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Privilege in peril?

Is legal professional privilege at risk of losing its status as a certain & absolute right? John Gould reports

IN BRIEF

- A statute can override legal professional privilege but Parliament's intention to do so must be clear.
- The distinction, illustrated in *Avonwick*, between the right to obtain privileged information and the right to use it is an important one.
- The Investigatory Powers Act 2016 could mean that there is no certainty that privileged communications will not be intercepted or used.

The rule of law requires that individuals can obtain legal advice in private. The risk that a policeman is listening to a client's discussions with his lawyer may stop an individual consulting a lawyer at all, or at least prevent him from giving a full and frank account to his lawyer. An individual, alone, without an effective lawyer in possession of the full facts, may not be able to obtain the justice the law provides.

Lord Taylor in *R v Derby Magistrates' Court, ex p B* [1996] AC 487, [1995] 4 All ER 526, described legal professional privilege as "a fundamental condition on which the administration of justice as a whole depends". Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563, [2002] 3 All ER 1 described it as "a fundamental human right long established in the common law". The point is that legal advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice.

Certainty

At the core of the effectiveness of privilege is certainty. A client must be certain that what he tells his lawyer will remain between him and the lawyer. If a lawyer has to qualify the assurance that privilege offers, particularly if the qualifications are technical or complicated, the confidence upon which the value of privilege depends may be lost.

Certainty cannot be reconciled with a privilege that depends on some future balancing of a public interest against the importance of the privilege to the client in a particular case. Privilege in a particular case is not just about the client in that case, it is about all clients into the future. As Lord Taylor in *Derby Magistrates* put it: "But it is not for the sake of the applicant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established."

If a communication or document qualifies for legal professional privilege, the privilege is absolute, it cannot be overridden by some supposedly greater public interest. It can be waived by the client entitled to it and it can be overridden by statute, but that is it.

The statutory exceptions to the general rule are important. The Solicitors Regulation Authority, for example, could not investigate and discipline solicitors if it was prevented by the privilege of their clients from obtaining and using documents as evidence in disciplinary proceedings. It is permitted to do so because the use does not infringe the client's privilege provided they suffer no prejudice and their identity is protected in public hearings to maintain confidentiality, which is an essential ingredient of privilege (see *Simms v Law Society* [2005] EWHC 408 (Admin), [2005] All ER (D) 281 (Mar)). The exception does not permit the use of documents to which a solicitor himself is the beneficiary of the privilege because, for example, he has obtained legal advice on his own position.

Lessons from *Avonwick Holdings*

The Court of Appeal has recently had to consider the use of privileged material where the interests of the client might very well have been prejudiced by its use. The court held firm to principle and agreed with the arguments of counsel Philip Marshall QC of Serle Court Chambers. In *Avonwick Holdings Limited & anor v Shlosberg* [2016] EWCA Civ 1138, [2016] All ER (D) 141 (Nov) the issues related to the application of privilege in circumstances in which the client became bankrupt. Avonwick obtained judgment against Mr Shlosberg, a Russian businessman, for US$195m and when he failed to pay made him bankrupt. The trustee obtained privileged documents from Mr Shlosberg's solicitors and the question was whether the provision of those documents to Avonwick's solicitors in connection with conspiracy proceedings against a third party infringed Mr Shlosberg's privilege.

Statutory function

Sections 312 and 333 of the Insolvency Act 1986 (IA 1986) give a trustee in bankruptcy rights to information and documents from the bankrupt which are reasonably required for carrying out the trustee's statutory function of gathering and distributing the bankrupt's estate. It is important that creditors get their due. There is no doubt that a statute can override legal professional privilege but Parliament's intention to do so must be clear. Lord Hoffmann in *R v Secretary of State for the Home Department Ex p Simms* [2000] 2 AC 115 at [131], in a topical passage given the recent Brexit litigation, was quoted with approval in *Avonwick*: "Parliamentary sovereignty means that Parliament can if it chooses, legislate contrary to fundamental principles of human rights…The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of

legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual."

A necessary implication arises where as a matter of express language and logic the court can be sure that it must have been intended for privilege to be overridden. This is not the same as a conclusion that such an effect would be reasonable or sensible.

A trustee in bankruptcy has an express power to take possession of documents belonging to or possessed or controlled by the bankrupt and this expressly includes any papers "which would be privileged from disclosure in any proceedings" (s 311(1) of IA 1986). Property belonging to the bankrupt, which would include documents, also vests in the trustee (s 306 of IA 1986). The question in *Avonwick* was, therefore, not whether the trustee could get hold of privileged documents but rather what he could do with them.

A conceptual distinction

The court found that privilege was conceptually distinct from the documents containing the privileged information. Documents were property but privilege was not. The trustee could not waive the bankrupt's privilege as he might dispose of property. The s 311 power to obtain documents still required consideration of what use of the documents by the trustee would be permitted by necessary implication.

The trustee could only use the privileged information in connection with the trustee's own duties and in exercise of his powers. This means the function of getting in and distributing the estate under s 305(2) of IA 1986. The functions do not extend to provision of privileged information to a third party to assist them in proceedings.

The distinction, illustrated in *Avonwick*, between the right to obtain privileged information and the right to use it is an important one. Privileged information may be lawfully obtained but its lawful use may nevertheless be restricted to a use which is permitted by necessary implication from the power used to get it. *Avonwick* reflects a conventional and principled approach to privilege. It shows the courts as custodians of privilege but nevertheless required to give way to the clear intention of Parliament as to when the public interest requires privilege to be overridden. The courts do not, however, weigh a person's privilege against some broader public interest in a particular case.

Application of privilege

Although the law continues to develop, particularly in relation to the application of privilege to internal company papers (see for example *Re the RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) in relation to which employees of RBS were "clients" for the purpose of privilege) the courts' approach seems to be to hold fast to the fundamentals while limiting any significant extension of the application of privilege beyond established classes of lawyers—to the irritation of accountants in particular. The challenges to privilege are essentially statutory. Their effect is to introduce in various situations a balancing exercise in particular cases and to have that exercise performed by the state.

> *"The direction of travel, however, appears to be towards a public interest balancing exercise"*

Investigatory Powers Act

The Investigatory Powers Act 2016 (IPA 2016) received royal assent on 29 November 2016. It deals with the powers of the state to obtain the content of communications as well as information about communications. The Act contains long and complex provisions described as additional safeguards for legal professional privilege. More than a dozen pages deal with privileged material and interception and examination with a warrant (s 27); restrictions on the use or disclosure of such material (s 55); equipment interference (s 112 and s 131); bulk interception warrants (s 153); bulk equipment interference warrants (s 194) and bulk personal dataset warrants (s 222 and s 223). Such complex provisions do not sit well with the aspiration that citizens should have confidence in the confidentiality of their communications with their lawyers.

The secretary of state may, for example, authorise a targeted warrant for the interception and examination of material if it is necessary in the interests of national security, to prevent or detect crime or in the UK's economic interest (s 20). Section 27 requires the person considering the authorisation to have regard to the public interest in the confidentiality of items subject to legal privilege. There must be exceptional and compelling circumstances that make the interception necessary. Arrangements must have been made for handling, retention, use and destruction of privileged items. The interception may only take place if the public interest in obtaining the information outweighs the public interest in the confidentiality of privileged material. There should be no other means by which the information may be reasonably obtained.

Following examination, privileged material must be destroyed unless:

i. the Investigatory Powers Commissioner allows its use or retention on conditions or;
ii. following a balancing exercise of public interests, the interests of national security or the prevention of death or serious injury make retention or use necessary (s 55).

What this means is that there is no certainty that privileged communications will not be intercepted or used. The balancing of public interests long eschewed by the courts is now established by statute. The public interest in the maintenance of privilege is by its nature diffuse and long term, the public interest in particular criminality or perceived national security threats is likely to be focused and immediate. The nature of surveillance means that the balance is unlikely to be struck in a transparently reasoned way.

Comment

It may fairly be said that the position pre-dating IPA 2016 was unsatisfactory, particularly following *In re McE* [2009] UKHL 15, [2009] 4 All ER 335, in which the House of Lords decided that it was lawful to bug conversations between lawyer and client in a police station. It may also be said that IPA 2016 is an improvement on the Bill introduced by the government because at least some protective mechanisms have been added. The direction of travel, however, appears to be towards a public interest balancing exercise and away from privilege as a certain and absolute right. IPA 2016 provides for a review of its own operation and this will be an opportunity for scrutiny of the actual benefit obtained from risking one of the most fundamental of all rights. NLJ

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