

Chapter 10: Privilege and Public Interest Immunity

Question One

- a) Alice, the four-year-old daughter of Mrs Y was badly injured in a playground incident at Treasure Island Nursery. Mrs Y is suing the nursery. An internal report was prepared by the Department for Education as part of its routine inspection of private nursery schools. In this report the Department indicated concern about management procedures and lack of proper vetting of staff at Treasure Island Nursery. The Department claims that the report is covered by public interest immunity because to disclose it would prejudice the conduct of future inspections in that it would deter witnesses from giving evidence. A 'mole' in the department sent a photocopy of key sections of the report to the pressure group ChildWatch which is helping Mrs Y and they have offered to let her have a copy.

Advise on the admissibility of the Report.

- b) Jane has been the victim of an unlawful drugs raid although no charges were preferred after it. She was badly hurt in the raid. She believes the raid occurred as a result of an article she wrote after an interview with Mrs Cake, a former dealer, detailing the extent to which drug dealers were plying their wares among school children. Jane is considering suing the police, having already made a complaint to the Independent Police Complaints Commission (successor to the Police Complaints Authority) which it has investigated. She wonders if she will be able to obtain copies of the investigation and is worried that at the trial she may be forced to disclose the name of Mrs Cake since she had promised her anonymity.

Advise Jane.

Answer guidance

- a) This question concerns public interest immunity. Note that it attaches to copies of documents unlike the position in relation to legal professional privilege which only extends to an original document. Outline the common law rule and the procedure under the Civil Procedure Rules 1998, r. 31.6. Explain that public interest immunity may be claimed on several grounds among which is the protection of sources of information including whistleblowers. Relevant cases to cite are *D v NSPCC* [1978] AC 171, *Air Canada v Secretary of State for Trade (No 2)* [1983] 2AC 394 and *Burmah Oil Co Ltd v Bank of England*. On the possibility of waiver by witnesses to the Inquiry note the conflicting authorities, see *Alfred Crompton Amusement Machines v Customs and Excise Commissioners* [1974] AC 405 and *Rogers v Home Secretary* [1973] AC 388.
- b) The answer should centre on the landmark decision in *R v Chief Constable of the West Midlands, ex parte Wiley* [1995] AC 274. In this case judicial review had been sought of the refusal of Chief Constables to give undertakings that material relating to complaints against the police would not be used to prepare defences to civil claims

on police misconduct. The House of Lords decided that no class immunity applied to police complaints procedure documents and cases which held otherwise were overruled. It was acknowledged that in some cases a 'contents' claim might be appropriate and that there may be a 'class' claim for subgroups of documents. Subsequently, this latter view was accepted for reports of officers investigating a complaint in *Taylor v Anderton (Police Complaints Authority Intervening)* [1995] 1 WLR 447. The question of protection of journalists' sources requires familiarity with the Contempt of Court Act 1981, s. 10. There is a significant body of case-law on its application. Relevant cases include *Goodwin v UK* (1996) 22 EHRR 123 and *Ashworth Health Authority v MGN Ltd* [2002] 1WLR 2033.

Question Two

'The fact that evidence which is relevant and otherwise admissible may be excluded by public policy or privilege, lends to the groups of rules an appearance of similarity which is misleading'. (Glover R. (2015) *Murphy on Evidence* 14th Edn p 476). Discuss this comment in relation to the differences and similarities between public interest immunity and legal professional privilege.

Answer guidance

Both public interest immunity and legal professional privilege allow departure from the principle of full disclosure of evidence. Answers should review the specific differences between the two in relation to waiver, the position of third parties, accidental disclosure and secondary evidence. It is important that the answers also assess the underlying rationales of the two common law doctrines including the difference between a duty in relation to public interest immunity and a right in relation to private privilege. The essay should distinguish civil and criminal law cases. Note that there are similarities between the two doctrines in that the application of both could lead in criminal cases to a possible miscarriage of justice. Discuss here *R v Derby magistrates Court, ex p B* [1996] 1 AC 487 and *R v Ward* (1993) 1WLR 619. Note also that both doctrines preserve the principle of equality of arms in that when applied neither party can use the evidence at trial. However in response to the landmark judgment *Al Rawi v Security Service* [2011] UKSC 34 the Justice and Security Act 2013 was passed. This extends the use of closed material procedures to the common law civil courts where evidence may only be available to one side, usually the Government.