Waiver of privilege

This blog post examines a recent US case on waiver of privilege the facts of which would, if repeated before an English Court, quite probably lead to a similar decision.

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Contact	Colin Passmore

One of my New Year's resolutions for 2018 is to try to keep my privilege blog more up to date. Accordingly, here is my first blog of the New Year, which I hope will be the first of many.

I want to start with a look at waiver of privilege. The English courts gave a number of judgments in 2017 on this topic. I will cover some of these in a later blog, but the message clearly coming out of them is that any voluntary waiver of privilege carries with it a real danger that the waiving party may be required to waive privilege over additional communications.

However, I want to start my 2018 blogs by looking at a decision from the Southern District of Florida, Miami Division, in *United States Securities and Exchange Commission -v- Matias Francisco Sandoval Herrera, et al* (case no 17 - 20301 - CIV - Lenard/Goodman), a decision handed down on 05 December 2017.

US decisions obviously have no direct precedent value in front of the English courts, but I think the lessons to be learned from this case are ones that any English lawyer would readily recognise and take into account. Quite probably, a similar decision on similar facts would follow from the High Court in London.

The background to the *Herrera* decision was as follows. The Defendants were the CEO and CFO of General Cable Corp (GCC). In 2012, GCC retained the US law firm, Morgan Lewis & Bockius (MLB) to provide legal advice concerning accounting errors at a Brazilian subsidiary company. MLB conducted an internal investigation, which included interviewing many GCC personnel. Attorneys from MLB then prepared notes and memoranda about those interviews. When the SEC learned of the investigation into GCC's accounting errors, it began its own investigation and, inter alia, asked for MLB's investigative findings.

In response, MLB provided the SEC with information about its findings, including a presentation prepared for the SEC as well as providing "oral downloads" of 12 witness interviews that it had conducted. Those downloads covered the substance of the underlying interview notes.

The SEC's investigation ultimately led to a Cease and Desist Order entered against GCC which required the payment of a $6.5m civil monetary penalty. Thereafter, the SEC filed a law suit against the CEO and the CFO (and another defendant) based on allegations that the Defendants concealed the manipulation of accounting systems at GCC's Brazilian operations. In the course of the SEC proceedings, the Defendants made an application against MLB directly for production of the actual witness interview notes for the twelve witnesses in relation to whom there had been an "oral download" to the SEC.

The Judge hearing the application (US Magistrate Judge Goodman) summarised the relevant US authorities as follows:

> "Generally speaking … work-product protection is waived when protected materials are disclosed in a manner which is either inconsistent with maintaining secrecy against **opponents** or substantially increases the opportunity for a potential **adversary** to obtain the protected information …" (Judge's emphasis).

The Judge concluded that In the original investigation the disclosure to the SEC was one made to an adversary, namely MLB's clients, since the SEC was investigating the possibility of the company's wrongdoing.

MLB contended that no waiver had occurred because it never actually produced the notes and memoranda of the twelve witness interviews to the SEC. However, the Judge rejected MLB's argument that there is a meaningful distinction between the actual production of a witness interview note or memo, and providing the same or similar information orally.

In the Judge's view:

> "… there is little or no substantive distinction for waiver purposes between the actual physical delivery of the work product notes and memoranda and reading or orally summarising the same written materials' meaningful substance to one's legal adversary."

The Judge therefore concluded that MLB had waived work product protection and so had to provide to the Defendants the interview notes and memoranda that were orally downloaded. The waiver was limited, however, to the witnesses whose interview notes and memoranda were orally provided.

Very similar principles would apply to the determination before an English court of a similar factual scenario to that outlined above. Disclosure of privileged materials to an adversary does in the vast majority of cases under English law amount to a waiver of privilege and accordingly sharing orally the substance of a privileged interview note, without disclosing the entirety of the note itself, will usually give rise to a waiver over the written materials. One often sees this type of issue arise in cases concerned with whether the substance of a privileged communication is set out in a statement of case or a witness statement (which amounts to waiver) , as opposed to a so-called mere reference to the privilege communication (which does not)

English law differs from US law in this one respect, inasmuch as it is possible to undertake a limited waiver of privilege, even to an adversary, for specified and limited purposes: see the Privy Council decision in *B -v- Auckland District Law Society* [2003] 2A.C. 736. The difficulty with this, however, is that it is rare that a UK regulator, equivalent to the SEC, would accept the receipt of privileged materials subject to any restrictions on the extent of the waiver. Accordingly, on similar facts, most likely the same result would be reached in front of the English High Court. The lesson is therefore clear: use privileged materials openly and without reservation with an adversary at your client's peril [1].

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[1] For whatever reason, the Defendants in the SEC action withdrew the motion to compel discovery that resulted in the

order summarised above. That did not stop the magistrate Judge from reiterating his “oral downloads equate to waiver” theory.

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elexica Limited, CityPoint, One Ropemaker Street, London EC2Y 9SS