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BRIEFING

# Legal advice privilege

Court of Appeal gives important judgment

## Executive summary

The Court of Appeal recently handed down a judgment concerning legal advice privilege. The decision in the *Three Rivers District Council v Bank of England* case raised questions regarding who the client is, what constitutes legal advice, and what documents are protected by legal advice privilege. This briefing looks at the judgment in more detail.

Lawyers and clients tend to take for granted the scope of legal advice privilege, ie the right to withhold documents in certain situations because they relate to the giving or receiving of legal advice. A recent Court of Appeal decision questions whether we can all do that to the same extent and has given cause for particular concern to those involved in gathering and preparing documents for use in all non-adversarial contexts, including responding to regulatory inquiries. The Court of Appeal's decision in *Three Rivers District Council and Others v Governor & Company of the Bank of England* [2003] EWCA Civ 474 is likely to have a profound impact on the way in which such responses are prepared and handled, and companies may need to reconsider how to organise their internal systems when doing so.

## The concept of privilege

In litigation or other adversarial proceedings, a party is entitled to refuse to produce for inspection 'privileged' documents in its power, possession and control. The main category of privilege is legal professional privilege. There are two types of legal professional privilege: legal advice privilege and litigation privilege.

Legal advice privilege protects 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. Documents sent to or from an independent third party (even if created with the dominant purpose of obtaining legal advice) are not covered by this privilege.

Litigation privilege arises only after litigation or other adversarial proceedings are commenced or contemplated. It is wider than legal advice privilege and protects all documents produced for the sole or dominant purpose of the litigation, including all communications between (i) a lawyer and his client (ii) a lawyer and his non-professional agent or (iii) a lawyer and a third party.

The *Three Rivers* case, which arises in the context of the ongoing litigation between the liquidators of BCCI and the Bank of England (the Bank), is primarily concerned with legal advice privilege.

In 1991, following the collapse of BCCI, the government set up the Bingham Inquiry to investigate the Bank's supervision of BCCI and to consider whether the actions taken by the UK authorities were appropriate and timely. The Bingham Inquiry Unit (BIU), an internal body at the Bank which consisted of three Bank officials, was set up to deal with all communications between the Bank and the Bingham Inquiry. The BIU was advised during the inquiry by the Bank's solicitors, Freshfields.

The liquidators of BCCI subsequently brought proceedings against the Bank for misfeasance in public office relating to events emerging from the collapse of BCCI. In these proceedings, the liquidators sought disclosure of certain documents prepared by the Bank's employees and ex-employees that came into existence at the time of the Bingham Inquiry, which were identified by the Court of Appeal as follows:

- documents prepared by Bank employees that were intended to be sent to and were in fact sent to Freshfields;
- documents prepared by Bank employees with the dominant purpose of the Bank's obtaining legal advice but not in fact sent to Freshfields (though their effect was perhaps incorporated into documents that were sent to Freshfields);
- documents prepared by Bank employees without the dominant purpose of obtaining legal advice but in fact sent to Freshfields; and
- documents under all the above three points, prepared by ex-employees of the Bank.

The Bank refused to disclose these documents on the grounds that they were covered by legal advice privilege; litigation privilege could not be claimed. The claim for privilege was upheld at first instance. However, the Court of Appeal decided that these documents were not covered by legal advice privilege.

## The Court of Appeal's decision

The Court of Appeal accepted the established principle of law that documents passing directly between a lawyer, acting in his professional capacity, and the client are protected by legal advice privilege, where the dominant purpose of those communications is to obtain legal advice. The decision, however, is noteworthy in that it:

- raises the issue of who the client is;
- raises doubt about what constitutes legal advice (as opposed to other forms of assistance a lawyer might provide); and
- appears to exclude from the privilege evidential materials obtained from employees prior to the communication between the lawyer and his client, even if prepared for the dominant purpose of being shown to a client's lawyer and prepared at the lawyer's request.

## Who is the client?

The court took a narrow view of who actually constitutes the client as opposed to an employee of the client. While the court accepted that a corporation can only act through its employees, it held that this in itself was not sufficient to protect all communications by an employee

to the employer's lawyers. In this case, the client was held to be the BIU and not any other Bank employee ('however eminent they may be'). It followed that communications between these non-client employees and the Bank's lawyers were treated as communications with an independent third party and not therefore protected by legal advice privilege. Ex-employees were also treated as independent third parties. How this will apply in other situations is uncertain, as the court gave no guidelines as to when an employee may be deemed to be a client and when it may not.

## What constitutes legal advice?

This question appears to have been left open but the court suggested that obtaining information from employees and ex-employees in the context of an investigation might be for the dominant purpose of enabling evidence to be presented to the investigation rather than to obtain legal advice, and so again fall outside the privilege.

## Preparatory documents

While the full legal and practical effect of this decision will require analysis against each situation that may arise, the court appeared to treat preparatory documents as no more than the 'raw material' on which the client can thereafter seek legal advice. At the risk of oversimplification, the apparent consequence of the court's decision is that all the following communications may *not* be protected by legal advice privilege:

- communications and documents prepared by the client's employees, if not deemed to be the client, with the dominant purpose of obtaining legal advice, but not sent to the client's lawyers;
- communications and documents prepared by the client's employees, if not deemed to be the client, with the dominant purpose of obtaining legal advice, which are intended to be sent to and are in fact sent to the lawyers;
- communications and documents prepared by or obtained from independent third parties such as expert non-legal advisers, ie brokers, economists or accountants (and including ex-employees) with the dominant purpose of obtaining legal advice, and then sent to the client but not sent to the lawyers; and

- communications and documents prepared by independent third parties (including those referred to in the point above) with the dominant purpose of obtaining legal advice for a client and passed by the third party to the client's legal adviser.

## Practical implications

If faced with an investigation or regulatory proceeding, it is first necessary to decide if the proceedings are adversarial or non-adversarial. The test as to what are adversarial proceedings is not entirely clear and may be difficult to determine. This is particularly so where an enquiry by a regulator may lead to an investigation (such as under the Competition Act 1998). If adversarial, the wider litigation privilege applies. If non-adversarial, only legal advice privilege applies and the precautionary measures discussed in the following three paragraphs should be taken. It remains to be seen what approach the courts may take.

It is now advisable to establish in advance who exactly constitutes the client. Where a company is the client, it cannot be assumed that all employees are treated as clients for the purposes of legal advice privilege. In different circumstances, a committee of the board, the whole board or another defined group may be treated as the client. In any event, this ought to be defined early in the process so that those handling the investigation know the scope of the protection from disclosure.

It is appropriate to reconsider internal processes for the gathering of information and creation of preparatory documents for those investigations. You should be aware that documents produced either by an employee (who is not deemed to be the client), ex-employee or independent third party for the purposes of obtaining legal advice, whether or not communicated to lawyers, may not be protected and therefore may have to be disclosed in subsequent litigation.

Some safeguards may be put in place by ensuring that in-house and/or external lawyers prepare all the notes and documents in the context of an inquiry. However, even if information is prepared in this way, for legal advice privilege to apply it will still be necessary to show that the dominant purpose of preparing the materials was to obtain legal advice. The court has indicated that advice

on how to present evidence within the context of an investigation may not be legal advice. Gathering evidence solely through lawyers may not therefore avoid the problems posed by this judgment.

For institutions under investigation by the Financial Services Authority or by the UK Listings Authority, section 413 of the Financial Services and Markets Act 2000 rather than the common law determines whether a document is privileged. The scope of section 413 is as yet untested in the courts. Indeed, it is not clear whether it restates the common law or creates a separate concept of privilege. However, the following points arise from the judgment in respect of section 413.

- Under section 413(3)(a), a communication between a lawyer and a client in connection with the giving of legal advice to the client attracts legal advice privilege. On the face of it, this would be broader than a 'dominant purpose' test.
- Section 413(2)(a) provides that 'communications between a professional legal adviser and his client or any person representing his client...' are privileged. It would appear that a court applying the statutory test would be open to taking a similar approach as the Court of Appeal and conclude that employees, ex-employees and witnesses would not be considered to be either the client or representing the client, and that communications between the lawyers and those persons would not therefore be privileged.

To avoid doubt, in the context of a regulatory investigation, a company is now advised to be cautious in producing documents or passing relevant information internally without the approval of its lawyers.

## Ongoing uncertainty

Mr Justice Tomlinson at first instance decided that privilege did attach to all categories of documents as claimed by the Bank. The three Court of Appeal judges took a fundamentally different view, yet all judges thought they were applying existing law. The Court of Appeal did, however, note that the scope of legal advice privilege is not as clear-cut as might be expected. There is clearly a possibility that the judgment will be appealed to the House of Lords or future cases may further clarify the scope of legal advice privilege. For now, however, it is necessary to be cautious.

The information and opinions contained in this bulletin are not intended to be a comprehensive study, nor to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations.

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