

# Who is the Client for the Purposes of Legal Advice Privilege?

## English High Court Confirms Narrow Scope of Legal Advice Privilege

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### UK Legal Advice Privilege – A Primer

- British law provides two types of privilege:
  1. Legal advice privilege
  2. Litigation privilege
- Where litigation is not being contemplated, there can be no claim to litigation privilege.
- Legal advice privilege covers communications between lawyers and their clients for the purpose of obtaining or giving legal advice.
  - Excludes communications with third parties.
- As with US privilege, the rationale for legal advice privilege is that clients must be able to share information fully with their lawyers without the fear that it will subsequently become discoverable or otherwise disclosed.

### Application of US or UK Privilege Law to Investigations with Multinational Reach?

- *Three Rivers (No. 5)* refused to allow application of US privilege law—which would arguably have protected documents from disclosure.
  - English Courts will apply English law to issues of privilege, regardless of connections that the matter has to other jurisdictions.
- Where cases have a US aspect, firms should continue to give their standard form Upjohn warning to employees at the outset of an investigation interview, even though the ability to assert privilege may come under challenge in the future.



## Background on RBS Rights Issue Litigation

- Decision arose as part of a long-running shareholder litigation where shareholders sought to recover investment losses on the grounds that the prospectus for a 2008 issue of shares was not accurate or complete.<sup>1</sup>
- Claimants sought disclosure and inspection of numerous documents, including records of interviews conducted by or on behalf of RBS with employees and ex-employees as part of the Bank's investigations.
- Bank claimed interview documents were protected by the UK's "Legal Advice Privilege" or alternatively were privileged "working papers."
- Bank's secondary argument was that US law, which provides a wider scope of privilege, should apply because the documents were created as a result of subpoenas issued by the US Securities and Exchange Commission.

## UK Applicable Precedent

- *Three Rivers (No. 5)*<sup>2</sup>
- Court of Appeals—whose decisions are binding on all courts except the British Supreme Court—created a narrow definition of "client" for the purposes of the legal advice privilege.
- "Client" means only those persons authorized to seek and receive legal advice on behalf of the company.
  - Does NOT extend to include all employees, no matter how senior they might be.
  - Client group only includes employees who are part of the "directing mind and will" of the corporate client.
- *Three Rivers (No. 5)* has been heavily criticized for too narrowly limiting the privilege, but the UK Supreme Court has not yet addressed its holding.

## RBS Rights Issue Decision

- Court applied *Three Rivers (No. 5)* and held that the records were not covered by legal advice privilege.
- Critical to the decision was the narrow definition of "client" to exclude most employees.
- The "client" does not include an employee who is authorized to communicate with lawyers (internal or external) in connection with an investigation or other matter and to provide company information to those lawyers.
- Notes of interviews with company employees were therefore not "communications between client and legal adviser" and thus were not privileged.

## US vs. UK Privilege

- US courts generally consider communications between company counsel and an employee to be within the scope of the company's attorney-client privilege.
- US has a broader definition for whom an attorney can communicate with and maintain the privilege where the client is a corporate entity.
- Limiting criteria—whether the...
  - Communications were made by employees at the direction of superior officers of the company for the purpose of obtaining legal advice;
  - Communications contained information necessary for counsel to render legal advice, which was not otherwise available from "control group" management;
  - Matters communicated were within the scope of the employee's corporate duties;
  - Employee knew that the communications were for the purpose of the company obtaining legal advice; and
  - Communications were ordered to be kept confidential by the employee's superiors, including that the communications were considered confidential at the time and were kept confidential subsequent to the interview.

## Implications of RBS Rights Issue

- Creates a problem for investigations and fact finding exercises which are "preparatory to and for the purpose of enabling [the company] ... to seek and receive legal advice."
- The legal advice given that stems from the investigation will continue to be privileged, but the preparatory steps will not be protected from disclosure.
- Watch this space for future litigation . . .

<sup>1</sup> *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch)

<sup>2</sup> *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2003] QB 1556

## Learning Points

- This decision does not change the law—it merely restates the principles in *Three Rivers (No. 5)*.
- The decision does, however, confirm the treatment by the courts of pre-litigation interview notes, with regard to legal advice privilege.
- Notes or records of interviews with employees who were not people who could authorize or receive advice were not covered by legal advice privilege.
- In-house counsel are more likely to be construed as the client, but there are no guarantees.
- There is no quick fix to ensure that legal advice privilege applies. Nevertheless, the integrity of the investigations conducted, and their records, must not be undermined in order to artificially try to attract privilege.

## Recommendations for Investigations

- We do not advise that clients or investigation teams adopt a wholesale change in their approach to investigations, which may lead to incomplete or partial records being created.
- Lawyers attempting to work legal advice into interview notes should not try to cloak them in legal advice privilege—it leads to confusing interview records and runs the risk of creating a more damaging document which may still have to be disclosed in due course.
- It probably makes sense to continue to use lawyers (in-house or external) even in UK investigations to create interview notes in any event, to ensure that the notes are recorded by professionals who understand the consequences of how they record an interview.
- Interview notes may still be privileged if litigation is being contemplated—the availability of litigation privilege may therefore become more widespread as the scope for corporate criminal liability expands.
  - Where a potential corporate criminal or economic crime issue is to be investigated, be sure to note the purpose of the investigation in your scoping documents to give the best chance of cloaking investigation or interview notes with litigation privilege.
  - This case fell in the unprotected middle ground because litigation privilege was not available, and the interviewees were not clients.

## What happens next?

If you would like additional information, including more specific experience, or need advice on related matters, please contact any of the members of our practice leadership team below.

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