scrutiny of the evidence before the Court asserting such reports were covered by litigation privilege – since liquidation usually means litigation;
 - Eder J said of one such report:-

“Although the magic words “dominant purpose” are used, it seems to me significant that there were no relevant extant proceedings at that stage and although [the witness] does indeed say that litigation “... was, and remains contemplated...”, such statement is ... entirely vague and lacks specificity. For example, [he] states that such litigation was and remains contemplated “... against potential defendants ...” but does not specify who such potential defendants might be.”

Litigation privilege: making the claim (2)

- Tomlinson LJ: CA will hesitate long before interfering with an experienced Judge's careful assessment;
 - Approved Moore – Bick J in *Philip Morris* (2004):-
"The requirement that litigation be "reasonably in prospect" is not ... satisfied unless the party seeking to claim privilege can show that he was aware of circumstances which renders litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility."

Litigation privilege: making the claim (3)

- *Rawlinson and Hunter Trustees SA -v- SFO* (July 2014, CA) concerned inadvertent disclosure of privileged documents;
 - Claimants applied under CPR 31.20 for permission to use them;
 - Documents disclosed under cover of letters that asserted the SFO had no intention of waiving any privilege;
 - Eder J took into account the sheer scale of the disclosure exercise and held documents disclosed by reason of “obvious mistake”;
 - In relation to one such document, CA focused on SFO’s evidence in support of its claim to privilege over the disclosed documents;
- In the CA, again a focus on the failure sufficiently to establish documents prepared for the dominant purpose of proceedings;
 - In particular the deponent failed to give an account of the circumstances in which created so as to satisfy the court that the claim to privilege was well founded

Litigation privilege: making the claim (4)

- The CA also disagreed with Eder J that the disclosures were not obvious mistakes:

“ .. once it is accepted that the person who inspected a document did not realise that it had been disclosed by mistake, despite being a qualified lawyer, it is a strong thing for the judge to hold that the mistake was obvious. Those reviewing the documents were engaged on an enormous task, in the course of which they had been required to consider many thousands of documents, some of which were, or at any rate may arguably have been, privileged.... ”

- CA went on to say:

“ ...but the essence of [the Judge’s] thinking seems to have been that it was obvious that the document had been disclosed by mistake because it was obvious that it was privileged. That seems to me to confuse two things: whether the document was privileged and whether, even if privileged, it had obviously been disclosed by mistake. It is only if the court is satisfied of the latter that it will consider whether to prevent the use of the document in the litigation. ”

- Note also that Longmore LJ indicated a potential change of policy towards these types of cases and went on to suggest that if the Supreme Court were ever to be presented with a case of inadvertent disclosure, it is not impossible that the simpler Australian approach would commend itself.

Litigation privilege: making the claim (5)

- High Court of Australia decision: *Expense Reduction Analyst -v- Armstrong Strategic* (2013 HCA) where the Court took a case management approach and observed:-

“Although discovery is an inherently intrusive process, it is not intended that it be allowed to affect a person’s entitlement to maintain the confidentiality of documents the way the law allows. It follows that where a privileged document is inadvertently disclosed, the Court should ordinarily permit the correction of that mistake and then order the return of the document, if the party receiving the document refuses to do so.”

- Deprecating expensive satellite litigation, the HCA said in this case:

- *“What the Court was faced with was a mistake which had occurred in the course of discovery. It was necessary that the mistake be corrected and the parties continue with their preparation for trial. This was not a case where the fact of mistake was disputed. There was no conduct on the part of [the appellants solicitors] and its clients which would have weighed against the grant of that relief. There was no delay of any significance in the mistakes being notified or confirmed. The primary judge was not persuaded that the [respondents] would be prejudiced by requiring the disks to be returned.”* and
- *“The question for a party to civil proceedings and its legal representatives is not just whether there is any real benefit to be gained from creating a dispute about whether a mistake in the course of discovery should be corrected. The CPA imposes a positive duty upon a party and its legal representatives to facilitate the CPA’s purposes. Requiring a court to rule upon waiver and the grant of injunctive relief in circumstances such as the present could not be regarded as consistent with that duty.”*

Litigation privilege: expert shopping (1)

- *Adams -v- Allen & Overy and Others* (2013, ChD)
 - Expert valuation witness report disclosed after commencement of proceedings;
 - Expert declined to act after his views were savaged, but before CMC;
 - Foskett J allowed an appeal against a CMC Order that the Claimant not to be allowed to appoint a new expert.
- Judge accepted expert's unwillingness to continue (for reasons best known to himself) "constituted a good reason" not to call him;
- Foskett J further ruled that not to allow the expert to be replaced would unbalance the fairness of the trial in a significant way;
 - Was there a price to pay for this? No:
 - Judge could not see how exchanges between expert and lawyer could properly be deployed in the trial process.

Litigation privilege: expert shopping (2)

- Compare with *BMG (Mansfield) -v- Galliford Try Construction* (2013, TCC)
 - Expert first instructed in 2004;
 - Report disclosed WP in 2006;
 - Claim commenced in 2010;
 - Expert withdrew following “bruising” WP meeting/mediation and as he approached 70th birthday in 2012;
- Edwards-Stuart J rejected allegations of expert shopping: nothing surprising about the fact the expert wished to announce his withdrawal – and refused to draw contrary inferences of shopping;
 - But, he ordered disclosure of any other report or document provided to the solicitors by the expert in which he expressed opinions or indicated the substance of opinions on matters in issue;
 - While accepting that in the right case he could do so, this was not a case where appropriate also to order disclosure of solicitor attendance notes on expert.

Common interest privilege

- *Asahi Holdings -v- Pacific Equity Partners* (2014, Federal Court of Australia) concerned:
 - Share purchase dispute in which
 - Purchaser/insured had taken out insurance against breach of warranty by vendors;
 - In the course of proceedings between purchaser and vendor, vendor sought disclosure of privileged information insured had disclosed to insurers.
- Was there a common interest between insurer and insured that prevented the disclosure to the vendors?
- Judge approached case on basis vendors and insurers had a common interest to establish that the vendors did not engage in the alleged wrongful conduct;
 - No commonality of interest arising from insurers' rights of subrogation under the policy given limited rights of subrogation under policy;
 - The privileged material provided as particulars given in support of a claim made under the policy.
- Accordingly the objective purpose of the provision of that material must have included the use of it by the insurer to assess the claim.
- In any event: note insurer's failure to spell out basis of insured's disclosure to insurers.

Starbev -v- Interbrew (December 2013)

- Under the terms of a business sale, I entitled to additional consideration if a business entity on-sold
- This depended on complex consideration provisions which I asked BC to consider so I could decide whether to challenge S
- Was the dominant purpose for litigation?
- Hamblen J:
 - No: I had a suspicion only;
 - Barclays' role was investigatory;
 - Until they confirmed the suspicion, no real reason to anticipate litigation.

Waiver of privilege (1)

- The dangers of sharing legal advice:
 - *Fortress Value Recovery Fund -v- Blue Sky Special Opportunities Fund* (2014, Comm. Court);
 - In order to address a conspiracy claim to remove assets from BSSO, D sought to prove the commercial rationale of the underlying asset reorganisation;
 - In doing so they put in issue their belief in the necessity of the reorganisation; and
 - And the difficulties otherwise in the way of a related entity's application under Italian banking law
- In support, they put in issue legal advice:
 - Said to contribute to their understanding of such matters;
 - But they sought to identify that understanding as representing the limits of the waiver.

Waiver of privilege (2)

- Cooke J:
 - The evidence had also put into issue D's view of various options available in relation to the Italian issue; and
 - Had made clear that the decision to reorganise was based on legal advice received about those different options
- Cooke J identified the transaction to which the legal advice was related.
 - This was the detrimental structure of the group as it then stood in the way of the Italian application; but
 - Limiting the waiver as D sought was unfair since the evidence went further than merely D's understanding of these matters;
 - The evidence also went to the view taken on the basis of advice as to necessity for restructuring.
- Accordingly, D's self-imposed limits on waiver were unfair

Waiver of privilege (3)

- Thus, Cooke J ordered disclosure not only of the advice that the instructions and material by which that advice was procured:-

“The ambit of the collateral waiver extends to the privileged material relating to the desirability or undesirability of all the reorganizational steps referred to by the Claimants as being part of the alleged scheme, and the different ways in which such reorganisation could be done. In short, all material which goes to what other instructions were given and advice received by the Defendants about the aims, purposes, reasons for, advantages and disadvantages of any part of the reorganisation of which the Claimants complain.”

Waiver of privilege (4)

- The dangers of using work email etc for personal privileged documents: *Sheppard -v- Fox Williams LLP* (2014, HC).
 - FW acted for FJI who were the former employers of L,
 - L (a solicitor) was the fiancée of the Claimant;
 - The Claimant's privileged documents (re his divorce) had been sent to L who viewed or opened them on her work computer whilst at FJI;
- Had C communicated to L in circumstances importing (expressly or impliedly) that L should treat them as confidential or had there been a limited waiver?
- FW argued for waiver since C should have known that FJI had policies in place that removed any expectation of privacy;
 - No, said Simler J:
 - Documents had not been sent to L at her work email address;
 - Rather they had been copied onto FJI's server in an "outlook content" folder.
 - This arose because C emailed L at a personal address and L forwarded emails to her work address in order to access them.

Waiver of privilege (4)

■ Simler J:-

“As a matter of law, [Counsel’s] proposition that by sending these documents to L’s personal email address, C is to be treated as having waived his privilege in relation to her employer, goes too far. It is equivalent to an argument that if L accidentally left copies of the privileged documents on her office desk, and another employee or partner of FJI looked through the papers on desk and found them there, a Claimant would be treated as having consented to this and to have waived his privilege in the document. Neither argument can be sustained. It would be contrary to the interests of the administration of justice if privilege is regarded as waived in these circumstances...”

Privilege and Criminal Proceedings (1)

- *R –v- Ritesh Brahmhatt* (2014, CA(CD)):
 - The inevitable waiver of privilege that occurs in relation to an appeal against conviction; or
 - An appeal seeking to vacate a guilty plea;
 - Which requires evidence from the appellant’s trial lawyers;
 - Must be made at an early stage and preferably prior to application for leave.
- *R –v- Pearce & Galloway* (2013 CA(CD)):
 - Conviction overturned because trial judge posed questions about his “no-comment” interview that the appellant could only answer by trespassing on his privilege;
 - There had been no waiver of privilege by the appellant in his previous answers in chief or in the cross-examination.

Privilege and Criminal Proceedings (2)

- *R –v- Minchin* (2013 CA(CD)):
 - Court granted production order in respect of documents held by solicitors relating to client’s purported alibi;
 - Crime fraud exception in play as evidence of a specific/freestanding agreement re perverting the course of justice;
 - *R –v- Hallinan* (2004 EWHC) followed
- *R –v- Okedar* (2014 CA(CD)):
 - Defendant unsuccessfully argued that the duty to maintain legal privilege prevented him from having a fair trial and being able to refer to exculpatory material:
 - Hallett LJ: “The trial process and stern warnings to the jury would provide sufficient safeguards to ensure that he had a fair trial.”

Without prejudice (1)

- *Rochester Resources Limited -v- Lebedev* (2014, Comm. Court):
 - See slide 1 above;
 - C argued no WP since:-
 - The draft complaint was in substance a letter before action; and
 - It contained no concession or offer and was not sent in the course of on-going mutual settlement discussions;
 - It was merely an invitation to treat.
- Blair J disagreed: the communications were sent in order to provide an opportunity for the parties to engage in settlement discussions.
 - Viewed objectively the draft complaint could not be regarded as an LBA;
 - It was sent as the first shot in settlement negotiations and so was subject to WP.

Without Prejudice (2)

- *Clydesdale Bank Plc -v- Duffy* (2014, CA).
 - Was there a genuine dispute between the parties?
 - Court had found that entire negotiations founded on the Bank’s ability to enforce its various securities;
 - Accordingly a commercial deal or solvent work-out was the subject under discussion;
 - Judge found as a fact that the parties did not seriously contemplate matters collapsing into litigation at any time during the negotiations.
- Accordingly, no WP.
- Lewison LJ’s warning that detailed factual findings in such cases should not be appealed: the Appeal Court deprecated an appeal based on references to carefully selected documents and parts of transcripts (“island hopping”).

Without Prejudice (3)

- *A –v- B&C* (2013, UK EAT):
 - Teacher subjected to a disciplinary hearing by his school;
 - Prior to pronouncement of the disciplinary decision, his union engaged in discussions with the school about a possible “agreed partings of the ways”;
 - Discussions marked WP/off the record;
 - No settlement reached and thereafter a final warning communicated.
- Following further disciplinary proceedings, teacher dismissed and unfair dismissal claim followed;
 - Could he rely on the (WP) discussions between school and union?
- Teacher argued that negotiations had taken place after the panel had made a decision but before it had been announced;
 - Accordingly there could be no dispute to which WP could apply.

Without prejudice (4)

- Keith J disagreed:-
 - The teacher wanted settlement discussions to avoid potentially career damaging consequences;
 - And although the school was not contemplating litigation, the teacher was;
 - It was enough for the WP to apply even though only one party feared litigation when negotiating.
- Note also that WP limited to the point at which teacher advised of final warning:
 - Thereafter teacher knew dismissal was not contemplated, at least at that stage;
 - Accordingly, WP limited to the earlier stages of negotiations and not the later stage, even though the same set of discussions.

Without Prejudice (5)

- What if there is no dispute – can the parties agree to import the WP privilege?
- Much debate about this at HL and SC level for several years;
- Court of Appeal has now confirmed that WP available under both public policy and contractual bases;
 - That means there does not need to be a dispute for WP to kick in *if* parties agree.
- Facts: a dispute for money alleged to be due under a loan agreement and a guarantee;
 - When borrower ran into repayment difficulties, it sent a proposed repayment schedule which lender refused;
 - Only when lender served demands on borrower/guarantor was the allegation first made that the loan repayment was conditional on receipt of payment from a sub-borrower.
- Up to this point, correspondence between the parties and their lawyers discussing the repayment schedule had been headed WP and Subject to Contract.

Without Prejudice (6)

AvonWick Holdings -v- Webinvest ([2014] EWCA Civ 1436)

- Accordingly, there was no dispute. Lewison LJ said: -

“There are two basis for the operation of the WP rules. The first rests on public policy and that policy is to encourage people to settle their differences. However, in order for that public policy to be engaged there must be a dispute. ... The other basis for the rule is contractual, that is by contract the parties may extend the usual ambit of the WP rule. ... Freedom of contract is a basic principle of English law. If A and B agree for valuable consideration that their communications will not be used in civil proceedings in Court, I find it difficult to see why, as a matter of principle, the Court should not uphold their agreement. ... It is often open to parties by agreement to immunise their acts from what would otherwise be their legal consequences.”

- In this case, although both parties had used the WP tag, they had also used “subject to contract” .
 - Usually means no legal consequences flow;
 - Accordingly there was no contract to the effect that communications would not be used in civil proceedings in Court.



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