English High Court Considers Status of Internal Investigation Interview Notes

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In *R (AL) v Serious Fraud Office*,[1] the English High Court considered the SFO's obligations to individuals prosecuted following the deferred prosecution agreement ("DPA") in July 2016 with a company anonymised as "XYZ Ltd". The Court's decision is likely to force the SFO to adopt a much more aggressive approach in relation to company counsel's notes of interviews conducted during a company's internal investigation. In particular, when those interview notes are potentially relevant to the defences of individuals being prosecuted, this judgment is likely to lead to the SFO putting further pressure on companies to produce the notes, through court proceedings if necessary. We analyse these and other issues covered by the judgment below.

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FACTUAL BACKGROUND AND DECISION

As part of its cooperation with the SFO which led to the conclusion of the DPA, XYZ Ltd's lawyers gave the SFO oral summaries of interviews with key employees during its internal investigation, expressly reserving privilege claims over the interviews. Several of XYZ Ltd's former employees were charged by the SFO with bribery offences. Having only received the SFO's transcriptions of the oral summaries, one of these defendants, anonymised as "AL", sought disclosure of XYZ Ltd's lawyers' full interview notes. After unsuccessfully applying to the Crown Court to force their production, AL sought judicial review of the SFO's decision not to pursue XYZ Ltd for the interview notes under the terms of the DPA requiring the company to cooperate with the SFO and disclose all relevant material that was not protected by privilege.

The High Court dismissed AL's application on the basis that the Crown Court, not the High Court, was the appropriate forum for determining matters in relation to disclosure in criminal proceedings. However, the Court took the view that the SFO had made a number of public law errors in its approach to the interview notes.

[1] [2018] EWHC 856 (19 April 2018).

FAIRNESS TO INDIVIDUAL DEFENDANTS REQUIRES SFO TO SEEK PRODUCTION OF INTERVIEW NOTES

The High Court found that the SFO's disclosure obligations to individual defendants generally require it to seek production of relevant internal investigation interview notes from companies, by means of a court order if necessary. The Court noted that the SFO must act as "*a persistent prosecutor which does not readily accept 'no' for an answer and [is] prepared to take the initiative to apply to the Court to enforce disclosure obligations*". The Court further stated that where the SFO does not accept the company's privilege arguments and the company has a duty of cooperation under the DPA to disclose relevant material, these factors and the SFO's duty to ensure that the defendant receives a fair trial will weigh heavily in favour of the SFO exercising its powers under the DPA to require production, under threat of revoking the DPA.

The likely consequence of this judgment is that the SFO will put further pressure on companies to produce notes made during the course of internal investigations, including by litigating privilege claims. If a company wishes to assert privilege over the interview notes, it will need to justify this under the increasingly strict interpretations of the applicable privilege rules by the English courts. While a DPA may make it easier for the SFO to obtain interview notes, the SFO will still need to seek production whether or not there is a DPA with the company in place.

ORAL SUMMARIES OF WITNESS INTERVIEWS LIKELY INEFFECTIVE TO PROTECT PRIVILEGE

The High Court in *AL* described the procedure of companies providing the SFO with oral summaries of internal investigation interviews as "*highly artificial*" and queried why the SFO had not "*robustly*" demanded that XYZ Ltd's lawyers produce the written summaries. In any event, the Court indicated that providing oral summaries likely constitutes a waiver of any privilege, regardless of disclaimers that the company does not intend to waive privilege. Further, even if limited waiver could be said to apply, the High Court took the view that this could not exclude the SFO's ability to disclose the interview notes to individual defendants.

The SFO is likely to point to this decision as showing the futility of companies providing oral summaries as an alternative to producing full interview notes, and press for production of those interview notes.[2]

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[2] A comparison can be made with the recent decision by a Florida court that providing oral summaries of the substance of interview memoranda to the Securities and Exchange Commission risks waiving attorney work product protection over those interview memoranda: *SEC v Herrera, et al.*, No. 17-20301 (S.D. Fl. Dec. 5, 2017). See the Debevoise client update https://www.debevoise.com/insights/publications/2017/12/court-holds-oral-downloads-of-interview-memoranda.

HAS THE DEGREE OF COOPERATION REQUIRED UNDER A DPA INCREASED?

The High Court went so far as to state that the SFO should have considered whether to require XYZ Ltd to waive privilege over the interview notes as part of its ongoing duty of cooperation under the DPA. Reference was made to the DPA Code of Practice and speeches by senior SFO staff highlighting the potential importance of companies waiving privilege over witness accounts to demonstrate their cooperation with the SFO, albeit in the context of seeking to qualify for a DPA in the first place. The Court observed that the SFO may wish to use the threat of a referral to the Crown Court for breach of a DPA to influence a company to produce interview notes requested by the SFO.

The practical implication of this decision is that when internal investigation interview notes are potentially relevant to follow-on prosecutions of individuals, the presumption appears to be that the SFO will seek their disclosure.

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