STEPHENSON HARWOOD

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Disclosure of risk/compliance documents and minutes: involvement of lawyer not enough for privilege

Summary

In *A v B and the FRC* [2020] EWHC 1492[1], a company which believed that internal governance and compliance documents (including a risk register and board minutes) had been created with privilege faced the decision of Mr Justice Trower that they were in fact not privileged. All firms (especially where they are regulated) would do well to check that relevant internal documents they are creating are properly protected by privilege so that they are not subsequently disclosable to a third party. Where, at the time of creation, specific thought is not given to a document's contents and the privilege rules, there is a real risk (as in this case) that it will be found by a Court to be disclosable; and significant damage could be done to the firm's interests as a consequence. We have extensive experience of advising clients regarding privileged and non-privileged workstreams/communications and would be pleased to assist with updating firms' internal systems in this regard.

Background

An audit Firm ("**B**") and one of its partners were subject to an FRC investigation concerning the audit of the 2018 financial statements of a retail business ("**A**"). The FRC issued B with a notice requiring the production of certain documents. In separate proceedings earlier this year, the Court of Appeal overturned[2] the High Court decision and reinstated the generally understood position that the FRC has no power to require the production of privileged documents. A asserted that some of the requested documents were privileged. These comprised a risk register, minutes of board and executive meetings, and a draft of a Chairman's script. The documents had been provided by A to B further to a limited waiver of privilege for audit purposes only. B disagreed with A's privilege assessment regarding six of the documents. Having first determined that the onus was on B (not A) to make an assessment as to whether the documents were privileged[3], the Judge considered the status of the six documents. He concluded that five of the six were not privileged. The part of the judgment concerning the sixth document was redacted.

Privilege

Legal professional privilege is a fundamental right underpinning our legal system. Lord Scott in *Three Rivers (No 5)* referred to it as "*necessary*", linked it to the rule of law itself, and famously said that "*[C]ommunications between clients and lawyers…should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else*"[4] (emphasis added). Privilege, once established, can only be overridden by express statutory wording. Establishing privilege, however, can often be less straightforward than might be expected.

The Judge in *A v B and the FRC* set out the test for a document to be covered by legal advice privilege ("**LAP**")[5].

- LAP attaches to confidential communications between lawyers and their clients for the purpose of giving or obtaining legal advice.

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[1] Anonymisation was ordered at an earlier hearing.
[2] [2020] EWCA Civ 177.

[3] *A v B and the FRC* [2020] EWHC 1491. See our update on the decision: https://www.shlegal.com/news/frc-audit-investigations-and-the-audit-client-s-privilege.
[4] [2004] UKHL 48, para 34.
[5] The Judge did not need to consider litigation privilege (the other main type of legal professional privilege) because it was not claimed that the relevant documents were created for the purpose of actual or contemplated litigation.

- LAP applies to confidential documents such as internal communications within a company which reproduce legal advice for dissemination to those who need it.
- LAP applies to advice on what can or should prudently and sensibly be done in a relevant legal context.
- The person asserting the privilege must show that the sole or dominant purpose was to obtain or to give legal advice.

Documents' status

The Judge considered whether LAP applied to the documents in question.

Risk register

A argued that the risk register, prepared by the General Counsel, was created in a legal context for the dominant purpose of obtaining legal advice; and the legal advice could be inferred from the record of how risks, which were dealt with item by item, were to be resolved by the business. The Judge disagreed and took the view that a document is not privileged merely because it "*takes into account*" legal advice. It was necessary to identify how the document in issue "*communicates or discloses the communication of that advice*". The risk register did not satisfy that requirement.

Minutes of board and executive meetings

These documents, in the Judge's view, were no more than a "*straightforward record*" of what was discussed at the meetings and did not appear to record any legal advice. The "*mere fact*" that a lawyer was "*involved*" in the preparation of minutes of a meeting did not necessarily mean the lawyer's function related to the giving of legal advice. The Judge observed that "*lawyers often fulfil secretarial functions in the context of recording discussions at important meetings, and there is nothing to indicate that the General Counsel in this case was doing any more than that*". The same analysis applied to the mere presence of a lawyer at such meetings; that presence alone was insufficient to demonstrate that any advice was given.

Furthermore, for a document to be privileged it had to be possible to identify from the document "*either directly or by inference*" a statement of the advice or communication said to be privileged. That was not possible in the case of the minutes of the board and executive meetings.

Draft Chairman's script

The particular version of the draft script contained A's lawyer's comments that had been struck out in track changes. Except for the lawyer's comments, which could be easily redacted, there was nothing to indicate on the face of the document that it communicated legal advice. The Judge was satisfied that the script as a whole was not protected by LAP.

Practical considerations

Documents such as risk registers or breaches registers have become an indispensable tool for regulatory compliance. In their nature, they often contain information that relates to significant legal or regulatory matters, and potentially to liability. Similarly, board and executive committee meetings are exactly the type of fora at which significant legal and regulatory issues are likely to be discussed. Minutes of those meetings sometimes record both legal advice and commercial or decision-making discussions. Certain practical steps can mitigate risks of the kind A faced in this case.

- It is generally preferable to avoid creating unnecessary documents about sensitive matters.
- Care should be taken about the creation of documents recording communications where the sole or dominant purpose has not been properly thought through. This risks making it impossible to assert privilege later.
- The rules of privilege must be thoroughly understood and properly applied. Unless a document meets the test for privilege set out by the Judge, the involvement of a lawyer in its creation will be completely irrelevant.
- The requirement for a relevant legal context can cause problems where in-house lawyers have a dual role of providing legal and commercial advice. Discipline is required. All legal work should be carried out through a separate, identifiable workstream, which should be properly evidenced, including with appropriate headings for relevant emails and documents, e.g. "Project XXX: Legally Privileged & Confidential", "Not to be disclosed further", etc.
- In the case of a risk or breaches register, this is not the place for recording or referring to privileged communications. These should be recorded elsewhere, in a freestanding privileged document.
- The drafting of what goes into a risk or breaches register should be purely factual and should

entirely avoid comment or analysis, and certainly anything that relates to legal or liability matters.

- As a general rule, regarding minutes of the kind discussed in this case, only those parts containing legal advice will be privileged. It is far preferable (albeit sometimes difficult to deliver in practice) that the discussion of legal advice is recorded separately from the discussion of commercial matters, i.e. so that the result is a privileged minute and a non-privileged minute.

This important and timely judgment draws attention to categories of documents that are routinely created by firms as part of their regular governance and oversight frameworks. Unless special care is taken in the creation of these types of documents, there is a real risk of disclosure in subsequent litigation or regulatory investigations, potentially with extremely adverse consequences. Important also is ensuring that the communication of any privileged advice to third party advisers is on the basis that privilege is only waived for a limited purpose (i.e. so that regulators and other third parties shall not be entitled to see the advice).

Should you wish to discuss any of the issues that this e-alert raises, please contact the authors.

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