

CLIENT MEMORANDUM

No Appeal Against High Court Ruling That Notes of Interviews Conducted by Lawyers Are Not Covered by Legal Advice Privilege

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AUTHORS

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A. Introduction

The High Court delivered a judgment in the RBS Rights Issue Litigation [2016] EWHC 3161 (Ch), in which it followed the Court of Appeal decision in Three Rivers District Council v. Governor and Company of the Bank of England (No 5) [2003] QB 1556 to decide that interviews with employees conducted as part of an internal investigation carried out by an external law firm were not protected by legal advice privilege, because the employees who were interviewed were not part of “the client.” RBS previously indicated they would be appealing directly to the Supreme Court. However, we understand that RBS have recently confirmed they will not appeal the ruling. Therefore, this decision states the law for the foreseeable future as to when interview memoranda can attract legal advice privilege.

B. Background and issues for the Court to decide

The issue arose in the context of claims against RBS by shareholders seeking to recover investment losses incurred subsequent to the collapse of RBS shares, on the grounds that the prospectus for the rights issue was not accurate. RBS had sought to withhold disclosure and inspection of notes of interviews with its employees and ex-employees conducted during two internal investigations. RBS did not argue that those investigations were conducted in contemplation of

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litigation, and therefore did not assert that litigation privilege applied. However, it argued that they were protected by legal advice privilege.

The Court was asked to rule on three broad issues: whether

1. the Interview Notes were covered by legal advice privilege;
2. RBS was entitled to rely upon the U.S. law of privilege to withhold disclosure as a matter of law; and
3. if the notes were privileged under U.S. law privilege, the English courts should, as a matter of discretion, order that inspection may be withheld.

The claim to privilege was in respect of transcripts, notes or other records (the “Interview Notes”) of interviews conducted by or on behalf of RBS in respect of two internal investigations, termed “Project Mortar” and the “Hong Investigation.” The Interview Notes were prepared variously by RBS in-house lawyers, external law firms instructed by RBS, and also non-lawyers within the RBS Group Secretariat (as agents for an external law firm). The interviews were with RBS employees and ex-employees.

The Court rejected RBS’s contentions that the Interview Notes were covered by legal advice privilege, and that the notes were entitled to privilege as “lawyer’s working papers.” Further, the Court rejected RBS’s argument that the appropriate choice of law for determining the applicability of legal privilege should be U.S. Federal law.

C. The basis of the claims for English privilege

RBS did not rely upon litigation privilege, but claimed that the Interview Notes were protected by legal advice privilege. RBS correctly, in our view, did not assert that the Interview Notes constituted communications between RBS and its lawyers in which legal advice was actually given – the interviewees were neither seeking nor being provided with legal advice. Rather, RBS’s argument was that the Interview Notes contained information gathered from employees or ex-employees, at the instigation of RBS’s lawyers, for the purpose of enabling RBS to seek legal advice from its external legal counsel. Therefore, the communications were said to attract privilege because they were between RBS’s lawyers, and employees authorized by RBS to give confidential instructions to its lawyers.

In relation to the Interview Notes produced by members of the RBS Group Secretariat (who were non-lawyers), RBS argued that the members were acting as agents or “channels of communication” through which the interviewees provided instructions to RBS’s lawyers.

Additionally, RBS argued, in respect of all the notes except those prepared by members of the RBS Group Secretariat, the Interview Notes were privileged under English law as “lawyers’ working papers.”

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D. Application of Three Rivers (No 5)

It was common ground that the leading authority is Three Rivers (No 5). The case concerned an action by the Claimants against the Bank of England (the “Bank”) for misfeasance in public office in respect of its supervision of the Bank of Credit and Commerce International (“BCCI”) before its collapse. The Claimants sought disclosure against the Bank of documents which had been produced for an inquiry into the Bank’s supervision of BCCI conducted by Lord Bingham. Significantly, a special unit of Bank officials known as the Bingham Inquiry Unit (“BIU”) had been specifically established to seek and receive legal advice on the conduct of the inquiry from its external lawyers. The Claimants sought disclosure of, amongst other things, documents prepared by Bank employees which were intended to be sent to, and some of which were in fact sent to, the Bank’s external lawyers for the purpose of advising on the inquiry. The Court of Appeal decided that legal advice privilege did not extend to documents obtained by third parties to be shown to a lawyer for advice, and that “*information from an employee stands in the same position as information from an independent agent.*”

RBS in the Rights Issue Litigation argued that Three Rivers (No 5) should be distinguished, on the basis that Three Rivers (No 5) was concerned only with internal communications within the Bank. Three Rivers (No 5), it was argued, did not concern any communications directly with the Bank’s lawyers; only the BIU could communicate with the external lawyers, and none of the employees in question could or had any authority to do so. As for the Rights Issue Litigation, RBS argued that the accounts given to the corporation’s lawyers, by employees authorized by the corporation to make them on its behalf, constituted lawyer-client communications for the purpose of legal advice privilege.

The High Court disagreed. It decided that “the client,” for the purposes of privilege, consists only of those employees authorised to seek and receive legal advice from the lawyer, and that legal advice privilege did not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer. The employees who were interviewed as part of the RBS internal investigations were interviewed as employees, and not as clients, and so the Interview Notes were not communications between client and legal advisor.

E. RBS’s claim that the Interview Notes were privileged lawyers’ working papers

The High Court confirmed that it is common ground under English law that lawyers’ working papers are privileged under the legal professional privilege doctrine. Both parties agreed that verbatim transcripts of otherwise non-privileged interviews would not be privileged. The Court held that in order for the Interview Notes to constitute lawyers’ working papers, RBS would have to prove “*facts which demonstrate that the documentation for which privilege is asserted does have some attribute or addition such as to betray or at least give a clue as to the trend of the advice being given to the client by its lawyer.*”

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The arguments and evidence put forward by RBS to show that the Interview Notes were lawyers' working papers included:

- the purpose of the Interview Notes was not to create transcripts, but documents which would assist in the giving of legal advice to RBS;
- the Interview Notes of interviews conducted by the external law firms stated on their face that they reflected external counsel's mental impressions. The notes reflected the lawyers' impressions in the sense that they reflected the work undertaken in preparation for the interviews, and also a selection by the author of the points to be included; and
- the Interview Notes recorded that the interviewee was informed that the interview was subject to privilege.

The High Court decided that the question was an evidential one as to whether RBS could demonstrate that the Interview Notes revealed some aspect of the legal advice RBS had received. In considering this the Court took account of the fact that *"any notes of an interview, as distinct from a bare transcript, are likely to reflect, even if only to a limited extent, the particular interests, lines of inquiry and perception of the relative importance of the points covered (including those omitted) of the person making the note. To that extent at least, such notes may be taken to reflect the note-maker's mental impressions."* It also bore in mind that the external lawyers had stated that the purpose of the interview was to create documents that would assist in providing legal advice.

However, the High Court decided that the evidence provided by RBS to support its claim for privilege was insufficient. RBS maintained that it followed from the mere fact that the Interview Notes were not verbatim and therefore contained some selection or line of inquiry, that the notes would attract privilege. Furthermore, the Court noted that *"even the reliance on the annotation that the Interview Notes reflect 'mental impressions' is not backed up (in evidence) by any assertion that such Interview Notes do in fact, upon careful review, contain material that would or could reveal the trend of advice."* The Court considered that there is a *"real difference between reflecting 'a train of inquiry' and reflecting or giving a clue as to the trend of legal advice."*

F. RBS's claim that the applicable law for determining entitlement to privilege is U.S. Federal law.

The Court noted that it appeared likely, and in any event it was prepared to assume, that the Interview Notes would be privileged under U.S. law. RBS contended that the general rule, that the English law of privilege be applied by the English courts, should be replaced by a rule whereby the Court should apply the law of the place with which the relevant engagement or instructions, pursuant to which the documents came into existence, had their closest connection. RBS also put forward a related argument that the Court should exercise its inherent discretion to permit the withholding of inspection, on the basis that RBS had a reasonable expectation that documents which were privileged under U.S. law would remain privileged in subsequent litigation. The High Court rejected both of these arguments. There was no reason to depart from the general rule. In terms of its discretion, the Court said that compelling grounds would need to be

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provided to override the public interest in disclosure, and although it was “troubled by the apparent assurances given to the interviewees” such grounds did not exist in this case.

G. Implications of the judgment

RBS initially communicated an intention to appeal the decision directly to the Supreme Court. However, we now understand that due to amendments to the case, the documents giving rise to these privilege concerns are no longer in issue and no appeal on this point will now take place. Therefore, this decision sets out the current legal basis on which interview memoranda can attract legal advice privilege. The decision raises important challenges for, and issues to be considered by, those conducting internal investigations, including determining which individuals can be considered the client for the purposes of legal advice privilege, and, more importantly, how interview memoranda should be produced to ensure they are legally privileged.

If you have any questions regarding this memorandum, please contact Peter Burrell (+44 20 3580 4702, pburrell@willkie.com), Paul Feldberg (+44 203 580 4734, pfeldberg@willkie.com) or the Willkie attorney with whom you regularly work.

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