

## Transparency vs. Privilege: Balancing competing public interests in respect of witness statements

In a judgment delivered on 16 November 2016 in *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd & Anor.*, the Court of Appeal of the Cayman Islands (“CICA”) held “*not without hesitation*” that litigation privilege ceases to have any application to signed witness statements at the time they are exchanged by the parties to litigation in advance of trial.

At issue was the question of whether a relevant witness statement made in foreign proceedings was liable to be produced on discovery in litigation in the Cayman Islands by a related entity of the party on whose behalf the witness statement was made, in circumstances where the witness statement was in the latter’s possession, custody or power.

Draft witness statements are privileged. But when finalised witness statements are served before trial, as is now routinely ordered, is it the case that the essential character of the statement changes, such that litigation privilege ceases to apply? Alternatively, does the act of service (a) amount to a complete loss or waiver of privilege, or (b) lead only to a limited waiver of privilege, such that privilege may not be maintained by the server against the recipient, but privilege may still be maintained by the server against third parties?

These questions might well also arise frequently in cross-border litigation, particularly when companies within the same group, or linked onshore/offshore funds, are involved in similar litigation in different jurisdictions against different litigants, and seek to share statements and other privileged material under the cloak of common interest privilege.

### Brief Background

The HSBC Group provided fund administration services to various funds that invested with Bernard Madoff. In Ireland, an Irish fund (“**Thema**”) sued an HSBC Group entity (“**HTIE**”), amongst other defendants, for losses suffered by Thema arising out of the Madoff fraud. Meanwhile, in the Cayman Islands, another fund (“**Primeo**”) issued proceedings against two other HSBC Group entities (“**Ds**”) concerning losses arising out of the fraud.

The Irish litigation was settled during the course of trial – after exchange of witness statements, but before HTIE’s factual witnesses had been called.

Three of the same witnesses who made witness statements in the Irish proceedings were to give evidence for Ds

in the Cayman litigation. HTIE had shared with Ds the Irish witness statements of those same witnesses (the “Previous Statements”).

Primeo and Ds exchanged witness statements for trial, but Ds asserted privilege in the Previous Statements. Primeo sought an order for their specific discovery, on the basis that they were not privileged (there was no dispute that the statements were both relevant and in Ds’ possession, custody or power).

## The First Instance Decision

On Primeo’s application for specific discovery of the Previous Statements, Mr Justice Jones QC held that the effect of service of the Previous Statements in the Irish proceedings meant only that there had been a limited waiver of privilege, so that privilege could not be asserted by HTIE (the server) *as against Thema* (the recipient) in that litigation, but that the witness statements remained privileged in the hands of HTIE at the time they were served on Thema (and thereafter) as against third parties to that litigation.

Since the Previous Statements were held to be privileged in the hands of HTIE as against the world, at the time that they were shared with Ds in the Cayman litigation, they remained privileged to HTIE; and given the context in which they were shared, they were privileged in Ds’ hands on the basis of a common interest privilege.

As the Court had no power to override privilege, the Judge dismissed the application for specific discovery of the Previous Statements. Primeo was granted leave to appeal by CICA.

## Appeal: Issue

Although there were other aspects to the first instance decision,[1] the only point that was the subject of the appeal was whether or not the Previous Statements were privileged at the time HTIE *served them on Thema* in the Irish proceedings. If so, then they were privileged at the time HTIE shared them with Ds; and there was no dispute that common interest privilege would apply, so that they would be privileged in the hands of Ds.

## Appeal: Submissions

Primeo made two arguments:

- **First**, the Previous Statements were not privileged at the time of service by HTIE on Thema in the Irish proceedings – litigation privilege had ceased to have any application at all because their character had changed. The Previous Statements were privileged before service; but on service they ceased to be documents which the public interest requires to be privileged. Given that there was no question of litigation privilege applying at all, it was not the case that privilege was waived. Primeo relied on *Visx v Nidex* [1999] FSR 91 as well as a decision of the Australian Federal Court in *Australian Competition and Consumer Commission v Cadbury Schweppes* (2009) 254 ALR 198.
- **Second, and alternatively**, Primeo argued that if the Previous Statements were privileged at the time of exchange, service of the Previous Statements on Thema amounted to a waiver of privilege.

Ds' position on appeal remained that, until service, a statement remains privileged and that, on service, that privilege is waived only as far as the recipient is concerned. A duty akin to a duty of confidentiality arises in its place, restricting the use to which the recipient could make of the statement. Privilege in the statement has not been waived entirely; the waiver is limited. As against a third party, it remains. In the hands of the server, the statement is not compellable by a third party.

Ds relied in particular on the decision of Mr Justice Hobhouse in *Prudential Assurance v Fountain Page* [1991] WLR 756, where he said: "*In my judgment when a statement is served pursuant to a direction... and the witness ... is never called by that party to give evidence... that statement remains a privileged document in the same way as without prejudice communication remains privileged. The party serving the statement may not be compelled to disclose the statement to any other person and is entitled to prevent any other person using that evidence without his consent and, in particular, using it as evidence against the person who originally served the statement*".

Ds also relied on Mr Justice Mance in *Vista Maritime v Sesa Goa* [1997] CLC 1600, 1601 who said that by service of a witness statement, a party "*has not thereby put his cards irrevocably on the table*." The party may not call the witness at all, or may choose not to adduce specific parts of the statement.

## Appeal: The Decision

The Court of Appeal held, "*not without hesitation*", that Primeo's first argument was correct, *i.e.* that at the time of service there was no question of litigation privilege applying because the character of the Previous Statements had changed. The Court decided not to make a finding on the second issue, namely waiver.

In arriving at its decision, the Court of Appeal acknowledged that the leading textbooks all supported Ds' analysis and not Primeo's position. The Court of Appeal, however, found for Primeo in part on the basis that (1) HTIE "*chose to serve [the Previous Statements] and did so without reservation*"; (2) the absence of the Previous Statements in the Cayman litigation would have a "*real potential of prejudicing a just outcome*"; (3) unnecessarily restricting the disclosure of documents would not be in the public interest; (4) *Prudential Assurance* was not determinative; and (5) there was "*no good reason for litigation privilege to apply to finalised witness statements... unconditionally served...*" and that "*a proper balance between the public interest in maintaining litigation privilege and the public interest in disclosure comes out... overwhelmingly... in favour of disclosure*".

## Commentary and Practical Considerations

Whether a witness statement is privileged immediately prior to its service, and whether that privilege is wholly or only partially lost on service, are questions of fundamental importance. As acknowledged by CICA, the point appears not to have been determined previously at appellate level in any common law jurisdiction.

It is therefore welcome that the point has arisen for determination in the Cayman Islands. Time will tell, though, whether the law has been suitably clarified. The decision was couched in equivocal terms ("*not without hesitation*") and is contrary to the views expressed in the leading textbooks.

More importantly, the decision that the Previous Statements were not privileged appears to have been based on

a balancing of policy considerations, rather than on an analysis of the characteristics of the Previous Statements and the weight of authority. With questions of privilege, however, there is not usually scope for any balancing exercise or judicial discretion – a document is either privileged or it is not. This decision appears to be a further erosion of privilege on the basis of “*an ever-greater emphasis on transparency and openness in civil litigation*”.

What are the practical consequences of the decision for litigants?

- Parties ought now to assume that any witness statement, once served by that party, could be compellable by any third party in subsequent litigation, irrespective of whether the evidence the subject of the witness statement was ultimately adduced at trial (or otherwise deployed) or the statement was subsequently amended.
- Witness statements exchanged in advance of trial should not be “*unconditionally served*”; rather, they should be served subject to an express reservation that privilege is not being waived as against the whole world. It is not clear from this decision, though, whether that would be sufficient to maintain privilege in the statement after its service if it is the case that the document has fundamentally changed its character.
- When a group of companies faces similar litigation in different jurisdictions, those companies with a common interest should be careful about sharing witness statements that have been served (but not adduced in evidence), since they may be rendered compellable.

[1] Such as the question of which law applies to determine whether a document is privileged. The answer, not in dispute on appeal, was that the law of the forum (*lex fori*) applies (i.e. Cayman law). This established rule has the oddity that (i) a document created in the context of foreign proceedings which is thought privileged in that jurisdiction, may nonetheless be held not to be privileged in the Cayman Islands; and (ii) a document in foreign proceedings which is not thought privileged in that jurisdiction may nevertheless be held to be privileged in the Cayman Islands.



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