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High Court Reaffirms the Broad Scope of Legal Advice Privilege

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In a High Court ruling on 5 November 2015, Mr Justice Snowden helpfully reaffirmed the established precedent that legal advice privilege is not confined to telling the client the law: it may also attach to factual updates forming a continuum of communications between the solicitor and client, provided that there is a relevant legal context to such communications.

In addition to setting out the facts of the case and the principles of legal advice privilege underscored by it, this post looks to examine the potential (in)significance of a judgment now much discussed in the legal press.

Facts

In *Property Alliance Group Limited v The Royal Bank of Scotland Plc [2015] EWHC 3187 (Ch)*, Mr Justice Snowden was asked to decide whether RBS's claim to legal advice privilege in respect of two sets of documents prepared by its lawyers, Clifford Chance, for benefit of the RBS Executive Steering Group ("**ESG**"), was well founded.

Clifford Chance had been retained by RBS with primary responsibility for regulatory matters (following the commencement of regulatory investigations against RBS in various jurisdictions in respect of allegations of LIBOR misconduct) and defending litigation brought by customers and third parties.

The ESG (comprised of individuals from within relevant functions of the bank, including legal) was set up as a standalone committee within RBS to oversee the bank's responses to the regulatory investigations and related litigation.

From July 2011 onwards, the ESG held regular conference calls with Clifford Chance (and other external lawyers) in order to provide, "*a forum for the ESG to discuss with the Bank's external legal advisors the status of the Regulatory Investigations and communication with regulators around the world.*"

The documents at issue

The first set of documents were classified as, "*confidential memoranda in the form of tables*

prepared by Clifford Chance, which advised and updated the ESG on the progress, status and issues arising in the Regulatory Investigations."

The second set comprised, "*confidential notes/ summaries drafted by Clifford Chance concerning the discussions between the ESG and its legal advisors at the ESG meetings*." These would be then be circulated at the end of each ESG meeting, effectively constituting the "*summary minutes*" of the meeting.

All of the documents were:

- produced by Clifford Chance for the ESG;
- expressly marked "privileged and confidential"; and
- all communicated by Clifford Chance to the ESG either before or after the ESG meetings.

First principles reaffirmed

Per Lord Rodger in *Three Rivers District Council v Bank of England (No 6)*, the fundamental tenet of legal advice privilege is that it, "*attaches to all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice, even at a stage when litigation is not in contemplation*."[1]

In the judgment at hand, Mr Justice Snowden drew attention to Taylor LJ's statements in the 1988 Court of Appeal case *Balabel v Air India*[2], in particular that:

- legal advice was not confined to telling the client the law, *"it must include advice as to what should prudently and sensibly be done in the relevant legal context*"; and
- in most solicitor and client relationships, "*where information is passed by the solicitor or client to the other as part of the continuum* [of communication] *aimed at keeping both informed so that advice may be sought and given as required, privilege will attach*."

Application to the documents

Satisfied that Clifford Chance (the authors of all the documents) were engaged by RBS in, "*a relevant legal context*", i.e. in order to provide advice and assistance related to RBS's rights, liabilities and obligations, Mr Justice Snowden went on to apply the core principles of legal advice privilege to each set of documents.

The first set—the tabular memoranda prepared for ESG meetings, were held to fall squarely within the "*continuum of communication*" (per Taylor LJ in *Balabel*) aimed at keeping both parties informed so that advice may be sought and given.

With regard to the second set of documents—the summary minutes of the ESG meetings, Mr Justice Snowden placed particular emphasis on the fact that Clifford Chance, "*gave their impressions of those matters* [the meetings with regulators], *they responded to questions as to RBS's position, and they gave their suggestion as to what RBS should do next in the context of the Regulatory Investigations*."

Mr Justice Snowden went on to consider whether the documents fell within the public policy rationale underlying the justification for legal advice privilege. Significantly, he determined that there was a clear public interest in regulatory investigations being, "*conducted efficiently and in accordance with the law*" and that, "*lawyers must be able to give their client candid factual briefings as well as legal advice, secure in the knowledge that such communications…will not subsequently be disclosed without the client's consent*."

In so doing, Mr Justice Snowden upheld RBS's claim to legal advice privilege in respect of both sets of documents.

(In)significance?

Whilst an undoubtedly helpful restatement of the breadth of the scope of legal advice privilege, particularly for those solicitors and their clients engaged in responding to a regulatory investigation (in which the role of external lawyers can oscillate on a daily, if not hourly basis between legal counsel and a client's 'man of business'), Mr Justice Snowden's judgment appears to be little more than that: a first instance restatement of existing principles as set out in *Balabel* and *Three Rivers (No 6)*.

Perhaps of most (in)significance however is that the judgment goes only to the scope of legal advice privilege and therefore has no bearing on the privilege status (or otherwise) of witness interview memoranda prepared by a solicitor during the course of an investigation—an area of sharp focus for those practising in the white collar criminal defence sphere. Determining the privilege status of such memoranda is a battle to be fought under the separate head of litigation privilege, in light of the principle that legal advice privilege does not protect communications between a solicitor (or his client) and a third party.[3]

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[1] [2004] UKHL 48, [2005] 1 AC 610 at para 50

[2] [1988] 1 Ch 317

[3] Per *Three Rivers District Council v Governor and Company of the Bank of England (No 5) [2003] QB 1556 (CA)* an employee of a client company seeking advice from external lawyers (where the employee is not directly involved in the process of seeking that advice) is to be regarded as a third party for the purposes of legal advice privilege.

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