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Legal Update
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SFO criticised for "material" public law errors in failing to "squarely address" its disclosure obligations by not challenging a company's claim of legal professional privilege

Introduction

In the recent judicial review proceedings of *R (on the application of AL) v Serious Fraud Office* ("**SFO**") *& (1) XYZ Ltd (2) ABC LLP (3) MS (4) DJ (Interested Parties)*[1], the High Court judgment, given by Mr Justice Green, criticised the SFO for failing to meet its duty of disclosure to a defendant in criminal proceedings. The defendant was previously employed by a company that had self-reported wrongdoing and subsequently entered into a Deferred Prosecution Agreement ("**DPA**"). The Court was of the view that the SFO made several errors in public law in not pressing the company further after it asserted legal professional privilege over first interview notes taken by external lawyers as part of an internal investigation.

While the case was dismissed on the basis that the Crown Court, rather than the High Court, was the proper forum in which to litigate a dispute relating to a DPA, it had "*real reservations*" about the approach adopted by the SFO and set out, in considerable detail, its reasons why it would have quashed the decision of the SFO, had it indeed been the appropriate forum. The judgment provides a useful examination of the scope of a prosecutor's duty of disclosure in criminal proceedings in the context of a DPA and suggests the SFO will in future be wary of accepting companies' claims to privilege.

Background

In 2012, XYZ Ltd used external lawyers to conduct interviews with four of its employees as part of an internal investigation into concerns about potential bribery. The interview notes taken by the external lawyers (the "**Interview Notes**") formed part of the basis on which the company decided to self-report to the SFO. One of the individuals who was interviewed, AL, is now a defendant in a pending bribery trial and was the Claimant in these judicial review proceedings. During its own investigation, which commenced in 2013 following the self-report, the SFO requested copies of the Interview Notes. The company's lawyers refused to provide the Interview Notes on the basis of legal advice privilege and/or litigation privilege. Instead, on 8 April 2014 the company's lawyers gave the SFO "*oral proffers*", or oral summaries of the interviews, which the SFO recorded and transcribed.

The Claimant, who was charged on 1 February 2016, made a request on 7 June 2016 to the SFO for disclosure which was sufficiently broad to encompass the full records of the Interview Notes. The SFO served the summaries upon the Claimant on 7 July 2016.

One element of the DPA, which was approved by the Crown Court on 11 July 2016, is a duty upon the company to disclose to the SFO all information and material in the possession, custody or control of the company "*not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure*" for all matters relating to the conduct described in the draft indictment and statement of facts.

1 [2018] EWHC 856 (Admin)

The Claimant initially applied to the Crown Court for an order requiring the SFO to disclose the Interview Notes. The Judge refused as the Interview Notes were not in the "*possession*" of the SFO, so the disclosure obligation in the Criminal Procedure and Investigation Act 1996 did not bite. As a result of the Judge's comments, the SFO once again reverted to XYZ Ltd and asked it to provide the Interview Notes, and again they refused. The SFO then told the Claimant that it would take no further steps against the company, stating in a letter dated 13 October 2017 that: (i) in 2014 they had taken reasonable steps to obtain the Interview Notes; (ii) they had instead been provided with the oral proffers; (iii) XYZ Ltd was not under an obligation to provide the Interview Notes; and (iv) cooperation under the DPA did not require a waiver of privilege.

Judicial review proceedings

Following the letter from the SFO, the Claimant sought judicial review of the SFO's decision not to pursue the company further, arguing that disclosure of the Interview Notes was potentially necessary to the Claimant securing a fair trial.

The SFO argued, *inter alia*, that: (i) the "*margin of appreciation*" to be accorded to the SFO is very broad, and the Courts will only interfere with a prosecutorial decision "*very exceptionally*"; (ii) in this case the decision of the SFO was that it was not required to obtain the full interview notes because XYZ Ltd's assertion of privilege was "*not obviously wrong*", even though the SFO did not accept the company's legal privilege arguments; and (iii) they had formed the view that, on the basis of a review of the material already held on its file, there was no material in the full interview notes which was not adequately covered by the oral proffers.

"Margin of appreciation"

Green J did not accept the SFO's assertion that it had a "*very broad*" discretion when it came to its decision not to proceed against XYZ Ltd for failure to disclose the Interview Notes pursuant to the co-operation clause in the DPA. The SFO had charged the Claimant and there is going to be a trial, and as such the duty now imposed on the SFO is "*to take the steps necessary to ensure the Claimant obtains a fair trial*". This is different to the scenario where a prosecutor is deciding whether to prosecute or not. While there is a "*margin of appreciation*" attributable to the SFO, its discretion is limited by Article 6 of the European Convention on Human Rights, the common law right to a fair trial, and by the Attorney General's Guidelines (which states that, if the prosecutor seeks access to material but the third party refuses to allow access, "*the matter should not be left*"[2]).

Assertion of privilege

The Court also considered issues of the law on privilege as it relates to the Interview Notes. Green J criticised the SFO for failing to press XYZ Ltd further on the basis that XYZ Ltd's grounds for refusing to disclose the Interview Notes (i.e. they were privileged), was "*not obviously invalid*", saying that the SFO's duty is "*to assess claims for privilege properly and not cursorily and superficially*". A decision by a prosecutor cannot be made upon the basis of "*cursory tests of obviousness*". Green J was also critical of the SFO's assertion that the current state of the law on privilege is unsettled pending the appeal in *SFO v ENRC*[3], affirming that "*[t]he law as it stands today is settled. Privilege does not apply to first interview notes*". In this case, at the time when XYZ Ltd's lawyers conducted the interviews, the company did not know whether it would self-report and therefore whether proceedings might be likely. Interview material obtained for the purpose of deciding whether there is evidence of a breach of the law is too remote from the conditions for privilege to apply, as set out in *Three Rivers District Council v Governor and Company of the Bank of England (No 6)*[4] and as confirmed in the *RBS Right Issue Litigation*[5] and *ENRC*[6], and as such that interview material would not be protected by privilege.

Adequacy of the oral proffers

The SFO claimed that, following testing the oral proffer summaries against all relevant material in the case, it was satisfied there was no additional value to the Interview Notes over and above that contained in the oral proffers. Green J stated he had "*real difficulties*" in understanding the validity of such a test, as in his view the only way to test whether the summaries contained all of the relevant information in the Interview Notes was to compare them to the

2 Paragraph 57 of the Attorney General's Guidelines on Disclosure (2013)
3 [2017] EWHC 1017 (QB)
4 [2004] UKHL 48
5 [2016] EWHC 3161 (Ch)
6 [2017] EWHC 1017 (QB)

Interview Notes themselves (which could have been undertaken by independent counsel). Given that, in one case, some 15 hours of interview had been condensed into around five pages, Green J was not persuaded by the argument that there was no material in the Interview Notes that was not already included in the summaries. There was a "*real possibility*" that the Interview Notes might contain relevant incremental material, so the approach adopted by the SFO was insufficient.

Another point made in the Judgment in relation to the oral proffers was on waiver of privilege for a limited purpose. Green J stated that, even if the Court accepted that providing the SFO with the oral proffers amounted to waiver for a limited purpose, he did not see how that limited purpose would not have included onward disclosure of the Interview Notes to the defendants in the criminal proceedings, since this was "*squarely in contemplation and was an integral part of the process being undertaken*". Companies should take note that, while oral proffers are often used in the US as an effective means of waiving privilege only in relation to the recipient of those oral proffers, the English Courts may be more likely to conclude that waiver for a limited purpose includes other parties if that forms an integral part of the process.

Conclusion

The Judgment concluded that the SFO "*failed to address relevant considerations, took into account irrelevant matters, provided inconsistent and inadequate reasons for its decisions, and applied an incorrect approach to the law*". The SFO will take this Judgment as a lesson on their duties of disclosure. Companies should be prepared for the SFO to take a harder line in challenging refusals to disclose documents on grounds of privilege, particularly in the context of a concluded DPA but also for criminal trials in general.

The Judgment is useful as it provides some guidance on the Court's expectations of the SFO's duty of disclosure in the context of legal professional privilege. Clients should be prepared to spend a greater amount of time and expense on any arguments relating to privilege, as it will now be incumbent upon the SFO to consider challenging all such claims.

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