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BRIEFING

Legal advice privilege

House of Lords clarifies position

Summary

The House of Lords recently handed down its long-awaited judgment in the *Three Rivers* case concerning legal advice privilege. The Lords rejected the Court of Appeal's narrow definition of this privilege and re-emphasised its extent. However, they did not address the issue of whether communications between a client's employees and its lawyers are covered by the privilege.

Legal professional privilege has rarely caused much excitement outside the narrow confines of the legal world. However, the attention paid to two decisions of the Court of Appeal and the recent House of Lords judgment in the *Three Rivers* case¹, in which we acted for the successful applicant, the Bank of England, has demonstrated a keen interest on the part of companies to continue to protect their documents from disclosure in the face of litigation, regulatory investigation or inquiry.

On 11 November 2004, the House of Lords overturned the second decision of the Court of Appeal², which concerned the proper scope of legal advice privilege. All five Law Lords unanimously rejected the Court of Appeal's restrictive approach and re-emphasised the fundamental position of legal advice privilege in English law and the right to obtain legal advice in confidence. As a result, companies will be able to rest more easily in the knowledge that their communications with their legal advisers are now less likely to be disclosable to outside parties.

While clarifying the position, the Law Lords have not dispelled all doubts about the extent and applicability of legal advice privilege. In particular, they declined to address the issue of the identity of the client for these purposes. The decision is nevertheless welcome and provides significant clarification following the confusion generated by, in particular, the second decision of the Court of Appeal.

Why does privilege matter?

In civil litigation and in investigations by bodies such as the Financial Services Authority (FSA), UK Listing Authority (UKLA), Office of Fair Trading, Department of Trade and Industry and Inland Revenue, companies are often subject to extensive obligations to disclose sensitive and confidential documents, including any that negatively affect their case before the court or regulator. Documents that are covered by legal professional privilege are, however, protected and parties are entitled to refuse to disclose privileged documents³.

As the House of Lords (Lord Carswell) has made clear, there are two main types of legal professional privilege: legal advice privilege and litigation privilege. Legal advice privilege protects from disclosure communications between a lawyer in his professional capacity and his client, provided they are confidential and are for the purposes of seeking or giving legal advice. Communications with an independent third party (even if created with the purpose of providing legal advice to the client) are not covered by this head of privilege, which applies whether or not there is any litigation.

Litigation privilege arises only where litigation or other adversarial proceedings are contemplated or ongoing. In addition to documents that would be protected by legal advice privilege, litigation privilege protects *all* communications produced for the sole or dominant

¹ *Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48

² *Three Rivers and others v Governor and Company of the Bank of England (No 6)* [2004] 2 WLR 1065

³ Although note the specific position in FSA and UKLA proceedings: section 413 of the Financial Services and Markets Act 2000 sets out the privilege rules in this context.

purpose of the litigation, including all communications between i) a lawyer and his client; and ii) the lawyer or client and an independent third party such as a factual or expert witness.

The *Three Rivers* privilege decisions, which have arisen in the context of the litigation between the liquidators of the Bank of Credit and Commerce International (BCCI) and the Bank of England, have focused on legal advice privilege. In particular, they have examined the scope of legal advice privilege and the identity of 'the client' for the purposes of this privilege. We deal with each of these issues below. First, however, we review the justification given by the Law Lords for the existence of the privilege.

The rationale for legal advice privilege

The Court of Appeal in its second decision stated:

'The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated, it is not easy to see why communications with a solicitor should be privileged.'

The Law Lords, however, came out very strongly in support of the need for and existence of legal advice privilege as a separate kind of legal professional privilege and rejected the Court of Appeal's unduly (and unexpectedly) narrow approach. Lord Scott reviewed a number of cases that dealt with the justification for legal advice privilege. He added that these judgments recognise that:

- there are many reasons why individuals or corporations may require the advice or assistance of lawyers in connection with their affairs;
- the seeking and giving of this advice so that clients may arrange their affairs in an orderly way is strongly in the public interest;
- for the advice to achieve this the full and complete facts must be placed before the lawyers who are to give it; and
- unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without the clients' consent, there will be cases in which the 'requisite candour' will be lacking.

Baroness Hale added that there is a clear policy justification for differentiating communications between lawyers and their clients from other professional

communications and that it is in the interests of the entire community that lawyers give their clients sound, legally accurate and sensible advice.

Their Lordships have therefore given a ringing endorsement to the logic and existence of legal advice privilege as a distinct head of privilege.

The scope of legal advice privilege

In this appeal, the House of Lords had to deal with the question of whether communications between the Bank of England and Freshfields (and, through them, Counsel) relating to the preparation and presentation of the Bank's evidence and submissions to the Bingham Inquiry into the collapse of BCCI were protected by legal advice privilege. In answering this question, the Law Lords had to consider what constitutes 'legal advice' for the purposes of legal advice privilege and in relation to what sort of communications legal advice privilege can be claimed.

The Court of Appeal decided that legal advice privilege was restricted to advice about legal rights and liabilities. In the context of this case, the Court thought that where Freshfields was providing presentational advice to the Bank on how to present evidence to the Bingham Inquiry, such advice was not legal advice and therefore not privileged.

The Law Lords considered that the Court of Appeal did not give legal advice privilege its proper scope and defined it too restrictively. Lords Scott, Rodger, Carswell and Baroness Hale all referred approvingly to the Court of Appeal decision in *Balabel v Air India* [1988] 1 Ch 317, where Taylor LJ said that, for the purposes of attracting legal advice privilege:

'... 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.'

Lord Rodger considered that what matters today in terms of legal advice privilege remains the same as in the past, namely whether lawyers are being asked 'qua lawyers' (in their capacity as lawyers) to provide legal advice. Elsewhere in his judgment, he expressed the privilege as falling within situations where the lawyers put their 'legal spectacles' on when giving advice to the client.

The Lords also provided some valuable guidance on what is a relevant legal context. In the context of inquiries, Lord Scott thought that presentational advice given by lawyers to parties in inquiries should be privileged in the same way as the advice of a lawyer about the prospects of judicially reviewing an inquiry. Lord Brown went further and declared that as a general principle the process by which a client seeks and obtains his lawyer's assistance in presenting his case in any formal inquiry – regardless of whether the inquiry relates to public or private law issues, is adversarial or inquisitorial, is held in public or in private, or directly affects his rights or liabilities – attracts legal advice privilege.

Lord Carswell provided another important example of a situation that falls under the privilege when he said that all communications between a solicitor and his client regarding a transaction in which the client has instructed the solicitor for the purpose of obtaining legal advice will be privileged, even where they do not contain advice on matters of law or construction, as long as they are directly related to the solicitor's performance of his professional duty as legal adviser to that client.

This conclusion will no doubt be of great assistance to all lawyers and clients dealing with non-contentious transactions. Lord Carswell clearly envisages that communications made in that legal context which do not contain legal advice would still be privileged provided the solicitor has been instructed to provide legal advice and provided the communications are directly related to the performance of the solicitor's duty as legal adviser.

The Law Lords considered a number of other areas and whether they are covered by legal advice privilege. Lord Scott considered that legal advice privilege would apply to advice to a developer and/or an objector in planning inquiries. Lord Carswell considered that clients seeking tax advice (and in particular advice on inheritance tax planning) would be very dismayed to think that the information they have made available to their lawyers might not remain confidential.

Lord Rodger said that legal advice privilege should apply to the conveyance of a property or the drawing up of a will. He equally thought that it applies to advice on criminal matters and to advice sought from lawyers

about someone else's legal position. The example he gave of the latter was where a concerned parent consults a lawyer about the repercussions for their adult child of a step that child is thinking of making. It would not be difficult to think of an example relevant in a corporate context, for instance where a parent company takes advice about something that may affect only the subsidiary.

However, the Lords emphasised that legal advice privilege does not cover all documents passing between clients and their lawyers. Lord Scott endorsed Taylor LJ's comment in *Balabel* that:

'... to extend privilege without limit to all solicitor and client communication upon matters within the ordinary business of a solicitor and referable to that relationship [would be] too wide.'

So, for instance, advice by a solicitor on business matters, including investment policy and finance policy, may not have a relevant legal context. Lord Scott thought that there was no way to avoid having to decide in some marginal cases whether the seeking of advice from lawyers has a relevant legal context.

Who is the client?

In its first decision in April 2003⁴, the Court of Appeal held that legal advice privilege only protected communications between the lawyers and the Bank's Bingham Inquiry Unit, whom the Court considered to be the clients. Communications between other employees of the Bank ('however eminent they may be') and the Bank's lawyers were not privileged, even if generated for the purpose of obtaining legal advice for the Bank in the context of the Bingham Inquiry.

The House of Lords refused leave to appeal this decision of the Court of Appeal, and it was not formally in issue at this hearing. However, it has caused a great deal of concern, particularly for companies and other entities such as government departments on how they can communicate with their lawyers through their employees or officers. The Law Lords were invited by the Bank, supported by instructions from the Attorney General, the

⁴ *Three Rivers and others v Governor and Company of the Bank of England (No 5)* [2003] QB 1556

Law Society and the Bar Council, to clarify the approach that should be adopted to determine whether a communication between an employee and his employer's lawyers should be treated for the purposes of legal advice privilege as a communication between the lawyers and their client.

Although Lord Scott acknowledged that this issue is particularly important for companies, he led the Lords in declining the invitation to consider the Court of Appeal's first decision. One of the reasons given by Lord Scott for doing so is that even if the Lords had disagreed with the Court of Appeal's conclusion on this issue, their views would not have been binding on the lower courts. He considered that the Court of Appeal's decision will continue, for the present, to be the guiding precedent on the issue.

Even so, it is far from obvious that the Lords wholeheartedly endorsed the logic or reasoning of the Court of Appeal on the issue. In particular, Lord Carswell made it clear that he is not to be taken to have approved the decision and has reserved his position on its correctness. Further, Lord Scott, approving Baroness Hale, noted that the decision meant there will be particular difficulties for large organisations in identifying the client. Clarification is still, therefore, needed.

Scope of litigation privilege

The House of Lords decision was concerned only with the scope of legal advice privilege. However, Lord Scott suggested that the Lords may have some doubts about the ambit of litigation privilege. Although he agreed that the need to grant privilege to the seeking or giving of legal advice for the purposes of actual or contemplated litigation is easy to understand, he did not agree that this held for documents or communications that, despite having the necessary connection with the litigation, neither constitute nor disclose the seeking or giving of legal advice. He cited communications between a litigant and third parties as an obvious example.

In *re L* [1997] AC 16, the House of Lords restricted litigation privilege to communications or documents with a connection to adversarial proceedings. Lord Scott suggested that civil litigation conducted under the

current Civil Procedure Rules is in many respects no longer adversarial and so provides another reason for re-examining the justification for litigation privilege.

Lord Scott's comments are obiter (made in passing) and therefore not binding. Nevertheless, they bring about the possibility that litigation privilege in its current form may be reconsidered by the courts in the future.

Conclusion

The House of Lords' judgment is a timely and welcome confirmation of the importance and breadth of legal advice privilege. Legal advice privilege will apply whenever a lawyer is advising 'in a legal context', 'qua lawyer' or 'with his legal spectacles on'. This is a far broader test than that adopted by the Court of Appeal, as it is not restricted solely to advice about 'legal rights and liabilities'. However, uncertainty still remains as to the identity of the client, which may cause companies some difficulty and additional cost when gathering information for the purposes of seeking legal advice.

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