Claimant
C Passmore
First
12 January 2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Claim No: CO/1052/2017

B E T W E E N :

THE QUEEN

on the application of

THE NATIONAL COUNCIL FOR CIVIL LIBERTIES (LIBERTY)

Claimant

- and -

(1) SECRETARY OF STATE FOR THE HOME DEPARTMENT

(2) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

Defendants

FIRST WITNESS STATEMENT OF COLIN JOHN PASSMORE

I, Colin John Passmore, of [redacted] will say as follows:-

Introduction and Background

1. I am a solicitor of the Senior Courts of England and Wales and I am also admitted to practice in the Courts of Hong Kong. I qualified as a solicitor in England in November 1984 and was admitted in Hong Kong in April 1986. I became a Solicitor-Advocate (Civil) in England and Wales in the late 1990s.

2. I became a partner in the firm of Simmons & Simmons in 1990 and was elected Senior Partner of Simmons & Simmons LLP in 2011, a position that I will hold until the end of my current term of office in July 2021.

3. Since qualifying over 33 years ago, I have always practiced as a litigator. Initially, between 1984 and 1986 when I was employed by Coward Chance, I conducted wet and dry shipping litigation. When I moved to Hong Kong with Simmons & Simmons in 1986 (I practised there between 1986 and mid-1991), my practice developed into one where I focussed on large insolvencies, professional negligence claims and banking disputes (especially those that arose out of the 1987 "Black Monday" financial crisis). When I returned to work with Simmons & Simmons in London in 1991, I continued my focus on working on large scale insolvencies and professional negligence claims, as well as developing my practice in relation to banking disputes.

4. At the beginning of this century, I also developed a practice working for individuals in relation to so-called "white collar crime" matters, especially in relation to money laundering, fraud and extradition issues.

5. I have maintained my litigation practice, notwithstanding that I have also been elected as Simmons & Simmons' Senior Partner. I have recently been handling a very large piece of litigation arising out of the global financial crisis from 2008.

6. I am a member of Liberty, the Claimant in this matter. I pay a monthly subscription for my membership, but I am what I would describe as a relatively passive member of Liberty in that I do not actively campaign on its behalf (although I did write a blog for Liberty about 3 years ago on the importance of the rule of law). I do not necessarily support the stance that Liberty takes in relation to every matter with which it engages.

7. I am not in any way benefitting from, or being remunerated by, providing this witness statement. Rather, my willingness to provide this statement stems from my interest as a practitioner in legal professional privilege.

8. I write an occasional blog on developments in the law of privilege (although this has been inactive for about 4 months as I have been very busy with my daily workload). I am also the author of a textbook that has become known as "Passmore on Privilege". This was first published in 1998 and the Third Edition was published by Sweet & Maxwell in 2013. The Fourth Edition is presently in preparation albeit it is held up whilst an important case works its way through the English appellate Courts. My book is occasionally cited (usually with some approval) in judgments of the English (and other) Courts.

9. I was the principal (but by no means the sole) draftsman of the Law Society of England and Wales' "Practice Note on Privilege", which was published in February 2017.

This Statement

10. The reason I have agreed to provide this statement is because, driven by my interest in the subject of legal professional privilege generally, I am interested in the subject of investigatory powers and the accompanying surveillance legislation. This interest stems from the impact these powers can have on privileged communications, in that some parties to those communications (lawyer and client) may become reluctant to engage in them, having regard to the fact that there must be some risk that those communications can be intercepted. I was sufficiently concerned by the publication of the Investigatory Powers Bill (as it then was), that on behalf of The Law Society I gave evidence in December 2015 about the likely impact of this legislation on privilege to the Parliamentary Joint Committee on the Draft Investigatory Powers Bill, which in its report published on 11 February 2016 referenced some of the evidence that I gave on that occasion[1]. I recall that its report concluded as follows:

> "537. The Committee recommends that provision for the protection of Legal Professional Privilege (LPP) in relation to all categories of acquisition and interference addressed in the Bill should be included on the face of the Bill and not solely in a code of practice. The Government should consult with the Law Societies and others as regards how best this can be achieved. (Recommendation 46)
>
> 538. The Home Office should review its proposals in relation to LPP to ensure that they meet the requirements of Article 8 and relevant case law. (Recommendation 47)"

11. I therefore hope that my observations below will be of some assistance to the Court in considering these issues. The observations below are made as a practitioner. For obvious reasons, I make no comment on the questions of law before the Court. These are matters for argument, not evidence.

12. Prior to preparing this witness statement, I have been provided with the Statement of Facts and Grounds for Judicial Review, the Detailed Grounds of Resistance and the First Witness Statement of Silkie Jo Ellen Carlo.

The "Chilling Effect"

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1 House of Lords and House of Commons, Joint Committee on the Draft Investigatory Powers Bill, *Draft Investigatory Powers Bill — Report* (HL Paper 93, HC 651, 11 February 2016) [519]–[538].

13. I consider that the use of surveillance powers is beginning to cause a "chilling effect" on the willingness of some clients to engage in privileged communications. By "chilling effect", I mean that some clients, and their lawyers, are increasingly concerned as to whether their ability to engage in totally confidential or sacrosanct communications still exists, with the consequence that their willingness to communicate openly and freely with each other, especially by electronic means, is being inhibited. I now explain why I hold this view.

14. It is clear to me as a practising lawyer that legal professional privilege is a very important component of the way in which lawyers advise their clients under English law. In my experience, members of the English legal profession, particularly those who practice as litigators, are very aware of the importance of legal professional privilege for their clients in terms of the way that lawyers can give confidential advice under a unique cloak of secrecy which is afforded to no other professional relationship. Accordingly, I see many examples on a very regular basis of lawyers using privilege in order to advise their client exactly in line with the underlying rationale of privilege that has been developed over the last 200 years or so.

15. That said, I do not yet think that the English legal profession as a whole is fully aware of the existence or potential impact of the types of investigatory powers which are the subject of this action; nor fully appreciates that they have the ability in certain circumstances to encroach upon legal professional privilege. That said, I do consider, based on my engagement with professional bodies such as The Law Society of England and Wales, as well as criminal practitioners in England, that sections of the English legal profession are slowly, but increasingly, becoming alert to the potential impact on privilege of the surveillance measures available to state and criminal justice agencies, especially with the passing of the Investigatory Powers Act 2016 ("IPA 2016"). This is something with which I am conversant both because of my studies into the subject and my engagement with such practitioners. But I do recognise that there are many lawyers who perhaps do not yet fully appreciate the way in which these powers can encroach upon privilege.

16. To an extent, this is probably understandable for lawyers who practice in relation to commercial matters and civil disputes. Here arguably, the risk of privileged communications being encroached upon by surveillance techniques is in some respects of less concern than, say, to a criminal law practitioner, both because the subject matter of those communications is less likely to give rise to matters of interest to the police or the security and intelligence services; and because there is less concern on the part of clients in such matters (and their lawyers) as to whether this is likely to happen.

17. But I am conscious that there is a growing appreciation amongst criminal practitioners at least (including those who practice in relation to "white collar" crime) that the existence of investigatory powers is a matter of concern and is a matter that is apt to give rise to the so called "chilling effect" (as I have described it above) on the ability of clients to communicate freely and unreservedly with their lawyers.

18. I first became aware of the interception issue generally as a result of the House of Lords' decision in *McE v Prison Service of Northern Ireland* [2009] 1 AC 908.

19. Of course, the decision in *McE* made clear that any intercepted materials that are privileged could never be used in Court as evidence unless the crime-fraud exception came into play in relation to them; and the Court also made clear that those powers (a) have to be used in a way that is Convention compliant (which they were not, when *McE* was decided in 2009); and (b) have to be used extremely sparingly.

20. Subsequent cases, particularly the *Belhadj* [2015] UKIPTrib 13_132-H litigation in the Investigatory Powers Tribunal, coupled with the Government's admission in the course of that litigation in February 2015 that the regime under which UK intelligence agencies had been monitoring conversations between lawyers and their clients was unlawful, brought home to me that such monitoring practices were continuing.

21. It is impossible for me to say or even to speculate how wide-spread such practices are. This is because of the Government's "neither confirm nor deny" policy. Indeed in the *Belhadj* litigation, it transpired in the event that only two privileged documents had been unlawfully accessed by the security services using surveillance powers. However, it is not the use alone of such powers that creates the chilling effect. It is the potential for their use.

22. As I have noted, I consider that some criminal practitioners are now increasingly aware of and concerned by the use of surveillance powers by Government agencies. In addition, I have observed, as an adviser to clients of my own over the last few years, small changes in client behaviour which suggest to me that this is, in part at least, a consequence of the chilling effect around privilege which in turn is a consequence of a growing appreciation of the availability and assumed use of surveillance powers.

23. In this respect, I have myself observed the following small changes in behaviour that are, in my opinion, intended to reduce the likelihood of lawyer-client conversations being monitored or overheard:-

(1) I have seen an increased desire for clients (even, on rare occasions, clients in civil matters) to meet in person rather than to use the telephone or email (this desire is not of course universally held);

(2) Whilst this is not entirely new, because I have had experience of this happening for at least the last 10 years, on occasions clients or representatives of clients ask either to meet abroad, or in public places (such as the lobbies of large hotels), believing that thereby their communications with lawyers are less susceptible to interception;

(3) Some clients have asked me to meet at their homes, where they have asked for my mobile telephone to be turned off;

(4) I have seen increasing use of WhatsApp as a means of communication because it is encrypted (as opposed to using the more conventional email, text message and telephone);

(5) Even where clients have been forced to use the telephone – even WhatsApp – I have noticed that sometimes conversations become more cagey, less explicit, and where there is sometimes the use of code words, all of which betrays a concern that the communication may be surveyed.

I am inhibited from going into further detail about these matters as they all arose from privileged conversations.

24. As noted, I have seen these behaviours mostly in relation to acting for individuals and particularly in relation to a criminal or quasi-criminal matters. These practices are by no means universal but nonetheless I have observed them. As I have explained, I believe that they are in part prompted by concerns about the use of surveillance techniques.

25. Accordingly – and while recognising that I do not conduct an extensive white collar crime related practice – I consider that I have begun to see some negative impact for clients on their ability or willingness to engage in unfettered communications and that this arises from the so-called chilling effect on clients.

Communications Data

26. Paragraph 135 of the Grounds of Resistance states "while communications data might reveal the fact that a person has spoken to their lawyer, or the duration of the conversation, it would not reveal any of the content of the conversation, and therefore would not attract legal professional privilege. Liberty does not provide any examples of

communications data that would be protected by legal professional privilege" (italics and underlining in original).

27. The correctness of this proposition as a matter of law is for the Court. The Court may be assisted by considering *Gardner v Irvin* (1878) 4 Ex D 49 and *Derby v Weldon (No 7)* [1990] 1 WLR 1156. As for the question of whether a client's identity or location is a matter for privilege, I expect the Court will be referred to *JSC BTA Bank v Solodchenko (No 3)* [2011] EWHC 2163 (Ch) and *SRJ v Persons Unknown* [2014] EWHC 2293 (QB). I am also aware of the recent ruling in *Greennet/Privacy International v SSFCA and GCHQ* [2016] UKIP TRib 14_85-CH and 120-126-CH where the contrary proposition to that set out in paragraph 135 of the Grounds of Resistance was conceded by the Government and where amendments were made to GCHQ's internal procedures as a result. (The Tribunal said at [87]: "the third problem was of metadata, which could attract LPP by reference to communications with lawyers, even without their content. There was no dispute between Counsel that metadata might attract LPP...".)

28. Furthermore, communications data are a type of metadata. GCHQ's procedures now accept that

"The concept of LPP applies to: ... Exceptionally, some communications data (ie 'events' or the fact of a communication)" (see Appendix III to the *Greennet/Privacy International* Judgment, which cites the new procedures in full).

29. It is also said that no examples have been given by Liberty of communications data that would be protected by legal professional privilege. If by this the Government means to suggest that no such examples exist, I consider that many litigators would disagree with this and I would point to the following:-

29.1 The fact that the client has consulted a lawyer (or a particular lawyer with a particular specialism at a particular firm) may itself be subject to legal advice privilege. In some circumstances, my clients would be entitled to claim privilege over the fact that they have taken legal advice, as well as over its content. Further, a client is entitled to assert privilege as to who they have taken legal advice from. Communications data alone will reveal (or suggest) the fact that such advice has been taken. This may be sensitive information given that certain legal advisers and firms, particularly in relation to the criminal law, are known for their expertise in a very focused and limited area.

29.2 The fact that a lawyer for the purposes of litigation has approached a potential witness, as well as the identity of the witness, are subject to litigation privilege. For example, in litigation I might manage to trace and take a draft witness statement from a relevant

witness. The fact that I have traced and approached the witness is itself privileged. It need not be disclosed. The communications data alone will reveal (or suggest) that fact.

30. It seems to me that as awareness grows that privileged information can be accessed through communications data, and that (as I understand) the concessions made in the *Greennet* case in late 2015 have been resiled from, this will only: (i) increase the chilling effect on a client's willingness to communicate over the email or by telephone with their lawyer; and (ii) much more worryingly, inhibit just how open a client is prepared to be with his own lawyer.

31. As noted above, I cannot say now that the use of surveillance techniques, including the capture of communications data, inhibits lawyer-client engagement on a daily basis. But as awareness of their availability and usage grows, I am concerned that this will add to the signs I have already observed that clients and their advisers are gradually becoming more circumspect as regards the manner in which they communicate with their lawyers.

I believe that the facts stated in this Witness Statement are true.

Signed [redacted]

Dated 12 January 2018.