BCL Solicitors LLP

FLA/YFLA Joint Educational Event 19 September 2017

"Internal Investigations: A Case Study - DPAs, privilege and the scope of liability"

Upjohn Co. v. U.S., 449 U.S. 383 (1981)

...The control group test thus frustrates the very purpose of the attorney–client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client.

...An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

SFO & CPS Published DPA Code of Practice (February 2014):

2.8.2 Additional public interest factors against prosecution:

> *i. Co-operation: Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative.* ***Co-operation will include*** *identifying relevant witnesses,* ***disclosing their accounts*** *and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents.*
>
> *...*

2.9.1 The prosecutor in giving weight to P's self-report will consider the totality of information that P provides to the prosecutor. ***It must be remembered that when P self-reports it will have been incriminated by the actions of individuals. It will ordinarily be appropriate that those individuals be investigated and where appropriate prosecuted. P must ensure in its provision of material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and where appropriate prosecution of those individuals****. To do so would be a strong factor in favour of prosecution...*

2.9.3 ***The prosecutor will consider whether any actions taken by P by not self-reporting earlier may have prejudiced the investigation into P or the individuals that incriminate P****. In particular the prosecutor will critically assess the manner of any internal investigation to determine whether its conduct could have led to material being destroyed or the gathering of first accounts from suspects being delayed to the extent that the opportunity for fabrication has been afforded. Internal investigations which lead to such adverse consequences may militate against the use of DPAs...*

3.3 All parties should keep in mind that DPAs are entirely voluntary agreements. The prosecutor is under no obligation to invite P to negotiate a DPA and P is under no obligation to accept that invitation should it be made. The terms of a DPA are similarly voluntary, and neither party is obliged to agree any particular term therein. The Act does not, and this DPA Code cannot, alter the law on legal professional privilege.

US ATTORNEYS' MANUAL Title 9: Criminal [9-28.710 and 9-28.720] (November 2015):

...The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, ***while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so****...*

Footnotes: ... ***To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the interviews conducted by counsel for the corporation****. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents...*

Ruling of Sir Brian Leveson in SFO v Standard Bank PLC [a Deferred Prosecution Agreement] (4 November 2015):

Furthermore, co-operation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them: see para. 2.8.2 (i) of the DPA Code of Practice. Where practicable it will

involve making witnesses available for interview when requested. In this regard, Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform. The Bank has agreed to continue to cooperate fully and truthfully with the SFO and any other agency or authority, domestic or foreign, as directed by the SFO, in any and all matters relating to the conduct which is the subject matter of the present DPA. Suffice to say, this self-reporting and cooperation militates very much in favour of finding that a DPA is likely to be in the interests of justice (para 30).

Alun Milford, SFO, speaking at the European Compliance and Ethics Institute, Prague (29 March 2016):

We are focused on the underlying facts, including the accounts of witnesses spoken to in corporate investigations. ***We do not regard ourselves as constrained from asking for them even if they are privileged*** *and, as with our colleagues in US DoJ who do operate under that constraint, our experience is that at least some corporates are not themselves constrained from letting us know what their investigators were told. As the saying goes, there are more solutions than problems.*

... if, notwithstanding the existence of a well-made-out claim to privilege, a company gives up the witness accounts we seek, then we will view that as a significant mark of co-operation: here again, ***to do otherwise would be inconsistent with the substantive protection privilege offers****.*

For the same reason, we will view as a significant mark of co-operation a company's decision to structure its investigation in such a way as not to attract privilege claims over interviews of witnesses.

Ben Morgan, SFO, speaking at the Global Investigations Review: Live (15 September 2016):

... despite the near obsession with the subject of privilege in articles and blogs, in many cases we have readily reached agreement with companies and their lawyers concerning access to witness accounts, where they exist. Behind all the noise, lots of people are quietly overcoming this and other perceived barriers when they deal with us.

Ruling of Sir Brian Leveson in SFO v Rolls Royce PLC [a Deferred Prosecution Agreement] (17 January 2017):

...The full and extensive nature of this co-operation has led to the acquisition, and application of digital review methods to over 30 million documents. All this has been in the context of an investigation concerning conduct in multiple jurisdictions, across four business lines and spanning a long period of time. Sir Edward has made clear (and the Statement of Facts confirms) that the proactive approach to co-operation adopted by Rolls-Royce has led to the SFO receiving pertinent information which may not otherwise have come to its attention. Rolls-Royce's approach has included:

> *i) genuine cooperation with the SFO in the conduct of Rolls-Royce's own internal investigation, including deferring interviews until the SFO had first completed its interview, and the audio recording of interviews where requested;*
> *ii) disclosure of all interview memoranda was made (on a limited waiver basis), despite Rolls-Royce's belief that the material was capable of resisting an order for disclosure, on the basis that it was privileged;*
> *iii) providing all material requested by the SFO voluntarily, that is to say without requiring recourse to compulsory powers (in one case at least effectively relinquishing control to the SFO); and*
> *iv) consulting the SFO in respect of developments in media coverage, and seeking the SFO's permission before winding up companies that may have been implicated in the SFO's investigation.*

Law Society of England and Wales Practice Note on Legal Professional Privilege (23 February 2017):

... Where LPP properly arises and has not been curtailed by parliament it cannot be overridden by competing private or public interests in disclosure. The Law Society considers that any form of pressure put on clients to waive LPP undermines the absolute nature of the protection.

In the context of criminal investigations such pressure could take the form of a suggestion that a failure to waive LPP will result in the client not being regarded as cooperative.

... Another form of pressure which the Law Society considers to be equally improper is to suggest that the client should conduct their affairs in such a way that LPP does not arise in the first place. Where pressure to waive LPP is applied by public bodies, it could breach their obligations under section 6(1) of the Human Rights Act 1998 to act compatibly with convention rights (LPP has been recognised as an aspect of Articles 6 and 8 of the European Convention on Human Rights.

Robert Bourns, President of the Law Society of England and Wales (12 May 2017):

The decision of the High Court that material generated during internal investigations by ENRC can be given to the Serious Fraud Office is deeply alarming, as it appears to narrow the scope of legal professional privilege (LPP) available to corporations facing criminal investigations.

While no one could object to the SFO's desire to combat suspected fraud and corruption, LPP is a fundamental part of the relationship that solicitors have with their clients, and undermining it threatens the foundations of our justice system. As the judgment itself acknowledges, LPP is a fundamental human right guaranteed by the common law and a principle which is central to the administration of justice

American Bar Association Suggested Upjohn Warning:

I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally. I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.

Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you

In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.

Do you have any questions?

Are you willing to proceed?

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