NORTHUMBRIA LAW SCHOOL

UNIVERSITY OF NORTHUMBRIA
CENTRE FOR EVIDENCE AND CRIMINAL JUSTICE STUDIES

LEGAL PROFESSIONAL PRIVILEGE
A HUMAN RIGHT OR A BARRIER TO JUSTICE?

1.0 Introduction

1.1 I bring to this discussion my experience of managing corporate criminal cases, investigations by regulators and the representation of corporate bodies at public inquiries in my capacity as an advocate instructed by the corporate body. Issues involving legal professional privilege and the cost of analyzing those issues are at their most acute, in my experience, where investigations are pursued by agencies such as the Serious Fraud Office, and where requests for relevant material have been made in the context of public enquiries. These generate the already well rehearsed complex issues of law which arise and which have to be considered in such circumstances, invariably at substantial cost to the corporate client.

1.2 I wish therefore to preface my remarks by emphasizing that this is a particularly complex area of the law. It is complex from an academic view point but it is particularly demanding in legal practice where decisions in relation to non disclosure may be subject to challenge. It also serves to consume significant financial and logistical resources on the part of corporate bodies involved in responding to requests for material generated in the exercise of statutory powers. Having said that I will declare my hand. In my judgment, apart from significant aspects of the law which still require clarification [including the reversal of *Three Rivers D C (No 5)],* I consider that the current principles governing the application of legal professional privilege, particularly in respect of legal advice privilege, are correctly formulated and should not be amended or eased in order to try to accommodate the conflict involved in seeking to ensure, in every case, a fair

trial. I say that, not to cast doubt on the profound importance of the principle of seeking to ensure a fair trial, but because I do not believe that erosion of most of the existing principles would lead to any fairer result in the criminal process. In due course I will provide some examples of how legal professional privilege can promote the wider interests of justice.

1.3 Legal Professional Privilege is a rule of substantive law which is to be contrasted with a personal right which attaches in litigation from rules of evidence. For many years it was treated as a rule of evidence. Since it is a rule of substantive law it has the advantage that it can be effectively asserted in response to any claim that some higher right or authority, such as a judicial search warrant or notices to produce documents by regulators, seeks to justify access to privileged material. A rule of substantive law also impacts upon the interpretation and drafting of statutes. The right attaching to privilege is also a fundamental human right. This is firmly established in English law and in my personal professional view, for good reason.[1]

1.4 However, there are, plainly, other human rights involved which are competing rights, one of which is the right to a fair trial in accordance with Article 6 (1) ECHR. The issue has been put succinctly by Andrew Higgins in his admirable study[2] entitled *"Legal Professional Privilege for Corporations – A Guide to Four Major Common Law Jurisdictions"* as follows:

> *"Classification of privilege as a fundamental human right raises a number of questions regarding the interests it is designed to protect, the extent to which it adequately protects those interests, and whether the rights to privilege may be curtailed or overridden to protect other fundamental rights."*

1.5 The strongest argument in favour of modifying the current principles of legal professional privilege is where the protection afforded by legal advice

[1] Morgan Grenfell v Special Commissioner of Income Tax [2003] 1 A.C. 563 / Three Rivers DC v Bank of England (No 6) [2004] 3 W.L.R. 1274.
[2] Oxford University Press – 2014 - §2.48.

privilege or litigation privilege may result in an adverse effect upon a person's right to a fair trial or a just outcome to litigation, in circumstances sufficient to justify overriding the privilege. This argument should, as a matter of principle, only arise where the privilege holder is, or may be in possession of material which is, demonstrably, of very real significance for the purposes of determining the outcome of the litigation. So far, it appears that within the common law jurisdictions, only Canada has acknowledged that in the criminal context it may be possible to require disclosure of privileged communications where there would otherwise arise a real risk of a wrongful conviction for murder.[3] It follows that even faced with the possibility that the result of litigation may be adversely and unfairly influenced by the protection afforded by legal professional privilege, the administration of justice will not generally countenance inroads into the existing principle of "once privileged, for ever privileged." This approach may be said to be inconsistent with a requirement in favour of displacing the privilege where the consequences of not doing so creates the scope for real or serious injustice to an otherwise innocent party. In this jurisdiction, the approach which has, exceptionally, arisen in Canada was firmly rejected in *R v Derby Magistrates' Court Ex parte B* [1996] A.C. 487, in circumstances where, at first instance and on appeal to the Divisional Court, it had been determined that in the interests of justice in a murder trial, access would be permitted to privileged material. The decision at first instance and on appeal therefrom were overturned, despite the fact that the overriding consideration in the judgments of the lower courts, was to secure a fair trial for the accused. The speech of Lord Taylor C.J. included the following succinct statement of principle:

"….it is not for the sake of the Applicant alone that the privilege must be upheld. It is the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that

[3] R v McClure [2001] 1 SCR 445 – cited by Higgins at §2.65 and Jones v Smith [1999] 1 S.C.R. 455 – cited in Phipson on Evidence 20th Edition at §23-07.

no exception should be allowed to the absolute nature of legal professional privilege, once established."

1.6 This extract from Lord Taylor's speech serves to explain why the legal system in this jurisdiction has adhered to the principle that legal professional privilege, once established, remains protected in all circumstances. Lord Taylor's words – "*the whole truth*" can be interpreted as acknowledging the exception in *Cox v Railton*.

1.7 I remain, from a personal professional viewpoint, adherent to the principle that there are wider issues involved in this debate which justify continuing to treat the decision in *Derby Magistrates' Court* as one which is correct in principle, despite the fact that the English courts have so far not ruled on the correctness of that decision in the light of the fact that it was decided before the implementation of the Human Rights Act. In the more recent decision in *Ventouris v Mountain*[4] Lord Justice Bingham, pursuing the same theme, made clear that the doctrine of legal professional privilege was rooted in the public interest and that actual and potential litigants should feel free to "*unburden themselves without reserve to their legal advisers*" without fear that these communications and their lawyers' advice may come to the attention of an opposing party should the issue come to court for resolution. Lord Taylor's concern in *Derby Magistrates' Court* was that inroads into the principle of privilege would deter clients from providing frank instructions to their legal representatives and that that was something that would have a wider impact on the administration of justice as a whole. The requirement to justify such an approach was emphasized by the Court of Appeal in the judgment in *Civil Aviation Authority v The Queen on the Application of Jet 2.Com*:

"LAP involves the right to withhold disclosure of relevant, and possibly crucial, evidence from legal proceedings; and consequently it potentially detracts from the fairness of those proceedings. Such a right requires powerful justification. "

[4] [1991] 1 W.L.R. 607

1.8 So it is my personal, professional view that conflicting individual rights must give way to the wider consideration of the administration of justice as a whole and that once exceptions are permitted, despite the gravity of individual circumstances, it would introduce an undesirable degree of uncertainty into the substantive rule and would in fact undermine the administration of justice, for the reasons made clear by both Lord Taylor C.J. and Lord Bingham. Speaking entirely personally, I would need to see a particularly convincing argument that full candour within client/lawyer communications would still arise regardless of whether the privilege exists, since my experience in the criminal and regulatory spheres convinces me otherwise. This is particularly so with corporations which seek legal advice on a vast range of issues. To take an example, in the field of corruption many corporations ask for advice on the potential consequences of existing or proposed contractual arrangements, quite possibly involving other jurisdictions, one of the most common of which is the payment of 'consultancy fees'. For the purposes of section 2 (2) and (3) of the Criminal Justice Act 1967 [powers of the Director of the Serious Fraud Office to require the provision of information and the production of material], the current exemption afforded by sub section 9 provides protection from disclosure of privileged material. Losing this protection would, in my judgment, lead to a reluctance on the part of corporate bodies to seek appropriate advice, knowing that the record of any consultation or correspondence on the subject would become a matter of record. This is particularly so where a company recognizes that it may have contravened the provisions of the Bribery Act and may need to conduct a transparent and demanding discussion with their lawyers. This in itself may have financial and reputational consequences since reputable corporations will want to make full disclosure to their lawyers in order to mitigate the consequences of any possible offending, including advice on 'self reporting' and the possibility of deploying a Deferred Prosecution Agreement.

1.9 It follows that my professional position is that the current principles relating to the application of legal advice privilege and litigation privilege [subject to some important specific exceptions], serve to support the necessary principle that a client must be afforded the right to consult with a lawyer for advice and, where necessary, to prepare for litigation, which is in reasonable contemplation, without fear that that material will be disclosed to any third party.

1.10 With these preliminary observations in mind I turn to the question of the complexities of managing the issue of privilege in the context of corporate criminal investigations.

2.0 The logistics and cost of managing the response to a corporate investigation or a public inquiry

2.1 The logistical demands imposed and the associated costs involved in circumstances where a corporate body is responding to an investigation by, for example, the Serious Fraud Office or to disclosure requests in the context of a public inquiry, are particularly onerous. They place heavy demands on the client's legal advisers. They become even more so where the corporate client is listed on the stock exchanges of other jurisdictions such as the United States, where the Securities Exchange Commission may be interested in a joint investigation with the United Kingdom authorities.

2.2 In the modern world it is necessary to cater for legal advice sought by large national corporations and multi national corporations. This creates significant difficulties in the context of identifying 'who is the client?' for the purposes of determining whether communications between employees and the corporations lawyers are in fact privileged. This brings into sharp focus the one area of reform which in my view is required, namely, the reversal or modification of *Three Rivers (No 5).*

2.3 Similar issues arise where a public inquiry requires access to material held by a body corporate pursuant to section 21 of the Inquiries Act 2005. Statutory protection from disclosure exists for material that is privileged by way of legal advice privilege.[5] This does not extend, in this context, to protection from disclosure of material prepared for use in non adversarial proceedings.

2.4 It follows that the demands imposed upon a corporate body and its legal representatives, where privilege is claimed, are particularly onerous. In many instances the number of documents that need to be examined can be measured in hundreds of thousands and even millions. One particular problem is that generated by e mail correspondence, apart from the sheer volume of such material. E mails sent to lawyers by employees having authority to instruct a company's lawyers for the purposes of obtaining legal advice may also be copied in to individuals who are not lawyers and who are not so authorized. This gives rise to very real complexities as the judgment in *Civil Aviation Authority v The Queen on the Application of Jet 2.Com* [6] makes very clear.

2.5 These complexities in terms of managing the response to an investigation therefore touch upon part of the theme of this session – the financial costs of LPP and the use of modern technology in disclosure. My experience is that very substantial costs are invariably generated by the process of identifying material that may be protected from disclosure, analyzing that material, determining to what category it is to be relegated and scheduling it accordingly. It will have been necessary to consider whether the material satisfies the legal test for privilege under the categories of legal advice privilege and litigation privilege [and sometimes lawyer's working papers]. Those responsible for this exercise need to be fully conversant with the demanding requirement of considering not only whether the communication

[5] In circumstances involving a Public Inquiry section 22 (1) provides that: *"a person may not under section 21 be required to give, produce or provide any evidence or document if….he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom…."*

[6] [2020] EWCA Civ 35 at Paragraphs 97 to 103

between the corporate body and the company's lawyers constitutes a request for legal advice and, in the context of litigation privilege, the dominant purpose for which the material was created, but whether those making the request themselves satisfy the preconditions for the protection of privilege by reason of their authority and status. As we know, this last problem arises in the context of communications between a lawyer and an employee of a corporate client who is not 'authorized' to instruct the company's lawyers and to seek and receive legal advice. Such communications are, following *Three Rivers DC v Bank of England*[7] not protected by legal professional privilege. As every recent decision of the Court of Appeal shows, that latter principle has been the subject of enduring criticism and remains ripe for appeal.

2.6 Invariably, a corporate body's legal advisers need to be supplied with the documentary material for analysis. Advice needs to be given in relation to 'keyword searches' which is the only means by which the material held by the corporation can be analysed. This has been recognized by the Serious Fraud Office and by other regulators and there is, in practice, significant scope for agreement between the investigators and the body corporate on the nature and extent of necessary key word searches which the investigator or regulator may recommend [always assuming that the company's material has not been seized and then subjected to sift and search with appropriate protection for LPP].

2.7 If these routes are followed, using dedicated and knowledgeable in house corporate lawyers and the external lawyers the material can be efficiently managed, but at a significant cost to the corporate body, none of which is likely to be recovered. The result is that efficient in house and external systems are required by any legal firm holding itself out as competent to represent corporate clients under investigation at this level, with the ability to obtain advice from counsel on the more demanding issues of disclosure. What is the benefit arising from this cost? What must be appreciated is that an

[7] [2003] Q.B. 1556

effective analysis of material that is privileged allows the corporate body to consider a very wide range of options with its legal advisers and to have confidence that its request for advice and the advice received will remain confidential unless, as a result of that advice, the company decides otherwise. Experience shows that it is in the interests of the administration of justice that that exercise, involving candid disclosure by the company to its lawyers, should happen. Take the following two examples:

(i) A corporation can decide to make a qualified disclosure in one set of proceedings in order, for example, to assist a law enforcement agency and yet retain the protection of otherwise privileged material.[8] The result is that privileged documents can be made available to the prosecuting authorities and yet remain protected from disclosure.

(ii) A corporation may decide to make full and unqualified disclosure of privileged material to regulators or investigators on the advice of its lawyers. This occurs from time to time in the context of 'self reporting' and is a powerful tool in mitigating the consequences of corporate criminal liability.[9] It has proved to be particularly valuable for corporations seeking Deferred Prosecution Agreements.

2.8 In conclusion, in my judgment there is a requirement for caution in considering the question of whether legal professional privilege is a barrier to justice. Plainly, it may be in individual cases, since, taken at its highest, the protection is capable of preventing a court from acquiring evidence of fact which may achieve an alternative and correct or just result. Viewed in isolation, that remains a compelling argument for relaxing the privilege in circumstances which involve the exercise of judicial discretion. But that argument stands to be confronted by the observations of Lord Nichols in *Ex*

[8] British Coal Corporation v Denis Rye (No 2) [1988] 1 W.L.R. 1113
[9] See Serious Fraud Office v Rolls Royce Plc [2017] Lloyd's Rep FC 249 at paragraphs 19 – 21, 35 – 39 and 121 and the commentary in ENRC v SFO [2018] EWCA Civ 2006 at paragraph 117.

parte Derby Magistrates Court in which he pointed out the impossibility of the exercise by which a Judge is to ascribe the appropriate weight to the diverse interests of the two sides in the disputed litigation. I therefore offer the opinion that the views of Lord Taylor and Lord Bingham provide the most compelling argument for maintaining most of the current principles relating to legal professional privilege and that the focus for reform is now narrowly confined.

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