

Legal advice privilege: a search for clarity?

Jan-Jaap Baer & Mark Hall review recent developments in the law of privilege

IN BRIEF

- ▶ The current restrictive approach to privilege poses real challenges to lawyers when seeking to investigate issues raised by corporate clients without creating documents that will be subsequently disclosable to regulators or litigants.
- ▶ Increasing difficulties in claiming privilege may make it harder to persuade employees to fully co-operate in investigations.

Since 2004 the leading authority on legal advice privilege has been the much criticised Court of Appeal decision in *Three Rivers (No 5)* [2003] EWCA Civ 474, [2003] QB 1556, which gave a restrictive interpretation as to who is the ‘client’ in the corporate context. Several recent court decisions have confirmed this narrow approach and may suggest a trend towards yet further erosion in the ability to claim both legal advice and litigation privilege.

In *Astex Therapeutics Limited v AstraZeneca AB* [2016] EWHC 2759 (Ch) Chief Master Marsh applied *Three Rivers (No 5)* to hold that notes of interviews with employees created during an internal review which pre-dated litigation were not covered by legal advice privilege. Chief Master Marsh said he was bound to follow *Three Rivers (No 5)* and concluded that where there is no dispute, seeking information from employees (and former employees) as part of a review is unlikely, in most circumstances, to be protected by legal advice privilege. Privilege does not apply if the lawyers are obtaining information from persons who are, for these purposes, third parties because they are not the ‘client’.

This narrow approach was confirmed by the decision of Hildyard J in *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch). This case concerned a claim to legal advice privilege and lawyers’

working papers privilege over the notes of some 124 interviews conducted by RBS’s external and in-house lawyers with RBS employees and ex-employees as part of RBS’s investigations into its sub-prime exposures in connection with its response to two Securities and Exchange Commission (SEC) subpoenas and in relation to allegations made by a former employee.

The basis of RBS’s claim to legal advice privilege was that each of the interview notes recorded a communication between a lawyer and a person authorised by RBS to give instructions to its lawyers and that, as such, those communications were privileged on the basis that the communication should be treated as if the individual were part or an emanation of the client.

Mr Justice Hildyard rejected RBS’s claim to privilege. He found that *Three Rivers (No 5)* was not confined to its own facts but was based on principles of general application that were binding as a matter of English law. The judge concluded that the client for the purposes of legal advice privilege consists only of persons authorised to seek and receive legal advice from the lawyer. So legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer. However, Hildyard J went even

further by suggesting that in a corporate context the ‘client’ may often only comprise the individuals constituting part of the directing mind and will of the corporation.

The judge also rejected a separate submission by RBS that the interview notes were privileged lawyers’ working papers on the basis that the evidence did not substantiate a claim that they had some attribute or addition such as to betray the tenor of advice given to the client by its lawyer.

Investigations & litigation privilege

In *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2017] EWHC 1017 (the ENRC case) the Serious Fraud Office (SFO) sought to compel production of various documents generated during investigations undertaken between 2011 and 2013 by solicitors and forensic accountants into the activities of ENRC. Investigations were initially prompted by allegations of bribery and corruption by a whistleblower. Dialogue between ENRC and the SFO began in 2011 as part of a self-reporting process and the SFO began a criminal investigation in April 2013. The documents sought by the SFO included some 184 notes of interviews carried out by Dechert with employees of ENRC, their suppliers and other third parties and reports generated as part of ‘books and

records' reviews carried out by forensic accountants.

A claim to legal advice privilege failed. Andrews J concluded that on the current state of the law the decision in the *RBS Rights Issue Litigation* case was 'plainly right' and there was no justification for departing from it. The judge said she expressed no view on Hildyard J's suggestion that the 'client' may be restricted to those individuals comprising the directing mind of the corporation. The judge also rejected a claim to lawyers' work product privilege applying the same test as Hildyard J.

A claim to litigation privilege also failed. Litigation privilege can extend to communications with third parties, not just the client. However, such communications must be for the sole or dominant purpose of obtaining legal advice about, or evidence or information for pending, reasonably contemplated or existing litigation. The litigation in question must be adversarial not investigative or inquisitorial. The judge noted that the case was the first in which the court had been asked to consider a claim for litigation privilege where the litigation in question was criminal rather than civil.

Andrews J held that a criminal investigation by the SFO was not adversarial litigation. Rather, an SFO investigation was a preliminary step taken, and generally completed, before any decision to prosecute was taken.

The judge stated that just because there was a real risk of investigation it did not necessarily follow that prosecution was likely thereafter—this is likely only to be the case once it was discovered that there was some truth to the allegations or at least some material to support them. The judge noted that there is a higher threshold for the commencement of criminal proceedings than for civil ones as they cannot be started unless the prosecutor is satisfied that there is sufficient evidence and the public interest test is met. By contrast a person may have reasonable grounds to anticipate civil litigation even if in fact there is no properly arguable case. On the facts the judge found no evidence that ENRC thought there was a real likelihood of criminal proceedings.

The judge also found that none of the documents in question satisfied the dominant purpose test. The information was not being gathered to form part of a defence brief. Rather, the primary purpose of the investigation was to find out if there was any truth in the whistleblower's allegations, and then

decide what to do about it if there was.

Andrews J also held that documents created for the purposes of seeking to persuade the SFO to go down the route of civil settlement instead of prosecution (ie the avoidance rather than the conduct of contemplated adversarial litigation) did not satisfy the test for litigation privilege. The judge also found that ENRC intended the documents to be shared with the SFO and so failed the dominant purpose test on that basis.

“Increasing difficulties in claiming privilege may make it harder to persuade employees to fully co-operate in investigations”

Comment

The restrictive approach to privilege confirmed by these recent decisions will continue to pose real challenges to lawyers when seeking to investigate issues raised by corporate clients without creating documents that will be subsequently disclosable to regulators or litigants. Challenges to claims to privilege are likely to increase.

As Andrews J stated in the ENRC case, legal professional privilege 'is a fundamental human right guaranteed by the common law, and a principle which is central to the administration of justice'. However, the circumstances in which that right can be exercised appear to be narrowing. There are important policy issues at stake as to whether the Court of Appeal's interpretation of a privilege doctrine developed in the 19th century, as applied in recent cases, remains fit for purpose in the modern corporate and regulatory context.

Where should the line be drawn between openness (both with regulators and in litigation) and the ability to investigate potentially sensitive issues and seek advice on the implications for the business? A fundamental rationale for legal privilege is to enable full and open communication between a client and its lawyer so the proper professional advice can be given. Companies will have duties to get to the bottom of issues affecting the business but equally will want to avoid

creating new documents that could be used against them in any proceedings.

Increasing difficulties in claiming privilege may make it harder to persuade employees to fully co-operate in investigations. It is difficult to see how this is in the interests of businesses or regulators. There is also the possibility of different conclusions on privilege depending on who is the regulator or investigating body in question and the scope of its powers, which could be said to be a somewhat arbitrary basis for determining the application of a fundamental right.

The suggestion in ENRC that documents created to avoid (rather than settle) litigation do not satisfy the dominant purpose test may seem odd to many litigators who are frequently engaged early on in the pre-action process for the very purpose of minimising the potential for litigation. It may also lead to some arbitrary decisions in practice.

Finally, Hildyard J's comments on the 'directing mind and will' are likely to be tested in further cases, creating yet more uncertainty over when privilege can be claimed.

In these recent cases the judges noted the criticisms of the legal principles set out *Three Rivers (No 5)* but said that if there is to be any change of approach under English law this will be a matter for the Supreme Court or Parliament. RBS was given permission for a 'leapfrog' appeal to the Supreme Court but the appeal was subsequently withdrawn. However, ENCR has recently been given permission to appeal to the Court of Appeal and the Law Society has sought permission to intervene so we may be a step closer to a review of the present law. **NLJ**

Legal advice privilege: who is the client?

► Legal advice privilege applies to confidential communications passing between a client and the client's lawyer which have come into existence for the purpose of giving or receiving legal advice or assistance in a relevant legal context.

► In *Three Rivers (No 5)* the Court of Appeal held that, in the corporate context, only communications between the lawyers and the small group of employees charged with the role of seeking and receiving legal advice on behalf of the entity were covered, rather than communications between the lawyers and employees of the entity generally.

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