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UPDATE

Litigation is not a game: litigation privilege should be narrowly construed

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In an important unanimous decision adopting a modern, open and transparent approach in relation to claims for litigation privilege, the Cayman Islands Court of Appeal has overturned a first instance decision which had allowed a party to assert litigation privilege and refuse to give discovery of witness statements served in foreign legal proceedings on essentially the same matters as those in issue in the Cayman Islands proceedings.

The CICA determined that the absence of the witness statements would have had the real potential of prejudicing a just outcome in the Cayman Islands proceedings. The public interest in ensuring that parties are not prejudiced in preparing and conducting litigation does not outweigh the public interest in full disclosure and transparency.

The case law on these issues has been uncertain and the judgment brings welcome clarification. As the CICA noted, the point at issue had never been previously determined in England or the Cayman Islands. It is now clear that there is no privilege in a finalised witness statement that has been served on the other party.

The Facts

Members of the HSBC Group (HSBC) acted as administrator and custodian to many feeder funds which placed assets for investment with Bernard L Madoff Investment Securities LLC (BLMIS).

Following the arrest of Bernard Madoff in December 2008 for operating a multi-billion dollar Ponzi scheme, several feeder funds commenced proceedings against HSBC entities for alleged breaches of duty. Two such funds were Primeo Fund (in official liquidation) (Primeo), a Cayman Islands incorporated investment fund, and Thema International Fund plc (Thema), an Irish incorporated investment fund.

The Thema proceedings went to trial in the Irish High Court in April 2013. The Irish HSBC defendant had served witness statements on behalf of three former or current employees of HSBC entities. The parties reached a settlement on day 17 of the trial, just before the HSBC witnesses of fact were due to give evidence. The Irish HSBC defendant passed copies of the witness statements to the Cayman HSBC defendant, to assist it in preparing its defence to Primeo's claim. When giving discovery in the Cayman Islands proceedings, the Cayman HSBC defendant asserted common interest privilege over the Irish witness statements. The Cayman HSBC defendant subsequently served witness statements from the same three witnesses in the Cayman Islands proceedings.

HSBC appeared to have adopted different positions in the proceedings in Ireland and the Cayman Islands. In particular, while it appeared to accept in Ireland that it had appointed BLMIS as its sub-custodian, in the Cayman Islands it asserted that a substantially identical sub-custody agreement had a totally different effect. Primeo wanted to see the Irish witness statements to check that the witnesses' evidence in the Cayman Islands proceedings was consistent with the evidence that they had previously served in the Irish proceedings. Primeo applied for specific discovery of the Irish witness statements from the Cayman HSBC defendant.

The assertion of common interest privilege required that the Irish witness statements remained privileged. If privilege had been lost, no common interest privilege could be asserted and the highly relevant witness statements would have to be disclosed.

At first instance, Mr Justice Jones QC held that the witness statements served in Ireland remained privileged.

Analysis of litigation privilege

The CICA's starting point in this case was that on the facts of the present case justice would be better served by disclosure of the witness statements. However, they had to decide a novel legal issue in relation to the scope of litigation privilege to determine whether the law prevented disclosure of them.

Litigation privilege is a concept intended to allow parties properly to conduct and prepare litigation while being candid with professional legal advisers. This protection is in the public interest. As the CICA made clear, litigation privilege extends to communications with a lawyer or to any document brought into existence for the dominant purpose of litigation. In the leading case of *Three Rivers DC v Bank of England* (No 6), Lord Rodger of Earlsferry described it in this way:

Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to defeat the other…In such a system, each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by is preparations.

There was no real dispute between the parties to the Cayman proceedings about the essential rationale for litigation privilege. However, there is also a public interest in parties conducting transparent and open litigation. The CICA viewed this as a good example of why the scope of privilege should not be viewed expansively.

Primeo advanced the following two propositions:

1. that litigation privilege has no application at all when signed witness statements, prepared for service are voluntarily served; or
2. alternatively, that service of signed witness statements amounts to a waiver of privilege.

In either case, Primeo submitted that the relevant witness statements were no longer privileged, highly relevant and discoverable.

Tom Smith QC, Primeo's leading counsel, relied on *Visx Inc v Nidex Co.* and others. In that case, the parties to US litigation were deposed and gave answers to interrogatories. In the course of related patent infringement proceedings in the UK, the defendants sought discovery of the depositions and answers to the interrogatories. Lord Justice Aldous found that:

… they are not the type of document that it is necessary in the public interest to exclude from the normal rule that justice is best served by disclosure.

Primeo also relied on the recent decision of the full *Federal Court of Australia in Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd*. The facts of the case were more closely aligned with the Cayman proceedings. In deciding whether or not litigation privilege continued to apply to finalised and served proofs of evidence, the Federal Court made the following observations in relation to the distinction between litigation and legal advice privilege:

In our view, whatever is the extent of confidentiality arising from litigation privilege, one element of confidentiality is essential, namely non-disclosure to one's opponent … The rationale for litigation privilege is different from that of advice privilege, and rests on the basis that, in the adversarial system, the legal representatives and their clients generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party or parties of the material acquired in preparation of the case

HSBC sought to argue that the witness statements remained privileged and that there had been no waiver of privilege on service. They relied on the Privy Council decision of *B v Auckland Law Society*, where it has been held that the provision of documents to the regulator for a limited purpose did not operate to waive

privilege generally. HSBC argued that on that basis, whilst service of the witness statements in Ireland may have waived privilege in respect of the parties to that action, it had not waived privilege to the world at large.

The first instance Judge and HSBC placed considerable reliance on the decision of Hobhouse J in *Prudential Assurance Company Limited v Fountain Page Limited*, where a plaintiff had served various documents, including witness statements, on the defendants, the action had settled and the question then arose as to whether the documents could be used for the purpose of proceedings in Texas. At the time of that decision, there was no restriction in the rules on the use of witness statements for a collateral purpose, although such a restriction was later introduced in England and the Cayman Islands. Hobhouse J held that there was a restriction on the use of served witness statements analogous to the implied undertaking given in relation to discovery documents. The CICA recognised that there are difficulties with the decision which confuses issues relating to privilege with issues relating to the implied undertaking and found that it was not determinative of the issues in the current case.

The CICA accepted the essential reasoning of the Australian Federal Court in ACCC that witness statements are not privileged once they have been served. The CICA also accepted that it is irrelevant to whom the witness statements are provided after they have been served. Privilege is lost against the world and not, as HSBC argued, on a limited basis. Witness statements are not served on the other side on a conditional basis or with express limitations. On that basis, the CICA distinguished the leading Privy Council decision on limited waiver in *B v Auckland District Law Society.*

Until the point of service, witnesses may discuss their evidence with legal advisers and revise their statement in the knowledge that such preliminary steps are privileged. However, on service the essential characteristics of a witness statement change and privilege is lost.

Conclusion

It is clear that the CICA regarded openness and transparency as being important. This is consistent with the approach in the UK, where the pre-action protocol demands early disclosure and parties are encouraged to lay their cards on the table from the outset. The purpose of litigation privilege is not to enable parties to avoid their discovery obligations and, where a document is voluntarily disclosed, it makes little sense that privilege should continue to apply unless there is an express limitation or condition to that effect.

Before signing and subsequently serving a witness statement in any proceedings, it is vital that the deponent is comfortable with the content. Once it has been served, it is no longer privileged and may reappear in future in a different context.

The President of the CICA made the following comment in reaching his conclusion:

As this case illustrates, a proper balance between the public interest in maintaining litigation privilege and the public interest in disclosure comes out, as it seems to me, overwhelmingly, in favour of disclosure … Civil litigation should not be regarded as a 'game' …

Peter Hayden and Jonathon Milne acted for Primeo.

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