

A brief overview of the doctrine of privilege

Sabina Lillyman, senior associate

In this edition, we will look at two recent High Court cases which have raised important implications and provided further guidance on the scope of both litigation and legal advice privilege.

RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)

The latest development in the long-running RBS Rights Issue Litigation was important for the law on privilege. The High Court applied the controversially narrow definition of legal advice privilege from the Court of Appeal's judgment in *Three Rivers*. This narrow interpretation of the scope of legal advice privilege risks creating difficulties for larger businesses in managing their legal risk.

The Rights Issue Litigation concerns a group claim against RBS over a rights issue announced by RBS in April 2008. In this latest judgment, the group claimants sought disclosure and inspection of interview notes relating to two internal investigations, in particular notes of interviews by RBS' solicitors with former and current RBS employees.

Legal Advice Privilege

RBS resisted disclosure on the basis that the Interview Notes were protected by legal advice privilege, which applies to communications between a lawyer and a client for the purpose of giving or receiving legal advice. Alternatively, RBS argued that the interview notes constituted lawyers' working papers and were therefore privileged.

The judge rejected RBS's claim to privilege on all grounds, since it was bound by the precedent set by the *Three Rivers case*.

The judge confirmed that the term "client" as narrowly defined by *Three Rivers* referred only to those employees who were authorised to seek and receive legal advice on behalf of the corporation. And that the authority to provide information to lawyers was not enough to meet this criteria. Even though, in this case, the interview notes recorded direct communications with RBS' lawyers, the notes were a product of information gathering from employees for the purpose of enabling RBS to seek and receive legal advice. In other words, the employees who were interviewed by the lawyers did not fall within the definition of "client" as defined by *Three Rivers*. Therefore, the Interview Notes were not covered by legal advice privilege.

The parties accepted that lawyers' working papers are generally protected by legal advice privilege on the basis that they "give a clue" to the trend of advice being given to a client by its lawyer. RBS argued that the Interview Notes were privileged because they showed the lawyers' "mental impressions" and revealed their train of enquiry.

However, the judge concluded that, on the facts, the evidence produced by RBS was insufficient to uphold this claim to privilege.

Comment

This judgment confirms that, in cases involving legal advice privilege, courts continue to be bound by the controversial and narrow definition of the term "client" in the *Three Rivers* case. It is therefore important for corporations to carefully consider who "the client" is in each case. It is not the corporate entity itself but a narrow group of individuals who are expressly charged with seeking and receiving legal advice. Only their communications will be covered by legal advice privilege.

Unfortunately, despite the judge granting a "leapfrog" certificate allowing RBS to appeal directly to the Supreme Court, the appeal will not take place because amendments to the claimants' case mean that the disputed documents are no longer relevant to the issues in the action.

This is unfortunate because an appeal to the Supreme Court would have provided the first opportunity in over a decade for the court to consider overturning Three Rivers and to redefine the scope of legal advice privilege.

For now, at least, Three Rivers remains good law.

Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd - [2017] EWHC 1017 QB

In the case of SFO and ENRC, the SFO asked the court for a declaration that certain documents generated as a result of an internal investigation into the activities of the ENRC were not subject to privilege.

In December 2010, a whistleblower alerted ENRC to alleged bribery and financial wrongdoing in relation to one of the company's subsidiaries. ENRC carried out an investigation into the allegations with the help of its solicitors. In August 2011, the SFO contacted ENRC, and the two corresponded for several months as part of the SFO's self-reporting process. The SFO began a criminal investigation in April 2013.

As part of its investigation, the SFO sought to compel ENRC to produce certain documents. The company refused to disclose four categories of documents on the basis that they were privileged.

The first category of documents was notes taken by ENRC's solicitors from interviews with the company's employees and former employees.

The second category was reports generated by forensic accountants, as part of a "books and records" review.

The third category was documents, including slides, containing factual evidence presented by ENRC's lawyers to the company's Board.

And the fourth category was emails between ENRC executives, one of whom was a Swiss qualified lawyer.

Litigation Privilege

ENRC argued that the Interview Notes, Accountants' Reports and Factual Evidence were subject to litigation privilege, on the basis that their dominant purpose was to enable the company to obtain advice or evidence in connection with anticipated adversarial criminal litigation.

The court rejected this claim. First and foremost, ENRC failed to establish that "it was aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility".

Secondly, a criminal investigation by the SFO is not considered to be adversarial litigation for privilege purposes. Instead, it is a preliminary step which is usually completed before any decision to prosecute is made. In practice this means that a claim to privilege will only be successful where a prosecution is in reasonable contemplation. There must be enough incriminating evidence to anticipate that there is some truth in and material to support the allegations. In this case, there was no evidence that there was anything beyond the unverified allegations themselves.

Civil v Criminal proceedings

The judge also referred to the "critical difference" between civil and criminal proceedings in that civil proceedings can be issued even if they are unfounded but a higher standard of

evidence needs to be met in order to commence criminal proceedings. A criminal prosecution cannot be started unless the prosecutor is satisfied that there is enough evidence for prosecution and that proceedings would be in the public interest.

In this case, there was not enough evidence to show that ENRC believed the risk of criminal proceedings against it was anything other than a possibility.

Lastly, even if a criminal prosecution had been in reasonable contemplation, none of the disputed documents were created for the dominant purpose of being used in that litigation. The main purpose of the documents created during ENRC's internal investigation was to determine if there was any truth to the whistleblower's allegations. It became clear at trial that ENRC had intended to show the majority of its findings to the SFO which was a direct contradiction of its claim for litigation privilege.

Legal Advice Privilege

ENRC also argued that the Interview Notes and Factual Evidence were subject to legal advice privilege. It said that the Interview Notes were the product of lawyers' work and so were by their nature, privileged and that the Communications with the Swiss-qualified executive were privileged because they related to legal advice given by a qualified lawyer.

This was rejected. The judge followed the approach taken in the RBS Rights Issue Litigation that legal advice privilege attaches only to communications between a lawyer and those individuals within a client entity who are authorised to obtain legal advice on that entity's behalf.

The protection afforded to lawyers' working papers is justified only if "they would betray the trend of the legal advice". A note of what a solicitor is told by a prospective witness is not a privileged document, even if the solicitor has interviewed the witness with a view to using the evidence as a basis for advising his client.

The Interview Notes gathered by ENRC's lawyers formed part of the preparatory work of compiling information so that ENRC could seek and obtain legal advice. Although the notes were taken by a lawyer, and thus represented the lawyer's selection of what should be written down, it was not sufficient to "cloak" the selected information with privilege.

The communications with the Swiss-qualified executive were not protected by privilege because the court found the executive had acted as a business person and not as a lawyer.

The only documents over which privilege was maintained by the court were the slides prepared by ENRC's lawyers for the specific purpose of giving legal advice to the company's board. They were part of the confidential solicitor-client continuum of communication and fell within the ambit of the protection of a solicitor's work product.

The High Court has granted ENRC permission to appeal the decision on litigation privilege.

Comment

In a criminal context at least, this decision will make it more difficult for parties to claim privilege over factual enquiries which they have undertaken in order to seek and obtain legal advice where the communications are between a lawyer and anyone other than the true client. Care will need to be taken over such "third party" communications.

Consideration will also need to be given to the purpose of any documents created as part of any factual investigations. They will only be protected by privilege if their dominant purpose relates to the conduct of the litigation.