

Investigations in the courts: how to challenge them and the judge's perspective

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1. The courts and investigations

Limited jurisdiction

- Judicial review challenges to investigations:
 - *R(Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756
 - *R(Grout) v FCA* [2015] EWHC 596 (Admin)
- Substantial case-law on reasonable investigations in unfair dismissal context e.g. *Sainsburys Supermarkets Ltd v Hitt* [2002] EWCA Civ 1588.

1. The Court's approach

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- Investigations are not given a special status:
 - A decision to initiate an investigation can be a detriment on whistleblowing or discriminatory grounds, or may breach the T&C clause.
- Some scepticism towards the subject of an investigation challenge that investigation...

2. Privileged investigations

- Legal professional privilege:
 - Legal advice privilege;
 - Litigation privilege.
- “Without prejudice” privilege.
- ***R(Prudential Plc) v Special Commissioner [2013]***
UKSC 1: advice privilege only applies only to lawyers.

- Legal advice privilege: (1) communication; (2) between client and lawyer; (3) made in confidence; (4) for the [dominant] purpose of giving or receiving legal advice.
- Litigation privilege: (1) communication; (2) between client & lawyer, or client & 3P, or lawyer and 3P; (3) when litigation in progress or in contemplation; (4) with sole or dominant purpose of obtaining legal advice or information for adversarial litigation.
- Without prejudice privilege: communications for purposes of attempting to settle an existing dispute.

Legal advice privilege: *Three Rivers* 11KBW

- Applies only to communications between lawyer and identified “client”.
- Does not apply to communications between lawyer and third party, or between client and third party.
- Applies to legal advice widely construed, including “presentational” advice.

- Three recent-ish first instance decisions: ***Astex Therapeutics Limited v Astrazeneca* [2016] EWHC 2759 (Ch)**; ***In re RBS Rights Issue* [2017] 1 WLR 1991**; and ***SFO v ENRC* [2017] EWHC 1017 (QB)**
- Where client is a corporation, an employee is the “client” only if authorised to seek and receive legal advice.
- Hence interviews of employees by external lawyers during course of internal investigations not covered – employees’ authority to give information to lawyers insufficient to make them the “client”.
- Confirmed (reluctantly) by ***ENRC* [2018] EWCA 2006**

Legal advice privilege: recent decisions on internal investigations

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R(Jet2.com Ltd) v Civil Aviation Authority [2020] EWCA 35:

- The dominant purpose test applies to legal advice privilege.
- Emails to lawyers and non-lawyers.
- Meetings at which lawyers and non-lawyers are present.
- Emails with attachments.

***SFO v ENRC* [2017] EWCA 2006** (reversing High Court on issue of litigation privilege):

- Sufficient that there was a realistic possibility of criminal proceedings
- Dominant purpose test satisfied even though:
 - ENRC intended to show documents to other party
 - Documents were designed to head off, avoid or settle proceedings

Litigation privilege: West Ham 11KBW

WH Holding Limited v E20 [2018] EWCA Civ 2652:

- Litigation privilege covers “*communications... for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation*”.
- “*Conducting the litigation includes deciding... whether to settle the dispute*”.
- But not documents created “*with the dominant purpose of discussing a commercial settlement of the dispute when litigation with [West Ham] was in contemplation*”.
- Why not? Internal emails within ‘the client’ were not “*for the purpose of obtaining information or advice*”, so long as the emails do not reveal the nature of any advice or information covered by LLP.

The court's approach to privilege (1) 11KBW

West London Pipeline v Total UK [2008] EWHC 1729 (Comm)

- How does the issue arise?
 - Disclosure list / production order; or,
 - Adversary adduces privileged material, e.g., *Fadario* (EAT, 2014).
- LLP is fundamental condition of the administration of justice: *Re Derby Magistrates* [1996] 1 AC 487.
- Burden is on the party claiming LLP: *West London*.
- Affidavit generally conclusive. If not, further affidavit:
 - *Astex v Astrazeneca* [2016] EWHC 2759 (Ch).
- Cross-examination may be required.

The court's approach to privilege (2) 11KBW

WH Holding Limited v E20 [2018] EWCA Civ 2652:

- Inspection of disputed documents:
 - **West London:** must be “reasonably certain” test misapplied in affidavit, and inspection is a “last resort”.
- **WH Holding:**
 - overrules **West London**.
 - Inspection is “a matter of general discretion”;
 - Court should be “cautious about doing so” and alive to lack of context;
 - Exercise discretion in accordance with the overriding objective.

3. Injunctions

Injunctions restraining publication of report:

- The courts will only restrain publication of a report by a public body if there are pressing or exceptional grounds for interfering with the expression of opinion or conveyance of information, particularly if the public body is under a duty to express its opinion or convey information: ***R v Advertising Standards Authority, ex p Vernons Organisation Ltd*** [1992] 1 WLR 1289

3. Injunctions

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- *“There is an important public interest in openness and transparency both of which go hand in glove with accountability. These ‘Nolan Principles’ are expressly enshrined in the LA 2011. The present claim involves an attempt to suppress independently collected and collated evidence and analysis about possible wrongdoing. No plausible justification has been advanced which overrides the importance of enabling a spotlight to be directed on the conduct of the Authority in seeking to address this sort of potentially serious misconduct.”*

R (Hussain) v Sandwell MBC [2017] EWHC 1641 (Admin)

3. Injunctions

- Useful summary of relevant principles set out in *R (Interim Executive Board of X) v Ofsted* [2016] EWHC 2004 (Admin)
- “The test of the judge’s thermometer, in terms of response to an injunction, will be set and calibrated several degrees higher, so far as looking at the arguability of a case”: *R (City College Birmingham) v Ofsted* [2009] 2373 (Admin)
- Some debate over the correctness of this approach:
 - *Taveta Investments Ltd v Financial Reporting Council* [2018] EWHC 1662 (Admin);
 - *R(Just Childcare Ltd) v Ofsted* [2019] EWHC 2283 (Admin);
 - *R(Barking & Dagenham College) v Office for Students* [2019] EWHC 2667 (Admin).

3. Injunctions

- Courts appear to be more willing to grant interim injunctions in the employment/contractual context
- In that context, the courts will apply conventional *American Cyanamid* test. Examples:
 - ***Gregg v North West Anglia NHS Foundation Trust* [2018] EWHC 390 (QB)**: injunction granted staying disciplinary proceedings pending CPS charging decision;
 - ***Ardron v Sussex Partnership NHS Foundation Trust* [2018] EWHC 1535 (QB)**: injunction granted prohibiting employer from proceeding with gross misconduct charge;
 - ***Harrison v Barking NHS Trust* [2019] EWHC 3507 (QB)**: mandatory injunction requiring an employer to return the claimant to work.