Regulatory Enforcement and Privilege – Waiver, Content, Cherry-Picking

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Key Points

- Privileged documents may be provided to third parties under a limited waiver without losing privilege to the rest of the world.
- Courts may extend the waiver for other purposes where there is a sufficiently close nexus, but will take a narrow view.
- Privilege can only be overridden by the iniquity exception, or modification / abrogation by statute.
- Documents deployed in open court may lose their confidentiality, and therefore privilege. However, there is a difference between privilege in a document, and its contents. Whether privilege in the document itself is lost is a question of degree.
- The “content / effect” distinction in the waiver doctrine has been modified and will not be applied mechanistically.

Abstract

Disclosing privileged documents under a limited waiver to regulators has the potential to attract cooperation credit when regulators decide on level of penalty or, indeed, whether to undertake enforcement proceedings or prosecution. There may also be benefits in relying on privileged material in any defence to regulatory enforcement or prosecution.

Such limited waiver or reliance raises questions regarding whether privilege can be maintained in the relevant documents against the rest of the world.

This article surveys judgments over recent years relating to limited waiver, privilege in a document versus its content, and collateral waiver.

Introduction

In recent years, much of the law around legal professional privilege has been developed in cases involving regulatory bodies and investigations.

Reasons for this, we suggest, include the increased vigour with which regulatory enforcement actions have been pursued since the 2008 financial crisis, the number of high profile incidents in recent years, and resultant civil

litigation. This is compounded by the costly impact that disclosure of privileged documents could have and the propensity to litigate to protect them, particularly where internal investigations have been undertaken and work product is produced that could prove extremely valuable to the other side of a dispute.

Disclosing privileged documents under a limited waiver to regulators has the potential to attract cooperation credit when regulators decide on level of penalty or, indeed, whether to undertake enforcement proceedings or prosecution. An example of this is in the context of deferred prosecution agreements (DPA), where cooperation by the entity under investigation is a factor the Serious Fraud Office (SFO) must consider in deciding whether a DPA is appropriate. The SFO's August 2019 Corporate Co-operation Guidance notes that whilst it will not penalise decisions not to waive privilege over relevant documents, such a decision will mean that a factor against prosecution (i.e. for use of a DPA) is not obtained. Further, in *Serious Fraud Office v ENRC* [2018] EWCA Civ 2006, Sir Brian Leveson warned, *obiter*, that a court may consider non-waiver of privilege over witness accounts in deciding whether a DPA is in the interests of justice.

There may also be benefits in referring to or relying on privileged material in any defence to regulatory enforcement or prosecution.

These strategies are not without risk. In particular, questions persist regarding the effectiveness of limited waivers in maintaining privilege in the relevant documents against the rest of the world. It is important to understand the legal landscape prior to making such decisions.

Limited Waiver

Privilege only applies to communications that are confidential. However, it is accepted that communications can be shared with a third party, including a regulator, on a confidential basis and for a limited purpose without losing their confidentiality and privilege against the rest of the world.

In *PAG* [2015] EWHC 1557 (Ch), Birss J held that this was the case "*despite the existence of legal rights or duties on the part of the regulators to use, act on or even publish the documents pursuant to their regulatory powers* [...] *The fact that the carve outs recognise the regulator's rights and obligations to take a step, which might go as far as even publishing the information in the document, makes no difference if that has not happened*".

This raises interesting questions about identifying the purpose for which privilege is waived, and the extent to which that purpose can be departed from.

Purpose

In the case of *Belhaj v DPP* [2018] EWHC 513 (Admin), the Foreign Commonwealth Office ("FCO") shared legal advice that it had received with prosecuting authorities, for the purpose of assisting with investigations and charging decisions. No charges were brought against the alleged wrongdoer, and Belhaj brought a judicial review against the DPP. As part of the judicial review, Belhaj sought disclosure of the legal advice that the FCO had provided to the DPP. Belhaj submitted there was a sufficiently close *nexus* between the charging decision, for which privilege over the advice had been waived, and the resultant judicial review such that privilege had also been waived for the judicial review. In support, Belhaj relied on the decision in *Scottish Lion Insurance Co Ltd* [2013] BCC 124 in which waiver of privilege in one part of an insolvency process was deemed waiver in another part of the same process.

The Court rejected Belhaj's submissions, stating that there was " *no inevitable or necessary nexus*" between the charging decision and judicial review, and that "*these are discrete processes not one composite process*".

Accordingly, this limits the scope for which privileged documents disclosed under a limited waiver can be sought or redeployed for other purposes.

Exceptions

Earlier this year, the Court of Appeal in *Sports Direct v FRC* [2020] EWCA Civ 177 confirmed this limitation. Sports Direct had disclosed certain privileged documents to its auditors on a limited waiver basis as part of an audit. As part of an investigation into the auditors, the FRC requested documents from Sports Direct. Sports Direct claimed privilege over some of the documents; the FRC sought production of those. At first instance, Arnold J accepted

that privilege had not been waived against the rest of the world by providing documents to the auditors under a limited waiver, but ordered production on two bases.

1. Firstly, relying on obiter comments of Lord Hoffman in *Morgan Grenfell* [2002] UKHL 21, that "*the production of documents to a regulator by a regulated person solely for the purposes of a confidential investigation by the regulator into the conduct of the regulated person* [the auditors in this scenario] *is not an infringement of any legal professional privilege of clients of the regulated person in respect of those documents. That being so, in my judgment the same must be true of the production of documents to the regulator by a client.*"
2. Secondly, that if there was an infringement, it would be technical only; FRC was investigating the auditors and not Sports Direct.

The Court of Appeal overturned the first instance decision, noting that the only two exceptions to override privilege were the iniquity exception (privilege does not attach to communications between a lawyer and client for criminal purposes), and where modified or abrogated by statute. Neither of these applied.

This case caused a nervousness about the extent to which privileged documents provided to auditors may be disclosed to regulators. This was exacerbated by the increasing number of investigations into auditors over the last 18 months.

Although the Court of Appeal decision reduces the opportunity for this, the burden is on the auditor, rather than the client, to identify privileged documents and withhold disclosure. This was clarified in *A v B & Anor* [2020] EWHC 1491 (Ch).

Further challenge

Whilst the Court of Appeal's decision brings some comfort, we expect that regulators will continue to challenge this area of law. We note that the court's obiter comments in *AL, R (On the Application Of) v XYZ Ltd & Ors* [2018] EWHC 856 (Admin) provide insight into circumstances that might give rise to such a challenge.

XYZ (a company) self-reported to the SFO after discovering potential instances of bribery. XYZ instructed lawyers to conduct an investigation, including interviews with four employees. The SFO subsequently entered into a DPA with XYZ; a condition of this was that XYZ would afford total cooperation to the SFO in its efforts to investigate and proceed against XYZ's employees.

The SFO sought disclosure of the interview notes. XYZ asserted privilege, but allowed its lawyers to give an "oral proffer" summarising the interviews. During the oral proffer, the lawyers stated that no privilege was waived over the full interview notes. The SFO took notes of these summaries, and disclosed them to the employees.

One of the employees was charged, and subsequently sought judicial review of the SFO's decision not to pursue XYZ for breach of its duty of cooperation under the DPA.

The Divisional Court held that the High Court was not the appropriate forum in which a dispute about disclosure of this sort should be litigated. However, the Divisional Court made *obiter* comments, including on limited waiver.

The Divisional Court opined that the oral proffers waived privilege over the full interview notes Accordingly, the SFO should have sought disclosure of the full interview notes and would have had to disclose them to the defendants. It might be argued that waiver over the full interview notes would have been a limited waiver in respect of the SFO only, but there was no evidence that the SFO had addressed the question. If such arguments were raised, the court stated it would have had difficulty with these, including because there was a real possibility that the summaries would be disclosed to the defendants.

We do not consider this analysis satisfactory since it puts the cart before the horse. Where privilege is not waived, as per *Sports Direct*, privilege can only be overridden by the iniquity exception or abrogation or modification by statute, and the SFO's duty of disclosure would need to be found to override legal privilege. Further, as decided by *PAG*, limited waiver can be relied upon despite the existence of carve outs.

Instead, we prefer the Divisional Court's secondary argument that "[e] *ven if we were to accept that the waiver was for a limited purpose we do not see how that limited purpose would not have included*

transmission of the underlying documents to the Defendants since this was squarely in contemplation and was an integral part of the process being undertaken".

This is consistent with *Belhaj*, that there may be implied waiver where there is a sufficiently close *nexus*.
In light of the above, parties should be comforted that disclosure of privileged material to a third party on a limited waiver basis should not result in a loss of privilege against the rest of the world. However, when providing documents to a regulator on a limited waiver basis, greater caution should be exercised, and parties should be prepared to accept that the waiver may extend to individuals against whom regulatory action may be taken. This opens the door for those individuals to deploy that material in open court, which could have the effect of privilege being lost in them entirely.

Privilege in the contents versus the document

In *SL Claimants v Tesco PLC* [2019] EWHC 3315 (Ch), the claimants sought disclosure of a note of an interview between a Tesco in-house lawyer and Tesco's external lawyers. It was alleged that, because the note had been "*summarised, partly read out and discussed extensively in legal argument*" during separate criminal proceedings, confidentiality, and therefore privilege, had been lost. Tesco submitted there was a difference between the information contained in a document and the document itself. The judge accepted this distinction, and that a loss of confidentiality in the content does not necessarily cause loss of confidentiality in the entire document; it is a question of degree. Hildyard J held that (i) the detail and extent of the references were insufficient to cause loss of confidentiality in the entire note; and (ii) disclosure of the note was not required to enable the public to understand the criminal court's approach to the decision before it; therefore confidentiality in the note was not lost.

Parties should be careful in referring to parts of privileged documents in open court since it is difficult to assess when confidentiality in the entirety of the document will be lost. In this case there was no contention that the note was deployed in such a way as to constitute waiver. However, this could be argued, and raises the risk that further documentation may need to be disclosed by operation of collateral waiver.

Collateral Waiver

When privilege is waived by deploying a document in proceedings, this can result in collateral waiver of privilege in related documents.

The recent case of *PCP Capital Partners LLP* [2020] EWHC 1393 (Comm) provides insight into the operation of this doctrine and highlights the risks of deploying privileged material to support one's position. In this case, privilege had been waived over documents disclosed by the defendant to the SFO and other parties in related criminal proceedings, for the purposes of conducting those proceedings. Some of these documents were referred to in open court in those proceedings, and it was accepted by both parties that these had therefore lost their privileged status (the "Open Documents").

Shortly before trial, the claimant applied for further disclosure of documents (non-Open Documents), relating to a particular agreement, which had been withheld (or redacted) on the grounds of privilege. The claimant submitted that references to legal advice (which were Open Documents) in the defendant's witness and opening statements were sufficient to constitute a waiver of privilege in those documents and, by collateral waiver, all otherwise privileged documents relating to the particular agreement.
The defendants argued there had been no waiver on application of the legal principles. Further, the legal advice referenced in the statements were Open Documents which were no longer privileged; accordingly, deployment could not amount to waiver, pursuant to which privilege over other documents was collaterally waived.

Waksman J rejected these arguments and ordered production. He accepted that a purely narrative reference to the giving of legal advice does not constitute waiver. However, he went on to consider the view, previously held by many practitioners, that "*waiver cannot arise if the reference is to the 'effect' of the legal advice as opposed to its 'contents'*".

He concluded that the application of this content/effect distinction cannot be applied mechanistically. Rather, its application must be viewed and made through the prism of:

- whether there was any reliance on the privileged material referred to;
- what the purpose of that reliance was; and
- the particular context of the case in question.

This is a fact sensitive exercise, and reference to the effect of legal advice rather than its content will not necessarily preclude waiver. In this case, reference in the witness statements stated the witness "took comfort from" the legal advice. Waksman J held that this was sufficient to constitute a waiver in the legal advice referred to.

Waksman J also rejected the defendant's second argument, that reliance on Open Documents, which were privileged documents that had lost their privilege, could not give rise to the operation of waiver. This seems to be a sound decision on public policy grounds; since if the opposite were true, parties could tactically seek to destroy privilege in selected documents they want to rely upon in order to avoid creating a collateral waiver affecting documents that may undermine their case.

Waksman J ordered production of all privileged documents relating to the same "*transaction*" as the documents referenced in the witness and opening statements. The defendant sought to rely on references to legal advice to support its arguments regarding the legality of the particular agreement. Accordingly, Waksman J defined the relevant "*transaction*" as the lawyers' advice about that agreement.

The decision in *PCP* makes it more difficult to predict when reference to a document or legal advice will give rise to a waiver of privilege which may engage the doctrine of collateral waiver. Parties should carefully consider any reference to legal advice in pleadings, witness statements, and other legal submissions and be prepared for what this might mean for disclosure of other documents.

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