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United Kingdom: High Court Rules that Regulatory Investigation Advice Protected by Privilege

Matthew O'Regan (St Johns Chambers, United Kingdom) · Wednesday, December 16th, 2015

In a recent judgment, *Property Alliance Group v Royal Bank of Scotland*,[1] the High Court has ruled that legal advice privilege applied to documents created by external lawyers whilst advising clients on multiple investigations by competition authorities worldwide into suspected anti-competitive behaviour. Accordingly, they were protected from disclosure in subsequent private damages litigation.

This judgment confirms that not merely legal advice, but related strategic advice, is protected by legal professional privilege. It will be welcome to defendant lawyers, both when representing and advising clients who are subject to competition or other regulatory investigations and in subsequent litigation brought by third parties seeking damages for losses caused by infringements of competition law or breaches of other statutory duties.

The facts

Between 2004 and 2004 Property Alliance Group ("**PAG**") entered into a series of interest rate swap agreements with The Royal Bank of Scotland ("**RBS**"). Three month GBP LIBOR was used as the reference rate.

As is now well known, RBS and numerous other financial institutions were subsequently subject to investigations by the European Commission, the Financial Services Authority ("**FSA**"), the U.S. Department of Justice and other competition and regulatory authorities around the world. RBS and other banks were found to have rigged rates for a variety of LIBOR tenors and have been fined substantial sums. RBS was, for example, fined £ 87 million by the FSA, around £ 300 million by US regulators and € 391 million (£ 324 million) by the European Commission.

PAG has brought legal proceedings against RBS, claiming that RBS misrepresented that it was not rigging LIBOR rates. It is seeking damages for losses that it claims it suffered as a result of GBP LIBOR being manipulated. RBS has denied rigging any LIBOR rates. RBS was ordered to disclose documents relating to all LIBOR tenors: this will apparently require over 25 million documents to be reviewed for relevance. PAG has particularly focused on obtaining disclosure of 'high level' documents prepared by or for RBS's 'Executive Steering Group' ("**ESG**"). RBS refused to disclose these documents on the ground that they were privileged.

In 2010, RBS faced numerous regulatory investigations worldwide into suspected anti-competitive

behaviour in the setting of LIBOR rates. It engaged multiple law firms to represent it. Its defence activity was led and coordinated by a major international law firm based in London. Given the enormity of the defence effort, RBS established the ESG (which comprised senior executives) to oversee RBS's defence. It held regular conference calls with its legal advisers, to discuss the status of the investigations, consider strategic issues and identify next steps. The coordinating law firm would prepare and circulate: confidential memoranda, setting out in tables a summary of the status of the different investigations; agendas for the calls; and summaries of the matters discussed during the calls. The documents were marked 'privileged and confidential'.

Were the ESG documents privileged?

Mr Justice Snowden (who was not the trial judge and had reviewed the relevant documents) found that many of the memoranda prepared for the ESG were more in the nature of 'informing' RBS of steps taken in the investigations, rather than 'advising' it on the investigations, as many merely recited relevant events (see para {**14**}). Many of these events were in the public domain and many of the non-public matters covered in the memoranda concerned meetings or correspondence with regulators that would not have been privileged (*id*.)

Nevertheless, despite these findings, the judge held that the ESG documents were privileged.

The following principles are clear in relation to legal advice privilege:

- it applies to all confidential lawyer/client communications made for the purposes of giving or obtaining legal advice, even if litigation is not then in contemplation[2]
- it covers not merely telling the client the law, but also advice on what the client should do in the relevant legal context[3]
- not all lawyer/client communications will necessarily be for the purpose of giving or receiving legal advice, and privilege will apply only to advice that, viewed objectively, "relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law"[4]
- privilege will extend to communications that do not contain advice on matters of law or construction, "provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client":[5] what matters is "whether the lawyers are being asked qua lawyers to provide legal advice"[6]
- privilege will apply to a continuum of confidential lawyer/client communication in which each necessarily exchanges information to inform the other so that advice may be sought and given where appropriate[7]

The judge applied these principles and concluded that the ESG documents were protected by legal advice privilege. The documents were prepared by external solicitors who had been retained by RBS to provide legal advice and assistance concerning the multiple on-going regulatory investigations into suspected rigging of LIBOR. This was plainly legal advice (see para. **27**). The documents formed part of the continuum of correspondence through which RBS and the solicitors would keep each other informed of developments concerning the investigations, so that RBS could receive legal advice from its lawyers (see paras. {**27 and 28**}). The summary meeting minutes recorded lawyers' contributions to the discussions held during the conference calls: these clearly conveyed legal advice (see para. {**30**}).

For these reasons, the ESG documents were privileged in their entirety, as (i) they constituted communications between RBS and it lawyers by which RBS sought and was provided with legal advice (see para. {**32**}) and (ii) the documents did not contain extraneous material that would not be protected by privilege (see para. {**33**}). Whilst Mr Justice Snowden confirmed that privilege would not apply merely because a document had been prepared or sent by a lawyer (e.g. where it was, as a matter of administrative convenience, merely acting as the secretary of a business meeting), it would apply – as here – where the lawyer was asked to provide legal advice (see paras. {**41** and **42**}).

The Court accordingly upheld the claims to privilege in the ESG documents.

Comment

It is clearly important, as a matter of policy, that clients are able to receive legal advice secure in the knowledge that it will remain confidential and that they will not be required to disclose it, whether to a competition or regulatory authority or to an opponent in litigation.

As Mr Justice Snowden observed (see para {**44**}), there are strong policy reasons for ensuring that clients and their lawyers can communicate frankly and with candour with each other in confidence. Lawyers must not merely be able to receive information and give advice, but must also be able to investigate matters and share information with their clients so that clients can take informed decisions and have a written record of discussions with their lawyers. This applies equally in the context of litigation and regulatory investigations. Ensuring that lawyer/client communications made during a regulatory investigation are privileged will ensure that investigations are "conducted efficiently and in accordance with the law", with "the regulators {able to} deal with experienced lawyers who can accurately advise their clients how to respond and cooperate" (see para. {**45**}).

As a matter of practice, during an investigation, lawyers (whether in-house or in private practice) must, in advising their clients, ensure that all steps are taken to protect documents which are subject to legal advice privilege. This includes emails, other forms of electronic communication and letters sent between the client and its lawyers. Each document should be marked "legal advice – privileged and confidential", although this does not necessarily ensure that it will be protected by privilege, which will depend on whether it is part of a 'continuum of lawyer/client communication' to facilitate the obtaining and provision of legal advice. (Equally, the absence of such marking would not in itself mean that a document will not be privileged, although it may as a matter of practicality lead to privilege not being identified and claimed.)

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