Defending the privileged, part II

In September 2016 we published the alert "Defending the privileged: the Law Society defends the use of privilege in regulatory investigations". In that alert we detailed how regulators such as the FCA and the SFO had expressed frustration when firms and companies under investigation have sought to resist disclosing documents to them on the grounds of legal professional privilege ("**LPP**"). This is particularly relevant in relation to the disclosure of preliminary interviews with employees or former employees (or "first accounts").

On 8 December 2016 Mr Justice Hildyard in the High Court handed down a judgment in the RBS Rights Issue Litigation[1] in which he found against RBS and determined that records of employee interviews are not subject to legal advice privilege ("**LAP**") (which is one of the two main types of LPP). We published an update on this decision at the time.

It is widely recognised that Hildyard J's re-statement of the law – as first expressed by the Court of Appeal in 2003 in the well-known but somewhat controversial *Three Rivers DC v Bank of England* case[2] – has significant implications in the context of internal investigations. In short, if such interviews take place in circumstances when litigation privilege does not apply, they may later be discloseable to a regulator or in any subsequent litigation to which their content is relevant.

It was thought that, given the significance of this decision, RBS would appeal this High Court decision (and it would have been able to appeal the decision straight to the Supreme Court, "leapfrogging" the Court of Appeal). However in early February 2017 it was confirmed that RBS would not be pursuing its appeal. Hildyard J's re-statement of the law (as expressed in *Three Rivers*) therefore stands unless the law is changed by the Supreme Court.

This is therefore a good opportunity to review two key issues in light of Hildyard J's decision late last year:

1. What is the current position in respect of claims of LAP over first accounts?; and
2. What are the implications for corporates which are performing internal investigations, especially where it is possible that a regulatory investigation (e.g. by the FCA or the SFO) may follow?

The current position

The circumstances we are dealing with here are where litigation privilege does not apply – where it does, then the interview notes in question will be privileged and so can be withheld from disclosure (whether in litigation or to a regulator).

This was the case in the RBS Rights Issue Litigation: RBS had interviewed employees where such interviews were either conducted by or at the direction of lawyers. The claimants who were suing RBS wanted the notes of these interviews to be disclosed because, the claimants alleged, they were relevant to the dispute. RBS claimed the interview notes were subject to LAP or (alternatively) were "lawyer's working papers" and so were by their nature privileged. RBS did not make any claim to litigation privilege.

Hildyard J, applying *Three Rivers*, found that "*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*". They were "*information gathering from employees or former employees*" and were "*not communications between client and legal adviser.*" As the employees were not "the client" for the purposes of LAP (as determined in *Three Rivers*), LAP did not apply to the interview notes.

1 [2016] EWHC 3161 (Ch)
2 [2003] EWCA Civ 474

Hildyard J also dismissed RBS's claim that the interview notes were lawyers' privileged working papers. As the conversation with the employee or ex-employee was not itself privileged then RBS needed to demonstrate that the notes revealed the "*trend of legal advice given*". Hildyard J found that RBS's evidence was insufficient to demonstrate this and so this claim to privilege also failed.

Therefore, where litigation privilege does not apply, notes of interviews with employees or third parties made during a corporate internal investigation are likely not to be covered by privilege either by way of LAP or by being lawyers' working papers.

Implications for corporates performing internal investigations

Hildyard J's decision is particularly relevant to a corporate when it believes a regulatory issue may have arisen but the corporate requires further investigation before it can determine what substantive action to take (including whether or not to approach the relevant regulator).

Any investigation will include conducting first account interviews with employees (and, potentially, former employees). However the effect of Hildyard J's decision is that such first accounts are potentially disclosable to regulators later on if the regulator opens an investigation (unless litigation privilege applies).

It has been suggested that one route to reducing the risk that the substance of the interviews is produced in a potentially disclosable form is for the only record of interviews to be a lawyers' note which clearly includes legal advice (such that LAP clearly applies) or not taking a note of or recording the interview at all. Whilst this ensures that the information obtained in the interview could not be disclosed to a regulator (or in future litigation), this has been criticised by regulators.

For example, on 5 November 2015 Jamie Symington, Director in Enforcement at the FCA, stated that "*this sort of approach looks to use like a 'gaming' of the process in order to shroud the output of an investigation in privilege. We find it particularly unhelpful and unwelcome.*" Such comments should be borne in mind if – in the event of subsequent regulatory proceedings – a corporate is seeking to demonstrate cooperation with the authorities, whether as part of its regulatory obligations or in order to attempt to secure a deferred prosecution agreement.

One approach which might at least preserve privilege against third parties whilst at the same time cooperating with the regulators would be to record the substance of the interview in a lawyers' note which clearly includes legal advice and then provide the note to the regulator under a "limited waiver" of privilege. The FCA, for example, has been happy to agree to accept privileged documents under a limited waiver in the past, without fettering the FCA's rights to use or rely on the documents. Nevertheless there are risks with this approach: the "limited waiver" may not be recognised in overseas jurisdictions, and if the regulator wants to rely on the note in subsequent regulatory proceedings or by providing the note to overseas regulators then privilege may be lost.

Conclusion

Whilst any decision on whether or not privilege applies can only be made on a case by case basis, corporates must be aware that, where litigation privilege does not apply, any notes of interviews with third parties – including employees and ex-employees – may well not be covered by LPP and therefore are potentially disclosable to regulators or in subsequent litigation. All such interviews should be conducted on this assumption.

Whilst a corporate may try to agree a way round this, such as by the "limited waiver" of privilege route, it must be mindful that any attempt to ensure the interview is covered by privilege in a way which a regulator or the court might see as artificial would likely be subject to sustained scrutiny and potentially count against a corporate in any regulatory investigation.

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