GIR Global Investigations Review

Privilege and SFO investigations

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L–R: Colin Passmore at Simmons & Simmons; Bankim Thanki QC at Fountain Court Chambers, Hodge Malek QC at 39 Essex Chambers

The UK's Serious Fraud Office has stated publicly that it will ask corporates under investigation to waive legal professional privilege (LPP) in respect of certain documents that it wishes to access, or to structure their internal investigations such that privilege does not apply to them, in return for co-operation credit. In addition, claims to privilege by corporates under investigation are increasingly being challenged by the SFO.

These developments have led to some concerns within the legal profession that this fundamental client right is being undermined and is at risk of being eroded further in the future. Leading experts on LPP, **Bankim Thanki QC** at Fountain Court Chambers, **Hodge Malek QC** at 39 Essex Chambers and **Colin Passmore**, senior partner at Simmons & Simmons, consider the impact of the SFO's approach, whether it is compatible with the client's absolute right to privilege and whether there is a middle ground where the objectives sought to be achieved by the SFO can be met without encroaching on privilege. The issues are complex and there is room for a range of reasonable opinions on the subject. Whether rights are in fact encroached will depend a lot on how the SFO proceeds in practice.

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The absolute right to privilege

LPP is treated under English law as a fundamental common law right and as a human right. Commonly overlooked is the fact that LPP is a right belonging to the client – whether individual or corporate – not the lawyer. The lawyer's duty is to advise clients of the availability of this right and their entitlement to assert it, to safeguard the client's privilege (absent waiver) and to ensure that LPP is asserted only where there are proper grounds for doing so.

Whether and what information and material is privileged will in each instance depend on the particular circumstances, not least on whether legal advice privilege or litigation privilege is being asserted. But English legal authorities clearly state that no adverse inference may be drawn from a valid assertion of LPP – a client cannot be criticised or penalised for doing so.

Privilege may be waived by a client either intentionally or inadvertently. Waivers may be express or implied, and may be made on a limited basis. A waiver of privilege can be irrevocable and carries a number of risks, particularly in an enforcement context. For example, a regulator or other enforcement authority with which privileged documents have been shared may elect or be obliged to (i) share them with other domestic or overseas authorities; (ii) use them as evidence in proceedings against the party who shared them; or (iii) make them or their contents public during court proceedings, or in publishing its findings.

Documents over which privilege has been waived could also be sought by co-defendants in any criminal proceedings or used by claimants in the context of follow-on damages claims.

The SFO's position

SFO investigations are by their nature complex and often concern events which raise regulatory and civil law issues, as well as possible breaches of criminal law. For example, the Libor and Forex cases have triggered parallel regulatory and criminal investigations both in the UK (where the FCA is engaged with regulatory and disciplinary proceedings against the relevant firms and their employees) and the US, where the SEC, CITC and Department of Justice each have their own furrows to plough. There is also the possibility of civil action in each of those jurisdictions. With those considerations in mind, a company that has identified a potential issue will want to conduct its own investigation, identify those involved and, where necessary, subject them to its internal disciplinary process. It is only natural that a company would seek advice and assistance from its lawyers in doing so. However, the involvement of lawyers in this way, and, specifically resulting claims to LPP over investigation records, can lead to tensions with the position and interests of the regulators and prosecutors involved.

Disputes with the SFO over LPP claims have arisen most often in the context of requests for witness accounts generated during the internal investigation, which is often carried out before an SFO investigation has commenced. The SFO has publicly voiced concerns that privilege claims over such accounts are not being made in good faith and are being used to frustrate its efforts to undertake investigations. The SFO has noted that it will review "very carefully" the basis for claims to privilege over witness accounts, and has frequently emphasised its willingness to litigate over "false or exaggerated" claims.

Whether a legitimate claim to privilege can be made in relation to witness accounts depends on the particular facts. It is generally accepted that communications between solicitors and individual employees who are within the definition of the "client" for the purposes of legal advice privilege (and associated communications) are privileged. Where a document records an account given by an individual who is not the client, the position is less clear. However, legal advice privilege has been found in certain circumstances to extend to factual briefings given to clients (which could include a report on an employee interview), provided they are part of "the necessary exchange of information of which the object is the giving of legal advice". A claim to litigation privilege (which is wider in scope and extends to communications with third parties) could be made in respect of a witness account if adversarial proceedings (including employment proceedings) are ongoing, or there is a real likelihood of their

being commenced, at the time the document is created and those proceedings are the dominant purpose of the document's creation.

According to the SFO, its reason for seeking disclosure of witness accounts is to gain "access to the best possible facts about what has happened", allowing it to understand the relevant issues quickly and develop lines of enquiry; and deal properly with the credibility of witnesses in any subsequent prosecution. As many of those interviewed during an internal investigation are liable to be witnesses in any subsequent criminal case, the SFO is concerned that, without access to their first accounts, its ability to assess the accuracy and integrity of any evidence later given by them may be affected.

This could result in the SFO being unable to call those witnesses in a criminal trial or, having called them, becoming embroiled in applications to stay the trial as an abuse of process on the basis that it cannot give disclosure of their first accounts. Whether these concerns arise will no doubt vary from case to case. It seems unlikely that the defence would be able to obtain a stay of proceedings on the basis that the SFO had not been able to produce first witness accounts, if in fact those records are privileged. In many cases, even where first accounts are unavailable, a prosecutor is likely to be able to form a reasonable view of the reliability of the witness.

Nonetheless, the SFO is placing companies under increasing pressure to relinquish claims to privilege. Alun Milford, SFO general counsel, recently confirmed that the SFO does not regard itself as constrained from asking for first witness accounts even if they are privileged. He further noted that the SFO will view as a "significant mark of co-operation" any decision to (i) waive a well-made-out claim to privilege and disclose witness accounts sought; or (ii) structure an internal investigation in such a way as not to attract privilege claims over interviews of witnesses.

Impact on the right to privilege

The SFO maintains that, while co-operation credit will be granted in return for a waiver, a well-made out assertion of privilege will not be held against a company. However, the obvious inference from its recent statements is that a company maintaining a valid assertion of privilege over witness accounts risks being viewed as uncooperative or obstructive. Corporates may therefore feel under pressure to agree to the SFO's requests for fear of being denied the benefits that may be afforded to co-operating defendants, including the opportunity to negotiate a deferred prosecution agreement (DPA) or secure a reduced penalty on sentencing. Such pressure, if exerted, undermines the absolute nature of the protection and overlooks the English legal authorities which state, in clear terms, that no adverse inference may be drawn from a valid assertion of LPP.

It is also interesting to note that there is no legal basis for the idea that a waiver or abandonment of a claim to privilege over witness accounts is necessary to show co-operation with an SFO investigation. The DPA Code of Practice notes that "[c]o-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them", however it expressly states that "[t]he [Crime and Courts Act 2013] does not, and this DPA Code cannot, alter the law on legal professional privilege". The Sentencing Guideline for Fraud, Bribery and Money Laundering Offences similarly does not identify waiver of privilege as being evidence of co-operation or a mitigating factor to be taken into account on sentencing.

The SFO has stressed that it has "no interest in communications between client and lawyer on questions of liability or rights" – it only wants access to the witness accounts, and the underlying facts captured within them. While there may appear to be some merit in the argument, allowing access to privileged witness accounts on that basis could encourage similar arguments to be made in respect of numerous other classes of documents which may contain factual material but also be subject to a legitimate claim to privilege (eg, investigation reports). Furthermore, the potential utility of a privileged document or its contents to an enforcement authority or regulator is irrelevant – the law has long recognised that an assertion of LPP may mean that highly relevant information is withheld from regulators, enforcement authorities, other parties to litigation and the courts.

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A way forward?

In its recent statements the SFO has oversimplified the dilemma faced by corporates under investigation who are asked to make privileged documents or their contents available to external investigators. A decision to waive privilege involves a complex balancing exercise, weighing the risk of documents falling into the hands of adverse parties and the importance of maintaining privilege in a way that enables it properly to investigate matters which are highly relevant to its business in an uninhibited manner, against the company's desire to co-operate and be seen to co-operate with the authorities and to conduct its affairs in a transparent manner. In some circumstances a corporate may find itself unable to advance its defence without waiving privilege, and conclude that, even with the associated risks, it is in its interest to follow that course. However, any decision to waive privilege, whatever the reason for doing so, must be made independently and not as a result of pressure exerted by the SFO.

One way in which a corporate could mitigate the risks associated with waiving privilege over witness accounts is by providing the SFO with oral summaries of the relevant factual findings, rather than disclosing the accounts themselves. While the SFO has been unclear in its public statements as to whether it considers such an approach to be acceptable, it ought to go some way toward satisfying the SFO's desire to obtain the "best possible facts" at an early stage in the investigation, and to equip itself for testing the credibility of witness evidence to be given at trial.

Most importantly, the practice has been sanctioned by the courts in both of the two DPA cases that have so far been heard. Standard Bank refused to disclose first account witness interviews to the SFO, instead providing what was described by its leading counsel as a "very brief oral summary given without any notes being handed over… and without any further analysis or questions". The provision of a summary of first accounts was identified by the judge as one of a number of steps taken by Standard Bank in co-operating with the SFO. Similarly, in the case of *XYZ Limited*, the provision of oral summaries of first accounts of interviewees was found by the judge to be evidence of genuine co-operation on the part of the company, satisfying the requirement in the DPA Code of Practice to identify relevant witnesses and disclose their accounts.

Whether the provision of oral or even written summaries of privileged witness accounts could itself constitute a waiver is an issue that has not yet been tested by the courts. However, it may, in the right circumstances, offer a corporate a compromise route to co-operating with the SFO without having to resort to waiving or abandoning claims to privilege. At the same time, there may be situations in which the giving of an oral summary of a privileged witness interview carries sufficient litigation risk that it will not be in the interest of a corporate to take that route. In those circumstances, its absolute right to assert a claim to privilege over that account must be protected and respected.

Professional guidance

The problem with all this is that there remains too much uncertainty as to how the SFO will react in given circumstances and so the pressure that corporates can feel around the issue of whether privilege needs to be waived is likely to continue for the present. It is for that reason that The Law Society of England and Wales has seen fit to respond with its draft guidance on privilege which is presently under consultation. This guidance can be found on its website.

The guidance is an excellent attempt to remind practitioners of the importance of LPP, its fundamental tenets and the fact that it is the client's right. Above all, it appears helpful in enabling solicitors to advise their clients on how to address the various attacks to which LPP is subjected at present. The SFO's reaction to this draft guidance is presently unknown – but given that its senior office holders are not shy about expressing their views on privilege, we will surely know before too long.

The authors were greatly assisted by Alexandra Webster of Simmons & Simmons LLP in the preparation of this article.