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Legal Update
16 December 2016

A "Skilled Person's Report" is held to be disclosable in litigation

An order in a recent case for disclosure of a report commissioned on the instructions of the Financial Services Authority ("**FSA**") pursuant to section 166 of the Financial Services and Markets Act 2000 ("**FSMA**") is a reminder both of the continuing obligation of disclosure in litigation and the fact that documents created for the purposes of regulatory supervision and internal investigations will be disclosable if not protected by legal professional privilege.

Section 166 FSMA gives the FSA's successor organisations, the Financial Conduct Authority ("**FCA**") and the Prudential Regulation Authority ("**PRA**"), the power to commission reports by a "Skilled Person" (typically an external consultancy, accountancy or law firm) in order to obtain an independent view of any aspect of a firm's activities. This has been a tool used increasingly by the FSA, and now the FCA and PRA, in recent years, not least because the regulated firm, rather than the regulator, normally bears the cost of producing the report. Such reports can be used to identify suspected problems within a firm's conduct of its activities, monitor progress or as part of a plan to rectify or improve any shortcomings. The regulator may use a section 166 report to decide whether to take any enforcement action against a firm or an individual. A section 166 report will not be protected by legal advice privilege or litigation privilege.

Other documents created by the firm itself as part of such a report process are also unlikely to be protected by legal privilege, such as notes of interviews with employees, internal audit reports, and internal fact finding communications and briefings. Written communications with the regulator will also not be protected from disclosure on grounds of privilege. Of course, documents created for the purpose of seeking or providing legal advice in connection with such a process will be protected by legal advice privilege, provided they are kept confidential between lawyer and client.

Firms can seek to limit the risk of having to disclose the contents of an investigation report if the firm instructs an external law firm to conduct an investigation on a privileged basis and is able to persuade the FCA or PRA that appointment of a skilled person is therefore unnecessary. The FCA or PRA are then usually willing to accept the provision of such a report on the basis of a limited waiver of privilege. Whilst the firm has no control over how the FCA or PRA might use such a report, the firm may be able to rely on the privilege to avoid disclosing such a report to third parties provided it has been kept confidential. However, even in this case, other related documents such as interview notes may well not attract privilege. It is also worth noting that not all jurisdictions recognise the concept of limited waiver of privilege.

Self-evidently, a skilled person's report and related materials are likely to provide useful evidence to a claimant alleging that it has suffered losses as a result of failings by the relevant firm which were the subject of such a report.

In the recent case of *Rocker v Full Circle Asset Management*, the claimant was an investor seeking damages for alleged negligence, breach of contract and breach of statutory duty against the defendant asset management firm. A few days before trial started, the claimant applied for specific disclosure of an FSA report on the how the defendant conducted its business, together with correspondence between the defendant and the FSA regarding the report. The Court granted the claimant's application.

The defendant was regulated by the FSA and had been notified in 2012 that it was required to cooperate with an independent investigation into whether its customers had been fairly treated, including the commissioning of a section 166 report. In July 2016 the claimant asked the defendant for a copy of the report and any relevant communications between the defendant and the FSA. The defendant resisted such disclosure on the basis, it said, that the report contained non-disclosable information. Before the Court, the defendant argued that disclosure of correspondence with the FSA would be disproportionate. It also provided a witness statement which stated that the FSA review had found that its investment risk processes had been in line with industry convention and fit for purpose.

However, the Court held that the section 166 report was a highly relevant document which revealed significant criticisms of the defendant's organisation, including that there was insufficient documentary evidence of client attitude to risk and that there were concerns about the general running of the defendant's organisation. Although a further report indicated that the identified concerns had been rectified and that the FSA had taken no further action, the first report presented a different picture. It could not be withheld from the claimant on the basis that it was no longer relevant because its findings had subsequently been addressed and issues rectified by the firm.

The Court also underlined the continuing duty to disclose which solicitors owed to the court. It does not matter that a document falling within the scope of disclosure comes into a litigant's hands after the formal disclosure process has been completed, it must still be shown to the other side promptly. That is the case even up to and during trial.

The case is: *Rocker v Full Circle Asset Management Ltd* (2016) QBD (Judge Cotter QC) (unreported)

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