In Practice

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Regulatory investigations and the parameters of privilege

Following the global crash of 2008, many financial institutions have had to respond to regulatory investigations across various markets and multiple jurisdictions, including working with external legal counsel on key issues. In this context, the question has arisen in the recent High Court case of *Property Alliance Group Limited v The Royal Bank of Scotland plc* [2015] EWHC 3187(Ch) as to the extent to which legal advice privilege (which protects such advice from the obligation of disclosure in litigation) attaches to the work product of such external legal counsel.

Since the decision of *Three Rivers District Council v Bank of England (No 6)* [2004] UKHL 48 it has been long understood that legal advice privilege 'attaches to all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not in contemplation' whether or not these communications are made directly or via an intermediate agent. This reinforced the decision in *Babel v Air India* [1988] 1 Ch 317 which made clear that 'legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context'.

In the *Property Alliance* case, PAG alleged that RBS made the implicit representation that it was not manipulating the LIBOR rate when it induced PAG to enter into certain interest rate swaps. Within these proceedings, RBS claimed that certain classes of documents attracted legal advice privilege. The court ordered the inspection of two of these classes after it was not satisfied that this claim to privilege had been properly made out.

RBS's response to various regulators in connection with the LIBOR manipulation allegations was co-ordinated by an "Executive Steering Group" (ESG), with external counsel retained as the legal adviser to the ESG. Both types of documents the court decided to inspect were produced by the external counsel and marked "privileged and confidential". The first type of documents was described as tables or memoranda that 'informed and updated the ESG on the progress status and issues in the regulatory investigations', with references to matters in the public domain, such as the launch of investigations by regulators or the initiation of litigation, as well as to non-public matters such as communications with various regulators. The second type of documents consisted of notes of the telephone meetings between the ESG and its legal advisers.

In order to decide whether the requirements for legal advice privilege set out in *Three Rivers* and *Babel* were satisfied in this particular case the court noted that a relevant legal context is necessary for privilege to arise and there is the potential for privilege to attach 'where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required' (*Babel*). The court specifically considered whether:

(i) the tables and memoranda, containing both advice and publicly available information, were privileged in whole, in part or not at all; and

(ii) where an administrative as well as a legal function had been provided by external legal counsel, the resulting work product attracted legal advice privilege.

In reaching its decision on (i), the court confirmed the principle derived from *Babel* that 'the communication of information between a lawyer and client *can* be privileged, provided that it is information that is communicated in confidence for the purposes of the client seeking, and the lawyer giving, legal advice ... the source of the information makes no difference'. The court concluded that the preparatory memoranda did not contain any extraneous material and were focussed entirely on the regulatory investigations. On this basis, it concluded that the information, in addition to any advice, had attracted privilege, meaning the tables and memoranda were wholly privileged.

On (ii), the court noted that the meetings between the ESG and its legal advisers 'all had a very substantial legal content' and that the lawyers present led the discussions not 'as a simple matter of administrative convenience: they were doing so as an integral part of their provision of legal advice and assistance to the ESG'. Accordingly, the court concluded that the notes of the telephone meetings were also privileged in their entirety.

Snowden J closed his judgment by commenting that as a matter of policy '[t]here is clear public interest in regulatory investigations being conducted efficiently' meaning that lawyers must 'be able to give their client candid factual briefings as well as legal advice secure in the knowledge that any such communications and any record of their discussions and the decisions taken will not subsequently be disclosed without the client's consent'. This decision should provide greater confidence as to the status of similar future communications between financial institutions and their legal advisers in the context of regulatory investigations. ■

Biog box

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