Letters and the law—legal professional privilege and the SFO

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Corporate Crime analysis: R (on the application of McKenzie) v Director of the Serious Fraud Office outlines the extent to which legal privilege can be invoked when withholding documents from public bodies. Alan Ward of Stephenson Harwood and Eleanor Davison of Outer Temple Chambers, examine the decision which will come as a relief to the Serious Fraud Office (SFO).

Original news

R (on the application of McKenzie) v Director of the Serious Fraud Office [2016] EWHC 102 (Admin), [2016] All ER (D) 203 (Jan)

The Divisional Court dismissed the claimant's application for judicial review of the legality of the procedure set out in the Operational Handbook of the SFO for dealing with material potentially subject to legal professional privilege(LPP) embedded in electronic devices. The procedure was lawful and, in particular, the preliminary sift of paper or electronic material did not have to, as a matter of law, be conducted by third parties.

What was the background to this application?

Eleanor Davison (ED): This case considered the appropriate procedure to be followed by an investigating authority, the SFO, where material which may be protected by LPP had inadvertently come into the possession of the authority in the context of seizures lawfully made.

The factual background to this matter was the arrest of Mr McKenzie at Heathrow Airport, on suspicion of conspiracy to commit an offence contrary to section 1 of the Bribery Act 2010—the offence was in connection with a contract for MIB Facades Limited, a firm of which Mr McKenzie is a director and major shareholder. At the arrest, various electronic devices were seized from Mr McKenzie under section 54 of the Police and Criminal Evidence Act 1984 (PACE 1984). Further devices were produced in response to a section 2 notice issued under the Criminal Justice Act 1987 (CJA 1987) six days later. Importantly, at neither the date of seizure or the date of production, was there any suggestion that the devices may have contained material covered by LPP. After obtaining the material the SFO, in accordance with its Handbook procedure, notified Mr McKenzie's lawyers that one device was believed to contain LPP material and that it had been quarantined on the SFO's Digital Review System (DRS). The solicitors were asked to provide search terms to permit the LPP material to be identified and reviewed by independent counsel. The solicitors then notified the SFO that all the devices may contain LPP material and declined to provide search terms on the basis that the procedure proposed by the SFO was unlawful.

What were the main legal issues and arguments put forward?

Alan Ward (AW): The claimant argued that the SFO's procedure, as set out in its Operational Handbook, involving the use of in-house IT staff to isolate material potentially subject to LPP, was unlawful. In particular, it was submitted that the Handbook procedure was inconsistent with the terms of the Attorney General's Supplementary Guidelines on Digitally Stored Material (2011). The claimant also submitted that the SFO's proposed approach would give rise to a risk that the investigative team would gain access to LPP material.

In support of these contentions, the claimant relied on *Bolkiah v KPMG* [1999] 1 All ER 517, in which the House of Lords held that, where a solicitor wishes to act against the interests of a former client, that solicitor must demonstrate that there is 'no real risk' of information, confidential to the former client, being disclosed. Counsel for the claimant argued that the same test must apply to the seizing authority, which must be required to show, 'with convincing evidence', that there is 'no real risk' of LPP material being disclosed to those investigating, for the proposed procedure to be lawful.

The claimant placed further reliance on the judgment of Sir John Thomas (as he then was) in *R (on the application of Rawlinson and Hunter Trustees) v Central Criminal Court* [2012] EWHC 2254 (Admin), [2012] All ER (D) 06 (Aug). In *Rawlinson and Hunter*, the divisional court found that the SFO's then practice of using in-house lawyers as 'independent'

lawyers to review materials for LPP was unlawful. The claimant in *McKenzie* sought to extend the logic of that case, to argue that the SFO's use of in-house IT staff to isolate material potentially subject to LPP must similarly be unlawful.

ED: Although the material in this case was stored on electronic devices, the judgment also considers the issues in relation to hard copy material. The court reviewed the Attorney General's Guidelines on Disclosure published in 2013 (the 2013 Guidelines) which append the Supplementary Guidelines on Digitally Stored Material 2011, as well as the previous 2011 Disclosure Guidelines, which appended a different version of the Supplementary Guidelines.

The later Guidelines omitted a paragraph which expressly provided that material suspected to include LPP material could be examined by a person employed within the investigative body, providing he or she is not one of the investigators or anyone connected with the investigation. The court considered whether the removal of that paragraph indicated that the meaning of the phrase 'an independent lawyer' had changed in the 2013 Guidance, such that what was required at the stage of filtering documents to isolate privileged material was a person or body wholly independent of the investigating agency, and not a person employed by the authority who was functionally independent of the investigative team.

It was argued on behalf of Mr McKenzie that the Handbook, which set out that the material could be isolated by in house IT staff, was not compliant with the 2013 Guidelines and the appendix on digitally stored material.

The complaint focussed on the early stage of the process where the SFO were using in-house staff to initiate an electronic search of the content of seized devices using search terms provided by their owners. This was for the purpose of isolating LPP material for subsequent review by independent counsel. It was argued that this stage of the procedure should be carried out by independent IT specialists despite the SFO's DRS being organised to isolate the case team's access. What the claimant sought was a ruling which indicated that the seizing body should only be provided with the electronic devices once all LPP material had been reviewed and deleted by an independent IT provider.

Counsel for the SFO contended that the obligations on the authority should not be more onerous in the circumstances of this case, where LPP material comes to light after lawful seizure, than those imposed where material is seized from a premises or person under PACE 1984, ss 50–54 and where regarding LPP material there is no suggestion that the filtering of LPP material should be undertaken by a third party.

What did the court decide, and why?

AW: The court granted the claimant permission to apply for judicial review, but dismissed the claim, finding the SFO's policy of using in-house IT specialists to isolate material potentially subject to LPP to be lawful.

In giving judgment, the court held that a seizing authority must 'have procedures in place which are intended to prevent investigators reading LPP material and which make it very unlikely that they will do so'.

Lord Justice Burnett elaborated upon the scope of the duty on law enforcement agencies, as regards claims to LPP over seized materials, as follows:

'…a seizing authority has a duty to devise and operate a system to isolate potential LPP material from bulk material lawfully in its possession, which can reasonably be expected to ensure that such material will not be read by members of the investigative team before it has been reviewed by an independent lawyer to establish whether privilege exists. That approach to LPP material imports the necessary rigour required by the law for its protection in this context.'

In formulating this approach, the court rejected the more onerous 'no real risk' test, advanced by the claimants, placing reliance on *Bolkiah v KPMG*. The court also resisted the claimant's attempt to extend the logic of the judgment in *Rawlinson and Hunter*, holding that:

'There is a world of difference between determining whether something is protected by LPP, which involves close consideration of the content and context of a document or communication, and identifying a document, file or communication as potentially attracting LPP, which does not.'

ED: The court was satisfied that the system put in place by the SFO did not give rise to a real risk that LPP material might be read by investigators before an independent lawyer had conducted his or her exercise. Furthermore, the court considered that the system in place afforded reasonable protection to prevent this situation from occurring, describing the risk on the facts of this case as fanciful.

The judgment makes clear that the current and earlier Guidelines and annexes are consistent in that the reference to an independent person meant a person in house but functionally independent of the investigation.

The procedures in the SFO Handbook were not considered to be inconsistent with the 2013 Guidelines and its annex. The judge further commented that even if the Handbook and the 2013 Guidelines had been inconsistent that of itself would not necessarily have rendered the SFO's approach in the Handbook unlawful. The Guidelines are not presented as a statement of the law and do not amount to a policy the SFO is obliged to follow. Even if an inconsistency had been found, the question would still have arisen regarding whether the procedure contended for by the claimant was required by law. The judge did not consider that the arguments regarding PACE 1984, ss 50–54 had any direct bearing on the question of what procedure should be applied to a seizing authority that is sifting material for LPP.

The judge thus distinguished the position of the SFO, a public body, acting in the public interest in investigating a crime and lawfully in possession of material, from that of a solicitor-client relationship where different considerations obviously apply.

The judge also reflected:

'It may well be that mistakes are more likely to occur in connection with hard copy, rather than digital, material. Either way, there should also be clear guidance in place meaning that, if an investigator does by mischance read material subject to LPP, that fact is recorded and reported, the potential conflict recognised, and steps taken to prevent information which is subject to privilege being deployed in the investigation. There may be cases where it is necessary to remove the relevant investigator from the case. The last bullet point of the policy for handling LPP material…shows that the SFO is alive to such matters.' (paras [35] and [36])

To what extent is the judgment helpful in clarifying the law relating to the management of legally privileged documents in document-heavy bribery and fraud investigations?

ED: The judgment clarifies that the current system regarding the management of legally privileged documents at the sifting stage applied by the SFO is lawful. It also clarifies the scope of the positive duty on any seizing authority in clear terms albeit without prescribing the particular procedure which must be adopted by each authority to discharge that duty.

The judgment is helpful from an advisory perspective for corporate crime lawyers in that it gives considerable insight into the process that is followed by the SFO in dealing with material which may fall within the protections of LPP. In summary, the process is as follows: it is the SFO's digital forensic unit to which seized or produced devices are first provided. Its staff download the content onto the digital review system named Autonomy. If that content is thought to contain LPP material it is immediately quarantined with the result that the investigation team is denied access. Thereafter the procedure identified in the Handbook (of applying search terms) is followed. A different team, known as the DRS team, applies the search terms which result in material responsive to those terms being confined to a separate folder.

The staff of the DFU and DRS teams are not part of the investigation team and are 'two independent technology specific departments' with specialist skills. Their work in this process was described by the court as highly technical. A third team, known as RAVN, with specialist expertise in the functioning of the Autonomy system, ensures that the uploading has been successful. That team is not employed by the SFO but is a third party technical support team. No material located on the Autonomy system can be viewed by members of an investigative team until it has been 'released' by the DRS. Access by investigators is thereby controlled—they have access only to areas which relate to their own cases and have no access to any material quarantined for LPP purposes until it has been reviewed and released by the independent lawyer. No access is ever granted to material which has been found to be subject to LPP.

What are the implications and lessons of this decision for corporate crime lawyers?

AW: The judgment will come as a significant relief for the SFO—had the court found the SFO's procedure for assessing claims to LPP, and isolating potentially privileged material to be unlawful, the implications for a large number of on-going cases may have been vast.

Lord Justice Burnett's judgment lays down the scope of the duties on 'seizing authorities', as opposed to the SFO in isolation. The judgment is therefore of potentially significant assistance to practitioners, seeking to advance claims to LPP over materials seized by other law enforcement agencies.

Furthermore, Lord Justice Burnett's emphasis on 'the positive duty the law imposes on a seizing authority to guard against the risk that an investigator will read a document protected by LPP', and the 'necessary rigor required by the law for [the protection of LPP] in this context' will also be helpful to practitioners seeking to impress upon law enforcement agencies the importance which the courts attach to the protection of LPP.

ED: It is of note that the court stated in the context of this judicial review that if a claimant suggests the system a seizing body has in place is deficient, the burden of establishing why it is deficient rests with him. It does not appear that the investigative authority has to prove it has discharged the positive duty it holds.

Corporate crime lawyers will want to clearly establish the alleged deficiencies before commencing any proceedings. In addition, corporate crime lawyers will note the observations of the court that departure from the 2013 Guidelines will not necessarily render a procedure unlawful. Rather the litmus test will be, 'does the procedure ensure the required outcome?'—in this case the prevention of investigators having access to privileged material. The judgment underlines the propriety of the SFO retaining some functions in house.

What are your predictions for future developments in the area of corporate crime investigations?

ED: The SFO continue to be very interested in testing claims to LPP, whether those made in respect of first accounts taken as part of internal investigations, or in the application of the crime fraud exception to advice allegedly given in furtherance of a criminal purpose. Following the first deferred prosecution agreement (DPA) in late 2015, practitioners in the field of corporate crime will await with interest the practical application of the guidance given in the *Standard Bank* case (*Serious Fraud Office v Standard Bank plc* (unreported)) to other DPAs which are doubtless under consideration.

AW: Electronically-stored data is now central to almost every substantial white-collar crime investigation, and the approach taken by law enforcement agencies to such data is likely to be the subject of challenge in the courts with increasingly regularity. In December 2015, the Court of Appeal considered the prosecutor's disclosure obligations, when very substantial amounts of electronic material have been seized in the course of a long-running investigation—*R v R and others* [2015] EWCA Crim 1941, [2016] All ER (D) 06 (Jan).

Although *McKenzie* was concerned with the SFO's procedure for handling potentially privileged material, the more fundamental question as to the scope of privilege is likely to be considered by the courts in the not-too-distant future, as David Green QC (Director of the SFO) seeks to test assertions of LPP made by corporate entities in the context of internal investigations.

The extent of the protection against disclosure that LPP provides, in the investigation context, is already being explored in the High Court in a claim brought by Property Alliance Group, against Royal Bank of Scotland. Two interlocutory rulings in 2015 cast some valuable light on the approach the courts may take in the future to claims of privilege in this context—see *Property Alliance Group Limited v Royal Bank of Scotland PLC* [2015] EWHC 1557 (Ch), [2015] All ER (D) 99 (Jun) (8 June 2015) and [2015] EWHC 3187 (Ch), [2015] All ER (D) 67 (Nov) (5 November 2015).

Through a combination of interlocutory rulings in the *Property Alliance Group* litigation, and a likely future test case brought by the SFO, we are likely to see some extremely important developments in the law on privilege in the next one to two years.

Interviewed by Julian Sayarer.

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