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Client Alert
Commentary

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UK Decision Highlights Potential Privilege Problems in Cross-Border Investigations

7 steps companies can take to maximize privilege protections under US and English law.

Key Points:

- In a recent case, an English court stated that privilege did not apply to notes of employee interviews, including notes of interviews conducted in the US in response to subpoenas from a US regulator.
- As a result, companies conducting internal investigations with a connection to the UK or faced with possible follow-on civil litigation in an English court should consider how English law could affect the applicability of the privilege to protect interview notes and other information.
- Companies can take practical steps to maintain privilege protection despite the potential differences under US and English law.

Introduction

A recent English High Court decision suggests that English law may take a narrow view of the applicability of legal privilege to notes of interviews conducted in both the US and Europe. This decision contrasts with US law, which generally gives strong protection to assertions of the privilege in the context of internal investigations.

The English case, *The RBS Rights Issue Litigation*,[1] was decided in December 2016. If followed, the case suggests a transatlantic divide on the applicability of legal privilege that would present a practical challenge as investigations — and subsequent civil litigation — become increasingly global in scope. This *Client Alert* analyzes the implications of the English court's decision, and suggests possible steps that companies should consider to mitigate the effects of the decision.

The *RBS* Decision[2]

The *RBS* case concerned a civil shareholder class action against Royal Bank of Scotland (RBS), in which the claimants attempted to obtain witness interview notes from two internal investigations. One of the internal investigations was conducted in response to subpoenas issued by a US regulator, the Securities and Exchange Commission (SEC). RBS asserted that the notes of employee interviews that were conducted in the US and Europe were subject to legal advice privilege, for three reasons.

First, RBS asserted privilege on the basis that it had authorized the interviewees to communicate with its external lawyers so it could obtain legal advice. The High Court disagreed, following the English Court of

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Appeal judgment in *Three Rivers (No. 5)*,[3] which adopted a restricted definition of the individuals within a corporation capable of requesting and receiving legal advice so as to constitute "the client." Following *Three Rivers* as precedent despite the trenchant criticism that the decision has received,[4] the High Court held that interviewees could not constitute "clients" because what they said was "preparatory to and for the purpose of enabling RBS, through its directors or other persons authorised to do so on its behalf, to seek and receive legal advice," and that "information from an employee stands in the same position as information from an independent agent."[5]

Second, RBS contended that the interview notes composed by in-house and external lawyers were subject to legal advice privilege as lawyers' working papers, because the notes had "some attribute or addition such as to betray or at least give a clue as to the trend of advice being given to the client by its lawyer."[6] The High Court accepted that all interview memoranda that go beyond a bare transcript contain some measure of lawyer thought processes, but held that "there is a real difference between reflecting 'a train of inquiry' and reflecting or giving a clue as to the trend of legal advice,"[7] and found that RBS's evidence failed to demonstrate this requirement. The High Court noted assertions in the documents themselves that they contained "mental impressions" — a practice routine in the US — but also found such assertions insufficient, by themselves, to prove that the documents attracted privilege.

Third, RBS asserted that US law should apply to the privilege question on the basis that a law firm based in the US had been retained to conduct one of the internal investigations in question in response to SEC subpoenas. The court also rejected this assertion. Instead, the court held that the law of the forum applied to issues of privilege, reflecting "a public policy decision as to how justice is best served between the parties."[8] As such, parties embarking on investigations or engaged in disputes with connections to the UK should consider how English law might apply to their documents.

Comparisons to US law

The *RBS* decision appears to reflect divergent views of privilege on either side of the Atlantic. One major distinction is the broad definition afforded under US law for who constitutes "the client" in the corporate context. Since the US Supreme Court's decision in *Upjohn Co. v. United States,*[9] any corporate employee can be "the client" of either in-house or external counsel when assessing claims of privilege.

In *Upjohn,* the US Supreme Court discarded the "control group" test for determining who within the corporation was the client of the corporation's lawyers. Under this test, only those employees "responsible for directing [the company's actions] in response to legal advice" would be considered clients,[10] and as the English court noted in the *RBS* decision, this control group test was "probably analogous" to the definition of the corporate "client" under English law.[11]

One important consequence of this broad interpretation of who constitutes "the client" under US law is that privilege disputes in the US tend to arise over whether *the purpose* of the communication is to secure legal advice. Whether interview memoranda are prepared for such a purpose was recently the subject of a high-profile case in federal court in Washington D.C. In that case, *US, ex rel. Barko v. Halliburton*, a district court curtailed the scope of privilege protections by holding that, because the interviews were conducted pursuant to a regulatory obligation and internal corporate policies, they were not prepared "but for" the provision of legal advice.[12]

On appeal, however, the US Court of Appeals for the D.C. Circuit rejected the formalistic view of the trial court and ruled that the materials at issue were privileged because "one of the significant purposes of the [Company's] internal investigations was to obtain or provide legal advice."[13] Importantly too, the appeal court held that interview memoranda are privileged if one purpose of acquiring the information is to obtain

legal advice. As this decision demonstrates, then, the US legal regime is more favorable to claims of privilege in the context of internal investigations.

Practical Suggestions for Maintaining Privilege

Despite the divergent views on privilege between the US and UK legal regimes, counsel can take several steps to maximize the protections available to internal investigations:

- **Consider which individuals constitute "the client."** This determination can be vital in asserting privilege (where appropriate) as a matter of English law. Keep the issue under review throughout the investigation, and maintain contemporaneous records on which individuals constitute "the client.". Ensure that these individuals are a conduit for discussions relating to the investigation.

- **Assert litigation privilege when a narrow view of a "client" might apply.** In many cases, even where a narrow view applies of who constitutes "the client," companies can still protect documents, provided that they were prepared for the dominant purpose of litigation reasonably in contemplation. RBS did not assert litigation privilege, and whether there was a basis for litigation privilege is unclear. In many cases, however, there will be a basis. If so, companies must ensure that the issue is considered objectively, and the conclusion and reasons documented to fend off any subsequent challenge.

- **Think critically about where the investigation may lead.** Investigations can change over time. Given the different approaches to privilege in the US and UK (and civil law countries, many of which do not recognize privilege for in-house counsel), companies should consider the courts where claims of privilege may later be tested. First, if there is any possibility of regulatory action or civil litigation in another jurisdiction, seek counsel at the outset of the matter to tailor the investigation appropriately. Second, resist the temptation to think that because the investigation is being conducted in response to a regulatory request in one jurisdiction, that jurisdiction's law will necessarily govern future privilege disputes. The *RBS* decision illustrates this well: even though RBS was responding to SEC subpoenas and conducted certain interviews in the US, the High Court held that privilege was a matter of English law, given that the forum of the civil proceeding was London.

- **Ensure lawyer participation during fact-gathering, clearly document beforehand when non-lawyers are acting at the direction of lawyers, and document legal advice clearly.** In the US, the presence of lawyers strongly indicates that the purpose of the communications is to obtain legal advice. In the UK, to cloak interview memoranda with the lawyer's working papers privilege, lawyers should draft these documents, or the documents should clearly identify legal advice, so that the documents might contain the "trend of legal advice" necessary for this privilege. Consequently, in both jurisdictions, companies should use lawyers during all phases of the investigation and clearly document in advance that non-lawyers are working at the behest of counsel.

- **Plan witness interviews carefully.** Consider the purpose of each interview, how the interview will be memorialized, and what the functions are of each participating team member. Be careful: verbatim transcripts are non-starters (from a privilege perspective) in both the US and UK. Under English law, privilege is a matter of substance, not form: as the *RBS* decision shows in relation to the working papers privilege, labels are not determinative of privilege.

- **Consider the content of documents.** Consider carefully how to frame interview notes and memoranda, including in light of the English doctrines of working papers privilege and litigation privilege.

- **Consider which entities should maintain interview memoranda.** Companies may be able to structure an investigation from the outset to reduce the prospect of challenges to privilege, and of relevant documents coming within the personal jurisdiction of a court that might restrictively interpret privilege. Keeping documents out of a particular jurisdiction may help, in certain circumstances, in asserting that a court lacks personal jurisdiction over them. This assessment must take place on a case-by-case basis and can require careful consideration across multiple jurisdictions.

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Endnotes

[1] [2016] EWHC 3161 (Ch).

[2] A summary of this decision can also be found on the Latham London blog: http://www.latham.london/2017/02/reserving-privilege-for-the-few-the-high-court-confirms-the-narrow-interpretation-of-client-for-the-purposes-of-legal-advice-privilege/

[3] [2003] QB 1556.

[4] Such criticism of the *Three Rivers* has been voiced in decisions in Singapore and Hong Kong. *See, e.g., Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and others* [2007] 2 SLR 367 in which the Singapore Court of Appeal adopted a broader view of "client," noting that "Three Rivers No 5 has been almost universally criticised and often trenchantly"; and similarly *Citic Pacific Limited v Secretary of State for Justice and Commissioner of Police* [CACV 7/2012], in which the Hong Kong Court of Appeal noted "[i]t would be meaningless to have a right to confidential legal advice if the management is hampered in such process by the concern that statements taken in that process could be open to discovery."

[5] *RBS* at ¶ 93.

[6] *Id.* at ¶ 107.

[7] *Id.* at ¶ 126.

[8] *Id.* at ¶ 160.

[9] 449 US 383 (1981).

[10] *Id.* at 391-392 (internal citations omitted).

[11] *RBS* at ¶ 96.

[12] *United States ex rel. Barko v. Halliburton Co.*, 2014 WL 1016784 at *3 (D.D.C. Mar. 6, 2014).

[13] *In re Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014).