Privilege revisited: privilege issues in internal investigations

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FOLLOWING THE RECENT SUPREME Court decision in *R (on the application of Prudential plc)* [2013], confirming that legal advice privilege does not attach to accountants or anyone else outside the legal profession, this seems an appropriate time to revisit the application of the principles of privilege within the context of internal investigations. We examine in this article the key issues relating to privilege that those conducting internal investigations should be aware of, predominantly in England and Wales but also, where applicable, from a US and European law perspective.

It is well established that the key principles underlying the application of privilege to documents and communications arising in the course of internal investigations are those of legal advice privilege and litigation privilege. The heads of privilege only apply to documents and communications created for one of the specific purposes set out below and do not apply to pre-existing documentation.

LEGAL ADVICE PRIVILEGE

Legal advice privilege attaches to confidential communications passing between a lawyer and a client of which the purpose is the giving or obtaining of legal advice, and only communications which are sent and received for this purpose will attract this head of privilege. In the context of an internal investigation, a considerable number of communications will be concerned with other matters, such as fact finding, and legal advice privilege will cover only those communications which have a legal context. It is therefore essential at the outset of any internal investigation to ensure that the overall purpose of the lawyers involved in the investigation is clearly set out as being the giving of advice, as this will provide the framework in which factual information can be shared and still attract legal advice privilege.

Lawyers

Practising barristers and solicitors, foreign lawyers and those acting under the direction of qualified lawyers (eg paralegals, legal secretaries and trainees) all attract legal advice privilege, provided they are acting in a legal capacity and not, for example, as general business advisers (*Taylor v Foster* [1825]).

The situation is not as clear cut for in-house lawyers. In relation to English law, in-house lawyers are treated in the same way as lawyers in private practice for the purpose of legal advice privilege (*Alfred Compton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1972]). However, practitioners should be aware that this is not the case under EC law. In 2010, the European Court of Justice confirmed that legal professional privilege only protects communications with lawyers in private practice and not those working in-house. The decision was principally based on the premise that in-house lawyers were not sufficiently independent from their employers (*Akzo Nobel Chemicals Ltd v European Commission* [2010]).

The judgment does not affect the position as concerns privilege and in-house lawyers in regard to investigations concerning purely domestic law issues. However, it is essential that this exception is taken into account when an investigation involves competition law issues.

Clients

Corporate entities seeking to rely on legal advice privilege also need to establish clearly who constitutes 'the client' for the purposes of communications with legal advisers in the course of an investigation. *Three Rivers District Council & ors v The Governor & Company of the Bank of England (No 5)* [2003] significantly limited the scope of those to whose communications legal advice privilege applied. The Court determined that the client, for the purposes of legal advice privilege, is not the corporate entity itself, or its employees generally, but only those employees and officers of the corporate entity expressly tasked with obtaining legal advice from either external or in-house lawyers. Communications involving members of staff who have not been so expressly tasked to seek such advice are not protected by legal advice privilege, no matter how senior they may be.

Third parties

As well as those employees who are not classed as 'the client', there are often a number of other third parties involved in an internal investigation such as accountants, IT experts and investigators. Communications with these third parties do not attract legal advice privilege.

LITIGATION PRIVILEGE

Although legal advice privilege is not available in relation to communications with non-client employees or third parties involved in the investigation, these communications may attract litigation privilege. This head of privilege only applies to communications or documents passed between a client and its lawyer or communications or documents passed between a client or its lawyer and a third party if the following conditions are met:

a) litigation must be in progress or contemplation;

b) the communications must have been made for the sole or dominant purpose of conducting or preparing for that litigation; and

c) the litigation must be adversarial, not investigative or inquisitorial (see *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] at paragraph 102).

Potential uncertainty arises, however, as to the stage at which litigation is 'in contemplation'. This was considered by the Court of Appeal in *USA v Philip Morris Inc* [2004]. The Court held that it was not sufficient for litigation to be a mere possibility or for someone to simply have a general apprehension of future litigation. In the above case, it was not sufficient for Philip Morris Inc to point to litigation instigated against other tobacco companies in the USA to demonstrate that litigation was in contemplation in circumstances where it had not received any letters before action or other such indicators.

The question in respect of internal investigations into potential criminal or regulatory breaches is, when do these investigations tip from being an investigative exercise into preparation for contemplated adversarial litigation? Some guidance can be found in a Competition Appeal Tribunal case involving Tesco and the OFT (*Tesco Stores Ltd & ors v Office of Fair Trading* [2012]). The factual details are complex but in simple terms one of the questions for the tribunal to decide was whether notes of discussions between Tesco and/or its external solicitors and potential witnesses were protected by litigation privilege. The tribunal concluded that, given 'the seriousness of the allegations... and the potential consequences... a fair procedure included the right to present its case and to gather evidence and, as a corollary, litigation privilege applies to its contact with third party witnesses' as well as notes of discussions between Tesco and/or its external solicitors and potential witnesses.

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WITNESS INTERVIEWS

Particular care should be taken in relation to the creation of notes or memoranda of witness interviews. The interview scenario is clearly not one to which legal advice privilege will apply and therefore a corporate may be forced to rely on litigation privilege in relation to these documents. Even if the notes of an interview are covered by litigation privilege, it is not possible to bind the interviewee from disclosing the questions asked of them and the answers they gave. There is no solution to this problem within the rules of privilege, but it is good practice to inform the interviewee that:

- you represent the company not them and that in your view the interview is covered by litigation privilege;
- the privilege is the company's and it could choose to waive it at some time in the future; and
- the matters discussed are confidential and therefore the interviewee should be careful to keep them confidential.

While the interviewee is under no general legal duty to keep the matters discussed confidential, they will usually be co-operating in the interview process as a result of their employment obligations, such that a clear request should be sufficient to maintain confidentiality.

COMMON INTEREST PRIVILEGE

When interviewing employees that may be the subject of an investigation, common interest privilege could arise. In simple terms common interest privilege extends the privilege in a document to other parties who have the same interest in the proceedings or advice. It was first recognised by the Court in *Buttes Gas & Oil Co v Harner* [1981]. In order for a document to attract common interest privilege, the document must be privileged in the hands of one party and that party must then disclose the document to another party who has a common interest in either the subject matter of the document or a common interest in the litigation that caused the document to be created. It is wise to exercise caution, however, in sharing privileged material in these circumstances as, if one of the parties subsequently makes a claim against the other, neither may claim privilege in relation to the documents that were disclosed under common interest privilege.

It should also be noted that it is common in these circumstances for parties to enter into common interest defence agreements. These agreements are not required to create the common interest but rather are useful for setting out the mechanism by which material is shared.

INTERNATIONAL INVESTIGATIONS

As it becomes increasingly common for organisations to be subject to investigations on both sides of the Atlantic, it is important for those conducting internal investigations

to have an overview of how privilege works in the US. Privilege in the US is broadly similar to privilege in England and Wales as the US attorney/client privilege and work product doctrine are the approximate equivalents of legal advice privilege and litigation privilege in England and Wales. That said, a privileged document under English law may not be privileged in the US and vice versa and there are a number of important differences between the two jurisdictions.

Firstly, and perhaps most importantly, the issue of selective waiver is of vital importance. In certain circumstances in the US, if a single privileged document is disclosed, then this can result in a complete loss of privilege in relation to the subject matter of the privileged document. In contrast, in England and Wales the document and related documents may remain privileged, as long as it/they remain confidential and not in the public domain and the disclosure was made for a limited purpose (for example to a regulator).

Secondly, in relation to communications with third parties, in the US, if a third party (such as an accountant) is assisting a lawyer in providing legal advice, then communication between the lawyer and third party will be protected by the attorney-client privilege, the work product doctrine, or both. By contrast, in England and Wales legal advice privilege would not apply and litigation privilege would apply only if litigation was reasonably contemplated when the communication was made.

The definition of 'the client' in the US is broader, and allows communications and documents created by *any* employee of the company that would otherwise meet the requirements of the attorney-client privilege or work product doctrines to fall under the privilege protection. In contrast, the English definition is much narrower and only includes employees of an organisation responsible for obtaining or receiving legal advice, as explained above.

Finally, one concept that is present in the US but not in England is that of bank examiners' privilege. In simple terms, this is privilege which applies to certain communications between a financial institution and its regulator. It is important to note that the privilege belongs to, and can be waived only by, the regulator. Care must be taken in any proceedings not to disclose material over which a regulator may hold privilege.

RESPONSE OF THE REGULATORS

Organisations both in the UK and the US that choose to self-report to the regulator are likely to be asked to waive privilege in the documents concerning their internal investigations. However, for those seeking to refrain from disclosing a document on the ground of privilege, it is quite possible that a situation may arise in which a document is privileged in the US but not under English law. This is likely to be a cause for concern when deciding what to disclose to the English regulators. Such a UK regulator will of course apply UK laws of privilege, but practical experience has demonstrated that in such circumstances UK regulators, such as the Financial Services Authority, would not seek to enforce the disclosure of communications protected under another legal system. That said, caution should be exercised in relation to this point and a continuing dialogue should be maintained with the regulator in relation to all privileged material. Anecdotally and in our experience, US regulators are generally respectful of non-US privilege claims, but the principle has yet to be litigated, so again caution should be exercised.

CONCLUSION

Internal investigations tend to be fast moving and, by their nature, require results as quickly as possible. In the heat of the moment, privilege may not seem the most pressing topic, yet its importance cannot be overlooked. Given the array of potential issues relating to privilege it is essential for in-house and external counsel to constantly be considering privilege issues so as to ensure that the company protects and maintains its privilege position both in England and Wales and across any other jurisdictions. Failure to keep on top of this issue is likely to lead to a loss of control by the organisation from which potentially damaging consequences may flow.

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Akzo Nobel Chemicals Ltd v European Commission [2010] 5 CMLR 19

Alfred Compton Amusement Machines Ltd v Customs & Excise Comrs (No 2) [1972] 2 QB 102

Buttes Gas & Oil Co v Harner (No 3) [1981] QB 223

R (on the application of Prudential plc & anor) (appellants) v Special Commissioner of Income Tax & anor [2013] UKSC 1

Taylor v Foster (1825) 2 C&P 195

Tesco Stores Ltd & ors v Office of Fair Trading [2012] CAT 6

Three Rivers District Council v The Governor & Company of the Bank of England (No 5) [2003] EWCA Civ 474

Three Rivers District Council v The Governor and Company of the Bank of England (No 6) [2004] UKHL 48

USA v Philip Morris Inc [2004] EWCA Civ 330