Court confirms that employee interview notes are not protected by legal advice privilege

Introduction

Confidential communications between lawyer and client for the purpose of soliciting or receiving legal advice are protected from the obligation of disclosure in litigation (civil or criminal) and regulatory proceedings by legal advice privilege. However, communications with third parties fall outside the scope of legal advice privilege. It is therefore important to identify who is the client and who is a third party. As a corporation can only act through its employees, it is often assumed that all employees' communications with the corporation's lawyers count as client-lawyer communications and will therefore be privileged. In 2003 in the well-known but somewhat controversial *Three Rivers* case, the Court of Appeal held[1] that this is not necessarily the position. Only communications made between those authorised by the corporation to seek legal advice on its behalf and its lawyers will be protected by legal advice privilege. By contrast, where litigation or other contentious proceedings are afoot or reasonably in contemplation, documents created for the purpose of that litigation will be protected by litigation privilege. This is broader than legal advice privilege and includes communications with third parties such as witnesses and experts.

In a recent application of the test in *Three Rivers* in the RBS Rights Issue litigation, the Claimants sought disclosure of transcripts, notes or other records of interviews ("the Interview Notes") with RBS employees and ex-employees, made as part of two separate internal investigations. RBS resisted disclosure on the basis that the Interview Notes were subject to legal advice privilege ("LAP") as records of direct communications between client and lawyer (including in the case of interviews with ex-employees) or, where such transcripts had been made by non-lawyers in RBS' Group Secretariat, that such non-lawyers provided a "channel of communication" through which the interviewees provided instructions to RBS' lawyers. RBS claimed that alternatively all the Interview Notes which had been prepared by lawyers were lawyers' privileged working papers. No claim was made for litigation privilege.

On 8 December 2016, Hildyard J handed down judgment in favour of the Claimants. All the claims to privilege failed. While this decision does not make new law, it highlights the fact that records of employee interviews created in circumstances when litigation privilege does not apply may later be discloseable in any subsequent litigation to which their content is relevant or to a regulator.

RBS also resisted disclosure on the grounds that the court should have determined the application according to the law of the US, under which the Interview Notes were said to be privileged. The judge found nothing in this argument sufficient to disturb the convention that, in an English court, the law of the forum applies to the issue of privilege.

The claim for Legal Advice Privilege

RBS asserted that the only documents in existence within the categories sought by the Claimants were Interview Notes prepared by in-house lawyers, external lawyers and non lawyers within the RBS Group Secretariat, each of which summarised the interviews.

The Interview Notes comprised information gathered from employees or ex-employees at the request of RBS lawyers for the purpose of enabling RBS to seek legal advice from external lawyers. RBS submitted that such communications are privileged provided that the

1 *Three Rivers DC v Bank of England* [2003] EWCA Civ 474.

person providing the information was authorised to do so by RBS. It was not contended by RBS that any of the interviewees had any authority to, or did in fact, seek or receive legal advice on behalf of RBS.

The leading authority is the Court of Appeal ruling in *Three Rivers*[2] which is binding on the High Court.

> *"only communications between solicitor and client, and evidence of the content of such communications ... were privileged. Preparatory materials obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, even if prepared at the solicitor's request and even if subsequently sent to the solicitors, [do] not come within the privilege"*[3]

RBS sought unsuccessfully to distinguish its case from *Three Rivers*, arguing that "where an individual, with the authority of a corporation which is seeking legal advice, communicates to the corporation's legal advisers at their request either instructions or factual information, in confidence and for the purpose of enabling that corporation to seek or receive legal advice, that communication (including any factual information) should be treated as if the individual were part or an emanation of the client and protected by legal advice privilege accordingly."[4]

The judge acknowledged that *Three Rivers* has "attracted disquiet and not a little academic criticism". He found force in the criticisms, said that it may be that, in a suitable case, the Supreme Court will have to revisit *Three Rivers*, but found no basis for disapplying it:

> *"Three Rivers confines LAP to communications between lawyer and client, and the fact that an employee may be authorised to communicate with the corporation's lawyers does not constitute that employee the client or a recognised emanation of the client."*

The Judge found that although the documents in question recorded direct communications between employees and RBS' lawyers, these were for the purpose of conveying factual information. The Judge applied the Court of Appeal's ruling in *Three Rivers* that "information from an employee stands in the same position as information from an independent agent". Therefore, the interviews were not privileged communications and RBS was not entitled to claim legal advice privilege in respect of the Interview Notes.

Privilege in lawyers' working papers claim

Lawyers' working papers are privileged from disclosure. The justification for withholding such documents is that their disclosure would give the receiving party "*a clue to the advice which had been given by the solicitor and ... the benefit of the professional opinion which had been formed by the solicitor*"[5].

It was not disputed that verbatim transcripts of unprivileged interviews are not privileged. To trigger the protection of lawyers' working papers privilege, RBS had to demonstrate some attribute of or addition to the Interview Notes, to distinguish them from verbatim transcripts or reveal the trend of legal advice being given.

RBS submitted that the Interview Notes reflected external counsel's "mental impressions"; that they reflected the work undertaken in preparation for the interviews (i.e. the lawyers' train of inquiry).

Unsuccessful claims for privilege in lawyers' working papers

(i) A verbatim transcript of an interview which (also) discloses the questions asked by the lawyers is not privileged[6].

(ii) Underlining or highlighting of documents held by counsel do not, of themselves, give rise to legal professional privilege[7].

The judge held that RBS' evidence was insufficient to substantiate the claim to privilege in lawyers' working papers. There is a real difference between reflecting "a train of inquiry" and reflecting or giving a clue as to the trend of legal advice.

2 *Three Rivers DC v Bank of England* [2003] EWCA Civ 474.
3 Lord Scott in *Three Rivers DC v Bank of England* [2005] 1 AC 610.
4 [2016] EWHC 3161 (Ch) Para 80
5 Cotton LJ in *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1.
6 *Property Alliance Group v RBS (No 3)* [2015] EWHC 3341 (Ch)
7 *Imerman v Tchenguiz* [2009] EWHC 2902 (QB)

Conclusions

Where litigation privilege is not available, verbatim notes of interviews with employees or third parties made during a corporate internal investigation will not be protected by legal advice privilege even if the interview is conducted by a lawyer. Non-privileged factual information cannot be cloaked in privilege merely by the fact that it is noted down by a lawyer. Therefore, consideration should be given as to whether there is a need to make a written or taped record of employee interviews in light of the nature and purpose of the investigation. However, it should be noted that both the SFO and FCA have criticised firms for withholding employee interview notes on the grounds of privilege or not recording such information to avoid disclosing it to the regulator.[8]

Legal advice that a lawyer gives to their client (in the case of a corporation, to those individuals authorised to receive legal advice from the lawyer), including as a result of information gleaned through employee interviews, will be privileged. This leaves a grey area where, as is often the case, a document records both the interviewee's words and the lawyer's impressions and/or the lawyer's resulting advice to their corporate client. In this situation it would be necessary to determine on a case by case basis to what extent some or all of such a document was privileged, bearing in mind the need to be able to justify such determinations to the Court if required.

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8 See, for example, a speech by Jamie Symington, Director in Enforcement (Wholesale, Unauthorised Business and Intelligence), FCA, delivered at the Pinsent Masons Regulatory Conference 2015 on 5 November 2015: *"A practice we sometimes see is for the investigation to produce only lawyers' notes of such interviews. No recordings, no notes by others including the interviewee. Then firms will sometimes argue that the notes of the interview are privileged. This sort of approach looks to us like a 'gaming' of the process in order to shroud the output of an investigation in privilege. We find it particularly unhelpful and unwelcome."*