[2015 Gib LR 104]

R. v. ROBINSON and WOOD

SUPREME COURT (Prescott, J.): January 9th, 2015

Evidence—privilege—legal professional privilege—iniquity exception—communications between client and lawyer not privileged if made with intention of furthering criminal purpose—purpose may be that of client, third party or solicitor—if firm of solicitors is partnership, partners' iniquitous purpose encompasses all communications made by innocent lawyers within firm

The first defendant sought an order for disclosure of material contained within computer equipment seized by the Royal Gibraltar Police from the law firm Marrache & Co. and a ruling that, if legal professional privilege attached to that material, he could nevertheless consider it.

The partners of Marrache & Co. had been convicted of conspiracy to defraud through misappropriation of clients' funds held in the firm's client account. As part of their investigations into criminal activity at the firm, the police seized computer equipment including the hard drive, server and workstations used by lawyers at the firm. The first defendant sought disclosure of the material stored within that equipment but acknowledged that it was highly likely that much of that material would be confidential communications between clients and lawyers attracting legal professional privilege. The first defendant therefore sought a ruling from the court that, if legal professional privilege attached to the material, he could nevertheless consider it.

The Crown submitted that the court had no jurisdiction to make such a ruling. Part 12 of the Criminal Procedure and Evidence Act 2011 gave the court jurisdiction in relation to disclosure but there was no provision in that Part by virtue of which the court was entitled to make such a ruling.

The first defendant submitted that legal professional privilege was a single integral privilege developed by law and reflected in statute and that, unless it was waived by the client, it continued to be protected in perpetuity. He conceded that there was an exception to legal professional privilege, both at common law and under s.14(2) of the Criminal Procedure and Evidence Act 2011, known as the iniquity exception, whereby material held with the intention of furthering a criminal purpose would not attract legal professional privilege, but he submitted that this exception only applied where the iniquitous purpose was either that of the client or a third party of which the solicitor was ignorant. In the present case, the iniquitous purpose was that of the partners of Marrache & Co., and the

iniquity exception could not therefore apply. The Crown submitted in reply that the iniquity exception extended to situations in which the iniquitous purpose was that of the solicitor, and so applied to the material contained within the computer equipment.

The first defendant further submitted that (a) if the iniquity exception did apply, it would operate to waive legal professional privilege only in respect of the material relating to clients who had funds in Marrache & Co.'s client account, as the partners of the firm had only intended to defraud clients who had funds in that account; (b) only the partners of the firm were convicted of conspiracy to defraud and *bona fide* confidential communications between clients and innocent lawyers at the firm should therefore not be deprived of legal professional privilege; and (c) a lawyer's iniquitous purpose of misappropriating clients' funds should not attach to all confidential communications passing between him and his clients even if they had all deposited money in the client account, as they might have sought the lawyer's advice on matters unconnected with the holding of funds in the client account.

The Crown submitted in reply that (a) it had been proved that the partners of Marrache & Co. had conspired to defraud clients and this was a permanent state of affairs within the firm and therefore all clients, whether or not they had deposited funds in the client account, were subject to the conspiracy; and (b) the firm was a partnership, there was an agreement between the partners to defraud clients, and the communications of the firm, even if made through an innocent lawyer, were made in furtherance of the partners' criminal purpose.

Held, allowing the application in part:

(1) The court was entitled under its inherent jurisdiction to make the type of ruling sought by the first defendant. If the court were put on notice that, in the opinion of the defence, consideration of the material disclosed by the prosecution would result in the breach of legal professional privilege, it could not ignore that and, under its inherent jurisdiction, it would assume jurisdiction to make a ruling as to whether or not the material attracted legal professional privilege (para. 7).

(2) The iniquity exception extended to situations in which the iniquitous purpose was the solicitor's, as well as situations in which the iniquitous purpose was that of the client or of a third party. The exception could therefore apply to the material contained within the computer equipment by virtue of the criminal activity by the partners of Marrache & Co. (para. 11).

(3) As the firm of solicitors was a partnership, any agreement by the partners to defraud clients encompassed any communications made by the firm in furtherance of the partners' criminal purpose, including communications made by innocent lawyers. The iniquity exception could therefore apply to communications between clients and innocent lawyers at the firm which were recorded on the computer equipment (para. 14).

(4) Legal professional privilege would be waived under the iniquity exception but only in respect of clients who had deposited money in the client account, rather than a blanket waiver, because legal professional privilege should only be waived under the iniquity exception in relation to communications made with the intention of furthering a criminal purpose and the partners of Marrache & Co. had only conspired to defraud clients who held funds in the client account (para. 16).

(5) Clients would therefore be put on notice that their legal professional privilege would be waived after the order waiving their privilege was made but before their privilege was actually waived, thus giving such clients the opportunity to make representations before their rights were actually extinguished (para. 17).

Cases cited:

(1) *R.* v. *Central Criminal Ct., ex p. Francis & Francis (a firm)*, [1988] 2 W.L.R. 627; [1988] 1 All E.R. 677; (1987), 87 Cr. App. R. 104; on appeal, [1989] A.C. 346; [1988] 3 W.L.R. 989; (1988), 88 Cr. App. R. 213, applied.

(2) *R.* v. *Cox* (1884), 14 Q.B.D. 153; [1881–85] All E.R. Rep. 68, referred to.

Legislation construed:

Criminal Procedure and Evidence Act 2011, s.14(2): The relevant terms of this sub-section are set out at para. 9.

R. Fischel, Q.C. and *K. Tonna* for the Crown;
J. Levy, Q.C. and *M. Levy* for the first defendant;
T. Hillman for the second defendant.

1 **PRESCOTT, J.:** This is an application by Mr. Robinson (the first defendant) relating to the issue of disclosure, specifically to item 192 on the schedule of unused material, which is an EnCase image of the hard drive, server and workstations seized by the Royal Gibraltar Police (RGP) from Marrache & Co. ("the EnCase image").

2 The prosecution took the decision to disclose the EnCase image as unused material in its possession. As a consequence, it was provided to the defence teams. Subsequently, an issue arose because the material on it was unreadable in the format provided. The prosecution submitted that it had no obligation to provide the material in a readable format because it was not in fact prosecution material, despite the fact that the prosecution itself had on various occasions described it as such. In due course, this court ruled that the EnCase image qualified as prosecution material as defined in s.239(2) of the Criminal Procedure and Evidence Act 2011 ("CPEA"). Following that ruling, the EnCase image was provided in a readable format.

3 The first defendant submitted that the "the server and workstations seized from the law firm Marrache & Co. are highly likely to contain confidential communications between clients and Marrache & Co. employees which were made on the clients' legitimate understanding that they would be protected by legal professional privilege." Although it is regrettable that the first defendant, who has throughout been aware of the nature of the contents of the EnCase image, has not taken the point sooner, he now seeks a ruling from the court akin to a "blessing" that, should legal professional privilege ("LPP") attach, he may nevertheless consider such material.

4 The prosecution submitted that the court has no jurisdiction to make such a ruling. Whilst the prosecution concedes that, pursuant to Part 12 CPEA, the court does have jurisdiction in relation to disclosure, it points out that there is no provision in Part 12 by virtue of which the court is entitled to make such a ruling.

5 The prosecution said that it made the decision to disclose the EnCase image, adopting the view that, in respect of contents that might otherwise attract LPP, the exception at common law in respect of the furtherance of a criminal purpose (subsequently enacted in the CPEA, s.14(2)) applied. The prosecution further submitted that it is not for this court to rule on whether it agrees with the stance adopted by the prosecution, and, whilst the court can make an order for the disclosure of material, it cannot reverse an order already made.

6 In my view, the court is not being asked to rule on whether it agrees with the stance taken by the prosecution, but rather whether all or part of the disclosure already made by the prosecution is subject to LPP.

7 It is trite that the court has a supervisory role to play in any disclosure proceedings, certainly evident in the present case from the management function it has undertaken in relation to disclosure issues arising prior to this application. If the court is being put on notice that, in the opinion of the defence, consideration of the material disclosed by the prosecution would result in a *prima facie* unlawful act, it cannot, in my view, ignore that, and, under its inherent jurisdiction, it is incumbent upon it to accept jurisdiction.

8 The first defendant submitted that LPP is a single integral privilege developed by law and reflected in statute. The first defendant further submitted that, unless LPP is waived by the client, who alone has the power to do so, it is a privilege which continues to be protected in perpetuity. It is unnecessary for me to highlight the importance which attaches to LPP in the administration of justice.

9 It was conceded by first defendant that there exists an exception to this rule, "the iniquity exception," which essentially provides that, if the

communication itself is the means of carrying out a fraud, it cannot be privileged. This exception is reflected in s.14(2) of the CPEA, which provides that "Items held with the intention of furthering a criminal purpose are not items subject to legal privilege."

10 The first defendant submitted, however, that the iniquity exception will only apply where the iniquitous purpose was either the client's own, of which the solicitor was ignorant (*R.* v. *Cox* (2)), or a third party's, of which both the client and the solicitor were ignorant (*R.* v. *Central Criminal Ct., ex p. Francis & Francis (a firm)* (1)).

11 The prosecution submits that the iniquity exception extends to situations where the iniquitous purpose was the solicitor's. Having considered the matter, I am bound to agree. The view of the majority of the House of Lords in *Francis & Francis* conclusively supports this. In the course of his judgment, when considering whether the relevant intention could extend beyond the client's intention, Lloyd, L.J., in earlier proceedings in the Divisional Court, agreed with counsel that "a criminal purpose" should be taken to mean "any criminal purpose." He was considering ([1988] 2 W.L.R. at 633) s.10(2) of the Police and Criminal Evidence Act 1984 which is drafted in identical terms to s.14(2) CPEA:

> "I would disagree with the view that the relevant intention for the purpose of section 10(2) is confined to the intention of the person holding the document. Though the construction may seem strained, I would hold that section 10(2) can be paraphrased: 'items held by the solicitor or any person entitled to possession of them which are intended to further any criminal purpose are not items subject to legal privilege.'"

Lord Griffiths stated ([1989] A.C. at 385):

> "I would construe the words as applying to all documents prepared with the intention of furthering a criminal purpose whether the purpose be that of the client, the solicitor or any other person."

12 The ensuing question is whether, because of the solicitors' criminal purpose, the exception can operate to waive LPP in respect of all of the material contained on the EnCase image. The submissions from the first defendant on this point are threefold and I quote liberally from the skeletons:

(i) there is no evidence that the convicted Marrache defendants had any iniquitous intention in relation to those clients who had no funds in the client account. The count on which the Marrache defendants were convicted concerned the misappropriation of client funds. There will have been many, if not most, clients to whom the fraud did not and could not have applied because they had no funds in the Marrache & Co. client account;

(ii) there were more lawyers at Marrache & Co. than Isaac and Benjamin Marrache; it is nonsense to suggest that the *bona fide* confidential communication between a client and a wholly innocent lawyer employed by Marrache & Co. would be deprived of LPP simply because the partners of the firm were stealing clients' money; and

(iii) there is no principle that a lawyer's undoubtedly iniquitous purpose of stealing clients' funds should attach to all confidential communications passing between the lawyer and his clients even if they had all deposited money in the client account. The client may have sought the lawyer's advice on matters unconnected with the holding of funds in the client account.

13 The prosecution submitted in relation to points (i) and (iii) that the conspiracy alleged and proved in the Marrache case was to defraud clients and trusts of the firm and this was the permanent state of affairs within the firm so that all clients, whether they had deposited funds in the client account or not, were "fair game," and, in relation to point (ii), that the firm was a partnership and it had only two partners both of whom were convicted. There was an agreement between the partners to defraud clients; the communications with the firm, even if made via an innocent lawyer, were made in furtherance of the partners' criminal purpose.

14 I am with the prosecution on point (ii). Given that the firm was a partnership, any agreement by the partners to defraud clients would encompass any communications made by the firm in furtherance of the firm's criminal purpose. The material question is, in relation to points (i) and (iii), whether all clients are caught in the net or only those who deposited money in the client account.

15 It is not in dispute that the fraud perpetrated by Marrache & Co. centred on the misappropriation of client moneys deposited in the client account. For the criminal enterprise to reach fruition by way of the misappropriation of funds, it was necessary that funds be deposited in the client account. By a process of logical extension, therefore, only those clients who so deposited moneys were "fair game"; all other clients were merely receiving legal advice and were not the victims or intended victims of the conspiracy. In these circumstances, the statutory (and common law) exception does not apply to the material produced and retained by Marrache & Co. in respect of those clients who did not deposit moneys in the firm's client account.

16 In respect of those clients who suffered actual loss as well as those who deposited moneys, LPP is waived, but, in my view, not by way of a blanket waiver. The waiver must be only to the extent envisaged by Lord Goff of Chieveley in *Francis & Francis* (1) (*ibid*., at 397) and that is that the client's—

> "privilege will only be excluded in so far as it relates to communications (or items enclosed with such communications, or to which reference is made in them) made with the third party's intention of furthering a criminal purpose. No other communication will be excluded from the application of the privilege; and the client's confidence will to that extent be protected."

17 The first defendant relies on the speech of Lord Griffiths in *Francis & Francis* (*ibid.*, at 385) for the proposition that proper procedure in cases where a client's LPP is about to be waived is for him to be put on notice of the same after the order is made but before his privilege is actually waived. No statutory provisions supporting this view have been brought to my attention, but, in any event, it seems to me that the procedure highlighted by Lord Griffiths is a sensible one to follow because the innocent individual who has been caught up in wrongdoing should be given the opportunity to make representations before his rights to LPP are extinguished.

18 It may be that in light of this ruling the question arises of who is to assess the EnCase image and conduct the exercise of the segregation of client files. If necessary, I shall hear counsel on the matter.

Orders accordingly.
