Client Update
English High Court Rejects Claims of Privilege Over Internal Investigation Interview Notes

LONDON
Karolos Seeger
kseeger@debevoise.com

Alex Parker
aparker@debevoise.com

Andrew Lee
ahwlee@debevoise.com

OVERVIEW

In a judgment last week, the English High Court ruled that notes, transcripts and records of interviews prepared by lawyers during an internal investigation are not covered by legal advice privilege. While the decision may be appealed (RBS has indicated that it intends to seek permission to appeal), it potentially has important implications for companies and their lawyers when internal interviews and investigations are being conducted, even when external counsel are retained.

The decision in *Re The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) (8 December 2016) arose in litigation brought by shareholders of the Royal Bank of Scotland ("RBS") against RBS alleging that the bank provided inaccurate or incomplete information in a prospectus which led them to subscribe for RBS shares in a rights issue in 2008. RBS's share price subsequently collapsed, resulting in the shareholders incurring losses. This judgment concerned applications by the shareholder claimants for disclosure and inspection of two categories of transcripts, notes and other records of interviews of current and former RBS employees (collectively referred to as "interview notes"):

- Interview notes prepared by external lawyers and non-lawyer RBS employees during RBS's internal investigation in response to two subpoenas from the U.S. Securities and Exchange Commission relating broadly to RBS's sub-prime exposures; and
- Interview notes prepared by RBS's in-house lawyers during its internal investigation into allegations made by a former employee.

RBS asserted that, for each category, the interview notes were subject to legal advice privilege, or alternatively (except for the interview notes prepared by non-

lawyer RBS employees) were lawyers' privileged working papers. RBS did not contend that litigation privilege applied to any of the interview notes.

LEGAL ADVICE PRIVILEGE

As a general principle, legal advice privilege protects confidential communications between a client and its legal advisers which were created for the purpose of giving or receiving legal advice. Unlike litigation privilege, legal advice privilege does not extend to communications between a client or its legal advisers and third parties.

The Court held that the interview notes were not communications between a client and its legal advisers, and therefore legal advice privilege did not apply, on the basis that the interviewees did not constitute the client. Following the reasoning in *Three Rivers*,[1] the leading (and much-debated) authority on legal advice privilege, the Court held that what constitutes the 'client' is to be narrowly interpreted and consists only of those employees of the company who are authorised to seek and receive legal advice from the company's lawyers. In this case, the Court held that the interviewees had provided information to RBS's lawyers in their capacity as RBS employees, not as clients (as it was common ground that none of the interviewees had authority to seek or receive legal advice on behalf of RBS), and were thereby to be considered third parties for these purposes. Hildyard J concluded that the interview notes comprised information-gathering from employees or ex-employees "*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*". Hildyard J held that legal advice privilege did not extend to such preparatory communications with lawyers.

RBS's primary submission was that the employees being interviewed were imparting factual information to the company's lawyers to enable the company to seek or receive legal advice, with the authority of the company to provide this information. Therefore, RBS argued, the interviewees should be treated as if they were part of, or an emanation of, the 'client' and, as a result, the interviewees' statements should be considered privileged lawyer-client communications, rather than information gathering preparatory to such communications.

The Court rejected this submission, following the reasoning in *Three Rivers* in which the Court of Appeal held that information gathered from employees was equivalent to information obtained from third parties, even if the information

[1] *Three Rivers District Council v Governor and Company of the Bank of England* (No 5) [2003] QB 1556.

was collected by a lawyer (or to be shown to a lawyer) for the purpose of enabling the lawyer to advise the company. The Court held that the fact that an employee was authorised to communicate with the lawyer did not mean that the employee was the client or an emanation of the client. In reaching this conclusion, Hildyard J also approved and developed the reasoning of Chief Master Marsh in another recent English decision, *Astex Therapeutics Limited v Astrazeneca AB*.[2]

In addition, Hildyard J commented that only individuals who were part of the "*directing mind and will*" of the company would constitute the client or an emanation of the client for the purpose of legal advice privilege. This comment was made '*obiter*' (*i.e.*, outside the narrow reasoning behind the decision) and is therefore not binding. It remains to be seen whether this becomes an established principle of English law.

LAWYERS' WORKING PAPERS

Lawyers' working papers can be considered privileged under English law if their disclosure would indicate the trend of advice given to a client by its lawyer. The Court considered that determining whether privilege applied was essentially an evidential question, in this case whether RBS had demonstrated that the interview notes provided a clue as to the legal advice (or some aspect of the legal advice) given to the bank by reason of the legal input reflected in the interview notes.

RBS submitted that the interview notes in question were privileged on a number of grounds: the interview notes were not simply transcripts of the interviews but included the lawyers' 'mental impressions', they reflected the lawyers' train of inquiry in preparing for the interviews, they recorded the lawyers' selection of the points covered in the interviews, and interviewees were told (and often acknowledged) that the interviews were subject to attorney-client privilege. Hildyard J held that these factors were not enough to establish privilege, as RBS had failed to provide examples of how the interview notes contained any analysis or legal input, or revealed the trend of legal advice provided to RBS.

ANALYSIS

This decision, if upheld on appeal, could have significant implications for the conduct of internal investigations, not only in the context of litigation, but also investigations by government authorities in the UK. Where litigation privilege

[2] *Astex Therapeutics Limited v Astrazeneca AB* [2016] EWHC 2759 (Ch) (8 November 2016).

does not apply because no adversarial proceedings were contemplated at the time of an interview, in-house and external lawyers should not operate under the assumption that their notes of confidential employee interviews are privileged. It will not be enough to state (as RBS's lawyers did) what is typically referred to as an 'Upjohn warning' at the beginning of an interview that the discussions are confidential and privileged. Nor will including language in an interview note that it is a summary of the interview and reflects the impressions and judgment of lawyers of itself be sufficient.

In recent years, both the UK's Serious Fraud Office ("SFO") and Financial Conduct Authority ("FCA") have increasingly challenged privilege claims by companies under investigation, particularly in relation to lawyers' notes or records of fact-finding interviews during internal investigations. This judgment may give further impetus to the SFO, FCA and other authorities to challenge any claims of legal advice privilege in the future.

Notably, Hildyard J's *obiter* statement that only the "*directing mind and will*" of a company—a person at or close to board level (a director, senior officer or other person who exercises autonomous control over the company's management functions)—should constitute the client for the purposes of legal advice privilege has the potential to affect substantially the conduct of internal investigations. Taken to its logical conclusion, this would impose such a high threshold that in-house lawyers and senior compliance personnel (for example) would not be able to seek and receive legal advice on behalf of the company under cover of legal advice privilege. It remains to be seen whether this theory receives more judicial attention and is further developed.

* * *

Please do not hesitate to contact us with any questions.