A Confidential Consultation?

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T***he Court of Appeal reaffirms the qualified nature of legal professional privilege***

In the recent case of *R v Edward Brown (formerly Latham)*[1] the Court of Appeal held that it was appropriate, in certain circumstances, to impose a requirement that third parties be present during a nominally private consultation between a defendant and his lawyer. In doing so the Court created a new common law qualification to the inviolable nature of legal professional privilege ("**LPP**") (for a detailed consideration of LPP and the protections that it affords see this WilmerHale W.I.R.E. UK post). This post explores some of the key issues in, and potential implications of, this judgment.

The facts

The facts of *Brown* are remarkable and hold the key to understanding its potential significance.

The appellant was detained, under the Mental Health Act 1983, in Rampton Hospital where, prior to the relevant incident, he was already serving life sentences for two other offences of attempted murder. He had a history of self-harming and had previously told a member of staff at the hospital that he intended to kill his solicitor.

In July 2011, whilst in detention at the hospital, the appellant attacked a fellow patient with a weapon fashioned from a radio aerial. Prior to standing trial for this attack in November 2012, the appellant's solicitor wrote to the court to ask for arrangements to be put in place to enable the appellant to consult in private with his lawyer, "*in the absence of nurses, custody officers and others*."[2] The Crown Court judge dismissed this application and granted an order requested by the hospital that the appellant was to be accompanied by (or in practice, handcuffed to) at least two nurses during any conference with his lawyer. This, it was suggested, was necessary to protect the appellant from self-harm as well as to protect others. The appellant was subsequent convicted, following trial, of attempted murder.

The appeal

The central ground of the appeal was that the appellant's conviction was unsafe because the Crown Court ruling—namely that the appellant's conferences with his lawyers were to take place in the presence of two hospital nurses—breached his right at UK common law to consult privately with his

lawyers and under Article 6(3) of the European Convention of Human Rights.

The decision

The appeal was dismissed and in delivering the judgment, Lord Justice Fulford held that by means of creating a new exception to LPP it was appropriate, "*in what is likely to be an extremely narrow band of cases",* to require particular individuals (nurses in this case) to be present at discussions between a defendant and his lawyer, "*if there is a real possibility that the meeting is to be misused for a purpose, or in a manner, that involves impropriety amounting to an abuse of the privilege.*"[3]

The orthodox exceptions to LPP

LPP and the closely connected right of a defendant to consult with his lawyer in confidence, without fear that the facts may afterwards be disclosed and used to his prejudice, are longstanding common law principles in the UK.[4] Whilst a fundamental right, LPP is not absolute however. It is subject to a number of qualifications or exceptions. Prior to the decision in *Brown*, there were two generally recognized common law qualifications or exceptions.

Firstly, the 'iniquity' or 'crime/ fraud' exception.[5] Strictly speaking not an exception, the iniquity principle provides that LPP does not attach to communications made, or information held, between a lawyer and his client which are themselves part of a crime or fraud, or which seek or give legal advice about how to facilitate the commission of a fraud or a crime. To do otherwise would confer an unjustified immunity on dishonest lawyers.

Second, statute is able to override the protections afforded by LPP by means of express words or necessary implication—by way of example see sections 291(1)(b) and 311(1) of the Insolvency Act 1986 and the decision of the House of Lords in *McE*[6] in respect of the Regulation of Investigatory Powers Act 2000.

The extension in *Brown*

The communications between the appellant and his lawyer in *Brown* were not in furtherance of a criminal purpose and nor was there a statutory basis for them to be subject to third party monitoring. In dismissing the appeal, the Court of Appeal created a new exception to LPP which provides that interference with legally privileged communications will be justified where there is a "*real possibility"* that the meeting (between a lawyer and his client) is to be "*misused*" for a purpose that involves "*impropriety*" amounting to an abuse of LPP.

The "*impropriety*" that there was a "*real possibility*" that the legal consolation was being "*misused*" for in *Brown* was that the appellant was at risk of harming himself, either seriously or fatally, if he was not accompanied by two nurses during his legal consultation. This represents a significant broadening of the range of circumstances in which LPP may be overridden, given that whilst attempted suicide may be unpalatable and concerning, it is not a criminal offence.[7] Notwithstanding this, the risk of the appellant self-harming was held by the Court of Appeal to involve possible impropriety amounting to an abuse of LPP.

The potential implications

In addition to the creation of a new common law exception to LPP, the judgement in *Brown* raises two points, amongst others, that merit further consideration.

Firstly, Lord Justice Fulford was explicit in his view that the nurses who were deployed to ensure that the appellant was detained were not to be equated with investigating police officers: "*they are not present to eavesdrop or secure a tactical advantage over the accused.*"[8] This line of reasoning is open to criticism. The nurses were state employees (from Rampton Hospital) performing a custodial function (handcuffed to the appellant pursuant to a court order) and crucially, as Lord Justice Fulford himself notes, they were not instructed to treat what they heard during the consultation in confidence.

Second, it is interesting to note the emphasis placed on the use that was to be made of the privileged communications in evidence, as distinct from the simple overhearing of what was said: "*in the present case there is no suggestion of an intention to misuse any of the privileged communications that were overheard*."[9] This offers little comfort to those looking to benefit from a private consultation with a lawyer. The very fact that there is a third party present during a legal consultation is likely to result in a defendant being reluctant to speak openly, whether for reasons of embarrassment or otherwise, regardless of the use to which the details of the communication may be put. The consequences are potentially dramatic. Without the full facts, counsel may not be aware of all the defences available to defeat an allegation, resulting in perfectly proper defences not being put forward at trial.

Conclusion

We should exercise caution before claiming that this judgment (and with it the creation of a new common law exception to LPP) signals the death knell for LPP and the closely connected right of a defendant to consult with his lawyer in confidence. Lord Justice Fulford was at pains throughout the judgment to stress that the decision was reached in light of the extraordinary facts in *Brown* and that the ruling would only likely be relevant to an extremely narrow band of future cases. We will note with interest however the approach that is adopted by the judiciary in interpreting *Brown* to see whether Lord Justice Fulford's prediction as to its limited application turns out to be true.

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[1] [2015] EWCA Crim 1328

[2] Ibid, paragraph 7

[3] Ibid, paragraph 41

[4] R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002] UKHL 21, [2003] 1 AC 563 [7]

[5] R v Cox and Railton [1884] 14 QBD 153

[6] McE v prison Service of Northern Ireland [2009] UKHL 15, [2009] 1 AC 908

[7] Per section 1 of the Suicide Act 1961

[8] Ibid footnote 1, at paragraph 37

[9] Ibid, paragraph 37

Authors

Lloyd Firth

COUNSEL

lloyd.firth@wilmerhale.com

+44 (0)20 7872 1014