Lawyers, internal investigations and privilege: recent developments

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Expectations as to the extent to which legal professional privilege can be asserted over materials generated during internal investigations conducted by external lawyers have been challenged recently. The ensuing cases are of interest to employment lawyers given the increasing prevalence of such investigations, often as likely to give rise to employment litigation as to commercial disputes with third parties.

Legal professional privilege

The starting point is that where a person is entitled to claim legal professional privilege (LPP) in respect of a document, their right to insist on it remaining confidential for all purposes and not disclosed or used to their prejudice (unless statute provides otherwise) whether in court or out of court, is a 'fundamental human right established in the common law' (*R (Morgan Grenfell & Co Ltd)*.

Legal advice privilege (LAP) is a type of LPP that applies to any confidential communication between client (or client's agent) and lawyer for the sole or dominant purpose of obtaining or giving legal advice, even where no proceedings are contemplated. The privilege is afforded to communications with professional lawyers *(R (Prudential plc))*.

The practical difficulty, as Lord Neuberger has explained ('The scope and role of the Legal Professional Privilege and its proper place in the context of corporate internal investigations') is that while these principles are well-established, they have to be applied 'in a world which has global electronic communications ... criminalisation of bribery and cartelism, detailed regulatory systems, increased investigative powers, ... [and] large and international and complex corporate structures'.

One place where this practical difficulty has proved particularly acute has been the field of internal investigations conducted by external law firms retained by companies in the face of potential regulatory, criminal and civil action.

Identifying the client

In a corporate context, many lawyers may consider that their client is, simply, the corporate legal entity itself. However, the officers, agents and employees of that entity are those practically responsible for the management of its day-to-day affairs. In *Three Rivers,* it was established that legal advice privilege does not extend to embrace communications passing between any real person within the corporate entity and the lawyer. So the question of which communications with which individuals within the corporate entity will be the subject of legal advice privilege will be a fact-sensitive question.

Internal investigations and LAP

In *RBS Rights Issue,* the claimants sought disclosure and inspection of transcripts, notes or other records of interviews conducted by or on behalf of RBS (i) with employees and ex-employees as part of 'Project Mortar', which was the name given by RBS to the investigation it undertook as part of RBS's response to two US Securities and Exchange Commission subpoenas relating (broadly) to RBS's sub-prime exposures; and (ii) during the course of an investigation into potential whistleblowing.

The bank asserted LAP on the basis that the notes, in respect of the whistleblowing investigation, were prepared by its in-house lawyers after the interviews had been conducted by an external lawyer and, as regards Project Mortar, by external lawyers or by agents (including the RBS Group Secretariat) on behalf of those lawyers.

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The RBS argument rested on asserting that each of the interviewees, including former employees, were communicating with the lawyers as persons authorised by RBS to give instructions to the lawyers, although these were not communications through which advice was either sought or given.

Hildyard J rejected that argument on the basis that *Three Rivers* established that the fact an employee may be authorised to communicate with the corporation's lawyer does not constitute that employee the client or a recognised emanation of the client (para 64). Nor, on the facts, were the employees interviewed 'the client': they were merely providers of information. Instead, only those employees authorised to receive the ensuing advice fell within the umbrella of LAP.

The challenge of drawing the ensuing dividing line emerged clearly in the *Property Alliance Group* litigation. In that case, the issue focused on interviews conducted into potential LIBOR-fixing by an executive steering group (ESG) for whom external lawyers had acted as the secretariat and lead investigators. Birss J ordered that a series of ESG documents be inspected by the court to see if the claim to LAP was made out because he was unconvinced that the bank had made out that claim. Upon the inspection being carried out by Snowden J, however, the latter took a significantly broader view of the scope of LAP.

In doing so he relied on *Balabel* for the proposition that: 'Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.'

Applying that approach, all the ESG's documents including interview notes were part of a continuum of communication that sought to ensure that legal advice could be sought and given as required. Further, it was as a matter of policy important that external lawyers retained to undertake investigations could give candid advice without fear of that advice, or factual briefings preceding it, being disclosed (*Property Alliance Group*).

Litigation privilege

Documentation will enjoy litigation privilege if the sole or dominant purpose of its preparation is litigation in progress or reasonably in contemplation, as long as that litigation is adversarial rather than investigative or inquisitorial (*Three Rivers*).

In *ENRC*, the SFO applied for disclosure of materials produced in the course of an internal investigation into allegations of overseas corruption. That application succeeded. In her judgment Andrews J took a narrow view of the scope of LIP. In particular, she:

- rejected the submission that litigation privilege extended to third-party documents created in order to obtain legal advice as to how best to *avoid* contemplated litigation (even if that entails seeking to settle the dispute before proceedings are issued);
- agreed with the narrow approach to defining the "client" taken in the *RBS Rights Issue* litigation, and indicated her tentative support for the view that only individuals singly or together constituting part of the directing mind and will of the corporation can be treated for the purposes of legal advice privilege as being, or being a qualifying emanation of, the 'client';
- held that the protection afforded to lawyers' working papers is justified if, and only if, disclosure would betray the tenor of the legal advice. A *verbatim* note of what the solicitor was told by a prospective witness was not, without more, a privileged document just because the solicitor has interviewed the witness with a view to using the information that the witness provides as a basis for advising his client. A client cannot obtain the protection of legal advice privilege over interview notes that would not be privileged if they interviewed the witness themselves, or got a third party to do so, simply because they procured their lawyer to interview the witness instead.

In addressing, for the first time, the issue of privilege in internal investigatory materials as against the SFO, Andrews J made the crucial finding that the fact there was a likelihood of SFO investigation did not mean that 'litigation' was reasonably in contemplation. The judge concluded that the SFO investigation was a preliminary step taken, and generally completed, before any decision to prosecute was

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taken in accordance with its then published guidance after consideration of the results of the investigation. Accordingly, it could not be considered that at that stage there was adversarial litigation or that this was a real likelihood.

Conduct of litigation not avoiding litigation

Andrews J also found that ENRC failed to establish the dominant purpose requirement as the disputed documents were not created for the dominant purpose of deployment in, or obtaining legal advice relating to the conduct of, such anticipated criminal proceedings. Documents created with the specific purpose or intention of showing them to the potential adversary in litigation should not be subject to litigation privilege. It did not matter whether the reason why they were going to be shown to the adversary was to persuade them to settle or to persuade them not to bring proceedings in the first place.

Conclusion

The conduct of internal investigations will remain a significant area of work for lawyers but in view of these decisions close attention needs to be paid to the scope of privilege and how, if it is to be asserted, a challenge can be resisted.

The cases prompt the wider reflection that there is a tension between the approach to privilege taken by Snowden J in the *Property Alliance Group* litigation and that taken in the *ENRC* case and the *RBS Rights Issue* litigation. The *ENRC* decision has been appealed to the Court of Appeal and that will provide the opportunity for reconsideration of the authorities. It may well be that the criticisms made in other jurisdictions (notably Singapore) of the law of privilege propounded by *Three Rivers* have increased force now that it is clear that that law will turn on fine distinctions far from evident to practitioners.

Nevertheless, at least pending the appeal of the *ENRC* decision, practitioners will need to be particularly attentive to privilege issues from the outset of investigations.

In both the *ENRC* case and the *RBS Rights Issue* litigation, the evidence put before the court was seen as lacking the degree of particularity to justify the claim of privilege. In the *Property Alliance Group* case, difficulties emerged before Birss J as to inconsistent and general accounts of the basis of privilege. The cases now provide plenty of lines of argument for counterparties seeking to put companies to the trouble of justifying claims to privilege in granular detail.

Practically it may follow that painstaking work will need to be done justifying each category of claim to privilege. That work is much more easily done if privilege questions have been addressed at the commencement of the investigation. Likewise, clients will need to be aware that investigations cannot be conducted on the basis that privilege will definitely be maintained. Practically then, a few thoughts:

- in an internal investigation for a client, at an early stage of instruction, identify who the internal client is for the purpose of any legal advice that may be given as a result. Reflect on what is truly privileged and advise the client of those limits;
- for those attacking privilege, try to identify the limits of the group of those properly regarded as the internal client and seek specific disclosure for those on the edges of that group;
- other than in respect of communications advising that internal client group and notes interwoven with the advice for that group, assume that all other materials and notes in the investigation are disclosable, unless a credible case can be maintained for litigation privilege;
- for those attacking assertions of privilege, do not accept the bald assertion of privilege as conclusive, press for explanations and reasons.

KEY:

R (Morgan Grenfell & Co Ltd)	*R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563
R (Prudential plc)	*R (Prudential plc) v Special Commissioners* [2013] 2 AC 185
Three Rivers	*Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556
RBS Rights Issue	*RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch)
Property Alliance Group	*Property Alliance Group Ltd v Royal Bank of Scotland Plc* [2015] EWHC 321 (Ch); [2016] 1 WLR 992
Balabel	*Balabel v Air India* [1988] Ch 317
ENRC	*Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (QB)