

Legal Professional Privilege and HSE Investigations - the rigour of SFO v ENRC Ltd in action

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SFO v ENRC [2017] EWHC 1017

- First case in which the adversarial litigation said to have been reasonably in contemplation was criminal, rather than civil.
- Explored the issue of who is the “client” for the purposes of legal advice privilege.
- Practical impact is that it is more difficult to claim privilege in a criminal context than a civil context.
- A reminder of the facts . . .

The Disputed Documents

- Interview Notes
- Accountant's Reports
- Factual Updates
- Communications with a Legally Qualified Businessman

The Basics – a reminder

- Legal Advice Privilege (**'LAP'**):
 - applies to communications between a lawyer and his client; or
 - lawyer's working papers.
- Litigation Privilege (**'LP'**):
 - Applies when there is actual litigation, or litigation which is "*reasonably in contemplation*".
 - Litigation must be adversarial, not investigative or inquisitorial
 - Applies to communications for the dominant purpose of conducting (*or advising in relation to*), such litigation.

“The Client”

- What is the ratio of Three Rivers 5 [2003] QB 1556 (CA)?
- Andrews J endorsed the approach of Hildyard J in the RBS Rights Litigation [2016] EWHC 3161 (Ch)
- In short – only communications with those authorised to seek and receive legal advice are subject to LAP.
- Both Hildyard J and Andrews J rejected argument that communications with an employee authorised to provide factual instructions (but not seek and receive legal advice) were covered by LAP.
- Compare approach in other jurisdictions:
 - Skandinaviska [2007] 2 SLR 367 (Singapore)
 - Citic Pacific [2015] 4 HKLRD 20 (Hong Kong)
 - Pratt Holdings [2004] 136 FCE 357 (Australia)

“Working Papers”

- Privilege only attaches if the documents would betray the tenor of the legal advice.

- What evidence will suffice? RBS at [125(2)] (cf. ENRC at [180]):

“Thomas described his notes of the interviews as containing ‘what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere’.”

Anticipation of Litigation

- Reasonable Anticipation is a mixed objective/subjective test – USA v Philip Morris [2004] 1 C.L.C. 811
- Andrews J held:
 - SFO investigation did not constitute adversarial litigation for the purposes of LP.
 - As a matter of fact ENRC did have an SFO investigation in reasonable contemplation.
 - But, unless a person knew of some “*substance*”, “*some truth*”, “*at the very least ... some material to support the allegations*” could not have prosecution in reasonable contemplation.
 - Because - threshold for bringing a prosecution higher than that for bringing a civil claim.

“Dominant Purpose”

- The “dominant purpose” had to be the “conduct” of litigation – i.e. preparing materials for the Defence. Or at least advice in relation to the same.
 - Is this consistent with *Highgrade* [1984] BCLC 151, or *Sagheera* [1997] 1 Lloyd’s Rep 160?
 - Vos (Chancellor) did not think so in *Bilta v RBS* [2017] EWHC 3535(Ch)
- Avoiding litigation was not a purpose which could engage LP.
- As the purpose of “self-reporting” was ultimately to produce a report for the SFO, the preparatory materials for that report not privileged.

Judgment distilled

Category of Document	Privilege claimed	Andrews J's judgement
Interview Notes	LP and LAP	LP – NO , litigation not reasonably in prospect and not dominant purpose. LAP – NO , not with client.
Accountant's Reports	LP	LP – NO , litigation not dominant purpose.
Factual Updates	LP and LAP	LP – NO , litigation not reasonably in prospect and not dominant purpose. LAP – NO , part of continuum of communications.
Communications with a Legally Qualified Businessman	LAP	LAP – NO , acting as a man of business not a lawyer.

Key points of Litigation Privilege

Will be privileged if, at the time of the communication in question, the following conditions are satisfied:

- Litigation is in progress or reasonably in contemplation and
- The communications are made with the sole or dominant purpose of conducting that anticipated litigation and
- The litigation must be adversarial, not investigative or inquisitorial

The ENRC approach in action

Key strategic points

Communications with **third parties will not** be privileged
for Legal Advice privilege alone

Communications with **third parties will** be privileged if you can assert
Litigation Privilege

Are the old assumptions being eroded by the ENRC approach? Rarely challenged

Write '**privileged**' on the front and hope for the best?

How does it inform H and S practice in the aftermath of an accident?

Canter through some cases

- R (AL) v. Serious Fraud Office [2018] EWHC 856
- R (HSE) v. Jukes [2018] EWCA Crim 176
- Bilta (UK) v. RBS and Mercuria [2017] EWCH 3535 – helpful approach but applied where there is a **dual** purpose to documents
- Is there a common denominator in the form of the financial services litigation?

R (AL) v. SFO (March/April 2018)

- Suspicion of corrupt practices on part of a company's employees abroad
- In house interviews (no representation etc) by lawyers appointed – Company self reports to the SFO
- Company lawyer 'Proffers' oral summaries of the interviews– enters DPA and individuals are then prosecuted
- An individual in criminal proceedings seeks disclosure of full records of interviews
- The SFO's declines – asserts the company's privilege

Caveats

- Obiter? Primary decision was **jurisdictional** – it is a matter for the Crown Court to sort out disclosure when there is an active prosecution, not the Divisional Court
- Careful - **disclosure issues in criminal prosecutions** bring different pressures to bear re fair trial obligations etc
- Procuring material in the hands of a third party – can an ‘oral proffer’ by a lawyer ever be enough to satisfy that obligation?
- The SFO in this case failed even to consider the original material for the purposes of its disclosure obligation

However

- It is settled law that privilege does not apply to first interview notes - fact sensitive?
- An assertion of privilege in relation to those documents may be 'thoroughly wrong'
- In any event, there had been a waiver that was to be judged not subjectively on the basis of the intention of the person asserting privilege but objectively as to the effect of what has been disclosed
- Implications for employees
 - Implications of that in the context of how employees are to be managed in an investigation
 - Upjohn style warning? Warned that no protection from disclosure?
 - Separate legal advice?
 - Mandatory obligation to comply? May that give some protection to an employee?

R (HSE) v. Jukes (January 2018)

- A refuse baler had an door interlock de-activation switch by-passed leading to a fatal accident when an employee entered the machine to clear a blockage
- Pause there
 - Charget
 - Evidence of accident =
 - Breach of duty
 - Reverse burden territory
- How likely is a prosecution on those facts...

Factual position

- D **interviewed** by solicitors for company shortly after accident and a statement signed
- D claimed subsequently they were **his** solicitors and others for the purpose as well as Company solicitors – if so – legal advice privilege
- In due course, **solicitors rejected** that proposition – never acting for D as an individual
- Statement made appeared to **accept more responsibility** for H and S than his subsequent HSE interview (18 months later) and DCS accepted
- This statement admitted into evidence – conviction followed
- This was **not** a document covered by privilege that could be asserted by D – fell at first hurdle subject to section 78 argument (failed)

Points of interest

- Is the Court of Appeal correct to say, **without evidence**, the threshold is not reached?
- Quoting from ENRC
 - ‘The reasonable contemplation of a criminal **investigation** does not necessarily equate to the reasonable contemplation of a **prosecution**’
 - ‘Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that **it is reasonable to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction**’

Reasonable Contemplation

- Millett J in *Plummers v Debenhams* [1986] BCLC 447 at 454:

There must be a **real prospect of litigation**. Where it is neither pending nor threatened, it must be **in the active contemplation of the party...**

That party must

Show that he was **aware of circumstances** which rendered **litigation** between himself and the particular person or class of persons **a real likelihood** rather than a mere possibility: *USA v Philip Morris* [2003] EWHC 3028

H and S first principles revisited

- Charget
- Evidence of Injury = evidence that material risk insufficiently addressed
- Reverse burden
- Is the **test not made out?**
- Counsel for D's – the HSE normally prosecutes
- Response – absent any evidence as to the solicitor's state of mind (assuming privilege CAN be asserted)

Argument

- First principles of H and S suggest the privilege hurdle (if yours to assert) could still be overcome subject to evidence of state of mind
- Manage that carefully in the first instance
 - **Opinion** on the likelihood
 - **Analysis of the HSE's** enforcement model
 - Solicitors commission investigation report
- Fact sensitive – can be done

Further practical implications

- Expect companies and/or solicitors to be have to justify a claim of privilege by reference to their state of mind **in evidence**
- Employment law issues
 - Protection of employees?
 - Warning about incrimination?
 - Contractual **obligation** to co-operate with investigation – section 78?
- What of the ‘dual purpose report’ – we think we are going to be prosecuted but we would also like to establish the root cause?

Bilta v. RBS [2017] EWCH 3535

- Neither the likelihood of litigation nor that it was adversarial in nature in dispute – if you can get over those hurdle(s) so much the better
- Issue was whether the ‘dominant purpose’ of preparing a report and interviewing witnesses was for the purpose of conducting that litigation
- Created interview transcripts pursuant to its own governance procedure BUT asserted it was also doing so for the dominant purpose of the anticipated claim – Highgrade Traders
- Andrews J’s conclusion that attempts to settle are not the same is not a matter of fact not principle – heavy inference of doubt
- Likely to have direct parallels with safety critical internal investigations – appointing solicitors was important – comms with the HMRC didn’t change the position

Conclusions

- On the face of it the old accepted wisdom is being eroded by cases nothing to do with H and S
- Fact sensitive? **Bilta** and **dual purpose**
- A proper analysis of an accident may still provide for a basis upon which litigation privilege can be asserted at an early stage – sooner the lawyers are involved the better – BUT may require **evidence in more cases than before**
- **Interview notes and statements** with employees (**subject to above**) are not **unless** you take steps to manage it **early**

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