



Participation working in groups continued for about 40 minutes. In each group, the participants tried acting out the roles of a cross-examiner and a witness in order to better understand the overall process. The exercise was not easy, but it was definitely fun.

Preparation of the questions to the witness revealed an interesting cultural component. While preparing ‘a case theory’ on the case and crystallising the issues ‘to be proven’ by cross-examination, participants took quite opposite positions. It is fair to say that participants from common law jurisdictions mostly aimed to show the underlying story of the case, emotions and omissions of the parties during cross-examination; while those participants from civil law jurisdictions planned to show through the witness the weak points in the documents and,

therefore, weak points in the legal position of the opposite party.

Given that the influence of cultural specificities is a topic of interest and exploration to the author, witnessing this live example of differences in people was very revealing and richly instructive.

Taking into account the increase of cross-border litigation and further rise of international arbitration with mixed panels, it is valuable to learn and gain knowledge about cultural specifics and the expectations of judges and arbitrators. This exercise allowed us to appreciate once again our joint conferences and meetings of the lawyers from different jurisdictions, because such meetings provide a great opportunity to learn more and to become better in what we are doing.

FEATURES

Privilege in English law: three common problem areas for litigators

Protecting sensitive information through legal privilege is a key consideration in litigation and investigations in common law jurisdictions. In English law, privilege does not provide blanket protection. Rather, protected communications must fall within one or more of the established categories of privilege. These categories are based on rules developed and refined through legal precedent. The rules are constantly developing in order to adapt to changes in the legal and commercial landscape and to address novel factual situations arising in disputes over privilege.

In this article, we consider the current state of play in three common privilege problem areas for litigators under English law: non-UK lawyer communications, internal investigations and partially privileged documents.

Privilege and non-UK lawyer communications

Cross-border litigation, particularly in common law jurisdictions where broad

disclosure/discovery is available, frequently raises issues about the application of privilege to non-UK lawyer communications. Under English law, the application of privilege is a matter governed by the *lex fori* (ie, the law of the forum of the proceedings). As such, in English proceedings, the courts apply English law in determining whether communications with non-UK lawyers are privileged.

On one view, this approach has the advantages of being straightforward and avoiding the need to adduce evidence of law in other jurisdictions. However, crucially for litigators, it may result in communications attracting less (or more) protection than in the relevant jurisdictions, an outcome that the lawyer and their client are unlikely to have intended.

Contrast the English position with that of the US federal courts, where a choice of law approach generally applies. This considers which jurisdiction has the ‘predominant’ or ‘most direct and compelling interest’ in the

Ruth Cowley

Norton Rose Fulbright,
London
Ruth.Cowley@
nortonrosefulbright.com

Andrew Judkins

Norton Rose Fulbright,
London
Andrew.Judkins@
nortonrosefulbright.com

communication, which can lead to non-US law being applied if there is no US nexus.¹

The English approach dates from the mid-nineteenth century, an age where cross-border litigation was far less common than today. In a recent case involving US lawyer documents,² the disclosing party sought to persuade the court that, to the extent English law did not protect the documents from disclosure, the *lex fori* approach should be revisited. Although this was not accepted, the court provided a gloss which suggests that considerations of non-UK law are not precluded entirely. It acknowledged that in an appropriate 'special case', the court's general discretion under the English Civil Procedure Rules to refuse inspection might consider rights under non-UK law.

This particular matter was held to not be a 'special case'. The court cited a lack of 'legitimate expectation' of protection under US law, given it was accepted that the subject matter of the communications were relevant to English proceedings (the case also involved a UK corporate group). It was also unpersuaded by the overall circumstances of the case. It remains to be seen whether different circumstances would open the door wider to non-UK law, but the threshold is likely to be a high one, with compelling reasons required. In the meantime, the best practical advice for cross-border litigants is that taking steps to maximise privilege and anticipating potential forums for disclosure requests should be at the centre of their planning from the earliest stage.

Internal investigations relating to government enquires: does litigation privilege apply?

Internal reviews or investigations are frequently conducted in connection with both government enquiries and actual/potential civil claims. In English law, litigation privilege has a broader scope than legal advice privilege, meaning that where an internal investigation relates to a contentious matter, it is likely to be a last line of defence to disclosure. Litigation privilege applies to confidential communications where, at the time of the communication: (1) litigation is in reasonable contemplation; and (2) the communication is made for the dominant purpose of that litigation.

Applying these requirements is relatively straightforward where the 'litigation' is a civil claim. It is less clear where the 'litigation' is

action by a government authority. Very often, parties will need to conduct investigations for multiple purposes, including in response to government enquiries, which may also involve analysis linked to defending potential civil or criminal proceedings, and dealing with governance issues and regulatory disclosures. This can lead to uncertainty about whether the reasonable contemplation and/or dominant purpose requirements are met. Two recent cases support the position that, where a government enquiry has a realistic possibility of leading to civil/criminal proceedings (and is treated as such by the client, ie, the instruction of external lawyers), the English courts are willing to take a broad approach and apply privilege to internal investigations.

In *SFO v ENRC*,³ the defendant engaged external lawyers and other advisers to conduct investigations into allegations of wrongdoing. The lawyers advised that criminal and civil proceedings were in reasonable contemplation. This view was shared by members of the defendant's legal and compliance teams. A few months after the investigation was commissioned, the defendant received a letter from the Serious Fraud Office (SFO), a UK crime agency, about the possibility of self-reporting. The SFO subsequently sought disclosure of documents created in the investigations.

The Court of Appeal addressed when 'litigation', that is, an SFO prosecution in this case, was in reasonable contemplation and whether documents created in the investigation were for the dominant purpose of that litigation. Following a careful examination of the evidence, the Court of Appeal held that litigation was in reasonable contemplation when the defendant commissioned the investigation and certainly by the time of the SFO letter. The court relied on advice given by the external lawyers that prosecution was a serious risk, a view which appeared to be shared by the defendant. The SFO letter had also 'specifically made clear' the possibility of prosecution. The fact that the defendant had to conduct further investigations before it could ascertain whether prosecution was indeed likely did not prevent prosecution from being in reasonable contemplation. The court also held that the investigation documents were created for the dominant purpose of such litigation. It rejected arguments that this was precluded by the additional purposes of fact finding and dealing with ongoing compliance issues.

In *Bilta & Ors v RBS*,⁴ the claimants sought documents from the defendant created in an internal investigation concerning a tax issue. The investigation was commenced after the UK tax authority, HM Revenue and Customs (HMRC), informed the defendant in a letter that it took the view it had sufficient grounds to deny a substantial amount of tax. However, the letter did not oblige the defendant to repay the tax and HMRC's enquiries remained ongoing. In response, the defendant instructed external tax litigation solicitors who ultimately prepared a report to HMRC (shared without waiving privilege).

The claimants did not contest that litigation was in reasonable contemplation, but argued that the dominant purpose of the investigation was not litigation. They argued its purposes were: (1) fact finding; (2) compliance with taxpayers' obligations to cooperate with HMRC; and (3) to persuade HMRC to not issue a formal demand. These arguments were rejected. The court described the HMRC letter as a 'watershed moment', analogous to a letter of claim by a private claimant. The investigation was conducted for the dominant purpose of responding to it. The fact that HMRC had not made a formal demand was not determinative, particularly given the defendant's instruction of external lawyers. A duty to cooperate with HMRC also did not preclude the investigation being conducted for the dominant purpose of litigation.

While these decisions are undoubtedly supportive of protecting privilege in internal investigations, cases will always turn on their facts. Inevitably, parties will be faced with situations where the threat of proceedings is less clear cut than these cases. Parties can maximise privilege protection by careful documentation of when proceedings are in contemplation and the purpose of internal investigations. It is also notable that in both cases, the instruction of external legal advisers was a relevant factor.

Partially privileged documents

The redacted document is a near universal feature of modern litigation. Most litigators will be familiar with the feeling of a seemingly material, if not tantalising, document obliterated by rows of black lines. But what is the scope of redaction permitted under English law?

There are two grounds available in English civil litigation for redaction: (1) privilege; and (2) irrelevance to the proceedings (and

confidentiality). In England, this has recently been codified in the procedural rules for the ongoing disclosure pilot scheme in the English Business and Property Courts. Privilege tends to be the more controversial and contentious ground. In matters involving government authorities, with broad statutory powers to compel production of documents, in practical terms, privilege is often the only ground.

The most common situation in which a document is redacted for privilege is where it contains material which reflects legal advice or instructions (ie, actual advice or instructions would be withheld entirely). In English law, redaction of such material is permitted under the *Lyell* test, which covers communications which would 'betray the trend of legal advice'.⁵ Some alternative formulations are: 'allow the reader to work out what legal advice is given',⁶ or 'give the other side an indication of the advice which being sought or [given]'.⁷ In a recent decision, the High Court endorsed a slightly more detailed but flexible interpretation: a 'definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given'.⁸ Given the near infinite iterations of potentially privileged words and phrases, in practice, its application is highly subjective, with disclosing parties likely to adopt a generous interpretation.

In civil litigation, claims for privilege, including in relation to redaction, can be challenged by an application by the party seeking inspection. However, the applicant is not required to disprove that privilege applies: the burden of proof is on the party claiming privilege to show the documents are genuinely privileged. The court has discretion to order inspection of the potentially privileged documents, but otherwise will rely on the parties' evidence (ie, witness statement or affidavit). Considerations include the number of documents and their relevance. In any event, the court must take a cautious approach and be alive to the risk of reviewing documents out of context.⁹ As a result, in litigation involving a large quantity of redacted documents, whether the court inspects documents or not, the evidence of the party asserting privilege on the approach taken will be very important. Note also that the English disclosure pilot scheme has introduced a requirement that when redacted documents are disclosed, they must include an explanation of the redaction and confirmation that the redaction has been

reviewed by a legal representative with control of the disclosure process.

Practically speaking, the key issue for parties seeking to protect privilege through redaction is adopting and documenting a logical and defensible approach. While this has to be grounded in a robust interpretation of privilege law, the semantics of the various iterations of the *Lyell* test are secondary to a sound and consistent approach. In modern litigation, where privilege decisions are undertaken by supervised teams, the quality of review protocols, privilege-tagging procedures and quality assurance are central. The impact of failing to following a defensible approach can easily have consequences beyond disclosure of the challenged documents: withholding relevant material on unsustainable grounds will not be viewed favourably by the court.

Notes

- 1 See, for example, *Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002).
- 2 *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).
- 3 *Serious Fraud Office (SFO) v Eurasian Natural Resources Corp. Ltd* [2018] EWCA Civ 2006.
- 4 *Bilta (UK) Ltd (in Liquidation) & Ors. v Royal Bank of Scotland Plc, Mercuria Energy Europe Trading Limited* [2017] EWHC 3535 (Ch).
- 5 *Lyell v Kennedy* (No.3) (1884) 27 Ch. D. 1; *Ventouris v Mountain (The Italia Express) (No.1)* [1991] 1 W.L.R. 607.
- 6 *Barr v Biffa Waste Services Ltd* [2009] EWHC 1033 (TCC).
- 7 *Excalibur Ventures LLC v Texas Keystone Inc* [2012] EWHC 2176 (QB).
- 8 *Edwardian Group Ltd & Anor v Singh & Ors* [2017] EWHC 2805 (Ch).
- 9 *WH Holding Ltd & Anor v E20 Stadium LLP* [2018] EWCA Civ 2652.

Natalie Todd

PCB Litigation, London
nt@pcbllitigation.com

Beware of the duty of full and frank disclosure in the English courts

When seeking ex parte remedies such as freezing orders, search orders and applications for permission to serve out of the jurisdiction, the applicant is under an obligation of full and frank disclosure and fair presentation. This involves disclosing all matters, whether in the applicant's favour or not, which are material to the court in deciding whether to grant the order and on what terms, and to fairly present to the court those matters which the absent respondents might have presented had they had notice of the hearing.

In a recent case, PCB Litigation acted for Walid Giahmi in a claim brought against him by the Libyan Investment Authority (LIA). In a decision handed down in June 2019,¹ Giahmi successfully challenged jurisdiction and applied to set aside the service of the proceedings against him and the fourth defendant on a number of grounds, including

a failure on the part of the LIA to comply with its obligation of full and frank disclosure on the without-notice application for permission to serve out of the jurisdiction. This is one of a number of recent decisions concerning compliance with the full and frank disclosure and fair presentation obligations. It is important that every litigator understands the principles and practicalities involved.

The principles

The principle is that if you make an application without notice, you have a duty to make full and frank disclosure of all matters material to the application whether facts or law.

The duty to inform the court of the likely issues and possible difficulties with the case does not, however, require a detailed analysis of every possible point to be made.² The duty only extends to those issues which can be said