The corrosion of lawyer client privilege - how real is the threat ?

[1] Over the past decade in Northern Ireland, the protection of legal professional privilege has been both topical and contentious.

[2] The judgments on legal professional privilege by Lord Bingham in Cullen v Chief Constable of the RUC [2003] 1 WLR 1763[1] or Lord Taylor in Derby Magistrates[2] who viewed such protections as a 'fundamental condition on which the administration of justice as a whole rests' have been tested to the full.

[3] The rationale for such protection enjoyed by the client was elucidated in R (Morgan Grenfell & Co[3] by Lord Hoffmann,

..*It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the*

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[1] " That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so ...'"at 1770/1

[2] R v Derby Magistrates' Court [1996] Cr. App. R. at page 401 -

[3] R (Morgan Grenfell & Co., Ltd) v Special Commissioner of Income Tax[2003] 1 AC 563 at 606/7,

adviser without fear that they may afterwards be disclosed and used to his prejudice. [4]

[4] In 2009, this was brought into sharp focus, when a solicitor in called Manmohan or 'Johnny' Sandhu, was bugged during his consultation with his clients which ultimately led to him being charged with a litany of criminal offences. This in turn led to a succession of requests by solicitors that police station consultations particularly with clients facing terrorist charges, were not being covertly monitored. The policy at the time was to 'neither confirm nor deny'. The Sandhu & related assurance cases made their way via the Divisional Court(with LCJ Kerr) in N Ireland to the House of Lords in Re McE & Ors.[5] A unique case for many reasons not least given the appellants had actually been successful in the court below.

[5] Leaving Sandhu to one side for the moment, as this was a case of course falling under the iniquity exception, in McE & ors the House was asked to consider whether in enacting the Regulation of Investigatory Powers Act 2000 ("RIPA"), Parliament intended to override or qualify a detainee's right to a private consultation

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[4] It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (Campbell v United Kingdom (1992) 15 EHRR 137; Foxley v United Kingdom (2000) 31 EHRR 637) and held by the European Court of Justice to be a part of Community law: A M & S Europe Ltd v Commission of the European Communities (Case 155/79) [1983] QB 878."

[5] [2009] 1 AC 908

with a solicitor at common law under legal professional privilege and under statute[6].

The Lords felt the Home Secretary had failed to provide sufficient safeguards under Art 8(2) of the ECHR within the RIPA Code of Practice. Secret surveillance of confidential lawyer client discussions was not prohibited, per se, but rather that legal professional privilege would operate to prohibit any *use* being made of material obtained in this way without the privilege holder's consent[7].

[6] A short time later I attended with my instructing solicitor at Her Majesty's Prison Maghaberry. On this occasion we were diverted away from the consultation rooms to the 'ecumenical room'.

[7] When the prison governor declined to provide an assurance to the client that his consultation was not being covertly recorded or 'bugged', we beat a hasty retreat to the High Court. The then Lord Chief Justice, Sir Brian Kerr, took the prison to task for failing to provide the necessary assurance.

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[6] the Police Act 1997 implicitly recognised that surveillance which disclosed communications protected by LPP was not contrary to domestic law. The Strasbourg jurisprudence demonstrated, however, the importance of the professional confidence between lawyer and client and the need for the law to regulate any interference with this in a manner that complied with article 8(2).

[7] As per the views of Lord Carswell para 83.

[8] This had the desired effect and assurance issued on the following terms ;

"On 11th March 2009, the House of Lords held in the case of re McE [2009] UKHL 15 that the present regime set out in the Regulation of Investigatory Powers Act 2000 and the Covert Surveillance Code of Practice provided an inadequate legal basis for the authorisation of directed surveillance in prisons and police stations of consultations attracting legal professional privilege. Until such time as the appropriate steps are taken to remedy the defects in the present regime identified by the House of Lords, no such surveillance will be authorised, permitted or conducted."

[9] By the time this case reached trial in 2011, the draughtsman had been busy with the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 & a revised Covert Surveillance Code of Practice with provision for the surveillance of legal consultations at places of detention or police stations or courts or legal offices[8].

[10] One aspect of note relating to the clients consultations with their lawyers is the legislative hurdle regarding authorisation for "intrusive" surveillance. Authorisation is required by (i) the Secretary of State ("SOS") or senior authorising officer (ii) au-

[8] This was to be treated as intrusive surveillance under Article 3 of the Regulation of Investigatory Powers (Extension of Authorisation Provisions — Legal Consultations) Order 2010.

thorisation can only take place where it is considered that it is necessary on grounds that it is (a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; or (c) in the interests of the economic well-being of the United Kingdom.; and (ii) that the authorised surveillance is proportionate. Oversight by a Surveillance Commissioner was not a new concept - usually a retired High Court judge - was required for police surveillance under the provisions, however the approval of the Commissioner is not required for applications to the SOS by the intelligence services,MI5 / MI6 or GCHQ[9].It is concerning that no judicial oversight exists for the security services.

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[9] (a) Article 3 (1) in the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 ("the 2010 Order) which states that directed surveillance that is carried out in relation to anything taking place on any premises specified in paragraph (2), at any time during the surveillance, used for the purpose of legal consultations shall be treated for the purposes of Part II of RIPA as intrusive surveillance. The following premises are included under Article 3 (2); (a) any place in which persons who are serving sentences of imprisonment or detention, remanded in custody or committed in custody for trial or sentence may be detained; (d) police stations; (e) the place of business of any professional legal adviser; and (f) any place used for the sittings and business of any court, tribunal, inquest or inquiry.

Section 32 of RIPA governs authorisation of intrusive surveillance.

There are two means by which intrusive surveillance can be authorised; the first is by a Secretary of State (see section 32 (1)) and the second is by a senior authorising officer (see section 32 (1) and (6)). Section 32(2) provides that authorisation can only take place where it is considered (i) that the authorisation is necessary on grounds falling within subsection (3) i.e. —(a) in the interests of national security; (b) for the purpose of preventing or detecting serious crime; or (c) in the interests of the economic well-being of the United Kingdom.; and (ii) that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out.

[11] More recently the client in the ecumenical room was charged with directing terrorism and given the factual context thoughts turned once more to the potential covert monitoring of his legal consultations.

[12] It is alleged the client's conversations with his co-accused were captured by means of hidden microphones secreted in the undergrowth. The recordings resulted in a litany of charges[10], not least being a directing member of the IRA. The prosecution papers also contain allegations that earlier that same year the same client travelled to Mallorca on a family holiday. Whilst there MI5 carried out a sting operation with an undercover agent adopting the role of a Serbian freedom fighter turned arms dealer. The conversations between them were also bugged.

[13]As far fetched as this might appear, the use of technical gadgetry in N Ireland by MI5 in the form of drones, GPS, disguised or concealed video cameras and bugging devices has become prevalent not only for intelligence but also evidential purposes.

[14] A similar 'non bugging' assurance was again sought only this time from variety of agencies including the Home Office, the

[10] (1) attempted murder of members of the Police Service of Northern Ireland; (2) possession of firearms and ammunition, namely two AK47 assault rifles together with a quantity of ammunition, with intent to endanger life; (3) conspiracy to murder members of the Police Service of Northern Ireland; (4) engagement in conduct for preparation of acts of terrorism; (5) direction of an organisation concerned in the commission of acts of terrorism; and (6) belonging to a proscribed organisation, namely the Irish Republican Army (IRA)

Northern Ireland Courts and Tribunal Service, the Northern Ireland Prison Service, the Secretary of State (acting on behalf of the security services) and the National Crime Agency that his legal consultations were not the subject of covert surveillance[11].

[15] Satisfactory assurances were received from all but the Home Office - the one that arguably really mattered given the involvement of MI5.

[16] Leave to apply for Judicial Review against the decision of the Home Office was granted[12] by the Divisional Court. The core argument being described by the court as the 'independence issue' seeking to establish that authorisations for surveillance should be approved by an independent judicial officer or a person of similar standing[13] in contravention of Art 8(2) ECHR.

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[11] In terms,'an undertaking that said consultation will not be covertly recorded either audio or visually, and that it will be subject to professional privilege and that such privilege will be respected by the prison authority'.

[12] The remedies sought included a declaration that the failure was incompatible with the applicant's rights under Article 8 of the European Convention on Human Rights and a declaration that, insofar as it fails to provide for prior approval of intrusive surveillance authorisations by an independent judicial officer or a person of similar standing, Part II of the Regulation of Investigatory Powers Act 2000 is incompatible with Article 8.

[13] The grounds for Judicial Review included inter alia, the possibility that the applicant's legal consultations could be subject to covert surveillance is an interference with his right to privacy and incompatible with Article 8(1) of the ECHR. The said interference cannot be justified because it is not in accordance with the law and does not pass the quality of law test for the following reasons not least given the lack of prior independent judicial control of authorisations for intrusive surveillance made by the Secretary of State

[17] Despite the granting of leave, the Divisional Court subsequently determined it did not now enjoy jurisdiction but that exclusive jurisdiction lies with the Investigatory Powers Tribunal. In order to mount an appeal to the UK Supreme Court required the court to certify a question of general public importance - it declined to so do.

[18] The Tribunal, it felt, had the necessary procedures and powers to address the applicant's complaints. This conclusion was reached despite the limits of the Tribunal rules in relation to disclosure, oral & public hearings, the absence of legal aid and a right of appeal and to the inability of the Tribunal to issue a Declaration of Incompatibility.

[19] Further concerns surrounding the IPT's procedures were previously raised, unsuccessfully, before the UKSC in A v B [2009] UKSC 12 by Liberty (an intervening party).[14] Lord Brown, citing the judgment of Lord Bingham in Shayler, felt 'wholly unpersuaded that the hearing of A's complaint in the IPT would necessarily involve a breach of article 6 (ECHR) concluding, 'Parliament has dictated that the IPT has exclusive and final jurisdiction in the matter.'

[14] intervening on behalf of A (who wanted to publish his book in contravention of his undertakings under the Official Secrets Act): first, that the entire hearing (save for purely legal argument) will be not only private but secret, indeed claimants may not even be told whether a hearing has been or will be held; secondly, that the submissions and evidence relied on respectively by the claimant and the respondent may be considered at separate hearings; thirdly, that only with the respondent's consent will the claimant be informed of the opposing case or given access to any of the respondent's evidence; fourthly, that no reasons will be given for any adverse determination.

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[20] Very briefly 'what of any product unlawfully obtained in contravention of LPP?'

An unlawful violation of LPP has in the past given rise to a successful stay of proceedings as an abuse of the process of the court in the E&W CA decision in R v Grant[15], where police covertly listened to & tape recorded privileged conversations that took place between the defendant and his solicitor in the police exercise yard. In quashing the appellant's conviction for conspiracy to murder, the CA observed that the deliberate eavesdropping upon legally privileged communications was unlawful and capable of infecting the proceedings as an abuse of process. The appeal court's finding was inextricably linked to the need to protect LPP[16].

[21] The basis for quashing the conviction being the learned trial judge had erred in that he had found there was no prejudice which

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[15] [2006] QB 60

[16] Prof David Ormerod writing in the Criminal Law review 2005 page 955 at 956, such was the affront to the integrity fo the justice system and therefore the Rule of Law, that the associated prosecution was rendered abusive and ought not to be countenanced by the court… as for the prejudice, it was a particular vice of the police misconduct that the court could not know whether it had in fact yielded fruit in the form of evidence, without enquiry into what the covert surveillance had revealed, but such an enquiry would force the defendant to waive privilege, thereby further violating his right to legal professional privilege. Certainly the emphasis of the court is on whether the moral integrity of the criminal process is undermined - this is viewed in terms of a doctrine of 'serious fault abuse' as per Lord Steyn's approach in R v Latif [1996] 1 WLR 104 at 112.

he deemed was a necessary requirement for a stay - something that has provoked criticism and some controversy in two more recent decisions. The first is the UKSC decision in Maxwell[17] - after CCRC investigation CA quashed the conviction for murder - the issue for the UKSC was whether (i) he should be retried (and (ii) whether in the exercise of the courts discretion under section 7 of the Criminal appeal act applying the interests of justice test, what weight should be attached to the serious misconduct of police (perjury) at the initial trial.

[22] In our context paragraphs 96&97 in the judgment of Lord Brown are noteworthy;

'I have to say that for my part I have the gravest doubts as to the correctness of the court's decision in Grant. True it is that Lord Taylor of Gosforth CJ had described legal professional privilege in R v Derby Magistrates' Court, Ex p B [1996] AC 487, 507 as

"much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests. But that is not to say that its every violation must result in a quashed conviction"

He continued,

[17] [2010] UKSC 48

"The law against perjury may equally be described as fundamental to the whole administration of justice but no one has ever suggested that perjury by a prosecution witness (even a police officer) must in all circumstances, irrespective of whether it prejudices the defendant, necessarily preclude a defendant's conviction or, if discovered later, result in its quashing".

[23] A theme subsequently touched upon the following year by Lord Dyson & Lord Kerr in R v Warren[18] in an appeal to the Privy Council. This was a case of an illegal cross border audio surveillance - misleading three foreign states & without the product of the unlawfulness there would be no trial[19] - court refused to interfere with the decision of the lower court not to stay it - the fact these were very serious offences by professional drug dealer seemed to outweigh or weigh heavily against a stay. The prosecution accepted that but for the unlawfully obtained material the prosecution would have no case - however the CA in Grant was criticised by the Board for the stay as there was no nexus between bugging the suspect (the behaviour in issue) and a fair trial (but for) but of relevance for the purpose of today, the Board also took the view that it did not consider the conduct of the police

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[18] [2011] UKPC 10

[19] The basis for the appeal to the Board was that Jersey police had pursued an investigative strategy calculated to disregard the law, misrepresent the true position & manipulate events so as to secure the admission in evidence of the product of an audio monitoring device (which they misled French authorities over) unlawfully placed in the car of the suspect later convicted.

to be so grave as to threaten or undermine the rule of law' that it was necessary to stop the case[20].

[24] Whilst the Board agreed that the deliberate invasion by the police of a suspect's right to legal professional privilege is a serious affront to the integrity of the justice system which may often lead to the conclusion that the proceedings should be stayed. But the Board felt that the particular circumstances of each case must be considered and carefully weighed in the balance. It was obviously right to hold on the facts in Grant that the gravity of the misconduct was a factor which militated in favour of a stay. But as against that, the accused was charged with a most serious crime and, crucially, the misconduct caused no prejudice to the accused. The misconduct had no influence on the proceedings at all which seemed to weigh against a stay by today's standards.

[25]In these circumstances, the Board felt the trial judge was entitled to decide in the exercise of his discretion to refuse a

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[20] para 30 Lord Dyson, 'the Board does not consider that the but for test will always or even in most cases necessarily determine whether a stay should be granted on grounds of abuse of process.

In terms of the Grant decision, Lord Dyson - para 36, regarding Grant at first instance 'surely the trial judge was entitled to decide in the exercise of his discretion to refuse a stay and the CA should not have held that his decision was wrong.'

stay and the Court of Appeal should not have held that his decision was wrong. [21]

In summing up

[26] What became of Johhny Sandhu? He was to enjoy the ecumenical room at Maghaberry but from a whole new perspective for several years, and rightly so - the abuse of LPP should never be tolerated.

[27] As for MI5 & the lack of independent oversight - this remains a live issue of concern. No doubt by the next World Bar conference in two years time I hope I will be in a position to provide an update. in relation to it's applicability in my trial… in the meantime double speak & confusion remains the order of the day.

Mark Mulholland QC

World Bar Conference

31st March 2018

[21] The court felt 'it is difficult to avoid the conclusion that in Grant the proceedings were stayed in order to express the court's disapproval of the police misconduct and to discipline the police'.

APPENDIX ONE

The Iniquity rule & LPP

[1] At para 11 of McE v Prison Service of Northern Ireland [2009] 1 AC 908 it is stated:

'I have adopted the expression 'the iniquity exception' to describe the principle that consultations or communications between a lawyer and his client that are in furtherance of crime or fraud are not protected by LPP. It is questionable whether this is properly to be described as an exception to LPP. The fact remains that disclosure of such communications will normally be based on a provisional conclusion that the communications were in furtherance of crime or fraud. If, after the documents have been disclosed, this proves to be the case, the protection of LPP will have been lost…'

[2] This was applied in Jones, Re Judicial Review [2014] NIQB 136 by Treacy J regarding the interception and opening of a suspect's letter from the prison to his solicitor which he deemed to be unlawful stating upon the application of McE,

"[58] A 'provisional conclusion' must therefore be arrived at before any ruling out of that provisional conclusion can be undertaken. The removal of the applicant's right to LPP was based on mere suspicion and without any accompanying safeguards. In the

circumstances of this case no conclusion provisional or otherwise could lawfully be reached in such circumstances. There was in short a complete absence of process. If a mere suspicion was sufficient to override an individual's Art 8 rights, Art 8 would be largely devoid of content".

[3] The common law, and domestic statute law, has long recognised that legal professional privilege cannot be invoked where there are communications, "criminal in themselves, or intended to further any criminal purpose". The exposition of this principle is contained in R v Cox and Railton 14 QBD (1884) in the oft-quoted judgment of Stephen J. At page 167 he said:

"The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rules. A communication in furtherance of a criminal purpose does not 'come into the ordinary scope of professional employment'.

[4] In Sandhu, the defendant, a solicitor, was alleged to have been in contact by mobile phone from the consultation room in the police station with other individuals to whom he passed on information about the investigations in respect of which his clients

were being questioned at the time in circumstances where, the prosecution allege, the information was plainly being supplied to enable those other persons to thwart the police investigations at that time. His clients were being questioned about the murder of Andrew Cully on 24 March 2004; the attempted murder of Jonathan Hillier on 20 August 2005, and the murder of Jameson Lockhart on 1 July 2005. In each instance evidence of the conversations relied upon was obtained by the police as the result of eavesdropping on the consultations by way of covert electronic surveillance. It is alleged that the terms of these conversations show that the defendant was reporting the progress of the interviews and the nature of evidence which had been put to his clients during police interviews.

[5] In addition the defendant allegedly made various statements as to steps he had taken which, it is suggested, bear the inference that he was frustrating the police enquiries by various means, for example by ensuring that individuals whom the police wished to question either as witnesses or suspects were alerted to the police desire to speak to them so that they could evade the police and thereby avoid questioning.

[6] In the course of consultations with the accused the following exchange was recorded

"Sandhu: Now tell me, after you've been charged, right, how the fuck did it go wrong.

Massey: I don't know.

Sandhu: Hmm.

Massey: I don't know how the fuck.

Sandhu: You tell me.

Massey: Fucked up the whole thing so they have, they've sent us down for a few years anyway like.

Sandhu: Hmm.

Massey: (Inaudible) wankers, just try and clip him again (inaudible). The wankers need to try and clip him again so he can't come to court. What would happen if that happened.

Sandhu: I've already told them he's at the Ulster Hospital, already told them that.

Massey: See if they were to get to him, by the time they were going to court, maybe kill it.

Sandhu: Uh huh.

Massey: Would that mean threw out of court.

Sandhu: Uh huh.

Massey: Its getting them boys to overcome that there (inaudible) they will, cause (inaudible) fucking (inaudible).

Sandhu: He's got to be taken out. Hasn't made a statement yet.