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Legal advice privilege: who is the client?

An English judge has put a narrow interpretation on who can be considered to be a lawyer's client for the purposes of legal advice privilege. This will place serious constraints on the extent to which fact gathering for the purposes of providing legal advice can be carried out under the cloak of privilege, and it certainly requires extra care when conducting investigations, unless litigation is imminent.

Since the controversial decision of the Court of Appeal in *Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556, there has been an open issue in English law as to whose communications with a company's lawyers attract legal advice privilege. Is it only those whose role is to obtain the legal advice, or does it extend to other employees who have material information that the lawyers need in order to give the legal advice?

Three Rivers (No 5) may, on one (heavily criticised) interpretation, have confined privilege to the instructing group, excluding other employees. In *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch), Hildyard J has given renewed vigour to this view of *Three Rivers (No 5)*, deciding that communications, even with lawyers, for the purpose of establishing facts do not attract legal advice privilege.

This decision will have implications for, in particular, the conduct of investigation and other fact-finding exercises. There may be considerable difficulty in undertaking interviews that are, as a matter of English law and procedure, privileged. At the least, great care will be required in the conduct of interviews and what notes are made of the interviews - unless and until *Three Rivers (No 5)* and *The RBS Rights Issue Litigation* are reversed.

Background

In English law, there are two heads of legal professional privilege: litigation privilege and legal advice privilege. Litigation privilege is wide-ranging, covering most communications that have as their dominant purpose the conduct of litigation. But, as its name suggests, litigation privilege depends upon litigation having started or, if not, on its being reasonably in contemplation.

If there is no litigation, only legal advice privilege is available. This covers communications between lawyers and their clients for the purpose of obtaining or giving legal advice. A key difference between litigation privilege and legal advice privilege is that litigation privilege can cover communications with a third party, but legal advice privilege is confined to communications between lawyers and their clients. If, for example, lawyers speak to third parties in order to provide legal advice, those conversations are not privileged.

The underlying basis for legal advice privilege is often referred to as the "rule of law rationale". This is as follows: in a complex world, individuals and corporations may need legal advice so that they can arrange their affairs in an orderly manner; it is in the public interest in any society built upon the rule of law that the affairs of individuals and corporations are arranged in an orderly manner; proper legal advice for this purpose can only be given if clients put full and complete facts before their lawyers; those full and complete facts might not be put before lawyers if clients are concerned that any disclosure made to lawyers may subsequently need to be revealed to others, whether in authority, business competitors or merely inquisitive busybodies; as a result, communications between lawyers and clients are absolutely confidential so that clients can safely put the full facts before their lawyers without fear of subsequent disclosure (*Three Rivers District Council v Bank*

Key issues

- Mere employees may not be treated as acting for the lawyer's client for legal advice privilege purposes
- Legal advice remains privileged but prior fact finding may not be, absent litigation
- Care is required in any investigation if privilege might be important

of England (No 6) [2005] 1 AC 610, [23]-[34]).

Where lawyers' clients are individuals, this raises no problem: communications between lawyers and individual clients are privileged. It becomes more complicated when companies are involved. The companies' information that might need to be given to lawyers to enable the lawyers to provide proper legal advice will seldom be in head of only one person but will be spread over any number of people. The more complex the issue, the more people - whether junior, middling or senior - are likely to have been involved and to have material information that needs to be given to lawyers in order to allow the lawyers to advise.

Who is the client?

The obvious approach to legal advice privilege in these circumstances is that communications between those who hold the companies' information and the companies' lawyers will be privileged. The rationale for legal advice privilege is to allow lawyers to obtain complete information, and it shouldn't matter from whom within a corporate client the lawyers must obtain this information. Any other interpretation could severely undermine the scope of legal advice privilege for companies.

But that is not the way English law has developed. It appears that only those who are actually charged by a company with obtaining the legal advice are able to conduct privileged communications with the company's lawyers. Communications between lawyers (whether inhouse or external) and others within the company, no matter how senior, may not be privileged.

This issue emerged from ambiguous nineteenth century case law that was given a new lease of life by the much-criticised Court of Appeal decision in *Three Rivers District Council v Bank of England (No 5)* [2003] QB 1556, though there were special circumstances applicable in *Three Rivers (No 5)* suggesting that the decision was of no application outside its singular facts. This limited view of *Three Rivers (No 5)* has been taken in other common law jurisdictions, such as Singapore. However, *Three Rivers (No 5)* has now been given broadest and, in our view, the least commercial, interpretation in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

The RBS Rights Issue case

The core issue in *The RBS Rights Issue Litigation* was whether notes of interviews conducted by lawyers as part of an investigation in response to Securities and Exchange Commission subpoenas in the United States were privileged in subsequent litigation between the bank and its shareholders in the English courts. Hildyard J decided that they were not privileged. The judge recognised the force of the criticisms of *Three Rivers (No 5),* but still declined to confine the application of that case to its facts.

The judge considered that *Three Rivers (No 5)* restricted legal advice privilege to communications between a lawyer and the lawyer's "client" (though he accepted that the company as a whole will still be the client in the broader, real, sense). The "client" for these purposes only includes those authorised to seek and receive legal advice on behalf of the company. "Clients" in this sense would, the judge anticipated, usually be a small number of persons at a relatively high level within a corporation. An employee might be authorised to communicate with the lawyers and to pass the company's information to the company's lawyers, but that was not sufficient to make the employee the lawyers' "client", or a recognised emanation of the "client", for privilege purposes. Fact gathering and the notes of that fact gathering were dismissed as "preparatory to and for the purpose of enabling [the company], though its directors or other persons authorised to do so on its behalf, to seek and receive legal advice." The legal advice eventually given will be privileged, but the preparatory steps are not.

Working papers

As an alternative, the bank argued in *The RBS Rights Issue Litigation* that the notes of interviews were privileged because they were lawyers' working papers. Hildyard J again took a narrow view of this ground. Having decided that the interviews themselves were not privileged, notes of the interviews could only be privileged if they offered a clue as to the legal advice, or some aspect of the legal advice, given to the bank.

The judge was not satisfied that the bank had discharged the burden of showing that the interview notes did this. On his approach, it would have been difficult for the bank to have done so.

Proper law

The interviews in *The RBS Rights Issue Litigation* were largely conducted by or for US lawyers in the light of the SEC's subpoenas. The bank argued that, in these circumstances, the relevant law of privilege was not English law but US law. On rather more orthodox grounds, Hildyard J rejected this argument. Whether a document is privileged from production in the English courts depends upon the English law of privilege, not any foreign law.

Conclusion

The RBS Rights Issue Litigation does not affect the privilege attaching to legal advice as such, only to fact gathering prior to the facts being used to give legal advice. It is, nevertheless, an unfortunate decision that undermines the basis of legal advice privilege by making it difficult for lawyers to gather information in a manner that will be privileged.

At a practical level, the decision will raise serious issues for the conduct of investigations. If the decision is followed (and other judges might be persuaded to take a different approach), normal communications between the company's lawyers and employees outside the lawyers' instructing group or ex-employees will not be privileged (absent litigation), unless a way of including all interviewees within the instructing group can be found. That is likely to prove difficult.

This leads on to the question of what notes lawyers should make in interviews. Is a formal statement or similar actually required, or can it be rolled into the lawyers' advice (which will still be privileged)? Should lawyers conducting an interview be sure to include elements of their advice in any notes, whether for their own purposes or recording an explanation given to the interviewee? The desirability of protecting the content of interviews will need to be balanced against the practicability of any attempted solution.

The best and most commercial solution would be for *Three Rivers (No 5)* and *The RBS Rights Issue Litigation* to be overturned or, at least, explained in a manner that gives greater recognition to the rationale for legal advice privilege. To do this authoritatively may take a trip to the Supreme Court. In the meantime, corporates may have to operate on the basis that there is a serious risk that internal fact-finding investigations will not attract privilege unless litigation is imminent.

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