



Article

Litigation Privilege: When Is the Shield Lowered?

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In the space of two years, the Cayman Islands Court of Appeal (CICA) and Irish High Court have reached opposite conclusions on an interesting legal issue in relation to the ability to assert litigation privilege over certain evidence.

The CICA decided that there is no privilege in a finalised witness statement that has been served on the other party. Subsequently, although it considered the CICA decision, the Irish High Court came to a different conclusion and held that witness statements do not lose their privileged status at the time of service. This article looks at the policy rationale behind both decisions and analyses the current state of the law in respect of this critically-important area of legal practice.

What is the scope of litigation privilege?

Litigation privilege is an important concept which allows parties to prepare for litigation while being open with their legal counsel. The parameters of the protections afforded by litigation privilege are sometimes difficult to determine, as competing policy considerations are often at play.

On one hand, as Lord Rodger of Earlsferry emphasised in *Three Rivers DC v Bank of England (No 6)*, it is crucial that each party is free to prepare its case as fully as possible without the risk that an opponent will be able to recover the material generated by its preparations. However, on the other, the general public has an interest in access to justice with the benefit of full disclosure and transparency.

How did this particular issue arise?

This is yet another chapter written in the aftermath of the notorious Madoff fraud.

As many readers will be aware, members of the HSBC Group acted as administrator and custodian to many feeder funds which placed assets for investment with Bernard L Madoff Investment Securities LLC. Among those feeder funds, were Primeo Fund (in official liquidation), a Cayman Islands incorporated investment fund, Thema International Fund plc, an Irish incorporated investment fund, and Defender Limited, also an Irish incorporated investment fund. Following Madoff's arrest in December 2008 for running the largest known Ponzi scheme in history, these feeder funds and others began proceedings against HSBC entities for alleged breaches of duty.

Thema's proceedings against HSBC went to trial first in the Irish High Court in April 2013. The Irish HSBC defendant had served witness statements on behalf of three former or current employees of HSBC entities. However, the parties reached a settlement during trial, days before the HSBC witnesses of fact were due to be called to give evidence. Therefore, the HSBC witness statements were never "adopted" by the relevant witnesses.

There was no real dispute between the parties, in either the subsequent Cayman Primeo proceedings or the Irish Defender proceedings, that the HSBC witness statements served in Thema were highly relevant and that the HSBC entities had possession of them. Accordingly, unless they remain privileged, the parties agreed that they should have been disclosed in the usual way.

The question in both sets of proceedings was: Is privilege in a witness statement waived and/or lost upon service on the other side?

Cayman position

In Cayman, HSBC argued that service of witness statements only amounts to a limited waiver of privilege (i.e. service of the witness statements in Ireland may have waived privilege in respect of the parties to that action, but not to the world at large).

The CICA favoured the position taken by the full Federal Court of Australia in *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd*. In ruling on whether litigation privilege was retained in served proofs of evidence, the Federal Court distinguished between litigation and legal advice privilege:

In our view, whatever is the extent of confidentiality arising from litigation privilege, one element of confidentiality is essential, namely non-disclosure to one's opponent ... The rationale for litigation privilege is different from that of advice privilege, and rests on the basis that, in the adversarial system, the legal representatives and their clients generally control and decide for themselves which evidence they will adduce at trial, without any obligation to make disclosure to the opposing party or parties of the material acquired in preparation of the case.

Once a document or any information is voluntarily provided, it loses the cloak of confidentiality and also privilege.

The CICA agreed with Primeo that privilege is lost against the world and not, as HSBC argued, on a limited basis. This is not a situation where documents are produced to the other side on a conditional basis or with express limitations (see, for example, the leading Privy Council decision on limited waiver in *B v Auckland District Law Society*). Accordingly, HSBC was ordered to produce the witness statements served in Thema.

Irish position

The Irish High Court accepted that the Thema witness statements were relevant and necessary for disposing fairly of the Defender litigation. The parties agreed that once a witness statement is adopted in open court then privilege in that statement is lost.

However, Mr Justice Twomey (the presiding judge) did not agree with the CICA that service of a witness statement constitutes a complete waiver of privilege and did not accept that serving a statement on an opponent is the equivalent of putting it into the public arena. Instead, he focused on the position in Ireland that a witness statement has no evidential value until it is adopted by the relevant witness or it is agreed that it should stand as evidence in chief.

Mr Justice Twomey also attached significant weight to the fact that often a major incentive for parties to settle proceedings is the desire to avoid publicity related to the dispute. Given that witness statements often contain detailed accounts of the history of the dispute, the Judge took the view that witnesses should be encouraged to be frank and open at an early stage in the hope that this will enhance the prospects of settlement.

Although he ruled that the Thema witness statements retained their privileged status, despite being served, the Judge did make one exception. Highlighting how nuanced and complex this area can be, Mr Justice Twomey decided that one of the witness statements had been placed in the public arena during trial and therefore privilege had been lost. Due to the fact that counsel had quoted from one of the statements at length and verbatim in submissions and cross-examination of other witnesses in the Thema proceedings, he placed that particular statement in a different category and ordered disclosure.

Comment

The Caymanian judiciary has prioritised access to justice and openness for the past several years. Many recent decisions reflect that priority and this is no exception. For example, in a bid to increase transparency, the Cayman court has decided to publish written reasons even in circumstances where parties have settled disputes in the period between the conclusion of the hearing and a judgment being handed down. Therefore, it is perhaps unsurprising that the CICA would form the view that the public interest in ensuring that parties are not prejudiced in conducting litigation does not outweigh the public interest in full transparency.

On either approach, witnesses may of course discuss their evidence with lawyers and revise their statement in the knowledge that any such preliminary steps are privileged. However, at the time of service, even if the proceedings are settled, parties must be conscious that the evidence their witnesses give may have lost privileged status and may be used elsewhere in future.

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