R (on the application of AL) v. Serious Fraud Office [2018] EWHC 856

SFO strongly criticised for numerous public law errors in failing to challenge company's assertion of LPP while subject to Deferred Prosecution Agreement

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In a case which raises novel issues concerning the scope of the Serious Fraud Office's disclosure duty towards a defendant in criminal proceedings who had previously been employed by a company which had self-reported wrongdoing and secured a Deferred Prosecution Agreement ("DPA"), the Divisional Court (Holroyde LJ and Green J.) found numerous public law errors had tainted the SFO's failure to challenge the company's assertion of legal professional privilege ("LPP") over the product of the internal investigation which led to the self-report.

While ultimately dismissing the claim for judicial review - on the basis that the Crown Court rather than the High Court was the appropriate forum for resolving the disclosure dispute - Green J.'s Judgment (*The Queen (AL) v. Serious Fraud Office & XYZ Ltd and* others [2018] EWHC 856) handed down on 19th April 2018 makes clear that, but for the forum issue, the Court would have quashed the SFO's decision. The lengthy judgment contains a valuable and scholarly analysis of the scope and nature of a prosecutor's duty of disclosure in the context of a concluded DPA but has wider implications for criminal trials in general.

The DPA at the heart of the case was the second to be concluded by the SFO. The background to it is set out in the Judgment of Sir Brian Leveson PQBD in *Serious Fraud Office v. XYZ Ltd* (Southwark Crown Court, 8/7/16 https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/). It is also the first occasion on which individual human defendants implicated by a company's self-report have been charged. Their trial is due to commence in 2019 (hence the need for anonymity in describing the parties in the Judgment).

The dispute at the heart of the judicial review claim concerned access to the full first account material provided by four senior company employees (one of whom was now a defendant in the pending bribery trial) in the course of lengthy interviews with outside lawyers appointed by the company to conduct an internal investigation of potential bribery of agents acting for overseas customers. The company had agreed to provide what it described as "oral proffers" of the first account material – in effect brief summaries of what were many hours of detailed questioning – but consistently refused either to waive LPP over the product of the investigation or to accept that LPP could not apply in light of *Three* Rivers, *RBS Rights* and *SFO v.* ENRC.

Despite the terms of the co-operation clause in the DPA – which required XYZ Ltd to disclose to the SFO all material and information in its possession not protected by a valid claim of LPP or any other legal protection against disclosure – and the fact that the SFO had made clear it regarded the claim to

LPP to be untenable in light of *ENRC,* the SFO steadfastly refused to trigger the breach clause within the DPA or to issue a witness summons under s.2 of the Criminal Procedure (Attendance of Witnesses) Act 1965, either of which courses of action would have enabled the LPP dispute to be resolved by the trial Judge. After the trial Judge ruled that he could not make a s.8 CPIA disclosure order against the SFO because the first account material was not in the possession of the SFO and nor could he review the SFO's failure to pursue breach proceedings against the company under the terms of the DPA, AL secured leave to move for judicial review of the SFO's apparently inexplicable refusal to compel the production of the first account material in the face of the prosecution's acceptance that the material was "not peripheral" in the light of the defence case statements lodged by the various defendants.

It was not contended that a claim for judicial review of the SFO's failure to trigger breach proceedings under the DPA pursuant to para 9 of Schedule 17 of the Crown and Courts Act 2013 was prohibited by reference to s.29 (3) Senior Courts Act 1981 on the basis that it related to trial on indictment. However the Court concluded that, in light of its analysis of the Parliamentary intent underpinning the statutory regime, all disputes relating to disclosure should be determined in the Crown Court rather than the High Court. The Court was satisfied that there were available alternative remedies in the Crown Court including a potential abuse of process submission in the event that the SFO continued to act in apparent breach of the AG's guidelines and its common law/A6 ECHR duty to secure a fair trial.

But in view of the importance and novelty of the issues raised and the fact that the Court concluded that "in material respects we considered that the approach the SFO was adopting was flawed", the Judgment addresses in detail the numerous errors of law committed by the SFO in its approach to its duty of disclosure. Thus the Court observed that:

- the SFO was wrong in its assertion that it enjoyed a broad discretion to decide not to proceed against the company to compel the production of the first account material pursuant to the co-operation clause in the DPA. The discretion as it applies to disclosure is circumscribed by Article 6 ECHR, the common law right to a fair trial and by the AG's Guidelines
- in its decision letter subject to the judicial review, the SFO simply accepted the assertion of LPP made by the company's lawyers even though it was the SFO's own case that LPP did not apply and the SFO's position is supported by the current case law.
- The SFO never addressed itself to the issue of waiver of privilege (either as a matter of law or as part of the company's duty to co-operate) arising as a result of the oral proffers.
- The SFO adopted a test of "not obviously invalid" in relation to the company's assertion of LPP and in so doing it erred since its duty is to assess privilege claims properly and not cursorily and superficially.
- In any event the SFO had not either before or during the judicial review hearing provided any sort of reasoning for its conclusion that

the points advanced by the company's lawyers in correspondence were "not obviously wrong".

- If and insofar as the SFO adopted an approach whereby it declined to reassess its disclosure obligations in the light of developments in the law because of a concern for "finality" reasons then it erred since that it is tantamount to an argument that the SFO can ignore the law and its duty to keep its disclosure obligations under review.

"In short", the Judgment concluded, "the SFO failed to address relevant considerations, took into account irrelevant matters and applied the wrong legal test to the assessment that it made. These public law errors were material. If, on proper analysis no privilege applies (either *per se* or because of waiver) then XYZ Ltd should simply disclose the interview records forthwith."

In a separate ruling, the Court declined to make an order for costs against AL notwithstanding that the claim failed because on all the substantive issues the Claimant prevailed.

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