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Litigation privilege revisited

Significant decision for many common-law jurisdictions

In one of the more important decisions on legal professional privilege (***LPP***) handed down this year,[1] the English Court of Appeal unanimously held that, when determining whether LPP attaches to the identity of persons communicating with lawyers in relation to litigation, the key question is whether disclosure of that identity would inhibit candid discussion between the lawyer and the client. LPP only attaches if this test is met, since otherwise the court would be deprived of relevant evidence. In the absence of clear authority on point, the Court of Appeal approached the issue as one of principle. In coming to this conclusion, the Court of Appeal revisited the law of the litigation privilege strand of LPP in England and Wales. The significance of the decision goes beyond the issues immediately before the court, raising questions about the scope and nature of litigation privilege, and its demarcation with legal advice privilege.

Background

The claimant brought securitisation-related claims under various heads of fraud against the defendant bank. A key issue concerns whether the claims are time-barred because the limitation period has expired. While the answer to this question would be determined at trial, a subsidiary point arose which was the subject of this judgment, namely which individuals were authorised to give instructions to the claimant's lawyers in these proceedings. The defendant argued that the answer to this question would allow them to infer whose knowledge could be attributed to the claimant. Accordingly, the defendant requested both (**i**) the production of the claimant's engagement letter and (**ii**) further information pursuant to CPR Part 18 on the persons authorised to instruct the lawyers. Following a case management conference, an order was made in respect of both requests, subject, however, to any claims to LPP.

The claimant produced the engagement letter, albeit with the section on 'Next steps and reporting arrangements' redacted, and it refused to comply with the Part 18 request, on the basis that the identity of persons authorised to give instructions to the lawyers was just as protected by litigation privilege as the identity of a prospective factual or expert witness.

Robin Knowles J at first instance rejected this argument, setting down two requirements: **first**, the communication itself needed to be privileged; and **second**, LPP would need to be undermined by any disclosure of the identity sought. The claimant had not satisfied this test.

[1] *Loreley Financing (Jersey) No 30 Limited v Crédit Suisse Securities (Europe) Limited & Ors* [2022] EWCA Civ 1484. Judges: Sir Geoffrey Vos MR, Nicola Davies LJ, Males LJ (who gave the judgment)

Analysis

The Court of Appeal unanimously allowed the claimant's appeal in part. A number of points are notable about the Court of Appeal's decision:

1. Definition of litigation privilege and demarcation with legal advice privilege.

The Court of Appeal referred to Lord Carswell's authoritative statement in the **Three Rivers No 6** case,[2] which defines litigation privilege as applying to:

*'**communications** between the parties or their solicitors **and third parties** for the purpose of obtaining information or advice in connection with existing or contemplated litigation [...], but only when the following conditions are satisfied:*

(a) litigation must be in progress or in contemplation;

(b) the communications must have been made for the sole or dominant purpose of conducting that litigation;

(c) the litigation must be adversarial, not investigative or inquisitorial" (emphasis added).'

There has been some debate in the case law and in commentary about whether claims to legal advice and litigation privilege are mutually exclusive or can coincide, although the leading authorities suggest that they are exclusive. The Court of Appeal did not accept this, and the point was conceded by the claimant. Thus, in the Court of Appeal's view, a confidential lawyer/client communication made for the dominant purpose of litigation attracts both legal advice **and** litigation privilege, despite Lord Carswell's definition of litigation privilege referring only to third-party communications.

2. The point of principle.

The Court of Appeal accepted that LPP, including litigation privilege, was '*absolute and fundamental*' where it applies. At the same time, approaching this case as a matter of principle, it also held that LPP must be weighed against the downside of the court being deprived of relevant evidence. In doing so, the Court of Appeal considered what it regarded as the true rationale of litigation privilege: it was **not** to protect some zone of privacy of litigating parties, but rather to protect a client's right to seek and receive legal advice on litigation in the unqualified confidence that such communications would be absolutely and permanently protected. Interestingly, the cases cited by the Court of Appeal in support[3] were cases about legal advice privilege or LPP in general, not about litigation privilege. The traditional wisdom has been that legal advice and litigation privilege do not share the same rationale, hence the need for two separate heads of LPP. Yet the Court of Appeal's judgment in this case collapses the rationales into one, with possibly far-reaching consequences for litigation privilege, such as the position of material other than communications and of self-represented parties. These issues are considered further below.

3. Focus on communications.

The Court of Appeal was at pains to state that LPP was concerned with **communications** (and secondary evidence of such communications), as opposed to facts, such as who was authorised to seek advice. It is true that Lord Carswell's definition referred specifically to communications, but as will be explored in further detail below, this must not be read too narrowly. Otherwise, the scope of litigation privilege would be narrowed to an extent that litigants and litigators would find surprising.

4. The test for determining whether the identity of persons authorised to give instructions is privileged.

The test is framed in terms of its being '*necessary to consider whether disclosure of that identity would inhibit candid discussion between the lawyer and the client (or the person communicating on behalf of the client)*.' There is, in effect, a presumption against such an inhibition. Rebutting the presumption would require the party to adduce evidence that disclosure of the identity would reveal something as to the content of the communication or litigation strategy, enabling the court to determine the issue of LPP. The Court of Appeal described such cases as '*exceptional*,' '*unusual*,' and '*rather special*.'

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[2] *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610 (HL).

[3] *R v Derby Magistrates Court, ex p B* [1996] AC 487 (HL), *B v Auckland District Law Society* [2003] UKPC 38, *R (Morgan Grenfell) v Special Commissioner of Income Tax* [2003] 1 AC 563 (HL), and *R v Manchester Crown Court, ex p Rogers* [1999] 1 WLR 832 (DC).

5. Reconciling prior case law.

There were cases in which it had been held that the identity of the client/persons authorised to communicate with the lawyers was privileged and cases in which it had been held that it was not privileged. For example, in one case,[4] a solicitor was compelled to produce records of client appointments. The Court of Appeal regarded the two cases which had found in favour of identities being privileged[5] as exceptional, in that the client's contact details had been provided to the lawyers specifically in confidence for legal advice purposes, respectively by a person convicted of an offence and 'on the run', and by an anonymous blogger. The Court of Appeal's analysis was that these cases fell within the test it had posited, and that the parties had been able to evidence the special circumstances in those cases.

6. Disposal of the appeal.

The Court of Appeal made three key orders. **First**, it ordered the engagement letter to be produced in full, without redaction. The claim to litigation privilege had not been made out, since disclosure of the identities would not, '*without more*,' reveal the contents of any advice or information. **Second**, Robin Knowles J's first-instance declaration to the effect that the identities are not subject to litigation privilege was set aside as it was too broad. The court stated that any questions as to whether the identity of a party to a particular communication was covered by LPP should be '*answered by reference to the principles set out in this judgment*.' The court had already answered that point in respect of the engagement letter, but not otherwise. **Third**, LPP was no answer to the defendant's Part 18 request: this concerned a request for factual information rather than any particular communication. The doctrine of LPP was therefore technically not engaged. (The court nevertheless set aside the request, on the ground that the information sought was not necessary and proportionate as required by the Practice Direction and the Commercial Court Guide.)

Commentary

The Court of Appeal's decision raises a number of important issues. Some of these, such as the collapse of the rationales for legal advice and litigation privilege, have already been touched on.

- The thrust of the decision is in favour of an alignment of the rationales and, to some extent, of the scope of legal advice and litigation privilege. The Court of Appeal regards as the core reason for the existence of litigation privilege the right to seek confidential legal advice in relation to litigation. It is unobjectionable to regard this as **one** relevant characteristic. However, litigation privilege has never been necessarily tied to the involvement of a lawyer at all and also avails, for example, litigants in person. The Court of Appeal did not address the situation of litigants in person and self-represented corporate entities, but the reliance on litigation privilege by self-represented parties sits uncomfortably with the court's reasoning.
- The sole focus on **communications** is problematic if taken literally. It has long been accepted that material that does not technically constitute a communication may be protected by litigation privilege. Examples include unserved witness statements or expert reports. To some extent, such documents could be regarded as intended or inchoate communications and hence properly within the ambit of litigation privilege. However, characterising other types of material as inchoate communications may be pushing linguistic boundaries, such as draft pleadings, the identities of factual and expert witnesses (which are undoubtedly privileged) or the 'materials for the brief' (such as client notes) or, in some circumstances, even real evidence (such as blood samples collected for litigation), for which there is considerable authority that they are covered by litigation privilege.
- Although the Court of Appeal tied the rationale for litigation privilege to the candid confidential exchange of communications between lawyer and client, litigation privilege also protects exchanges with third parties in respect of legal proceedings (in fact, this is the paradigm case of litigation privilege). The better reading of the judgment is therefore that the Court of Appeal did not intend to limit the situations outside the lawyer/client relationship which may give rise to litigation privilege. On this basis, the two doctrines which extend LPP to pre-existing documents collected from third parties in certain circumstances,[6] are unaffected by the decision. That said, while the courts have for some time regarded the Lyell and Palermo doctrines as ripe for authoritative reconsideration, the Court of Appeal's decision has added no clarity.

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4 *R v Manchester Crown Court, ex p Rogers* [1999] 1 WLR 832 (DC).

5 *JSC BTA Bank v Ablyazov* [2012] EWHC 1252 (Comm), *SRJ v Person(s) Unknown* [2014] EWHC 2293 (QB).

6 *Lyell v Kennedy (No 3)* (1884) 27 ChD 1 (CA), *The Palermo* (1883) 9 PD 6 (CA).

- It is not clear how, in practice, a party can meet the test posited and evidence required by the Court of Appeal. The court did acknowledge that whatever evidence is adduced must not itself reveal the information over which LPP is claimed. This is easier stated than applied in practice, in particular given the inbuilt presumption against the identity of persons authorised to instruct lawyers being privileged. The court was not convinced that this was a genuine problem, because people were rarely so specialised that their involvement could allow inferences as to the underlying advice sought. Of course, it should also be pointed out – though it was not by the Court of Appeal – that a party may often in any event have to disclose the identity of those authorised to seek or receive legal advice, namely where there is any doubt about whether a particular person is an emanation of the 'client'.

While the Court of Appeal decision provides authoritative guidance on the LPP status of the identity of persons authorised to instruct lawyers in relation to litigation, the case raises many questions which are left unanswered. This also falls into a line of cases which have queried the extent of litigation privilege and certain of its characteristics.

Key Contacts

If you have any questions about this case or any other issues related to privilege, our disputes team will be happy to assist. Please contact your usual relationship lawyer or one of our experts: Tobias McKinnon, Joaquin Terceño, and Christopher Robinson.

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