

Does legal advice privilege always extend to the "Client"?

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The protection of legal advice provided by a lawyer to their client is critical for a number of obvious reasons. Usually the advice given will fall within the domain of legal advice privilege. However, this form of privilege is not automatic, and is dependent upon the substance of the communication and who, in reality, constitutes the client.

Understandably, there is often confusion about the various forms of privilege which may, or more importantly, may not, attach to certain documents. Of particular importance to corporate entities is the position in respect of notes prepared by a lawyer from a consultation or interview with employees of the client. The English High Court recently grappled with the issue in *The RBS Rights Issue Litigation*^[1], applying a narrow interpretation to "client". Though not binding on the Royal Court of Guernsey, English decisions can be persuasive. Mathew Newman, Head of Guernsey's dispute resolution team, examines the judgment^[2].

Background

RBS (the "**Bank**") authorised their employees to participate in interviews with the Bank's legal advisors. The employees were informed that the notes (the "**Interview Notes**") taken by the legal advisors would be kept confidential and subject to "attorney- client" privilege.

In response to the application for the disclosure of the Interview Notes, lawyers acting on behalf of the Bank claimed legal advice privilege and "lawyers' working papers privilege" in respect of the transcripts, notes and records of interviews that had been held with employees of the Bank, but no claim was advanced regarding litigation privilege.

The purpose of the Interview Notes was not to create transcripts of the interviews held with the employees but rather to assist in providing legal advice to the ultimate client, the Bank. It was noted that the Interview Notes were not verbatim recitals of the interviews, but evidence of the "mental impressions" of the respective lawyers conducting the interviews with a view to advising the Bank.

The main thrust of the Bank's argument in relation to legal advice privilege was that the Interview Notes reflected a communication between an individual authorised by the Bank to provide instructions to its lawyers and as such those communications should be privileged. The Bank did not assert that the Interview Notes were a communication between the Bank and its lawyers in which advice was sought or given or that the Interview Notes were the product of legal advice. The Bank submitted that any communication between an authorised employee and their lawyer is privileged and that it is not a part of the test of privilege that the communication should consist of instructions rather than information.

In summary, the opposing submission was that legal advice privilege does not cover the communication of factual information between an employee of the client and a legal adviser. It only covers communication between a client and a lawyer for the purposes of seeking or receiving legal advice. Therefore, the mere gathering of information by a person who is not the client, is not protected by privilege, despite being authorised and instructed to do so at the request of the employer/client.

Decision

The Court rejected the claim to privilege over the Interview Notes on all grounds that were advanced and followed the (much criticised) decision of *Three Rivers No 5 [2003] EWCA Civ 474*; that in a corporate context, information gathered from an employee is no different from information obtained from a third party. That is, despite the information which was collected enabling the lawyers to advise the corporate entity.

The Court held that "*the communication must be to or from a person who on behalf of the corporation is authorised to seek and receive legal advice, and the communication must be for the purposes or in the course of that person giving or receiving legal advice*". This communication was to be distinguished from preparatory work which amounted to the compiling of information which was conducted by persons who do not have authority to seek or receive legal advice.

The Court accepted that the Interview Notes were a record of direct communications from the employees to the Bank's legal advisors and that as a consequence, the Interview Notes enabled the Bank to seek and receive legal advice. However the Court followed *Three Rivers (No 5)* where it was held that "*information from an employee stands in the same position as information from an independent agent*". More importantly, the employees that were interviewed were only providers of information and as the employee was not the client, it followed that the Interview Notes were not communications between a client and a legal adviser.

Comment

The important point to take away from this decision is that only communications with an individual capable, in law, of seeking and receiving legal advice as a duly authorised organ of a

corporate entity will be afforded the protection of legal advice privilege. Accordingly, corporate entities should take legal advice before employees are due to communicate with their lawyers to ensure that the corporate entity is protected as far as possible. We understand that this judgment may be appealed and it will be important to follow this developing area of jurisprudence.

[1] [2016] EWHC 3161 (Ch)

[2] At this point, it is useful to reflect on the differences between legal advice privilege and litigation privilege. Broadly speaking, litigation privilege protects the assembly and content of evidence for the purpose of litigation and thus focuses on the purposes for which the documentation has been obtained/assembled. Legal advice privilege applies only to the confidential communication between a party and his legal advisers for the purpose of enabling that party to obtain informed and professional legal advice, and is confined to confidential communications within that relationship for the purpose of its fulfilment (*Anderson v Bank of British Columbia* (1876) 2 Ch D 644)

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