

**LEGAL PROFESSIONAL PRIVILEGE
IN
COMMERCIAL LITIGATION**

**LECTURE NOTES
5.5.14
JONATHAN CROW QC**

TOPICS

- I. General observations about the supposed inviolability of LPP.
- II. Who is the client – *Three Rivers (Nos. 5 & 6)*.
- III. Privilege between a company and its own members.
- IV. Joint privilege between a company and its directors.
- V. The iniquity exception.

I. GENERAL OBSERVATIONS ON ‘INVIOLABILITY’

(1) The basics

1. Justification: LPP serves an important public interest because:¹
 - (i) people need to be able to order their affairs and conduct disputes with the benefit of professional advice;
 - (ii) without an assurance of confidentiality, people would either not consult lawyers, or would not tell them the whole truth, and
 - (iii) without that same assurance, lawyers would not feel free to give full and frank advice.
2. Categories: There are two categories of LPP: legal advice privilege and litigation privilege. The difference between the two is that:

¹ *Greenough v. Gaskell*, at 101-103.

- (i) legal advice privilege applies only to confidential communications between lawyer and client in which legal advice is sought and given;
 - (ii) litigation privilege is wider in two respects, because it extends also to:
 - communications with third parties ...
 - created for the dominant purpose of either (a) seeking or obtaining advice in relation to the litigation or (b) obtaining evidence.
3. Scope: “Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”.²

(2) Inviolability

4. LPP is a branch of the law of confidence.³ Other duties of confidence can be overridden by higher public interests,⁴ even where national security is at stake.⁵ By contrast, it is often said that LPP is inviolable.⁶ That prompts 2 questions: is it true, and if so why?
5. LPP is not necessarily inviolable:
- (i) LPP can be overridden by express statutory provision.⁷
 - (ii) LPP can be waived – intentionally or unintentionally.⁸
 - (iii) LPP can be overridden by the ‘iniquity exception’.⁹
6. To the extent that LPP is absolute, why should it be? If doctors or priests (rather than lawyers) were judges, would medical confidences or the confessional (rather than legal advice) be inviolable?
- (i) By definition, communications with lawyers are likely to be highly relevant, and the disclosure of relevant material is generally regarded as an indispensable element in a fair trial process.¹⁰

² *Air India v. Balabel*, at 330-331.

³ *Three Rivers (No. 6)*, at §24.

⁴ *Soden v. Burns*.

⁵ *R v. Chief Constable of West Midlands Police, ex Wiley*.

⁶ *R v. Derby Magistrates*, at 509; *Three Rivers (No. 6)*, at §25.

⁷ See e.g. Insolvency Act 1986, s. 291. Any such statutory provision must be clear and explicit in this regard: *R (Morgan Grenfell) v. Special Commissioner of Income Tax* and *B v. Auckland District Law Society*.

⁸ *Great Atlantic Insurance v. Home Assurance*.

⁹ *Bullivant v. AG for Victoria*, at 201, and *Gamlen v. Rochem*.

- (ii) Human rights legislation generally protects both the right to respect for privacy (including the privacy of privileged communications¹¹) but also the right to a fair trial (including the right to disclosure of relevant documents¹²). Where different human rights are in competition, the law generally balances one against the other in the circumstances of each case, rather than simply according automatic primacy to one as a matter of principle.¹³
- (iii) The Freedom of Information Act 2000 does not afford LPP an absolute exemption against disclosure.¹⁴
- (iv) The consequences of one person seeing another person’s LPP material will depend on the particular facts of each case.¹⁵
- (v) In particular, why should legal advice privilege (as opposed to litigation privilege) be inviolable? LPP has almost always been justified by reference to “the fundamental condition on which the administration of justice as a whole rests”,¹⁶ so why should it be given special protection in situations where litigation is not in reasonable contemplation?

II. WHO IS THE CLIENT – THREE RIVERS (Nos. 5 & 6)

(1) The facts of *Three Rivers* (No. 5)

7. After the collapse of BCCI, Bingham LJ was appointed to conduct an investigation into its supervision, *i.e.* principally an investigation into the conduct of the Bank of England.
8. The BoE established a committee to communicate with the Bingham Inquiry and with the BoE’s solicitors – the “BIU”.
9. A claim was brought on behalf of 6,000⁺ depositors alleging misfeasance in public office against the BoE.

¹⁰ *Al Rawi v. Security Service*.

¹¹ *Campbell v. UK* at §46–8, and *Foxley v. UK* at §43.

¹² *MB v. Secretary of State for the Home Department*.

¹³ *Campbell v. Mirror Group Newspapers*.

¹⁴ See ss. 2(3) & 42.

¹⁵ *Stiedl v. Enyo Law*.

¹⁶ Lord Taylor in *R v. Derby Magistrates*.

10. After the failure of the BoE's strike-out application, the scope of its obligations to give disclosure arose.

(2) The decision in *Three Rivers (No. 5)*

11. It was common ground that litigation privilege was not available to the BoE in relation to its dealings with the Bingham Inquiry because litigation privilege only applies (so it was thought) in adversarial proceedings,¹⁷ whereas the Bingham inquiry was inquisitorial. As a result, the decisions in *Three Rivers* are only concerned with legal advice privilege.

12. In *Three Rivers (No. 5)* BCCI sought disclosure of materials prepared by BoE employees and ex-employees for provision to Freshfields in the course of preparing the BoE's evidence to the Bingham Inquiry.

13. The CA held that the preparatory material was not privileged:

- (i) Legal advice privilege applies only to communications between lawyer and client, not to the preliminary material prepared by the client's employees or ex-employees (such as draft witness statements).¹⁸
- (ii) The 'client' was the BIU – not any individual officer within the BoE, no matter how senior.¹⁹
- (iii) Legal advice privilege applies only to advice on the client's legal rights and obligations, not to advice on matters of presentation to the Bingham inquiry.²⁰

14. Leave to appeal to the HL was refused.

(4) The sequel – *Three Rivers (No. 6)*

15. Following *Three Rivers (No. 5)*, the BoE –

- (i) disclosed the material prepared by employees and ex-employees, but
- (ii) refused to disclose any communications passing between the BIU and Freshfields.

¹⁷ See *In re L* at 26, 30 & 37.

¹⁸ *Ibid*, at §19–21 & §22–31.

¹⁹ *Ibid*, at §31.

²⁰ *Ibid*, §37.

16. Basing itself on the 3rd element of the judgment in *Three Rivers (No. 5)*, BCCI saw an opportunity and applied for disclosure of those communications (*i.e.* the communications passing between the BIU and Freshfields): this became *Three Rivers (No. 6)*. It went to the HL.

17. In the HL:

- (i) No argument was addressed and no judgment was given on whether preliminary material prepared by employees and ex-employees should be covered (*i.e.* the 1st issue in *Three Rivers (No. 5)*).
- (ii) Although argument was heard, no judgment was given on which individuals on behalf of a corporation can be identified as the corporate client, such that their communications with lawyers will attract LPP (*i.e.* the 2nd issue in *Three Rivers (No. 5)*), although Lord Carswell did say that Tomlinson J's original judgment on that issue (that the documents were privileged), "*appear[s] to me to have considerable force*".²¹
- (iii) The only point on which *Three Rivers (No. 6)* is authority is therefore on the meaning of 'legal advice', in the context of legal advice privilege.

18. On that point, the HL decided that 'legal advice' does not just mean advice on legal rights and obligations, but extends also to questions *e.g.* of presentation to the Bingham Inquiry.²²

III. PRIVILEGE BETWEEN A COMPANY AND ITS SHAREHOLDERS

19. There is a long-standing line of authority to the effect that –

- (i) a trustee cannot claim LPP against a beneficiary in relation to legal advice to the trust,²³ and
- (ii) no privilege exists as between partners in relation to legal advice on the partnership's affairs.²⁴

²¹ *Ibid*, at §70.

²² *Ibid*, at §43–44, §57, §59–60, §62, §112 and §121.

²³ *Re Whitworth*.

²⁴ *BBGP v. Babcock & Brown*.

20. Based on that earlier case-law, there is now also a line of authority to the effect that a company cannot claim LPP against its own shareholders (other than in respect of advice taken in relation to a dispute between the company and the shareholder).²⁵
21. Some of the cases tend to focus explicitly on an entitlement to see the advice as such,²⁶ but others talk more generally about a shareholder's entitlement to disclosure of "*matters passing between solicitors and a company*",²⁷ and on general principle if the disclosure of material other than the actual advice is necessary in order to understand the advice given, then access to that other material ought to be governed by the same principles as access to the advice itself.²⁸
22. It would appear that a shareholder is entitled to demand disclosure of advice to the company, but if that shareholder is itself a corporate entity it is not entitled to provide onward disclosure of the advice to its own members: the advice remains confidential within the broad concept of the 'client', embracing only the company receiving the advice and its own shareholders.²⁹

IV. JOINT PRIVILEGE – R (FORD) v. FSA

(1) The facts of R (Ford) v. FSA

23. The FSA started an investigation into a company's business. Solicitors were retained to advise the company.
24. Subsequently, the FSA notified a number of directors of that they too were the subject of formal investigation personally.
25. The company was in due course put into administration by the court on the application of the FSA, & PwC were appointed as administrators. The company's solicitors ceased to act.

²⁵ *Re Hydrosan and CAS v. Nottingham Forest*.

²⁶ *CAS v. Nottingham Forest, Woodhouse Ltd v. Woodhouse, and Dennis Ltd v. West Norfolk Farmers Ltd*.

²⁷ *Gourad v Edison Gower Bell and Hydrosan*. The trust analogy suggests that the entitlement can be framed in terms of communications generally: see for example *Lewin on Trusts*, 18th ed., at §23-48.

²⁸ See by analogy *Fulham Leisure Holdings v. Nicholson Graham & Jones*, at §18–19, dealing with waiver of privilege.

²⁹ *BBGP v. Babcock & Brown*.

26. The FSA then used its statutory powers to compel PwC to provide an electronic copy of the directors' email records, which PwC did. The FSA investigators realised that the emails contained material which was subject to LPP. Before reading it, they therefore approach PwC with a request that they, as administrators, waive the company's privilege. PwC obliged.

27. The FSA then prepared an Investigation Report, in which reference was made to the content of privileged emails passing between the directors and the solicitors. The FSA's Regulatory Decision Committee (RDC) considered the Investigation Report and issued Warning Notices based on it. Judicial review proceedings followed.

(2) The proceedings

28. One of the directors complained that –

- (i) the solicitors had been acting both for the company and for the directors personally, and hence joint privilege attached to communications with them;
- (ii) PwC could not waive the directors' privilege, &
- (iii) communications with the company's accountants, Grant Thornton, also contained legal advice & was subject to LPP.

29. The claim for judicial review was successful in relation to communications with the solicitors, but not with the accountants.³⁰

30. As a result, there was a separate hearing to determine whether the FSA's investigation team & the RDC had to stand down, having been tainted by seeing the LPP material.³¹

31. The legal issues therefore included –

- (i) the scope of joint privilege,
- (ii) whether legal advice from an accountant is privileged,³² &
- (iii) the wider consequences for the FSA of having seen the LPP material.

(3) Joint privilege

32. When does joint privilege arise?

³⁰ [2011] EWHC 2583 (Admin).

³¹ [2012] EWHC 997 (Admin).

³² The definitive answer to that is "no": see *R (Prudential) v. Special Commissioner of Income Tax* [2013] 2 AC 185.

- (i) Where two or more parties jointly retain the same lawyer, or
- (ii) where, even though there is no formal, joint retainer, the parties have a joint interest in the subject matter of the communication in issue at the time it comes into existence (referred to as ‘joint interest privilege’).

33. What are the consequences of joint privilege? *“Parties who grant a joint retainer to solicitors of course retain no confidence as against one another: if they subsequently fall out and sue one another, they cannot claim privilege. But against all the rest of the world, they can maintain a claim for privilege for documents otherwise within the ambit of legal professional privilege; and because their privilege is a joint one, it can only be waived jointly, and not by one party alone.”*³³

34. *R (Ford) v. FSA* shows that, where there is no joint retainer, an individual claiming joint privilege in communications with a lawyer will need to establish the following facts by evidence:

- (i) that he communicated with the lawyer for the purpose of seeking advice in an individual capacity;
- (ii) that he made clear to the lawyer that he was seeking legal advice in an individual capacity, rather than only as a representative of a corporate body;
- (iii) that those with whom the joint privilege was claimed knew or ought to have appreciated the legal position;
- (iv) that the lawyer knew or ought to have appreciated that he was communicating with the individual in that individual capacity; and
- (v) that the communication with the lawyer was confidential.

(4) The consequences of wrongful examination by the FSA

35. Since the FSA’s investigators & its RDC had had access to the directors’ LPP material –

- (i) all copies of LPP material had to be located and returned or destroyed,
- (ii) the RDC had to be replaced with an untainted panel made up of individuals who had not seen the privileged material,
- (iii) but the FSA’s Warning Notice was not quashed, and
- (iv) the FSA’s investigation team did not have to be replaced.

V. THE INIQUITY EXCEPTION – BABCOCK & BROWN

³³ *The Sagheera*.

(1) Basic principle

36. LPP can be overridden by the 'iniquity exception' – *i.e.* where legal advice is sought and given in the furtherance of a fraud (in its wider sense) or of a criminal offence.³⁴
37. The 'iniquity exception' applies as much to litigation privilege as it does to legal advice privilege.³⁵

(2) The facts of *Babcock & Brown*

38. Babcock & Brown was a limited partnership, of which the general partner was BBGP. The limited partners consisted of a number of investors, some but not all of whom were within the B&B Group.
39. The outside investors became disaffected with the performance and involvement of B&B, and the individual managers within BBGP aligned themselves with those outside investors. The management team accordingly took legal advice on how to terminate BBGP's management agreement – but in doing so they communicated with the solicitors on their BBGP email accounts.
40. The management agreement was in due course terminated, and when BBGP subsequently discovered what had happened it applied to the court for a declaration that the legal advice given by the solicitor was not privileged as against them, on the grounds that –
- (i) it was advice given to BBGP, and/or
 - (ii) it was advice given to the partnership, in which BBGP was a partner, and/or
 - (iii) it was advice given to employees of BBGP with a view to prejudicing BBGP's rights and as such the iniquity exception applied.

(2) The court's decision

41. The court held that –
- (i) the advice was given to the partnership, Babcock & Brown, not to the managing partner, BBGP;
 - (ii) nevertheless, BBGP as a partner was entitled to disclosure;

³⁴ *Bullivant v. AG for Victoria*, at 201, *Gamlen v. Rochem*, *O'Rourke v. Darbishire* and *Barclays v. Eustice*

³⁵ *Kuwait Airways v. Iraqi Airways (No. 6)*, at §31–38.

(iii) the advice was obtained for the purpose of enabling the management team to act in breach of their duties to their own employer, and as such the iniquity exception applied.

42. The court also held that the managing partner's entitlement to disclosure did not enable it to provide onward disclosure to its own shareholders.

Jonathan Crow QC

4 Stone Buildings

May 2014

Authorities

1. *Air India v. Balabel* [1988] 1 Ch 317
2. *Al Rawi v. Security Service* [2012] 1 AC 531
3. *B v. Auckland District Law Society* [2003] 2 AC 736
4. *Barclays Bank Plc v. Eustice* [1995] 1 WLR 1238
5. *BBGP Ltd v. Babcock & Brown Global Partners* [2011] Ch 296
6. *Bullivant v. AG for Victoria* [1901] AC 196
7. *Campbell v. Mirror Group Newspapers Ltd* [2004] 2 AC 457
8. *Campbell v. UK* (1992) 15 EHRR 137
9. *CAS (Nominees) Ltd v. Nottingham Forest Plc* [2001] 1 All ER 954
10. *Dennis and Sons Ltd v. West Norfolk Farmers Co Ltd* [1943] Ch 220
11. *Foxley v. UK* (2000) 31 EHRR 637
12. *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] 2 All ER 599
13. *Gamlen Chemical Co v. Rochem* [1983] RPC 1
14. *Gourad v Edison Gower Bell Telephone Co Ltd* (1888) 57 LJ (Ch) 498
15. *Great Atlantic Insurance v. Home Assurance* [1981] 1 WLR 529
16. *Greenough v. Gaskell* (1833) 1 My & K 98
17. *Re Hydrosan Ltd* [1991] BCLC 418
18. *In re L (A Minor)* [1997] AC 16
19. *Kuwait Airways Corp v. Iraqi Airways Co (No. 6)* [2005] 1 WLR 2734
20. *MB v. Secretary of State for the Home Department* [2008] 1 AC 440
21. *O'Rourke v. Darbishire* [1920] AC 581
22. *R v. Chief Constable of West Midlands Police, ex parte Wiley* [1995] 1 AC 274
23. *R v. Derby Magistrates Court, ex parte B* [1996] AC 487
24. *R (Ford) v. FSA* [2011] EWHC 2583 (Admin) & [2012] EWHC 997 (Admin)
25. *R (Morgan Grenfell) v. Special Commissioner of Income Tax* [2003] 1 AC 563
26. *R (Prudential) v. Special Commissioner of Income Tax* [2013] 2 AC 185
27. *The Sagheera* [1997] 1 Lloyd's Rep 160
28. *Soden v. Burns* [1996] 1 WLR 1512
29. *Stiedl v. Enyo Law LLP* [2012] PNLR 4
30. *Three Rivers (No. 5)* [2002] EWHC 2730 (Comm) & [2003] QB 1556 (CA)
31. *Three Rivers (No. 6)* [2003] EWHC 2565 (Comm), [2004] QB 916 (CA) & [2005] 1 AC 610

32. *Re Whitworth* [1920] AC 581

33. *Woodhouse and Co (Ltd) v. Woodhouse* [1914] 30 TLR 559.