

Legal advice privilege upheld in regulatory investigations

In an important judgment on legal advice privilege under English law in relation to regulatory investigations, the High Court has held that communications between lawyer and client are privileged not only when the lawyer is advising on the client's rights and obligations but also when the lawyer is assisting the client in dealing with and co-ordinating responses and other communications to regulators. The judgment highlights the important role played by specialist lawyers in complex, multi-jurisdictional regulatory investigations, and the public policy rationale for protecting the privilege of their communications with clients.

In *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2015] EWHC 3187 (Ch), Snowden J rejected an argument that legal advice privilege could only attach to a narrow category of communications between lawyer and client dealing with the client's rights and obligations. Instead, he decided that privilege attaches to a wider range of communications, provided that the lawyers are acting as lawyers and not merely as administrators. Privilege can therefore attach, for example, to minutes of meetings prepared by lawyers as long as the lawyers' work falls within the relevant legal context. The lawyers must be instructed because of the legal expertise they bring to the matter.

Background

A claim brought by the Property Alliance Group (PAG) alleges that The Royal Bank of Scotland plc (RBS) induced PAG to enter into four interest rate swap agreements between 2004 and 2008 that used

three-month sterling LIBOR as a reference rate. PAG claims that, by proposing the swaps, RBS implicitly represented that it had not attempted to manipulate LIBOR rates. As has been widely reported, LIBOR manipulation has been the subject of investigation by regulatory and other governmental authorities in multiple jurisdictions.

At an earlier stage of the litigation, RBS claimed legal advice privilege over documents prepared by Clifford Chance for the RBS Executive Steering Group (ESG) in the period from 2011 to 2013 (the ESG Documents). The ESG oversaw RBS's response to the various regulatory and criminal investigations into LIBOR and other rates in the UK, the US and elsewhere. Clifford Chance was engaged by RBS to assist with these responses, as well as with any litigation that might arise from the investigations.

In *Property Alliance Group Ltd v The Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch), PAG contested

RBS's claim to privilege over the ESG Documents. PAG's hope was that that seeing these documents would avoid any need to consider the significant number of underlying documents. Not having reviewed the documents, Birss J was unsure whether or not these documents were privileged, and therefore took the unusual step of ordering that another judge should inspect the documents and then rule on whether or not they are privileged. Snowden J was appointed as the inspecting judge.

Legal principles

The basic requirements for legal advice privilege were set out in *Three Rivers District Council v Bank of England (No 6)* [2004] UKHL 48. Lord Rodger said that "legal advice privilege 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".

This formulation was accepted by the parties, as was Taylor LJ's

observation in *Balabel v Air India* [1988] 1 Ch 317 as to what constitutes legal advice for these purposes. Taylor LJ said that "legal advice is 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". Taylor LJ added that where "information is passed by the solicitor or client to the other as part of this continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach".

The key issue in the context of regulatory investigations is how far legal advice stretches for these purposes. When facing regulatory action in a number of countries, solicitors' clients will need not just pure legal advice as to the merits of the issues under investigation and possible follow on litigation, but also co-ordination and other practical advice as to how to handle responses to different regulators. In this respect, the vital question is whether the lawyers are being asked *qua* lawyers to provide legal advice.

The parties' submissions

PAG's main argument was that Clifford Chance's role was not confined to the provision of legal advice but that it extended also to the performance of a number of administrative functions. These included: (i) co-ordinating RBS's responses to the LIBOR investigations; (ii) serving as the principal repository for key documentation relating to the investigations; (iii) acting as the secretariat for the ESG and holding related documents; and (iv) attending the meetings of the ESG. PAG argued that RBS could not claim legal advice privilege merely because

Clifford Chance had attended ESG meetings or performed secretarial functions.

PAG also argued that the ESG comprised both business and legal personnel, such that at least one of the functions of the ESG was to enable the reporting of factual matters to RBS senior executives and, in turn, to the RBS Board of Directors.

The reporting of these factual matters, such as information concerning current events or correspondence with regulators, PAG contended, should be disclosed; any legal advice contained in the ESG document could be redacted.

RBS submitted that Clifford Chance was acting in a legal context because RBS's legal rights, obligations and liabilities under multiple legal systems were directly engaged. Clifford Chance had been instructed because of its expertise and specialist knowledge in advising on regulatory investigations and litigation. There was therefore no question of Clifford Chance acting as RBS's "man of business"; Clifford Chance was engaged because of its legal expertise. In this role, Clifford Chance produced tables to update the ESG as to the status and progress of the investigations, and also memoranda following the meetings covering the key matters identified by Clifford Chance from the meetings.

Judgment

Snowden J was "entirely satisfied" that Clifford Chance was engaged by RBS in a relevant legal context. The judge said: "Dealing with, and co-ordinating the communications and responses to such regulators was a serious and complex matter upon which RBS naturally wished to have

the advice and assistance of specialist lawyers". The advice that Clifford Chance provided "undoubtedly related to the rights, liabilities and obligations of RBS and remedies that might be granted against it in private or public law in a number of jurisdictions".

Snowden J rejected PAG's submission that only the parts of the ESG Documents containing legal advice were privileged. Applying *Balabel*, Snowden J said that documents forming part of the continuum of lawyer-client communications would be privileged even if they did not expressly set out legal advice. Snowden J was satisfied that the ESG Documents formed part of a continuum of communications between RBS and Clifford Chance, the object of which was the giving of legal advice as and when appropriate.

Dealing with two categories of documents produced by Clifford Chance, Snowden J said that the purpose of the tables showing the status of the various investigations was to provide the ESG with a comprehensive and up-to-date summary of developments in the regulatory investigations. The minutes of the ESG meetings prepared by Clifford Chance showed that the lawyers supplemented those tables with reports and references to some of the meetings they had attended and the communications which they had had with regulators on behalf of RBS.

Snowden J said:

"Importantly, the lawyers also gave their impressions of those matters, they responded to questions as to RBS's position, and they gave their suggestions as to what RBS should do next".

Snowden J noted that the outcome may have been different if the ESG Documents had been prepared by the ESG itself in order to record its deliberations or decisions.

The judge also considered that minutes of a business meeting would not be privileged simply because they were taken by a lawyer. In that situation, the lawyer would not be acting as a lawyer. However, in this instance, Snowden J said that the ESG meetings had a very substantial legal content. The lawyers present led the discussions because they were handling the many regulatory investigations and claims in different jurisdictions on behalf of RBS. The purpose of the meetings was to present information and legal advice to the ESG. In that legal context, it was entirely understandable that Clifford Chance took the lead with the preparation of agendas, co-ordination of meetings and in leading the discussions and preparing the meetings.

Snowden J concluded:

"[Clifford Chance] were not providing those services as a simple matter of administrative convenience; they were doing so as an integral part of their provision of legal advice and assistance to the ESG."

Snowden J also added that the public policy justification for legal advice privilege applied equally in the context of a regulatory investigation. The public interest in the efficient conduct of regulatory investigations is advanced if regulators can deal with experienced lawyers who can

accurately advise their clients how to respond and co-operate.

Snowden J said:

"Such lawyers must be able to give their client candid factual briefings as well as legal advice, secure in the knowledge that any such communications and any record of their discussions and the decisions taken will not subsequently be disclosed without the client's consent. In my judgment, the [ESG Documents] all fall squarely within that policy".

Implications

This judgment is an important reminder that communications between a lawyer and their client do not all need to comprise legal advice for a claim of privilege to be properly made out. It is, however, necessary for the lawyer to be acting in a relevant legal context – to be wearing “legal spectacles” as one judge put it in another case – and for the document to form part of the continuum of communication between lawyer and client for the overall purpose of obtaining legal advice. It is not enough for documents simply to be sent or copied to lawyers or for the lawyers to play a purely secretarial role.

Companies subject to regulatory investigations will, if they wish to be able to assert privilege in the English courts both to the regulators and in any subsequent litigation, need to ensure that their internal processes and their engagement of external counsel satisfy the criteria for maintaining a claim to privilege as set

out in this judgment by Snowden J. This may require careful consideration at the outset of any investigation as to how to handle the investigation and its fallout, including in particular what role lawyers should play.

The judgment related to documents by which lawyers communicated with their clients. However, the judgment can also be interpreted as providing support for claims to privilege over documents generated by lawyers when performing a fact-finding role in the context of a regulatory investigation, for example lawyers' notes or memoranda of interviews with clients' employees. Such documents have increasingly become a target for disclosure requests by regulators (and litigants) in recent years. Snowden J recognised that lawyers are often asked to investigate factual matters on behalf of their clients. He also found that, as a matter of policy, lawyers should be free to communicate in writing the information they gather to clients to enable them to make a fully informed decision as to what further legal advice to obtain, and what to do.

Finally, the judgment highlights the important role played by external lawyers in advising clients in regulatory investigations, not only in connection with their co-ordination and handling of complex and multi-jurisdictional investigations, but also in assisting with the efficient conduct of the regulators' investigations.

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