WILMER, CUTLER & PICKERING

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Surprising UK Approach to Privilege: The Implications of the Decision in Three Rivers District Council and The Bank of England

1. Background

Following the Bank of England's ("the Bank") petitioning for the provisional liquidation of BCCI in mid-1991, and its subsequently being placed in liquidation in 1992, an enquiry was ordered into the circumstances surrounding the collapse of BCCI chaired by Lord Justice Bingham ("the Enquiry"). The Enquiry was not adversarial; its terms of reference were to enquire into the supervision of BCCI under the UK Banking Acts and to consider whether the action taken by all of the UK authorities was appropriate and timely, and to make recommendations to prevent such problems occurring in the future. However, the outcome of the enquiry was a report which could obviously involve criticism of the conduct of the Bank as BCCI's regulator and could also lead to or encourage the institution of proceedings against the Bank by BCCI depositors or other creditors. The Governor of the Bank of England appointed three bank officials to deal with all communications between the Bank and the Enquiry who became known as the Bingham enquiry unit ("the Unit"). The Unit retained solicitors on behalf of the Bank, Freshfields, and Freshfields advised the Unit in relation to communications with the Enquiry including preparation of the Bank's lengthy statement to the Enquiry and a further paper concerning supervisory issues. Witnesses on behalf of the Bank also gave evidence before the Enquiry and their evidence was transcribed.

Bingham's report, when it was published, commented on the Bank of England's conduct in a number of respects. It was subsequently followed by litigation commenced on behalf of a nominal depositor with BCCI ("Three Rivers") against the Bank claiming tortious damages for misfeasance in public office.

2. The Discovery Dispute

In the course of the proceedings, a dispute arose as to whether certain documents prepared in connection with the Enquiry did or did not enjoy privilege from production. As a matter of general principle, English law differentiates between the scope of privilege where litigation is contemplated and/or pending and where it is not. Communications will be privileged even though no litigation is either contemplated or pending only when they are letters or other communications passing between a client and its solicitors which are confidential and written to or by the solicitors in their professional capacity and for the purposes of getting legal advice or assistance for the client. The test is whether the communication or other document is made confidentially for the purposes of legal advice. That must be the dominant purpose but need not be the sole purpose for their production.

In contrast, where litigation is either contemplated or pending, communications between a client and solicitor will be privileged, if in each case they meet the

following criteria. They must have come into existence after litigation is contemplated or commenced and are made with a view to such litigation, either for the purposes of obtaining or giving advice in regard to it or of obtaining or collecting evidence to be used in it, or obtaining information which may lead to the obtaining of such evidence. Accordingly, documents obtained by a solicitor with a view to enabling him to prosecute or defend a claim, or give advice with reference to existing or contemplated litigation, are privileged.

The dispute which arose in the Three Rivers case concerns not "litigation" privilege but legal advice privilege where no litigation was either contemplated or pending. In particular, both parties accepted that for the purposes of the dispute, the Enquiry did not constitute adversarial litigation and that litigation privilege could not arise.

The Bank also agreed that for the purposes of legal advice privilege, documents emanating from or prepared by independent third parties and then passed to the Bank's solicitors for the purposes of advice being given were not privileged under legal advice privilege, but beyond that concession, the precise scope of legal advice privilege was disputed.

3. The Disputed Documents

Three Rivers did not seek disclosure of documents passing between the Unit and Freshfields nor Freshfields' own internal memoranda or drafts. It was accepted by Three Rivers' Counsel and the Court that the Unit was, for the purposes of the Enquiry, the client of Freshfields and communications passing between the Unit and Freshfields were covered by legal advice privilege. Whether the Bank should have also conceded that the Unit alone was the client rather than the Bank as a whole or some other, wider class of individuals is less clear.

Three Rivers claimed that documents prepared by the Bank's employees or ex-employees, whether or not for submission to or at the direction of Freshfields, were not privileged since it was said they were no more than raw material on which the Unit would thereafter seek legal advice. There were four separate categories.

1. Documents prepared by Bank employees which were intended to be sent to and were in fact sent to Freshfields (presumably the dominant purpose for which they came into existence was to enable the Bank to seek legal advice);

2. Documents prepared by Bank employees with the dominant purpose of the Bank's obtaining legal advice but not in fact sent to Freshfields (although in some cases their content was incorporated in other documents sent to the solicitors);

3. Documents prepared by Bank employees but without the dominant purpose of obtaining legal advice, but which were in fact sent to Freshfields;

4. Documents in any of the above categories which were prepared by then Bank employees but who were now ex-employees.

The Bank argued that any document prepared with a dominant purpose of obtaining the lawyers' advice came under the ambit of legal advice privilege, whether or not it was ultimately communicated to the lawyers. The only exception was in respect of documents sent to or received from an independent third party, even if created for the dominant purpose of obtaining the solicitor's advice. The latter would not be covered by the legal advice privilege.

The Bank won at first instance, but Three Rivers appealed. The Court of Appeal embarked upon an extensive review of the earlier authorities. In part there was focus upon the issue of whether documents which had been prepared for submission to the solicitors but had not in fact been submitted to the solicitors would still be privileged. The main issue, however, was whether employee and ex-employee communications were properly to be regarded as privileged either under the general principle asserted by the Bank (that all communications with the above purpose are caught except third party communications) or upon the basis that employees act as agents of the client so that their communications themselves are deemed to be communications by the client. In one of the authorities considered (Wheeler V Le Marchant), a very clear distinction was drawn between the position where litigation was contemplated, and where documents had been provided to or had been received from third parties but which would still be protected by litigation privilege, and circumstances in which no litigation was

in contemplation. If in the latter case a solicitor wished to obtain information from a third party to assist him in giving his advice, it had been held that those communications would not enjoy privilege. The same case cited considered the position of representatives of the client communicating with the lawyers, indicating that agents employed by the client *to obtain legal advice* stood in exactly the same position as the client itself, but that the same could not apply in relation to third parties (Lord Justice Cotton's comment). The Bank sought to rely on those comments in support of its case that employee/lawyer communications were privileged in this context.

The Court of Appeal did not agree. The Bank had argued that because corporations have to act through employees, therefore communications by employees are to be regarded as those of the client. The Court of Appeal did not accept the Bank's arguments, saying "information from an employee stands in the same position as information from an independent agent". Only if the employee was employed specifically to obtain legal advice was it to be regarded as equivalent to the client itself. The Court of Appeal went on to indicate that it may be problematical in some cases to decide whether any given individual is an employee or an agent and undesirable that the presence or absence of privilege should depend on the answer. With respect, the reasoning is arguably flawed. There is a community of interest and mutual duties that exist between a company and its officers and employees which does not exist between a company and an independent third party, and which might suggest that a different conclusion should have been reached in the case of officers and employees. Even if that factor does not militate in favour of a different conclusion, there are ordinarily going to be senior officers, in-house counsel and other senior employees who represent the guiding mind and will of a company, and in their case at least there must be an argument that their communications ought to be regarded as communications to and from the client itself.

The Court of Appeal relied upon a statement in one of the older cases to suggest that reports made by agents or employees to an employer would not be privileged unless they satisfied the litigation privilege test. The Court of Appeal (wrongly in our view) also indicated that a principle stated in one of the cases (approved in Waugh v British Railways Board by the House of Lords) to the effect that any document which was brought into existence "to obtain legal advice or to conduct or aid in the conduct of litigation" should be treated as being referable to litigation privilege only. Whilst they say that it is the natural meaning of the statement to say it refers to litigation privilege only, the reference to "or" seems clearly to go the other way.

Having successfully distinguished all of the cases that had been referred to by the Bank in support of its proposition that employee-generated documents with a dominant purpose of seeking legal advice were privileged, the Court of Appeal concluded that none of the four categories of documentation enjoyed privilege.

In a last ditch attempt to save the case, the Bank of England's Counsel questioned whether written comments by the Governor of the Bank of England himself as the notional head of the Bank would be privileged. The Court of Appeal said that there was no specific issue raised on the basis of those particular facts, but it was the Unit that had been established to deal with the Enquiry and to seek the advice. It was the client rather than any single officer, however eminent he or she may be. This would seemingly prevent any argument to suggest that junior employees' communications may not enjoy privilege, but senior "guiding mind" employees such as directors in the corporate context might.

4. The Net Effect and Implication of the Decision

The result of the Court of Appeal's decision would appear to mean that where litigation is neither commenced or in contemplation, whilst communications between "the client" (whoever that may be characterised to be) and the lawyers is prepared with the dominant purpose of obtaining legal advice will be privileged, documents prepared by employees or ex-employees and other communications by those individuals through the client or directly with the lawyers will not be regarded as covered by any privilege. For those purposes, the employees and ex-employees are regarded as independent of the client itself. Seemingly, if the employee is employed specifically to obtain the legal advice on behalf of its employer, there is a limited exception. In the context of a client seeking to carry out an internal investigation itself before litigation is contemplated or commenced, if employees prepare their own witness statements or something similar, whether or not directly submitted to the lawyers, the document will not be privileged. If the client itself prepares the witness statement during or following an interview with the employee or ex-employee

and the dominant purpose test is fulfilled, then the document itself should be protected by privilege if it is intended to be communicated to the lawyers. Similarly, if the lawyer prepares the witness statement, the document itself may well be protected by privilege, although oddly it may arguably need to be provided to the client as part of advice rather than kept "internal" to the lawyers so as to fulfil the communication requirement. A difficult question arises as to whether in-house counsel are employees, so that their communications would not be privileged, or are they "the client" because they are employed specifically to seek legal advice. It makes sense to expressly designate them as part of the unit/client.

More problematic, however, are the verbal answers given by the employee or ex-employee to lawyers (either in-house or outside counsel) interviewing them. Since they are not regarded as being the client of the solicitors in any sense, their comments will apparently not enjoy privilege nor will any comments made by the solicitors to them. The same will presumably be the case where in-house counsel interview employees, *i.e.* the questions, answers and other discussions will not be privileged although the witness proof will be if it fulfils the dominant purpose test.

The net effect is that companies and other similar bodies are going to need to be a lot more careful in carrying out internal investigations, and they will have to think very carefully about who the "client" is and the composition of the "team" or "unit". They will also need to think carefully about whether, if they prepare witness statements themselves, they should submit or provide them to the employee witnesses for correction and clarification. They should certainly not allow them to keep copies. Alternatively, there may be some means by which the scope of retainer of the solicitor is modified so that they are acting for not only the employer but also all of its employees.

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This briefing note is not intended to be relied upon as a definitive statement of the law and specific advice should always be sought on any particular topic.

For further information please contact:

David Capps +44 20 7872 1080
david.capps@wilmer.com

Eva Heffernan +44 20 7872 1052
eva.heffernan@wilmer.com