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Legal Update
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Defending the Privileged, Part III: The difficulties of asserting litigation privilege in the context of internal investigations

Introduction

In September 2016 and February 2017 we published alerts on the issue of claiming privilege over documents created in the context of internal and regulatory investigations and the frustrations expressed by regulators in relation to the same.

Since those alerts were published, there have been several important cases concerning the law of privilege which have been the subject of much discussion and debate amongst academics and practitioners.

In this alert, we consider the recent Court of Appeal decision in the case of *R v Paul Jukes*[1] – a criminal case which concerned, among other matters, the admissibility of a document relied upon by the prosecution that came into existence in the context of an internal investigation.

Background

The case concerned the criminal prosecution of Paul Jukes, transport and operations manager of Gaskells NW Limited (**"Gaskells"**). The prosecution came about following a fatal injury suffered by one of Gaskells' employees whilst attempting to unblock a baling machine in December 2010.

Following the fatality, Gaskells initiated an internal investigation (which was overseen by Gaskells' external solicitors) during which Mr Jukes provided a signed witness statement. In that witness statement, Mr Jukes stated that:

> *"Following Des [Brown's] redundancy I took over formal responsibility for health and safety. I started a process of assessing the overall health and safety competency of the lads".*
>
> *"I'm responsible for daily housekeeping and health and safety on site, including the implementation of site safety and working practices".*
>
> (the **"Investigation Statement"**)

Although the internal investigation took place in 2011, Mr Jukes was not interviewed by either the Health and Safety Executive (**"HSE"**) or the police until June 2012.

At trial, the Investigation Statement did not immediately come to light, however, once discovered, the prosecution sought to rely on it as evidence of Mr Jukes' culpability. The Investigation Statement was particularly enlightening in circumstances where Mr Jukes had already given evidence at trial which was directly contradictory to it.

It was the prosecution's case that Mr Jukes had taken over responsibility for health and safety and the maintenance of the baling machine after his supervisor (Des Brown) had been made redundant earlier that year. Consequently, Mr Jukes was liable for the death of the employee under section 7 of the Health and Safety at Work Act 1974.

Mr Jukes asserted that the Investigation Statement was protected by litigation privilege and was inadmissible. The claim for privilege was, however, rejected at Mr Jukes' trial and formed one of the two grounds of appeal to the Court of Appeal.

1 [2018] EWCA Crim 176

Was the document privileged?

The Court of Appeal held that the Investigation Statement was not privileged.

Delivering the Court of Appeal's judgment, Lord Justice Flaux set out (by reference to the House of Lords' decision in *Three Rivers (No 6))*[2] the test for asserting litigation privilege over a document. In that regard, litigation privilege will only arise in circumstances where:

- litigation is in progress or reasonably in contemplation;
- the relevant communication or document is made or created with the sole or dominant purpose of conducting that litigation; and
- the litigation is adversarial, not investigatory or inquisitorial.

Applying those principles to the facts, the Court of Appeal was able to conclude that the Investigation Statement was not protected by litigation privilege because:

- the Investigation Statement was taken 16 months prior to Mr Jukes being interviewed by the HSE and the police – a criminal prosecution could not therefore have been in reasonable contemplation at the time the Investigation Statement was made;
- consequently the Investigation Statement could not have been made for the sole or dominant purpose of conducting litigation - particularly in circumstances where it was held that there was no evidence to suggest that, at the time, either Gaskell or its senior management (let alone Mr Jukes) appreciated that it was realistic to expect the HSE to be satisfied that it had sufficient evidence to stand a good chance of securing any conviction;
- upon making the Investigation Statement in February 2011, no decision had been taken by the HSE to prosecute and matters were still at an investigatory stage. As per the decision in *Serious Fraud Office v Eurasian Natural Resources Corporation Limited*[3] (**"SFO v ENRC"**) an investigation is not the same as adversarial litigation.

2 *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48

3 EWHC 1017 QB. The first instance decision is subject to appeal, to be heard later this year.

The Court of Appeal also noted *obiter* that even if the Investigation Statement was privileged, it was not Mr Jukes' privilege to assert. Any privilege would have been that of Gaskell or its senior management, neither of which had sought to assert privilege over that document. Furthermore, where a privileged document falls into the hands of the other party in criminal proceedings, it is admissible, subject to the power of the court to exclude it as unfair evidence under section 78 of the Police and Criminal Evidence Act 1984.

Differences between the point at which litigation privilege arises in civil and criminal contexts

In addition to restating the principles of litigation privilege, this decision also serves as a useful reminder of how litigation privilege works differently in civil and criminal contexts.

In finding that the Investigation Statement was not protected by litigation privilege, the Court of Appeal in *R v Jukes* referred to Andrews J's judgment in *SFO v ENRC*, in which it was held that:

> *"One critical difference between civil proceedings and a criminal prosecution is that there is no inhibition on the commencement of civil proceedings where there is no foundation for them [...] a person may well have reasonable grounds to believe they are going to be subjected to a civil suit [...] even where there is no properly arguable cause of action...Criminal proceedings, on the other hand, cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the public interest test is also met. 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 realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction"* (emphasis added).

Whereas in a civil context a party may be able to claim that litigation was reasonably contemplated (irrespective of whether a proper cause of action actually exists) at a relatively early stage of a dispute, in a criminal context the point at which litigation privilege arises is likely to be much later – i.e., once all of the information gathering and investigative work is complete and a decision has been taken to prosecute.

Comment

This decision is a further reminder that documents created in the course of internal investigations may not be privileged and may be disclosable in future court proceedings unless they, on proper examination, concern the giving or receiving of legal advice between solicitor and client.

The decision in *R v Jukes* also brings into sharp focus the divergence which exists in respect of the point at which litigation privilege is available in a civil context as compared to a criminal context.

It of course remains to be seen later this year what impact the appeal in *SFO v ENRC* will have on the law of privilege and, indeed, ultimately whether this is an issue that requires the input of the Supreme Court before it is finally settled.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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