The effect of a duty of confidentiality owed by a witness

This blog post considers the situation where evidence is sought from a potential witness who owes a duty of confidentiality to another.

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When a solicitor wishes to interview a prospective witness, she needs to be clear both that the witness does not inadvertently share any privileged information with the solicitor, but also needs to ensure whether or not the evidence that is sought from the witness might breach a duty of confidentiality that the witness owes to another. The solicitor needs to be particularly alive to this in circumstances where the witness owes a duty of confidentiality to the solicitor's client's opponent in the litigation for which the evidence is sought. This is a consequence of the decision of Christopher Clarke J. in *Porton Capital Technology Funds -v- 3M UK Holdings Limited* [2010] EWHC 114 (comm).

However, these restrictions fall away once that same witness comes to give evidence in court. As it was put by Nugee J. in *Glen & Another -v- Watson and Others* [2016] EWHC 3259 (Ch):

> "Where A sues B and there is a prospective witness who can give relevant evidence, but who owes a duty of confidentiality to A, then first, B is free to call W to give evidence at trial and may ask him any question relevant to the dispute even if the answer would otherwise be confidential to A, and W is, subject to questions of privilege and any judicial discretion, both entitled and indeed obliged to answer such questions… In doing so W is not in breach of any obligation of confidence owed to A, nor is B liable for inducing such a breach."

The problem with this approach is that in so far as W's evidence is subject to a duty of confidentiality from which W has not been released, then W's evidence can only be revealed at trial. This has the result that those wishing to interview W can never be sure of what W is going to say until that point is reached in the proceedings. This is so irrespective of the relevance or admissibility at trial of W's evidence.

Furthermore, the interviewing solicitor's ability to hear W's evidence pre-trial does not change just because the opponent in the litigation discloses (where he is obliged to) confidential information relating to a matter in issue in the proceedings to which W's evidence is relevant. As Christopher Clarke J put it in *Porton*:

> "I do not, however, accept that the effect of disclosure is in any way to alter any duty of confidence owed by (say) an employee or former employee (save that compliance with the obligations of disclosure would, obviously, not be a breach of duty). Subject to any special order of the Court the receiving party is entitled to use the documents

> disclosed for the purpose of the actions. He may show the documents to a potential witness or provider of relevant information. But that does not mean that the witness is absolved from any duty of confidence that he may owe to an opposing party (or anyone else). Fulfilment of that duty may preclude him from answering some of the questions that may be asked of him. The fact that the disclosing party has been compelled to disclose the documents to the receiving party does not alter that duty."

What happens if the disclosing party goes further and actually pleads a matter which is confidential and which otherwise the witness would not be able to discuss with third parties prior to trial? In *Glenn -v- Watson*, the Defendants wished to call a witness, M, who owed duties of confidentiality to the Claimants. The Defendants accepted this with the result that, following negotiations, a protocol was agreed under which the Defendants could talk to M about certain specific topics relevant to the proceedings. That protocol included undertakings given by the Defendants' solicitors, including one only to discuss with M the matters which the parties had agreed might be discussed, and not to trespass beyond those boundaries without further agreement or order of the Court.

The Defendants applied to add to the agreed topics on the basis that the Claimants had waived confidentiality in particular topics which the Defendants now wished to ask M about. The Defendants, relying on principles applicable where there is an express waiver of privilege, which they submitted were equally applicable to a waiver of confidentiality, asserted that the Claimants had waived confidentiality in those topics because of the way they had referred to them in their pleadings.

Nugee J approached these submissions by first examining whether there is a waiver of privilege when a party pleads a privileged document. Here, the general principle is that mere reference in a pleading to a privileged document does not waive privilege in that document: see *Buttes Gas and Oil Co -v- Hammer* (No.3) [1981] QB 223. Equally, as made clear in that decision, relying on a document at trial does waive privilege in it, and by pleading the document a party shows that he intends to rely on it at trial. In those circumstances, Lord Denning MR in *Buttes Gas* said that by pleading the documents in question Buttes showed that they intended to rely on them and therefore they should either make them available for production or amend their pleading by striking out reference to them. See also *Property Alliance Group Limited -v- Royal Bank of Scotland plc [2016]* 1 WLR 361, where Birss J held that the manner in which RBS had pleaded certain matters in that case had put them in issue in those proceedings such that they were disclosable. However, he also ordered that there be a "grace period" to enable RBS to decide whether to maintain its plea and provide inspection of the privileged materials, or amend to withdraw the plea (which in the event they did).

According to Nugee J:

> "Those cases therefore appear to be authority for the principle that if a party by his pleading puts in issue in the proceedings a particular privileged communication, it can be held to have lost its right to object to production of documents that it would otherwise have been entitled to withhold. That looks very much like a doctrine of waiver of privilege by pleading, subject to the right to amend to delete the pleading rather than give inspection."

Those authorities were not undermined by the Court of Appeal's decision in *Paragon Finance plc v Freshfields* [1999] 1 WLR 1183, which was concerned with an implied waiver which arises where a party sues his former solicitor. As a result, Nugee J. was clear that:

> "If a claimant, in a case in which he is suing not his former solicitor but a third party, pleads a privileged document, does this amount to an express waiver of privilege in that document? My answer is "Yes". Or, to be more precise, it amounts to an announced intention to rely on, and hence waive privilege in, the document at trial, and thus attracts the consequences identified by Lord Denning MR in *Buttes*, namely that he is put to an election either to abandon

his reliance on the document, or to accept that privilege has been waived."

However, do those same principles apply to a waiver of confidentiality in non-privileged communications? The Defendants submitted that they did on the basis that confidentiality is "a necessary predicate" of privilege and hence there is no reason to distinguish between loss of privilege and loss of confidentiality. The Judge disagreed, focusing on the different practical effect that privilege and confidentiality have. As to the rights conferred by privilege, namely an entitlement to withhold privileged material even if directly relevant to pleaded issues, he suggested that by voluntarily waiving privilege the person who benefits from it "gives up these rights" and therefore comes under an obligation to disclose the document, is no longer immune from answering questions about it and is unable to stop others from giving evidence about it."

He held that confidentiality does not work in the same way. A party who has a confidential document is unable to keep its contents secret in the course of litigation. If the document is relevant to the pleaded issues, then whether or not the document itself is referred to in the pleading, the party in whose possession the document is, is obliged to disclose it. In that way the litigation process forces that party to reveal what would otherwise be confidential to the other parties. If he gives evidence he could be asked about the document, as can anyone else. These consequences, said Nugee J, follow so long as the document is relevant to the issues in the action, whether the party with the benefit of the confidence pleads the document or not. And noting the ratio of *Porton* that even though confidential matters have been referred to in disclosed documents and thereby come into the possession of the other party, that does not entail the further consequence that a potential witness who owes a duty of confidentiality to the disclosing party is now free to talk about such matters to anybody he wishes to. Nugee J said:

> "Putting the matter another way, when a party waives privilege, that changes fundamentally the parties' rights in relation to the privileged communication: as I have sought to explain, the nature of the privilege is one that casts a blanket over the privileged communications so that it cannot be referred to at trial at all. By waiving the privilege the party has lifted the blanket and made the question of the advice received an issue that can be gone into at trial. That is obviously a significant shift in the party's rights in relation to the communication which would otherwise be privileged. But it does not seem to me that the same is true of a matter which is prima facie confidential. Here … the very fact that there is litigation in which issues are raised to which the confidential communication is relevant has the consequence that the party cannot resist disclosure and cannot prevent witnesses being asked about it at trial, but he can, according to the decision in *Porton*, ensure that those who owe existing duties of confidentiality do not discuss these matters before trial. By pleading reference to such a communication in his Statement of Case, the party does not, it seems to me, fundamentally change the nature of the communication; it remains something relevant to the proceedings, it remains disclosable, and it remains something about which witnesses can be asked questions, but equally it seems to me it remains something in relation to which the party is entitled to continue to insist that those who owe duties of confidentiality keep those matters confidential until called as a witness at trial."

Accordingly, whilst the issues on which the Defendants wished to question M could be gone into at trial, that did not mean that the Claimants have thereby waived their right to insist that M did not talk to the Defendants before the trial about such matters.

The practical effects of these decisions are clear, if surprising in that they do not, I suggest, aid effective case management. Accordingly, even if one's opponent puts a confidential matter into issue by pleading a reference to it, any witness with evidence to give about such matters is prevented, if he is subject to an on-going duty of confidentiality owed to that opponent, from discussing his evidence with any other party. Those other parties have no right to know what that evidence will be – absent the duty being lifted or waived – prior to the witness actually giving evidence. This is all the more surprising given that a key rule of advocacy is not to ask a witness a question to which you are not confident you know the answer. One must speculate whether an appellate court would reconsider the case management

consequences of these decisions.

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