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Whose privilege?

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Joint interest privilege

Joint interest privilege may arise where two or more parties jointly retain the same lawyer or where, although there is no joint retainer, the parties have a joint interest in the legal advice at the time that it comes into existence.

In a recent case the High Court has ruled that the FSA acted unlawfully in using material that was protected by legal professional privilege in an investigation into the executives of Keydata Investment Services Limited (*The Queen on the application of Stewart Ford v the Financial Services Authority* [2011] EWHC 2583 (Admin)). The judgment contains a helpful discussion of the circumstances in which individual officers or employees of a company may share the privilege attaching to advice given to the company by its lawyers.

The High Court's decision

The case concerned executives of Keydata Investment Services Limited ("Keydata"), a company under investigation by the FSA. In December 2007, Keydata engaged external lawyers to advise it on the investigation. The FSA later opened investigations into certain individual executives of Keydata. Keydata subsequently went into administration. During the course of the FSA's investigation into Keydata, the administrators agreed to waive legal privilege over particular emails from Keydata's lawyers.

The application for judicial review concerned the FSA's reliance on emails from Keydata's external lawyers in its investigation into the executives. Certain of these emails contained advice from accountants, as opposed to advice from the company's lawyers. It is no surprise, given recent case law, that the Judge dismissed any suggestion that legal advice privilege attached to the accountants' communications (**click here** to view our update on the scope of legal professional privilege). The case, therefore, concerned only two key emails from the company's lawyers. The case for the executives was that they shared with Keydata joint interest privilege in the emails and that the administrators could not waive that privilege on their behalf. They argued that the FSA should not, therefore, have relied upon the emails in its investigation into the executives.

In order to establish the protection of joint privilege, it was necessary for the executives to show that Keydata's lawyers were, in addition to advising the company, advising them in their personal capacities. The Judge outlined the facts which need to be proved by an individual if joint privilege with others is claimed in cases where there is no formal joint retainer. An individual must prove that:

- he communicated with the lawyer for the purpose of seeking advice in an individual capacity;
- he made clear to the lawyer that he was seeking legal advice in an individual capacity, rather than only as a representative of a corporate body;
- those with whom the joint privilege was claimed knew or ought to have appreciated the legal position;
- the lawyer knew or ought to have appreciated that he was communicating with the individual in that individual capacity; and
- the communication with the lawyer was confidential.

On the facts of the case the executives were able to show that, at the time the emails were sent, it was understood that they were being advised in their personal capacities and that they therefore enjoyed joint legal advice privilege with Keydata. The Judge found that the FSA should not, therefore, have relied on the material in the emails without the executives first waiving their right to privilege.

The draft order provides that the FSA may not rely on the content of the emails in the regulatory proceedings against the executives or the company. The further consequences as to the use and/or retention of the documents will be dealt with at a separate remedies hearing. It is not yet known whether the FSA will appeal.

Important practical lessons

- The Judge made clear that, as a matter of best practice, the retainer letter should clearly set out whether advice is being given to a corporate body alone or also to a number of identifiable directors or employees and that, if the position evolves after the initial engagement, any change should be recorded. In any such case the retainer letter also needs to note that if a conflict, or a significant risk of a conflict, arises between the company's and the individuals' interests the lawyers will not be able to continue acting for the individuals and separate representation will be needed. Although the case related to an FSA investigation, this point is of general application and applies whenever a lawyer is retained. If the retainer letter is not clearly drafted, it may still be possible for joint privilege to be claimed, but there may be more difficulties in establishing the claim.

- The Judge recognised that questions about joint privilege are likely to arise in connection with relatively tightly controlled companies where the directors and the company are in reality one and the same. However even in such a case directors should not assume that they will necessarily control, or even be aware of, the company's actions going forward (as occurred in this case, when the company went into administration) and, as indicated above, it is important that the position should be clearly documented at the outset.

- The FSA cannot compel the production of privileged material. However it is not uncommon for the FSA to ask parties to waive their right to assert legal privilege in documents which are the subject of an FSA information request. In this case, the Judge stressed the importance of the protection afforded by privilege. It is an absolute right which exists to ensure the fair administration of justice and cannot be overridden by some supposedly greater public interest. Only the party entitled to the privilege may waive it. Careful consideration should therefore be given to any request to waive privilege.

  As the FSA recognises in its Enforcement Guide, it may be possible for parties to provide it with privileged materials on the basis of a limited waiver only. However, the FSA will not accept a limited waiver if to do so would restrict the FSA from carrying out its statutory functions. It is also important to appreciate that regulators in other jurisdictions, to whom documents may be disclosed by the FSA through the regulatory gateways, may not recognise limited waivers of privilege.

- It is apparent from references in the judgment that the FSA's procedure for ensuring that its investigators did not see privileged materials contained within emails (before privilege was waived) involved IT specialists conducting keyword searches designed to identify any potentially privileged email communications. It is always prudent to ensure that documents and emails to which it is intended privilege should attach are clearly labelled as such so that they will be readily identifiable as privileged (or potentially privileged) by keyword searches. It is also notable that the Judge indicated that the FSA may wish to consider the procedures adopted by the SFO and the Police for dealing with privileged materials to ensure that any potential dispute about privilege is resolved before the material is reviewed by investigators and relied upon in the course of regulatory activity.

- The Judge declined to adopt the test for joint privilege used in US jurisprudence. Companies and individuals facing regulatory investigations or legal proceedings in the UK and the US should therefore be aware that the tests for joint privilege will be different.

- The case is also a timely reminder that FSA enforcement can involve long delays interspersed with periods of intense pressure. The FSA served a Supplementary Investigation Report two years after the executives were notified that they were the subject of a formal investigation and three months later than the date originally indicated. The Judge noted that it was served (together with a bundle comprised of some 5,000 pages) at a time when, as the FSA knew, the executives' lawyer was away, with a deadline for a full response within 28 days. Despite this, the FSA refused a request for an extension of time, on the basis that a date had already been fixed for the RDC meeting to consider the report and the executives' responses with a view to deciding whether formal warning notices should be served on them.

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